

IN THE MATTER OF ARBITRATION BETWEEN

State of Minnesota,

Employer,

and

AFSCME Council 5,
Local 1011

Union.

DECISION AND AWARD

BMS CASE NO. 11PA 0525

ARBITRATOR:

Stephen A. Bard

DATE OF HEARING:

September 29, 2011

PLACE OF HEARING:

Roseville, Minnesota

DATE OF RECEIPT OF POST-HEARING BRIEFS:

Not Applicable

DATE OF DECISION AND AWARD:

October 14, 2011

GRIEVANT:

Steve Glockner

APPEARANCES:

For the Employer:

Mr. Jim Jorstad
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Minnesota Management and Budget
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For the Union:

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INTRODUCTION

This matter came on for arbitration before Neutral Arbitrator Stephen A. Bard, on September 29, 2011, at 9:00 a.m. in Roseville, Minnesota. The Employer was present with its witnesses and was represented by Mr. Jim Jorstad. The Union was present with its witnesses and was represented by Mr. Bart Anderson. The parties stipulated that there were no issues of timeliness or arbitrability and that the matter was properly before the Arbitrator for a decision on the merits.

Testimony and exhibits were taken at the time of the hearing and at the conclusion thereof the parties waived submission of post-hearing briefs and, instead, delivered closing oral arguments.

ISSUES

1. Did the Employer violate the Collective Bargaining Agreement when it terminated the employment of the grievant?
2. If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

The following provisions of the Collective Bargaining Agreement are relevant to a decision of this case.

ARTICLE 16—DISCIPLINE AND DISCHARGE

Section 1. Purpose. Disciplinary action may be imposed upon an employee only for just cause...

Section 3. Disciplinary Procedure. Disciplinary action or measures shall include only the following:

1. oral reprimand;
2. written reprimand;
3. suspension;
4. demotion; and
5. discharge.

Section 5. Discharge

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

The following provisions of the **Mn/Dot Policy on Zero Tolerance of Violence** in the Workplace are relevant to a decision of this case.

MN/DOT POLICY POSITION STATEMENT

Position Statement and Guidelines

- I. It is the policy of the Minnesota Department of Transportation and the responsibility of all employees to provide a workplace free from violence..... Employees who are involved in a violation of this policy will be subject to disciplinary action up to and including discharge from employment.

- II. Definitions
 - A. Violence: The threatened or actual use of force that results in or has a high likelihood of causing fear, injury, suffering, or death.

 - B. Zero Tolerance of Violence: Mn/DOT’s intent is to eliminate the potential for violence in and around the workplace, and to promote a work culture that is safe, inclusive, and respectful.

- IV. Responsibilities.....
 - C. Employees
 - 1. Be familiar with Mn/DOT’s Zero Tolerance of Violence policy/guidelines and its potential consequences.

 - 2. Treat co-workers and others in the workplace with dignity and respect and manage conflict appropriately.

The following provisions of the **MN/DOT Harassment Policy** are relevant to a decision of this case.

MN/DOT POLICY POSITION STATEMENT

Position Statement:

It is the policy of the Minnesota Department of Transportation and the responsibility of the managers and supervisors to provide a work environment free from unlawful discriminatory harassment and general harassment.

Guideline:

I. Definition of Harassment

A. Harassment.

Harassment is the conduct of one employee (**toward another employee**) which has the purpose or effect of 1) unreasonably interfering with the employee's work performance, and/or 2) creating an intimidating, hostile, or offensive work environment.[emphasis added]

B. Types of Harassment

.....

2. General Harassment

Harassment which is not based on the above characteristics is "general" harassment. Examples may include, but are not limited to:

- a. Physically intimidating behavior and/or threats of violence.
- b. Use of profanity (swearing), vulgarity.
- c. Ridiculing, taunting, belittling or humiliating another person.
- d. Inappropriate assignments of work or benefits.
- e. Derogatory name-calling.

.....

