
In Re the Arbitration Between:

BMS 10-PA-1296

State of Minnesota,

Employer,

and

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

Minnesota State Employees Union,
AFSCME, Council No. 5, AFL-CIO,

Union.

Pursuant to **ARTICLE 17** of the collective bargaining agreement between the above parties effective July 1, 2009 through June 30, 2011 the above matter was brought to arbitration.

James A. Lundberg was appointed by the parties to serve as the neutral arbitrator from a list of arbitrators provided by the Minnesota Bureau of Mediation Services.

The parties stipulated that no procedural issues have been raised and the matter is properly before the arbitrator for a final and binding decision.

A grievance was submitted on January 25, 2010.

A hearing was conducted on October 31, 2011 and November 4, 2011.

The parties made oral arguments on November 4, 2010 and the record was closed.

APPEARANCES:

FOR THE EMPLOYER

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FOR THE UNION:

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ISSUE:

Whether the Employer had just cause to discharge the grievant? If not, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS:

Article 16 – Discipline and Discharge

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....

FACTUAL BACKGROUND:

The grievant, Nina Vibar, began working part time for the State of Minnesota in 2003 and was hired as a full time employee of the Alcohol and Gambling Enforcement Division (AGED) in 2006. She received very good job evaluations from her supervisors, until the last two months of 2008, when her job duties were modified by the Employer. Ms. Vibar had been processing mini-grants related to underage drinking but the funding for that work was not tied to the funding source from which Ms. Vibar was paid. Ms. Vibar's work assignments were adjusted to conform to the sources that funded her position.

Between February 25, 2009 and June 25, 2009, Ms. Vibar had a number of incidents with her co-workers and supervisors and also had incidents with customers of the Alcohol and Gambling Enforcement Division. The incidents included complaints from co-workers about Ms. Vibar followed by complaints about co-workers made by Ms. Vibar. There were a number of incidents where Ms. Vibar refused to perform assigned work. On April 4, 2009 Ms. Vibar filed a discrimination complaint against her supervisor Ms. Kjelsberg and Mr. Willems, the Department Director. The discrimination complaint was made contemporaneous with Mr. Willem's attempt to confront Ms. Vibar over job performance issues. On April 15, 2009 Ms. Vibar was given a Letter of Expectations regarding Gambling License Responsibilities. On June 9, 2009 a second Letter of Expectation was issued to Ms. Vibar. On June 23, 2009 Ms. Vibar had an incident involving co-worker, Alicia Cleveland, which resulted in Ms. Cleveland filing a harassment complaint against Ms. Vibar on June 25, 2009. On June 24, 2009 the Assistant Commissioner's report *exonerated* Mr. Willems and Ms. Kjelsberg of the charges of discrimination made by Ms. Vibar. On June 25, 2009 Ms. Vibar was placed on administrative leave while the harassment complaint of Ms. Cleveland was investigated.

In order to avoid possible claims of conflict or bias the Employer retained attorney Susan Hansen of the law firm of Madden, Galanter, Hansen, LLP. to conduct an independent inquiry into the harassment claim. During the course of Ms. Hansen's investigation, instances of alleged mistreatment of AGED clients were discovered. The alleged misconduct involving AGED clients was deemed to be serious but outside the scope of Ms. Hansen's investigation and a second independent investigator, Ms. Michelle Soldo, also an attorney, was hired to conduct an inquiry into Ms. Vibar's alleged mistreatment of customers.

The investigation conducted by Ms. Hansen included interviews of 18 different people, including two extended interviews with Ms. Vibar, wherein she had Union representation and was given an opportunity to respond to all allegations of misconduct. Two of the interviews were of people Ms. Vibar believed would corroborate her claim that she was being victimized by her co-workers and supervisors. Twelve witnesses appeared at the arbitration hearing and corroborated the findings of Ms. Hansen's investigation, which was completed on September 21, 2009.

The scope of Ms. Hansen's investigation was to determine whether Ms. Vibar had engaged in conduct that harassed co-workers. The two Department of Public Safety Policies that relate to the type of misconduct that Ms. Vibar allegedly engaged in are as follows:

The Department of Public Safety Administrative Policies #1501 – General Harassment

Verbal, psychological, symbolic, social or physical methods of intimidation, ridicule, entrapment, degradation, coercion or harm, with the purpose or effect of:

Interfering with or jeopardizing an individual's employment or career opportunities; or creating an intimidating, hostile or offensive employment environment among employees or individuals who provide contract or volunteer services.

