BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between	
STATE OF MINNESOTA DEPARTMENT OF REVENUE	**Employer Case No. 2010-0119**
	Association Case No. 09-8-5394
and	**Grievant:**
	Arbitrator: Sharon K. Imes
MINNESOTA ASSOCIATION OF PROFESSIONAL EMPLOYEES (MAPE)	

APPEARANCES:

Rebecca Wodziak, Principal Labor Relations Representative, Minnesota Management and Budget (MMB), appearing on behalf of the State of Minnesota Department of Revenue.

Kathy Fodness, Business Agent, Minnesota Association of Professional Employees (MAPE), appearing on behalf of MAPE and the Grievant.

JURISDICTION:

The State of Minnesota and its Department of Revenue, referred to herein as the Employer or the Department, and Minnesota Association of Professional Employees, referred to herein as the Union or MAPE, are parties to a collective bargaining agreement effective July 1, 2009 thru June 30, 2011 which is automatically renewed from biennium to biennium thereafter unless either party gives notice of a desire to modify the agreement in accord with Article 34 of the collective bargaining agreement. Under this agreement, the undersigned was selected to decide a dispute that has occurred between them. Hearing was held on June 4, 2010 in St. Paul, Minnesota. The parties, both present, were afforded full opportunity to be heard. The hearing was closed with oral arguments and the matter is now ready for determination.

STATEMENT OF THE ISSUE:

Did the Employer have just cause to discharge the Grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE 4
NON-DISCRIMINATION

Section 1. Pledge Against Discrimination. The provisions of this Agreement shall be applied equally to all employees in the bargaining unit without discrimination as to sex, marital status, sexual preference/orientation (including having or being perceived as having a self image or identify not traditionally associated with one's biological maleness or femaleness), race, color, creed, religion, disability, national origin, veterans status for all eligible veterans, current or former public assistance recipient status, political affiliation, age or as defined by statute. The Association shall share equally with the Appointing Authority the responsibility for applying this provision of the Agreement.

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ARTICLE 8
DISCIPLINE AND DISCHARGE

Section 1. Purpose: Disciplinary action 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

If the Appointing Authority has reason to reprimand an employee, it shall be done in such a manner that will not embarrass the employee before other employees, supervisors, or the public. Oral reprimands shall be identified as such to the employee.

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 and the Association in writing of the specific reason(s) for such action.

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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. The Appointing Authority shall notify the employee that he/she may request an opportunity to hear an explanation of the evidence against him/her and to present his/her side of the story and is entitled to

Association representation at such meeting. 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 his/her normal pay status during the time between the notice of discharge and the expiration of the meeting. However, if the employee for any reason was not in pay status at the time of the notice of discharge, this shall not apply. All employees, no matter if they are in or out of pay status at the time they received notice of discharge, shall be in pay status for the actual time they spend in the above-mentioned meeting.

The Association shall have the right to take up a discharge at the second step of the Grievance Procedure and the matter shall be handled in accordance with this procedure, if so requested by the Association.

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.

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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.

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Section 3. Procedure.

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Arbitration Panel. The arbitration proceeding shall be conducted by an Arbitrator to be selected by lot from a permanent panel of six (6) Arbitrators. . . . .

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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ARTICLE 28
WORK RULES

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. . . . .

OTHER RELVANT DOCUMENTS:

Minnesota Department of Revenue Code of Conduct
Achieving Compliance With the Tax Laws

INTRODUCTION

Our mission is to achieve compliance with the tax laws of Minnesota. To accomplish that we must gain the public's confidence in our competence and integrity. Thus, state employees must act according to the highest ethical standards. As employees of the State of Minnesota and the Department of Revenue particularly, employees must understand what is expected of them regarding their obligations to the state and their relationships with co-workers and the citizens of Minnesota. The *Code of Conduct* outlines those responsibilities.

POLICY STATEMENT

The *Code of Conduct* applies to all Minnesota Department of Revenue employees. **. . .**

As an employee, you are individually responsible for complying with this Code and must avoid all conduct that is, or could be see as, inappropriate or as a conflict of interest. **. . .**

In general, your supervisor is responsible for making this information available to you and advising you about it. However, you are *also subject to Minnesota law* (see Statues Appendix) *and other requirements*, such as the state alcohol and drug policy and the Revenue Department's policy on violence. It is your responsibility to familiarize yourself with these policies.

