

**IN THE MATTER OF ARBITRATION  
BETWEEN**

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**MINNESOTA GOVERNMENT  
ENGINEERS COUNCIL,**

**Union,**

**and**

**STATE OF MINNESOTA, DEPARTMENT  
OF TRANSPORTATION,**

**Employer**

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**ARBITRATION DECISION  
AND AWARD**

(Discipline and Discharge)

Arbitrator:	Andrea Mitau Kircher
Date and Place of Hearing:	January 22-23, 2009
Date Record Closed:	January 23, 2009
Date of Decision:	March 17, 2009

**APPEARANCES**

For the Union:  
Dana Wheeler  
MGEC Executive Director  
475 Etna Street, Suite 11  
St. Paul, MN 55106-5845

For the Employer:  
James Jorstad  
Labor Relations Representative  
Minnesota Management and Budget  
658 Cedar Street  
St. Paul, MN 55155-1603

**INTRODUCTION**

The State of Minnesota (“Employer”) and the Minnesota Government Engineers Council (“Union” or “Council”) are signatories to a collective bargaining agreement (“Contract”) that covers certain employees employed by the Minnesota Department of Transportation (“MNDOT” or

Department), including the Grievant. MNDOT disciplined and discharged the Grievant during November and December 2007, as set out below. The Union grieved these disciplinary actions. The parties duly selected me as the arbitrator to hear and decide the Grievant's five-day suspension and discharge grievances. On January 16, 2009, after a hearing on procedural disputes, I issued a written opinion that the Council's appeal to arbitration was timely.

On January 22-23, 2009, the parties and their witnesses participated in an evidentiary hearing at the Arden Hills Training Center of the Minnesota Department of Transportation ("MDOT" or "Agency"). During the hearing, the Arbitrator received exhibits, and witnesses testified under oath, subject to cross-examination. After the hearing, the parties chose not to submit written briefs, but to make an oral summation of their cases. The record closed on January 23, 2009. The parties graciously agreed to authorize extra time for completion of this opinion due to a death in the Arbitrator's family.

### **ISSUES**

1. Did the Employer violate Article 14 when it suspended the Grievant for five days?
2. Did the Employer violate Article 14 when it discharged the Grievant from employment?
3. If so, what remedy is appropriate?

### **RELEVANT CONTRACT PROVISIONS**

#### Article 14 - DISCIPLINE AND DISCHARGE

Section 1. Purpose. Disciplinary action may be imposed on employees with permanent status only for just cause.

Section 2. Disciplinary Action.

A. Discipline shall include only the following:

- ...
- 3. Suspension (Paid or unpaid)
- ...
- 5. Discharge

## FACTS

The Grievant was hired as a Senior Engineer by MDOT on or about October 5, 1998. By a letter dated November 26, 2007, MNDOT suspended him for five days without pay and later, by a letter dated December 26, 2007, MNDOT sent him a notice of intent to discharge. The Union duly grieved these disciplinary actions.<sup>1</sup>

At the time of the disciplinary actions, the Grievant's job was to serve as a project manager for MNDOT. According to a document sent to all project managers in 2005,<sup>2</sup> the job requires a high degree of leadership skill as well as technical skill and "systems thinking". The project manager is to direct and coordinate development of projects with multiple groups of people and effectively communicate with them. The project manager is the focal point of project development and must be accessible, reliable, and trustworthy and "remain calm in all situations".<sup>3</sup>

The suspension and discharge originated with a request from an upper level MNDOT manager, Valerie Svensson, to the Human Resources Division to investigate conduct she deemed unacceptable. The conduct included allegations that the Grievant had done the following:

- Instructed a facilities employee to remove a keyboard tray from a cubicle occupied by another employee
  - Failed to follow instructions to clean up and remove five large bags of old pop cans from his previous work cubicle
  - Downloaded unauthorized software and files to his computer
  - Failed to accurately or properly record his work time
  - Slept during a meeting on June 20, 2007
  - Made inappropriate comments to Val Svensson on June 21, 2007.
- Employer Ex. 4.