The Department of Public Safety Administrative Policies #1502 – Illegal Discrimination, Sexual Harassment

All employees are expected to conduct themselves with dignity and respect for others.

Employees are responsible for creating and maintaining an environment free from illegal discrimination/sexual harassment....

Sexual harassment includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:....

3. that conduct or communication has the purpose or effect of substantially interfering with an individual's employment... or creating an intimidating, hostile, or offensive employment.. environment, and in the case of employment, the Employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Ms. Hansen concluded that Ms. Vibar had violated Department of Public Safety Administrative Policies #1501 and #1502. The investigative report made the following findings:

Based on the evidence gathered during the course of the investigation, it is substantiated that Vibar has engaged in conduct and communication contrary to the Department of Public Safety Administrative Policies #1501 – General Harassment and #1502 – Illegal Discrimination, Sexual Harassment.

The vast majority of employees reported serious concerns regarding Vibar's unpredictable behavior in the workplace and the distractions created by her outbursts in the office. For example, Artt reported that Vibar's loud outburst in the hallway created a distraction for the office. Cincotta reported that the incidents involving Vibar were distracting. Forsman reported that Vibar negatively impacted the work environment for many AGED employees. Lowell reported that Vibar's outburst created stress in the workplace and an uncomfortable, work environment. Kremple reported that Vibar's behavior made employees uncomfortable. A number of employees expressed concerns for retaliation by Vibar as well as safety concerns. For example, Cleveland reported that Vibar scares her. Kessler reported fears of retaliation. Lowell expressed the possibility of seeking a restraining order against Vibar. Ahart reported safety concerns due to the unpredictable and bizarre nature of Vibar's behavior in the workplace. Ahart, Anglin and Cincotta reported that they changed the location of where they store their weapon at work to ensure that

Vibar could not gain access to the weapon. These reports from employees were consistent and genuine and underscore the seriousness of this matter.

June 23, 2009 Incident Involving Vibar and Cleveland:

The preponderance of the evidence establishes that on June 23, 2009 Vibar used verbal and physical methods of intimidation and entrapment which created an intimidating employment environment for Cleveland. Vibar admitted going back into Cleveland's office after the telephone call from Erickson, approaching Cleveland and asking her, "if I have a question, are you going to answer me." While Vibar claims she was inquiring about a work related matter relating to mail labels, Vibar admittedly did not tell Cleveland this information. Vibar admitted she was not going to let Cleveland get up and walk away from her in the office. Cleveland credibly reported she was scared and upset as a result of the incident.

June 25, 2009 Incident Involving Vibar and Lowell:

The preponderance of the evidence establishes that on June 25, 2009 Vibar used verbal and physical methods of intimidation which created an intimidating employment environment for Lowell. Lowell's report of the incident with Vibar is credible and largely consistent with the reports of Kjelsberg, Cincotta and Kessler. Vibar's claim that Lowell caught her off guard when she walked out of Kjelsberg's office is inconsistent with Vibar's own report that she saw Lowell standing outside of Kjelsberg's office waiting to meet with Kjelsberg or trying to eavesdrop while Vibar was meeting with Kjelsberg. Vibar's claim that she approached Lowell because she just wanted to say hello to her as she had not seen her all day, is inconsistent with Vibar's initial statement that Lowell makes inappropriate passive aggressive comments to her in passing in a quiet volume so just Vibar can hear. If Lowell makes such comments, one would not expect Vibar to seek out Lowell to say hello to her. None of the individuals interviewed reported observing Vibar shaking or hyperventilating in the hallway. None of the individuals interviewed reported hearing

Lowell scream "you're scaring me" at Vibar in the hallway as Vibar claimed. The evidence establishes that the June 25, 2009 incident upset Lowell.