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CONFLICTS OF INTEREST

Fair and impartial administration of state government and the enforcement of its laws make the avoidance of any conflict of interest extremely important. A conflict of interest exists when your conduct or activities are inconsistent with your official duties and responsibilities as a Minnesota Department of Revenue employee. This usually happens if your private interest, whether personal, financial or in any other way beneficial, conflicts or appears to conflict with your public responsibilities. A conflict of interest may occur if your independence of judgment is impaired. You have an obligation to avoid all conflicts of interest.

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TAX RETURN FILING AND PAYMENT

At the beginning of this document, you were reminded that out *mission is to achieve compliance with the tax laws.* Therefore, all of us must adhere to the standards we impose on others. You must comply with federal, state and local tax laws and meet all filing requirements and payment obligations. Remember, state and federal statutes require people who meet income thresholds to file returns even if they expect a refund.

You also will be considered in compliance with your tax payment obligations if you comply with the terms of an authorized payment plan. If you have questions regarding tax compliance, contact the director of the Human Resources Management Division to arrange for confidential assistance.

- ALL OF US MUST ADHERE TO THE STANDARDS WE IMPOSE ON OTHERS -

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DISCIPLINARY AND OTHER REMEDIAL ACTION

Violations of the Code
If you violate this Code, you may be subject to disciplinary action. Violations of law may result in civil or criminal prosecution. Discipline may also be administered in accordance with the appropriate bargaining agreement or plan. The Revenue Department may also reassign you or change your duties to avoid a conflict; and/or require you to stop an activity that conflicts with your work. You have specific appeal rights under law and/or your collective bargaining agreement if disciplined for violating this Code.

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MINNESOTA – REVENUE

Employee Behavior:
Policies, Guidelines and Expectations

Human Resources Management Division

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Code of Conduct
The *Code of Conduct* applies to all Minnesota Department of Revenue employees. You are responsible for complying with the *Code* and must avoid all conduct that is, or could be seen as, inappropriate or as a conflict of interest.

To maintain high standards of conduct while on the job, the *Code of Conduct* was developed to help you avoid conduct or activity that will, or appear to:

- Conflict with your employment;
- Result in use of your position for private or personal gain;
- Show favoritism to any organization or person;
- Interfere with your objectivity;
- Hinder the department's efficiency; or
- Lower the public's confidence in the department's integrity or yours.

The *Code* includes the following topics:

- Courtesy and Appearance
- Conflicts of Interest
- Political Fundraising and Other Political Activities
- Tax Return Filing and Payment

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For more information:

- Because it is of utmost importance that you are familiar with the content in the *Code of Conduct* and that you comply with all aspects of the *Code*, we have enclosed the full document with your orientation materials for your review. If you have any questions, they may be referred to your supervisor or Human Resources Management.
- The *Code of Conduct* is also in the HR *Information for All Employees* database in Lotus Notes.

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Tax Filing Requirements for Revenue Employees
As an employee of the Department of Revenue, you must comply with all state and federal tax laws. This requirement is a condition of your employment and must be taken seriously. You must file your tax returns timely, accurately and

pay any amounts owed. This means that you must file by April 15, even if you are expected a refund. If you are unable to pay the tax due, you are expected to make arrangements for a payment plan by April 15.

If you have questions or experience difficulty in completing your tax returns, information and assistance is available in the department. Tax return assistance and any payment plan arrangements you need are confidential.

The public has the right to expect employees who are responsible for administering the tax laws to obey the laws themselves. Your job depends on it! Failure to meet this obligation is cause for disciplinary action, up to and including dismissal.

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Minnesota Revenue/HRM/Employee Orientation/Revised Jan 2004

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MINNESOTA – REVENUE

Memorandum

DATE: **February 6, 2007**

TO: **All Revenue Employees**

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SUBJECT: **Keeping Your Job – Filing and Paying your Taxes**

As an employee of the Department of Revenue you are required to comply with all state and federal tax laws. This is a condition of your employment that you need to take seriously. Although the vast majority of the department's employees fulfill their tax obligations each year, a few instances of non-compliance continue to occur. Disciplinary action for violations has resulted in reprimands, suspension, and in those instances where more than one offense occurred, dismissals.

Your responsibility is clear: you must file your tax returns timely and accurately and pay any amounts owed. This means you must file your federal individual return by April 17, 2007, or request an extension where appropriate, even if you are expecting a refund. The due date for filing your Minnesota Individual return is April 17, 2007. You must also pay your Minnesota tax in full by April 17, 2007.

