

BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between

STATE OF MINNESOTA

**Minnesota Management and Budget
Department of Human Services**

**MAPE Case 3024-08-006617
State of Minnesota Case 2012-0163
Grievant:
Arbitrator: Sharon K. Imes**

and

**MINNESOTA ASSOCIATION OF PROFESSIONAL
EMPLOYEES, UNIT 14**

APPEARANCES

Valerie A. Darling, Labor Relations Representative, State of Minnesota, Department of Management and Budget, appearing on behalf of the Department of Human Services, Minnesota State Offenders Program, Moose Lake, Minnesota.

Rich Ransom, Business Agent, Minnesota Association of Professional Employees, appearing on behalf of Minnesota Association of Professional Employees and the Grievant.

JURISDICTION

The State of Minnesota, referred to as the State or the Employer and Minnesota Association of Professional Employees (MAPE), referred to as the Union or MAPE, are parties to a collective bargaining agreement effective July 1, 2013 through June 30, 2015 which shall automatically renewed itself from biennium to biennium thereafter unless either party provides notice of desire to modify the Agreement in accord with Article 34 of the current agreement. Under this agreement, the undersigned was selected to decide a dispute that has occurred between them. Hearing was held on January 14, 2015 in Moose Lake, Minnesota. The parties, both present, were afforded full opportunity to be heard. Prior to closing the hearing the parties agreed to electronically exchange briefs through the Arbitrator on February 17, 2015, a date which was extended by the arbitrator upon request by one of the parties to

February 20, 2015 The briefs were received on that day and exchanged by the Arbitrator. The matter is now before the Arbitrator for a decision.

STATEMENT OF THE ISSUE

Did the Employer have just cause to discharge the Grievant as required by Article 8, Section 5 of the 2011-2013 agreement between the parties? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

**ARTICLE 4
NON-DISCRIMINATION**

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Section 5. Prohibition of Sexual Harassment. See Appendix H entitled "Prohibition of Sexual Harassment."

**ARTICLE 8
DISCIPLINE AND DISCHARGE**

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

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Section 3. Disciplinary Action.

Discipline includes only the following, but not necessarily in this order:

1. Oral reprimand (not arbitrable)
2. Written reprimand
3. Suspension, paid or unpaid: The Appointing Authority may, at its discretion, require the employee to utilize vacation hours from the employee's accumulated vacation balance in an amount equal to the length of the suspension. All suspensions must be served away from the worksite.
4. Demotion
5. Discharge

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Section 5. Discharge of Employees. The Appointing Authority shall not discharge any employee without just cause. If the Appointing Authority believes there is just cause for discharge, the employee and the Association will be notified in writing, that an employee is to be discharged and shall be furnished with the reason(s) therefore, and the effective date of the discharge. ...

An employee found to be unjustly discharged shall be reinstated in accordance with the conditions agreed to between the parties if appropriate or the decision of the Arbitrator.

...

**ARTICLE 9
GRIEVANCE PROCEDURE**

Section 1. Intent. The purpose of this procedure is to secure, in the easiest and most efficient manner, resolution of grievances. For the purpose of this Agreement, a grievance shall be defined as a dispute or disagreement as to the interpretation or application of any term or terms of this Agreement.

...

Formal

...

Section 4. Arbitrator's Authority. The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of the Agreement. The Arbitrator shall consider and decide only the specific issue submitted in writing by the Employer and the Association and shall have no authority to make a decision on any other issue not so submitted to him/her.

The Arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law. Except as indicated in Section 5 below, the Arbitrator shall submit his/her decision in writing within thirty (30) days following the close of the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision shall be based solely on the Arbitrator's interpretation or application of the expressed terms of this Agreement and the facts of the grievance presented. The decision of the Arbitrator shall be final and binding on the Employer, the Association and the employee(s).

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**APPENDIX H
PROHIBITION OF SEXUAL HARASSMENT**

It is agreed by the Employer and the Association that all employees have a right to a workplace free of verbal and/or physical sexual harassment, "sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact 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 the Employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Sexual harassment complaints shall be processed pursuant to the Appointing Authority's affirmative action complaint procedure. The Employer agrees that all agency complaint procedures for sexual harassment shall be opened to Association participation unless the complaining employee requests in writing that the Association not be notified. The complainant shall have the right to Association representation. The Agency Affirmative Action Officer/Designee shall inform the complaining employee of this right, and any employee waiving this right must do

so in writing. Further, the Employer and Association agree that agency complaint procedures covering sexual harassment are modified to include these additional requirements:

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2) Within the time limits set forth in the affirmative action complaint procedures, but not to exceed thirty (30) days, the Appointing Authority shall conduct a full investigation and prepare a report along with designated actions to be taken to remedy the complaint. If the complaining employee has not waived the Association's involvement in the complaint, the Association's representative as well as the complainant shall be provided a written summary of the finding and resolution. The Association and Employer agree that reprisal against the complaint employee or a witness is prohibited. The provisions of this Appendix are not subject to the provisions of Article 9 of the Master Agreement between the Association and the Employer except that the Association may grieve the initial implementation of the complaint procedure found in the Appendix.

