

**IN THE MATTER OF THE ARBITRATION BETWEEN**

**STATE OF MINNESOTA, )  
DEPARTMENT OF )  
ADMINISTRATION )  
and )  
MINNESOTA ASSOCIATION )  
OF PROFESSIONAL )  
EMPLOYEES )**

**Discharge of Larry Pepin**

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Employer Case No. 02-025  
Union Case No. 01-08-4207



**Arbitrator: Laura Cooper**

**Dates of Hearing: January 24, 2002  
January 25, 2002**

**Date Record Closed: February 9, 2002**

**Date of Decision: March 7, 2002**

**APPEARANCES**

**For the Employer: Anthony F. Brown  
Labor Relations Representative, Principal**

**For the Union: Sheila M. Pokorny  
Senior Business Agent**

**JURISDICTION**

The Minnesota Association of Professional Employees (Union) represents certain professional employees employed by the State of Minnesota (Employer). The parties have entered into a series of collective bargaining agreements. This grievance arises under the 1999-2001

Agreement between the parties. Article 9 of that Agreement establishes a Grievance Procedure, including arbitration.

By letter dated August 30, 2001, the Employer notified employee Larry Pepin that his employment with the Department of Administration was terminated, effective September 4, 2001. On August 30, 2001, the Union submitted to the Employer a second-step grievance alleging that the Employer did not have just cause to terminate Pepin's employment. The parties agree that the grievance is arbitrable.

The arbitration hearing was held in St. Paul, Minnesota, on January 24 and January 25, 2002. At the hearing, each party had a fair and equal opportunity to present evidence and argument. Witnesses testified under oath and were subject to cross-examination; exhibits were introduced into the record. The record closed on February 9, 2002, when the arbitrator received the parties' post-hearing briefs.

#### **STIPULATED ISSUE**

Did the Employer have just cause to discharge the Grievant, effective August 30, 2001? If not, what is the appropriate remedy?

#### **RELEVANT CONTRACT LANGUAGE**

##### **1999-2001 Agreement**

##### **Article 8, Discipline and Discharge**

Section 1. Purpose. Disciplinary action may be imposed on employees only for just cause and shall be corrective where appropriate.

Section 5. Discharge of Employees. The Appointing Authority shall not discharge any employee without just cause. . . .

## INTRODUCTION

Larry Pepin (Pepin or Grievant) had been employed by the Employer for twenty-seven years at the time of his discharge. For the previous twenty-one years, he had been employed with the Department of Administration. At the time of his discharge, his position was that of an Information Technology Specialist 3 (ITS 3) with the working title of Local Area Network (LAN) Administrator within the Division of State Building Construction (DSBC), a Division within the Department of Administration. His position description includes three responsibilities: (1) serving as LAN administrator for DSBC's computer operation; (2) designing and implementing new data base applications for DSBC; and (3) assisting in the maintenance of purchased software applications of DSBC.

On May 17, 2001, Pepin gave Department Ethics Officer Kirsten Cecil printed copies of more than twenty e-mail messages that had been sent between Brian Shablow and Heidi Myers between January and August 2000. At the time the e-mails had been sent, Shablow was employed as an engineer within the Division. At the time that Pepin provided the e-mails to Cecil, Shablow was no longer a state employee. He had resigned from the Division to accept a position in the private sector commencing February 1, 2001. At the time most of the e-mails were sent, Myers was an architect within the Division. She became the Director, or head, of DSBC in July 2000.

