

STATE OF MINNESOTA
BUREAU OF MEDIATION SERVICES

In Re the Arbitration between

Minnesota Teamsters Public & Law
Enforcement Employees' Union, Local 320
Grievant,

and

BMS Case No.: 11-PA-0035

St. Louis County, Minnesota
Respondent.

DECISION AND AWARD II

BEFORE

Bernice L. Fields, Arbitrator

APPEARANCES:

For: Labor Union Local 320

Patrick J. Kelly, Attorneys at Law
Kelly & Lemmons, P.A.
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For: St. Louis County

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Place of Hearing

Duluth, Minnesota

Date of Hearing

April 7, 2011

Date of Award

June 27, 2011

Reconsideration Denied

August 2, 2011

Relevant Contract Provisions

Article 3 and Article 8

Contract Year

2008-2009 (Continuous Renewal)

Type of Grievance

Discharge

I. STATEMENT OF JURISDICTION

This matter came on for hearing pursuant to a Collective Bargaining Agreement (CBA) between the parties effective January 1, 2008 - December 31, 2009 with annual continuous renewal. A hearing occurred on April 7, 2011 in a conference room of the Richard H. Hanson Transportation and Public Works Complex, Duluth, Minnesota. Attorney Patrick J. Kelly represented the Minnesota Teamsters Public & Law Enforcement Employees' Union, Local 320, hereinafter Union. Assistant County Attorney Tokunbo Okanla represented St. Louis County, Minnesota, hereinafter Employer.

The hearing proceeded in an orderly manner. There was full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the Arbitrator. The advocates fully and fairly represented their respective parties.

The parties stipulated that the matter had been properly submitted to arbitration and that there were no issues of substantive or procedural arbitrability to be resolved. The Arbitrator officially closed the record upon receipt of briefs from the parties on June 1, 2011.

II. ISSUE

WHETHER THE GRIEVANT'S DISCHARGE WAS FOR JUST CAUSE? IF NOT, WHAT IS THE APPROPRIATE REMEDY?

III. STATEMENT OF THE FACTS

Grievant, name redacted pursuant to Minnesota Statutes 2008, section 13.43, subd. 2., began employment as a Utility Worker with the Public Works Department of St. Louis County, hereinafter Employer, in 1987, twenty-three years ago. He was promoted to increasing more

responsible positions until at his termination he was Senior Equipment Operator and acted as Intermittent Foreman when his supervisor, Jeff Dulinski, was not on site.

Mr. Dulinski was Grievant's only supervisor his entire career. Performance evaluations completed by Mr. Dulinski, hereinafter Supervisor, from 2004 through 2008 rated Grievant at the highest level in each evaluated category. The categories are: co-operation with co-workers, public contact, job knowledge, responsibility, organization, attendance, acceptance of supervision and organizational procedures, judgment and comprehension, and work habits. There is no previous discipline in Grievant's work history.

Grievant is not a sophisticate, he has a rural farming background and a GED. In October, 2009 Grievant was taking medication for depression. He is married with children.

Grievant and his six person work crew were responsible for maintenance of 200 miles of road in St. Louis County. They are based in the Cotton Tool House in Northern Minnesota. The work crew had been with Grievant from two to twenty-three years.

On October 28, 2009 Grievant was escorted from his employment by law enforcement officers based on a complaint to Leah Schadle, human resources representative, by a person the Employer will not identify. There were conflicting stories about the identity of the complainant. In one, the Employer alleged that the complaint against Grievant came from comments made to another work crew who reported the matter to the Employer. Later in the hearing, that version was challenged. In the conflicting story, the complaint came from one of Grievant's co-workers. However, the Employer never revealed the name of the complainant or explained the failure to disclose.

Based on the complaint from this undisclosed person, Grievant was placed on paid

administrative leave pending the completion of a criminal investigation for making terroristic threats at the workplace. After a criminal investigation, the St. Louis County Attorney declined to charge Grievant with terroristic threats because the Grievant's comments, the County Attorney concluded, were not directed at a specific person. It is unclear whether any other criminal charges were ever brought against Grievant.

Either on December 1, 2009 or December 28, 2009, the Employer presented conflicting testimony; the Employer began its own investigation of the allegations against Grievant by interviewing Grievant's co-workers. The interviews were conducted by Leah Schadle, human resources representative, and Ron Garden, former Deputy Director of Public Works. Mr. Garden testified he did not take notes during the interviews and did not "recall all the co-workers' concerns."

On March 8, 2010 the Grievant was interviewed by Ms. Schadle and Mr. Garden. The Employer did not explain the long delay between the interviews of the co-workers in December, 2009 and Grievant in March, 2010. On March 15, 2010 Grievant received a Termination Letter. The Termination Letter was issued by James Foldeski, Highway Engineer and Director of Public Works. The Termination Letter alleged:

Late in the day on October 27, 2009, I became aware of an allegation that you had engaged in workplace misconduct consisting of threatening comments made to your co-workers regarding actions you intended to take against your supervisor, Jeff Dulinski.

You were placed on paid administrative leave on October 28, 2009, for the pendency of a criminal investigation, followed by an employment investigation.

As a result of the criminal investigation, you have been charged with disorderly conduct. Upon completion of that investigation, the employment investigation proceeded. Information gathered in the course of the investigation supports the following:

1.) On Tuesday, October 20, 2009, you were in the lunch room with all of the Cotton staff, with the exception of your supervisor. You told staff that you should set up a toaster in Jeff's office, use a piece of paper for an igniter, use the 20 pound gas tank that was in cold storage, and create a gas leak so you could kill him. After saying this, you went on to state you

wondered If they made a 12 volt toaster so you could do this and with Jeff in his pick-up instead.

2.) In the fall of 2009, you stated in front of a number of staff that you should shoot your supervisor in his office, but should not use hollow point bullets, as it would blow his fat all over the office and create a mess to clean up.

3.) You told a staff member that you would like to shove your supervisor in the chipper, but that it would make such a mess with the blood spattering.

4.) You made comments in the late summer or early fall 2009, that you should have pounded your supervisor into the ground with the excavator.

5.) You have told staff on multiple occasions that you take medication so you do not kill people.

6.) In September of 2009 you met your supervisor and two other staff on the road, in separate instances when hauling from the Munger Shaw pit and nearly hit them as the result of failing to slow down sufficiently for the narrow width of the road.

7.) In the summer of 2009, while working on the Melrude Road, you hit your supervisor with the rear bucket of a backhoe causing him to lose his balance.

8.) In July 2009 while working on the West Melrude Road project you argued with your supervisor regarding which dozer you should operate that day. You operated the smaller dozer as your supervisor had directed, but ran it nearly full throttle shifting from forward to reverse rapidly in a careless and reckless manner, risking damage to the equipment and creating an unsafe work environment for other staff. You were yelling at your supervisor telling him he was stupid and that people were laughing at him. Your actions were so reckless that your supervisor had to remove you from this project for the safety of other staff and the preservation of equipment

9.) You made comments in June 2009 about blowing up your supervisor's boat with him in it.

