

IN THE MATTER OF THE ARBITRATION BETWEEN:

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 320

AND

POPE COUNTY

BMS Case No. 12-PA-1181

OPINION AND AWARD OF ARBITRATOR

Arbitrator:

Richard A. Beens

APPEARANCES

For the Union:

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For the Employer:

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**Date of Award:
September 27, 2012**

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”)¹ between IBT 320 (“Union”) and Pope County, Minnesota (“Employer” or “County”). The Grievant was a member of the Union and employed by the County.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on August 9, 2012 in Glenwood, Minnesota. The parties stipulated that the matter was properly before the arbitrator. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Written final arguments were submitted on September 14, 2012. The record was then closed.

ISSUE

The parties stipulated to the issue presented for consideration:

Did the Employer have just cause to terminate Grievant and, if not, what is the proper remedy?

FACTUAL BACKGROUND

The Employer, Pope County, is a political subdivision of the State of Minnesota with Glenwood as the county seat. Grievant began working for the County in February, 1991. She has spent her entire 21 years as an office manager in what was originally called Planning and Zoning, later termed Environment Services, and is now called the Land and Resource Management Department (“LRM”). She was supervised by the Department Head, Steve Lawrence, for the last 14 years. While LRM monitors state and

¹ Joint Exhibit 1.

federal environmental regulations and hazardous waste issues, the bulk of their work deals with issuing and monitoring construction permits. The work has seasonal fluctuations, with late March through early October being extremely busy. The workload is considerably slower during the remaining late-Fall and Winter months.

According to her supervisor, the majority of Grievant's work time was spent at the LRM front desk.² She answered builder's regulatory questions, took permit requests, and entered them into the County computer system. Hard copies of permits were then printed, signed by the builder and co-signed by another LRM employee, Bill Winters.³ The signed permits are ultimately filed in the LRM archives. In addition, electronic versions of the permits are retained in the County computer system.

In April, 2010, Grievant received discipline for purchasing an anti-virus software program with county funds and installing it on her personal computer. The disciplinary action included a 20-day suspension, a one step reduction in pay, and a Last Chance Agreement ("LCA").⁴ The latter contained the following provision:

"[Grievant] and Union agree that the terms as set forth in this Notice of Suspension and Last Chance Agreement are reasonable conditions for [Grievant] to comply with in order for her to save her job and continue employment with County. [Grievant] and Union acknowledge and agree that if [Grievant] engages in any conduct that would constitute "just cause" for discipline or fails to comply with or complete any one of the requirements specified herein it constitutes "just cause" for her discharge from the County employment and the Veterans Preference Act, if applicable."

Grievant complied with all the conditions of the LCA and again became eligible for step increases by April 1, 2011. However, the LCA contained no termination date.

² If there is a formal job description for Grievant's position, it was not offered into evidence at the hearing.

³ Winters retired from the LRM department in November, 2011. His position had not been filled by the time of Grievant's termination in April, 2012.

⁴ Employer Exhibit 8.

The County's internal computer network is maintained, serviced, and monitored by a three-person IT Department headed by Donna Martin. They maintain a network filtering program entitled Barracuda. It sets up criteria which block certain website from County computers. For instance, any website with the word "sex" in its title cannot be accessed by County computers. This program also alerts IT when anyone uses one of the County's 135 computers and attempts to visit a forbidden site or is infected with a virus. There is no evidence that Grievant ever visited a forbidden site.

Because of her role as office manager of the LRM department, Grievant was allowed to download software programs needed for departmental duties. Most County employees did not have this authority. Once in 2010 and again in 2011, Barracuda indicated Grievant's computer had a virus. Both times, the County IT Department could not uninstall the viruses and had to re-load the computer hard drive. Martin testified that the 2011 incident prompted her to talk to the LRM department head, Steve Lawrence, and urged him to talk to Grievant about her computer use.⁵ The department head has no recollection of such a conversation and, consequently never discussed computer use with Grievant. According to Grievant, after the 2011 virus incident, Martin simply told Grievant to "be careful" about what she downloads. She was given no other admonitions regarding her computer use.

