

IN THE MATTER OF ARBITRATION BETWEEN

MINNESOTA ASSOCIATION OF PROFESSIONAL EMPLOYEES)	
)	CORRECTED ARBITRATION AWARD
Union,)	
)	
and)	
)	PLORIN DISCHARGE GRIEVANCE
)	
STATE OF MINNESOTA, Department of Revenue,)	
)	
Employer.)	

Arbitrator:	Stephen F. Befort
Hearing Dates:	June 23 – 24, 2010
Post-hearing briefs received:	N/A
Date of decision:	July 19, 2010
	APPEARANCES
For the Grievant:	Kathy Fodness
For the Employer:	Carolyn Trevis

INTRODUCTION

The Minnesota Association of Professional Employees (Union), as exclusive representative, brings this grievance contending that the State of Minnesota, Department of Revenue (Employer), violated the parties’ collective bargaining agreement by discharging Gordon Plorin without just cause. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through

the testimony of witnesses and the introduction of exhibits. The parties decided not to submit post-hearing briefs. This award corrects an earlier version, dated July 9, 2010.

ISSUES

1. Did the Employer have just cause to discharge the grievant?
2. If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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.

FACTUAL BACKGROUND

Gordon Plorin has worked for the Department of Revenue (DOR) for more than 28 years. At the time of his discharge, he worked as a Level 5 Information Technology Specialist, the highest non-supervisory level in his job classification. In this position, he was the team leader of a group of information technology networking technicians. He holds 29 certifications in information technology specialties as well three certifications in project management. He consistently received above average performance evaluations and has no history of discipline.

In terms of the pertinent chain of command, Mr. Plorin reported to Larry Ernster who supervises the Work Station Support Group to which Mr. Plorin was assigned. Mr. Ernster described the work of the group as that of a “geek squad” that takes care of computer support issues for the DOR. Mr. Ernster reports to Lee Ho and Don Friedlander, the Co-Directors of the Information Systems Division (ISD). The Co-

Directors, in turn, report to Chief Information Officer Steve Kraatz who is subject to the direction of DOR Commissioner Ward Einess and Deputy Commissioner Dan Salomone.

In 2005, the DOR launched the Infrastructure Renewal Project (IRP). The principal objectives of the IRP were to replace outdated hardware and to move from multiple operating platforms to a single Windows operating platform. The IRP was an ambitious undertaking that became even more so over time. Steve Pine of Insight, an outside contractor, prepared a risk assessment plan which concluded that the IRP had a “high risk due to a variety of factors.” Nonetheless, the DOR’s Business Systems Planning Team gave its support to the project.

After some early shuffling of personnel, Don Maher, a manager at ISD, was appointed as the overall Project Manager of the IRP. Mr. Maher, who reported to ISD Co-Directors Ho and Friedlander, oversaw approximately 90 employees who were charged with working on the IRP in addition to carrying out their normal information support service duties. Testimony at the hearing described Mr. Maher as someone with a quick temper who got into a number of spats with subordinates. He was disciplined for a particularly unpleasant confrontation with Mike Kemper, a former ISD employee who had transferred to the Office of Enterprise Technology.

Mr. Plorin was asked to become project manager of the server team for the IRP. The server team was one of approximately ten working groups assigned to the IRP. Mr. Plorin soon found problems in the IRP management. According to the investigation report prepared by William Everett, Mr. Plorin expressed concerns with four aspects of the IRP:

- (1) The Project was ill conceived from the outset as it was risky and not supported by a sound business case;
- (2) The project was poorly managed by DOR

leadership; (3) Managers within DOR did not elicit input or give due consideration to concerns raised by subordinates with superior technological knowledge; and (4) Managers leading the IRP were autocratic, difficult to work with, and unresponsive to concerns.

At the hearing, Mr. Plorin also expressed concerns with the ever-increasing scope and cost of the project.

According to Mr. Plorin, he expressed his concerns about the IRP to Maher, Friedlander, and Ho. He testified that Maher and Friedlander rebuffed his concerns and berated him in group meetings. He testified at the hearing that he felt that he was working in a hostile environment and that he could not safely bring up any further concerns to either Maher or Friedlander.