10.) You made comments that you should sink your supervisor's boat with him in it to get rid of him

11.) In the summer of 2008, while working in #312, your supervisor was holding a fire number sign post and you were pushing it with a back hoe. You commented to coworkers later that you missed your chance (to pound him into the ground with the back hoe.)

13.) As you exited the shop, you also made the comment, "Where can I get a gun?"

Although Mr. Foldeski's office is located at the site of the arbitration hearing, he did not testify in support of the allegations in his letter. Grievant never received a copy of the Employer's investigative summary which supports the allegations in the Termination Letter before or after his termination, nor was the Employer's investigative summary introduced at the arbitration hearing.

Only at the arbitration hearing, thirteen months after his termination, did the Employer cite the *Policy Prohibiting Discrimination and Sexual Harassment* as the rule Grievant is alleged to have violated. The specific section of the *Policy* Grievant is alleged to have violated was never identified.

Grievant alleges that the comments attributed to him in the Termination Letter were taken out of context. All of Grievant's co-workers testified that Grievant and the Supervisor argued over best work practices, sometimes those disagreements became heated. The co-workers testified that Grievant's comments alleged to be threatening were always made after those disagreements. The comments were made only to co-workers and usually only in the break room. Grievant never had arguments with any of his co-workers and never made any threatening comments to or about them.

The co-workers testified that they generally laughed at Grievant's remarks. Grievant testified that "their laughter egged him on." All of the co-workers testified that they were not alarmed by Grievant's comments when they began in 2007 since they considered the remarks as "just venting." However, they became alarmed as the comments became more frequent and detailed by 2009. None of the co-workers ever told Grievant that they found his remarks disturbing, or ever asked him to refrain from such remarks.

In 2008, the co-workers told the Supervisor about the wood chip remark Grievant made about him in 2007. The Supervisor "blew off" the remark, telling them there was nothing he could do about Grievant's comment since the comment was not made directly to him. He testified that even though he knew about all of Grievant's comments before Grievant was removed from the workplace, he "did not take the comments seriously."

The Employer alleged that the Supervisor was unaware of any of Grievant's comments until Grievant was removed from the workplace in October, 2009; however, the Supervisor contradicted the Employer's assertion. In addition, the Supervisor testified that none of the co-workers ever reported that they were afraid of Grievant or that he had made threatening comments to them. Nor, he testified, did he ever have concerns about the safety of co-workers in the Grievant's presence.

Lastly, the Supervisor testified that since Grievant was removed from the workplace Grievant has never harassed him at the worksite or at his home. The Supervisor was unable to explain why he procured a Restraining Order against Grievant in March, 2011 since Grievant had not attempted to contact him since 2009.

The co-workers and the Supervisor both told Bob Lloyd, the Supervisor's supervisor, about the comments, but Mr. Lloyd was not concerned and did nothing. Mr. Lloyd did not testify at the hearing. Ms. Schadle testified that Mr. Lloyd would have been disciplined for failing to report Grievant's comments if he had not retired.

At the arbitration hearing, the Employer withdrew some of the charges alleged in the Termination Letter since those incidents were considered accidents by the Supervisor who counseled Grievant at the time the incidents occurred. The withdrawn charges are:

6.) In September of 2009 you met your supervisor and two other staff on the road, in separate instances when hauling from the Munger Shaw pit and nearly hit them as the result of failing to slow down sufficiently for the narrow width of the road.

7.) In the summer of 2009, while working on the Melrude Road, you hit your supervisor with the rear bucket of a backhoe causing him to lose his balance.

8.) In July 2009 while working on the West Melrude Road project you argued with your supervisor regarding which dozer you should operate that day. You operated the smaller dozer as your supervisor had directed, but ran it nearly full throttle shifting from forward to reverse rapidly in a careless and reckless manner, risking damage to the equipment and creating an unsafe work environment for other staff. You were yelling at your supervisor telling him he

was stupid and that people were laughing at him. Your actions were so reckless that your supervisor had to remove you from this project for the safety of other staff and the preservation of equipment

These allegations were not considered further in this opinion.

During his interview with Ms. Schadle on March 8, 2011 Grievant alleged that he was “just kidding” when he made the comments about his Supervisor. No co-worker ever mentioned they found his comments offensive. He admitted he now understands the comments were inappropriate and he regrets them. He was misled by the laughter of his co-workers into believing they enjoyed his humor based mainly on action films like the *Bourne Trilogy* and *Fargo*. After October, 2009, Grievant entered counseling and understands how his comments caused concern among his co-workers. He told Ms. Schadle he would never make such remarks again.

However, Grievant testified that the Termination Letter presented a distorted interpretation of what he actually said. Specifically:

He joked with one co-worker while they were using a wood chipper that “someone should stuff the Supervisor in the chipper.”

After using a back hoe he repeated the remark first made by another co-worker who said “he missed his chance to squash the [Supervisor].”

His actual statement was: “someone should shoot the Supervisor, but not use hollow point bullets.” Grievant testified that he owns no firearms and learned about hollow point bullets from another co-worker who has an extensive gun collection and who educated the work crew about hollow point bullets;

He admits that on October 20, 2009 he described a scene from the *Bourne Supremacy* where the main character used a toaster and propane tank for an explosion as something he should do to the Supervisor.

When a co-worker saw him with a fleck of foam around his mouth and asked him if he had rabies he replied: “He took pills so he won’t kill people.” Everyone laughed and it became a running joke.

After leaving a frustrating meeting, he did say: “where can I get a gun?” However, he testified that comment was not directed at the Supervisor or anyone else.

Several members of the work crew testified that they had also made comments about the Supervisor. One co-worker testified the Supervisor “made them do a lot of off the wall things.”

Although the Termination Letter alleges that the Grievant used the word “kill” frequently in his alleged threats, none of Grievant’s co-workers testified Grievant ever used that word in his remarks.

Although it was not cited in the Termination Letter, Ms. Schadle testified at the arbitration hearing that the decision to terminate Grievant was based on its *Policy Prohibiting Discrimination and Sexual Harassment* written by Ms. Schadle. The policy describes prohibitions against sexual harassment, other protected Title 7 rights, and the procedures for reporting such violations. Grievant and his co-workers were trained on this *Policy* in 2002. Ms. Schadle testified that Grievant’s threat to blow up the Supervisor’s boat fits into the *Policy* because Grievant’s comments constituted “class discrimination.” She testified that she determined that Grievant was “jealous of the Supervisor because the Supervisor had a nice boat;” therefore, Grievant’s remarks sprang from class discrimination. Grievant’s threats based on this discrimination created a hostile work environment.

Progressive discipline was not appropriate the Employer determined because of the danger Grievant’s presence presented to his co-workers. Ms. Schadle testified that she observed “raw fear” in Grievant’s co-workers when she interviewed them. Mr. Garden, former Deputy Director of Public Works, testified that no other discipline except termination was considered.

This matter moved through the grievance procedures to arbitration on April 7, 2010.