Pope County first adopted an Information Technology Policy in 2000.⁶ Grievant acknowledged receiving, reading, and understanding the initial policy.⁷ A revised

⁵ Employer Exhibit 16.

⁶ Employer Exhibit 9.

⁷ Employer Exhibit 10.

Information Technology Policy was put into effect on November 5, 2005.⁸ Aside from slight differences in format, the only significant change in the revised policy was to allow “*Minimal personal use*” of County computers as oppose to “*De minimis personal use.*”⁹ There is no evidence of Grievant receiving the revised version. Further, there is no evidence the County ever conducted any employee training with respect to either version.

On February 23 and 24, 2012, Barracuda indicated to the IT Department that Grievant’s computer was again infected with a virus.¹⁰ Martin took the computer on the 24th and attempted to uninstall the virus, but was unable to do so. Once again, she had to completely reload Grievant’s computer. While working on the machine, Martin determined the virus had originated with a site, www.shopzilla.exe, that she believed had no relationship to County work. Consequently, Martin requested permission to audit Grievant’s computer.¹¹

The County has had a Random Computer Audit Policy in place since 2005.¹² In addition, the County promulgated a policy allowing the County Coordinator to authorize an investigation of employee actions if he deems it necessary.¹³ After a discussion with Martin, the Coordinator authorized an audit of Grievant’s computer use.¹⁴

The audit was conducted by the IT Department, using STAFFCOP, a program

⁸ Employer Exhibit 11.

⁹ Employer Exhibits 9 and 11, paragraph V.

¹⁰ Employer Exhibits 14 and 15. Barracuda indicated that Grievant’s computer showed 965 spyware requests on 2-23-12 and 75 on 2-24-12. However, the mechanics and relevance of spyware requests were not explained in the course of the arbitration hearing. Consequently, I cannot determine whether these represent multiple computer operator inputs or simply result from the computer’s viral infection.

¹¹ Employer Exhibit 16.

¹² Employer Exhibit 12.

¹³ Employer Exhibit 13.

¹⁴ Employer Exhibit 16. Although the audit request was not fully filled out or signed, there is no dispute that the action was requested by Martin and authorized by the County Coordinator. Consequently, I regard the deficits as immaterial.

which operates without the employee's knowledge and produces a record of website "clicks" and preserves "screen shots" taken once every six minutes. Grievant's computer was under STAFFCOP's surveillance for five days, March 5, 2012 through March 9, 2012. Martin acknowledged this was the first use of STAFFCOP since she joined the County in 2008. The audit revealed that Grievant spent a good deal of time, more than 50% according to the Martin, viewing websites having little or no relationship to County business.¹⁵ These included www.weightwatchers.com, frontierairlines.com, priceline.com, oneclickcash.com, thinkpaddepot.com, and many others. As part of the investigation, the Coordinator spoke briefly with Grievant's Department Head, Steve Lawrence. The conversation is reported thusly,

*"Mr. Lawrence was asked if he at any time, verbally or in writing gave permission to any staff member to use their county issued computer for personal use. He stated that if any staff member had questions about what they can do or how they may use their county issued computer, he referred them to Donna Martin, IT Manager."*¹⁶

Grievant was never interviewed during the course of the investigation or computer audit.

As a result of the audit, the County Coordinator, with the help of Martin and the head of the County Human Resources Department, prepared a report dated March 21, 2012 to the County Board recommending that Grievant be discharged.¹⁷ Their termination recommendation was based on the 2010 Last Chance Agreement with the Union and Grievant.

Grievant was placed on administrative leave on March 13, 2012. It appears Grievant first learned of her pending termination through a letter from the Human

¹⁵ Employer Exhibits 17, 18, 19, 20, and 21.

¹⁶ Employer Exhibit 23.

¹⁷ Employer Exhibit 23.

Resources Manager, Jackie A. Stevens, dated March 23, 2012.¹⁸ A Loudermill hearing was held on April 2, 2012 which is the first time Grievant was shown the County's investigative report and supporting documents.¹⁹ Although Grievant's Department Head was initially invited to the Loudermill Hearing, he did not speak and was instructed to leave shortly after it began.

