

IN THE MATTER OF ARBITRATION BETWEEN

01-318

**MINNESOTA STATE EMPLOYEES UNION)
AFSCME COUNCIL NO. 6, AFL-CIO)
and)
STATE OF MINNESOTA)
DEPARTMENT OF ADMINISTRATION)**

**OPINION AND AWARD)
BMS 02-PA-1156)
Grievance re: Discharge)**

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ARBITRATOR: Charlotte Neigh

HEARING/RECORD CLOSED: November 13, 2002

AWARD: December 2, 2002



REPRESENTATIVES

For the Union:

Sandra Curtis, Business Representative
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For the Employer:

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JURISDICTION AND PROCEDURE

Pursuant to the parties' Agreement and the procedures of the Minnesota Bureau of Mediation Services, Charlotte Neigh was selected to arbitrate this matter. A hearing was held in St. Paul at which time both parties had a full opportunity to offer evidence and argument; the record was closed at the conclusion of the hearing. Copies of this Award are being sent by Certified Mail to the parties' representatives noted above.

ISSUES AS STIPULATED BY THE PARTIES

1. Did the Employer have just cause to discharge the Grievant on January 29, 2001?
2. If not, what is the proper remedy?

PERTINENT AUTHORITY

LABOR AGREEMENT

ARTICLE 16 - DISCIPLINE AND DISCHARGE

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

STATEWIDE POLICY: ELECTRONIC COMMUNICATION AND TECHNOLOGY ETHICS

Effective November 15, 1997

The State of Minnesota provides a variety of electronic tools such as . . . computers . . . electronic mail (e-mail) systems, Internet access and a browser for employees whose job performance would be enhanced by the technology. . . . This policy memorandum governs access to and the appropriate use of this technology during time periods before and after work and during break periods by State employees in the executive branch.

Employee access to and use of electronic tools such as e-mail and the Internet is intended for business-related purposes. *Limited and reasonable use of these tools for occasional employee personal purpose* that does not result in any additional costs of loss of time or resources for their intended business is purpose is permitted. . . .

Employee Responsibility: Executive branch employees are responsible for appropriate use of e-mail and Internet access. They are expected to adhere to the highest ethical standards when conducting State business and to follow the Code of Ethics and related State statutes applicable to executive branch employees. For example:

Minn. Stat. §43A.38, Subd. 4 provides "Use of state property":

(a) An employee shall not use or allow the use of state time, supplies, or state owned or leased property and equipment for the employee's private interest or any other use not in the interest of the state, except as provided by law. . . .

Minn. Stat. §43A.39, Subd. 2 provides "Noncompliance":

Any employee who intentionally fails to comply with the provisions of Chapter 43A shall be subject to disciplinary action and action pursuant to Chapter 609.

Appropriate Use: State employees need to use good judgment in Internet access and e-mail use. They are expected to ensure that e-mail messages are appropriate in both the types of e-mail messages created and the tone and content of those messages. Employee use of e-mail and the Internet must be able to withstand public scrutiny without embarrassment to the agency or the State of Minnesota.

Examples of inappropriate use include, but are not limited to: . . .

- Receipt, storage or transmission of offensive, racist, sexist, obscene or pornographic information . . .

The traditional communication rules of reasonableness, respect, courtesy, common sense, and legal requirements also apply to electronic communication. For example, actions that are considered illegal such as gambling and harassment are not up to the discretion of individual agencies or individual managers or supervisors: these actions break the law whether the behavior is conducted on e-mail or by another means of communication, and they may subject the employee to disciplinary action up to and including discharge.

Employees . . . may receive inappropriate and unsolicited e-mail messages. Any such messages should be reported immediately to the employee's supervisor and any other designated official within the employee's agency. . . .

Monitoring: . . . The State reserves the right to monitor all use of e-mail and Internet resources at the time of use, during routine post-use audits, and during investigations.

Pertinent Authority (continued)

HARASSMENT POLICY

The Minnesota Department of Administration believes that harassment has no place in the work environment. Therefore, it is the department's policy to prohibit harassment of its employees based on race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age. This prohibition with respect to harassment includes both overt acts and other actions that create a negative or hostile work environment. . . . Any unintentional or deliberate violation of this policy by an employee will be cause for appropriate disciplinary action. . . .

DEFINITIONS

Discriminatory harassment is any behavior based on protected class status that is unwelcome, personally offensive, insulting or demeaning. . . .

Sexual harassment has also been specifically defined by the Minnesota Human Rights Act, which states in regard to employment, that:

"Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when: . . . (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

. . .

BACKGROUND AND UNDISPUTED FACTS

In September 2000 a Plant Management Division employee reported seeing a picture of a naked woman on a coworker's computer. This caused the Division to investigate the coworker, which led to a review of the e-mail accounts of employees in contact with the coworker. This revealed a large number of "adult content" e-mail messages and attachments exchanged among the small group of employees initially reviewed. This precipitated a full-scale investigation, including the services of outside consultants specializing in internet use, and the services of a computer forensic expert from another state agency. This expert recovered and analyzed data from several hard drives, including the one from the computer used by the Grievant.

