

**NEW JERSEY STATE BOARD OF MEDIATION**  
50 Park Place  
Newark, NJ. 07102-4301

**NJSBM #09-0725**

<b>Horizon Blue Cross / Blue Shield</b>	:	
<i>Employer</i>	:	<b>OPINION</b>
	:	
and	:	<b>And</b>
	:	
	:	<b>AWARD</b>
<b>OPEIU Local 32</b>	:	
<i>Union</i>	:	

**ARBITRATOR:** Daniel J. Hussey, Esq., mutually chosen by the parties pursuant to the rules and regulations of the New Jersey State Board of Mediation.

**HEARING:** November 22, 2010 at the offices of the New Jersey State Board of Mediation, Newark, NJ.

**APPEARANCES:**

<b>For the Union:</b>	
Kevin McGovern	
Mets, Schiro & McGovern	Union Counsel
Juanita Ray	Business Representative
Robyn Banks	Chief Steward
Cheryl Zacka Coger	Grievant
<b>For the Employer:</b>	
Jana L. Taylor, Esq.	
Joseph Guarino, Esq.	
Epstein, Becker & Green	Counsel
Candace Messina	Employee Relations
Mary Hollywood	Operations Manager
Samantha Antoine Hickman	Shared Services Training

**ISSUE:** Was the discharge of the grievant, Cheryl Coger, for just cause the terms of the C. B. A. ?  
If not, what shall be the remedy?

**BACKGROUND**

The parties are signatories to a collective bargaining agreement whose term ran from May 1, 2005 through April 30, 2010. The instant dispute

arose and was grieved under the appropriate provision of the contract. The matter was not resolved and it has come to me for resolution.

An arbitration was held on November 22, 2010. The company and the union were both represented by counsel. A full opportunity was presented to both sides to present testimony and relevant exhibits. At the conclusion of the hearing counsel submitted post-hearing briefs. The hearing was closed at that time and this award is issuing within thirty days of the closing of the record.

The grievant, Cheryl Zacka Coger, was first hired by Horizon Blue Cross / Blue Shield ("Employer") in November 2001. On July 10, 2009 the company terminated her for failing to meet the quality standard required for the performance of her job duties for a nine-month period within a twelve month rolling calendar. The termination was grieved and proceeded to arbitration.

### **FACTUAL BACKGROUND**

Cheryl Coger was employed as a Client Service Representative in November 2001 and performed satisfactorily in that position until the summer of 2008. The during the course of the following 12 month period she failed to meet the quality standards in nine of those months. Her performance prior to August of 2008 had been acceptable to such a degree that she applied for and was granted the right to perform her job duties from home. She began to work from home in September of 2008. She testified that at this time the nature of her job had begun to change in that she and her coworkers in the Blue Card Unit were required to answer phone calls which necessitated her working with a software system captioned "Universal Customer Service Workstation" ("UCSW") with

which she was not been familiar. In subsequent months she also claims she was additionally assigned an ever-increasing number of service requests (S/R's) in addition to the prior duties she had previously performed as a Customer Service Representative.

Each month a random audit is conducted checking the performance of employees as to both quality and production. During the year in question the grievant exceeded the production quota in ten of the twelve months, at times achieving double her quota. In evaluating quality, 15 examples of an employee's work are selected, ideally throughout the month, and each sample is rated on a 100 basis for potential quality points. They are required to achieve a 97% rating. During the nine months in question the grievant rated 93% or better for seven months; 80.73% and 86.67% for two months; 98.341 one month and 100% for two months. Based on the fact that she failed to achieve the 97% pass rate for nine of those months she was terminated. During that period the record shows that she was counseled on three occasions, namely August 20, 2008; October 15, 2008 and February 18, 2009. Five written warnings were issued to her over this period of time.