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OTHER RELEVANT DOCUMENTS

Statewide Policy: Appropriate Use of Electronic Communication and Technology

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

1. Illegal activities
2. Wagering, betting, or selling
3. Harassment, disparagement of others, stalking, and/or illegal discrimination
4. Fund-raising for any purpose unless agency sanctioned
5. Commercial activities, e.g., personal for-profit business activities
6. Promotion of political or religious positions or activities
7. Receipt, storage, display or transmission of material that is or may be reasonable regarded as violent, harassing, discriminatory, obscene, sexually explicit, or pornographic, including any depiction, photograph, audio recording, or written word.
8. Downloading or installing software (including games and executable files) unless agency sanctioned
9. Unauthorized accessing of non-public data
10. Non-State employee use (e.g., family member or friend) at work or away from work
11. Uses that are in anyway disruptive or harmful to the reputation or business of the State
12. Purposes other than state business, except incidental or minimal use

Engaging in any of the above listed activities may subject an employee to discipline, up to and including discharge.

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STATE OF MINNESOTA

Zero Tolerance for Sexual Harassment Policy

It is the policy of the State of Minnesota to prohibit harassment of its employees based on sex, race, national origin, religion, age, creed, color, disability, marital status, sexual orientation, status with regard to public assistance or political affiliation.

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Sexual Harassment is any behavior of co-workers or supervisors, based on sex, which is unwelcome, personally offensive, insulting and demeaning where:

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- Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment, or creating an intimidating, hostile, or offensive working environment.

Sexual harassment may take different forms. One specific form is the demand for sexual favors. Other forms of harassment may include:

- Verbal: Unwelcome sexual innuendoes, suggestive comments, jokes of a sexual nature, sexual propositions, threats.
- Non-Verbal: Unwelcome sexually suggestive objects or pictures, graphic commentaries, suggestive or insulting sounds, leering, whistling, obscene gestures.
- Physical: Unwelcome physical contact, including touching, pinching, brushing by the body, coerced sexual intercourse, assault.

Agencies must provide any employee subjected to such harassment with more than one resource for filing a complaint. These resources may include the employee's supervisor/manager, the agency's affirmative action officer/personnel director, the agency's commissioner and/or a representative from the Department of Employee Relations Office of Diversity and Equal Opportunity staff.

Sexual harassment by any employee, manager, supervisor, or non-employee will not be tolerated. All employees, managers, supervisors and non-employees alike will be expected to comply with this policy and take appropriate measures to ensure that such conduct does not occur. Anyone who violates this policy will be subject to appropriate disciplinary action up to and including discharge.

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Prohibition of Sexual Harassment Policy

Approved by Senior Management Team June 9, 2010

Overview

Description:

This policy is designed to provide notice about the prohibition of sexual harassment in the workplace, to explain the responsibility for reporting and investigating complaints of sexual harassment, and to give notice of the consequences of violation of this policy.

Reason for policy:

To comply with state and federal anti-discrimination laws, and to establish and maintain a work environment free of sexual harassment.

Applicability:

This policy applies to employees, supervisors, and non-employees who conduct business in the DHS workplace.

Failure to comply:

Employees who engage in sexually harassing behavior may face disciplinary action up to and including termination. Non-employees who engage in sexually harassing behavior may be denied access to the workplace, and/or face other appropriate sanctions.

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Definition(s):

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Sexual harassment: Unwelcome conduct such as sexual advances, requests for sexual favors, and other written verbal or physical conduct of a sexual nature, which unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment. Sexual harassment can occur between supervisors and subordinates or among co-workers or between employees and non-employees, and can take many different forms including:

1. Verbal: unwelcome sexual innuendos, suggestive comments, jokes of a sexual nature, sexual advances or propositions, offensive questions or comments about physical appearances or sex life, lewd comments, sexual jokes and sexual insults.
2. Non-verbal: unwelcome sexually suggestive objects or pictures, suggestive or insulting sounds, leering, whistling, obscene gestures.
3. Physical: unwelcome physical contact including touching, pinching, brushing by the body, sexual assault, or rape.

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Prohibition of Discrimination

Purpose:

To provide work environments free of unlawful discrimination.

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Sexual harassment: A form of discriminatory harassment that includes unwanted behavior of a sexual nature such as requests for sexual favors or other verbal or physical conduct of a sexual nature when:

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3. That the conduct or communication has the purpose or effect of substantially interfering with an individual's employment or creating an intimidating, hostile or offensive work environment.