IV. RELEVANT CONTRACT PROVISIONS

ARTICLE 3 MANAGEMENT RIGHTS

The EMPLOYER has and retains the right to operate, manage and control its properties and facilities, to establish functions and programs, to set budgets, to determine the utilization of technology, to establish or modify its organizational structure, to maintain order and efficiency, determine the number of personnel and the amount of supervision, to hire, promote, transfer, assign, suspend, demote, discharge or retain employees in this unit, and to take whatever action necessary to carry out the mission of the County in situations of emergency. Such rights and responsibilities are limited only as specifically stated in this Agreement.

ARTICLE 8 DISCIPLINE

The Employer shall not discharge, demote, suspend or issue written reprimand to an employee without just cause. An employee, who is discharged, demoted, suspended or receives a written reprimand shall receive written notice of the action, stating the reasons therefore, with copy to the UNION...

V. POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

Grievant Engaged In Conduct That Required Discipline.

St. Louis County has a clearly defined anti-discrimination and harassment policy of which [Grievant] and his co-workers were aware. They all attended mandatory training that specifically addressed the issue of workplace harassment and hostile work environment. At this training, specific scenarios were presented to them and resolutions to these scenarios were discussed. One of these scenarios specifically addressed the issue of workplace threats towards supervisors and the effect of these threats on a co-worker. At this training they were also put on notice that consequences for behavior that constitutes harassment and/or creates a hostile work environment could include suspension and/or termination. Here [Grievant] engaged in harassing behavior by adversely affecting the working conditions of his co-workers when he commented

on his ideas of ways to kill his Supervisor. Without a doubt these statements and actions fall within the purview of what would be considered “worthy of discipline.”

Grievant Was Afforded Adequate Due Process.

Grievant was afforded due process when he was notified of the allegations against him and consented to be interviewed by the County as a part of the County’s investigation. Due process is essential to the idea of just cause. It requires that [Grievant] have the right to know of what he was being accused and an opportunity to be heard and in this case, that is exactly what happened. Once the County became aware of the allegations against Grievant, Ms. Schadle notified [Grievant] of the allegations and began an investigation. During this investigative interview, [Grievant] had a Union representative present and he was given the opportunity to respond to the allegations against him.

Grievant’s Infraction Was Severe Enough To Warrant Discharge from Employment.

Discharge from employment after over 22 years of service is a severe penalty. However, the severity of the penalty here is matched by the severity of [Grievant’s] infraction. It is “axiomatic that the degree of penalty should be in keeping with the seriousness of the offense.” Elkouri & Elkouri, *How Arbitration Works* (5th Ed. 1997), p. 916, quoting *Capital Airlines*, 25 LA 13, 16 (Stowe, 1955). Talking about ways to kill one’s supervisor not once or twice, but multiple times, is a serious offense. Talking about ways to kill one’s supervisor and engaging in behavior that makes other co-workers believe the threat is probable if not most likely, is also a serious offense.

This behavior caused them to be concerned for their personal safety, created a tense work environment and they were afraid to address the issue with him because they did not want his

anger for [the Supervisor] to be redirected to them. These are facts that were supported by both the testimony and demeanor of the witnesses.

Grievant's Comments Were Not Jocular.

Testimony showed that when Grievant talked about how to harm his Supervisor it was not done in a jocular manner. Amongst other things, jokes are told to make people laugh and relieve tension; however, this was not the case here. In fact, all Grievant's statements did was to create an atmosphere of tension in the workplace. As succinctly described by a co-worker, the tension in the workplace due to Grievant's comments was a seven on a scale of one to ten.

Grievant stated that he was joking and that everyone else engaged in this type of jest. However, he has failed to produce one shred of evidence to support his claim and the testimonies of his co-workers prove the contrary. If indeed Grievant's claim of collegiality in making jest infused threats is true, then it makes no sense that co-workers who have known and worked with Grievant for two, four, five and even ten years, all of a sudden during the last two years of his employment became genuinely concerned about their safety because of these alleged jokes.

Grievant's Threats Show a Manifest Intent to Act.

Although Grievant never acted on the threats he made, his actions and demeanor in the workplace gave the impression that he was capable of causing harm and/or intended to do so. An astute investigator must take all of these factors into consideration when determining whether or not the accused employee had intent to follow through with his or her actions and here, one would conclude that Grievant probably had intent and capability to follow through with these threats since the actions outlined above were in line with the spirit of the threatening comments

that he had made.

Grievant Acknowledges That His Threats Were Made In Poor Taste.

There is no dispute that the threatening comments and actions made by Grievant were inappropriate for the workplace. However, what is of concern is that even after receiving training that specifically addressed this fact scenario, Grievant acknowledged that he made the inappropriate comments, acknowledged that his comments created concern in his co-workers but could not acknowledge that he shared any responsibility for making these comments. Instead he attempted to use his testimony to discard the responsibility for his statements onto his fellow co-workers. He claimed that everyone made similar comments and that all the inappropriate statements he has been accused of making were in fact comments he got from his fellow co-workers. Grievant's testimony is not credible.

Again, Grievant makes these claims without offering any evidence or testimony to back them up and in direct contradiction to every one of his co-workers. One thing is clear; Grievant's co-workers testified that he made inappropriate and threatening statements. None of them implicated anybody else.

Grievant's actions clearly spoke louder than his words because although Grievant acknowledged that his comments were inappropriate, his actions spoke otherwise.

Progressive Discipline Is Not Required To Establish Just Cause To Discipline Grievant Because Of Overwhelming Safety Concerns For His Supervisor And Co-Workers.

Grievant raises the issue of the lack of progressive discipline before the County's decision to discharge him from employment, but this is not relevant. The CBA does not require the County to use progressive discipline; all it requires is the existence of just cause. As Ron

Garden, former Deputy Director of Public Works testified, this was not the first time that an individual had been terminated from the County's employ without prior corrective action due to the seriousness of the infraction. In other words, the severity of the infraction determines whether corrective action is warranted on a case by case basis. Here, the County determined that corrective action was not appropriate.

Grievant also attempts to imply that because he had received satisfactory performance appraisals he should not have been terminated. However the issue here is not whether Grievant satisfactorily performed his job when operating a bulldozer or excavator, it was whether Grievant made threats that were severe enough to raise a safety issue within the workplace and ultimately warrant termination.

In the arbitration case of *State of Minnesota Department of Transportation AFSCME Council 5, Local 106*, BMS Case No. 10PA0522 (5/11/10), where an employee threatened violence against his supervisor, Arbitrator Bard recognized the need to distinguish instances when progressive discipline is necessary by stating that "The threat to a co-worker is sufficient, even standing alone, to justify summary discharge without imposing progressive discipline."

Furthermore, he affirmed the ability of an employer to discharge an employee on the first offense by referencing *Central Soya Co.*, (74 LA 1084) where the idea of summary discharge was deemed appropriate in cases of violence and threats of violence. There is no doubt that Grievant's work product was satisfactory as his performance reviews indicate. In fact Mr. Garden testified that all these positive factors were taken into consideration by the County when evaluating the situation as a whole. Nevertheless, the severity of his infraction trumped the quality of his work product and performance reviews and the ultimate decision was made to

terminate his employment from St. Louis County.