In the course of the hearing, Grievant admitted personal use of the County computer, but indicated that she had acted in that manner for "years" and was never told by anyone that it was unacceptable. While acknowledging "misuse" of the County computer, she denied violating the policy. Further, Union Counsel argued the LCA had expired on 4/1/11 and didn't apply to this case. Despite the defenses raised, the County Board passed a resolution discharging Grievant effective April 17, 2012.²⁰ The County Coordinator never consulted with Lawrence prior to discharging Grievant. The Union immediately grieved the Board action.²¹

APPLICABLE CONTRACT AND POLICY PROVISIONS²²

Collective Bargaining Agreement

Article X. Discipline

10.1 *The Employer will discipline for just cause only. Discipline will be in the form of:*

- A. *Oral Reprimand - Oral Reprimands are verbal. Written documentation of an oral reprimand shall note date and general topic of the reprimand and be placed in the employee's confidential file in Human Resources. Written documentation of a verbal reprimand shall remain in the confidential for a period of one year, if not part of a continuing record.*

¹⁸ Employer Exhibit 1.

¹⁹ Employer Exhibit 2.

²⁰ Employer Exhibit 3 and 4.

²¹ Employer Exhibit 5.

²² Only those provisions deemed relevant to the present case have been included.

- B. *Written Reprimand*
- C. *Suspension*
- D. *Demotion*
- E. *Discharge*

Grievant's Last Chance Agreement

[Grievant], Teamsters Local No. 320 ("Union") and the County of Pope ("County") for mutual consideration, the adequacy of which they each acknowledge, hereby enter into this Notice of Suspension and Last Chance Agreement, and agree as follows:

.....

- 2. *[Grievant] will receive a suspension without pay for twenty (20) working days, which is to begin on April 1, 2010.*
- 3. *[Grievant] will receive a one step reduction in pay to Grade 8, Step 9 for a period of one year from April 1, 2010. Provided that there is no further disciplinary action against [Grievant], she will be eligible for a step increase on April 1, 2011.*

.....

- 6. *The discipline and conditions specified in paragraphs 2 and 3 above and the other terms of this agreement provide [Grievant] with a "last Chance" to correct her behavior. [Grievant] and Union agree that the terms as set forth in this Notice of Suspension and Last Chance Agreement are reasonable conditions for [Grievant] to comply with in order for her to save her job and continue employment with County. [Grievant] and Union acknowledge and agree that if [Grievant] engages in any conduct that would constitute "just cause" for discipline or fails to comply with or complete any one of the requirements specified herein it constitutes "just cause" for her discharge from County employment...*
- 7. *[Grievant] shall pay restitution to Pope County in the amount of \$42.74.*
- 8. *[Grievant] shall be required to use vacation time for all regular hours for which she was compensated during her paid suspension and/or administrative leave from March 18, 2010 through March 31, 2010. To the extent that such hours are not currently available, vacation hours shall be deducted as they accrue.*
- 9. *[Grievant] shall not have the ability to purchase any goods and/or services whatsoever for County. [Grievant] shall not have the authority or otherwise encumber, expend, or use County funds. [Grievant] shall return any County issued credit card forthwith.*

.....

[Signed by Grievant 4/7/10]

APPENDIX E

INFORMATION TECHNOLOGY POLICY

V. UNACCEPTABLE USE

All County information technology systems must be used only for business-related purposes.

Limited Personal Use Exception for Employees: Minimal personal use by Employees during non-duty hours may be authorized in advance by their DH in writing. Such use must comply with all other requirements of County policies and must not interfere with workplace productivity. Personal use of a more substantial nature (e.g. masters' degree thesis, etc. may be authorized by the Coordinator upon written request.