June 16, 2009 Incident Between Ahart and Vibar:

Based upon observations of Vibar's office, the size of the office would not require one to yell to speak to someone standing at or outside of the threshold. If Vibar genuinely believed Ahart was trying to cause her to yell by standing far away, one would expect Vibar to stand up and walk closer to Ahart so as not to have to yell. When Vibar explained to the undersigned what she said to Ahart, she made statement such as "this conversation is over," in an angry tone of voice. The evidence substantiates Ahart's report that Vibar spoke to her in an angry tone and in a manner contrary to the expectations of an Office and Administrative staff member.

June 2009 Incident Involving Vibar and Kessler:

The preponderance of the evidence establishes that in June, 2009 Vibar used verbal methods of intimidation which created an intimidating employment environment for Kessler. Vibar suggested during her interview statement, when she described the tone of voice she used at the June 2009 meeting, that she in fact made the statement "I will not allow Pat Kessler to train me." The statement is similar to Kessler's and Kjelsberg's reports that Vibar used an angry and hurtful tone of voice during the June 2009 meeting, Vibar described the meeting to the undersigned investigator using an angry tone of voice.

July 2008 Involving Vibar and Cleveland:

Vibar was inconsistent in her interview statement regarding training Cleveland. First, Vibar reported that Cleveland was very needy in the training. Vibar later reported that Cleveland asked very few questions. This

inconsistency undermines the credibility of Vibar's denials regarding the use of a nasty tone of voice with Cleveland while training her. The preponderance of evidence substantiates Cleveland's claims.

Comments of a Sexual Nature to Artt:

The preponderance of the evidence establishes that Vibar engaged in unwelcome verbal communication of a sexual nature with Artt which was offensive and embarrassing to him. Artt's report of Vibar's communication is credible and largely consistent with the reports of Stojevich and Vibar. Vibar's statements regarding the incident were inconsistent and not credible.

Comments to Forsman Regarding Love Doctor:

The evidence substantiates that Vibar asked Forsman to accompany her to the Love Doctor to obtain her final paycheck. Although Forsman was not offended by the request, he genuinely reported that he found the request to be bizarre.

April 2009 Incident Involving Cincotta's POST Credits:

The evidence substantiates that Vibar told Forsman she did not want to enter Cincotta's POST credits for a grant writing course and referred to it as a "real kick in the teeth" based on Vibar's admissions. Vibar claimed that when she received Cincotta's POST credit form for a grant writing class, she did not believe it was her responsibility to enter that POST credit because she had been instructed not to do grant related work. This is not a credible explanation. Both Forsman and Ahart described Vibar as taking the issue of Cincotta's the grant writing course very personally. This was also apparent during Vibar's interview with the undersigned investigator.

Spring 2009 Incident with John Moore:

The evidence substantiates that Vibar initiated contact with and communicated with Moore about tribal communities. This is established by both Moore's statement and his conversations with Forsman. Vibar then continued these conversations with Moore over a lunch meeting in a manner that suggested to him that she had work-related responsibilities or information associated with the tribal communities. Vibar's work duties did not relate to establishing contacts with tribal communities.

Computer Analysis:

The evidence substantiates that Vibar used the State computer system on two occasions to communicate with a co-worker from the Love Doctor. The evidence substantiates that Vibar created a folder on the AGED network drive labeled "Love Doctor".

The customers who complained to AGED about Ms. Vibar's conduct were not asked to testify at hearing. However, Ms. Soldo appeared and testified regarding all aspects of the investigation she conducted. Ms. Vibar did not contest any of the findings of Ms. Soldo's investigation but did testify that any errors she made were because she had been improperly trained by Ms. Kjelsberg. In her interviews with Ms. Soldo, the grievant claimed that she did not recall specific situations that led to complaints about her treatment of customers. She was given an opportunity to respond to all allegations of misconduct involving customers and had Union representation during her interviews.

The scope of Ms. Soldo's investigation was to determine the validity of either or both of the following allegations:

Allegation 1. In 2008 and 2009, Vibar exceeded her authority and imposed surety bond documentation requirements on Minnesota liquor licensees that are not mandated or authorized by State statute, A&GED policy, or A&GED supervisors.

Allegation 2. Vibar engaged in conduct that unreasonably hindered prospective and current licensee efforts to comply with State liquor license requirements.

Ms. Soldo concluded that the allegations against Ms. Vibar were valid. Her investigative report made the following findings:

Allegation 1 is substantiated.