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DEPARTMENT OF EMPLOYEE RELATIONS
ADMINISTRATIVE PROCEDURE - 04-07-88

HARASSMENT PROHIBITED

Description and Scope - . . . Harassment is a form of discrimination and in general is the display of behavior by one employee toward another employee which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment. Of particular concern is sexual harassment which is unwelcome sexual advances by an employee toward another employee, requests for sexual favors, and other verbal or physical conduct of a sexual nature

. . . .

BACKGROUND AND FACTS

The Minnesota Sex Offender Program (MSOP) is a direct care and treatment program within the Minnesota Department of Human Services (DHS). MSOP provides comprehensive services to individuals (clients) who have been court ordered to receive sex offender treatment. Most of those committed by the courts begin treatment at the MSOP Moose Lake, Minnesota facility. As of October 1, 2014, the facility provided treatment for 703 individuals.

MSOP's mission is to promote public safety by providing comprehensive treatment and reintegration opportunities for civilly committed sexual abusers. Among the principles it adheres to are personal accountability; respect for others, and community responsibility. Further, it stresses the importance of maintaining personal and professional boundaries by requiring its employees to take boundaries training yearly and, annually, providing its employees a management-drafted memo emphasizing the importance of maintaining these boundaries.

The Grievant, a Client Rights Coordinator (CRC) at the time of his discharge in March, 2013, had been continuously employed by the State of Minnesota since approximately 1994, first in the Department of Corrections and then in the MSOP since 2002. He had been a MSOP CRC since 2008. As a CRC, the Grievant monitored and responded to individual and programmatic issues related to the rights of those admitted to the MSOP program; coordinated residential services for program participants, and identified, addressed and promoted human, civil and legal rights for those who have been committed.

On February 7, 2013, the Grievant and a female co-worker who had been hired in August, 2012 were working in their adjacent cubicles when the Grievant yelled to her that she should come look at something. When she complied he clicked on a thumbnail image on his computer screen to enlarge it and showed her the image of a naked man bent over to highlight his penis, scrotum, anus and buttocks which were tattooed to resemble a dragon. The woman, finding the image offensive, asked why he would show that to her and then walked away.

According to the Grievant who had nicknamed another employee, Puff, he had been conducting an internet search of the term "Puff, the Magic Dragon" in order to show the other employee and his co-

worker where the nickname had come from and had come across the image while conducting the search. In order to access the website and the enlarged image of the naked man, the Grievant had to click on a thumbnail of the image that appeared as part of his search. The site, a single page, contained six images of the naked man's tattooed genitalia, although the co-worker was only shown one image, and the following warning:

The images below could be perceived as sexually explicit and could potentially offend the easily offended and I assume no responsibility for you being easily offended and not being able to view mature content for the sake of art. If you scroll down, you do so at your own risk and agree not to bitch at me for your own insecurities!!!

The following week, on February 14, the Grievant invited this co-worker to help him celebrate the day named after him by going to lunch with him. According to the co-worker she declined but the Grievant would not take "no" for an answer and continued to follow her and to beg her to go to lunch with him until she left for lunch with her husband. She continues that near the end of the day, she left her work early and stopped by the office of two other co-workers who were located in another building. While she was talking with one of the women there, she states the Grievant appeared in the doorway and kicked her in the shin. Continuing, she declares that when she asked him why he had done that he replied "You can't get away from me, sneaking off and not letting me know where you are."

After this incident, according to the co-worker, she was upset and felt the Grievant would not leave her alone or listen to her when she told him to stop. The women to whom the co-worker had been talking comforted her and told her she should talk to their supervisor. Taking this advice to heart, she telephoned their supervisor the next day and told her about the Grievant's behavior and said she would need to quit since she could not work with him anymore. The supervisor advised her to file a confidential incident report which she did on February 19th.

The co-worker's report was transferred to the Equal Opportunity and Access (EOA) division of the Department of Human Services and the allegations were investigated by an EOA investigator. After the investigation was completed, an investigation summary and report were sent to MSOP Human Resources for discussion at an upcoming Work Incident Review Committee meeting. At the meeting, the Clinical Director decided to discharge the Grievant citing the seriousness of the Grievant's misconduct as reason for discharge.

On March 27, 2013, the Grievant was sent a letter advising him he was being discharged effective that day for engaging in sexual harassment. The letter also referenced the Grievant's past history of similar interactions. While no specific actions were cited, at hearing the Employer brought up a number of previous incidents in which it was alleged the Grievant had failed to honor the personal and

professional boundaries of other staff members. Most of this conduct was described as teasing, joking, flirtatious and pushing boundaries. It is this discharge that is before the Arbitrator.