Users shall not use the Count's information technology systems, including, but not limited to, computers, equipment, internal or external E-mail, or Internet access for any of the following purposes:

- To access, upload, download, transmit, receive or distribute pornographic, obscene, abusive, or sexually explicit materials, or materials containing unclothed or partially clothed people unless in an official capacity while investigating crimes.*
- To transmit or receive obscene, abusive, or sexually explicit language or profanity unless in an official capacity while investigating crimes.*
- To violate any local, state or federal law or engage in any type of illegal activity.*
- To vandalize, damage or disable the property of another person or organization.*
- To access the materials, information or files of another person or organization without permission.*
- To violate any applicable state, federal and international copyright, trademark or intellectual property laws and regulations or otherwise use another person or organization's property without prior approval or proper attribution consistent with copyright laws, including unauthorized downloading or exchanging of pirated or otherwise unlawful software or copying software to or from any County computer.*
- To engage in any form of gambling.*
- To engage in any type of harassment or discrimination, including but not limited to sexual harassment and harassment or discrimination based upon race, gender, sexual orientation, religion, national origin, marital status, status with respect to public assistance, disability or any other type of harassment or discrimination prohibited by law and County policy.*

- *To engage in any type of commercial enterprise unrelated to the specific purposes and needs of the County.*
- *To engage in any form of solicitation without the express prior written consent of the DH or the County Board.*
- *To promote any political or private causes, or other activities, without the express prior written consent of the DH.*
- *To enter into financial or contractual obligations without the express prior written consent of the County Board. Any financial or contractual obligation entered into by a user without the express prior written consent of the County Board shall be the sole responsibility of the user.*
- *To review or access any materials related to, obtaining, or using any controlled substances or products such as alcohol which may not lawfully be used or consumed by minors, without the express prior written permission of the DH.*
- *To advocate or access information advocating any type of unlawful violence, vandalism or illegal activity, without the express prior written consent of the DH.*

APPENDIX I

RANDOM COMPUTER AUDIT POLICY

.....

IV. CONTROLS

.....

Infringements of the ITP will be reviewed on a case-by case basis. The Coordinator will report audit findings to the applicable DH.

If the audits show serious or continued violation of the County’s ITP, the County reserves the right to discipline the violator up to and including suspension, demotion, or dismissal. The Coordinator, in consultation with the DH, will determine the appropriate corrective action.

OPINION AND AWARD

The Last Chance Agreement’s lack of a termination date presents a threshold issue in need of resolution. The Employer’s discharge of Grievant is principally based on her alleged violation of the LCA. Paragraph 6 provides, “...if [Grievant] engages in any conduct that would constitute “just cause” for discipline or fails to comply with or

complete any one of the requirements specified herein it constitutes “just cause” for her discharge from the County... ”²³

Last Chance Agreements inure to the benefit of both the employer and employee. They give the employee a final opportunity to correct conduct that might otherwise lead to termination. The employer avoids the risk of an unsuccessful arbitration plus the trouble and expense of replacing an employee. LCAs are outside the collective bargaining agreement and are customarily strictly construed and enforced.²⁴

The County argues that Grievant’s violation of the Information Technology Policy mandates her immediate discharge. In fact, if the LCA applies, any Grievant misconduct that provides “just cause” for any disciplinary action mandates her termination. This would be true if Grievant had only acted in a manner that constituted “just cause” for a verbal warning. Application of the LCA would significantly lower the quantum of proof needed for the employer to discharge Grievant.

The Union counters by asserting the present LCA had expired almost a year before the current incident. As a consequence, they argue the current case must be analyzed like any other disciplinary matter and the arbitrator must therefore determine whether the facts of the present case, standing alone, constitute “just cause” for Grievant’s termination. Acceptance of the Union’s argument would increase the quantum of proof the Employer needs to discharge Grievant.

The LCA in this case is problematic in that it contains no time limit. The Employer contends this results in the LCA being in effect throughout the remainder of

²³ Employer Exhibit 8

²⁴ Elkouri & Elkouri, *How Arbitration Works*, Sixth Edition (2003), Ch. 15.3.F.iii.

Grievant's employment with the county. The Union points to the fact that the LCA required Grievant to meet certain requirements within one year of its signing at which point she would be again eligible for pay increases. She met those deadlines and, in the Union's view, terminated the application of the LCA.