If you are unable to pay the tax you owe, you must file and make arrangements for a payment plan by April 17, 2007. It is not appropriate to file your return and wait for collection action to be taken. If you have fully paid your tax by April 17, 2007, through wage withholding, estimated tax payments, or a prepayment using Form M-13, you have until October 15th to file your Minnesota return. You must meet these requirements, even if you do not personally prepare or file your own return.

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Remember, you must comply with state tax laws and the department's Code of Conduct. Failure to do so will result in disciplinary action, including dismissal. **Keeping your job depends on it!**

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MINNESOTA – REVENUE

Memorandum

DATE: **February 19, 2008**

TO: **All Revenue Employees**

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SUBJECT: **Keeping Your Job – Filing and Paying your Taxes**

As an employee of the Department of Revenue you are required to comply with all state and federal tax laws. This is a condition of your employment that you need to take seriously. Although the vast majority of the department's employees fulfill their tax obligations each year, a few instances of non-compliance continue to occur. Disciplinary action for violations has resulted in reprimands, and suspensions. In certain instances employees who have had more than one offense have been dismissed.

Your responsibility is clear: you must file your tax returns accurately and in a timely manner, paying any amounts that you owe. This means you must file your federal individual return by April 15, 2008, or request an extension, if appropriate, even if you are expecting a refund. The due date for filing your Minnesota Individual return is April 15, 2008. You must also pay your Minnesota tax in full by April 15, 2008.

If you are unable to pay the tax you owe, you must file and make arrangements for a payment plan by April 15, 2008. It is not appropriate to file your return and wait for collection action to be taken. If you have paid your tax in fully by April 15 through wage withholding, estimated tax payments, or a prepayment using Form M-13, you have until October 15, 2008, to file your Minnesota return. You must meet these requirements, even if you do not personally prepare or file your own return.

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BACKGROUND AND FACTS:

The Minnesota Department of Revenue has approximately 1,500 employees; administers twenty-eight different taxes and collects about thirteen billions dollars. Its Collection Division is responsible for collecting delinquent tax debt and for collecting other state agency delinquent debts.

In early 2007, the Department, seeking to hire thirty-six additional collection officers at its St. Paul location, held a Job Fair. The offered position at that Job Fair was a Revenue Collection Officer 2 position whose responsibility would be to collect delinquent tax and other agency debt.

At the Job Fair the potential applicants took a math test and those who successfully passed it were interviewed for the positions. Prior to the interview, however, those who successfully completed the math test were asked to complete an employment application form and told the Department would conduct a background check and a tax background check on them. They were also told that if the tax background check showed that an applicant was not current in filing and paying his or her Minnesota taxes he or she would be told that at the time a job offer was made

and that they would need to resolve the tax issue prior to beginning employment with the Department.

The Grievant participated in this job fair and successfully passed the math test. On April 18, 2007, she filled out an employment application form. On that form, she indicated that she did not presently owe any state or federal income taxes and that she had complied with all tax laws. She also authorized the Department to conduct an inquiry into the information that she had provided and to look at her past and current tax returns, both state and federal, in order to verify whether she had filed and paid her returns. On April 24th, the Department discovered that the Grievant had not filed her 2005 Minnesota tax return and advised her of that fact when it called her to offer her a Revenue Collections Officer 2 position on April 27th. At that time she was also told that if she wanted the position she would need to contact a representative from the Income Tax Division to get help in filing her 2005 tax return. In response, the Grievant did contact a representative from the Income Tax Division and brought him her 2005 tax return on April 30, 2007.[1] After confirming that the 2005 tax return had been signed on October 19, 2006 and had been filed, the Department sent the Grievant a memorandum offering her a Revenue Collections Officer 2 position with an effective start date of May 16, 2007.

In July 2007, the Tax Operations Division notified the Grievant that her 2005 Minnesota Individual Income Tax Return was being reviewed and that she would need to provide receipts for certain expenses she had deducted on the return by August 25, 2007. While the notice was sent to the Grievant's address listed on her 2005 tax return, the notice was returned to the Department and the Grievant did not receive it. On September 10, 2007, a tax order was filed advising the Grievant that the questioned deduction had been denied because she had failed to reply to the Department's request for additional information and now owed approximately $600 on her 2005 tax return. Although the order stated that it was to be re-sent to the Grievant, it is unclear whether the Grievant received that notice and whether she paid the amount due.