ARGUMENTS OF THE PARTIES:

The Employer:

The Employer maintains it has just cause to terminate the Grievant for several reasons. First, the Grievant violated both the Statewide Policy on Appropriate Use of Electronic Communications and Technology; the State of Minnesota Zero Tolerance for Sexual Harassment, and created a hostile work environment for one of his co-workers. Secondly, the Grievant knew his behavior was unacceptable, and harmful to the MSOP mission of providing treatment to sexual offenders in a therapeutic environment. Third, DHS met its responsibility to provide the Grievant with industrial due process. Fourth, discharge is warranted based upon the seriousness of the Grievant's misconduct, and lastly, MSOP did not treat the Grievant any differently or more harshly than other similarly situated employees.

Referring to its position that the Grievant violated the Statewide Policy on Appropriate Use of Electronic Communication and Technology; the State of Minnesota Zero Tolerance for Sexual Harassment policy and created a hostile work environment, the Employer argues the Grievant violated the first policy when he accessed a graphic image of a dragon tattooed on a man's penis, scrotum, anus and buttocks on February 7th and the second policy when he intentionally showed the image to his co-worker. As additional support for its position, it rejects the Grievant claims he was searching for an image of "Puff the Magic Dragon" and states he deliberately decided to take a closer look at the thumbnail image he had encountered during his internet search even though the statewide policy clearly states it is inappropriate to use a state-owned computer for the "receipt, storage, display, or transmission of material that is or may be reasonably regarded as harassing, obscene, sexually explicit, or pornographic, including any depiction, photograph, audio recording, or written word."

Further, the Employer asserts that in addition to offending his co-worker by showing her the tattooed image, the Grievant's behavior from the time this co-worker began work at the facility went well beyond that of a typical mentor and in February 2013 escalated to a point where his inappropriate behavior interfered with the co-worker's employment and created a hostile work environment the co-worker could no longer tolerate. According to the Employer, from the start, it appeared the Grievant planned to use his knowledge and experience to make the co-worker dependent upon him to do her job by patronizing her and insisting they do everything together. It adds that the Grievant made up stories

about another co-worker cancelling lunch plans so that he and the co-worker could go to lunch alone and that, finally, in February 2013, he caused her to be offended by showing her a graphic image of a man's tattooed penis, scrotum, anus and buttocks; pursuing her on Valentine's day begging her to go to lunch with him, and at the end of that day kicking her in the shin for leaving work without telling him, actions which caused the co-worker to decide she needed to quit her job. The Employer continues that these actions not only created a hostile work environment but that they constitute sexual harassment.

Expanding upon its assertion that the Grievant knew his behavior was unacceptable, inappropriate and harmful to the MSOP mission of providing treatment to sexual offenders in a therapeutic environment the Employer asserts the Grievant received training concerning the State of Minnesota Zero Tolerance for Sexual Harassment Policy and the Statewide Policy on Appropriate Use of Electronic Communications and Technology and notes that a violation of either policy may result in discipline up to and including discharge. It also charges that the Grievant, a ten year employee with MSOP, was well aware of the need to maintain personal and professional boundaries and to model respectful behavior since he was required to take boundaries training annually and the record shows he received this training in 2004, 2009, 2010, 2011 and 2012.

Continuing along this line of reasoning, the Employer charges that any argument advanced by the Union that the Grievant was not fully aware that his behavior was serious misconduct must fail since the culture and policies regarding boundaries are integral to MSOP's mission and the need to maintain boundaries and role modeling in order to maintain a therapeutic environment is so well known that the policies do not need to expressly state that discharge is appropriate. As support for this assertion, the Employer cites **The Common Law of the Workplace: The View of Arbitrators** on discipline and discharge.¹

Rejecting the Grievant's charge that he was denied industrial due process, the Employer declares the evidence shows the Grievant was the subject of a neutral, fair and thorough investigation and that the co-worker's incident report followed established DHS intake procedures and was transferred to DHS' EOA office due to the potential of a sexual harassment claim. It also asserts that the EOA investigator was fair and neutral; that the Grievant was allowed to tell his side of the story to the

¹ **The Common Law of the Workplace: The Views of Arbitrators**, Second Edition, Theodore J. St. Antoine, Editor, National Academy of Arbitrators, BNA Books, Washington, D.C., (2005), pg. 178. "Some rules and expectations are so obvious . . . that employees are presumed to know them. These include prohibitions on theft, fighting, law-breaking and insubordination. Because these 'capital offenses' are so well known and so serious, they do not require express rules to support discipline, and may not require the use of progressive discipline . . ."

investigator; that the investigator interviewed the relevant witnesses, and that the investigator concluded, in good faith, based upon the investigation, that the Grievant's actions constituted sexual harassment. Further, it notes that the Grievant exercised his *Weingarten* rights and states that while the Union argued at that hearing that the investigator was biased, it failed to produce any evidence of bias. And, finally, it asserts that the Grievant was treated fairly when the decision to discharge him was made and cites the fact that during the WIRC committee meeting the investigation was discussed by a group of management and human resources staff as proof.