The record indicates that in 2008 and 2009, Vibar exceeded her authority and imposed surety bond documentation requirements on liquor licensees that are not mandated or authorized by State statute, A&GED policy, or A&GED supervisors.

The record indicates that Vibar rejected continuation of surety bond certificates Minnesota liquor licensees submitted with annual license renewal applications. Vibar took the alleged action identified herein with respect to three licensees, Rohlfing of Brainerd, Sand Creek Brewing and Mantorville Brewing. The record strongly suggests that Vibar rejected continuation of surety bond certificates submitted by other licensees and required the submission of original duplicate surety bonds or the cancellation of existing bonds and the issuance of new bonds. Vibar said she cannot recall which companies she told to provide the surety bond documentation.

The record indicates that Vibar required licensees to submit duplicate original surety bonds and issue new bonds. See Exhibits 2 and 11.

The record indicates that Vibar did not have legal, direction from a supervisor or other authority to direct licensees to cancel existing surety bonds issued to the DPS.

Vibar's job description states that her discretion to act is limited by Chapter 340A and MN Rule 7515 and supervisor direction. See Exhibit 1, Vibar Job Description; Exhibit 2; and Exhibit 10, Kjelsberg Interview

Transcript.

The surety bond documentation Vibar required is not mandated or authorized by Chapter 340A or MN Rule 7515. See Exhibits 2, 10 and 11. See also, Minn. Stat. 340 A and Minn. Rule 7515.

The surety bond documentation Vibar required is not authorized by A&GED policy and was not authorized by Vibar's Supervisor, Marlene Kjelsberg. See Exhibits 2 and 11. See also, Minn. Stat. 470 A and Minn. Rule 7515.

The record indicates that when Vibar was asked by licensees to provide support for the surety bond documentation requirements she imposed, she was abrupt, aggressive and authoritarian. Vibar did not provide statutory or other valid support for the documents she required. Vibar simply restated the surety bond requirement or she gave false reasons for the requirement. Vibar falsely indicated or intimated to licensees that original surety bond documents for liquor licensees that had previously been submitted had been lost in a building flood. Vibar also falsely stated that due to an audit, A&GED was requiring all licensees to provide the surety bond information she requested. See Exhibits 2 and 11.

The record indicates that Vibar exceeded her authority and, without statutory authorization, A&GED supervisor authorization or other valid authorization, cancelled the licenses of Minnesota liquor licensees who did not provide the surety bond documentation she required. See Exhibits 2, 10, and 11. See also Minn. Stat. 340A and Minn. Rule 7515.

Vibar acknowledged she imposed the alleged surety bond documentation requirements reported by licensees.

Vibar acknowledged her actions were not mandated by State statute and were not authorized by her supervisor, Marlene Kjelsberg.

Vibar acknowledged it is A&GED practice to accept continuation of surety bond certificates from liquor licensees, but asserted it was a sloppy practice employed by her predecessor and permitted by her supervisor.

Vibar asserted that her request that licensees submit duplicate original surety bonds or cancel existing bonds and issue new bonds was reasonable. Vibar asserted she acted in a reasonable and responsible effort to ensure that she obtained valid surety bond information. Vibar acknowledged she did not employ other methods available to her to confirm the validity of licensee surety bond documentation. Vibar also asserted she would

have accepted other forms of verification. There is no credible evidence or indication Vibar demanded the documentation and cancelled the liquor licenses of licensees who did not provide the documentation she requested. See Exhibit 2, Vibar Interview Transcripts and Recording.

Vibar denied licensee reports that her behavior was unprofessional, aggressive, authoritarian and/or hostile. Vibar asserted that licensees falsely reported her behavior. Vibar's assertion is contradicted by the following:

Multiple, unrelated licensees independently and consistently reported that Vibar was heavy-handed, authoritarian and aggressive. She demanded that they provide the specific surety bond documentation she requested and threatened to cancel their liquor license (s) if they did not provide the documentation. See Exhibit 11, Witness Interview Summaries and Transcripts.

There is no credible evidence or other indication that licensees reported Vibar's conduct because they were disgruntled, disagreeable or sought to get her in trouble. The record indicates the licensees tolerated Vibar's unprofessional behavior in the hope they could overcome the obstacles she created, and reported her behavior only when they believed they had no other recourse and/or sought assistance from other A&GED staff. See Exhibit 11.