POSITION OF THE UNION

The CBA protects job security by limiting the employer's power to discipline and discharge. Article 8 of the CBA "provides that the county shall not discharge, demote, suspend or issue written reprimand to an employee without just cause." There are three relevant inquiries to determine whether just cause exists—(i) whether the evidence establishes that [Grievant] committed the offense forming the basis of discipline; (ii) whether [Grievant] was afforded due process; and (iii) whether the penalty is appropriate, considering the nature and severity of the offenses and any mitigating factors. The burden of proof is on the County to establish by clear and convincing evidence that Grievant engaged in wrongdoing sufficient to support discharge. Elkouri, *How Arbitration Works*, 6th Ed., at 949 (2003).

Even if the misconduct occurred, however, a grievant may present mitigating circumstances that excuse the alleged misconduct. Just cause for termination requires employers to establish that due process standards were met and that attempts at progressive discipline have been unsuccessful. Here, the County's investigation disregarded the safeguards of due process and the County made no attempt to utilize progressive discipline to address the comments of [Grievant's] 23 years of employment [which] demonstrate that he was a competent and worthy county employee. The evaluations that highlight this conclusion were conducted and written by his Supervisor, despite his Supervisor's knowledge of the various comments that eventually were the County's grounds for [Grievant's] discharge. The evidence in the record demonstrates there was not just cause to discharge [Grievant].

The County Violated [Grievant's] Right to Due Process.

Due process is an integral part of just cause and requires that employers treat employees fairly during the disciplinary process. Norman Brand, *Discipline and Discharge in Arbitration*, 2nd ed., at 36 (2008). Discharge actions by management have been consistently reversed where the action was found to violate the basic notions of fairness or due process. *Elkouri*, at 967. Arbitrators typically rely on several requirements of industrial due process, including (i) timely action by the employer; (ii) a thorough and objective investigation; and (iii) a precise statement of the charges. *Discipline & Discharge*, at 39. The County's investigation into this matter was untimely, partial, and incomplete, resulting in a violation of due process.

Timely Action by Employer

Employers must impose discipline within a reasonable time after learning of misconduct. *Discipline and Discharge*, at 40. An unreasonable delay subjects employees to suspense or uncertainty and deprives the Union and the employee the opportunity to investigate, gather evidence, and prepare a defense. *Id.* The passage of time may disadvantage the grievant if witnesses lose their recollections or become unavailable. *Id.* Accordingly, arbitrators reduce penalties where the employer unduly delayed the assessment or enforcement of discipline. *Id.* at 496

In this case, the County had notice of the alleged misconduct on October 20, 2009, yet [Grievant] was not placed on leave until October, 28, 2009. The County interviewed eight witnesses on December 1 (or December 28), 2009, and conducted no further interviews or investigation until March 3, 2010, when it interviewed [Grievant]. [He] was then discharged on March 15, 2010. In short, the County waited over five weeks before it initiated an investigation into the alleged October 20 incident; did nothing for almost three months before interviewing

[Grievant] and then waited another two weeks before discharging [him]. The County provided no explanation for the delay in initiating or conducting the investigation. The employer may not reserve charges and revive them as a basis for discipline later. *Discipline and Discharge*, at 55. The County's unexplained delay in imposing discipline violated [Grievant's] right to due process.

Thorough and Objective Investigation

An employer must conduct a careful and unbiased investigation of the charge that leads to the conclusion that “sufficiently sound reasons exist to discipline the employee.” *Discipline and Discharge*, at 42. When an investigation is found to be less than thorough, arbitrators have concluded that the just cause standard has not been met. *Id.* Arbitrators “frequently look beneath the surface of an investigation to determine whether the employer made its decision at an earlier stage and then just went through the motions of conducting investigatory interviews and fact finding.” *Id.* at 40.

There is no document in evidence that describes or summarizes the investigation nor are there any written statements, findings, or recommendations of the investigator. Even though he was an integral part of the County's investigation, Mr. Garden testified that he did not take notes and could not remember everything from the investigation. The key to a thorough and objective investigation is to gather *all* relevant information to obtain an accurate version of events—even if those facts may also benefit the subject of the investigation.

A review of the March 15 termination letter reveals the investigation's lack of impartiality and fairness. Ms. Schadle's testimony indicated that, as the investigator, she had her own opinions that she would like to bootstrap to her own conclusions that those events or non-

events support a finding of misconduct. Moreover, the County failed to establish a precise timeline of events to support the allegation of “threatening, disruptive behaviors that affect the performance and safety of department staff.” A thorough and complete investigation would have, at a minimum, attempted to clarify specific dates and actions before alleging a policy violation that resulted in the discharge of a 23-year employee.

It was apparent that not all of the Tool House workers heard the alleged October 20 comments, but rather based their knowledge upon talk amongst themselves—in effect, rumors and hearsay. The timelines are crucial because they show the inaction of [Grievant’s] co-workers as well as the Supervisor and his supervisor, Mr. Lloyd with respect to reporting the October 20 comments in accordance with policy, which leads to the conclusion that the comments were not important and were, in fact, accepted in the Tool House work environment.

Such blatant disregard for [Grievant’s] due process rights cannot stand: the County cannot hide behind its failure to conduct a fair and impartial investigation. Regrettably, the incomplete investigatory record is compounded by the County’s delay in initiating and conducting the investigation, making it extremely difficult to accurately determine dates.

Precise Statement of the Charges.

An employee is entitled to receive timely information regarding the reason for discipline with sufficient detail to allow him/her an opportunity to respond, and the employer’s failure to do so may violate the employee’s due process rights. *Discipline and Discharge*, at 48. In addition to being subjected to suspense and uncertainty from October 28, 2009 to March 3, 2011, [Grievant] was not given the opportunity to investigate, gather evidence, and prepare a defense because he was not given a precise statement of the charges against him until he was interviewed

on March 3, 2010. This is especially troublesome given that no substantive investigation occurred between December 1, 2009 and March 3, 2010. There was no reference to a policy violation other than that presented at the hearing of a policy on discrimination, harassment, and retaliation in County Exhibit 1. [Policy *Prohibiting Discrimination and Sexual Harassment*]

Discharge Is Not Appropriate Considering the Nature and Severity of Grounds Alleged Offense and Any Mitigating Factors.

Progressive Discipline

The employer must show that “a reasonable attempt was made toward rehabilitation through the use of progressive discipline.” *Discipline and Discharge*, at 110. The purpose of progressive discipline is to correct the employee’s unacceptable behavior and to afford the employee an opportunity to improve. *Id.* at 65. Progressive discipline is thus mutually beneficial, in that it allows the employee a chance to correct his/her behavior and allows the employer to keep a trained employee. *See Id.* at 66. The expected result of progressive discipline is that the employee will recognize that he/she has engaged in unacceptable conduct and will correct their future behavior. *Id.* Discipline is excessive “if it is disproportionate to the degree of the offense, if it is out of step with the principles of progressive discipline, if it is punitive rather than corrective, or if mitigating circumstances were ignored.” *Discipline and Discharge*, at 103. In the case of a 23-year employee with a good work record, the County’s decision to discharge [Grievant] is out of step with progressive discipline and clearly punitive rather than corrective.