Finally, arguing that discharge is the appropriate level of discipline given the seriousness of the Grievant's misconduct, the Employer declares that while the Grievant's behavior "is absolutely unacceptable and cannot be tolerated in any workplace . . . it is especially egregious in a sex offender treatment program." Further, it posits that the Grievant's misconduct exposed MSOP to legal liability and "breached a trust that MSOP had placed in him" by betraying the program's mission to maintain appropriate personal and professional boundaries in a therapeutic environment.

The Employer continues that the Grievant's treatment of this co-worker as well as his past history of similar behavior with other female co-workers shows he is unable to "fully appreciate that his actions were persistently intrusive, overbearing, patronizing, and ultimately physically aggressive to female co-workers." It adds that despite being told "no" many times and receiving an oral reprimand, the Grievant continued to ignore and cross boundaries.

As further support for its position the Employer stresses that the parties' collective bargaining agreement does not require progressive discipline and, again citing **The Common Law of the Workplace**, this time regarding a finding that sufficiently serious misconduct justifies serious discipline for the first offense, the Employer adds that offenses creating a hostile work environment based on sex, accessing an offensive and graphic image of a man's tattooed genitalia and sharing this image with a female co-worker is a capital offense in a program like that run by MSOP.

The Union:

Stating a finding of just cause generally requires the Employer to conduct a full and fair investigation; that there be sufficient proof of the offenses, and that the penalty must reasonably relate to the offenses, the Union argues that the Employer failed to establish just cause in this case. According to the Union, not only did the Employer fail to conduct a full and fair investigation or provide sufficient proof of the offenses but the penalty it imposed was not reasonably related to the alleged offenses.

As proof the Employer did not conduct a full and fair investigation, the Union declares that the Grievant's supervisor never attempted to determine if the accusations against the Grievant were true and that if she had she would have discovered the co-workers were engaged in horseplay and all were willful participants. It adds that instead of conducting an investigation, the Supervisor took the word of a six-month employee and passed it off to human resources and human resources passed it on to an EOA investigator who inappropriately investigated for sexual harassment after inserting himself into the process. It continues that if the investigator had properly examined the facts he would have found that the Grievant's conduct did not rise to level of sexual harassment, either by statute or policy or by the provisions in the collective bargaining agreement. Finally, declaring there was "absolutely" no proof of the alleged offenses, the Union posits that the evidence provided as proof was inaccurate for the most part and the witness testimony was "scripted, disingenuous, and overwhelmed with . . . insidious accusations" and "erroneous and misguided thoughts and observations" and "orchestrated by a few co-workers who 'traveled together in inner circles'." Continuing, the Union asserts that the State, knowing its burden of proof would be difficult to meet, resorted to "character assassination" with many of the witnesses not even present to testify.

According to the Union the Grievant was a dedicated, faithful employee of the State who has always been a team player with an upbeat, good sense of humor and well-liked by most employees at the facility. Further, it states that during the Grievant's entire career with the State he never had an unsatisfactory performance review and notes that even the EOA investigator's report stated the Grievant in each of his performance reviews during the past three years had satisfactory performance reviews. The Union also notes that the report stated there were no issues regarding workplace relations that substantiated the allegations of the "current sexual harassment complaint".

Continuing to address due process violations, the Union states that when the Grievant was placed on an investigatory leave the reasons cited were vague and that when the Grievant confirmed he would attend his *Loudermill* hearing he was never told this was his opportunity to explain his side of the story or what else he might expect. It adds that under the collective bargaining agreement the Grievant is entitled to Union representation during that hearing and he was never provided such representation although he never waived his right to Union representation.

According to the Union, there were other examples of the State's failure to grant the Grievant due process. Among them were the provision of redacted information at the Step 2 grievance hearing and the State's response to the Step 2 meeting.

As for the evidence provided by the State as proof of wrongdoing, the Union disputes the testimony of the co-worker who initiated the complaint. Referring to the February 7 incident, the Union asserts not only did this co-worker know that the Grievant was doing an internet search for “Puff the Magic Dragon” and why but that her testimony regarding the incident was contradictory and lacked credibility. It also challenges her testimony regarding the incident on February 14, particularly that relating to her assertion that she firmly told the Grievant “no” several times and that his request later escalated to a demand. Further, it questions why the co-worker would not have initially told the Grievant that she was going to lunch with her husband since that would have put the Grievant’s request to an end. Lastly, it notes that the co-worker said she suspected that the Grievant’s badge was not broken as he had asserted when he asked her to let him back into the area where their cubicles were located.