## **CONTRACT LANGUAGE AND OTHER RELEVANT EXHIBITS**

### **Exhibit J – 1          Collective Bargaining Agreement (excerpts)**

#### **Article XXV – Management Prerogatives**

##### **Section 1 – Policy**

*(a) The Employer reserves the right to determine size and composition of workforce... To determine minimum qualifications for each job;.... to determine qualifications of its employees and place of work; to promote, transfer, suspend, layoff and rehire;.... to establish standards of quantity and quality of work; to determine the kind of*

*and amounts of training required, to conduct such training and to require employees to undergo such training;...*

### **Article XXXI Discipline**

Section 2      *Warnings, disciplinary layoffs and discharge notices shall be issued only for just cause...*

### **The Position of the Horizon / BCBSNJ**

In opening and closing arguments and in a post hearing brief counsel for Horizon emphasized the following points in support of the Employer's request that the grievance be denied and the discharge be upheld.

Counsel initially notes that Horizon utilizes progressive discipline for employees as is evident in the series of warnings this grievant received prior to her discharge. Clearly she had more than ample notice of her problems and the possibility of discharge unless she improved her performance and met the required standards. Cited also is the fact that when employees are audited for quality, the mistakes that are noted by the Audit Department are communicated electronically to the employee to alert them to the exact mistake that was found to enable them to identify their areas needing improvement. Furthermore it is claimed that supervisors, team leaders and/or coaches also speak to employees about their errors. In this instance the grievant acknowledged receiving the standard training given to employees upon beginning her career with Horizon.

Ms. Coger also acknowledged that she attended ten days of company training in April 2007, which covered a detailed list of topics pertaining to the duties involved in a Blue Card Correspondent's job duties. Testimony presented clearly established that these modules of training covered

in 2007 were also available to employees such as the grievant on Horizon's internal computer network. Ms. Coger's record, (Ex. C-1) also documents the three counseling sessions she received along with a series of warnings and counseling's during the year in question. It is obvious she had ample training.

In applying for Horizon's Work-At-Home Program the grievant voluntarily acknowledged on her application that she was able to process all pending claims, adjustments, edits, enrollment documentation and correspondence including Tier 1 and Tier 2 calls and had product knowledge of several specific computer systems. However she now testifies that she was directed by her supervisor to note those on her application even though she only had limited knowledge of the systems. The fact remains, despite her present testimony, that at that time that she certified on her application that she had a working knowledge of those systems.

The documentation supplied in the hearing detailing the coaching the grievant received indicates that they were in-depth sessions, which detailed the errors she had made and provided suggestions for corrective action. Counsel notes that the unsigned and uncorroborated Coaching Action Plan (Ex U-1) which the union claims Horizon proposed as a solution to assist her has never been authenticated by testimony from any of the witnesses produced by either Horizon or by the union.

Counsel argues that the poor performance record was not invented or fabricated by the company. All of Horizons employees are held to the same standard. If it were to allow employees to repeatedly failed to meet the minimum quality standard it would have a devastating effect on the quality and reputation of the entire company. The grievant received ample training and coaching

despite which her performance continued to deteriorate. Her discharge was just, reasonable and necessary.

Counsel cites various arbitration decisions and court precedents on the various criteria used to determine just cause. Of particular note is a quote from Arbitrator Harris in RCA Communications, Inc., 29 LA 567 in which the arbitrator defined just cause being established when “a reasonable man taking into account all relevant circumstances, would find sufficient justification in the conduct of the employee to warrant discharge”. The cases state as a general principle that acts of misfeasance or nonfeasance which substantially disadvantage a company warrant a finding of just cause. Counsel notes the evidence is clear that the grievant proved repeatedly that she was unable to perform her duties by meeting the minimum quality standard after receiving ample training and coaching.

In summary counsel argues that it is clear that the grievant’s consistent failure to meet work product quality standards under criteria uniformly applied to all of her coworkers constitutes just cause for her discharge. On behalf of Horizon counsel asks that the grievant’s discharge be upheld.