The group of documents Pepin provided to Cecil included messages sent by Shablow, some messages from Myers to which Shablow had replied, and some attachments. Some of the messages were ordinary business communications, such as arranging for travel to a business meeting, making arrangements for a speaker at a professional conference and seeking information such as a biographical statement and an e-mail address. Others were of a casual personal nature, such as

arranging for a lunch date, inquiries about the health or welfare of Myers or her child, comments about styles of architecture, skiing and beer-making. Several of the e-mails were romantic in nature; several included or attached pieces of romantic poetry. One exchange of e-mails (one sent from Myers' home computer on Sunday, June 19, 2000, and the reply to it sent from Shablow's office computer on Monday, June 19, 2000) was explicitly sexual in nature. When Pepin presented the stack of e-mails to Cecil, this June 18-19 document was on the top of the pile. On May 22, 2001, three business days after Pepin had provided the Shablow-Myers e-mails to Cecil, Larry Whitcomb provided the identical group of Shablow-Myers e-mails to the Department's Human Resources Director, Deb Tomczyk, also with the June 18-19 document on the top of the pile. At the time Whitcomb gave the e-mails to Tomczyk, Whitcomb was Assistant Director of DSBC. In his cover letter accompanying transmittal of the e-mails to Tomczyk, Whitcomb asserted that Shablow's work efforts in the DSBC might have "failed" because of Shablow's relationship with Myers and that their relationship was a "sleaze" that might have influenced Whitcomb's performance evaluations. Whitcomb subsequently retired from state employment.

Thereafter the Pepin e-mails from Cecil and the Whitcomb e-mails from Tomczyk, reached Labor Relations Director Sue Wickam. Wickam, in consultation with Department of Administration Assistant Commissioner Kath Ouska, decided to seek an external investigation to determine how *employees obtained access to personal e-mails on the computer of another state employee*. Wickam hired Michelle Soldo to conduct the investigation. Soldo is an private attorney, under contract with the Department of Employee Relations to conduct external investigations for state agencies. Soldo's *investigation included interviews with Pepin and Whitcomb, as well as consultation with computer experts Gary Johnson and Rich Platt*. Soldo concluded that Pepin had downloaded and accessed e-

mail accounts of Myers and of John Retzer, the Division's Business Manager and Pepin's immediate supervisor (since deceased). Soldo also found that Pepin had accessed, reviewed, printed and copied e-mail messages from Shablow's e-mail account. Soldo further concluded that Pepin helped Whitcomb obtain access to Shablow's e-mail account to search for evidence of a personal relationship between Shablow and Myers. Soldo found that Pepin did not have authorization from the Department of Administration to engage in any of these activities.

In her August 30, 2001, letter to the Grievant informing him of his termination, Department of Administration Assistant Commissioner Kath Ouska informed Pepin that he was being discharged for three actions. The letter stated that he had:

- (1) Downloaded and accessed the e-mail account of his supervisor and division director;
- (2) Accessed, ordered, retrieved, printed, and disseminated personal e-mail messages he found on a departed employee's computer; and
- (3) Helped another employee in the division obtain access to these same personal e-mail messages.

Ouska's termination letter also stated the following reasons for the Department's conclusion that these actions warranted discharge. Ouska wrote to Pepin:

In all of these actions, you used your position as LAN Administrator to secure access to materials you had no business reason to read or to convey to any other employee. The Department cannot tolerate such a significant breach of trust in employees who have broad authority and responsibility for department and employee data. Because of this violation of ethical practices, we can no longer give you the systems access your job requires and must therefore end your appointment.

## **CONTENTIONS OF THE PARTIES**

### **Position of the Employer**

The Employer contends that it had just cause to discharge the Grievant. The Employer asserts that the Grievant was aware that he was only authorized to access e-mail accounts of other

employees for legitimate business reasons. The Employer argues that it conducted a fair and impartial investigation and proved that the Grievant engaged in misconduct. The Employer notes that some of the conduct that it considers misconduct the Grievant admits having done, that is, accessing and printing from the e-mail account of Shablow and accessing the e-mail account of Myers. The Employer contends that the Grievant's assertion that he accessed Retzer's, Shablow's, and Myers' e-mail accounts for legitimate business reasons is not credible. The Employer further asserts that Pepin gave Whitcomb access to Shablow's computer for illegitimate reasons and that Pepin worked with Whitcomb in such a way as to cause the two to submit identical sets of e-mails to the Employer. The Employer asserts that the Grievant's conduct warrants his discharge because it constitutes a significant breach of trust and a violation of ethical practices. The Employer maintains that the position of LAN Administrator requires honesty and proper handling of confidential information, requirements it asserts the Grievant has shown an inability to provide. The Employer requests that the Arbitrator deny the grievance.