Continuing, the Union states the co-worker alleged the Grievant had kicked her later that day and that he was mad at her because she had not walked out of the workplace with him and challenges the truth of this testimony. In addition, the Union asks why she would not have taken a picture of the area where she had been kicked if the kick had been as hard as she alleged. Further, it notes that at least one of the witnesses interviewed by the investigator about the incident could not recall whether the co-worker was kicked at all or whether she was even in the room when the incident allegedly occurred.

And, finally, the Union denies that the Grievant was angry when the co-worker on February 19 when she had already retrieved her client requests before the Grievant arrived at work. As support for its assertion, it states the co-workers testimony is simply another effort to misstate the facts and declares that the Grievant’s comment was merely an effort to acknowledge that the co-worker had confronted her fear of meeting with the clients on her own since she had previously asked that the Grievant accompany her when she picked up requests.

With respect to the other witnesses who were interviewed during the investigation, the Union charges that most of their statements also fail to establish just cause for termination. As proof, it cites statements made by Witness One, a friend of the co-worker’s, that she knew there were days when the Grievant made the co-worker feel uncomfortable; that she finds him annoying, and that he will make off-colored remarks and notes that when she was asked to provide an example of the remarks she could not recall any specifics. Further, the Union states states that although this witness’ statements were meant to show the Grievant’s behavior was sexually harassing, she also told the investigator that the Grievant never told jokes of an inappropriate sexual nature in her presence. And, lastly, this witness

told the investigator that when she opened the Grievant's e-mail labeled "Armed and Dangerous" and saw the dragon picture attached she laughed about it which suggests she did not find anything offensive about the e-mail or being nicknamed "Puff" by the Grievant.

Continuing, the Union states that Witness Two described the work relationship between the co-worker who had issued the complaint and the Grievant as "fairly comfortable on his part" but there were times when he would appear to be overly friendly toward the co-worker. She also stated, however, that she did not know whether the Grievant's behavior had actually made the co-worker uncomfortable, a statement which clearly indicates this witness did not find the Grievant's behavior toward the co-worker sexually harassing. The Union adds that when this witness was asked to cite incidents where she believed the Grievant was being overly friendly, she indicated that there had been at least two meetings the previous summer when the Grievant had bumped her on the elbow during the meeting but then said that when she asked the Grievant to stop touching her he did so.

According to the Union Witness Three had little recollection of the events on February 14 except that he recalled the Grievant and the co-worker sitting at the security desk and the Grievant asking the co-worker to go to lunch with him more than once and the co-worker saying "no" more than once. The Union added, however, that since this witness could not say how many times the request and response were made this observation is not proof that the Grievant was "begging" the co-worker to go to lunch with him.

The Union also asks that the testimony of a previous worker regarding an incident that had occurred between the Grievant and this co-worker in 2010 be stricken from the record and given no weight in this dispute. As support for its position, it states that although the Grievant received an oral reprimand for the incident, there is no paper trail substantiating the facts relating to the incident and there is no proof that this reprimand remains a part of the Grievant's record since Article 8 of the collective bargaining agreement provides that if an infraction is corrected, the reprimand shall not become a part of the employee's personnel file.

In summary, the Union posits that the State's failure to provide the Grievant due process together with the questionable testimony of the witnesses are cause to sustain the grievance. As remedy it seeks that the Grievant be reinstated and be made whole.

DISCUSSION

When a sexual harassment charge is made and appealed to arbitration, it is incumbent upon the arbitrator to determine whether the alleged misconduct actually was sexual in nature and whether the

discipline imposed is appropriate given the seriousness of the misconduct. In making that finding many arbitrators rely upon the EEOC's definition of sexual harassment which in this case is very similar to the definition advanced by the Employer in its sexual harassment policy² and consider, among other criteria, whether the "victim's" testimony is credible; whether the incident was reported to management; whether the conduct interfered with the "victim's" job performance; whether an intimidating, hostile or offensive working environment was created, and whether the accused was aware of the employer's policies prohibiting such actions in determining whether the discipline imposed is reasonable. In addition, because the matter is being decided in arbitration under a contract where just cause is regularly deemed a part of the disciplinary process, other factors such as whether the accused was denied due process and whether there are mitigating factors such as a good work record, the absence of past disciplinary problems; the frequency of the misconduct; the context in which the incident occurred, and the nature and amount of horseplay, obscenity, etc. prevalent in the particular work environment, among others are considered.³

Every employee is entitled to a work environment free of harassment, including sexual harassment. Consequently, when faced with such an accusation, the Employer, given the importance of maintaining a work environment free of such harassment, is obligated to treat the matter seriously and to act upon the allegation leaving it to a third party to decide whether the accusation is valid. In this case, the Employer argues that the Grievant sexually harassed a co-worker by showing her a computer image of a man's tattooed genitalia; by refusing to take "no" for an answer when he asked her go to lunch with him on Valentine's day, and by kicking her in the shin or ankle later that day after she left work for the day without telling him. It continues that these actions, together with his constant failure to observe personal and professional boundaries with the co-worker, had the effect of creating an intimidating, hostile and offensive working environment.

