

**BEFORE THE ARBITRATOR**

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In the Matter of the Arbitration Between

**STATE OF MINNESOTA**

and

**MINNESOTA STATE EMPLOYEES UNION  
AFSCME, COUNCIL NO. 5, AFL-CIO**  
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**BMS Case No. 08-PA-4358  
Grievant:**

***APPEARANCES:***

**Carolyn J. Trevis**, Assistant State Negotiator, State of Minnesota, appearing on behalf of the State of Minnesota and the Minnesota Lottery.

**Christi H. Nelson**, Field Representative, American Federation of State, County and Municipal Employees (AFSCME) and **Cynthia M. Nelson**, Field Representative, AFSCME, appearing on behalf of Minnesota State Employees Union AFSCME, Council No. 5, AFL-CIO and the Grievant.

***JURISDICTION:***

The State of Minnesota, referred to herein as the State, the Employer, or the Lottery and Minnesota State Employees Union AFSCME, Council No. 5, AFL-CIO, referred to herein as the Union, are parties to a collective bargaining agreement effective January 1, 2007 thru June 30, 2009, which shall be automatically renewed from biennium to biennium thereafter unless notice is given in accord with Article 35. Under this agreement, the undersigned was selected to decide a dispute that has occurred between them. Hearing was held on October 8, 2008 in Roseville, Minnesota. The parties, both present, were afforded full opportunity to be heard. The parties closed the hearing with oral arguments and the matter is now ready for a decision. The parties also agreed to extend the time limit for issuing this decision.

***STATEMENT OF THE ISSUE:***

Is there just cause to discharge the Grievant? If not, what is the appropriate remedy?

**RELEVANT CONTRACT LANGUAGE:**

**ARTICLE** 16 **DISCIPLINE** **AND**  
**DISCHARGE**

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

**Section 2. Union Representation.** The Appointing Authority shall not meet with an employee for the purpose of questioning, in person or by a phone interview, the employee during an investigation that may lead to discipline without first offering the employee an opportunity for union representation, and such meeting shall not take place until a Union representative is available or is released by his/her supervisor. . . . The employee shall be advised of the nature of the allegation(s) prior to questioning. . . . If an employee is being questioned for any other purpose the employee shall be given a general overview of the nature of the investigation. Upon request, an employee shall be provided a copy of the transcript of his/her interview, if available, and/or be allowed to listen to a tape of his/her interview, if any.

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

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

. . . When any disciplinary action more severe than an oral reprimand is intended, the Appointing Authority shall, before or at the time such action is taken, notify the employee in writing of the specific reason(s) for such action, and shall provide the Local Union with copies of any written notices of disciplinary action.

An employee who has been notified by his/her Appointing Authority that he/she is being investigated for possible disciplinary action shall be informed, in writing, of the status of the investigation upon its conclusion.

. . .

**Section 5. Discharge.** The Appointing Authority shall not discharge any permanent employee without just cause. If the Appointing Authority feels there is just cause for discharge, the employee and the Local Union shall be notified, in writing, that the employee is to be discharged and shall be furnished with the reason(s) therefore and the effective date of the discharge. The employee may request an opportunity to hear an explanation of the evidence against him/her, to present his/her side of the story and is entitled to union representation at such meeting, upon request. The right to such meeting shall expire at the end of the next scheduled work day of the employee after the notice of discharge is delivered to the employee unless the employee and the Appointing Authority agree otherwise. The discharge shall not become effective during the period when the meeting may occur. The employee shall remain in pay status during the time between the notice of discharge and the expiration of the meeting. However, if the employee was not in pay status at the time of the notice of discharge, for reasons other than an investigatory leave, the requirement to be in pay status shall not apply.

**Section 6. Appeal Procedures.** Any disciplinary action imposed upon an employee may be processed as a grievance through the regular grievance procedure as provided in Article 17.

. . .

**Section 7. Personnel Files.**

A. **Materials in File.** Initial minor infractions, irregularities, or deficiencies shall first be privately brought to the attention of the employee and, if corrected, shall not be entered into the employee's personnel record.

An oral reprimand shall not become a part of an employee's personnel record. Investigations which do not result in disciplinary actions shall not be entered into the employee's personnel record. A written record of all disciplinary actions other than oral reprimands shall be entered into the employee's personnel record. All disciplinary entries in the personnel office record shall state the corrective action expected of the employee.

Each employee shall be furnished with a copy of all evaluative and disciplinary entries into the personnel office record and shall be entitled to have the employee's written response included therein.