**Position of the Union**

The Union contends that the Employer failed to demonstrate just cause for discharging the Grievant. It asserts that the Grievant gave Whitcomb access to Shablow's computer because Whitcomb's request for access was a directive from a superior that the Grievant was obligated to follow. The Union asserts that the Grievant's methods for carrying out his responsibilities may have appeared unusual and cumbersome to more formally trained computer professionals, but they were nevertheless legitimate business practices. The Union contends that the Grievant was treated unequally because Myers also engaged in misconduct, by not reporting receipt of an inappropriate e-mail from Shablow, but that she was not investigated or disciplined. It further asserts that the

Employer failed to prove that the Grievant had ever read or printed any e-mails in the accounts of Retzer and Myers. The Union contends that all of the Grievant's actions were consistent with the performance of the duties of his position and that he did not violate any articulated state policy. The Union requests that the Arbitrator sustain the grievance and order the Employer to reinstate the Grievant.

### **DISCUSSION AND ANALYSIS OF THE EVIDENCE**

**1. Did the Grievant access, order, retrieve, print and disseminate personal e-mail messages found on Brian Shablow's computer? Is so, were such actions undertaken for illegitimate reasons?**

Brian Shablow left his position at the State in the beginning of February 2001. On April 26, 2001, the Grievant admits that he obtained access to Shablow's e-mail accounts, that he used computer commands to arrange the e-mails in an order to facilitate his examination of the messages, that he opened or retrieved some of those messages, that he printed some of those messages, and that he provided them to Cecil. In short, the Grievant admits that he undertook each of the actions related to this Employer allegation. The Grievant, however, denies that these actions were undertaken for any illegitimate reasons. Rather, he maintains that he accessed Shablow's e-mail messages for the purpose of archiving project data, that in the course of identifying messages related to projects he noticed messages he considered inappropriate, that he reconsidered the significance of the inappropriate messages after over-hearing Robert Armbruster ask Whitcomb if Shablow might have been asked to leave the Division, thinking they might be evidence of sexual harassment, and that thereafter he ordered messages looking for nonjob-related titles, and that he printed some of them and gave them to Cecil because he sought to bring to the Employer's attention the possibility that

Shablow's departure might have been the result of sexual harassment.

The Grievant's assertions of the reasons for his examining Shablow's e-mails and printing selected ones, are not, however, credible. The Grievant, on April 26, 2001, the same day he accessed Shablow's messages, told Whitcomb in an e-mail that he was working on Shablow's computer for a different reason, that is reconfiguring Shablow's computer for use as a replacement for Retzer. (Employer Exhibit 11). The assertion that the purpose of accessing Shablow's computer was archiving of project data is also incredible because Pepin had never before sought to archive e-mail messages from the computer of a departing employee, he did not identify or archive a single project-related message from Shablow's e-mail account either on April 26th or on any subsequent date, and he had no reason to believe that there was critical project data on Shablow's computer that had not already been properly retained elsewhere. No one directed Pepin to review Shablow's computer for project-related e-mail messages. Although Pepin asserts that he was seeking to archive the e-mail messages as the result of a new policy, communicated generally to employees in the Department on April 18, 2001, nothing in the policy suggested that it was Pepin's responsibility to search through computers of departing employees to identify any such e-mails. Indeed the policy itself said, "E-mail users are responsible for retention of e-mail messages that are records. . . ." (Union Exhibit 16)