As was amply demonstrated by Counsels' final briefs, there is a wide range of arbitral opinion relating to the absence of a termination date in a LCA. While not mandatory or conclusive, the recommended elements of a LCA set out by Elkouri & Elkouri in *How Arbitration Work* provide a reasonable framework for analysis:

Elements of an enforceable last-chance agreement may include the presence of competent union counsel for the employee when negotiating the agreement, consideration from the employer (usually, this consists of the employer foregoing its right to terminate the employee for the recent misconduct), a standard of fairness demonstrated by the designation of a specific time period during which the employee will be subject to the agreement's terms, and a clear statement of what action will result in termination.²⁵

I would first observe that the County was generous to offer Grievant a LCA following discovery of her misuse of County funds in 2010. A contested arbitration could well have resulted in her termination at that time. However, the County chose to forego its potential right to terminate and the Grievant chose to forego her right to grieve specific disciplinary actions set out in the agreement. This represented a classic use of the LCA. It was a win-win situation with the County avoiding the time, expense, and risk of arbitration while retaining the services of a long term employee. The Grievant was given an opportunity to "rehabilitate" herself by meeting conditions set out in the agreement. Nevertheless, some aspects of the 2010 process are at variance with the criteria suggested

²⁵ Elkouri & Elkouri, *Ibid.*, at 970.

in Elkouri & Elkouri.

While both Grievant and the Union business agent signed the LCA in question, there is no evidence that “competent counsel” ever reviewed the document on their behalf prior to signing. Further, it is misleading to call this LCA a “negotiated” contract.

Former County Human Resource Manager Jackie Stevens testified that she was present when the LCA was drafted by the county’s former labor counsel and coordinator.²⁶

There is no evidence that Grievant, her Union business agent, or Union legal counsel were ever consulted. In fact, Stevens testified the LCA was simply presented to Grievant as a “take it, or leave it” deal. It also appears the Union business agent didn’t see and sign the final document until two weeks after Grievant signed.²⁷ While a questionable practice, the lack of mutual input is not necessarily fatal. Ultimately, the Union and Grievant both signed the LCA.

Far more problematic, in my view, is the lack of a specified time period for the employee to be subject to the provisions of the LCA. Jackie Stevens testified that the issue was never discussed, or even considered, by those County employees drafting the document. Further, neither the Grievant nor her Union recognized or raised the duration issue. The document, as written, allows both sides to now make arguments. The County contends the lack of a termination date means the LCA restrictions apply throughout the remainder of Grievant’s employment. The specific tasks to be completed within one year and the one year pay reduction reasonably leads Grievant to assert the LCA expired after one year.

²⁶ Then labor counsel, Justin Anderson, and then county coordinator, Riaz Aziz, drafted the agreement but are no longer employed by the County and did not testify at the arbitration hearing.

²⁷ Employer Exhibit 8.

While arbitrators have come down on all sides of this issue, the most authoritative and convincing direction is set out in the Nation Academy of Arbitrators' publication, *The Common Law of the Workplace*, Theodore J. St. Antone, Editor (2nd Edition, 2005) at 175:

*A well-drafted last-chance agreement will specify an expiration date, after which the employee will be subject to the same disciplinary rules and procedures applicable to other employees. If the agreement does not state how long it lasts, an arbitrator should find that the parties intended it to last a "reasonable" time, depending on the nature of the offense, the parties' practices, and other relevant factors.*²⁸

Designation of a specific time period is a matter of elemental fairness. An LCA can have a limited time period or be effective for the remainder of the employee's tenure. There is no law that dictates or favors one end of the durational spectrum over the other. Agreement of the parties is the only limitation. However, that agreement as to duration should be specifically spelled out in the LCA.²⁹ Any workplace will function more smoothly and productively when both the employer and employees have a crystal clear understanding of their respective rights and obligations. If the LCA in this case had explicitly stated what the County now contends, the present arbitration would likely not have occurred. Grievant's simple admission of "misusing" the county computer within an LCA specified time period would have provided "just cause" for immediate termination under the terms of the document. However, that is not the constellation of facts before me.

²⁸ Similar positions are taken in *Grievance Guide*, 10th Edition (BNA 2000) and *Discipline and Discharge in Arbitration Cases*, Brand Editor, (BNA 1998) at 403. Both cite with approval *Gaylord Container Corp.*, 97 LA 382 which held a specified termination date to be an essential element of a last chance agreement.