The excessive nature of discharge in this case is exacerbated by the County’s lax enforcement of its rules. The record demonstrates that [Grievant] has made comments of a similar nature in the past that have gone uncorrected. To that end, the County introduced its

policy on discrimination, harassment, and retaliation as an exhibit at the hearing. It is important to give force and weight to the policy only after viewing it in its entirety. Specific attention should be given to the complaint procedures included in the policy.

Mitigating Circumstances

Prior work record is the most frequently cited factor considered by arbitrators in discharge arbitrations. Jennings, Sheffield, & Walter, *The Arbitration Discharge Cases: A Fourth Year Perspective*, 38 Lab. L.J. 33, 41 (1987). After 23 years of employment with the County, [Grievant's] annual evaluations reflect that [he] was a competent and worthy employee who has received many positive comments from his supervisors. He has even acted as an intermittent supervisor without any negative notes in his work record. It is apparent that the investigator and the non-testifying public works director failed to consider [Grievant's] prior work record. Their failure to take into account the exemplary work record provides yet another example of how the County determined at an early stage that [Grievant] had committed misconduct and then merely went through the motions of conducting an investigation. That his supervisors were aware of various comments made by [Grievant] in that past that did not result in discharge lends further support to the Union's argument for mitigating circumstances. Moreover, the County's attempt to convert non-disciplinary actions into a basis for the current discipline is inappropriate and unfair.

The County's severely flawed investigation does not substantiate discharge. [Grievant] testified that his comments were a mistake and that they were inappropriate in today's day and age. It is important to note, however, that not only was [Grievant] misinterpreted, but that none of his coworkers, who were aware of county policies, expressed to him the inappropriate nature

of his comment or followed the official complaint procedure. Moreover, if his Supervisors had directed him to stop, he would have complied. The County missed the opportunity to follow the tenet of progressive discipline when it made the drastic leap to discharge of a long-term employee. Since October 2009, the [Supervisor] has been relocated to Virginia, Minnesota, and there are other locations within the County where [Grievant] could work. This job has been [Grievant's] livelihood for the past two decades. He has been out of employment since March 2010 and would like to return to work.

VI. ANALYSIS AND FINDINGS

There is a fundamental understanding between the parties in the employment relationship.¹ A potential employer is willing to part with its money only in return for something it values more highly, the time and satisfactory work of the employee. The potential employee will part with his/her time and work only for something he/she values more, the money and fulfilling work offered by the employer. This fundamental understanding of the employment relationship can be easily summarized: both parties realize that the employer must pay the agreed wages and benefits and that the employee must do “satisfactory” work.

“Satisfactory work” in this context has four elements: (1) regular attendance, (2) obedience to reasonable work rules, (3) a reasonable quantity and quality of work, and (4) avoidance of any conduct, on or all duty, that would interfere with the employer’s ability to operate the business successfully. The main addition to the fundamental understanding that Unions seek in collective agreements is job security. Most frequently, the agreement protects job security by limiting the employer’s power to discipline and discharge.

¹This discussion on the fundamental understanding follows the theory of Professors Laura Cooper, Dennis Nolan and Richard Bales in *ADR in the Workplace. (2000)*

The fundamental understanding, as amended in the collective bargaining agreement, can be stated as follows: employees will provide “satisfactory work” in return for which the employer will pay the agreed wages and benefits, and will continue the employment relationship unless there is “just cause” to terminate it.

“Just cause” is obviously not a precise concept. It cannot be applied to a particular dispute by an employer or an arbitrator without careful analysis and exercise of judgment. There will never be a simple definition of “just cause,” nor even a consensus on its application to specific cases, but this does not mean the phrase is devoid of meaning. On the contrary, it is possible to make sense of the term and give it substance. This can be done by viewing the just cause standard as an amended form of the fundamental understanding. Just cause, in other words embodies the idea that the employee is entitled to continued employment provided the employee attends work regularly, obeys work rules, performs at some reasonable level of quality and quantity, and refrains from interfering with the employer’s ability to efficiently conduct its business with activities on or off the job. An employee’s failure to meet these obligations will justify discipline up to and including removal.

There are three inquires to determine whether just cause exists. The first is whether the evidence establishes that the Grievant committed the offenses forming the basis of discipline. The second is whether the Grievant was afforded due process. The last inquiry is whether the penalty is appropriate considering the nature and severity of the offenses and any mitigating factors.

A. DOES THE EVIDENCE ESTABLISH THAT THE GRIEVANT COMMITTED THE OFFENSE FORMING THE BASIS OF DISCIPLINE?

The Employer Did Not Meet Its Burden To Establish By Clear And Convincing Evidence

That Grievant's Comment About His Supervisor on October 20, 2009 Constituted Misconduct.

1. The Doctrine of Toleration Bars The Comments Made By Grievant in 2007 through October 19, 2009.

The Employer has a problem with the doctrine of toleration. Grievant's Supervisor was told in 2008 that Grievant had said in 2007 that "someone should put him in a wood chipper." The Supervisor was not bothered by the comment or the other later comments he learned about from the co-workers. The Supervisor's superior was told of Grievant's comments and the second-line supervisor was not concerned and evidently did not believe Grievant had a propensity for violence or that Grievant intended to carry out the scenarios in his comments and Grievant has not. The Employer tolerated Grievant's conduct for years before he was disciplined.

Now, a third supervisor, the human resources representative, who is far from the day to day supervision of Grievant, has found fault with those prior decisions and has recommended discharge for three year old comments. The need for some time limitation in the consideration of past offenses may be recognized even where the CAB does not expressly impose one. The record is so poorly developed that the Employer could not identify the particular day the conduct alleged to be wrong-doing actually occurred or which co-worker heard which remark when. Some of the other remarks have no timeline at all so it is impossible to tell if those remarks were made one year or ten years ago. There must be precision in charges the Employer purports are so egregious they can terminate a 23 year career.

Consequently, it is fair to limit the charge against Grievant solely to the most recent and most troublesome remark made on October 20, 2009.

2. The Employer Has An Obligation To Provide A Workplace Environment Free of Violence, Threats, and Intimidation.

Workplace violence has come to the forefront of public and employer concerns in the last two decades. Increased violence in the workplace has prompted employers to implement specific policies to protect workers from both physical harm and threats of physical harm. Sensitivity to the disturbing accounts of workplace violence has certainly contributed to the view that an employer's obligation to provide a safe working environment requires:

- 1) zero tolerance for violence policies, and
- 2) the discipline or removal of employees who threaten or engage in violence.²

Consequently, the discharge of employees who make credible threats will be upheld.³ Even threats that do not really involve violence can lead to some form of discipline.