Moreover, the alternative explanation for the Grievant's review of Shablow's e-mails on April 26th, that is, that he was from the start specifically looking for inappropriate communications between Shablow and Myers is much more consistent with the events. It was on that date that Pepin said he first heard of the suggestion that Shablow might have been asked to leave. If someone were actually looking for project data in Shablow's files, many such messages would have been easily identified from the subject line of the messages, yet Pepin testified that he never printed out any

project-related e-mails from Shablow's account. There are additional reasons to question the Grievant's credibility. The Grievant had told Soldo in the investigation that he had found the inappropriate documents without using any search or sort commands, but rather by going through the documents one by one. When confronted by Soldo with the fact that a document-by-document review of the messages as they would have initially been listed in the e-mail account would have identified several sexually-explicit jokes that the Grievant had not seen or printed, the Grievant admitted to her that he had "ordered" the documents to identify those sent by Shablow to Myers. When Soldo asked him why he had not explained this ordering when she initially asked him about his process for examining the messages, the Grievant told Soldo, "You didn't ask me if I ordered the messages. You asked me if I searched for or sorted them. I didn't do that." (Union Exhibit 5, at p. 10) The Grievant's comments in the Soldo interview appear particularly deceptive in light of the Grievant's testimony at the arbitration hearing in which he said that the terms "sort" and "ordered" are "basically interchangeable."

The next question is whether, having found the personal e-mail messages in Shablow's account, the Grievant was seeking to follow the State's sexual harassment policy when he printed and distributed them, rather than, instead, seeking to embarrass or undermine the privacy of Shablow and Myers, or perhaps to assist Whitcomb in challenging the legitimacy or authority of Myers. Pepin acknowledged that enforcement of the State's sexual harassment policy was not within his job description. Rather, he asserts he had a duty to report the information as evidence of sexual harassment because he thought it might indicate harassment by a superior (Myers) of a subordinate (Shablow). First of all, nothing in the e-mails suggested that either Myers or Shablow were engaging in unwelcome sexual advances. Second, most of the e-mails with any romantic content had been

written when Shablow and Myers were fellow employees without any supervisor-subordinate relationship. Third, nothing in the e-mails even remotely suggested that Myers was pursuing Shablow against his wishes. Fourth, the Grievant claimed that he was concerned for Shablow's treatment, but Shablow had certainly never suggested that he was being harassed, nor did he seek assistance in any way from Pepin. Fifth, the Grievant said that State policy required him to report sexual harassment, but the State policy indicates that the person responsible for reporting is the person subjected to the harassment and that the responsibility for enforcement of the policy rests with managers, supervisors and the Human Resources Division, not with individual employees or LAN administrators.

The evidence therefore indicates that the Grievant did access, order, retrieve, print and disseminate personal e-mail messages found on Brian Shablow's computer and that he did so for illegitimate reasons.

**2. Did the Grievant help John Whitcomb obtain access to Brian Shablow's personal e-mail messages? Is so, was such action undertaken for illegitimate reasons?**

The evidence is undisputed that (1) the Grievant on April 26th accessed the twenty or so e-mail messages that he submitted to Cecil; (2) that the Grievant gave Whitcomb access to Shablow's computer on April 26th; (3) that the Grievant and Whitcomb exchanged messages about Whitcomb's access to Shablow's computer that day that Whitcomb, at a minimum, knew to be false with regard to the reason for access and that the Grievant and Whitcomb knew to be false with regard to the timing of the access;\* (4) that the group of messages offered by Whitcomb and the Grievant were

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\*Although Whitcomb had already sought and obtained physical access to Shablow's computer from Pepin, Whitcomb wrote an e-mail to Pepin requesting such access for the purpose of locating deliverables from David Solberg related to a BCA project. At the time of writing the e-mail Whitcomb already knew that Solberg was providing the

precisely identical and included the same message at the top, even though the selected messages were just a few taken from hundreds of messages, and that both collections included identical inoffensive messages and both omitted sexual jokes that were also in Shablow's account.

