

IN THE MATTER OF ARBITRATION BETWEEN

SAINT PAUL PUBLIC SCHOOLS  
INDEPENDENT SCHOOL DISTRICT  
NO. 625

(Employer)

and

DECISION  
(Discharge Grievance)  
BMS Case No. 12-PA-1031

INTERNATIONAL UNION OF  
OPERATING ENGINEERS, LOCAL 70  
(Union)

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ARBITRATOR: Frank E. Kapsch, Jr.

DATE AND PLACE OF HEARING: August 27th and 28<sup>th</sup>, 2012 at the St. Paul Public Schools Central Administration Building located in St. Paul, MN.

RECEIPT OF POST-HEARING BRIEFS: Both Parties submitted timely briefs as of October 1, 2012.

APPEARANCES

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JURISDICTION

The Parties stipulated that this Arbitrator has been properly selected and appointed in accordance with the provisions of Article 22 (Grievance Procedure) of the applicable labor agreement and thereby possesses the duties, authorities and responsibilities set forth therein to hear and resolve this dispute.

## THE ISSUE

The Parties stipulated that the Issue is; Did the Employer, on September 20, 2011, discharge Jon C. Bergstrom, an employee, with Just Cause? If not, what shall be the remedy?

## THE EMPLOYER

St. Paul Public Schools<sup>1</sup> is the second largest school district in the State of Minnesota, serving some 39,000 students in the City of St. Paul, MN. The District educational system currently consists of some 250 learning sites, including some 50 elementary schools, 8 middle schools and 7 senior high schools. The system is staffed by approximately 6,700 full- and part-time employees, most of whom are represented by various labor organizations and with whom the District has on-going contractual collective bargaining relationships; including a relationship with IUOE, Local 70, the Union herein.

## THE UNION

International Union of Operating Engineers, Local 70 (the Union) is headquartered in St. Paul MN and is the current collective bargaining representative for over 5,000 employees employed in over 200 different bargaining units throughout the State of Minnesota. These employees are employed in a wide variety of industries and organizations, including the St. Paul Public School District, where they are typically responsible for the operation, maintenance, repair and cleanliness of their employer's buildings and related physical facilities.

## COLLECTIVE BARGAINING HISTORY

The Union has been the collective bargaining representative for a unit of custodial engineers, maintenance employees, building custodians and related classifications employed by the St. Paul Public School system for many years and that bargaining relationship has been embodied in a continuing series of labor contracts. The current bargaining unit numbers approximately 225 employees. The Parties have stipulated that the labor agreement applicable in this matter was effective July 1, 2010 and was scheduled to expire on June 30, 2012.

## AN ARBITRABILITY ISSUE

At the outset of the hearing, Counsel for the Employer advised the Arbitrator that it was moving for dismissal of the Union's grievance in this matter, on procedural grounds. More specifically, the Employer contended that the Union had waived

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<sup>1</sup> Also referred to herein as the Employer or the District.

the grievance by not properly following the specified Steps of the contractual Grievance Procedure. The Union, in turn, denied the Employer's allegations and urged dismissal of the Motion.

According to the Employer, Article 22 – *Grievance Procedure* of the applicable labor agreement sets forth a detailed grievance procedure consisting of four distinct Steps, the first three of which are intended to facilitate specific meetings between various Employer and Union representatives with the hope that the two parties can talk out and reach agreement on an informal and mutually satisfactory resolution of the grievance. Absent such an informal resolution, the grievance procedure culminates in Step 4, Arbitration.

At this point, the Arbitrator advised the Parties that the Employer's Motion to dismiss the underlying grievance on procedural grounds became a "threshold issue" that had to be formally addressed prior to any possible proceedings on the merits of the grievance. The Arbitrator further proposed that each Party immediately proceed with the presentation of their respective positions and evidence with respect to the Arbitrability Issue and upon completion of those presentations, the Arbitrator would take the Motion under immediate consideration and advisement and would subsequently issue an oral Bench Decision. If the Employer prevailed and its Motion granted, the grievance would be immediately dismissed and the hearing would be closed. If the Employer failed to sustain its Motion, it would be denied and the hearing would proceed on the merits of the grievance. The Parties were in agreement with that procedure.