In the fall of 2007, a series of anonymous letters began to arrive in the DOR Commissioner's Office. At first, the letters principally criticized the IRP as a DOR endeavor. Over time, however, the letters became increasingly angry in tone and attacked IRP management with a particular focus on Mr. Friedlander. The letters belittled Mr. Friedlander as a manager, expressed disappointment that he had not yet been terminated, and described his actions, and those of other managers, as "criminal" in nature. More than 25 letters were received in the period from September 2007 to April 2008. A number of witnesses testified that Mr. Friedlander became very upset with the continued onslaught of these letters, and he expressed concerns for his safety and that of his family.

In April 2008, an anonymous survey was sent to approximately 90 employees who had worked on the IRP. The survey, adapted from an internet website, asked a series of questions as to why this project had "failed." The mailing included a postage-paid return envelope addressed to Chief Information Officer Steve Kraatz. Several

witnesses at the hearing expressed the opinion that the recipients easily could have interpreted the survey as an official DOR instrument. At about the same time, Commissioner Einess received an anonymous letter informing him about the survey and telling him that he could take credit for the survey if he wished to do so. Having discovered the nature of the survey, the Commissioner's Office authorized the removal of the remaining surveys from employee mailboxes.

By the spring of 2008, DOR management had focused on either the grievant or Mike Kemper as the most likely author of the anonymous letters. In June of that year, the Employer retained William Everett to investigate these two individuals. As an initial matter, he reviewed a forensic examination of Mr. Plorin's work computer conducted by Scott Stillman, a forensic expert employed by the Minnesota Department of Human Services. Mr. Stillman's examination did not find any evidence to show that Mr. Plorin had authored the anonymous letters, but he did find evidence that numerous files had been deleted.

Mr. Everett interviewed Mr. Plorin on October 2, 2008, and again on November 18, 2008. Mr. Everett testified at the hearing that he believed that Mr. Plorin was not answering questions with candor since his explanations kept changing. Mr. Everett's written report cited, for example, the following succession of responses provided by Mr. Plorin during the first interview to questions inquiring about whether he authored and/or mailed the letters or surveys in question:

1 (p. 36 of interview transcript)

BE: My question for you is did you write this letter?

GP: Ya know, people have asked me this before. I didn't mail anything to anybody. And I don't know who did.

2 (p. 39)

BE: Yes. And I specifically asked you, um, did you write the letter, and your answer was I didn't mail the letter.

GP: That's correct.

BE: So, you haven't answered my question yet as to whether you wrote the letter.

GP: I wrote the letter

BE: Okay. Who mailed the letter?

GP: I don't know.

3 (p. 39)

BE: Was [the letter] stored on any common drives at ah the Department of Revenue?

GP: No, no. Did I ever put it on a stick? I carry a lot of memory sticks in and out. Or I did then. . . . It might have been on a stick. I don't know. Did I lend a stick to anybody? It's been months. I don't know.

4 (p. 58-59)

BE: Alright. And so there's a stack of more than 50 of those [surveys] sitting in your home someplace correct?

GP: At some point yes.

BE: Alright. And that's the last place you saw them?

GP: I put them, ya know, I tossed them out.

* * *

BE: You threw them in the garbage?

GP: I throw them in the garbage. How did I get rid of these things, mostly I put these things in the garbage, I put a lot of stuff in the garbage after I wrote it.

5 (p. 60)

GP: [A] member of my family could have mailed those. I'm going to have to go to ask some questions.

Thus, after initially deflecting the question of whether he had written the letters, Mr. Plorin admitted to writing the letters but denied mailing them, alternatively suggesting that the letters had been taken from his memory stick, retrieved by someone out of the garbage, or perhaps mailed by a family member.

Mr. Plorin began the second interview by explaining that he did in fact have knowledge of how the letters came to be mailed, but that Mr. Everett had failed to ask the appropriate questions during the initial interview. Mr. Plorin then offered the following explanation:

. . . But the one question that you never asked me last time was, do I know what's going on here. . . we had people here, primarily Don Friedlander, but not entirely, that were actually doing very bad things, like wasting taxpayer money, failing to follow state rules, so on and so forth, lying to their bosses. That somebody's got to say something about this. But because the department's run on intimidation, there was no possibility that anyone was going to step up to the plate and do it. We knew that. Um, about this time there was a suggestion that we put things in the commissioner's [suggestion] box. Which as I said, I did. . . but nothing ever happened. . . So, I thought there's got to be a way to do this. About the same time, we heard also that somebody had written a letter to the, to the um, executive committee. And Don Friedlander was furious. Now this time I had not written letters to the executive committee. But ah, as a result of that Larry [Ernster] had asked me not to mail anything. He said be careful, don't mail anything. So I thought, okay, I can't mail stuff, because I'm promising Larry I'm not going to mail anything, but I can't let it go either. So now what do you do? Now besides this, you have to understand I have a very strong religious background, I have great faith in God. And the Bible says there are places where you should not oppose the ah, the elected officials and so forth, and I had a lot of trouble with that so how do you report it when the Bible says you shouldn't? So I did some more research and sure enough there's plenty of places in the Bible where people did oppose and speak out against their leaders. But at the same time I had said I wouldn't mail anything. So I tried to come up with a way, um, to get the work out without mailing. This is tricky. Especially since the suggestion box doesn't seem to working. So, it took me months to figure out a system, and I figured out a system.