While the Grievant admits that he allowed Whitcomb access to Shablow's computer on April 26th, he contends that he did so because Whitcomb requested it and that he had an obligation to abide by the direction of a superior. This defense is, however, implausible because Whitcomb was not his supervisor; because, in another instance when Whitcomb sought access to employee computers, the Grievant inquired further about whether he had authority to do so before affording Whitcomb access; and because the Grievant participated in an exchange of e-mails with Whitcomb about the timing of the access which the Grievant knew to be false. It is also likely that the Grievant further knew that Whitcomb's proffered rationale was also false because (1) the Grievant's interest in the reasons for Shablow's departure arose from a conversation that Whitcomb had with Armbruster (that Armbruster said had not been overheard by anyone); and (2) the absolute identity of the two collections of e-mail messages is itself proof of collusion beyond any likelihood of chance, although both Whitcomb and the Grievant deny such communication.

I therefore conclude that the Grievant knowingly gave Whitcomb access to Shablow's computer and shared information with Whitcomb about the identification of certain personal e-mail messages between Myers and Shablow, and that these actions were not undertaken for any legitimate business reason.

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*information about the deliverables to Myers and that there was no need for Whitcomb to do anything related to the Solberg deliverables. Pepin replied that he would wait to make other uses of the Shablow computer until he heard that Whitcomb had had an opportunity for access, even though Pepin knew at the time of writing the e-mail that he had himself already made the computer available to Whitcomb. (Union Exhibit 12)*

**3. Did the Grievant download and access the e-mail account of his supervisor, John Retzer? If so, were such actions undertaken for illegitimate reasons?**

The Employer alleges that the Grievant downloaded and accessed the e-mail account of his supervisor, John Retzer, in pursuit of information related to Retzer's handling of a claim the Grievant had submitted in December 2000 regarding overtime compensation under the Fair Labor Standards Act (FLSA). The Grievant told Soldo that Retzer was the "sole person" responsible for the rejection of his claim, that would, if approved, have yielded the Grievant in excess of \$5000. (Employer's Exhibit 4 at p. 3) Following rejection of his FLSA claim by Retzer, the Grievant twice requested from the Commissioner all correspondence, including e-mails, pertaining to his FLSA overtime pay eligibility. These requests were made May 8, 2001 and July 2, 2001. The latter request asserted that he felt that he had not received all of the documents he had requested and asked that a second retrieval process be undertaken.

The Employer's evidence, largely presented through the computer files and testimony of the Employer's computer forensics expert, Gary Johnson, indicated that the Grievant accessed e-mail files of Retzer both by downloading them to the Grievant's own office computer as well as viewing them on Shablow's computer to which the Grievant had regular access after Shablow's departure. The Employer's evidence indicates a remarkable lock-step chronological correspondence between developments in the Grievant's FLSA dispute and the Grievant's obtaining access to Retzer's e-mail account.

- (a) The Grievant submitted his FLSA claim in December 2000 and the Grievant first accessed Retzer's e-mail account by creating an OST (offline storage) file linking the Grievant's computer to Retzer's account on January 25, 2001.

- (b) On March 26, 2001, Retzer advised Myers that he was going to inform the Grievant that most of his FLSA claim was going to be denied and on March 28, 2001, a file was created including a spreadsheet crafted by Retzer to calculate the Grievant's overtime eligibility.
- (c) On April 25, 2001, the Grievant received an e-mail denying a new request for 3.5 hours of overtime in the previous pay period. On April 26, 2001, the Grievant accessed Retzer's e-mail.
- (d) On April 30, 2001, the Grievant received an oral reprimand for incurring the overtime hours without approval and on May 1, 2001, the Grievant deleted Retzer files that had been placed on Shablow's computer.
- (e) On May 7, 2001, documents on Shablow's computer from Retzer's computer pertaining to the Grievant's FLSA calculations, including spreadsheets, were moved to the Recycle Bin and deleted, and the next day, the Grievant wrote to the Commissioner requesting "correspondence, spreadsheets and e-mail communications" related to his FLSA eligibility.