Ms. Svensson stated that on June 20, 2007, the Grievant slept through a project manager's meeting, and on June 21, he lost his temper in a meeting with her. That meeting was to review a supervisor's decision to deny the Grievant a pay increase based on work performance (the subject

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<sup>1</sup> For further discussion of procedures, *see*, State of Minnesota and MGEC, (Kircher, Jan 16, 2009)

<sup>2</sup> Employer Ex. 34.

<sup>3</sup> Employer's Ex. 34.

of another grievance). At that meeting, the Grievant became frustrated and raised his voice with Ms. Svensson, telling her he was “tired of this shit, you never intended on giving me a raise!” He pointed his finger at Ms. Svensson and accused her of abusing her power.<sup>4</sup> MGEC Business Representative Dana Wheeler, also present, stood up quickly, told the Grievant to stop talking, and ushered him out of the office.<sup>5</sup>

The allegation of computer misuse cited above stemmed from actions taken while Josephine Lundquist was supervising the Grievant. On Jan 31, 2006, she wrote to the Grievant that he must remove his personal files from the Department’s network within two weeks.<sup>6</sup> She made sure that the Grievant had received various MNDOT policies concerning computer use. Yet, in February 2007, Ms. Lundquist received notice from Department computer specialists that the Grievant had a “great deal of unauthorized software on his machine” and that he had asked for special access to additional computer software that he was not authorized to use. There were over 100 employees in the Design group including the Grievant and the MIS employees stated he alone was using over 10% of the division’s entire space on the computer system.<sup>7</sup> The Grievant failed to follow the explicit policies of MNDOT regarding use of the Department’s computer and additionally failed to follow the directions of his supervisor in a timely fashion.

Ms. Lundquist wrote the Grievant a “Letter of Expectations” on February 12, 2007, to draw the Grievant’s attention to expectations of improvement concerning excessive absences and regular tardiness. These matters had been brought to his attention during his performance review in August 2006, and had “gotten progressively worse since then.”<sup>8</sup> At the hearing, the Employer furnished substantial evidence of the Grievant’s lack of progress in this area both before and after this memo.

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<sup>4</sup> Er. Ex. 39

<sup>5</sup> *Id.*

<sup>6</sup> Employer Ex. 22.

<sup>7</sup> Employer’s ex. 23 and 24.

<sup>8</sup> Employer’s Ex. 25

The Grievant's time records did not correspond with his calendar records as to the specific tasks he was working on. This was an important consideration for MNDOT because bids for future construction work were based on the time spent on earlier comparable projects. The Grievant had been repeatedly told to keep his GroupWise calendar current.

The incidents involving the keyboard tray and the bags of empty pop cans created much argument, but the ultimate facts are undisputed. The Grievant left bags of pop cans in a previous office space when he moved to a new unit and despite a supervisory request, did not remove them promptly. The keyboard computer tray incident involved a specially designed computer tray, which was similar to the one the Grievant had previously been assigned. The Grievant directed that one be moved to his computer from another cubicle without supervisory permission.

In August 2007, Human Resources professional, Sue Brenner, began the investigation that led to the five-day suspension, concluding with a report dated October 12, 2007. Ms. Brenner interviewed the Grievant and six other witnesses; she reviewed documents and concluded that the above incidents occurred. She investigated each of these incidents as if they were all equally significant, and concluded, "Mr. \_\_\_\_ exercised poor judgment and disregarded established work rules, policies and procedures because he did not believe they were applicable to him."<sup>9</sup> His explanations of these various incidents did nothing to persuade her that the Grievant should not be held accountable for this misconduct.

After the Brenner investigation, Glen Ellis, District Design Engineer, signed a memo to the Grievant dated November 29, 2007, notifying him that the Department intended to impose a five-day unpaid suspension because of the conduct described above. Consistent with the Contract, Mr. Ellis attempted to deliver this document to the Grievant personally on November 29. He notified the Grievant by e-mail of the meeting, directing him to come. He also notified the Grievant that he

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<sup>9</sup> Employer Ex. 4.

would schedule another meeting the next day when his Union representative would be available, at which all of them would be able to discuss the proposed suspension and hear the Grievant's side of the story.