#### The Employer's Position and Evidence:

- The grievant, Jon C. Bergstrom, a Custodial Engineer, was terminated by the Employer on September 20, 2011.
- On September 23, 2011, the Union Business Representative, Ernie Lund, filed a written grievance on behalf of Mr. Bergstrom protesting his discharge. Mr. Lund informally requested that the Parties skip the subsequent Steps of the Grievance Procedure and proceed to Step 4 – *Arbitration*. The Employer refused that request and advised him that it wished to follow through with each Step of the Grievance Procedure.
- On October 11, 2011, the Parties met for what the Employer labeled a Step 1 meeting. During the meeting Union Representative Lund made it clear to the Employer that the Union's position was that Bergstrom's conduct was insufficient to justify discharge and that the Union and Bergstrom would readily agree to some lesser form of discipline. On October 18, 2011 the Employer issued its written Step 1 Answer to the grievance by denying it and standing by its discharge decision.
- On October 27, 2011, Union Representative Lund sent an email to Joyce Victor, the Employer's Assistant Manager of Negotiations & Employee Relations asking what the status was on the Union's request to skip the rest of the Steps in the Grievance Procedure and move directly to the Arbitration Step? Later the same day, Ms. Victor asked Amy King, a

School District Human Resources Consultant, to advise Lund that the District wished to fully proceed through each of the contractual Steps of the Grievance Procedure. King so informed Lund on October 27.

- On November 4, 2011, the Parties met in a Step 2 grievance meeting. The principals for the School District were Ms. Victor and Mr. Lund for the Union. In the meeting, Mr. Lund again requested that the Parties skip further discussions regarding the grievance and proceed directly to arbitration because it was clear that it was not going to be resolved informally by the parties. Ms. Victor reiterated the District's desire to fully proceed through each of the formal Steps of the Grievance Procedure.
- On November 14<sup>th</sup>, 2011, following the Step 2 meeting, Mr. Lund contacted the Minnesota Bureau of Mediation Services (BMS) and requested a panel list of potential arbitrators to hear the Bergstrom grievance case.
- On November 17<sup>th</sup> 2011 MN BMS issued an arbitrator panel list to both Mr. Lund and Ms. Victor.
- On November 18, 2011, Ms. Victor issued a written Step 2 Answer and again denied the grievance and standing on its discharge decision.
- The labor agreement in Article 22.3 of the Grievance Procedure requires that the Union, within fourteen (14) calendar days of receipt of the Employer's Step 2 Answer, request a Step 3 meeting. The Union did not request a Step 3 meeting. The labor agreement clearly states that "*...Any grievance not referred in writing by the Union within fourteen (14) calendar days following receipt of the Employer's [Step 2] answer shall be considered waived.*"

#### The Union's Position and Evidence:

- The Union acknowledges that the Employer's chronology and fact sequence with respect to the processing of the Bergstrom grievance is essentially accurate and correct.
- However, the Employer's chronology fails to include the fact that the Bergstrom discharge situation in September, 2011 was merely one of a large number of discharges and disciplinary actions involving other bargaining unit employees; all related to alleged misuse of the Employer's email/Internet system. Mr. Lund had been involved in a significant number of grievance meetings and discussions relating to those situations and was well aware of the Employer's positions and arguments and quickly concluded that the Employer was not going to back down on its decision to discharge Bergstrom. Accordingly, he advised the Employer that unless the Employer was willing to discuss and consider lesser discipline for Bergstrom, further Grievance Step meetings would be an exercise in futility for both Parties and they might as well save their efforts and resources for arbitration by skipping those meetings.
- Mr. Lund made it clear to the Employer that, given their respective positions relative to the Bergstrom grievance; it would be both reasonable and efficient to move the matter to the arbitration Step of the Grievance

Procedure as quickly as possible. There was never any intention by the Union to waive or otherwise drop Bergstrom's grievance; to the contrary, he clearly put the Employer on notice at the conclusion of the Step 1 meeting that, absent a change of heart on the part of the Employer regarding its discharge decision, the Union was definitely going to arbitration on the Bergstrom grievance.

- In view of the foregoing, Mr. Lund's alleged failure to formally invoke Step 3 of the Grievance Procedure frankly resulted in streamlining the procedure by eliminating another fruitless and futile meeting by the parties to merely rehash and restate their previously announced positions.
- Accordingly, the Employer's Motion should be dismissed and the hearing should proceed to the merits of the grievance.

#### Bench Decision on Employer's Arbitrability Motion to Dismiss

Upon full and due consideration of the record evidence and arguments presented by the Parties with respect to the Arbitrability Issue, I find as follows:

- The Union's actions clearly demonstrate that its only intent in requesting that the parties skip some of the Grievance Procedure Steps was to facilitate the processing of the grievance to arbitration as quickly as possible.
- The Union's intent behind its failure to formally invoke Step 3 of the Grievance Procedure was made patently clear to the Employer when it received the arbitration panel list from BMS on or about November 17, 2011. The Union's message to the Employer was essentially, "If you are willing to settle this with disciplinary action short of discharge, we can settle this informally. Otherwise, let's get moving to arbitration and not waste further time and efforts in futile grievance meetings."
- The fact that we are all here in arbitration some ten months later confirms the fact that Mr. Lund correctly perceived that the Parties were firmly at impasse with respect to the Bergstrom grievance, back in November, 2011.
- There is no evidence to indicate that the Union's action in skipping Step 3 has harmed or otherwise prejudiced the Employer. If either Party had experienced some epiphany over the past months, they were certainly free to explore new informal settlement discussions.
- In general arbitral law there is a presumption that favors arbitration over dismissal of a grievance on technical grounds. Additionally, Minnesota Statute §179 *et. seq.* clearly states that it is public policy to insure that public employees are disciplined for Just Cause only. It also states that where there is a dispute on the question of Just Cause, arbitration is the preferred method of resolving that question.
- Finally, to uphold and affirm the Employer's Motion to dismiss the grievance under these circumstances would be manifestly unjust in that it would deny the Grievant his legislatively supported "day in court" and would be "...*elevating form over substance*". See *G4S Regulated Security*