V. Penalty For Engaging In Harassment Or Reprisal

A violation of this policy may be grounds for immediate discipline up to and including discharge. The specific penalty to be imposed shall be determined on a case-by-case basis, after a careful review of all the relevant facts, and in accordance with labor agreements or plans.

FINDINGS OF FACT

The Arbitrator finds that the following facts are either not in dispute or have been

established by a fair preponderance of the evidence by the party having the burden of proof.

1. The Grievant, Steve Glockner, came to work for Mn/DOT in January 1979 and worked there continually in various positions until the termination of his employment on November 9, 2009. He was promoted to “Transportation Generalist Senior”(“TGS”) on August 5, 2002. At the time of his discharge his job title was “Transportation Generalist Senior/Inspector.” His duties were varied and included safety, inspection, quality control, and working with contractors on road repair and construction projects.

2. Mn/DOT’s general policy is to remove records of discipline from an employee’s file after two years. However, these records are kept outside the personnel file. A partial record of the Grievant’s previous disciplines was introduced into evidence and included the following:

- (a) On May 12, 1998 Grievant received a Letter of Reprimand for “acting in a threatening and intimidating manner towards his fellow employees and causing them to fear for their physical safety in the work place. The Letter of Reprimand arose out of an incident which occurred on January 21, 1998 when Grievant confronted a fellow employee in a threatening and intimidating manner, made an obscene gesture at him, and invited him to settle their differences after work. The Letter of Reprimand referred to similar incidents which occurred on February 12 and February 18, 1997 and was accompanied by a “Letter of Expectations” which specifically set forth the conduct from which he was to refrain in the future.
- (b) On August 13, 1998 Grievant received a three day suspension without pay for violation of MN/DOT’s Harassment Policy. His violations included four occasions of confronting and challenging a supervisor on the validity of the Letter of Expectations, calling the supervisor a liar, and interfering with the supervision and direction of a mason crew. In addition, On July 6 and 7, 1998, Grievant failed to follow supervisor instructions which disrupted and delayed the work. He was also disciplined for having “engaged in careless and harassing behavior while feeding material into the mudjack machine.....[and hitting the operator of the machine with these materials.]”
- (c) On April 19, 2004, Grievant received a ten day unpaid disciplinary suspension arising out of his conduct on March 18, 2004 while attending Inspector Academy Training. At that time, during the communications class he identified his supervisor by name and “made demeaning, disparaging and intimidating personal comments about his supervisor’s character.” This was deemed to be a violation of both MN/DOT’s Harassment Policy and Zero Tolerantion for Violence in the Workplace Policy. In

addition to the suspension, Grievant was ordered to attend anger management sessions. The discipline letter contained the following warning.

“Please Note: This is your final warning. Any future incidents of this nature will result in your discharge.”

3. The Grievant attended and completed anger management. There were no similar incidents giving rise to discipline during the five and one-half years between April 2004 and October 2009.
4. The Grievant received copies of both the Zero Tolerance of Violence in the Workplace Policy and the Harassment Policy as part of his training and was familiar, in general, with the terms of those policies.
5. Only one Annual Performance Appraisal (2007) was placed in evidence. This showed the Grievant to be excellent or superior in all aspects of his job performance and showed no problems of the type for which he had previously been disciplined.
6. The atmosphere on the site of road repair and/or construction projects is frequently tense due to people dealing with adverse weather conditions, traffic, contract deadlines, tensions between contractors and Mn/DOT employees, etc. A certain level of argument, anger, raised voices, and profanity is fairly common.
7. On October 14--16, 2009, the Grievant was working on two separate road projects. These will be referred to as the Highway 61 job and the Highway 35 job respectively. The Highway 35 job was being performed by a contractor called “Hardrives.”
8. On October 14, 2009, the Grievant had a serious disagreement with his supervisors concerning the use authorized by them of a “center lane closure” at the Highway 35 job site. The Grievant considered this to be extremely dangerous, in violation of Mn/DOT’s own traffic manual

as well as the job specifications. The Grievant testified that he felt the disregard of this job specification would compromise his authority when trying to enforce contract specifications with the contractor in the future and that he was still upset about this matter the following day.