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Only the personnel office record may be used as evidence in any disciplinary action or hearing. This does not limit, restrict, or prohibit the Appointing Authority from submitting supportive documentation or testimony, either oral or written, in any disciplinary hearing, nor does it so limit the Union.

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**ARTICLE 17 – GRIEVANCE PROCEDURE**

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**Section 1. Grievance Procedure.** A grievance is defined as a dispute or disagreement as to the interpretation or application of any term or terms of this Agreement.

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D. **Steps.**

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STEP 4: ... The decision of the arbitrator shall be final and binding upon the parties. Except as provided in the procedures for Section 4, the arbitration shall be requested to issue his/her decision within thirty (30) calendar days after the conclusion of testimony and argument. ....

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**Section 5. Arbitrator's Authority.** The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. He/she shall consider and decide only the specific issue or issues submitted to him/her in writing by the parties of this Agreement. The arbitrator shall be without power to make decisions contrary to, inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law. The decision shall be based solely upon the arbitrator's interpretation and application of the expressed terms of this Agreement and to the facts of the grievance presented.

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**ARTICLE 22 – WORK RULES**

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An Appointing Authority may establish and enforce reasonable work rules that are not in conflict with the provisions of this Agreement. Such rules shall be applied and enforced without discrimination. ...

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**OTHER RELEVANT DOCUMENTS:**

**LOTTERY POLICY  
NON-DISCRIMINATION**

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All employees are to conduct themselves with dignity and respect for others. Employees are responsible for creating and maintaining an environment free from discrimination.

The Lottery does not tolerate discrimination among its employees and will take appropriate corrective action against employees violating this policy. Employees engaging in discriminatory activities or actions in the work place or while representing the Lottery away from the work place can expect disciplinary action. Disciplinary actions will be considered on a case-by-case basis. Appropriate corrective action, up to and including termination of employment, will be taken.

Retaliation or intimidation directed toward a complaining party, or a person who cooperates with an investigation, is also prohibited. If retaliation or intimidation occurs, disciplinary action, up to and including termination of employment, may result.

Discrimination can take several forms. One form is making repeated jokes about an employee's unique characteristics such as race, disability, religion, etc. which are insulting, demeaning, or in any way negatively received or perceived. Another form of discrimination is repeated remarks or names that are insulting, demeaning, belittling or disparaging. These are two forms of discrimination provided as examples. They are not inclusive.

**LOTTERY POLICY  
GENERAL HARASSMENT**

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All employees are to conduct themselves with dignity and respect for others. Employees are responsible for creating and maintaining an environment free from harassment.

The Lottery will not tolerate general harassment among its applicants, eligibles or employees and will take appropriate corrective action against anyone violating this policy. Employees engaging in general harassment in the work place or while representing the Lottery away from the work place can expect disciplinary action. Disciplinary actions will be considered on a case-by-case basis. Appropriate corrective action, up to and including termination of employment, will be taken.

Retaliation or intimidation directed toward a complaining party, or a person who cooperates with an investigation, is also prohibited. If retaliation or intimidation occurs, disciplinary action, up to and including termination of employment, may result.

General harassment is behavior involving verbal, psychological, symbolic, social or physical methods of intimidation, ridicule, entrapment, degradation, coercion or harm with the purpose or effect of affecting the work environment or when:

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Such behavior or communication unreasonably interferes with an individual's productivity and/or creates a working environment that is intimidating, hostile or offensive; or

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General harassment differs from other forms of harassment because it is not based on any protected characteristic and, therefore, is not a form of unlawful discrimination. Harassment can take several forms some of which are:

- Repeated remarks or names which are insulting, demeaning, belittling or disparaging;
- Repeated jokes about employees' unique characteristics such as race, disability, etc. which are insulting, demeaning, or in any way negatively received or perceived;
- Repeated ridicule of an employee;
- Sabotage of an employee's character, reputation, personal possessions or job performance or product;
- Exclusion from orientation or teamwork;
- Unequal assignment of job responsibilities such as repeatedly giving an employee less responsible or less challenging assignments not related to ability; or
- Unequal application of performance standards, discipline or work rules.

The forms of harassment listed above are only examples. They are not inclusive.

The Director is responsible for the enforcement of this policy within the Lottery. However, managers, supervisors, and the Human Resources Director are also responsible for the implementation and enforcement of this policy. This includes initiating and supporting programs and practices designed to develop understanding, acceptance, commitment to and compliance with the framework of this policy. Each employee must be informed that harassment is unacceptable behavior and that they are responsible for personal conduct consistent with the spirit and intent of this policy.