On April 30, 2008, the Department sent the Grievant a letter advising her that it could not locate her 2006 Minnesota income tax return and that failure to comply with the Department's requirement that all tax returns be timely filed and all taxes due be paid is a violation of its Code of

[1] The Grievant asserts that she also brought in her 2006 tax return at that same time but the evidence does not establish this as fact.

Conduct and is cause for disciplinary action.[2] The letter also advised the Grievant that she must reply to the letter by providing a copy of the return together with a copy of the front and back of the cancelled check showing payment if taxes were owed or with documentation showing that a refund had been received. And, finally, the letter stated that the Department may need to determine if she has violated the Code of Conduct with respect to filing her 2006 tax returns and if it concludes she has it will need to take disciplinary action up to and including dismissal. That same day, the Grievant provided the Department with an unsigned and undated copy of her state and federal 2006 tax returns.

In early April 2009, the Department conducted an investigation into whether the Grievant had violated the Code of Conduct with respect to timely filing of income tax returns. As part of the investigation, the Grievant was interviewed by two different Department employees. During the interviews, the Grievant told the investigators that she knew she was to file her state and federal tax returns by April 15 of each year; that they could be filed as late as October 15 of each year if an extension to file had been requested by April 15th, and that she had not requested an extension. She also told them that she had a copy of the Code of Conduct and that she was familiar with the Commissioner's annual letter regarding employee tax obligations. And, finally, she stated that she had filed her 2006 tax returns late;[3] that she had prepared them herself, and that she had received a refund which had been revenue recaptured.

After completing its investigation, the Department sent the Grievant a letter dated August 24, 2009 stating that the Department intended to dismiss her effective August 25, 2009 for failing to comply with her tax obligations and for violating the Code of Conduct. In that letter, the Grievant was told that the Department's records indicate that she had failed to file both her 2006 and 2007 tax returns in a timely manner and that the documentation she had provided regarding the filing of her 2006 Minnesota tax return failed to provide evidence that the 2006 tax return had been timely filed. It also summarized the statements the Grievant had made during the

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[2] The Department's annual check for compliance with the tax return requirements is not conducted until late winter after the filing deadline has occurred so the Department had no information regarding the Grievant's status with respect to filing and paying her 2006 tax returns until January or February 2008.

[3] In one interview, the Grievant stated that she filed the returns the year she received the letter from the Department and, in the other interview, she stated that filed them when she got the letter. The Grievant then went on in the second interview to state that she thought she had filed her returns even before she started working for the Department and that although she filed the return late she thought the return and the Department's letter may have crossed in the mail.

investigation and pointed out that while the Grievant had said during the investigation that her 2006 tax return was the only one she had failed to file in a timely manner, the Department's records show that her 2005 tax return was not filed until September 2007, and that her 2006 and 2007 tax returns were not filed until December 2007 and 2008 respectively. And, finally, the letter stated that the Grievant was being dismissed not only for failing to file her returns in a timely manner but for failing to pay her debt or establish a payment plan.

That same day, however, the Department sent the Grievant a revised notice of dismissal which cited the same reason for dismissal as that cited in the earlier letter but amended the Department's statement regarding the Grievant's failure to file her 2006 and 2007 tax returns in a timely manner to only failure to file her 2006 individual income tax returns in a timely manner. The remaining parts of the letter remain unchanged except for the paragraph which referred to the Grievant filing her 2007 individual tax return in December 2008. In that paragraph all references to the Grievant's 2007 individual tax returns were deleted and filing dates for the Grievant's 2005 and 2006 tax returns were amended.[4]

On August 31, 2009, the Union grieved the Grievant's termination alleging unjust termination. The grievance was denied on October 21, 2009 and it was appealed to arbitration. It is this dispute that is before the Arbitrator.