9. On the morning of October 15, 2009, a meeting was held at approximately 11:45 a.m in the field office trailer located at the site of the Highway 35 job. The purpose of the meeting was to discuss and correct the safety problems which had resulted the previous day from the central lane closure. In initial attendance at the meeting were Garret Hendrickson (“Hendrickson”), the Mn/Dot Chief Inspector, Jesse Jacobson, Safety Signs Officer, Tom Krier (“Krier”), Project Supervisor, and three representatives of the contractor (“Hardrives”)—Chad Anderson (“Anderson”), Steve Weis (“Weis”), and Tony Latimer (“Latimer”).

10. The field office is small and, in addition to the six individuals present, it contained a drafting table with a telephone on it and some chairs. It was a crowded environment.

11. During the meeting Latimer, the chief of the milling operation for Hardrives, made a statement that at the beginning of the project (about one and one half months previously) the Grievant had made certain statements to him concerning the milling requirements of the project’s specifications. Hendrickson stated that he did not believe the Grievant had made those statements and that he believed the Grievant should have an opportunity to respond himself to the “accusations.” Hendrickson then left to get the Grievant to come to the meeting.

12. When Hendrickson found the Grievant he told him what Latimer had “accused” him of saying concerning the milling requirements. The Grievant adamantly denied having made the alleged statements to Latimer and accompanied Hendrickson back to the field office trailer.

13. When the Grievant entered the trailer he and Latimer exchanged words back and forth with the conversation becoming more heated. The Grievant denied ever making the statement concerning the milling requirements that Latimer had attributed to him and Latimer insisted that he had made the statement. The Grievant became angry, raised his voice, used profanity, and repeatedly asked Latimer if he was calling the Grievant a liar. Latimer replied that “he guessed he was.” At one point in the argument the Grievant came within one foot of Latimer. However, at no point did the Grievant make a fist, physically threaten Latimer, or touch him in any way.

14. At some point in the argument Weis made physical contact with the Grievant’s shoulder in an attempt to calm him down. The testimony varied widely on the type of touching involved. Witnesses variously described it as “a touch”, a “pat” and a “grab.” The touch came from behind and caused the Grievant to turn around and warn Weis not to ever “f...king touch me.” The Grievant kicked the door to the trailer.

15. Krier adjourned the meeting until he could defuse the situation and the Hardrives employees left. According to Krier, the Grievant was totally enraged and “out of control.” After the others left, the Grievant continued to have a temper outburst slamming doors and striking the drafting table so hard the telephone receiver flew off the hook. Krier could not calm the Grievant down and warned the Grievant not to retaliate against Hardrives and the Grievant told him that “there will be no deviation from the specifications from this point on.” The Grievant maintained that Hardrives had been performing the job in an extremely lax manner and that he intended to “throw the book” at them from then on.

16. After leaving the field office trailer the Grievant went into the material testing trailer for a period of time. He shut down his computer, locked up, and he then left the job site in his truck.

The manner of his leaving was in dispute. There was testimony that he spun his tires on the wet pavement in close proximity to some Hardrives personnel and drove off at a high rate of speed causing them fear for their safety. The Grievant described this event entirely differently, essentially denying those charges.

17. For his part, the Grievant generally admitted the above description of what happened at the October 15 meeting but vigorously disputed the *intensity* of his conduct as described by the other witnesses. The Grievant did admit, however, that when Weis “grabbed hold of me” that he thought he was being physically attacked and he “saw white” and “lost control.” The gist of most of the testimony was that the Grievant’s conduct went beyond ordinary anger and had reached the stage of out-of-control white hot rage. However, the testimony was not entirely consistent on this point. For example, Hendrickson felt that except for kicking the door, the Grievant’s outburst was not that unusual. He stated to the Investigator that:

“Unfortunately, on our job it happens a lot.—jobs in general. Swearing does happen and on jobs that are pretty stressful. The only thing unusual was kicking the door. .. I’ve seen violence on these projects. So this is nothing unusual.There’s always hollering and screaming at each other. It’s not the first time I’ve seen this and worse.”