Claims of general harassment or violations of this policy will be investigated by the Human Resources Director or an investigator(s) selected by the Human Resources Director. Progress is monitored and an attempt is made to maintain confidentiality during the investigation.

#### **GENERAL HARASSMENT COMPLAINT PROCEDURE**

Applicants, eligibles and employees who believe they have been subjected to general harassment in the workplace or believe they have witnessed such behavior have the obligation of first trying to resolve this complaint or concerns by talking with the responsible party their supervisor, the division director or the Human Resources Director. Employees not satisfied with the results of their efforts to remedy the complaint or concern must file their complaint in writing. The Lottery's initial step in response will be to determine whether the complaint is properly a discrimination complaint, and therefore, appropriate to be addressed by the internal procedure.

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4. The Human Resources Director reports the results of the investigation to the employee filing the complaint, the alleged offending person and the supervisor of the alleged offending person. (Timeline: within 3 days of final determination).
5. The supervisor of the alleged offending person, in consultation with the Human Resources Director, takes recommended corrective action. The severity of the corrective action should be correlated to the severity of the conduct with its purpose to prevent subsequent occurrences.

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#### **MINNESOTA STATE LOTTERY EMPLOYEE CODE OF CONDUCT**

1. Policy Statement

Each employee of the Minnesota State Lottery is expected to act in a manner that will maintain the public's confidence in and respect for the Minnesota State Lottery. Each employee must perform their work in accordance with the highest standards of law and ethics and should avoid all conduct that is, or could be seen as, inappropriate.

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15. Harassment

- A. The Minnesota State Lottery will not tolerate any form of harassment.
- B. All employees may not engage in any unwelcome conduct or verbally or physically harass another employee, customer of the Minnesota State Lottery, or a workplace visitor based on race, color, creed, national origin, religion, sex, sexual orientation, age, marital status, disability, or reliance on public assistance. This prohibition with respect to sexual harassment includes both serious acts as defined by the Equal Employment Opportunity Commission (EEOC) and petty and annoying acts which create a negative work environment.
- C. An employee subject to harassment or discrimination or who has witnessed such conduct should contact their supervisor or the Minnesota State Lottery's Human Resources Director.

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22. Reporting Requirements

An employee must report any suspected violation of this Code of Conduct to his/her supervisor and/or the Minnesota State Lottery's Human Resources Director.

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24. Disciplinary and other Remedial Action

- A. If an apparent violation of this Code of Conduct arises, an investigation of the alleged violation will be conducted. Determination of any action to be taken will be made according to each individual situation. The following factors will be considered: (1) a thorough analysis of the activity or conduct, including the employee's side of the story; (2) how the activity or conduct affects the employee's ability to perform his/her duties; (3) how the activity or conduct might conflict with, or appear to the public to conflict with the employee's duties; and (4) the interests of the Minnesota State Lottery and the State of Minnesota.
- B. If an employee violates this Code of Conduct, the employee may be disciplined in accordance with the law or provisions of the appropriate collective bargaining agreement or plan established by the Commissioner of Employee Relations in addition to any criminal penalty that might be imposed.
- C. In addition to or instead of any disciplinary action for a violation of this Code of Conduct, the Minnesota State Lottery may take any of the following non-disciplinary action: (1) change the employee's work assignment or job; (2) require that the employee stop the conflicting or inappropriate activity; or (3) disqualify the employee for a particular job or work assignment.

- D. If an employee is disciplined for violating these standards set forth in this Code of Conduct, the employee may appeal through proper channels, if available, pursuant to the appropriate collective bargaining agreement or the appropriate plan established by the Commissioner of Employee Relations for an employee not covered by a collective bargaining agreement.

APPENDIX A

DEFINITIONS

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- D. **“Harassment”**. “Harassment” includes (1) disparaging, belittling, demeaning, or insulting remarks; (2) jokes about an employee or characteristic unique to that employee; or (3) demeaning an employee’s character, reputation, work efforts or property.

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***BACKGROUND AND FACTS:***

At the time of the incident that led to this grievance, seven regular employees worked in the warehouse for the Minnesota Lottery. Five of them had worked for the Lottery between six and eighteen years. The other two had worked for the Lottery two years or less. During the last two, and maybe more, years these employees have generally worked unsupervised since their supervisor was, and is, not only the warehouse and distribution manager but the facilities manager and is frequently away from the warehouse. Due to security issues relating to the operation of a lottery, the work of these employees is videoed.