ARGUMENTS OF THE PARTIES:

Stating that it believes its policy regarding the need to be compliant with all tax laws is an essential rule to enforce since it speaks to the Department's integrity and whether the public has confidence in it, the Department declares that it has just cause to dismiss the Grievant for failing to comply with this rule. More specifically, it charges that the Grievant was well aware of her need to timely file her individual personal income tax returns and to pay or make arrangements to pay any debt owed; that despite this knowledge she failed to timely file both her State and Federal 2006 tax returns in a timely manner, and that when questioned about it failed to provide answers that would cause the Department to consider discipline somewhat less than dismissal. Further, it challenges her credibility stating that the Grievant gave different answers at different times and

[4] In the first letter, the State said that the Grievant had filed her 2005 Federal return on September 1. 2007; her 2006 Federal return on December 1, 2008 and her 2007 Federal return on December 1. 2008. In the revised letter, the State

that it heard for the first time, at hearing, that she had provided a copy of her 2006 State tax return at the same that she had given the Department a copy of her 2005 State tax return due because the Tax Division representative she had talked with had encouraged her to bring in both returns at the same time.

The Union, however, asserts that although the Department terminated the Grievant for not timely filing her 2006 tax returns the Grievant was in compliance and that she submitted her 2006 State tax return to the Department at the same time that she submitted her 2005 State tax return to the representative from the Tax Division. Further, it charges that even if the Grievant's return was not timely filed, her termination is unjust since the Employer does not typically terminate employees for a single infraction and since equitable treatment requires the Department to treat employees with similar problems in similar ways. Continuing, it states that the Grievant deserves to have her individual circumstances considered and to be treated like other Department employees who received lesser discipline based upon their individual circumstances. And, finally, the Union raises the Employer's delay in investigating the Grievant's filing of her returns as a concern and charges that the delay is prejudicial.

In response to this last allegation, the Department states that it is not an ideal situation for an employee to find out a year after an incident that the employee will be dismissed for not being in compliance with respect to filing tax returns but that the Grievant was not prejudiced by this delay since the issue concerns whether the Grievant timely filed her 2006 tax returns. As further justification for its action, it adds that the Department of Revenue is a large agency and that it is "not inconceivable" for it to take awhile to complete its investigation.

DISCUSSION:

As this Arbitrator has stated before, a finding of just cause to discipline or discharge an employee requires the Employer to show that the employee not only was guilty of the alleged misconduct but that it did not act in an arbitrary, capricious or discriminatory manner in making its findings or in deciding upon the degree of discipline to impose for the alleged misconduct. Included in this requirement is a showing that the Employer complied with the employee's due

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said that the Grievant filed her 2005 Federal return on March 20, 2007 and her 2006 Federal return on March 24, 2008.

process rights when it determined the employee was guilty of misconduct and that consideration was given to any mitigating factors when deciding upon the degree of discipline to impose.[5]

In this dispute, the Grievant and the Union assert that the Grievant did not know the importance of timely filing her tax returns; that the Grievant's 2006 State tax return was timely filed since the Grievant filed it with the representative from the Tax Operations Division at the same time that she had filed her 2005 State tax return prior to being hired by the Department and that the Grievant's termination constitutes disparate treatment since the Department has not terminated an employee over a first infraction before. The Union also charges that the Department's delay in investigating the alleged misconduct was prejudicial and is cause to overturn the Department's action. These arguments are not persuasive, however.

After reviewing the record, the Arbitrator concludes that, despite the Grievant's pleas of ignorance, she knew she needed to timely file her tax returns in order to work for the Department; that she adequately understood the Department's policy regarding the need to timely file her tax returns and/or to set up a payment plan if tax was due, and that she knew that failure to comply with this requirement would result in discipline up to and including discharge. The Arbitrator also finds that during and after the investigation and during the hearing the Grievant offered multiple and frequently inconsistent explanations for her behavior, demonstrating a lack of credibility, which leads to a conclusion that her assertion that she is not guilty of the alleged misconduct is not believable. Further, the Arbitrator concludes that while the Employer's delay in investigating and disciplining the Grievant is not justified by its assertion that other pressing business priorities caused the delay, its action was not fatal to a finding of just cause since there is no evidence that the Grievant was led to believe she would not be disciplined for her misconduct nor is there