18. The following morning, Friday October 16, the Grievant arrived at the Highway 35 job site at approximately 7:00 a.m. He admitted that he had gone to bed angry the previous night and was still mad when he woke up. He met Hendrickson and was hollering and screaming over the events of the previous day. They did discuss the day’s work and Hendrickson sent him to the Highway 61 job and told him to calm down and finish the work at the Highway 61 site and then return to the Highway 35 job site.

19. The Grievant returned to the Highway 35 site shortly after noon even though they were still doing work at Highway 61. He testified that the work that was being performed at the Highway 61

site was properly set up and did not require his continued presence. When he arrived at the Highway 35 site he went to the milling operations where he noticed three trucks which had “illegal” beacons. He reported this to Hardrives and told the appropriate person there that they could not return to the job site until they were in compliance with the specifications. He claims to have spotted another truck which was overloaded, beacon visibility was blocked, and had a broken windshield. Material was falling out of the truck onto the road.

20. At the same time the Grievant was checking the job specifications to determine whether it was alright for the trucks to have bells instead of beepers for backup alarms because he could not hear them over the noise on the site. While doing so, he came across a requirement in the specifications that each truck have a “cab card” in it which specifies the weight the truck can have on bridges. The Grievant had never enforced this requirement before. He advised the Hardrives representative that the trucks needed cab cards and he told the drivers of the three trucks that they should not return until they had legal beacons.

21. The Grievant did not know that Hardrives had been advised that morning by a Mn/Dot employee that all of its trucks needed beacons that were visible from 60 feet and had sent seven non-compliant trucks off the job site. It is unclear from the evidence whether the three trucks which were sent off in the afternoon had been inspected and cleared that morning and it is also unclear whether the reason they were sent off by the Grievant was because the beacons were “illegal” or because they lacked cab cards. Both violations were cited by the witnesses. It is clear, however, that although it is in fact in the specifications, the “cab card” requirement is almost never enforced by Mn/Dot. Its enforcement is left to the State Highway Patrol. The Grievant had never previously been aware of this particular requirement nor had he ever previously enforced it. He seems clearly

to have been motivated to “crack down” on Hardrives because of the anger arising out of the previous day’s confrontation.

22. Notwithstanding his activities in regard to the trucks on October 16, there was no evidence presented that the Grievant’s behavior resulted in any disruption or delay in the completion of the job.

23. After the events of October 15 and 16, the Grievant was put on paid investigatory leave while a comprehensive investigation was performed by Eric Embacher, Mn/Dot Engineer in the Northeast Metro Area and Sue Bremer, Mn/Dot Labor Relations Representative. During the investigation detailed statements were taken from all relevant witnesses. and a final report dated November 2, 2009 was prepared. The Report contained detailed findings of fact which included the following statement:

Steve Glockner’s unprovoked actions on the I-35 project constitute misconduct because they created an intimidating and hostile work environment, and disrupted work activities. To repeatedly yell, scream, swear, or utter profanities at one or more individuals, invade their personal space, kick a door or strike a table with one’s fist, and drive a vehicle in a reckless manner are a violation of both the department’s harassment and violence policy.

24. After the Investigation Report was prepared it was submitted for review to Mr. Terry Zoller, a Mn/Dot Metro Construction Engineer part of whose job is to decide discipline cases. Mr. Zoller reviewed the Report but did not interview any of the witnesses or the Grievant. He testified that although he did receive “input” from others he made the final decision alone. He did not review the Grievant’s work records but did review the 1998 and 2004 disciplines. He stated he was concerned about the safety of his employees, the intensity of Grievant’s behavior, and he concluded that this situation far exceeded “normal” disputes between Mn/Dot personnel and contractors. In his opinion

this behavior, standing alone, and without regard to the previous disciplines, was sufficient to support discharge.