A&GED records document that Vibar engaged in other inappropriate and unprofessional behavior that is consistent with the behavior licensees reported. A&GED records document numerous incidents during the period October 2008 to June 2009, in which Vibar engaged in hostile and aggressive behavior consistent with the behavior licensees reported. See Exhibit 3, Vibar Incident Reports. A&GED records indicate the Vibar was the subject of a co-worker harassment complaints filed in June and July 2009. The findings of that investigation indicate that Vibar engaged in hostile and aggressive behavior that is consistent with the behavior licensees reported. See Exhibit 6, Investigation Report. #2. A&GED records indicate that in June 2009, Vibar was disciplined for engaging in unprofessional behavior toward and hindering the licensing efforts of another long-standing licensee (VinLanzano Imports). Her conduct was consistent with the behavior licensees reported. See

Exhibit 3, Vibar Incident Reports. A&GED records indicate that on or about June 9, 2009, Vibar received a Letter of Expectation. The letter documents that Vibar engaged in behavior consistent with the behavior licensees reported. See Exhibit 5, 06.0.09 Letter of Expectations and Performance Plan.

Vibar's behavior during her November 30, 2009 and December 7, 2009 Investigatory interviews was consistent with the behavior licensees reported. Vibar did not seek to develop and maintain a respectful rapport and dialogue. Her tone and demeanor was generally abrupt and authoritarian. She became visibly frustrated and verbally aggressive when she could not successfully control the interview. When asked to explain her rationale for her conduct, Vibar gave non-responsive answers, demanded a caucus and/or repeatedly accused Investigator Soldo of trying to trick her. When pressed to respond to specific questions posed, Vibar was short-tempered, defensive, confrontational and accusatory. See Exhibit 2, Vibar Interview Transcripts and Recording.

Vibar and AFSCME Local 3142 President Kuehl asserted that AGED Assistant Director Kjelsberg harassed and treated Vibar differently than other employees and that Kjelsberg's behavior adversely affected Vibar's ability to effectively perform her job duties. Vibar reported that in April 2009, she filed an internal harassment complaint against Kjelsberg (and A&GED Director Willems). Vibar said the findings of the resulting DPS Internal Affairs investigation will substantiate her claims regarding Kjelsberg's conduct. Local 3142 President Kuehl asserted the Internal Affairs investigation record is relevant to this inquiry. The Internal Affairs investigation does not substantiate Vibar's claims she was subjected to harassment and disparate treatment by Kjelsberg. See Exhibit 2, Vibar Interview Transcripts and recording (12.07.09) Transcript); Exhibit 4, Investigation Report #1.

Allegation 2 is Substantiated:

The record indicates that in 2008 and 2009, Vibar engaged in conduct that unreasonably hindered prospective and current licensee efforts to comply with State liquor license requirements. Vibar was responsible for providing information and assistance to prospective and current Minnesota liquor licensees. See Exhibits 1 and 2. The record indicates that Vibar gave a prospective farm winery license applicant (D.A.) incorrect

information about minimum land ownership and produce requirements, made negative remarks about his intended business venture, and told the prospective applicant not to call her again until he satisfied the requirements she identified. The prospective licensee was discouraged and considered not starting the venture based on the incorrect information Vibar provided. The prospective licensee later sought assistance from State Senator Tony Lourey, whose intervention resulted in the prospective licensee receiving assistance from other A&GED employees (Kjelsberg and Special Agent Mike McManus). See Exhibit 11 (D.A. Interview Summary).

The record indicates that Vibar told a three (3) year Minnesota liquor licensee (J.W. of Sand Creek Brewing) the company could submit a license renewal application, but she would recommend denial of the application. The licensee was discouraged and considered not continuing business in Minnesota. The licensee's renewal application was subsequently approved by another A&GED employee. See Exhibit 11 (J.W. Interview Summary).

The record indicates that Vibar cancelled the liquor license of a 13 year Minnesota liquor licensee (T.F. of Mantorville brewing) the same day the licensee met with her and provided the documentation she required. The licensee sought assistance from Assistant Director Kjelsberg, who confirmed the licensee submitted the requisite information and reinstated the company's liquor license. See Exhibit 11 (T.F. Interview Summary).