Approximately thirty employees were investigated for both e-mail and internet usage and content, resulting in a range of disciplinary actions: none; written reprimand; one-day suspension; three-day suspension; five-day suspension; ten-day suspension; fifteen-day suspension; and discharge. The Grievant was one of three who were discharged.

A 1/29/01 letter to the Grievant stated that he was being terminated from his employment effective immediately for:

"using your state computer to access adult content internet sites and for sending inappropriate e-mails to other department employees. These sites included images that were sexually explicit and contained violence and nudity. These activities violate the sexual harassment policy and the statewide electronic communications and technology ethics policy. There is no work related reason for you to engage in this behavior."

1/29/01 Letter (continued)

“You were present at a training session on October 21, 1998 when the state electronic communication and technology ethics policy was presented by your supervisor. You received another copy of the policy on February 7, 2000. You also received information on proper use of division computers in March of 2000. Despite these clear instructions about use of the computer, you repeatedly used your computer to access adult sites that included both nudity and violence.”

The Union filed a grievance dated 2/6/01 that did not specify the basis for the grievance. By Memorandum dated 4/2/01 the Department’s Director of Labor Relations responded to the third-step grievance meeting held on 3/29/01, stating that the Union was contending that the Department had not met just cause standards for notice or equal treatment. The parties were unable to resolve this matter and, at the initiative of the Employer, it proceeded to arbitration.

POSITIONS OF THE PARTIES

THE EMPLOYER ARGUES THAT:

- The Grievant flagrantly violated the policies on harassment, violence and proper use of the computer, and the trust placed in him to be a good steward of the State’s time and equipment.
- The State is required to have a workplace free from harassment and violence; the Department could suffer consequences from the Grievant’s conduct, as it had potential liability for harassment if other employees had encountered the material on the Grievant’s computer.
- This incident was reported in St. Paul’s major newspaper, resulting in embarrassment to the State as an Employer, as questions were raised about such use of time and equipment paid for by tax dollars.
- The Grievant admitted to using State time and equipment to search for and access violent pornographic websites that were demeaning, threatening and disgusting.
- The Grievant was given ample notice that he could be discharged for the type of activity he engaged in: he had received copies of the Department’s policies and had received training regarding them.
- Even without dissemination of the policies and the training, plain common sense should have indicated to the Grievant that searching out and accessing pornography, female bondage and abduction sites that showed graphic torture and mutilation of fearful victims, on state time using the state computer, is wrong and would be subject to discipline including discharge.
- Discharge is an appropriate remedy because of the extraordinary type of sites repeatedly accessed by the Grievant.

Employer's Arguments (continued)

- The Grievant was not treated differently than other employees; a fair and consistent method of determining the appropriate degree of discipline resulted in a range of discipline, including three supervisors being suspended and one supervisor being discharged.
- The grievance should be denied and the discharge upheld.
- If the Grievant is to be reinstated, it should be without back pay because: he committed serious violations; he has been employed elsewhere; and it has been nearly two years since his discharge because the Union delayed pursuing the grievance.

THE UNION ARGUES THAT:

- The discipline was too severe for the admitted offense; it was not consistent, as other employees got a lesser punishment, and was motivated by personal values in reaction to content rather than a professional review of any actual violation.
- The Grievant had a good employment record and accepted responsibility for his behavior when he was questioned; a 28-year employee must be given an opportunity to correct inappropriate behavior, which he surely would have done.
- The Grievant was unaware that his computer activity could form the basis for a discharge: there was not a zero tolerance policy and the Grievant was not on notice that discharge would be automatic.
- The Grievant's behavior took place in a private setting, did not involve other employees, and there was no complaint from any employee, therefore the Grievant's behavior was not threatening or violent and no sexual harassment took place.
- The Employer failed to take immediate steps to stop the activity, or to act on the Grievant's alleged violations of the violence and sexual harassment policies.
- The Employer subsequently took measures to prevent the employees from accessing such sites.
- The Grievant should be reinstated and made whole, and the discipline pulled from his file.

ANALYSIS AND DISCUSSION

The Union does not dispute that the Grievant used the State-owned computer to access the websites and pages identified by the Employer, although the Grievant said that he was unable to remember some of them. The fundamental question is whether the Employer had just cause to impose the penalty of discharge. In support of this most extreme penalty, the Employer relies on workplace policies regarding violence, harassment, and appropriate use of computers.

Department Policy for Zero Tolerance of Violence

Neither party offered evidence or argument regarding the interpretation and application of this Policy. A reading of the Policy suggests that in order for it to be violated, an employee or a visitor must be on the receiving end of a threat or some aggressive behavior by an employee. The facts of this case do not support a violation of this Policy.