Um, and, so this is basically what I did every single time. I'd write a letter. And I would, or whatever it was. Review it very carefully to make sure there was nothing in there that was threatening, terroristic, absolutely nothing that was false. Um, and put it in an envelope and address it and stamp it as we went through, which is kind of an entertaining approach to everything going one little step at a time. Um, then I would take that letter and I would carry it out. And I would take it someplace, didn't much care where. And I would say God if you want this letter to get through get it through, and if you don't, don't. And then I would drop it someplace, someplace where it could be picked up, it could be blown away on a breeze, a child could steal it, a thief could steal it, or somebody could pick it up and put it in a mailbox. And I'd walk away from it and never once did I ever mail anything. So I prepared everything. There was nothing in those letters that I'm ashamed of. There's nothing in those letters that I thought was untrue, and as I said I went through extraordinary editing to make sure there was nothing that was threatening or terroristic. Or that anybody could in any way take this to be offensive. Just telling the truth. And I would drop it and walk away. And until the last meeting, I never knew what got through and what didn't. . . .

Transcript at p. 2-3.

At the arbitration hearing, Mr. Plorin testified that he is a diabetic and that he became lightheaded and foggy during the second half of the first interview because of the lack of a lunch break. Mr. Plorin suggested, as a result, that some of the statements made during that portion of the interview might not be totally accurate. Mr. Everett testified that he provided Mr. Plorin with a break that was long enough for lunch and that he also provided additional breaks whenever such was requested by Mr. Plorin. Mr. Everett, who has training in emergency medical services, also testified that he did not notice that Mr. Plorin experienced any physical symptoms of hypoglycemic shock.

Mr. Everett submitted his completed Investigation Report on December 31, 2008.

Included among Mr. Everett's Findings of Fact are the following:

10. Plorin caused the survey to be mailed to DOR employees.
13. Plorin was aware that he could face negative employment consequences for his anonymous mailings, and put gloves or socks on his hands with each of the documents he sent to avoid being identified through fingerprints.

14. Plorin was dishonest and deceptive while being interviewed under *Garrity*.

At the hearing, Mr. Plorin admitted that he “sent” the letters and the survey, but denied “mailing” them. He also acknowledged that he used gloves while handling the letters and survey to avoid leaving fingerprints, but he denied any intent to be dishonest during the interviews.

Deputy Commissioner Dan Salomone issued an intent to dismiss letter to Mr. Plorin on January 27, 2009. In that letter, Commissioner Salomone described the basis for discharge in the following terms:

The basis for my decision to terminate you is as follows: You repeatedly took actions that negatively reflected upon the credibility, integrity, and reputation of the Department of Revenue and unduly disrupted the agency’s work efforts. Those actions – and your subsequent responses to our inquiries concerning them during your investigative interviews – evinced that you were untruthful and lacked the good judgment that the Department of Revenue expects of its employees.

* * *

The frequency of your letters, the fact that you did not identify yourself as the author, and the inflammatory nature of their content caused disruption to the workplace and discredited the management of the IRP project and the Information Systems Division. . . . Your actions intimidated management and caused distress to those targeted in your letters. . . . Your behavior compromises our ability to trust you to continue to perform work for the Department of Revenue and constitutes just cause to terminate your employment.

The Union filed a grievance challenging the termination on the following day.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to discharge the grievant. The Employer points out that Mr. Plorin has admitted that he wrote and sent more than 25 anonymous letters as well as the “failed project” survey. The Employer maintains that

these missives warrant discipline because they belittled ISD management and labeled them as criminals. The Employer also argues that discipline is warranted because Mr. Plorin was dishonest and deceptive during the investigatory interviews. In terms of remedy, the Employer asserts that discharge is appropriate because Mr. Plorin's obsessive attacks illustrate that he cannot work cooperatively with managers and co-workers who might disagree with his perspective. In addition, an employee working as an Information Technology Specialist 5 has access to sensitive taxpayer data, and Mr. Plorin's actions undermine the degree of trust required in such position.