The Grievant, a seventeen-year state employee, has worked with the Minnesota Lottery since 2000 as a Central Services Administrative Specialist. In general, the Grievant’s performance reviews indicate that he has very good organizational and communication skills; that he is very efficient on the computer and that he performs at a satisfactory to a higher level than the jobs requires. His last two reviews also indicate that he can be critical of fellow workers in front of other workers and that he should work with his supervisor to ensure a harassment free work area. At no time, however, was he disciplined for this behavior with co-workers or was a work performance plan initiated.

In general, the employees have described the work environment as a tense and stressful one with employees, including themselves, openly critical toward each other regarding the work they are doing. They also describe on-going situations where employees bump into each other when walking; differ over the degree of lighting needed to do the work, with the majority

of employees stating they prefer dimmer lighting in order to read the ticket numbers while others insist on bright lighting, and differ over how loud the radio is and which station the radios are set to. The record reflects that in response to these actions and complaints, the supervisor has issued general directives, as early as May 9, 2005, advising the employees that they are expected to treat each other with respect and that if a situation between employees escalates to a point where the situation might become hostile they are expected to remove themselves from the situation and immediately discuss it with a supervisor. The directives also indicated that failure to comply with these expectations may result in discipline. The record does not reflect, however, that any employee has been disciplined for failing to adhere to these directives although there have been a number of complaints to the supervisor about employee behavior.<sup>1</sup>

In November 2005, the Lottery hired an employee who had previously worked as a lead stocker for Northwest Airlines. Shortly after beginning work there, this employee, thinking he knew ways to streamline the operation, suggested several changes to the process at the warehouse. He also began complaining about employee behavior toward him and toward one other employee in the warehouse and about warehouse conditions to the warehouse supervisor and to Human Resources. Although no action was taken by either, his complaints did not make him popular among four of the employees who had been at the warehouse for more than six years. Whether they ceased talking to him except when the conversation was work-related is because they did not like him or is because they were concerned he would complain about them is unclear.<sup>2</sup> Nonetheless, little social conversation between this employee and the four employees occurred. A fifth employee, the newest hire, tried to remain more neutral toward this employee but had been advised by at least one of the other four employees that the four did not talk with this employee. As a result, she felt caught between the two factions. She also stated she feared what might happen to her if she was too friendly with that employee.

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<sup>1</sup> In general, all of the employees have indicated that they do not respect the supervisor; that they do not trust him, and that they find him ineffectual.

<sup>2</sup> This employee states it is because they were retaliating against him while the four employees state it is because they did not trust him and were concerned he would complain about them to management.

On October 5, 2007, the employee hired in November 2005 (hereinafter referred to as the complainant) filed a harassment and discrimination complaint against the Grievant and the three other employees who had been with the Lottery for more than six years and who did not talk to him except when the conversation was work-related. In his complaint he alleged the four employees had engaged in harassing and discriminatory conduct toward him and toward another employee who had been with the Lottery for eighteen years and that the most recent incident had occurred on September 7, 2007. Consistent with Lottery Policy and the Code of Conduct, a consultant was hired to investigate the complaint.

Five days later on October 10, 2007, the complainant was working on the end job in the warehouse and noticed that packages of tickets that were coming down the rollers were not always in sequential order. He raised the issue with the supervisor and suggested to the supervisor that he view the video tapes to see what was going on. A review of the video tape showed that the Grievant took an order that he had just picked and placed it in front of the orders to be packed, thus putting the packets out of sequential order, several times between 10:15 a.m. and 1:37 in the afternoon. The supervisor then asked security to view the tape between 6:30 and 9:00 a.m. to determine if the Grievant had done this when another employee had been on the end job. That review indicated that no ticket packages had been placed out of order during that time.<sup>3</sup> Concluding that the Grievant's actions appeared to be deliberate; that the action was inconsistent with instructions given regarding packing, and without talking to the Grievant about his actions, the supervisor reported the activity to Human Resources and it was added to the charges made in the complaint for investigation by the consultant.

On November 14 and 15, the consultant hired to investigate the complaint interviewed the complainant; the employee identified by the complainant as also being harassed; the newest hire at the Lottery, and the four employees against whom the complaint had been made. From the questions asked during the interviews, it is apparent that she had been apprised of the complaints made by the complainant and also had viewed the video of the October 10, 2007 incident prior to conducting the interviews.