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[5] **Discipline and Discharge in Arbitration**, ABA Section of Labor and Employment Law, The Bureau of National Affairs, Washington, DC, 1999, Chapter 2; **Management Rights,** BNA Books Arbitration Series, The Bureau of National Affairs, Inc., Washington, DC, 1986, pp. 95-104; **How Arbitration Works**, Sixth Edition, Elkouri and Elkouri, The Bureau of National Affairs, Washington, DC, 2003, pp. 931-933; *Arbitral Discretion: The Tests of Just Cause",* John E. Dunsford, **Arbitration 1989 The Arbitrator's Discretion During and After the Hearing, Proceedings of the Forty-Second Annual Meeting, National Academy of Arbitrators**, The Bureau of National Affairs, Washington, DC 1990, Chapter 3, pp. 23-64; **Labor and Employment Arbitration,** Second Edition, Bornstein, Gosline, Greenbaum, Lexis Publishing, 2000, Volume 1, Chapter 14; Chapter 15, p. 15; 613 F.2d 716, 103 LRRM 2380 (8th Cir.), *cert. denied,* 446 U.S. 988 (1980); **The Common Law of the Workplace, The Views of Arbitrators**, Second Edition, National Academy of Arbitrators, The Bureau of National Affairs, Washington, DC, 2005, Chapter 6, and **Just Cause, The Seven Tests**, Second Edition, The Bureau of National Affairs, Washington, DC, 1992.

evidence that the delay adversely affected the Grievant's due process rights with respect to the ability to adequately respond to the investigation. And, finally, the Arbitrator concludes that there is not sufficient evidence to support the Union's disparate treatment argument. Following is a discussion regarding each of these findings:

Knowledge of the Department's Policy:

The Department's policy concerning its employees need to be compliant with all tax laws and to timely file their tax returns is reasonable and has been accepted by both parties. Further, the record establishes that the Department used a variety of means to inform employees, including the Grievant, of this policy. Employees were told of the need to be current in filing and paying their Minnesota taxes at the Collection Division Job Fair and during employee orientation. The Department's Commissioner also reminded them of this requirement, yearly, by posting a business notice on RSpace, the Department's internal intranet for its employees.

The record also establishes that the Grievant knew of this policy and knew that failure to comply with the tax laws and/or to be timely in filing her tax returns could result in disciplinary action. Proof of this conclusion lies in the fact that the Grievant states that once you are an employee the need to be compliant "is drummed in". Further, she admits receiving a copy of the Department's Code of Conduct which clearly states violations of the requirement to comply with federal, state and tax laws and to meet all filing deadlines and payment obligations subject employees to disciplinary action. She also admits having seen the Commissioner's memo which is posted yearly on RSpace. In that memo, entitled "Keeping Your Job, Filing and Paying Your Taxes", the Commissioner states employees are required to comply with all state and federal tax laws as a condition of their employment and that employees who have more than one offense have been dismissed. And finally, it is undisputed that prior to being hired in May 2007 the Grievant was told that the Department had discovered that it had no record of her having filed her 2005 tax return and that she must file this return in order to be hired. Given this evidence, one can only conclude that if the Grievant failed to understand the importance of this policy and that failure to comply with it could lead to disciplinary action it was due to her deliberate refusal to read the information provided her and to accept the importance attached to.

The Grievant's Conduct and Credibility:

As a Revenue Collections Officer 2, the Grievant was responsible for investigating and resolving delinquent tax and non-tax debts incurred by taxpayers through the use of enforced collection techniques and for ensuring taxpayer compliance with state tax filing requirements. At the time she was hired, the Grievant was told the Department required her and other employees to also be in compliance with the state's tax filing and debt paying requirements in order to preserve the Department's integrity and maintain the public's confidence in it. She was also advised prior to being hired that the Department had no record of her having filed her 2005 tax return and that she would need to contact a representative from Tax Operations Division to resolve this problem before she could begin work with the Department. The parties agree that she did contact the Division representative and that she filed her 2005 tax return on April 30, 2007. These are the only facts regarding this dispute that the parties were able to agree upon.

The Department declares that in April 2008, it discovered that the Grievant had also failed to file her 2006 tax returns; that it advised her of this fact by letter dated April 30, 2008, and that the Grievant submitted an unsigned, undated 2006 tax return to the Department on that same date as proof that she had timely-filed her return. It continues that since the return was unsigned and undated and did not prove that she had timely-filed her 2006 return it conducted an investigation to determine if she had violated its Code of Conduct. It adds, that based upon this investigation, it concluded that had violated the Code of Conduct since it had no record of the Grievant's 2006 state return being timely-filed; since, during the interview, the Grievant gave confusing information regarding whether she had timely filed both her state and federal 2006 returns, and since the information it received from the federal government indicated that the Grievant filed her federal return on March 26, 2008. The Grievant asserts the Department's information is not accurate; that she filed her 2006 state return at the same time she had filed her 2005 return, and that she was in compliance with the Code in 2007. The Grievant's assertions are simply not believable.