Union:

The Union acknowledges that Mr. Plorin wrote the anonymous materials in question, but it denies both that he mailed them and that he lied during the investigative interviews. The Union further argues that the grievant should not be disciplined for communications that alerted the DOR of management actions that impaired the Department's mission. Even if some discipline is warranted, the Union maintains that discharge is too severe of a sanction because: 1) the hostile environment perpetrated by ISD management compelled the grievant to communicate in an anonymous manner; 2) Mr. Plorin's communications did not threaten or harass anyone; and 3) Mr. Plorin has an exemplary work record and should not be subjected to discharge without progressive discipline.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decisions. This inquiry typically involves two distinct steps. The first step concerns

whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See Elkouri & Elkouri, HOW ARBITRATION WORKS* 948 (6th ed. 2003). Each of these steps is discussed below.

The Alleged Misconduct

The Employer claims that Mr. Plorin engaged in misconduct warranting discipline by authoring and sending a series of anonymous communications that disparaged certain managers and disrupted the workplace. According to the Employer, the fact that Mr. Plorin may have placed stamped letters on the top of a mailbox rather than in a mailbox does not detract from the fact that his actions caused the letters to be sent. The Employer further alleges that Mr. Plorin was dishonest and deceptive during the investigatory interviews.

The Union does not dispute that Mr. Plorin authored the anonymous materials in question, but it asserts that this should not be viewed as misconduct. The Union claims that Mr. Plorin was acting for the benefit of the Employer by exposing areas of mismanagement, and that the manner of communication was essentially the same as placing an anonymous suggestion in the DOR suggestion box. In addition, the Union maintains that Mr. Plorin did not act with any intent to deceive during the interviews and that any misstatements made were the results of hypoglycemic shock.

While the Union raises several valid points in its argument, I find that Mr. Plorin's conduct, when viewed in its totality, does constitute misconduct. One important consideration concerns the number of communications that he sent. The conduct at issue

goes far beyond a note or two placed in a suggestion box. In this instance, the DOR received more than 25 letters over an approximate seven-month span of time, plus a detailed survey mailed to 90 DOR employees. Based upon the record, it is clear that the sheer volume and frequency of these communications had a very disruptive and unsettling impact on the workplace. This impact was heightened by the substance of the communications. They went far beyond constituting suggestions designed to enhance productivity. Over time, the letters segued from pointing out perceived problems with the IRP to demeaning attacks on specific individuals.

The survey distributed by Mr. Plorin also was disruptive. The survey was not seeking unvarnished information about the IRP, but was specifically designed to show why and how this project had failed. In this respect, the survey is similar to that distributed by a disgruntled assistant district attorney in Connick v. Myers, 461 U.S. 138 (1983). The attorney in that case, who was unhappy with a transfer to a less desirable position, distributed a survey asking slanted questions of co-workers about a number of office management issues. In finding the questionnaire and the attorney's discharge unprotected by the First Amendment, the Supreme Court stated:

Questions, no less than forcefully stated opinions and facts, carry messages and it requires no unusual insight to conclude that the purpose, if not the likely result, of the questionnaire is to seek to precipitate a vote of no confidence in [the department head] and his supervisors . . . [and] carries the clear potential for undermining office relations.

461 U.S. at 152. Here too, the personally motivated and disruptive communications authored by Mr. Plorin provide a legitimated basis for discipline.

The evidence with respect to the grievant's alleged dishonesty during the investigatory interviews is admittedly mixed. The transcript of the first interview reveals

a number of inconsistent explanations offered by Mr. Plorin. On the other hand, Mr. Plorin is diabetic, and he maintains that he cannot remember what he said through the haze of a hypoglycemic incident. While the Union's evidence is rather weak on this point, a determination of this issue is not necessary, since the essence of this case concerns the anonymous communications rather than Mr. Plorin's veracity during the interviews. On the former matter, the Employer adequately has established that the grievant engaged in the misconduct alleged.