Accordingly, in view of my findings above, and as announced in my previous Bench Decision regarding this Issue, I conclude that the Employer has failed to establish by clear and convincing evidence that the Union waived the instant grievance by skipping Step 3 of the contractual grievance procedure and, thereby rendered the grievance subject to perfunctory dismissal. Therefore, the Employer's Motion to dismiss the grievance on grounds of Arbitrability is hereby dismissed in its entirety.

In view of the dismissal of the Employer's Arbitrability Motion, This grievance is properly subject to the applicable contractual grievance/arbitration procedure and the hearing shall proceed to the merits of the grievance.

### BACKGROUND

As previously noted, the subject Grievant in this matter is Jon C. Bergstrom. Mr. Bergstrom commenced employment with the Employer in June, 1996 as a Custodial Engineer I. Over the ensuing years Bergstrom worked at a number of different school facilities within the District, most recently at Central High School, the largest of the District's Senior High Schools.

During his tenure with the Employer, Bergstrom was always regarded as a very competent and dedicated worker, as reflected in his consistent record of positive and complimentary work performance reviews. As a result of his dedication, work ethic and consistent positive work performance, he rose rapidly in the ranks and by 2009 had achieved the classification of Custodial Engineer V, the highest work classification in the contractual bargaining unit. His advancement through the Custodial Engineer ranks from Level I to Level V in some thirteen years is regarded as a remarkable achievement. At the time of his discharge, he held the title and classification of Custodial Engineer Level V and Head Engineer at Central Senior High School. In that capacity, Bergstrom headed a crew of about nine (9) other custodial, maintenance and janitorial employees responsible for insuring the proper operation and maintenance of the building and its systems, e.g. heating, water, electrical, etc. and the continuing cleanliness of the facility.

Mr. Bergstrom's discharge in September, 2011 centers on his alleged improper and inappropriate use of the Employer's intra-organizational email/Internet access system.

At all times material and relevant herein, the St. Paul Public School District has operated and maintained its own email and internet access systems to facilitate work-related communication and interaction between the District and its employees and also among and between its employees. Virtually every employee employed by the District has his/her own personal email account and

internet access using the District's system. Like similar systems operated by a myriad of other employers, each District employee has his/her own assigned account to which access is restricted to that individual by a password system.

Also, like other employers who operate intra-organizational email/internet access systems for employees, the St. Paul Public School District Board has, since 1999, implemented, promulgated and maintained what is referred to as the *Information Technology Usage and Safety Policy, #520.00*; which governs the use of the District's information technology resources, including the email/Internet system, by employees and students.

The following are excerpts from the *Information Technology and Safety Policy, #520.00* which are directly relevant to this matter:

#### *INFORMATION TECHNOLOGY AND SAFETY POLICY 520.00*

*The use of the school district information technology resources and access to use of the Internet is a privilege, not a right.*

*Unacceptable use of the school district technology resources, including e-mail and the Internet, may result in one or more of the following consequences: suspension, cancellation of use or access privileges; discipline under applicable district policies and procedures, or civil or criminal liability under applicable laws.*

#### *RESPONSIBILITY OF USE*

*The proper use of information technology resources...is the joint responsibility of students, parents or guardian and employees of the school district. Individual users of the St. Paul Public Schools information technology resources have the responsibility to:*

- Comply with all existing Board of Education policies as they may be interpreted to apply to technology resources.*
- Immediately disclose inadvertent access of unacceptable materials or an unacceptable Internet site to an appropriate school district administrator.*

#### *UNACCEPTABLE USE*

*Unacceptable uses of information technology resources include, but are not limited to:*

- Using technology resources to access, review, upload, download, store, print, post, receive, transmit or distribute;  
{1} Pornographic, obscene or sexually explicit material or other visual depictions that are harmful to minors; or*

*{2} Abusive or threatening materials, including hate mail or harassing or discriminatory materials that violate school district policies.*

#### **LIMITED EXPECTATION OF PRIVACY**

1. *Limited Privacy*

*By authorizing the use of school district information technology resources, the school district does not relinquish control over materials on the system or materials contained in files on the system. Users should expect only limited privacy in the contents of personal files on the school district system.*