Sexual Harassment Policy

The Union correctly points out that the Grievant's activity seems to have been unobserved by and unknown to other employees, and so arguably did not violate the Harassment Policy. On the other hand, the Employer has reason to be concerned about its potential liability if someone would encounter the material that the Grievant was viewing on his computer, which arguably could be considered to create a negative or hostile work environment. It is not necessary to determine whether the Grievant's conduct constituted sexual harassment because this grievance will be decided based on the computer use Policy.

Statewide Policy: Electronic Communication and Technology Ethics (Effective November 15, 1997)

This Policy expressly governs the Grievant's misuse of the State's computers, e-mail and internet access. The Grievant received information and training regarding this Policy, which clearly prohibits the type of activity in which he deliberately engaged. This Policy also incorporates the provision of Minn. Stat. §43A.39 Subd. 2, that an employee who intentionally fails to comply shall be subject to disciplinary action. Article 16, Section 3 of the Labor Agreement includes discharge in the list of disciplinary actions or measures. There was no basis for the Grievant to expect that discipline resulting from his conduct could not include discharge.

The Union's primary argument is that management was inconsistent and unfair when it determined that the Grievant should be discharged while imposing lesser discipline on other employees who were found to have misused e-mail and/or internet access. The Union even suggests that the harsher treatment of the Grievant stemmed from the personal discomfort that was expressed by one of the investigators regarding some of the content of the sites that he visited. However, this theory is not supported by the evidence.

Analysis and Discussion - Computer Policy (continued)

The Employer carefully created a rational, systematic plan for evaluating the various kinds and degrees of inappropriate use of e-mail and the internet; there is no evidence that this plan was outcome oriented for the purpose of discharging the Grievant. A team that included representatives of management, human resources, the Department of Employee Relations, and internal and external investigators met and consulted about how to evaluate the employees' activities. A consultant/investigator with experience in internet-pornography investigations advised that she ranked content at four levels: 1) sexual jokes and cartoons with nudity; 2) more sexually explicit materials, including nude pictures and stories or jokes about sexual acts; 3) much more sexually explicit and violent pictures and stories; 4) child pornography. She ranked the content of the Grievant's internet activity at level 3. She also considered it relatively more serious to send than to receive such e-mails, and even more serious to search out such material on the internet, which the Grievant did.

The 5/31/01 draft summary of the various discipline levels (Employer Exhibit 5) shows that:

- "Adult content" was defined as nudity and sexual activity, language or innuendo in the form of images, videos, animations, interactive animations and audios.
- The review of e-mail activity emphasized the number of e-mail messages containing adult content attachments.
- Less weight was given to receiving such e-mails than was given to sending them.
- It was considered as a mitigating factor for employees who received such e-mails from their supervisor, and an aggravating factor for a supervisor who engaged in such activity.
- Weight was given to the amount of work time an employee spent on nonwork-related use of the internet.
- Weight was given to the degree of offensiveness of the content of the materials.
- Misuse of both e-mail and internet access was weighted more heavily than just one or the other.

These complex factors were applied to all of the employees identified as violators of the Policy. The result (per Employer Exhibit 5) was a range of disciplinary actions: none (5 employees); written reprimand (4); one-day suspension (3); three-day suspension (3); five-day suspension (7); ten-day suspension (2); fifteen-day suspension (3); and discharge (3).

The discharged employees included a supervisor who received and distributed a large number of e-mail attachments with adult content to 23 other employees, including three who reported to her. Although her use of the internet had been minimal and had not included pornographic sites, she was held to a higher standard because of her supervisory obligations. The other person was discharged based on the extensive amount of time that he spent on the internet, accessing adult content and other types of nonwork-related sites.

Analysis and Discussion - Computer Policy (continued)

The basis for the Grievant's discharge was unique in this group: it was the violent and pornographic nature of the content of the material that he accessed. None of the other violators had used websites similar to those used by the Grievant. The Grievant intentionally used search terms such as "abduction.com", "torture.com", and "bondage.com"; and repeatedly accessed at least 30 websites and more than 100 web pages showing acts of violence against naked and terrified women. The type of content viewed by the Grievant stood out as violent and disturbing in comparison to the content of the sites visited by the other violators, and in comparison to other cases in the experience of the investigators.

Given the number and variety of violations by numerous employees, the disciplinary scheme devised to address them was necessarily complex. It was not unreasonable for the Employer to conclude that the nature of the material accessed by the Grievant was more offensive; nor was it unreasonable to conclude that more offensive misuse warranted a more serious penalty. It is also valid under this Policy for the Employer to consider the embarrassment to the Department and the State when such offensive workplace misconduct by a public employee is exposed to public scrutiny, which it was in this case. The Grievant's long-term employment and good record notwithstanding, the Employer reasonably applied a carefully considered and rational set of factors to his conduct, which logically led to a determination that his violation of the Policy warranted termination of his employment.


CONCLUSION

The Employer had just cause to discharge the Grievant on January 29, 2001.

AWARD

The grievance is denied.

December 2, 2002



Charlotte Neigh, Arbitrator