²⁹ See Peterson, Donald J., *Last Chance Agreement*, 52 *Dispute Resolution Journal*, 37 (Summer 1997) ; Grimstead, Kenneth, *The Arbitration of Last Chance Agreements*, 48 *Arbitration Journal* 71 (March 1993).

The lack of a termination date in the present LCA may have been oversight on the part of the former labor counsel and county coordinator. However, Jackie Stevens' un rebutted testimony is that they never raised or considered the issue. More important, there is no internal evidence that the LCA was intended to be perpetual. On the other hand, there is internal evidence to support a one-year duration: As part of the 2010 discipline, Grievant received a one-year step reduction in pay grade. Paragraph 3 of the LCA ends with the following: *"Provided that there is no further disciplinary action against Hill, she will be eligible for a step increase on April 1, 2011."*³⁰ Testimony indicated that the remaining requirements, restitution to the County of \$42.74, requiring the use of vacation to cover paid suspension and/or administrative leave, and return of a county credit card where all completed well before April 1, 2011. Last, just prior to the current incidents, both the Human Resources Manager and County Coordinator responded favorably to her department head's proposal to promote Grievant.

Commentator Donald J. Peterson stated:

*"At a minimum the last chance agreement should specify the time the agreement is to be in effect. The sample cases indicate the preferred duration is one year or six months. Otherwise, the agreement appears to hang like the Sword of Damocles over the head of the grievant. A specified time limit removes his doubt."*³¹

At some point, an employee who has met all the conditions of a LCA should be deemed "rehabilitated." Having Grievant forever subject to immediate dismissal for any subsequent discipline, even a mere verbal warning, is draconian and unreasonable.

Based on the evidence presented and the LCA requirements for Grievant, I find it

³⁰ Employer Exhibit 8.

³¹ Peterson, Donald J., *Last Chance Agreement*, Ibid.

most reasonable to conclude the LCA in this case had a duration of one year and expired on April 1, 2011. As a consequence, Grievant's discharge must be analyzed under the standard considerations relating to just cause.

A "just cause" consists of a number of substantive and procedural elements. A review of discipline for alleged employee misconduct requires an analysis of several factors. First, has the employer relied on a reasonable rule or policy as the basis for the disciplinary action? Second, was there prior notice to the employee, express or implied of the relevant rule or policy, and a warning about potential discipline? A third factor for analysis is whether the disciplinary investigation was thoroughly conducted. Were statements and facts fully and fairly gathered without a predetermined conclusion? Finally, did the employee engage in the actual misconduct as charged by the employer?

The Pope County Information Technology Policy³² is reasonable on its face. Employers, both public and private, have adopted similar policies as the use (and potential abuse) of company computers has become a standard workplace feature. While the primary thrust of the policy is to protect privacy and prohibit employee access to obscene materials, it also places restrictions on non-objectionable personal use. The Employer asserts Grievant violated the following provision:

*Limited Personal Use Exception for Employees: Minimal personal use by Employees during non-duty hours may be authorized in advance by their DH [Department Head] in writing. Such use must comply with all other requirements of County policies and must not interfere with workplace productivity.*³³

Again, there is nothing unusual or unreasonable about this provision. The County has the

³² Employer Exhibit 11.

³³ Employer Exhibit 11, p.2.

right to expect employee attention to county work during duty hours.

Was there prior notice to the employee of the rule and a warning about potential discipline? The answers to these questions are less clear.

The County first adopted the policy in 2000.³⁴ On October 6, 2000, Grievant signed an acknowledgement indicating she had read and understood the policy.³⁵ That acknowledgement also warned of possible disciplinary action “*..up to and including discharge,*” for violation of the Technology Policy. The policy was revised effective November 2, 2005. Although other county employees were required to sign acknowledgements of having read and understood the revised policy, there is no record of it being presented to Grievant. However, the revisions were very minor. In the applicable section quoted above, the original referred to “*De minimis personal use..*” while the revision stated, “*Minimal personal use..*” Although there is no record of Grievant having accessed it, the revised policy, along with all other county policies, was available on the County intranet system.