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<sup>3</sup> The earlier viewing of the video was while employees were picking "dailies" and the later viewing of the video was while employees were picking "allocations", two different processes.

Relying solely on the interviews, a review of the video tape and a conversation she had with the warehouse supervisor, the consultant, on December 11, 2007, issued an investigation report in which she concluded there is a “history of interpersonal conflict between Lottery warehouse employees that continues today” and that “some warehouse employees engage in inappropriate workplace behavior” including criticism of how employees work and the speed at which they work. She also stated that employees engage in name calling; use profanity; confront and challenge each other; decline to talk to each other and criticize their supervisor. In addition, she found that employee behavior “negatively affects the warehouse work environment and has resulted in the filing of employee complaints and counter-complaints, multiple workplace investigations, (and) a conflict resolution intervention . . .”<sup>4</sup> Then, based upon these findings the investigator concluded the record supported a finding that the Grievant and two other employees<sup>5</sup> had engaged in harassing conduct toward the complainant and the other employee identified as being harassed in the complaint because of age and in violation of Lottery policies and that these three employees had also engaged in harassing conduct toward the complainant in retaliation for his involvement in an investigation, in violation of Lottery policies.<sup>6</sup>

After receiving this report, the warehouse supervisor, stating that the Grievant had violated the Lottery’s Policy Prohibiting General Harassment, the Lottery Code of Conduct, and had “repeatedly engaged in inappropriate workplace behavior”, discharged the Grievant effective December 17, 2007. In the letter of discharge, the Grievant’s supervisor specifically cited the following as cause for discharge: “deliberately and repeatedly” placing “stacks of lottery tickets on the warehouse packing line in non-sequential order, making it difficult for a coworker to check the ticket stacks against the manifest”; providing an explanation for this behavior that “is not credible”; admitting that he “made disparaging and discriminatory remarks about two coworkers, including . . . referring to them as the ‘old white hairs,’ and ‘this

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<sup>4</sup> The investigator also stated that “an employee is experiencing physical symptoms” attributed to “work-related stress” as a finding of fact when, in fact, there was no evidence provided, other than a statement made by the complainant, which supported this finding.

<sup>5</sup> No finding was made toward a fourth employee since during the interviews with the investigator the complainant stated that this employee was not a subject of his complaint. (See footnote 1 of the investigator’s report.)

is Lottery daycare”); telling employees that “‘we don’t talk’ to a co-worker because of his involvement in an investigation”, and receiving a report by one co-worker that “they were reluctant to talk to this coworker because of concern that you would retaliate against them”.

The discharge was grieved on December 17, 2007 and was denied at all three steps of the grievance process. It is now before this Arbitrator.

***ARGUMENTS OF THE PARTIES:***

The Employer argues that this case is about “sabotage, harassment and retaliation” and declares that it has just cause to discharge the Grievant since there is ample evidence that he retaliated against and mistreated others; since he sabotaged an employee’s work by moving tickets out of sequential order on the packing line, and since the investigation it conducted showed he instigated a hostile behavior campaign against two co-workers. It adds that the Grievant was aware of its policies against harassment in the workplace and had been warned repeatedly that he needed to be a team worker and to cooperate with his supervisor to ensure a harassment free workplace. Specifically, it charges that the Grievant targeted two older employees and deliberately and intentionally belittled them by referring to them as “old white hairs” and saying that the lottery was a “day care”, and that he intentionally interfered with one of the employee’s ability to do his job accurately and efficiently.

The Union declares, however, that the Grievant was a “good and valued” employee who did not deserve to be terminated. As support for its position, it states that all of the Grievant’s performance reviews state he has valued skills and that while other employees have received reprimands and suspensions for misconduct the Grievant has not.

With respect to the specific charges against the Grievant, the Union argues that the Lottery has had a hostile work environment for a long time, as is evidenced by many investigations and employee complaints; that management has been aware of this fact for a significant period of time and that it has not addressed that issue. Further, addressing the sabotage charge, it declares that the Grievant gave a reasonable explanation for why the tickets were moved out of sequential order on October 10, 2007. And, finally, it charges It that the

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<sup>6</sup> In her findings, however, she concluded that the Grievant was the primary instigator while the other employees

complainant has instigated many incidents and is not guilt-free in the charges that led to the Grievant's discharge. As remedy, it seeks that the Grievant be reinstated with back pay and all benefits.