2. *Violations*

*Routine maintenance and monitoring of the school district system may lead to a discovery that a user has violated this policy, another school district policy or the law. An individual search will be conducted if school authorities have a reasonable suspicion that the search will uncover a violation of law or school district policy.*

6. *School District's Rights*

*The school district reserves all rights to control its information technology resources. Among other rights, the school district may monitor or restrict a user's use of information technology resources including, but not limited to, the Internet; search any computer or electronic storage devices that are assigned to a user or used on any district computer or network; and retrieve, alter and delete any data created or maintained by any user using school district information technology resources.*

#### **INTERNET USE AGREEMENT**

*As a condition of access to the school district's Internet and technology resources, users must agree to, accept and abide by the Information Technology Usage and Safety Policy and the Guidelines for Acceptable Use, as they may be amended or updated from time to time.*

Mr. Bergstrom testified that he was granted access to the District's email and Internet system in about 2003. He was working at Murray Junior High School and received instructions on how to set up his account and password from David Putnam, a classroom teacher for math and computers. As Putnam was setting up the access account, Bergstrom told him that he already had a personal email account through MSN Hotmail. According to Bergstrom, Putnam responded to the effect, "you don't need that account anymore; this is the only account that you'll need." Bergstrom stated that based on of Putnam's statement, he

subsequently ceased using his Hotmail email account and began using the District email account for both work-related and personal email communications.<sup>2</sup>

Bergstrom further testified that, other than assisting him in the setup of his account, Putnam provided no other training or information relating to the use of the District email/Internet system.

At some point in about 2009 officials in the City of St. Paul began checking their own organization's email/Internet system for possible inappropriate usage by City employees. Their investigation, indeed, disclosed that a number of City employees were engaged in the use of the City's email and Internet systems in ways that clearly violated the City's own Information Technology policies.

As the City of St. Paul's investigation unfolded, it was discovered that some employees of the St. Paul Public School District were using their school district email accounts to communicate with and exchange what appeared to be emails containing inappropriate content with various City of St. Paul employees.

At some point in the summer of 2010, St. Paul City officials contacted the St. Paul School District and shared their findings with respect to school district employees who appeared to be involved in communicating and exchanging inappropriate emails with City employees, using their respective organizational accounts. The school district immediately responded by assigning Eileen Cardwell, Assistant Director of Human Resources, to investigate the situation.

One of the school district employees "flagged" by the City of St. Paul's investigation was an employee herein identified as "J.F.". Cardwell found that J.F. was employed by the District as an engineering and building maintenance worker and was a member of the Union's bargaining unit. Cardwell's investigation of J.F.'s District email account revealed that he had received and forwarded a large number of emails that contained photos, cartoons and jokes, the contents of which were clearly inappropriate, sexually explicit and/or pornographic and, therefore, violated the District's *Information Technology Usage and Safety Policy*.

J.F. was subsequently placed on administrative leave and invited to attend an investigative meeting. He did attend, accompanied by David Monsour, a Union Representative. Following the meeting J.F. resigned his employment with the District.

As Cardwell's investigation continued, she found that as she examined one employee's emails, other employees' inappropriate email usage would also come to light. One of those individuals was Jon C. Bergstrom.

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<sup>2</sup> In the hearing, Bergstrom stated that he abandoned the Hotmail account because he had been unable to access that account from District computers at work, due to the District's use of security filters.

The investigation into Bergstrom's email history for his District email account revealed that in just 2010 and 2011 he was very actively involved in using his email account to send and receive a very large number of emails containing sexually explicit content and photos. An examination of the emails disclosed that he had used his District email account to sign up for and use online dating services such as Adult Friend Finder and XMatch. XMatch promotes itself as a "unique site where you can find XXX personals and singles for XXX dating." These sites were somewhat different than Harmony.com

His emails revealed that he had sought out sexual relationships with more than a dozen different women using his District email account. His emails to them generally contained very explicit language of a sexual nature describing in vivid detail specific sexual acts that he wished to perform upon them or that he wished to have them perform on him. One such example was his email exchanges with a female whose screen name was "slaveforrealsex". He invited this individual to live at his home as his "sex slave" and assured her that he would easily fulfill all of her sexual needs and wants – most, if not all of which, he described in stunning, explicit detail.