The Grievant, on the other hand, testified that he had never accessed Retzer's e-mails to look for FLSA-related documents. The Grievant said that he did access Retzer's e-mail account perhaps eight or ten times over a period of more than four months trying to fix persistent problems with Retzer's e-mail. Although during this period, Retzer was out of the office frequently for cancer treatment, the Grievant said that he did not do the troubleshooting at Retzer's workstation when Retzer was absent because he only worked on Retzer's account when Retzer was present so that Retzer would know the Grievant was working on it. The Grievant's explanation for not working

directly on Retzer's machine to resolve Retzer's e-mail problems is inconsistent with a statement by Retzer to Johnson and a statement by the Grievant to Soldo. Johnson testified that Retzer was startled to learn that Retzer's e-mails were present on Shablow's computer. Pepin told Soldo, when asked how he notified Retzer (and Myers) when he was accessing employee e-mail accounts, "I didn't tell them. No one notified me that I had a responsibility to notify them of this." (Employer's Exhibit 4, at p. 5)

The Grievant's suggestion that using Shablow's computer was a reasonable technique to troubleshoot Retzer's e-mail problems also seems implausible. In order to isolate a problem, the troubleshooter would want to make sure that no new variables were introduced into the investigation. Bryan Alpaugh, employed by the Department to supervise LAN administrators, said that one would not troubleshoot e-mail problems using another employee's computer because that might introduce additional unknowns. The Union's two computer experts agreed. Charles Ball, a network administrator in the Department said that a troubleshooter might put an employee's e-mail on the troubleshooter's own computer only if access to the problem computer was unavailable. He emphatically said he would never use a vacant computer to try to fix another employee's e-mail problems. Another Union computer expert, Paul Stewart, an experienced State LAN administrator, said that he might profile a user's e-mail on his own workstation to check whether the problem might be at the server level or if the user's machine was not available because the user needed to work on it, but he did not suggest any circumstances in which it would be appropriate to troubleshoot one employee's e-mail problems using the computer of another employee.

The evidence, including the Grievant's own testimony, demonstrates that he accessed Retzer's e-mail accounts and the preponderance of the evidence further indicates that he did so for

an illegitimate purpose, that is to track Retzer's handling of the Grievant's FLSA claim, rather than to fix problems on Retzer's e-mail account.

**4. Did the Grievant download and access the e-mail account of his Division Director, Heidi Myers? If so, were such actions undertaken for illegitimate reasons?**

The evidence indicated that on August 21, 2000, the Grievant created an OST file on his workstation affording him the ability to read, access and print messages in Myers' e-mail account without her knowledge. Pepin never provided any plausible work-related reason for his having done so. Pepin told Soldo that he had done so in order to work on e-mail problems he claimed Myers was experiencing at that time. The Grievant never suggested that Myers asked the Grievant to fix any e-mail problem for her and the general departmental problems with e-mail, resulting from installation of a firewall, did not arise until months later, in December 2000 and January 2001. Later in his testimony, the Grievant said that he had accessed her e-mail on his workstation to synchronize Myers' new palm pilot with her e-mail. This explanation is not credible because it was never mentioned to Soldo when she asked the Grievant why he had accessed Myers' e-mail account and because the method that the Grievant suggests he used for synchronizing the palm pilot, creating an OST, would not be the appropriate method for doing so. Johnson's testimony, which was unrefuted, was that a palm pilot operates with proprietary software, wholly unrelated to a Microsoft OST, and that a palm pilot comes with the software appropriate for linking the palm pilot to one's existing e-mail account.

The evidence demonstrated that the Grievant did access Myers' e-mail account and that there was no legitimate purpose for doing so.