25. The Grievant was sent a letter of Discharge dated November 9, 2009 which stated in relevant part:

“The investigation found that you:

- Verbally abused two contract employees
- Struck inanimate objects by kicking a door and striking a table with your fist
- Invaded the personal space of two Hardrives employees
- Caused the individuals in attendance at the field office to fear for their safety
- Drove your state vehicle in a manner that endangered yourself and others
- Disrupted normal work operations on the I-35 Project.

Your behavior was a clear violation of the Zero Tolerance for Violence in the Workplace Policy and the Harassment Policy. Mn/Dot will not tolerate this type of behavior. Your previously received notice that this type of behavior was completely unacceptable and would not be tolerated.”

26. The Union filed a timely Grievance on November 25, 2009 and this Arbitration followed.

POSITION OF THE UNION

The arguments of the Union in support of the grievance can be summarized as follows:

1. The outburst of anger displayed by the Grievant are not uncommon on Mn/Dot jobsites.
2. The Grievant’s actions did not put anyone in real fear for his safety.
3. The actions of the contractor’s employees contributed equally to the problem and nothing was done to the contractor.
4. The totality of the circumstances supports the conclusion that the Grievant was, in fact, provoked.

5. The Grievant's actions on October 16 were within his duties as an Inspector and the evidence does not support a finding that he in any way disrupted normal operations.
6. Both Mn/Dot and the contractor contributed to the stress of the situation and only the Grievant was singled out for punishment. The Employer has not sustained its burden of proof that there was just cause for discharge.

POSITION OF THE EMPLOYER

The Employer's arguments in defense of its actions are summarized below.

1. The Employer carried its burden of proof. His actions on October 15 clearly violated both the Harassment Policy and the Zero Tolerance of Violence in the Workplace Policy.
2. His tirade continued on October 16 and disrupted the workplace and the work flow.
3. His record of previous discipline is terrible and, in combination with his October 2009 behavior clearly supports a finding of just cause for discharge.
4. The Grievant's characterization of the intensity of his behavior is not credible in light of the consistency of the contrary testimony by virtually all of the eye witnesses.
5. The Union has not presented sufficient evidence to support its claim of "disparate treatment" of the Grievant.
6. The Union's evidence and arguments concerning the lane closure on October 14 is a "red herring" and is totally irrelevant.

DISCUSSION

BURDEN AND QUANTUM OF PROOF

It is well settled that in discipline arbitrations, the Employer has the burden of proving that an offense meriting discipline has occurred. The *quantum* of proof issue is less clear. In discipline cases not involving discharge the prevailing view is that the case must be proved by a simple preponderance of the evidence. In cases involving criminal behavior or other extreme stigmatizing actions, the majority view seems to be that the appropriate standard is “clear and convincing evidence.” In discharge cases, the Arbitral precedent is split between the two standards. The majority view favors the “preponderance of evidence” standard in discharge cases where the underlying behavior does not involve egregious or criminal activity. However, some arbitrators hold that because termination of employment is the “industrial death penalty” that the higher standard is appropriate. See, e.g., *Carrier Corp.* 103 LA 865 (Lipson, 1994).

The majority position is clearly one that unless the underlying behavior is criminal or immoral, the *quantum* of proof required in a discharge case should be the same as in other disciplinary cases; i.e. “preponderance of the evidence.” This Arbitrator agrees and adopts the “preponderance of evidence” standard as applicable to this case.

DID THE GRIEVANT VIOLATE THE HARASSMENT POLICY?

The Employer’s Harassment Policy, quoted in relevant part above, applies by its express terms to conduct of an employee **directed at another employee**. The language is clear and unambiguous on this point. In this case, all of the evidence is consistent and unequivocal that the

Grievant's conduct was not directed at another employee but rather at employees of the contractor, Hardrives. The Arbitrator is not inclined to depart from the express language of the Policy and expand it to conduct toward third parties. This being the case, there is no necessity to analyze the evidence to determine whether it might otherwise fit the definition of general harassment. Accordingly, the Arbitrator finds that the Grievant's conduct did not constitute a violation of Mn/Dot's Harassment Policy.