Of more concern in this case is the type and level of County enforcement. Testimony indicated that since the policy was adopted three other employees violated the policy and received disciplinary action: one for gambling online and two for downloading pornographic images. The former violated the policy twice and received a five day suspension the first time and a LCA the second time. The latter two employees were simply given verbal warnings. It appears Grievant is the first to be disciplined for personal use that didn't involve those types of uses or websites specifically prohibited in

³⁴ Employer Exhibit 9.

³⁵ Employer Exhibit 10.

the Employer's policy.³⁶ Further, Grievant indicated that she had used the office computer in a similar manner for "years" without complaint from her department head or the IT department. Perhaps more important, Grievant's supervisor, Steve Lawrence indicated that, while he had not authorized her personal use of the computer, he was unaware of any County department head who enforced the personal use provisions of the Information Technology Policy.³⁷ Nevertheless, Grievant acknowledged "misuse" of her county computer.

Was the disciplinary investigation thoroughly conducted? The short answer is "not quite." Additionally, the validity of the Employer's conclusions based on the facts gathered is debatable. STAFFCOP, the software program used to surreptitiously audit Grievant's computer, measures the number of "clicks" per screen and takes "screen shots" every six minutes. The investigator, IT department head Martin, concluded that 53% of Grievant's time was spent on personal rather than county business. As I understand the testimony, that conclusion is inaccurate and misleading.

First, STAFFCOP measures the number of "clicks" not the actual time spent viewing the web page resulting from the "click." For example, if an employee spent 90 minutes working on a document resulting from a single "click" and then 10 minutes and 19 "clicks" surfing the web, the County's logic would conclude that 95% of the employee's time was spent web surfing. The periodic screen shots captured by

³⁶ See Employer Exhibit 11, Appendix D, paragraph V., pp. 2 and 3.

³⁷ It was disquieting to learn that Lawrence was, in essence, forced by the County Board to resign his 20-year employment and 14 year position as DH of LRM three months after Grievant's termination and only three days after testifying on her behalf at an unemployment compensation hearing. One of the reasons given by the County Board was his failure to properly manage Grievant. There may have been additional reasons, but they were not entered in evidence.

STAFFCOP³⁸ are helpful, but do not definitively measure time spent on County vis a vis personal business. For instance, three screen shots showing the same web page and spanning 12 minutes are misleading if Grievant spent the middle 10 minutes assisting a customer at the counter. While there is no question, Grievant spent considerable time on personal matters, the quantum of time cannot be precisely determined by STAFFCOP data.

Second, Martin consulted neither the department head nor Grievant in determining which sites were or were not work related. For instance, anywhere from 11% to 18% of Grievant's "clicks" were on google.com during the audit period.³⁹ That universal search engine can just as easily be used for county as well as personal business. In other instances, some state websites appear to have been counted as personal: Elink4web.bwsr.sta is a Minnesota Board of Soil and Water Resources logon page.⁴⁰ Citrix.pca.state.mn.us is a link to the Minnesota Pollution Control Agency's feedlot officers training manual.⁴¹ Again, while there is no doubt Grievant spent a good deal of time on personal sites during the audit period, these sites are obviously related to LRM business. It is not at all clear that Martin excluded them from her analysis of personal use time. Further, testimony indicates much of Grievant's job and work time does not involve computer use. She was the first person encountered by LRM customers and, according to her supervisor, help them filling out forms and answering 90% of their questions. No attempt was made by the Employer to quantify time spent on other duties.

³⁸ Employer Exhibit 22

³⁹ Employer Exhibits 17 through 21.

⁴⁰ Employer Exhibit 18.

⁴¹ Employer Exhibit 20.

Had that been done, it would be far easier to measure the gravity of the present offense.

Finally, did Grievant violate the County Information Technology policy? There is no doubt that she did. Grievant acknowledged “misuse” of the county computer at both the Loudermill and arbitration hearing, but denies violation of the policy. She would be right if the policy was limited to prohibiting online gambling, viewing pornography, and prying into protected data. However, it is not. Personal computer use is clearly limited in the County policies. The fact that supervisors turned a blind eye to or winked at County computer use for personal purposes has a bearing on the severity of discipline, but does not obviate the fact she violated the policy. I find the Employer had just cause to discipline Grievant.