Mike Herman, who began supervising the Grievant in May 2007, directed him to come to the meeting. Mr. Herman was aware of the Grievants' anxiety in this kind of situation. Supervisor Herman wrote a note to the Grievant before the meeting, because he knew the Grievant would not want to attend. He testified that he meant the note as friendly advice:

Larry, this is my advice to you concerning the meeting this afternoon.

The meeting is only to notify you of the findings of the investigation. The people in attendance cannot do anything about the findings. It will do you no good to argue about the findings. Please refrain from any discussion at this meeting. The meeting scheduled tomorrow is your opportunity to discuss, challenge, negotiate the findings. Do not use the meeting this afternoon to challenge the findings.

I saw some of the incidents occur that you are being reprimanded for when you first were assigned to me. I have not seen much recurrence of these incidents lately. I have supported you in your assignments and will support you when I can with others in the department. My advice to you is to bite the bullet and accept the findings so you can put all these issues behind you and move on.

Do not use the meeting this afternoon to show your frustration.

Employer Exhibit 33.

This advice upset the Grievant. He believed (incorrectly) that he was entitled to a Union representative at the meeting on the 29<sup>th</sup> as well as the meeting on the 30<sup>th</sup>, and he refused to attend a meeting without his Union representative. He believed it was disrespectful for Mr. Herman to insist he attend a meeting at which he could not defend himself. Mr. Herman went to the Grievant's workspace and asked him to attend the meeting. Supervisor Herman told the Grievant that this was an order. the Grievant refused to attend, and Mr. Herman conveyed this information to Mr. Ellis, who was waiting downstairs to convene the meeting. Mr. Ellis sent Mr. Herman

upstairs again to direct the Grievant to the meeting with no result. Supervisor Herman directed the Grievant to attend and told him that failure to do so could result in further discipline. When the Grievant still refused to attend the meeting, Mr. Ellis sent Mr. Herman back with Keith Jacobson, an employee with security guard experience. Finally, Mr. Herman, Mr. Ellis and Mr. Jacobson decided to suspend the Grievant immediately and called the police to escort the Grievant from the building. By then, the Grievant was quite upset and became loud and intimidating according to several witnesses. The police escorted him from the building.

Mr. Herman stated that he had felt “a little threatened” by the Grievant’s conduct: “I have seen him get upset before. I saw him get mad at a printer and kick it around. I never saw him strike a person. I heard him say some things that might be considered threatening.”<sup>10</sup>

More than one person testified that when the Grievant became angry with others he shouted, got red in the face, and acted threatening. Mr. Jacobson testified that at the hearing on November 30, he was directed to stand outside the room, and he could hear that the Grievant was loud, confrontational, upset and aggressive. The day before the hearing when the Grievant refused to meet with Mr. Ellis, other employees in the vicinity testified that the Grievant was shouting before the police came, and they wondered what was going on.<sup>11</sup>

After another Human Resources Department investigation of the November 29 incident where the Grievant refused to meet with his superiors, MNDOT issued a notice of intent to discharge on December 26, 2007. MNDOT discharged the Grievant for his belligerent refusal to come to the meeting on November 29 with his manager.

At the time of his discharge, the Grievant’s previous disciplinary record included two written warnings in the previous year. One, dated February 5, 2007, was for sleeping during a

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<sup>10</sup> Testimony, Mike Herman.

<sup>11</sup> Employer Ex. 4.

manager's meeting in October 2006, which may have been attributable to side effects of medication. The other warning, dated January 24, 2007, was for calling other employees names and making disparaging remarks by e-mail about them in connection with an incident where they encouraged him to step into an elevator when it was resting somewhat below the floor level, and the co-workers laughed at him when he stumbled.

### **EMPLOYER POSITION**

The Employer argues that for a multitude of reasons, both these disciplinary actions are justified. The Employer claims that when an employee is frequently tardy, does not follow instructions, sleeps during meetings, makes inappropriate comments to or shouts at a manager, there is just cause for a 5-day suspension.

The Employer further alleges that the Grievant refused to attend the November 29 disciplinary meeting when directed to attend by his manager and his supervisor; that the Grievant became angry, loud, agitated and argumentative and was disruptive to the work unit; that he had sufficient notice that such behavior was unacceptable; and that this behavior constituted just cause for discharge.