The following email exchange between Bergstrom and "slaveforrealsex" is an example:

*Date: 07/14/2010 07:39AM  
From: J C Bergstrom/spps  
To: "slaveforrealsex"  
Subject: master of your universe  
Full time yes, tools are gone. Last 2 took them with them when they left. It has been a year since my last non slave left. Are you in the mood for a little taste? I like my slave to put her ass high in the air as i shove my well 7.5 and kind of fat dick in her ass as she yells for more. I as master do not mind taking the little blue pill to make things go as long as god had attended to make things last.  
Hope you are ready. Jc*

*J. C. Bergstrom  
Head Engineer, St. Paul Central H.S.  
276 Lexington Pkwy N, St. Paul MN 55104  
651-632-6030 pager: 612-650-0173  
email: JC.Bergstrom@spps.org*

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*Date: 07/14/2010 06:33AM  
To: [jc.bergstrom@spps.org](mailto:jc.bergstrom@spps.org)  
From: slaveforrealsex  
Subject: cock4slave from aff*

*[excerpts]...Master, I am a disease free slave..I don't do drugs...don't smoke..I only drink socially..I love been fucked from the ass and tied to a table/chair..I love great spanking everytime you fuck me from the ass. Master, have been living this lifestyle for a long time now and am proud of who I am..i believe so much in this world of BDSM..Master, if you think this will cause any further problem between us please let me know cause I want to make you happy Master. I can't think of anything but to be with my loving Master. I enjoy cum a lot Master and would love to show you how I can do my work as your slave. Master, ..... I love wear skimpy dress when I perform my duty as your slave, Master. I also love to dress like a nurse making me look like a medical personnel..when you will be my client when I start sucking your cock hard Master..till you make me gag and you cum burst in my mouth and spread your cum all over my body. Master, I do like it sometime when you pure your cum inside my pussy..i will do anything that will make you happy, Master..cause I believe in you and I want to serve you. Master I can't think of anything else but you. You are always on my mind.....*

In reviewing Bergstrom's numerous inappropriate emails, Cardwell noted that each one he sent, contained his full school district identification, as indicated at the bottom of his 7/14/2010 message to slaveforrealsex, above.

On August 3, 2011, Bergstrom was presented with a formal letter from the District informing him that he was being placed on immediate administrative leave pending an investigation of serious misconduct on his part. He was also invited to attend an investigatory meeting the next day.

On August 4, 2011 Bergstrom did attend the scheduled investigatory meeting. Present were Eileen Cardwell for the District and Union Business Representative Ernie Lund. Bergstrom and Lund were shown a representative sample of the numerous inappropriate emails that Cardwell had retrieved from Bergstrom's District email account. Bergstrom admitted that those were his personal emails and that he had composed and sent them, using his District email account. He further admitted that he had received many emails from various women some of which contained inappropriate language and he agreed that he had stored those emails, with his own, in the District' email system. In reviewing the emails themselves, Bergstrom acknowledged that the emails contained sexually explicit, vulgar and/or obscene language and, therefore, could be construed as violations of the District's *Information Technology Usage and Safety policy, 520.00*. He further conceded that he had routinely sent, received and stored at least some of the emails while he was working and on duty.

However, Bergstrom also noted t Cardwell that back in 2003 when David Putnam had assisted him in obtaining access to the District's email and Internet account; that Putnam had allegedly told him that now that he had the district email account, he could get rid of his personal Hotmail account, because his district email account was the only one he'd ever need. He also understood from Putnam that his District email account was totally "private". He was now shocked

to learn that his emails really were not “private” and that the District had full access to all messages, materials and information that he and other employees chose to place in the District’s system. When confronted with the District’s Information and Technology Safety policy, 520.00, Bergstrom denied ever seeing or receiving that policy. He further pointed out that other than his conversation with Putnam, when he was issued access to the District’s system in 2003, he had never received any formal orientation or training by the District with respect to the use of the system and the “Dos” and “Don’ts”.

Bergstrom argued that it was never his intent to knowingly violate the District’s rules regarding use of the email system. He said that if he’d been made aware of the District’s policy and the fact that his “personal” emails in the system were not “private” he would never have used his District email account in connection with his personal romantic/sexual relationships.

Later in August, 2011, Cardwell presented the results of the Bergstrom investigation to Jean Ronnei, the District’s Director of Nutrition and Custodial Services and Bergstrom’s immediate supervisor. Ms. Ronnei’s duties included the oversight and management of the District’s entire Custodial system for all its facilities. Cardwell recommended that, based on the nature and scope of his misconduct, Mr. Bergstrom should be terminated.

On August 29, 2011, Ms. Ronnei sent a letter to Bergstrom informing him that the School District was considering disciplinary action in the form of Discharge. The letter went on to specifically outline the nature of each of the allegations. The following is a brief summary of the allegations set forth in the letter:

*He allegedly used School District Information Technology resources to open, send, receive and store numerous inappropriate emails containing crude, vulgar and sexually explicit language. Some of the inappropriate messages allegedly sent by him contained messages requesting or soliciting various specific sexual acts by women contacts and also offered specific sexual acts by him for them. He allegedly composed, sent, received, opened and stored such inappropriate emails during work time using School District computer equipment. He allegedly sent inappropriate emails to other St. Paul School District employees, using their District email addresses. Finally, he allegedly included, in each of his inappropriate email messages, his full personal identification as an employee of the St. Paul School District; including his full name, job title, the name and address of the school where he worked and his work phone and pager numbers.*

The letter went on to point out that his alleged misconduct violated 1) the District policy prohibiting discrimination, 2) the District policy prohibiting harassment, violence and other offensive behavior and 3) the District policy and procedures regarding the use of the District’s Information

Technology resources. Finally, because of his status as a public Civil Service employee, his alleged misconduct also violated Civil Service Rule 16.B. Cause for Discharge, Reduction or Suspension, points 5, 9 and 10:

5. Conduct unbecoming a City employee; or
9. Commission of an act which amounts to an act of insubordination, or disgraceful conduct, whether such acts were committed while on duty or off duty; or
10. Wanton offensiveness in language or conduct toward the public or toward City employees.