**5. If the Grievant engaged in the actions alleged by the Employer, and did so for illegitimate reasons, do such actions provide just cause for his discharge?**

The Union maintains that even if the Grievant engaged in the actions alleged by the Employer, and even if he had no legitimate reasons for undertaking those actions, the Employer nevertheless lacked just cause to discharge him. The Union points to the Grievant's record of long service, including positive evaluations and performance commendations. The Union contends that the Grievant should not be discharged because he was not treated equally with others, because he did not violate any explicit Employer policy, and because he is amenable to corrective discipline.

With regard to equal treatment, the Union alleges that Myers should have been investigated for possible sexual harassment and that she should have been disciplined for failure to report receipt of inappropriate e-mail messages. Even if Myers had engaged in the misconduct the Union suggests might have occurred, such allegations are so disparate from those involving the Grievant that they would not support a claim of unequal treatment. Furthermore, there never was any evidence presented to the Employer that Myers engaged in misconduct of any sort. There was no evidence that she was sexually harassing Shablow. The State's policy on electronic communication explicitly permits employees to use state e-mail to some extent for personal messages. The policy states that messages are inappropriate if they contain "offensive, racist, sexist, obscene or pornographic information," but there was no evidence presented that Myers sent or received any such information. The policy directs employees to report any "inappropriate and unsolicited e-mail messages," but there was no evidence that Myers received any inappropriate unsolicited messages. (Union Exhibit 17)

The Union contends that the Employer lacked just cause for the discharge of the Grievant

because it could not point to any specific Employer policy that the Grievant had violated. The evidence here demonstrated that the Grievant, without any legitimate business reason, accessed the personal e-mail accounts of his supervisor, the Director of his Division, and a fellow employee, and that he, in the latter case, shared with another employee the personal information so obtained. The theory of just cause does not require that every possible kind of misbehavior in which an employee might engage must be catalogued by the Employer in advance. The theory of just cause requires that employees not be surprised to discover that conduct they reasonably believed to be appropriate was secretly considered by the employer to be misconduct. No employee, however, could reasonably believe that he or she has the right to access and disseminate the contents of personal e-mail accounts of other employees in the absence of a legitimate business purpose. The absence of a specific Employer rule prohibiting such conduct does not preclude the discharge from having just cause.\*\*

Finally, the Union contends that, if the Employer's allegations are true, the Grievant should receive corrective discipline and not be subject to termination. Although the misconduct of a long-term employee often suggests the appropriateness of corrective discipline rather than discharge, such treatment is not appropriate in this case. The Grievant did not engage in just one instance of misconduct, but repeatedly accessed other's e-mail accounts without legitimate justification. His

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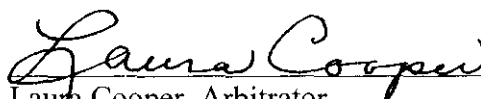
\*\*See, National Academy of Arbitrators, *The Common Law of the Workplace: The Views of Arbitrators* (Theodore J. St. Antoine, Editor, 1998) (Note c. to § 6.5, *Reasons Constituting Just Cause*: "It is unfair to punish an employee for conduct the employee has no reason to know would be unacceptable. Normally that elemental requirement of justice will mean that the employer must announce the rules it expects the employees to follow and must give some indication of the penalties that will follow a breach. Some rules and expectations are so obvious, however, that employees are presumed to know them. . . . Because these "capital offenses" are so well known and so serious, they do not require express rules to support discipline, and may not require the use of progressive discipline.")

position, as a LAN administrator, requires that he have access to employee e-mail accounts for legitimate purposes and that he perform his duties without close supervision. The Grievant's statements, both to the investigator and in this arbitration, suggest a capacity for dishonesty. Under those circumstances, the Employer is warranted in declining to take the risk that reinstatement of the Grievant would result in further breaches of trust.

**ORDER**

Based on the entire record and the foregoing discussion and analysis, I find that the Employer had just cause to discharge Larry Pepin. The grievance is denied.

Issued and ordered this seventh day of March, 2002, in Minneapolis, Minnesota.

  
Laura Cooper, Arbitrator