### **The Position of the Union**

Counsel, in argument at hearing and in his post-hearing brief, argues that the grievant’s discharge was not for just cause. He asserts that her performance problems were the direct result of Horizon’s failure to provide proper training and coaching despite her repeated requests for assistance. To support this allegation counsel traces the grievant’s history and argues from events that took place beginning in September of 2008 that the grievant’s

performance problems began shortly thereafter when Horizon changed her duties and increased her work load. Despite her repeated requests for help to deal with these changes, the company failed in its obligation to assist her in meeting her performance goals.

Counsel notes that for the first seven years of her employment Ms. Coger dealt exclusively with processing claims, essentially a clerical function. She did very little phone work and was not asked to investigate, research or resolve problems that arise in connection with claims processing. Such issues known as "service requests" ("S/R's") were performed by a different unit. During those initial seven years, other than a brief performance issue several years ago, she performed as required. In fact based on her record she was approved for the Work-at-Home Program in August of 2008, something counsel claims were reserved only for highly rated performers. However when she began working from home the nature of her job began to change and additional duties were added to her over the course of the following months. Specifically beginning in early 2008 she and her coworkers and the Blue Card Unit were required to take phone call, a task they had not previously been assigned. In performing that task they were required to work with the new software system known as UCSW. In November 2008 a substantial number of service requests (S/R's), significantly more complex and time-consuming than processing claims, were additionally assigned to the grievant.

Turning his attention to the grievant's record (Ex C-1) counsel argues that in November 2008 Ms. Coger's problems began and, being unable to improve her quality herself, sought help as she testified. Specifically she asked Delores Peterson, her supervisor, that she receive one to one coaching. In answer

to that request she was directed to return to the office one day a week and to work with auditor Brianna Fitzpatrick. Without contradiction, the grievant testified she came in every Wednesday for months but on only one Wednesday did Ms. Fitzpatrick provide her with any coaching. When she made inquiry she was merely told Ms. Fitzpatrick was very busy. As a result of her continued inability to reach the necessary quality standards in the following months, she was directed to return to the office in February 2009 to perform her job duties. The grievant's testified that she continued to request training and as has been noted on her records (Ex C-1), she was only provided with sessions on April 20 and May 22. That very record ironically describes the coaching as "weekly 1:1" despite the fact that that was far from the reality. Counsel also notes that despite her repeated requests for help Ms. Peterson and/or the company, never placed the grievant on its Performance Improvement Program.

Somewhere in time and unbeknownst to the grievant, the company created a "Coaching Action Plan" (Ex U-1), which specifically laid out a proposed program to address the grievant's performance problems. The plan noted that its aim was to assist Ms. Coger in meeting her quality requirements as of June and beyond. Counsel argues the plan was never provided to the grievant and only came to the union's attention in answer to a discovery request made by Business Representative Juanita Ray during the grievance procedure. Counsel argues it is obvious that as a result of Horizon's failure to adequately train the grievant to handle service requests and to provide the weekly coaching session set forth in the plan the conclusion must be reached that just cause did not exist for her discharge.

The grievant testified in November 2008 she began to be assigned a significant increase in service requests. Counsel argues that the company's record of her performance confirms her testimony since for the first time her production dropped to 90% for that month, the lowest level in the 12-month period in question. He dismisses Horizon's attempt to claim she was properly trained to perform the job of processing service requests since, as she testified the 13 training modules listed in the April 2007 training session, were covered in a four-day period. Horizon's own documents describing the training make no reference to any training dealing with the handling of service requests. Furthermore she testified she did not participate in the "hands-on" portion of the training because Delores Peterson assigned her regular work during that time. Moreover the training agenda itself indicates it was designed to educate trainees how to use the UCSW system. It says nothing about actually processing service requests. Moreover that training (if she received any at all which he denies) took place 17 months prior to her actually being assigned a heavy workload of S/R's. Robyn Banks, Local 32's chief steward, testified employees assigned S/R's are typically given up to four weeks of training. Clearly any training Ms. Croger could have received in the April 2007 session could not be equated with that formal training. After analyzing these facts it must be concluded that Horizon failed to train the grievant to perform the service request function, the failure of which, formed the basis of her discharge. Consequently it is impossible to conclude that her discharge was for just cause.