Ronnei's letter concluded by offering Bergstrom an opportunity to attend and present a statement in his defense regarding the allegations in a meeting scheduled for September 1, 2011. This type of proceeding is often referred to as a "Loudermill" hearing or meeting.<sup>3</sup>

The Loudermill hearing took place on September 1, 2011, as scheduled, and present for the District were Eileen Cardwell and Amy King. Jon Bergstrom attended with Ernie Lund, the Union Business Representative. In the hearing, Bergstrom conceded that the emails that the District presented from his email account were accurate and he agreed that, in light of the District's Information Technology policy, they also were an inappropriate use of the District's email system. He admitted that his conduct with regard to the emails was wrong and said if he had been aware of the District's Information Technology Usage and Safety policy #520.00 he would never have engaged in that conduct.

Bergstrom pointed out that he had served as a dedicated employee of the District for some 15 years and had been consistently told that he was an excellent employee. He noted that as soon as he received the Investigation letter from Eileen Cardwell on about August 3<sup>rd</sup>, he had immediately opened a new personal email account with "gmail" and was subsequently conducting all his personal email activities via that mailbox. He said he felt that a letter of reprimand would be a more appropriate form of disciplinary action, than discharge. He reiterated that if he had been aware of the District's Information Technology Usage and Safety policy, he would never have used his email account in an inappropriate manner. He noted that if he was returned to work, he would personally inform other employees about the proper use of the District's Information Technology resources. He said he was sorry about his emails and said he really wanted to return to work and hoped that the District would allow him to continue in his job.

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<sup>1</sup> See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In this case, the U.S. Supreme Court held that certain public employees have a property interest in their employment and to protect that interest, they are to be afforded due process, including a hearing, prior to the employer making any determination with respect to discharge.

Following the Loudermill hearing on September 1, 2011, Cardwell subsequently interviewed David Putnam at Murray Junior High School on September 14th, for possible corroboration of Bergstrom's assertion that Putnam told him that the District email/Internet account was his personal account and would be the only account that he would ever need. Putnam told her that he isn't the person that sets up email accounts for other employees. The Technology Support person assigned to the school typically handles that function. However, Putnam said he does recall helping Jon Bergstrom set up his District email/Internet account. Putnam said he didn't give Bergstrom any sort of "training"; he just did the setup for him. He also stated that he didn't recall ever talking with Bergstrom about email, but if he had, he would not have referred to the District email system as anyone's "personal account" at work. He said the SPPS email system belongs to the St. Paul Public School District.

Cardwell subsequently met with Ronnei and Tim Caskey, the Executive Director of Human Resources to review the Bergstrom situation. Cardwell said she still felt that Bergstrom should be discharged, given the nature, severity and sheer volume of inappropriate emails he had sent, using the District's equipment and system exclusively. She also noted that Bergstrom composed and sent a large number of the emails from his work station and during paid work time. She also noted that All of Bergstrom's sent emails clearly and unabashedly identified him as an employee of the St. Paul School District.

Cardwell noted in the hearing that in the course of deliberating the appropriate discipline for Bergstrom's misconduct, one consideration for her was;

*"At a time when this organization, and any other school district, is trying to assure taxpayers and parents that it is making the best possible use of time and resources to provide education for their children," Bergstrom's conduct is "devastating!"*

With the information that Cardwell had just obtained from David Putnam, Jean Ronnei agreed that discharge was really the only appropriate action, given the totality of the investigative findings.

On September 19, 2011 Ronnei issued a letter to Bergstrom formally advising him that his employment with the St. Paul Public School District was terminated effective at the end of the workday on September 20, 2011. The specific reasons for discharge, as set forth in the letter, were essentially the same as those presented to Bergstrom as "allegations" in Ronnei's letter of August 29<sup>th</sup>, as outlined previously.

### The Grievance

On September 23, 2011, Ernie Lund, the Union Business Representative, filed a timely grievance with the Employer protesting Bergstrom's discharge. The

Grievance states that Mr. Jon Bergstrom was unjustly terminated on September 20, 2011. The Grievance goes on to allege violation of the Preamble, Articles 4, 8, 9, 10, 17, 20, 21 and Appendix C of the applicable labor agreement and any/all other Articles that may apply, including policies, practices and laws that apply. The Grievance states that the Remedy Desired is that Mr. Bergstrom be made whole in all respects.