After reviewing the testimony; the evidence submitted at hearing; the arguments of the parties, It is determined that the Grievant's actions, although unwelcome, did not amount to sexual harassment and did not create a hostile environment. In addition, there is evidence that the investigation was

²EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. Section 1604.11 defines sexual harassment as "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when: . . . 3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance, or creating an intimidating, hostile or offensive working environment."

³ See **The Common Law of the Workplace, The Views of Arbitrators**, Second Edition, Theodore J. St. Antoine, Editor, National Academy of Arbitrators, BNA Books, Washington, D.C., (2005), pgs. 223-229; **Labor and Employment Arbitration**, Second Edition, Bornstein, Gosline, Greenbaum, General Editors, Mathew Bender and Company, Inc. (2000), Chapter 21, pgs. 21-1 – 21-31, and **Arbitrating Sexual Harassment Cases**, Vern E. Hauk, Editor, The Bureau of National Affairs, Inc., Washington, D.C. (1995), pgs. 1-1 – 1-54.

tainted by the investigator's bias and that the Employer acted arbitrarily when it failed to consider the Grievant's length of service and his record of satisfactory performance evaluations as well as his discipline-free record in determining whether discharge was warranted for the misconduct that did occur.

This case juxtaposes one employee's version of events against another's. If the co-worker is to be believed the Grievant is guilty of failing to maintain personal and professional boundaries by constantly touching her; joking inappropriately; singing love songs to her; seeking attention from her and invading her space. If the Grievant is to be believed he was well-intentioned and the co-worker's attitude toward their working relationship was affected by the fact that she disliked working at the facility and was having difficulties at home. This is a classic case of "she said, he said" and neither version is totally believable. Further, there is no other evidence to prove the Grievant did much of that alleged by the co-worker.

While it is conceivable that the co-worker who complained of the Grievant's behavior viewed his behavior as sexually harassing since it is her view of the behavior that matters, the evidence in the record does not support a finding that she believed his behavior to be sexually harassing. This is demonstrated by the fact that while she complained of Grievant failing to maintain personal and professional boundaries no incident reports concerning his behavior were filed until the February 2013 incidents; by the fact she voluntarily went to lunch with him a number of times during the five months they worked together prior to filing the complaint, and by the fact that she admits he did not ask her for sexual favors. It is also demonstrated by the fact that when she complained to her supervisor about the Grievant's behavior she described her relationship with the Grievant as "frustrating" and said she did not like his "joking around" but made no formal complaints about his behavior and ultimately told the supervisor that she thought her problems with him had been addressed and there was no need to address them further and by the fact that there is no evidence she, personally, ever told the Grievant his behavior was not welcome.⁴ Further, the fact that this co-worker did not immediately complain to management about the Grievant's behavior when he showed her the tattooed image on February 7th and the fact that she initially identified the Grievant's February 7th and 14th behavior in the incident report filed on February 19th as "general harassment" strongly suggests she did not consider his behavior

⁴ It was only after the incidents on the 14th that the co-worker called her supervisor to say she was going to have to quit and cited the Grievant's behavior as the cause. While it is possible that his behavior was the cause, one cannot ignore that it is also possible she was planning on quitting because she did not like working at the facility as the Grievant alleged. The one fact that is certain is that she worked at the facility less than two years and now works in a hospice facility, a facility far different from one that deals with sexual offenders.

as sexually harassing and only changed her mind after discussing the incidents with the EOA investigator who clearly was asked to investigate a charge of sexual harassment and not general harassment.

While there is evidence that the Grievant violated the Statewide Policy on Appropriate Use of Electronic Communication and Technology and it is undisputed that the Grievant showed the co-worker who issued the complaint against him a computer image of a man's tattooed genitalia; the record does not support a finding that these actions were taken with the intent of sexually harassing the co-worker. Instead, the record indicates that the Grievant was searching the computer for dragon images of "Puff the Magic Dragon" and that the image of a man's tattooed genitalia inadvertently showed up in that search. The fact that he showed the image to her does not, however, indicate that he intended to show it to her in order to harass her since the record establishes this was the first and only time he had ever shown her a sexual image.