### **UNION POSITION**

The Union essentially argues that although many of the facts alleged occurred, that the incidents set out as reasons for the five-day suspension were minor problems, and that extenuating circumstances should excuse the Grievant's conduct. On November 29 when the facts leading to the discharge occurred, the Union points out that the Grievant believed he was entitled to a Union representative at the meeting where he was to receive the written suspension document, and that Supervisor Herman's note suggesting that the Grievant should not speak at the meeting was confusing and disrespectful. Further, the Union argues, nothing about the Grievant's previous

conduct gave the Employer reason to suppose the Grievant would become violent; calling the police to accompany him to the door was unnecessary, publicly embarrassing, and distressing. The Union argues that the Employer unfairly targeted and harassed the Grievant, and that it has not established just cause for either disciplinary action.

### **DISCUSSION AND OPINION**

This discussion will focus first on the issue of just cause for termination. Article 14, Section 5 provides that MNDOT shall not discharge any permanent employee without just cause. Thus, MNDOT has the burden of establishing that when it discharged the Grievant, it acted in a fair and reasonable manner. The Employer terminated the Grievant because he was either unable or unwilling to comply with the conduct expected in the workplace. The final instance of this conduct was his refusal to obey the directions of his manager and supervisor to attend a disciplinary meeting.

#### **A. Insubordination.**

One of the general rules of the workplace is that an employee must take direction from his supervisor. Failure to do so is insubordination. If an employee believes that a supervisor's direction violates the bargaining agreement, the proper response is to obey the order and discuss it later pursuant to the grievance article of the contract. This is known as the "work now, grieve later" rule. Without such a general rule, arbitrators have concluded that a workplace would come to resemble a "debating society"<sup>12</sup> and the work of the business could grind to a standstill.<sup>13</sup> The Employer's burden of proof in a case of insubordination may be described as:

...the employer case would include showing the order was explicit, reasonable, work related and communicated. The employer would also have to make some showing that

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<sup>12</sup> 3 LA 779, 780-81 (Shulman, 1994)

<sup>13</sup> This general rule is subject to a number of exceptions. *See, i.e. Discipline and Discharge in Arbitration*, ed. Norman Brand, BNA, (1998), at 159-167. The Union does not argue that any of these exceptions apply.

the disobedience of a superior's order was willful and that the employee knew or should have known the consequences.<sup>14</sup>

The Employer provided evidence to meet these criteria. The Employer directed the Grievant to attend the November 29 meeting explicitly. It was a reasonable, work related order. Supervisor Herman told him that refusal to go to the meeting could result in further disciplinary action. He also made it clear that nothing would be accomplished by arguing at this meeting, and that the Grievant and his Union representative would be able to meet with the same people the next day. The Grievant refused in a loud and agitated manner to go to the meeting. By doing so, he violated the "work now, grieve later" rule. The Employer established that the Grievant's action was insubordinate and that he should face disciplinary action for his refusal to attend the meeting.

#### B. The Grievant's Work History

The Employer's discharge letter states in pertinent part:

...you have been disciplined and put on notice for your inappropriate behaviors and poor performance in the past and there has been no improvement in either your conduct or your job performance. You continue to exercise poor judgment and your refusal of a direct order to attend a meeting because you did not feel you had to without union representation on November 29, 2007 showed a total disregard to your supervisors and managers.

The Employer made significant efforts to change the Grievant's workplace conduct early in his employment. By a "letter of expectation" dated October 23, 2001, supervisor Leonard Sandstrom, informed the Grievant that his behavior toward other MNDOT employees was "disrespectful, loud and threatening".<sup>15</sup> He directed the Grievant to attend anger management training, among other things.<sup>16</sup> Even after completing the required four individual sessions with a psychologist, the Grievant did not understand that his conduct needed to be changed. Instead, he

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<sup>14</sup> Discipline and Discharge in Arbitration, N. Brand, ed., BNA, (1998). at 168.