The record indicates that Vibar's actions adversely affected prospective and current licensees by creating additional work for them, by causing delay and/or by cancellation of their company's Minnesota liquor license(s). Vibar's actions also adversely affected licensee's view of the role of the A&GED.

Vibar said she does not recall her interactions with the liquor licensees, but denied she engaged in the conduct alleged. See Exhibit 2. The denial is not credible in light of the following:

Multiple, unrelated licensees independently and consistently reported that Vibar engaged in inappropriate and unprofessional behavior that hindered their ability to renew their company's Minnesota liquor licenses.

There is no credible evidence or other indication that licensees reported Vibar's conduct because they were disgruntled, disagreeable or sought to get her in trouble. The record indicates that licensees tolerated Vibar's unprofessional behavior in the hope they could overcome the obstacles she created, and reported her behavior only when they believed they had no other recourse and/or sought assistance from other A&GED staff. See Exhibit 11.

A&GED records document that Vibar engaged in other inappropriate and unprofessional behavior that is consistent with the behavior licensees reported. See Report, Section III (H).

Vibar's non-responsive answers to interview questions and her abrupt, defensive, confrontational and accusatory tone of voice and demeanor during her investigatory interviews is consistent with the behavior licensees reported. See Exhibit 2, Vibar Interview Transcripts and Recording.

SUMMARY OF EMPLOYER'S POSITION:

The grievant, who had been a good employee, engaged in misconduct beginning in late 2008 and early 2009 that falls into two general categories. First, she mistreated her co-workers and supervisors. In general her mistreatment of other people within the department could be characterized as rude, volatile, confrontational and disrespectful. Specific instances of refusing to perform work she was assigned were described by witnesses and investigators at arbitration. Witnesses and investigators also describe situations where grievant was defiant and belligerent with her supervisors and intimidated co-workers. Ms. Vibar's treatment of her co-workers and supervisors created a hostile and tense work environment within the agency. Ms. Vibar also mistreated licensees by cancelling their licenses without affording them due process. Licensees were forced to meet fictitious bonding requirements. In one instance, a broker's authority, which is established by statute, was not recognized. Ms. Vibar's treatment of agency clients was counter to agency policy and detrimental to the reputation of the agency.

The investigation into Ms. Vibar's conduct was fair and impartial. In fact, two independent investigators conducted investigations into Ms. Vibar's conduct. Ms. Hansen from the law firm of Madden, Galanter, Hansen, LLP. was asked to investigate Ms. Vibar's conduct within the agency to avoid possible internal bias. When Ms. Hansen learned of possible impropriety in the treatment of agency clients, the investigation of those possible improprieties was conducted by a different investigator, Michelle Soldo. Both independent investigators documented multiple instances of misconduct over extended periods of time. Direct testimony from roughly ten (10) witnesses at hearing corroborated the findings of the investigators.

Ms. Vibar's explanation that she was the victim of retaliation was not corroborated by any witness nor is there any documentation that supports her defense.

The Employer viewed Ms. Vibar's conduct as so egregious that any disciplinary step short of discharge was inappropriate. Progressive discipline, while often an effective disciplinary tool, is not required by the collective bargaining agreement and would have been inappropriate in this instance. It is not the Employer's job to teach an employee "ordinary manners." More importantly, the Employer cannot continue to employ a worker who engages in conduct that is detrimental to the agencies enterprise. Ms. Vibar's mistreatment of agency client's was sufficient to support her discharge as was her mistreatment of co-workers and supervisors.

While Ms. Vibar did not receive progressive levels of discipline she did receive a written reprimand and two Letters of Expectation that clearly placed her on notice that her conduct was unacceptable and needed to change. Instead, Ms. Vibar's misconduct escalated. There is no evidence that Ms. Vibar was likely to change in response to discipline. Hence, the Employer had just cause to discharge the grievant and the grievance should be denied.

SUMMARY OF UNION'S POSITION:

The Employer's treatment of the grievant changed markedly, when she took a part time job as a cashier at a store that sells "sex toys." As the grievant testified, her co-workers conducted Bible study sessions in the break room and were offended by her part time job. Prior to taking the part time job, which she did out of economic necessity, she received shining performance reviews. It should have been apparent from the grievant's performance reviews through 2008 that she was perfectly capable of correcting on the job errors. The grievant admits that she made mistakes on the job but contends that the motivation behind her discharge had nothing to do with performance problems but with the part time job she took in response to a family economic crisis. The grievant was targeted by her supervisors and co-workers once information about her part time job became known and she was victimized.