DID THE GRIEVANT VIOLATE THE ZERO TOLERANCE FOR VIOLENCE IN THE
WORKPLACE POLICY?

This Policy defines the term "violence" as "[t]he threatened or actual use of force that results in or has a high likelihood of causing fear, injury, suffering, or death." It becomes necessary, then, to analyze the behavior of the Grievant to determine whether or not his behavior on the days in question constituted "violence" within the meaning of this definition.

It is clear from the uncontradicted evidence that the Grievant did not at any time use actual force against anyone. It is equally clear that that he never made a fist, or verbally threatened to strike anyone. In fact, the only physical contact which occurred was when Mr. Weis touched, tapped, or grabbed him on the shoulder from behind him.

It is also established that the Grievant was in close physical proximity to Mr. Latimer and was cursing and yelling and using profanity at him. The evidence on this point is uncontradicted, and the only difference in the testimony pertains to the degree or intensity of the Grievant's anger. The evidence also establishes that the Grievant was reacting to having been called a liar. This is, of course, not an excuse for his tirade but it is at least an explanation of its cause.

The Employer has contended that this conduct caused fear in Mr. Latimer. This argument fails for two reasons. The first is that the Employer inexplicably failed to call Mr. Latimer as a witness and he is the only one who was in a position to testify as to his emotional condition. It is true that Mr. Latimer claimed in the statement given to the investigators that the Grievant's behavior made him afraid—"I thought he was going to take a swing at me." This statement was in the report which was received in evidence under an exception to the Hearsay Rule. Nevertheless, it still suffers from the problem afflicting all hearsay evidence—it is not under oath or subject to cross-examination.

Even if the Arbitrator were to conclude that the Grievant's behavior caused fear in Mr. Latimer, it would be insufficient to constitute "violence" as defined in the Policy because it did not result from "a threat of force." Hollering and using profanity and even kicking doors not constitute a threat of force. It is certainly bad behavior and may result in inducing fear in the people nearby, but in the Arbitrator's opinion, in the absence of a clearly threatening gesture such as a fist directed at the other party or an overt verbal threat of violence, it is not sufficient to constitute "violence" as defined in Mn/Dot's Zero Tolerance of Violence in the Work Place Policy.

For similar reasons, the Arbitrator does not believe that the manner in which the Grievant drove his truck away from the job site was a violation of this policy. The facts on this issue are in dispute and the Grievant's version of events is as credible as that of the contrary witnesses. Even if the testimony of the Hardrives' employees on this point is accepted as true, the conduct may have instilled fear for their safety in them but was not a "threat or actual use of force." At worst it was angry driving which, while not justifiable, is also not violence in the work place as defined by the Policy.

For the foregoing reasons the Arbitrator has concluded that the Grievant did not violate Mn/Dot's Zero Tolerance of Violence in the Work Place Policy.

WAS THERE JUST CAUSE FOR DISCIPLINE EVEN WITHOUT A VIOLATION OF EITHER POLICY?

Notwithstanding the Arbitrator's conclusions that neither Policy was violated, it is certainly possible that Grievant's behavior, taken as a whole, was cause for discipline. The instant CBA does not enumerate the specific type of behavior which constitutes "just cause" for discipline except for the Policies discussed at length above. If there are other specific work rules applicable here they were not introduced into evidence and, therefore cannot be considered.

Where "just cause" is not defined in a Collective Bargaining Agreement it is generally agreed that the term includes grounds for discipline that traditionally have been observed in the law of labor and management. As one Arbitrator put it,

"They constitute the duties owed by employees to management and, in their correlative aspect, are part of the rights of management. They include such duties as honesty, punctuality, sobriety, or, conversely, the right to discharge for theft, repeated absence or lateness, destruction of company property, brawling and the like. Where they are not expressed in posted rules, they may very well be implied, provided they are applied in a uniform, non-discriminatory manner."

Worthington Corp., 24 LA 1, 6-7 (McGoldrick, Sutton, & Tribble, 1955).