***DISCUSSION:***

The Employer argues that it has just cause to terminate the Grievant's employment since he harassed, retaliated and sabotaged the work of a co-worker. This Arbitrator and others generally hold that in order to establish just cause, an employer has the burden to prove that the employee engaged in the alleged misconduct; that the discipline imposed for that misconduct is commensurate with the seriousness of the offense, and that there are no mitigating factors that affect the reasonableness of the discipline imposed. In arriving at these findings, under most circumstances, many arbitrators, including this one, also require a finding of just cause to include procedures that dictate fair play.<sup>7</sup> This requirement is often described as due process and the degree to which it affects a finding of just cause depends upon the degree to which the employee has been denied the opportunity to timely respond to any accusations of wrongdoing; the opportunity to correct unacceptable behavior if there is a finding of unacceptable behavior and the extent to which the employer has applied its rules, orders and penalties even-handedly among its employees.

After reviewing the record in this dispute, it is concluded that the Employer failed to establish just cause to discharge Grievant primarily because of due process violations. Although some of the Grievant's conduct may have been unacceptable, the record establishes that none of the employees, including the Grievant, understood the type of conduct the Grievant and other employees had engaged in would lead to disciplinary action even though the Lottery's policies and the posted memos clearly stated so. It also establishes that the Grievant had no opportunity to address the allegations of misconduct on a timely basis and that he was given no opportunity to correct his behavior prior to being discharged. Further, the record indicates that

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simply "followed along".

<sup>7</sup> Some arbitrators apply the "seven tests" established by Carroll Daughterty while he was serving as a permanent umpire. Most do not but that does not mean that consideration is not given to the principles described in those tests.

the Employer treated the Grievant disparately when it decided to discharge the Grievant for his misconduct and issue letters of warning to other employees whose misconduct was similar.

Both in the interviews conducted as part of the investigation into harassment complaint filed by the complainant and testimony at hearing, all employees, except the complainant, confirmed that there has been a history of conflict in the warehouse for a number of years and that all of the employees, including the complainant and the Grievant, engage in criticizing each other's work performance; criticize their supervisor; decline to talk with each other socially, and engage in name calling.<sup>8</sup> They also confirm there have been a number of complaints and counter-complaints filed regarding employee conduct in the workplace, most of which resulted in no action being taken, and that there is tension and stress in the warehouse as a result of the activity and management's failure to correct it. Further, they confirm that the employees, seldom, if ever, take complaints to their supervisor because he fails to investigate and/or take action regarding complaints registered; because he tends to show favoritism toward certain employees, and because he cannot be trusted.

In addition, the record, as a whole, supports the assertions made by these employees. As evidenced by the May 9, 2005 memo posted by the warehouse supervisor, employees, including the Grievant, have been critical of each other over work performance and work assignments even before the complainant was hired. The record, through employee' admissions, indicates that several of them, including the complainant, do not talk to each other socially while at work and that they have opening criticized their supervisor whom they do not trust.<sup>9</sup> Further, while the complainant denies having ever engaged in name calling or inappropriate behavior, there is enough evidence in the record contradicting his denial to find his denial not credible.

In addition, the record shows that a number of employee complaints concerning conduct by other employees have been filed; that the supervisor failed to investigate the complaint at the time it was made, and that, ultimately, in almost all instances, no action was

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<sup>8</sup> Although the investigator stated only that some employees engaged in these activities, a review of all of the interviews indicates all of the employees engage in these activities, some to a greater extent and some to a lesser extent.

<sup>9</sup> At least two employees stated they believed the supervisor had lied to them and others credibly testified they found him to show favoritism and to be ineffectual in handling their complaints.

taken to address the complaints. This finding does not ignore the fact that the supervisor posted notices on May 9, 2005 and March 16, 2007 intended to address employee complaints. The problem with these notices is that although they advise employees that they are expected to treat each other with courtesy and respect and that failure to do so will result in disciplinary action and that DOER will evaluate the light levels and that the radio rules have been updated, there is no evidence that the posted notices were enforced. Not only is there is no evidence in the record that employees have been disciplined for failing to comply with the posted notices but there is evidence that the conduct complained of prior to the postings and addressed by the postings continued after the notices were posted.