The investigations into the grievant's conduct were biased. Ms. Hansen's law firm only represents Employers and Ms. Soldo's questioning of the grievant reveals bias against the grievant. Ms. Soldo apparently did not like the answers she received from the grievant and kept asking the same question in an effort apparently to get the answer she wanted.

The Employer did not forewarn the grievant of misconduct and give her an opportunity to change her behavior. A Letter of Expectation is not discipline. The Employer made no effort to correct the grievant's behavior using discipline. Instead, the Employer simply removed the grievant from the workplace and then spent eight months looking for reasons to discharge her.

The Employer contends that the grievant's misconduct was so egregious that no form of discipline short of discharge was appropriate. However, the record does not support the contention. The grievant's job performance evaluations strongly suggest that she is a person who responds well to supervision, and is capable of pursuing goals and objectives. The investigations

found only six (6) complaints from a case load of nearly two thousand (2,000). As Ms. Vibar testified, she was trained by her supervisor and processed applications as she had been trained. Furthermore, rather than attempting to correct grievant's mistakes the Employer suspended her from work and launched two extended investigations in order to justify the discharge.

The Employer did not have just cause to discharge the grievant. Grievant was not forewarned by the Employer that her conduct may result in her discharge. She was not disciplined progressively, despite evidence that she had a positive work record. Furthermore, the investigations were biased. The Employer jumped to the conclusion that grievant was engaged in unacceptable misconduct and spent eight months attempting to support the conclusion through two biased investigations.

The Union asks that the grievant be returned to work with back pay and reinstatement of all benefits and seniority.

OPINION:

The Employer established by a preponderance of the credible evidence that the grievant engaged in the misconduct for which she was discharged. Two independent investigations involving twenty five interviews or statements taken of witnesses other than Ms. Vibar were conducted. Ms. Vibar was interviewed and given an opportunity to respond to all allegations made against her. Ms. Vibar received due process! Twelve witnesses appeared at the arbitration hearing in addition to Ms. Vibar and a Union Representative who testified on her behalf. The testimony at hearing was consistent with the statements made to investigators and is further corroborated by documentary evidence in the form of e-mails, letters and Departmental records. No testimony and no document presented at hearing supported or in any way corroborated Ms. Vibar's claim that she was a victim due to her part time job. Ms. Vibar did harass co-workers in

violation of Department Policies. Ms. Vibar also mistreated customers of the AGED, exceeded her authority in her treatment of AGED customers and required customers to provide proof of bonding that is not required by statute, department policy nor was it required by her supervisors.

Ms. Vibar was warned that her conduct was improper and she failed to change her behavior in the workplace. She received an oral warning and two Letters of Expectation relating to the forms of misconduct for which she was discharged.

The investigations into Ms. Vibar's conduct were thorough and even handed. In fact, the interviews with Ms. Vibar conducted by the investigators gave her every opportunity to defend herself against allegations of misconduct. Tennessee warnings were given to Ms. Vibar before any questions were asked of her and she had Union representation throughout the process.

Ms. Vibar's Union Representatives pursued all possible avenues of defense. However, in the final analysis, Ms. Vibar's testimony simply lacked credibility.

The collective bargaining agreement provides for a variety of different forms of discipline that may be imposed but does not require the use of progressive discipline. In this instance, the Employer argues that grievant's misconduct was so egregious that discharge is the only reasonable remedy. The arbitrator agrees. The degree of misconduct in this case calls for discharge. The grievant's misconduct created a hostile work environment and was detrimental to the public that is served by the Alcohol and Gambling Enforcement Division. The actions grievant took against licensees damaged the image of the department and harmed the public it serves. In fact, the results of either investigation would have been sufficient to support a discharge in this case.

The Employer had just cause to discharge the grievant and the grievance should be denied.

AWARD:

The grievance is hereby denied and the discharge upheld.

Dated: November 14, 2011



James A. Lundberg, Arbitrator