When an employer receives information about threats of violence the employer must respond whether the information was received directly or by hearsay is irrelevant. An employer must act on such information, but the employer must act reasonably and not rush to judgment.⁴

Employees who make threats of physical violence are subject to the same discipline (i.e. discharge) as for actual physical assaults.⁵ However, not every threat leads to discipline if it is determined that an employee has no propensity for violence and the employer has only mere

² USS, Division of USX Corp., 114 LA 948(Das, 2000); Steel Warehouse Co., 114 LA 498 (Cox, 1999); Georgia Pac. Corp., 113 LA 679 (Jennings, 1999); Champion Int'l Corp., 111 LA 100 (Duda, Jr., 1998).

³ Ball Metal Bev. Containers, 119 LA 1793 (Allen, 2003)(employer had just cause to discharge even long-service employees with clean record who had threatened co-worker during altercation and who refused to cooperate in company investigation); Anchorage Sch. Dist., 119 LA 1313 (DiFelco, 2004)(school district had just cause to discharge employee who confided to medical personnel that he wished to kill school district personnel and union representative because employee was deemed to be "human time bomb."); VA Med. Ctr., 120 LA 642 (Betts, 2004)(discharge appropriate for employee who threatened co-worker); SBC Midwest, 122 LA 1(Duda, 2006) (employee who said: "I'm going to bring myself a gun tomorrow and start shooting some folks" properly discharged.); USS Corp., 119 LA 433(St. Antoine, 2003)(employee stated that "if he were fired the co-worker who reported him and others would leave the workplace in body bags" properly terminated).

⁴ Advance Circuits, 106 LA 353,355 (Daly, 1996).

⁵ *Id.*, See also Butler Restoration Inc., 109 LA 614 (Kanner, 1997); Levi Strauss & Cp., 109 LA 255 (Eisenmenger, 1997).

suspicious that the employee would act on the threat.⁶ An arbitrator may mitigate discharge when the employee's threat was not intended to be "violent" or was out of character and the employee expresses regret.⁷

Here, it is necessary to balance the Employer's obligation to maintain safety in the workplace and Grievant's right to a fair review of his alleged misconduct. In this case, the evidence is uncontested that Grievant's co-workers laughed when he made comments about their Supervisor and that none of the co-workers ever told him that his comments made them uncomfortable. Other co-workers admitted they also made comments about the Supervisor. I take arbitral notice that supervisors are a frequent topic among supervisees and hardly a word is ever charitable. Supervisors are the outside entity that helps to create internal cohesion among co-workers so negative comments about supervisors are commonplace and as free speech can rarely be the subject of discipline. However, negative comments about supervisors or co-workers that can be reasonably be construed as threats have no protection from discipline.

Grievant's comment on October 20, 2009 was a step over the line of common supervisor bashing and was correctly recognized by the Employer as a step too far. The issue is whether the comment constituted conduct so egregious that termination is the only remedy.

Mere words alone have no meaning until viewed in the context in which they were spoken. If mere words could convict, prisons and jails would be overrun with parents who have threatened their teenagers with death and worse for any number of adolescent sins. Without special circumstances, these threats are not credible when seen in the family context.

⁶ Walt Disney World, 127 LA 353 (Abrams, 2010).

⁷ Snap-On tools Corp., 104 LA 180 (Cipolla, 1995).

Disappointed sports fans who threaten to line up the players of their favorite football/baseball/hockey team and perhaps selected referees and shoot them all are not sanctioned unless the fan shows up at the stadium with a weapon. Pet owners are not arrested when they threaten to murder pets that leave surprises on rugs. Threats must be seen in context. However, threats made at work deserve greater scrutiny with the hindsight of recent past incidents of workplace violence that have shocked the nation.

The employees were correctly alarmed when the comments became more graphic on October 20, 2009 and the complaint to the Employer was properly done. The Employer correctly removed Grievant from the workplace pending its investigation of the circumstances surrounding Grievant's behavior.

However, it is impossible to determine how the Employer balanced the competing rights of the workers to feel safe at work and the Grievant's right to a fair review of his remark in context since the Employer did not submit its investigative summary for review. In cases where no investigative record exists, the arbitrator does the balancing from the evidence presented at the hearing.

Here, in this small work crew that had been together for many years, Grievant felt free to use language more carelessly than he should have. The evidence was uncontested that Grievant thought he was being a comedian. The co-workers testimony was that they laughed when Grievant made disparaging remarks about the Supervisor. Grievant testified that their laughter "egged him on." The testimony was unanimous that the supervisor bashing occurred after heated arguments with the Supervisor about best work practices. Some employees called it "venting" and did not take it seriously. No one testified that Grievant ever made disparaging comments

about his co-workers or any other County employee.

Consequently, I do not find that Grievant's remark on October 20, 2009 was a credible threat to do violence to the Supervisor. While I condemn the remark, I do not find it so egregious as to terminate a 23 year career otherwise free of blemishes.

3. Nothing in the Record Indicates that Grievant's Comment Was Intended to Be Violent.

Every employee brings his or her childhood to work with them everyday. If the Employer does not substitute its corporate standard of acceptable humor through workplace training, the employee will continue to play the tapes from his/her family of origin. If an employee's family dynamic was one where sharp jests and cutting banter was the norm that is exactly the humor the employee will display at work. Here, Grievant has the unsophisticated sense of humor of an adolescent male who watches too many action movies. However, in his 23 years as a County employee, he has never displayed violence toward anyone. There are no reports of disruptive behavior, explosive outbursts, or of a rude, belligerent attitude toward co-workers or management.

His "heated discussions" with the Supervisor never deteriorated into profanity or name calling on either side. There was no hostility between the Supervisor and the Grievant at the hearing. When the Supervisor described these disagreements he said: "[Grievant] did not understand the policy considerations involved in decision-making." He never complained that Grievant was uncooperative, had difficulty accepting authority, or refused assigned tasks. He never wrote Grievant up for insubordination. Instead he gave Grievant the highest rating in every evaluated category.

2004

- **Job Knowledge** – "Paul has good operating techniques and does a good job

grading.”

- **Responsibility** – “Paul has done a good job operating, maintaining and keeping records with our brush cutting and herbicide application program.”
- **Acceptance of Supervision and Organizational Procedures** – “Paul does what is asked of him.”
- **Judgment and Comprehension** – “Paul has good ideas for solutions for problems that arise.”

2005

- **Job Knowledge** – “Paul is improving on the excavator doing roadside ditching.”
- **Responsibility** – “Paul does a good job maintaining equipment.”
- **Organization** – “Paul did a good job running the screener operation in the Three Lakes Pit. Paul puts in extra time to assure that the job gets done right and on time.”
- **Judgment and Comprehension** – “Paul has good ideas to solve problems to get the job done.”

2006

- **Job Knowledge** – “Paul is efficient and has good operating skills and techniques.”
- **Responsibility** – “Paul fills in as intermittent foreman.”
- **Organization** – “Paul puts in extra effort and time to ensure that the job gets done satisfactorily.”
- **Judgment and Comprehension** – “Paul has a lot of ideas that he puts to use to help save time.”

2007

- **Cooperation with Co-Workers** – “Helps others when needed.”
- **Job Knowledge** – “Paul has good operating skills.”
- **Responsibility** – “Paul fills in as intermittent foreman.”
- **Organization** – “Paul put in extra time and effort to ensure the job gets done.”
- **Acceptance of Supervision and Organizational Procedures** – “Paul does what is asked of him.”
- **Work Habits** – “Paul has improved safety practices.”