The lack of supervision in the warehouse and management's failure to take action when complaints are made, together with constant criticisms of each other among the employees, has created a work environment that is not only an unpleasant place to work but which allows employees to be discourteous to each other; to show little respect for each other, and to quarrel over working conditions. In addition, it sends a message that this conduct is acceptable despite policies and notices stating otherwise. Further, evidence that the supervisor shows favoritism toward the two older employees in the warehouse does nothing more than increase employee distrust of each other and encourage inappropriate exchanges among the employees. Given this environment, it cannot be concluded that the Grievant, who acted no differently than his co-workers, should be disciplined for having "made disparaging and discriminatory remarks about two co-workers" even if the comments he made were inappropriate and boorish since these remarks and others like it have been tolerated by management.

Of equal concern, is the fact that the Grievant was denied a timely opportunity to respond to the allegations and to marshal any defenses, if there were some, to challenge the allegations. Many of them date back nearly two years and there is no evidence as to when the incidents cited by the Employer as cause for the Grievant's termination occurred or how often they occurred. Further, the Employer, relying solely upon a surveillance video and the investigator's report and without evidence to support its conclusion, decided that the Grievant had sabotaged the complainant's work performance on October 10, 2007 without investigating the incident at the time it occurred or giving the Grievant an opportunity to explain his actions

that day. This lack of a fair and complete investigation, even though a consultant was hired to conduct an investigation into the allegations, is a strong indication that the supervisor had concluded that the Grievant was guilty as charged which violates the concept of fair play and fails to establish just cause.

Evidence of this foregone conclusion is demonstrated by the lack of specificity in the formal complaint; the willingness to accept that specificity and the lack of evidence to corroborate the charge of harassment and sabotage. The formal complaint filed by the complainant on October 5, 2007 directed the complainant to provide specific names, places, dates and times regarding the alleged harassing conduct on the form. In response, the complainant attached a total of thirty pages, some of which were duplicative, to the form and wrote in "See attached paperwork." The attached paperwork consisted of handwritten notes made by the complainant; a typewritten version of the handwritten notes; e-mails exchanged between the complainant and his supervisor; handwritten notes of a meeting between the complainant and his supervisor taken by the supervisor; a newspaper article written about Red Lake tribal leaders filing a formal complaint with a radio station; a picking summary dated 8/28/07; notes on a bill of lading, and a manifest dated 6/10/06.<sup>10</sup> In addition, many of the notes were nothing more than generalizations and assumptions and most of them did not describe incidents in any detail that would allow a finding of harassing conduct that violates the Lottery's policy on general harassment.<sup>11</sup>

Without seeking to establish when the incidents occurred; under what conditions they occurred, and whether there were any witnesses to the corroborate the allegations, the

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<sup>10</sup> One must seriously question why the Employer was willing to accept this complaint as a valid complaint since it not only lacked specificity but since many of the charges dated back nearly two years, particularly since the Lottery's policy clearly require an employee to make an effort to resolve the problem when it occurs first by talking to the responsible party and then, if it remains unresolved, by talking with the supervisor, the division director or Human Resources. While the complainant asserts he talked with his supervisor at one point in time about his complaints it is clear that he chose to take matters into his own hands since he believed his supervisor had mishandled one of his complaints. It is not the complainant's responsibility to take matters into his own hands and simply file a complaint when he has accumulated what he believes to be enough allegations of misconduct.

<sup>11</sup> The Lottery's policy on general harassment and its Code of Conduct defines general harassment, among other things, as repeated behavior, verbally or otherwise, that is insulting, demeaning, belittling or disparaging that has the purpose or effect of interfering with that employee's performance. Based upon this definition, a claim of harassment requires that the complaining party be subjected to a repeated pattern of unwelcome verbal or physical contact or to conduct that has the purpose or effect of unreasonably interfering with that employee's performance. In the complaint that was filed the complainant provided little evidence of repeated behavior that occurred frequently enough to establish a pattern of harassing conduct.

investigator made several findings and drew several conclusions which indicate that the investigator was predisposed to finding the Grievant and the other employees identified by the complainant guilty of harassing the complainant and the other employee identified by the complainant in the complaint as being harassed. Her findings and conclusions, some of which were not completely accurate, also indicate that she was willing to conclude that the Grievant was the primary instigator and that he had sabotaged the complaint's work performance on October 10, 2007.