The Appropriate Remedy

The Employer contends that discharge is appropriate because Mr. Plorin's conduct illustrates that he cannot work cooperatively with managers and co-workers who might disagree with his perspective and that his actions have undermined the degree of trust required in the Information Technology Specialist 5 position. In contrast, the Union argues that termination is too severe of a sanction because: 1) Mr. Plorin was dealing with a hostile environment perpetrated by ISD management; 2) Mr. Plorin's communications did not threaten or harass anyone; and 3) Mr. Plorin has an exemplary work record and should not be subjected to discharge without progressive discipline. Each of the Union's arguments is addressed below.

Hostile Work Environment

The Union claims that Mr. Plorin had no choice but to resort to anonymous communications because his earlier attempts to report problems with the IRP were met with a hostile reaction. Mr. Plorin testified to discussing IRP problems in two group meetings and being publicly rebuffed, once by Mr. Maher and once by Mr. Friedlander. Both he and Mr. Kemper further testified that Mr. Maher had an anger problem that

frequently boiled over in public. According to Mr. Plorin, these circumstances led him to conclude that any further attempts to raise concerns directly to management would be met with retribution.

The notion of a hostile work environment has its source in sexual harassment law. In that context, the United States Supreme Court has ruled that a claim of hostile work environment harassment is established only if a co-worker's actions are sufficiently severe or pervasive to alter the conditions of one's employment. Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986). In this case, that standard is not met. Mr. Plorin has not suffered a detrimental alteration of his working conditions such as a demotion or the transfer to a less desirable assignment. The mere fact that his ideas were rebuffed on two occasions does not constitute a change in working conditions. In addition, Mr. Kraatz made a presentation at a Commissioner's Forum in the fall of 2007 where he expressly sought to reach out to the anonymous letter writer by encouraging anyone with concerns about the IRP to discuss them with him. Under the circumstances, the grievant was not compelled to author 25 anonymous letters and a biased survey in order to express his concerns with the IRP.

No Threats

The Union also contends that discharge is inappropriate because the letters that Mr. Plorin authored did not threaten or harass anyone. Mr. Plorin testified that he edited each letter carefully with an eye toward excising any content that would pose a threat to any particular individual.

While it is true that the letters do not contain any explicit threats, their overall tenor is implicitly threatening. The letters, over time, became more strident in tone and

more focused on Mr. Friedlander. The letters characterized Mr. Friedlander as incompetent and a criminal and demanded his termination. After more than 25 letters and an ever-increasing level of vitriol, it is not surprising that Mr. Friedlander found the letters threatening and that he feared for his safety. The absence of an explicit threat does not exonerate this course of conduct.

Work Record

As a final argument, the Union urges leniency in light of Mr. Plorin's good work record. The Union's characterization of Mr. Plorin's work record is undisputed. He has served as a DOR employee for more than 28 years. He has no disciplinary record. He consistently received above average performance evaluations, and he has earned a number of achievement awards. Larry Ernster, Mr. Plorin's direct supervisor, described the grievant as "one of his best workers."

The Union argues that, given Mr. Plorin's good work record, he should be subject to progressive discipline rather than an immediate discharge. The purpose of progressive discipline is to correct inappropriate behavior. While an immediate discharge is appropriate for serious misconduct that is unlikely to be rectified by a lesser sanction, this ultimate penalty is not appropriate if a less severe disciplinary step is likely to correct the grievant's behavior. *DISCIPLINE AND DISCHARGE IN ARBITRATION* 65-66 (2nd ed., Brand & Biren eds. 2008).

In the instant context, it is unlikely that a lesser form of discipline would correct Mr. Plorin's behavior. The letters and survey authored by Mr. Plorin were not an isolated instance of misconduct. Together, they represent a seven-month span of repeated and escalating misconduct. The obsessive nature of these communications suggests that a

significant change in behavior is doubtful. Having repeatedly belittled ISD managers, it is doubtful that Mr. Plorin could put those highly charged feelings aside and work cooperatively with these same individuals in the future. It also is doubtful that these managers can put aside their reactions and work cooperatively with Mr. Plorin. Finally, as Deputy Commissioner Salomone testified, there is a legitimate concern that Mr. Plorin might funnel his anger into some action that would compromise the sensitive data to which he has access by virtue of his position. Accordingly, even though Mr. Plorin is a gifted and dedicated employee who arguably had legitimate concerns with respect to the IRP, the manner in which those concerns were communicated has resulted in a deficit of trust that cannot be remedied by a lesser disciplinary sanction.

AWARD

The Grievance is denied.

Dated: July 19, 2010

Stephen F. Befort
Arbitrator