As set forth in Fact Finding #25, *supra*, the Employer based its discipline on findings in its investigation that the Grievant had:

1. Verbally abused two contract employees
2. Struck inanimate objects by kicking a door and striking a table with his fist
3. Invaded the personal space of two Hardrives employees
4. Caused the individuals in attendance at the field office to fear for their safety
5. Drove his state vehicle in a manner that endangered himself and others
6. Disrupted normal work operations on the I-35 Project.

The Arbitrator does not agree with all of the above findings. The Arbitrator finds that the evidence established that the Grievant:

1. Verbally abused one contract employee
2. Struck inanimate objects by kicking a door and striking a table with his fist
3. Invaded the personal space of one Hardrives employee
4. Drove his state vehicle in an unsafe manner.

The Arbitrator expressly finds that although the Grievant's "nitpicky" enforcement of job specifications was almost certainly motivated out of anger, it was within the technical parameters of his job duties and, in any event, did not have any significant impact on normal work operations on the I-35 Project.

The behavior of the Grievant on October 15 and 16, 2009 was disruptive, contributed to a tense work environment, and even if it was not entirely unprovoked, was excessive and out of proportion to the provocation. As such, the Employer established just cause for discipline.

IF SO, WAS THE PENALTY IMPOSED EXCESSIVE?

Court decisions have overwhelmingly recognized and supported the existence of broad arbitral discretion to review the reasonableness of the penalty imposed by the employer in relation to the employee's wrongful conduct. These decisions often rely on the statement of the Supreme Court in *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 41(1987) that the arbitrator is to bring his informed judgment to bear in order to reach a fair solution of a problem, especially when it comes to formulating remedies. See also, *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Where, as here, a Collective Bargaining Agreement does not confer express authority on arbitrators to modify penalties, it is often found by implication. As one arbitrator put it:

“In many disciplinary cases, the reasonableness of the penalty imposed on an employee, rather than the existence of proper cause for disciplining him, is the question the arbitrator must decide. ...In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. This right is deemed to be inherent in the arbitrator’s power to discipline and in his authority to finally settle and adjust the dispute before him.”

Platt, *The Arbitration Process in the Settlement of Labor Disputes*, 31 Am. Jud. Soc’y 54, 58 (1947).

There is a difference of arbitral opinion as to the standard an arbitrator should follow in exercising his power to modify penalties. One view is that an arbitrator should not substitute his judgment for that of management unless discrimination, unfairness, or capricious and arbitrary action have been proved. See, e.g., *Schulze & Burch Biscuit Co.*, 100 LA 948, 955 (Goldstein, 1993). The majority of authorities, however, support the more “liberal” view that arbitrators may change a penalty if, given all the facts of the case, including the grievant’s seniority and work record, the discipline imposed appears “unreasonable.” See, e.g., *Caro Center*, 104 LA 1092 (Kanner, 1995)

This Arbitrator adopts the majority view and has reviewed the discipline imposed for fairness and reasonableness under all the facts of this case.

In determining the propriety of the discipline imposed, it is customary to consider the Grievant’s past employment records including his disciplinary history. There is a useful discussion of this point in *Elkouri & Elkouri, How Arbitration Works*, Sixth Edition, pp. 983 *et seq.* where it is stated:

“An offense may be mitigated by a good past record and it may be aggravated by a poor one. Indeed, the employee’s past record often is a major factor in the determination of the proper penalty for the offense....However; there are limitations on the consideration of past offenses..... Id at 983-986.

Arbitrators have recognized the need for some time limit in the consideration of past offenses even where the agreement does not expressly contain one. One arbitrator put it this way:

“In general, we should say that in discharge cases the past conduct of the employee in question is of concern to the arbitrator---However, this does not mean that we are to consider everything that is introduced as having equal weight and significance. We sympathize with the position often taken by unions that there should be some limitation on how far back in the record one should be permitted to go in the matter of digging up old scores. Such historic incidents should be close enough in their relation to the problem involved in the immediate case to warrant consideration.