### Relevant Contract Language

According to Article 21. DISCIPLINE, section 21.1 of the applicable labor agreement, “*The Employer will discipline employees for just cause only.*

*Discipline will be in the form of:*

*Oral Reprimand  
Written Reprimand  
Suspension  
Reduction  
Discharge*

As noted previously in the Arbitrability section of this Decision, the Grievance was subsequently processed and discussed by the Parties at Step 1 and Step 2 of the contractual Grievance Procedure, Article 22, but no resolution was reached. Essentially the Employer stood firm on its decision to discharge Bergstrom and the Union argued for some form of lesser discipline.

Ergo, here we are in arbitration.

### Summary of Positions and Major Arguments of the Parties

#### The Employer-School District:

It is the position of the St. Paul Public School District that it has clearly met its burden of proof herein to establish that the Grievant, Jon C. Bergstrom, was properly discharged for Just Cause, in accordance with the requirements of Article 21, Section 21.1-Discipline of the applicable labor agreement.

As is the case here, where the parties have not specifically defined their use of the term “Just Cause” in their labor agreement; some arbitrators refer to Arbitrator Carroll R. Daughtery’s Seven Tests or Steps of Just Cause as set forth in Enterprise Wire Co., 46 LA 359 (1966) (Arb. Daughtery). It is noted that this arbitrator has used Daughtery’s Seven Tests as at least an analytical tool in past disciplinary decisions. Applying Daughtery’s “Tests” or Steps to this situation, it is clear that the District had “Just Cause” to discharge Bergstrom.

1. Test/Step 1 – Notice: Did the Employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?

The answer is “Yes”. There is no dispute that Bergstrom’s conduct in the use of his District email account violated the District’s Information Technology Usage policy and procedures. Furthermore, his misconduct violated Civil Service Rules 16B, points 5, 9 and 10. Although Bergstrom has staunchly and continuously claimed that he was not aware of the District’s technology usage policy or that his specific conduct was prohibited, the evidence herein is clearly to the contrary. Bergstrom knew or reasonably should have known that his misconduct was prohibited and that such violations could result in serious disciplinary consequences, including discharge. His professed lack of knowledge is not credible.

First, the evidence demonstrates that the Employer has posted its Information Technology Usage policy #520.00 on its website at all times material herein and the website is easily accessible by employees, via their own computer equipment or using their access accounts and the District’s equipment, routinely made available for their use while at work. Employees are well aware that they are subject to all of the Employer’s policies and procedures as issued and posted on the Employer’s website. Posting of a specific policy on the website is considered “notice”.

Additionally, the applicable labor agreement specifically refers to the District’s Information Technology Usage policy in Appendix C. In Appendix C, a Memorandum of Understanding (effective January, 2011), the Union specifically agreed that the use of the District’s email system by authorized Union representatives and agents for certain Union activities is subject to compliance with the District’s Information Technology Usage policy in the same manner as District employees; including the fact that “...*information is not private and is subject to District monitoring of e-mail*”. This express reference to the Information Technology Usage policy in the labor agreement put Bergstrom, as a bargaining unit employee and a Union member, on constructive notice of the existence of the policy and its requirements.

Secondly, Bergstrom knew from co-workers and other person outside the District that his email-related conduct was not acceptable in the workplace. As shown in the record, he was well aware in 2010 that co-workers were being investigated for violation of the District’s Technology policy involving inappropriate use of the email and/ or Internet systems and that some of them had been discharged or had resigned. Additionally, at least two of the women, outside the District’s system, with whom he was engaged in sexually-related email communications, tried to “educate” him about the acceptable use of his workplace email. One of the women pointed out to Bergstrom that personal emails at her workplace had led to employees getting “written up” and was definitely a “no-no”. The other woman warned him that she thought the District was reading his emails. Later she complained to him about using his workplace email system to “spew his

desires and possibilities”, apparently referring to his use of sexually explicit language.

Finally, even assuming, arguendo, that Bergstrom was totally unaware of the District policy or to take it a step further, assume that no such policy existed; he should have known that his conduct and behavior was totally unacceptable for any employee and even more so for an employee in a public school system. In Brisson v. City of Hewitt, 789 N.W.2d 694 (Minn. Ct. App. 2010) the Court considered whether a city employee committed employment misconduct when he used his employer’s computer system to open pornographic emails and access pornographic websites. The employee admitted the conduct, but claimed that the city did not have any policy that prohibited the conduct. The Court rejected that defense. The Court stated “*an average reasonable employee would not have engaged in such conduct under the circumstances*”. The Court further held that “[*Employee’s*] *use of his employer’s computer to open pornographic email attachments and access pornographic websites seriously violated a standard of behavior that the employer had a right to reasonable expect of the [employee], even though the employer did not adopt a policy that prohibited [employee’s] conduct.*” (emphasis added).