Counsel reiterates many of his arguments concerning the failure of Horizon to properly provide the training the grievant requested to improve her job performance. He dismisses Horizon counsel's questioning of the authenticity

of the Coaching Action Plan the union introduced. With regard to that Plan which called for coaching of one and possibly two sessions every week, Cheryl Kroger's testimony remains uncontradicted that at best she received two sessions during this entire nine-month period of time. It is clear she never received the "adequate coaching" the company asserts it provided to her. In summary counsel argues that Horizon, having failed to properly train the grievant to handle service requests and having ignored her requests for help and having failed to implement the coaching action plan, has demonstrated that the termination cannot be sustained.

Finally counsel argues that Horizon both under sampled and over sampled Ms. Kroger's work performance thus providing a distorted picture of her performance. Under Horizon's Performance Improvement Program (PIP) employees sampling is increased from 15 examples to 44 a month to more accurately reflect his or her actual performance. In this instance despite recognizing Ms. Coger's performance problems Horizon nevertheless failed to implement the increased number of samples. Conversely in June when she was off on approved vacation for two weeks during that month on her honeymoon rather than even halving the number of samples it sampled 15, in effect doubling her sampling was a month. As a result he argues the quality figures relied on by the employer for both these reasons are skewed and therefore fatally flawed.

In summary it is argued that Horizon failed to train the grievant, failed to coach the grievant, and failed to properly sample the grievant's work. Accordingly counsel argues it is evident that the grievant's discharge was not for just cause and he asked that she be returned to her employment with back pay benefits and full seniority.

In conclusion counsel argues that for all of the reasons cited discharge is totally inappropriate for this offense given the totality of the circumstances.

## DISCUSSION

The record should reflect that the burden rests on the Employer in every discipline case to go forward and establish that just cause existed to discipline or terminate an employee. The arbitrator's function is not to substitute his own personal judgment for that of the Employer but merely to ascertain that the Employer has met its burden of proof and that the grievant was afforded due process in the investigation of the incident. It is the right of the union to argue that just cause does not exist for discipline, and to request a remedy and demonstrate that it is appropriate and within the arbitrator's jurisdiction to impose it were the arbitrator to conclude that just cause did not, in fact, exist.

Were this case to be decided merely on the Horizon's objective measurement of the grievant's performance over the 12 months involved the discharge most certainly would be upheld. However those performance records are not considered in a vacuum. For the reasons stated below the conclusion is reached that the union has presented a significant amount of evidence, most if not all of it totally unchallenged, so as to prevent the employer's evidence from reaching the standard of proof required to establish just cause for the grievant's discharge. Testimony revealed that Delores Peterson, Ms. Cogger's supervisor during this entire 12-month period, was terminated from her position at

Horizon. Regardless of the reason, the fact remains that she did not testify in the hearing. Brianna Fitzpatrick, the member of the Audit Department who provided two coaching sessions to the grievant, also did not testify. The void left by the lack of personal testimony from the two Horizon employees with personal knowledge of the grievant's deficiencies is most significant.

Candace Messina, a Senior Employee Relations Consultant who did testify, acknowledged having no personal knowledge of the grievant. Her testimony simply described the process whereby a supervisor recommends discipline, including termination, which is passed up the management ladder ultimately reaching a committee of approximately seven employees who review the documents and agree or disagree with the recommendation. The recommendation must be unanimous. Her bosses' boss then ultimately reviews it. All of the contact between members of the committee and the final arbiter of the discharge is accomplished by e-mail. The committee does not interview the supervisor. Ms. Messina acknowledged the generally none of the members of the committee would know the individual.