<sup>15</sup> Employer Ex. 17

<sup>16</sup> Employer Ex. 17.

told the staff psychologist that the employer was unfairly harassing him,<sup>17</sup> and that anger management training was being “used as a tool intended to intimidate him”<sup>18</sup>. Less than a year later, by a memo dated October 1, 2002, Mr. Sandstrom again notified the Grievant that he had failed to follow specific instructions, had failed to treat others with dignity and respect, and specifically, had raised his voice in response to Mr. Sandstrom. In an additional warning, Manager Glen Ellis issued a written reprimand to the Grievant dated January 6, 2003, for writing derogatory and allegedly defamatory comments about his supervisor and leaving it where others could read it.<sup>19</sup>

These early actions, though not considered evidence of progressive discipline because they took place years ago, are evidence that MNDOT had notified the Grievant that he must not raise his voice toward supervisors or writing derogatory comments about them. These documents are also evidence of a pattern of inappropriate conduct.

During the years of 2004 and part of 2005, the Grievant was absent from the workplace on various medical leaves.<sup>20</sup> When he felt ready to return to work, MNDOT was not eager to reinstate him, and a dispute ensued concerning whether the Grievant could meet the essential requirements of his job. He was eventually returned to work in November 2005.

From November 2005 until May 2007, the Grievant was assigned to a different supervisor, Josephine Lundquist. Ms. Lundquist, a Principal Engineer, was an experienced manager<sup>21</sup> supervising 22 employees six of whom were managers themselves. The Grievant stated that when he first met his new supervisor, Ms. Lundquist, she said, “I hear you are a bad employee.”<sup>22</sup> Ms.

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<sup>17</sup> MGEC Opening Statement.

<sup>18</sup> Letter from D. Curry, Staff Psychologist to L. Sandstrom, February 28, 2002. Employer Ex. 18.

<sup>19</sup> Employer’s Ex. 40.

<sup>20</sup> Grievant’s Statement, page 3.

<sup>21</sup> Ms. Lundquist had been supervising a number of managers for 12 years at MNDOT.

<sup>22</sup> Grievant’s hearing statement,

Lundquist denied making this statement. On this matter, I found Ms. Lundquist the more believable. She had no apparent animus toward the Grievant, and it is unlikely that an experienced manager would begin a new relationship with any employee in this way. It is more likely that the Grievant's admitted feelings of anxiety and lack of support contributed to a misunderstanding.

Ms. Lundquist found that supervising the Grievant was a time consuming project. He was not self directed and had some poor work habits including repeated and unplanned absences from the office. Ms. Lundquist estimated that she was spending about 30 percent of her time overseeing the Grievant and his work.

The Grievant did not so much dispute the facts as attribute them to causes beyond his control. He believed that his managers hated him and were trying to get rid of him.<sup>23</sup> As evidence of this, he described two previous occasions where the employer did not attempt to assist him after his 14-month leave of absence, and instead terminated his employment. Eventually, these terminations were resolved in his favor and he returned to the Department in November of 2005. Nonetheless, he continued to react to supervisory authority in surprising ways. For example, in October 2007, when his supervisor denied his request to attend additional training on the grounds of budgetary considerations, he responded by e-mail to Sue Mulvihill, Metro District manager, by advising her that this denial of his request was essentially unfair and unreasonable:

For the past six years I have been harassed, lied to, threatened, and because of hatred [*sic*] directed toward me denied twice my step increases. Enough is enough. I want you to investigate this training situation and make sure it never happens again.<sup>24</sup>

He also accused Manager Svensson of unfair behavior, claiming she had once raised her voice and pointed her finger at him when advising him that he was never to take another employee's keyboard tray. Whether or not Ms. Svensson raised her voice (which she denied), it is instructive

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<sup>23</sup> Testimony and Statement of Grievant.

<sup>24</sup> E-mail memo from Susan Mulvihill to Grievant dated Oct. 17, 2007 and his reply. Originally part of Union Ex., labeled 343. Introduced through Employer.

that the Grievant saw no difference in their positions. At the hearing, he argued that it was not fair that she could yell at him and he couldn't yell at her. Another example of his lack of clarity about supervisory authority occurred on November 29, 2007, when he argued that he would rather not attend the disciplinary meeting and that he would attend the November 30 meeting instead. Yet, when questioned, he did not recall every refusing an order in all the eight years he worked at MNDOT.