The evidence supports the Department's assertion that the Grievant gave confusing explanations for her actions. It shows that not only were her explanations confusing but that during and after the investigation, as well as during the hearing, she offered multiple and frequently contradictory explanations which make her explanations not believable. Among them was testimony regarding who had prepared her 2006 tax returns; when they were filed; whether

she understood she needed to file her return on time, and whether she had received any Department notices regarding non-compliance. For instance, during the investigation she stated that she had prepared and filed the 2006 tax returns herself and that she had filed her 2006 federal return electronically. During the hearing she testified that she did not personally prepare her 2006 federal tax return and had assumed it had been filed on time although she did not know that. Again, during the investigation, she told the Department that she had filed her federal return late and that she filed it when she had received the Department's letter and during the hearing she challenged whether her return had been filed late and the State's assertion that the federal tax return was filed on March 26, 2008.

Most difficult to believe, however, is the Grievant's insistence that she had filed her 2006 State tax return on April 30, 2007 prior to being hired. During the investigation, when asked about filing her 2006 state return, the Grievant stated that she had filed it late but had received a refund and that she filed it the year she had received the letter from the Department. She also stated during the investigation that she may have filed her return before she started working and when asked if she could provide evidence of when she filed the return she said that the refund from that return had been revenue recaptured and the Department should be able to tell from that but made no effort to provide that information. At hearing, the Grievant's testimony changed. When asked about when she filed her 2006 tax return she testified that she filed it with a Tax Operations Division representative in May 2007, the same day that she had filed her 2005 tax return as a condition of being hired and that both were signed. This testimony flies in the face of evidence that the Department had no record of the 2006 return being filed; evidence that that in May 2007 the Department only knew that the Grievant's 2005 tax return had not been filed; testimony from the Tax Operations Division representative that he only received the Grievant's 2005 tax return, the fact that the 2006 return she provided the Department was unsigned, and evidence that her federal return was not filed until March 2008, a fact that suggests that it was more likely that her state return was filed in 2008 and not in 2007. Given these contradictory explanations, one can only conclude that the Grievant's statements and testimony were an attempt to cover up her actions and are not credible. This lack of credibility is emphasized when one considers the Grievant's testimony regarding a number of other issues which, while not relevant to whether the

Department had just cause to terminate her for failing to timely-file her 2006 tax return, reflect her unwillingness to be straightforward in this dispute.[6]

The Grievant's failure to provide a credible explanation for her conduct together with the fact that evidence shows she knew her 2006 tax returns had not been filed at the time she was told she had not filed her 2005 tax returns, only underscores the Grievant's deceptiveness and her belief that she did not have to comply with the Department's expectations or policies. Her actions and the evidence clearly show that the she failed to timely-file her 2006 tax returns and violated the Department's Code of Conduct. Further, they undermine her trustworthiness as an employee and undermine the integrity of the Department. This weakens any consideration that might be given to the Department's delay in investigating the misconduct and imposing discipline for it, a violation of the Grievant's due process rights.

The Employer's Delay in Conducting the Investigation and Disciplining the Grievant:

Although the record establishes that the Grievant received timely notice on April 30, 2008 that the Department had no record that the Grievant had filed her 2006 Minnesota income tax return and the Grievant provided an unsigned, undated copy of that return on the same day as proof it had been filed, the Department did not act to investigate the Grievant's possible misconduct until nearly a year later and did not decide to dismiss the Grievant until a year after the misconduct occurred. This delay, absent unusual circumstances that would justify it, is generally not acceptable and is usually considered a violation of a Grievant's due process rights.

In this case, the Department states that it was "very unfortunate" that the investigation was not conducted until April 2009 and gives as its reason for the delay that "other priorities got in the way". Among the "priorities" cited were "other investigations"; "job fairs"; "hiring"; "lots of activity"; "some human resources turnover" and "a budget cut". None of these reasons, without a

[6] Among other incredulous statements the Grievant made are that she was never personally told she must comply with the tax laws although there is ample evidence that she was personally told that; that she did not think she had to file her tax returns on time since she had a refund due although the policy, which she admits she is aware of, clearly states she must file on time even if a refund is due; that she did not know that her 2005 tax return had been audited although she was told a deduction had been denied and that she owed money as a result, and that she could not remember her wages being garnished or when they were garnished although one would certainly remember having one's wages garnished.

showing that significantly impacted the Department's operations, constitutes unusual circumstances which justify delaying the investigation for nearly a year since they are frequently part of the normal operations of a large employer.