Is discharge an appropriated penalty under the facts of this case? While an arbitrator has the power to determine whether or not an employee’s conduct warrants discipline, his discretion to substitute his own judgment regarding the appropriate penalty for management’s is not unlimited. Rather, if an arbitrator is persuaded that the discipline imposed was within the bounds of reasonableness, he should not impose a lesser penalty. This is true even if the arbitrator would likely have imposed a different penalty in the first instance. On the other hand, if an arbitrator is persuaded the punishment imposed by management is beyond the bounds of reasonableness, he must conclude the employer exceeded its managerial prerogatives and impose a lesser penalty. In reviewing the discipline imposed on an employee, an arbitrator must consider and weigh all relevant factors including employee’s length of service, her work record, and the seriousness of the misconduct.

As previously indicated, discharge would clearly be appropriate if the LCA were

still in effect. A finding of just cause for any type of discipline would have left the arbitrator no choice but to uphold termination under a strictly construed paragraph 6 of the LCA. I have no doubt the Employer acted in good faith in relying on what I have now determined to be an expired LCA. While they had no hand in drafting the flawed original document, they understandably felt compelled to enforce it. However, having determined the LCA no longer applies, the penalty imposed must be analyzed as in other discipline cases.

There are a number of conflicting factors to be considered when viewing the appropriateness of the punishment imposed. The Grievant's 21-year tenure with Pope county is a strong mitigating factor. With the exception of the discipline in 2010 and the present infraction, she has had a good work record. The only employee evaluation she ever had was conducted 2005.⁴² It consistently rated her in the "good" or "very good" categories. Her 14-year supervisor, Steve Lawrence called Grievant "a very good employee" and "the best communicator" in the LRM office. Just prior to the current incident, both the HR manager and County Coordinator viewed her possible promotion favorably.

The Employer contends Grievant's conduct warrants discharge even without the LCA. I cannot agree. The current offense, while not trivial, does not warrant termination. The combination of unclear evidence, lax enforcement, and lack of supervisory direction lowers the level of Grievant's culpability. The audit was conducted during the time of the year when the LRM office is least busy. Although it doesn't excuse her, Grievant

⁴² Union Exhibit 4.

credibly testified that the audit period is not indicative of her normal computer usage. Next, there was no compelling evidence that Grievant was significantly behind in her LRM workload. While hardcopies of some permits were unsigned and unfiled, the evidence is that the LRM employee charged with signing them had retired in November, 2011. No one had been designated to take over his duties at the time of the audit four months later. More important, Grievant's occasional computer use for personal purposes was apparently known and tolerated for years despite the County policy. Neither the IT department nor her supervisor personally warned her to discontinue the practice despite apparent opportunity to do so. However, Grievant's assertion that she "misused" the Employer's computer but didn't violate the policy presents a distinction without a difference. If anything, it indicates Grievant knowingly took advantage of lax supervision and enforcement despite the personal use policy.

Finally, this is Grievant's second discipline in two years. That fact alone, while not compelling termination, certainly exacerbates the seriousness of the present offense. Her 2010 violation was extremely serious. She was fortunate to receive 20 days off, a pay reduction and a LCA at that time. While not in the same category as her first offense, the current incident cannot be ignored. Nevertheless, I am reluctant to end a 21-year career based on the facts before me. I believe her rehabilitation can be accomplished with a lesser punishment.

After considering the evidence before me, the equities, and based of the foregoing factors, I believe reinstating Grievant without back pay justly punishes Grievant and sends the message that the County Information Technology Policy must be honored.

AWARD

The grievance is DENIED IN PART and SUSTAINED IN PART. The Employer had just cause to discipline Grievant. However, Grievant' punishment is reduced from termination to reinstatement without back pay. The Employer shall reinstate Grievant to her former position, seniority and benefits within 10 calendar days of this Award. I will retain jurisdiction for 60 days to consider any issues that may arise regarding execution of the Award.

Dated: 9/27/12

Richard A. Beens, Arbitrator