This finding is supported by evidence that the initial search of the Grievant's hard drive and his DHS e-mail account did not reveal the website containing this image or any other websites containing pornographic images and that the site only showed up after the Human Services investigator doing the sexual harassment investigation asked forensics to search the Grievant's e-mail account for an e-mail entitled "Armed and Dangerous" which contained a cartoon picture of a dragon. In doing this search, the record shows that the site containing the image, along with several sites that contained images of cartoon-like dragons, were found and it was discovered that the Grievant did a ten-minute search for "Elliott Puff the Magic Dragon" and that the site was accessed during the last minute of the ten-minute search done by the Grievant. Further support for a finding that the Grievant did not intend to harass the co-worker is the fact that when the Grievant sent an e-mail to the co-worker he had nicknamed "Puff" and copied the co-worker complaining of sexual harassment, the attachment contained a cartoon picture of a dragon and not the sexual image that had popped up.

The fact that the Grievant did not intentionally search his computer for the tattooed image or for any other picture sexual in nature does not excuse the fact that the Grievant did access the site after finding a thumbnail picture of the site during his search and clearly violated the Employer's electronic communication and technology policy since he knew what he would see when he clicked on the thumbnail picture. This violation, however, is a minor one since there is no evidence that the Grievant intended to search for sexual images or had done so in the past, and is not serious enough to warrant

discharge for this first time offense.⁵

In addition to arguing that the Grievant was not guilty of sexual harassment, the Union argued strenuously that the Employer's failure to conduct a full and fair investigation; the investigator's bias, and the Employer's failure to provide Union representation to the Grievant during his *Loudermill* hearing constituted a denial of due process which demands the grievance be sustained no matter what the merits of the case are. These issues are not going to be discussed since the merits support the Union's argument. Nonetheless, it is worth noting that a review of that part of the record dealing with due process and the degree of discipline imposed based upon the seriousness of the misconduct indicates the investigation was tainted and that the Employer failed to consider the Grievant's work record, the absence of past disciplinary problems with the Grievant, and that fact that this was a one-time occurrence when it decided when it decided the Grievant's misconduct was so egregious it warranted immediate discharge.

While the investigator found no evidence "to substantiate the allegations of current sexual harassment complaint"; that the Grievant had satisfactory performance evaluations during the past three years; "that the Grievant had no record of past written action and/or formal discipline administered during his tenure of employment with DHS"; that the oral reprimand the Grievant received in 2010 "was removed from his employee file after one year because there were no further incidents", he, nonetheless, concluded that the co-worker's complaint was substantiated.⁶ Based on what is unclear since the witnesses he interviewed stated the Grievant tended to be overly friendly, teasing and flirty and at times pushed the boundaries of personal and professional behavior but did not say he had made any sexual advances toward them or make any comments that were sexual in nature. Further, one must seriously question why he would have inserted himself in the process by persuading the co-worker to change her claim from "general harassment" to "sexual harassment" after he had been asked to investigate whether the co-worker had been sexually harassed.

Further, although it is understandable that the Employer has legitimate reason to be concerned about whether the work environment is free of sexual harassment and is concerned about employees maintaining personal and professional boundaries in the MSOP, it cannot ignore the just cause requirement in its contract nor the provision that states discipline shall be corrective in nature when it

⁵ While the investigator indicated in his investigative report that the Grievant had been one of several employees involved in a 2012 computer audit regarding the inappropriate using state technology to access inappropriate sexual content, there is no evidence that he or anyone else was disciplined as result of that audit and that nothing more than a warning to all employees had occurred.

⁶ See Employer exhibit D.

decides the degree of discipline to impose upon employees. By ignoring the Grievant's length of service with DHS; his length of service in MSOP; his work performance record and his discipline-free record during his tenure with MSOP, the Employer's finding that a one-time incident involving another employee observation of a photo which she found "disgusting" is so egregious that the misconduct warrants immediate discharge was arbitrary and unreasonable and would have been cause to reduce the degree of discipline imposed had there been proof of sexual harassment. Since there was not proof, however, this finding is not relevant.

Accordingly, based upon the record as a whole, the arguments of the parties and the discussion set forth above, the following award is issued:

AWARD

The grievance is sustained in part. The Employer is ordered to reinstate the Grievant and make him whole for wages and benefits lost between the date of his discharge until he is reinstated less any interim earnings he may have received. In addition, based upon a finding that the Grievant violated the Statewide Policy on Appropriate Use of Electronic Communication and Technology and showed the image to a co-worker, conduct which has the potential to affect the mission of MSOP, the Grievant is to receive a one working week unpaid suspension and the amount is to be deducted from the make-whole award. The Arbitrator retains jurisdiction for 90 days, or longer if jointly requested by the parties, in order to resolve any disputes which may arise in the implementation of this award.

By: _____
Sharon K. Imes, Arbitrator

April 8, 2015
SKI