While arbitrators have often sustained grievances when an employee's due process rights have been violated in order to emphasize that the employer cannot ignore, willy-nilly, an employee's due process rights in determining that an employee is guilty of misconduct, the question that must be answered in determining whether the procedural flaw in this dispute is fatal to it is whether the delay caused any harm to the Grievant. This consideration is given since the evidence clearly establishes that the Grievant is guilty of failing to timely-file her 2006 tax returns and concocted a story in an attempt to cover her misconduct. Such misconduct should not be overlooked if the procedural error does not affect her ability to prove her innocence. In this dispute, there is no evidence that the Grievant was led to believe that there would be no investigation or was led to believe that no discipline could be forthcoming at the time she was given notice of suspected misconduct. Further, since the Grievant easily could have dispelled the Department's assertion of failure to timely-file her 2006 return by providing documentation as to when she did file it, if she had filed them, there is no evidence that the Department's delay in investigating the allegation prejudiced the Grievant and her ability to prove her innocence. Given this fact, it is concluded that while the Department should have conducted the investigation more promptly and that, under other circumstances, failure to do so could fatally affect its action, its failure to act promptly in this dispute is not fatal to finding that it has just cause to terminate the Grievant.

Allegation of Disparate Treatment:

The Union charges that the Department discriminated against the Grievant when it decided to dismiss her since the evidence shows that no previous employee has been dismissed for a first infraction and since the Commissioner's memo states that "employees who have had more than one offense have been dismissed". At first glance, a review of the disciplinary record provided by the Department suggests the Union is correct. Of the fifteen employees who have been disciplined for late or non-filing of tax returns since 1997, with the exception of one employee, none of them were discharged for a single failure to timely-file a tax return. Instead, each received a suspension and the suspensions ranged from one day to twenty days. While this evidence shows that

Department, generally, suspends employees the first time they fail to timely-file a tax return, it lacks proof that the circumstances surrounding the misconduct for which the employees were disciplined was similar to the circumstances surrounding the Grievant's misconduct and the Union provided no other evidence to establish that nexus. The only other evidence provided was Department testimony that in one instance the employee had hired a tax preparer in another state who had failed to file the return, action which the preparer documented, and, in another instance, the employee was a thirty-year employee who had FMLA leaves during the time the employee failed to file a timely return. Unlike these two employees, the Grievant prepared the returns herself and, therefore should have known when the return was filed, and was only a two-year employee.

The more relevant disciplinary action taken by the Department concerns an employee who failed to timely-file his tax return and then failed to pay the debt owed. In that instance, while the employee received a twenty-day suspension for failing to timely-file the return he/she was discharged less than thirty days later for continued non-payment of the debt owed.[7] In the Arbitrator's opinion, the Grievant's misconduct is as egregious, if not more egregious, than the misconduct for which this employee was discharged. Not only did the Grievant fail to bile both her state and federal 2006 tax returns but her failure to do so was aggravated by the fact that she knew she knew she had to be in compliance before being hired; knew that she was not in compliance when she filed her 2005 tax return in order to be hired and took no action to either apprise the Department that she also needed to file her 2006 returns or to become compliant as was her responsibility in order to be hired. Instead, in an obvious effort to circumvent the Department's requirement that she comply with the tax laws and file her returns on time, she waited until the Department notified her of her failure to timely-file the return and then claimed, first, that she did not know that it was important for her to timely-file her returns, and, then, to assert she filed them before she was hired without proof that she had done so. While one could speculate as to the reason for her behavior, such speculation would ignore the fact that the Grievant simply engaged in misconduct fully justifying her dismissal; sought to thwart the very procedures designed to assist

[7] While listed as two incidents and two separate disciplines, the actions taken all referred to one incident which became more egregious over time.

her in the event she found herself in need of time to file her tax returns, and continues to assert there was nothing wrong with what she did.

In summary, based upon the record, the arguments advanced by the parties and the discussion above, it is concluded that the Department had just cause to dismiss the Grievant. Accordingly, the following award is issued.

AWARD

The grievance is denied.

By: _____
Sharon K. Imes, Arbitrator

July 10, 2010
SKI