An example of this is the investigator's finding that the Grievant and two other employees engaged in harassing conduct when reference to "white hairs" or "grey hairs", it is unclear which term was used, and referred to the Lottery as a "day care" was made. While all involved admit these terms were made, the investigator made no effort to determine when the remarks were made; under what circumstances they were made, how often they had been made and to whom they were addressed. Instead, she relied solely upon the complainant's assertion that the mere use of these terms was proof that he was being harassed. Another example is the investigator's finding that the Grievant and the two other employees engaged in retaliatory conduct by not talking to the complainant and saying they do not talk to him even though her record clearly establishes that none of the employees, including the complainant, talk to all of the other employees and that several employees stated they did not talk to the complainant because they do not trust him. From the record, it appears this finding was based upon one of the new hire's assertions that she had been told by the Grievant and the other long-term employees that they don't talk to the complainant because of something he had done earlier. The assumption, based upon the complainant's assertion, was that the "something" was his involvement in an investigation that led to another employee's termination. While that may have been the fact, no effort to determine the accuracy of the complainant's assertion was made and statements to the fact that those who had stated they did not talk to the complainant because they did not trust him were completely ignored. Yet another example is the investigator's conclusion that the Grievant intentionally made it difficult for the complainant to efficiently check ticket packets against the manifest when he placed some stacks of tickets on the packing line in non-sequential order on October 10, 2007. A lengthy review of the surveillance video does not support that conclusion. Instead, it shows

that even though some packets were not in sequential order, the complainant had little trouble finding the numbers on the manifest and that there were still times when he stood and waited for packets, a clear indication that the Grievant's actions did not actually affect the

complainant's work performance.<sup>12</sup> These findings, together with the Employer's reliance upon them indicate that the Grievant was denied a fair and thorough investigation.

Even if these due process violations were not sufficient reason to find that the Employer failed to establish just cause to terminate the Grievant, the Employer also failed to establish just cause to terminate him by failing to take corrective action earlier if it believed the Grievant's behavior had been inappropriate workplace behavior; by failing to show that the Grievant's alleged misconduct was serious enough to warrant immediate discharge and by imposing harsher discipline on the Grievant than it did on the two other employees found guilty of similar misconduct. A review of the Lottery's policies and its collective bargaining agreement indicate that the parties have agreed that disciplinary action is meant to be corrective and that progressive disciplinary steps shall be taken unless the wrongdoing is serious enough to merit immediate discharge. This concept is also generally endorsed by arbitrators who believe progressive discipline is a way to bring about change in an employee's behavior and that termination should be reserved only for those guilty of serious offenses and those who, through progressive discipline steps, incurred increasingly stiffer penalties without being rehabilitated. For the employee, this process opens the door to rehabilitation and the opportunity to continue to be employed. For the employer, it allows the employer to recoup the cost invested in an employee's training and skill development and to avoid the additional cost of hiring and training replacement personnel. In this dispute, however, despite the parties' intent as expressed in the Lottery policies and Article 16 of the collective bargaining agreement, no corrective action was taken and the Grievant was discharged even though he had no record of

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<sup>12</sup> There are several more examples of slightly incorrect conclusions that could be cited but rather than refer to them in detail, suffice it to say that she used words such as "some employees" when the record indicates it is "all employees", that she referred to "an employee" rather than "the complainant" when concluding he is experiencing physical symptoms which he attributes to work-related stress; that no evidence to support that assertion was requested, and that she stated that the Grievant specifically told "employees" not "an employee" that he does not talk to the complainant because of his involvement in another investigation even though the reason was only cited by the complainant and never established through any other interview.

prior discipline and there was no showing that the Grievant's behavior was so egregious that it warranted discharge.

Further, without a showing that the Grievant's behavior was any more egregious than the conduct of at least two other employees against whom the complaint was lodged, the Employer unreasonably decided to terminate the Grievant and issue the other two employees a letter of warning. It is assumed this decision was made based upon the investigator's unproven conclusion that the Grievant was the instigator and that the other two employees were merely "followers". Since there is no proof that the Grievant was the instigator, merely louder, it is unreasonable to imposed harsher discipline upon the Grievant and issue lesser discipline to other employees found guilty of the same misconduct. Misconduct is misconduct and if the degree of misconduct is the same, the Employer is obligated to treat its employees fairly by imposing the same degree of discipline.

Accordingly, based upon the record, the arguments and the discussion above, it is concluded that the Employer did not have just cause to terminate the Grievant and that its due process violations are serious enough to overturn all disciplinary action taken against the Grievant that is related to this claim. Based upon these findings, the following award is issued.

**AWARD**

The grievance is sustained. The State is ordered to reinstate the Grievant and to make him whole for any wages and benefits lost between the time he was discharged and the time he is reinstated. The Arbitrator will retain jurisdiction for the purposes of resolving any disputes over implementation of this remedy.

By:   
Sharon K. Imes, Arbitrator

November 25, 2008  
SKI