Borg-Warner Corp., 22 LA 589, 596 (Larkin, 1954)

It is also well established law that in reviewing penalties for discharge, it is appropriate for an arbitrator to consider the employee’s length of service with the company as a mitigating factor. See, e.g., *Elkhart County, Ind., Govt.*, 112 LA 936 (Cohen, 1999).

As previously noted, in this case the person deciding on discharge as the appropriate penalty testified that he did review the Grievant’s disciplinary record but did not review his work record as a whole in coming to his decision. Also, the only personal work review that was placed in evidence was for the year 2007. The Arbitrator is quite limited, therefore, in his ability to review the records. It is fair to assume that any negative work records would have been introduced by the Employer. Accordingly, the Arbitrator concludes that the Grievant had an almost 31 year history of excellent work performance with the important exception of his previous disciplines. The previous incidents both involved loss of temper by the Grievant and resulted in two courses of anger management and two suspensions without pay. The instant behavior is of a similar type and it is therefore relevant to at least consider these previous incidents.

The Arbitrator notes that people who have a problem with their temper will have varying degrees of success in keeping it under control. In this case, after receiving anger management

instruction in 1998, the Grievant kept his temper under control for almost six years before another discipline arising from him losing his temper took place in 2004. Then almost five years elapsed before the event in 2009. It seems to this Arbitrator that, contrary to the position of the Employer, the anger management has been largely successful as there have been only two times in the last eleven years where the Grievant has lost control to the extent of giving rise to behavior meriting discipline. The age of the previous incidents does not totally preclude either the employer or the Arbitrator from considering them in determining the harshness of the penalty for the present conduct. However, the passage of such a long period of time does indicate that, for the most part, the Grievant has his temper under control.

The Employer has submitted for the Arbitrator's consideration three Minnesota arbitral decisions on discharge, including two of this Arbitrator's own decisions. The Arbitrator has carefully reviewed those cases and believes they are distinguishable from the instant case and hence not applicable or binding. Those cases all involved situations in which the grievant's conduct was more overtly threatening to others, more continuous, or more disruptive on an ongoing basis and tending to create in the work place a truly hostile environment.

Based on the foregoing analysis, the Arbitrator has determined that termination of employment was too severe a penalty to impose under all of the facts and circumstances of this case.

IF SO, WHAT IS AN APPROPRIATE REMEDY?

Before turning to a discussion of an appropriate remedy, the Arbitrator wishes to state parenthetically that a period of almost two years passed between the filing of the grievance and the

hearing date. In the opinion of the Arbitrator, this is unacceptable and inexcusable in any discharge case where the Grievant's life is in limbo until he learns one way or the other whether he will be getting his job back. This is particularly true in the instant case where the CBA contains an express and rather unusual provision (Article 17, Section 4) which provides for an "expedited arbitration" process in cases where the parties agree "in the interest of achieving swift and economical resolution of these grievances."

The passage of this much time between filing a grievance and the hearing in a discharge case not only is prejudicial to the Grievant, but exposes the Employer to a large potential liability in the event the grievance is upheld and back pay is awarded.

The Grievant's behavior in the instant case clearly merited serious discipline short of discharge and harsher than the three and ten day suspensions he had previously received for similar conduct. However, after imposing a more appropriate penalty, the Grievant should be made whole. The Arbitrator has decided that a suspension of sixty days without pay is a penalty commensurate with the Grievant's behavior on October 15 and 16, 2009.

DECISION AND AWARD

For the above stated reasons the grievance is sustained. The termination of the Grievant's employment is vacated and reduced to a sixty day suspension without pay. The Grievant is reinstated to his previous position without loss of seniority. The Grievant is awarded back pay commencing sixty days after November 9, 2009 with full credit to be given the Employer for any Unemployment Compensation Benefits or earned income received by the Grievant since that date.

The Arbitrator retains jurisdiction over the matter to resolve disputes over the implementation of this award if the parties are unable to do so.

Respectfully Submitted

Stephen A. Bard, Arbitrator