On January 24, 2007, Val Svensson signed a written reprimand to the Grievant for sending electronic communications including "name calling and disparaging remarks" to other employees regarding the "elevator incident" (described above). She advised him that he had six months to correct his behavior problems and warned of further disciplinary action.<sup>25</sup> The Grievant's pattern of behavior did not change within that time. In fact, by June of that year the Grievant had slept through another manager's meeting and lost his temper in a meeting with Ms. Svensson, shouting at her about her alleged abuse of power, and telling her that he was tired of "this shit".<sup>26</sup>

The Grievant left the impression in numerous encounters with his supervisors and at the hearing that through no fault of his own, terrible things kept happening in his workplace that were not within his control to change. He asked to be left alone to do his work in peace. Unfortunately, MNDOT is a large, bureaucratic organization where employees are subject to many rules, regulations and contract provisions. The Project Manager position requires well-developed communication skills, the ability to work as part of a team, independent planning and follow-up, reliability, accessibility and calm demeanor, as well as an attention to lines of authority.<sup>27</sup> The Employer has established that disciplining the Grievant was reasonable because his conduct did not improve and he bore responsibility for meeting workplace expectations.

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<sup>25</sup> Employer Ex. 35.

<sup>26</sup> Employer Ex. 39

<sup>27</sup> Employer Ex. 34.

C. Appropriate Penalty.

Just cause requires that the Employer prove that it has acted within the boundaries of workplace due process. One of the elements of due process is that the Employer should impose discipline in a timely manner. This tends to encourage early settlement of disputes without the need for arbitration. In addition, unreasonable delay subjects employees to suspense or uncertainty damaging workplace morale.<sup>28</sup> The Union raises a good argument when it claims that processing disciplinary actions was exceedingly slow. One written reprimand for sleeping during a project manager's meeting on October 26, 2006 is dated four months later. This delay is confusing and inexplicable. In addition, the investigation upon which the Employer based the five-day suspension took five months to conclude. This investigation was a more extensive effort, with interviews of seven people and many documents to review. The investigator interviewed the Grievant August 30, 2007. She told him the purpose of the interview. The investigator interviewed various other witnesses in October. She stated that the delay was caused by the collapse of the 35W Bridge in August of that year, which had overburdened the Department. This was not contradicted. Because the Grievant knew of the allegations at least by August and because of the possibility that the bridge crisis caused delay, the five-day suspension will stand despite the length of time it took to complete the investigation.

Further, the Union claims that bundling up six misdeeds into a five-day suspension is an unfair method of trying to correct the Grievant's behavior. He should have been advised of each problem as it occurred. The Grievant was told that each incident was unacceptable and change was necessary at the time they occurred. Even though each of the misdeeds standing alone does not constitute grounds for major disciplinary action, taken together, the Employer has established a pattern of behavior. The Employer has succeeded in painting a picture of an

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<sup>28</sup> See, Brand, *supra* at 37-38.

employee who is unable or unwilling to recognize the role of the supervisor, to take direction, and to avoid abusive language and distraught behavior. The Grievant's ability to follow rules and cooperate with others appears limited.

As to progressive discipline, the Employer has made sufficient efforts to rehabilitate this employee. His pattern of workplace misconduct has not improved over the years despite the Employer's efforts to find a compatible supervisor and despite one or more referral(s) to anger management training; evidence establishes that there were meetings, formal and informal, to review and explain the conduct that needed to be changed. The written reprimand for abusive language toward other employees (January 24, 2007) and the five-day suspension include incidents of inappropriate conduct and communication with others, similar to the allegations of the discharge. The Employer established that the Grievant was discharged for insubordination and inability to control his loud, distraught reaction to the directions of a supervisor on November 29, 2007. Even if shouting at your supervisor and refusing to go to a meeting were not obviously inappropriate conduct, the Grievant was on notice for a number of years that this type of workplace behavior was unacceptable. On these facts, there is just cause for discharge.

### **AWARD**

The Grievances are denied.

Dated: March 17, 2009

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Andrea Mitau Kircher  
Arbitrator