2008

- **Job Knowledge** – “Paul has good operating skills, especially the grader and dozer.”
- **Responsibility** – “Paul fills is an intermittent foreman and does a good job.”
- **Organization** – “Paul organizes work well to complete in a timely manner.”

Looking at the Grievant's record, I do not see any indication that Grievant has exhibited violent tendencies. On the other hand, anything can happen in the workplace. A good employee can turn bad, and some do, but that does not justify firing a good employee based on mere suspicion that he will become violent. A worker's job cannot be cut short without good reason.⁸

The Employer failed to present any evidence that Grievant has a propensity for violence. Since Grievant was terminated in March, 2010 there have been no reports that he has harassed the Supervisor or the co-workers in person, by phone, mail, or email. Nothing in the record tips the balance toward summary discharge because of the potential danger of Grievant in the workplace.

4. The Employer's *Policy Prohibiting Discrimination, Harassment and Retaliation* Is Inapplicable to the Misconduct Alleged.

Although it is difficult to believe, St. Louis County has no workplace violence policy. The *Policy* which it alleges Grievant violated prohibits discrimination based on protected rights under Title 7, sexual harassment, and retaliation for reporting these activities. No part of the conduct for which Grievant was terminated fits that policy. Although the Employer tries to shoehorn this matter into the *Policy* by alleging that Grievant's comments about his Supervisor stem from class discrimination, the argument fails.

Class discrimination is not protected by State or Federal law or the CBA. Nor is it likely Grievant disparaged his Supervisor because the Supervisor owned a boat since Minnesota has more boat owners than any other State in the United States. Therefore, one does not have to be in an exclusive class to own a boat.

⁸ Walt Disney World, 127 LA 353 (Abrams, 2010).

Even though the Employer has not promulgated a workplace violence policy under which Grievant's action more properly fits, the Employer can still control threats, intimidation, or actual violence under Article 3 of the CBA which sets out Management Rights:

The EMPLOYER has and retains the right to operate, manage and control its properties and facilities, to establish functions and programs, to set budgets, to determine the utilization of technology, to establish or modify its organizational structure, **to maintain order and efficiency**, determine the number of personnel and the amount of supervision, to hire, promote, transfer, assign, suspend, demote, discharge or retain employees in this unit, and to take whatever action necessary to carry out the mission of the County in situations of emergency. Such rights and responsibilities are limited only as specifically stated in this Agreement.(emphasis added)

It is not clear why the Employer did not choose Article 3 as the authority in this case.

5. The Employer Must Provide Knowledge and Training of Its Rules and Procedures Before It Can Hold An Employee Responsible For Violations.

The Employer's problem here is that without a workplace violence policy and employee training Grievant had no knowledge that that making jokes in poor taste was a prohibited activity. An employer must establish reasonable rules or standards, consistently applied and enforced, and widely disseminated. Here, the Employer failed to promulgate rules that would have put Grievant on notice that even comments intended to be humorous among co-workers could also be interpreted to be threatening and lead to discipline.

Grievant could hardly be expected to abide by rules when the Employer has never communicated those rules. Just cause requires that employees be informed of a rule, infraction of which may result in suspension or discharge unless the conduct is so clearly wrong that specific reference is not required.⁹

⁹ Lockheed Aircraft Corp., 28 LA 829, 831 (Hepburn, 1957); Federal Aviation Admin., 99 LA 929(Corbett, 1992); Bayshore Concrete Prod., 92 LA 311, 316 (Hart, 1989); Donaldson Mining Co., 91 LA 471, 476 (Zobrak, 1988) (verbal policy, unwritten and unpublished simply does not rise to level of policy that can bind employee;

B. WAS THE GRIEVANT AFFORDED DUE PROCESS?

1. The Employer Failed To Provide Adequate Due Process Protections in Grievant's Discharge.

The main addition to the “fundamental understanding” that Unions seek in collective agreements is job security. Here, the fundamental understanding is embodied in Article 8 of the parties CBA which states:

The Employer shall not discharge, demote, suspend or issue written reprimand to an employee without just cause. An employee, who is discharged, demoted, suspended or receives a written reprimand shall receive written notice of the action, stating the reasons therefore, with copy to the UNION...

Article 8 limits the Employer's power to discipline and discharge without just cause.

Adequate due process protections prevents the imposition of discipline where there is little or no evidence on which to base a just cause discharge. The first procedural requirement in due process is that the employers conduct a reasonable investigation before assessing punishment.¹⁰ A fair investigation would present the specific charge and the facts which support the charge to the Grievant and should provide an opportunity for a grievant to offer denials, explanations, or justifications that are relevant before the employer makes its final decision.¹¹ That did not happen in this case. The Employer's investigation did not meet basic procedural due process standards.

2. The Employer Withheld Critical Evidence from Grievant

First, the Employer provided two stories about its discovery of Grievant's October 20, 2009 statement. In the first iteration, the Employer alleged that some anonymous person on

company cannot demand compliance with policy that has never been communicated to affected employee, nor can employee be disciplined for violating policy they do not know exists); Warren Jewelry Case Co., 87 LA 160 (Atkesibm 1986) (notice and warning that violation of company work rule is grounds for discharge must be made clear to employee in order to sustain discharge).

¹⁰ Metro Pittsburgh Pub. Broad., 89 LA 934,936(Talarico, 1987); Safeway Stores, 89 LA 627,630(Staudohar, 1987).

¹¹ Shaefer's Ambulance Serv., 104 LA 481, 486(Calhoun, 1995).

another work crew who heard about Grievant's statement called human services. In the second iteration, a member of Grievant's crew made the report. Whichever story was true, the Employer refused to disclose the identity of the complainant which deprived Grievant of his fundamental right to confront and cross-examine his accuser to determine whether bias or some other impermissible reason motivated the report.

A Grievant who is subject to discharge for "just cause" has a due process right to confront his accuser.¹² The Employer presented no authority which allows it to conceal the identity of the informant. Concealment of the informant is a severe restriction of Grievant's right to due process.

3. The Employer Did Not Conduct A Full and Fair Investigation of the Allegations Against Grievant.

A full and fair investigation will, at a minimum, contain:

- a) the specific allegation on which the discipline is based;
- b) the employer's summary of the facts;
- c) the investigative methodology utilized;
- d) the documents examined by the employer;
- e) the employees interviewed with a summary of the interview and the questions asked;
- f) other witnesses on whom the employer relied for information; and
- g) a summary of the analysis and findings on which the decision to discipline was based.

Here, the Employer never disclosed a summary of its investigation so there is nothing for an arbitrator to review; consequently, the Employer's final decision falls into the fatal category of arbitrary and capricious because there is no way to examine and test the Employer's reasoning.

4. The Employer Failed To Provide Notice of the Specific Rule/Policy Alleged To Have Been Violated Until the Arbitration Hearing.

¹² 103 LA 891 (Lipson,1994).