Mary Hollywood, Operations Manager, testified that she was Delores Peterson's supervisor. She basically explained how the Audit Department does quality sampling and how the errors found are communicated to both the supervisor and to the employee. She testified that she does not do any training and has no knowledge if the grievant's workload changed in any way beginning in November 2008. She did acknowledge that Coger's performance

declined from that point forward. She has no knowledge of any coaching other than the record of sessions on April 20, 2009 and May 22, 2009.

Finally the company presented the testimony of Samantha Antwine Hickman who holds the position of Supervisor of Shared Services, Quality and Training. The majority of her testimony involved verifying the training provided to the grievant and other employees on the Blue Card Team in April of 2007. She testified that during the 10-day training SR's were included together with a UCSW module under the overall topic of Blue Card Correspondence. She also noted that the grievant would have had access to any of the modules covered in the training on her computer at all times.

The company finds itself in the unenviable position of presenting its case without the testimony of the Delores Peterson, the grievant's supervisor, who dealt with her well more than the 12 month period involved here. None of the other witnesses had any personal knowledge of the grievant, her workload or the training, or lack thereof that she actually received. As a result virtually all of Ms. Coger's testimony cannot be rebutted. This is not to imply that one might expect that it could be rebutted. It is simply a statement of the fact that all of the testimony presented to me on the record basically involved individuals testifying about procedures and documents. It should be noted that the grievant was adjudged to be a highly credible witness. Her testimony concerning the added duties of handling an increasing number of S/R's combined with the new use of the UCSW software and her repeated requests for coaching is accepted.

As counsel for Horizon validly notes Ms. Coger's performance records were not invented. They are what they are. It is clear that there is no issue dealing with the reporting of her mistakes during this period of time. It is also clear that the grievant received notice of these errors as each monthly audit was completed. The grievant herself acknowledged that she had notice of her problems and the possibility of losing her position. Were there no extenuating circumstances this would be an open and shut case and the discharge would be sustained.

The hearing record offers much more than the mere numerical scorecard relating to her performance. It documents several extenuating circumstances that have not been sufficiently explained away by the employer to clear the way for it to meet its burden of establishing just cause by a clear preponderance of the evidence. By way of background it should be noted that the grievant performed satisfactorily from the beginning of her employment to the beginning of the 12-month period in question. Ms. Coger did acknowledge that early in her career she did have a few unsatisfactory months and was placed in the Performance Improvement Program, which enhanced her performance and allowed her to continue her career in a satisfactory manner. Also noted for the record is the fact that after the prior year-end review she received a "3" which represents the designation of a satisfactory employee. Counsel also notes that she was approved for the Horizon Work-At-Home program which, based on his assertion, is reserved for the most qualified performers. These facts are mentioned by way of background simply to indicate that we are not dealing with an individual who has chronically underperformed throughout her career. To the contrary something happened during this period of time which counsel for

the union contends is easily understood given the fact of her increased workload, the changed nature of her duties and the company's failure to provide the training she requested and was promised.

Perhaps the most significant aspect of this case is the union's introduction into evidence of what can best be described as an unsigned copy of a Coaching Action Plan apparently intended to be implemented to provide coaching for the grievant. Horizon's counsel's questioning of the legitimacy of this document is a bit far-fetched. Granted that testimony was provided, significantly from union witness Robin Banks herself, that these Coaching Action Plans are countersigned by a supervisor and the employee involved, the fact remains that the union's testimony that this was provided to them in answer to a request made in discovery was not challenged. The very language of the document itself clearly identifies Ms. Coger, Brianna and Delores. Hence it is clear that someone in the company envisioned implementing it to assist the grievant. Why it never came to fruition is anyone's guess. Perhaps the left hand was unaware of what the right hand was doing. Certainly no one from Horizon provided any answers. Ms. Coger testified that she had never seen the document prior to the union receiving it in discovery. As it remains Horizon has been unable to explain why this coaching action plan was never implemented or why the promised one-on-one weekly training coaching Delores Peterson promised Cheryl was never provided. As Ms. Coger testified she was only told that "Brianna is very busy".

Union counsel also makes an allegation that her work was both under-sampled and over-sampled. The point he makes, although not significant in and of itself, when viewed in the context dealing with her discharge and

dealing with the issue of the failure to properly train her provides another extenuating circumstance that detracts from Horizons attempt to establish just cause for her termination.

Counsel also criticizes the testimony concerning the April 2007 training session, which the grievant attended. He argues the training involved, given the topics covered over a four-day period, could not have effectively taught either use of UCSW or handling of S/R's. The witness had no personal knowledge of the actual training the grievant received. The grievant's testimony concerning what actually occurred during the training goes unchallenged. However I do find significant Ms. Hickman's testimony that self-help was available to the grievant in her computer program. The union and the grievant's failure to counter that point serves as one of the balancing elements considered in the remedy provided below.

Over time legions of arbitrators have offered their respective definitions of just cause. The corollary of Arbitrator Harris quote in RCA Communications, Inc., 29 LA 567 that just cause is established when "a reasonable man taking into account all relevant circumstances, would find sufficient justification in the conduct of the employee to warrant discharge" is applicable in this case. Simply put Horizon has failed to establish that the relevant circumstances in this record should be considered sufficient to warrant discharge.

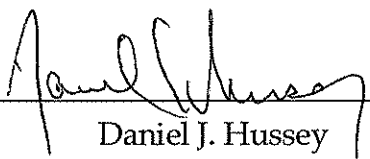
In conclusion it needs to be restated that absent the extenuating circumstances discussed this discharge would be upheld based on the objective record of her failed performance in nine of the 12 months under consideration. Horizon's attempt to establish just cause was also compromised by the

termination of Delores Peterson, the grievant's supervisor, and the resultant inability to present her testimony. The grievant credibly testified to the events during this period of time particularly concerning her repeated requests for training and coaching and the failure to receive any despite following Ms. Peterson's directions to work in the office one afternoon one day a week to receive that training. Essentially the abandoning of this employee after promising her the coaching she requested to avoid termination was the key factor in leading to the assessment that just cause had not been established. The fact that the draft coaching action plan (Ex U-1) exists and remains unexplained by Horizon proves to be the most significant factor that deprives it from establishing the just cause existed for her termination.

In summary the grievance is sustained to the extent hereby specified. The grievant shall be returned to work. She will be provided with training to be agreed upon by the company and the union. It shall involve a minimum of 10 days of refresher training relating to her job duties. Once returned to work after her training she is to be considered a typical employee whose performance shall be judged accordingly. Horizon acted in good faith when it terminated the grievant. For that reason reinstatement with full back pay is not warranted under the unique circumstances presented in this case. Her seniority however will be recognized as having been uninterrupted and her time away from the job will be tolled for this purpose. This matter was originally scheduled for August 4, 2010 and was adjourned at a late date by the company. Therefore the grievant shall be made whole for her salary from August 4, 2010 through November 22, 2010, the date of the hearing. Furthermore she shall be returned to her employment as specified above on before March 7, 2011.

**AWARD**

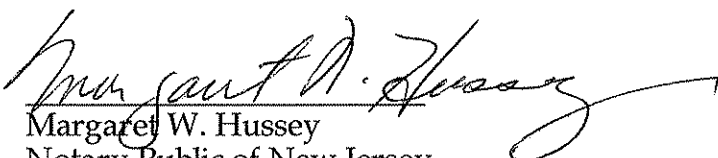
The discharge is set aside and the grievance is sustained  
to the extent set forth in the above Opinion.

  
\_\_\_\_\_  
Daniel J. Hussey  
Arbitrator

Date: February 5, 2011

STATE OF NEW JERSEY:  
COUNTY OF MIDDLESEX:

On this 5th day of February 2011 before me personally came and  
appeared Daniel J. Hussey, known by me to be the individual described herein,  
who executed the foregoing instrument and who duly acknowledged to me that  
he executed the same.

  
\_\_\_\_\_  
Margaret W. Hussey  
Notary Public of New Jersey  
Commission expires August 4, 2013