Another major failure of due process is that the Grievant never knew the specific rule he is alleged to have violated before he was discharged. It was not until the arbitration hearing that the Employer even produced the anti-discrimination and sexual harassment policy alleged to have been violated by the Grievant. The Employer's case is frozen on the day Grievant receives Notice of Termination. No new evidence or charges can be added. Here, that is exactly what happened. After an extraordinary delay between the interviews of the co-workers in December, 2009 and the interview of Grievant in March, 2010, the Employer had plenty of time to investigate and compile its case. The failure to include the specific rule/policy violated before Grievant's termination is fatal to the Employer's case.

Although the Employer did not make the argument directly, there was an implication that the reason the Employer did not present an investigative report was to protect the anonymous informant. Whether that was the Employer's true motivation or not, the Employer did not cite any authority that supports the non-disclosure.

C. WHETHER THE PENALTY IMPOSED IS APPROPRIATE, CONSIDERING THE NATURE AND SEVERITY OF THE OFFENSE AND MITIGATING FACTORS, IF ANY?

There Are Many Factors That Mitigate Against Discharge.

a. The Employer Failed To Warn Grievant That Future Conduct of a Similar Nature Would Result in Specific Disciplinary Action.

Evidence of whether warnings of improper conduct, even if no penalty was imposed, were given prior to discharge or other discipline is relevant in determining whether the subsequent sanctions were justified. Where an employee continues prohibited conduct after

having been warned, the fact that there had been a prior warning stands against the employee.¹³ Failure to give prior warnings may be used for the refusal by an arbitrator to sustain disciplinary action, particularly discharge.¹⁴ However, no warning is required where the offense is serious, **illegal**, and morally wrong.¹⁵ A crude sense of humor is not illegal or morally wrong.

b. The Employer's Mere Suspicion That Grievant Will Be A Danger to Co-workers Is Not Supported by the Evidence Presented.

The Employer states that Grievant's actions in the workplace show a manifest intent to act. The Employer states:

“Although [Grievant] never acted on the threats he made, his actions and demeanor in the workplace gave the impression that he was capable of causing harm/or intended to do so.”

As support for this proposition, the Employer uses paragraphs 6, 7, and 8 of the Termination Letter. Since those allegations were withdrawn by the Employer at the hearing because those incidents were accidents resolved by counseling. Therefore, the Employer cannot cite those withdrawn allegations to support its assertions that Grievant would be a danger in the workplace.

c. The Employer Failed To Use Progressive Discipline.

The idea of progressive discipline grows out of the idea that an employee should be given a warning when they behave improperly or perform below expected norms. The “fundamental understanding,” i.e. the just cause requirement, in labor contracts requires that discipline shall be corrective and not punitive. So even if the CBA is silent on the issue of progressive discipline, Article 8 certainly embodies that principle.

¹³ City of Duluth, Minn., 113 LA 1153 (Neigh, 2000). Ward's Bldg. Maint., 111 LA 1088 (Bogue, 1998).

¹⁴ Albertson's, 111 LA 630 (Eisenmenger, 1998); GTE Cal., 99 LA 196 (Richman, 1992); Binswanger Glass Co., 92 LA 1153,1156 (Nicholas, Jr. 1989); Georgia Pacific Corp., 89 LA 1080, 1082 (Nicholas, Jr 1987); Sandford Corp., 89 LA 968, 972 (Wies, 1987).

¹⁵ Ward's Bldg. Maint., 111 LA 1088 (Bogue,1998) (the principle of progressive discipline does not always require discipline before discharge if the discharge is for serious misconduct and violations of serious work rules or safety standars such as insubordination, fighting on the job, and theft.

There are two general classes of disciplinary offenses, first, those extremely serious offenses such as stealing, physically assaulting another worker, persistent refusal to obey a legitimate order and other similar unacceptable under any circumstances conduct which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline.

The second category of offenses are those less serious infractions of work rules or of such as tardiness, absence without permission, careless workmanship, insolence, etc., which call not for discharge for the first offense, but some milder penalty aimed at correcting the employee's behavior. Grievant's conduct falls into the second category.

The Employer testified that termination was the only remedy considered. The penalty imposed for Grievant's October 20, 2009 comment is disproportionate to the degree of the offense and incorrectly ignores the principles of progressive or corrective discipline.

d. The Grievant Introduced Evidence of Post-Termination Rehabilitation.

Arbitrators can consider post-discharge rehabilitative treatment as a mitigating factor in determining the propriety of discharge where drug and/or alcohol addiction was involved. In one case, for example, the arbitrator considered the misconduct a consequence of the employee's illness and imposed a penalty short of discharge where the employee completed treatment and remained sober since his discharge.¹⁶

Grievant introduced evidence that after his termination he entered psychological counseling with his family and gained insights into his behavior. Grievant has now expressed

¹⁶ Northwest Airline, 89 LA 943 (Nicolau, 1984); See also Youngstown Hosp. Ass'n 82 LA 31, 35 (Miller, 1983).

regret for his remarks. His assurances that there will be no repeats of the behavior that brought him to arbitration are believable.

e. The Employer's Failure to Consider Grievant's Past Satisfactory Work Record Mitigates Against the Penalty Imposed.

An employee's past record is a major factor in the determination of the proper penalty for a new offense. It is very common for an arbitrator to reduce penalties in consideration of an employee's long, good past record.¹⁷ Here, even the Employer agrees that Grievant has an outstanding work record. The Employer is incorrect that the evidence shows that Grievant poses a danger to the workplace which overshadows his excellent work record.

In many cases, arbitrators have reduced penalties in consideration of the employee's long, past record.¹⁸ Here the Grievant's long and stellar work record cannot be ignored.

VII. CONCLUSION

Discharge is inappropriate considering the nature of the offense and the substantial mitigating factors:

- 1) Foremost, among mitigating factors is the Employer's failure to process this case with adequate substantive and procedural due process safeguards that would have provided the Grievant, at the least, with the specific rule he allegedly violated before his termination.
- 2) The failure of the Employer to provide the name of the complainant to the Grievant or to provide an authority which would allow the Employer to withhold the name of the complainant.

¹⁷ Wayne State Univ., 111 LA 986 (Brotsky, 1998); Mason & Hangar Corp., 109 LA 957 (Jennings, 1998); Pfizer, Inc., 79 LA 1225., 1236 (Newmark, 1982); Stylemaster, Inc., 79 LA 76,78-79 (Winton, 1982); Pinkerton's of Fla., 78 LA 956, 961 (Goodman, 1982).

¹⁸ Food & Commercial Workers Local 7 v King Soopers, Inc., 222 F.3rd 1223, 164 KRRN 2970 (10th Cir. 2000); Wayne State Univ., 111 LA 986 (Brotsky, 1998); Mason & Hangar Corp., 109 LA 957 (Jennings, 1998); Pfizer, Inc., 79 LA 1225., 1236 (Newmark, 1982); Stylemaster, Inc., 79 LA 76,78-79 (Winton, 1982); Pinkerton's of Fla., 78 LA 956, 961 (Goodman, 1982).