In Bergstrom’s related Unemployment Compensation case; where he also argued ignorance of any District policy regarding the inappropriate use of its technology resources and that he had been told that his District email account was “private”; an unemployment law judge rejected that defense. She specifically referred to the Brisson case and noted that the Court of Appeals held that using an employer’s computer to open pornographic email attachments and access pornographic websites is a serious violation of the standards of behavior that the employer has a right to reasonably expect of an employee, even if employer has not adopted a policy that prohibits the conduct. She went on to state that “*Bergstrom knew or should have known that sending, receiving and storing sexually explicit emails using his work email was a violation of the employer’s reasonable expectations, particularly where the employer is a public school and where his email signature identified him as an employee of a public high school. Bergstrom was discharged because of employment misconduct. Accordingly, Jon Bergstrom is not eligible for unemployment benefits based upon his separation from employment.*” (emphasis added)

As reflected in the record, Maurice Vasquez, another custodial employee who was discharged for inappropriate use of the District email system, appealed his discharge under Veteran’s Preference regulations to the City of St. Paul Civil Service Commission. Like Bergstrom, Vasquez argued that he was also unaware of the District’s Information Technology policy. In rejecting that defense and upholding his discharge, the Commission noted;

*“Mr. Vasquez’s testimony that he was unaware of the Information Technology Usage and Safety policy is contradicted by the fact that the*

*policy is available and posted on the St. Paul School District website and prohibits...”*

2. Test/Step 2 – Reasonable Rules: Was the company’s rule or management order reasonably related to (a) the orderly, efficient and safe operation of the company’s business and (b) the performance that the company might properly expect of the employee?

The answer to this question is clearly “Yes”. There can be no dispute that the policies and rules cited for the discharge of Mr. Bergstrom are reasonably related to the operation of a public school district; which is responsible for educating children and concurrently exercising good stewardship of the public’s tax dollars, of which it is entrusted and accountable.

3. Tests/Steps 3, 4 and 5 – Investigation, Fair Investigation, Proof: The questions under 3, 4 and 5 are as follows:
  - 3) Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
  - 4) Was the company’s investigation conducted fairly and objectively?
  - 5) At the investigation, did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?

The answer to each of these three (3) questions is a strong “Yes”. The arbitrator will note that during the hearing, the Union raised no questions, objections or issues with regard to the propriety or procedure followed by the Employer during the investigation of the Bergstrom situation. Clearly, the Union was satisfied that Bergstrom was afforded full due process during that procedure.

4. Test/Step 6 – Equal Treatment: Has the company applied its rules, order and penalties even handedly and without discrimination to all employees?

Again, the answer to the question is “Yes”. Although the Union has contended that Bergstrom was treated more harshly than other employees who also violated the technology usage policy, it has failed to meet its burden of proof on that point,

The District has presented substantial evidence that it has consistently and even-handedly enforced violations of its technology usage policy involving employees accessing, sending, receiving and storing messages containing sexually explicit or pornographic materials. Eileen Cardwell testified that she had personally investigated numerous cases involving such violations and was involved in recommending discipline in those cases. Those cases involved employees in many classifications within the District, including teachers, paraprofessionals, managers and custodial employees such as Bergstrom.

Cardwell testified that in comparing the cases that she investigated, she placed the severity level of Bergstrom's email violations to be 9 or 10, on a scale of 1 through 10, where 10 is the most egregious offenses. Comparing Bergstrom's case to other cases that led to discharge or resignation of the accused employee, she said that Bergstrom's emails were similar in terms of content (sexually explicit) and volume or sheer number of messages. Contrasting Bergstrom's case to other employees who received discipline short of discharge, she noted that those other employees sent, received and/or stored mostly photographs and cartoons and the narrative in their emails typically consisted of insertions and additions of the employee's opinion or of an inappropriate joke authored by someone else. According to Cardwell, those employees' emails were "bad enough to justify discharge, but Bergstrom went even further. His conduct was more egregious because his offensive, pornographic<sup>4</sup> and sexually explicit email materials were his own personal compositions and creations. As she further stated,

It was not a matter of [his] hitting the "send" or "forward" key. Mr. Bergstrom drafted the materials. He chose the subject matter. He chose what to talk about –what words to use and to convey. He was the originator of the content.

Furthermore, the record shows that Bergstrom composed many of the email messages while he was on paid work time and overtime and that he specifically included his name and specific employment information on each of his emails,

Thus far, as a result of the inappropriate email investigation, the record shows that of employees working in the custodial bargaining unit;

- Three have been discharged (Bebault, Vasquez and Bergstrom).
- Three chose to resign when confronted by the investigation.
- One (Yanarely) was initially discharged, but during the subsequent grievance process, her discharge was reduced to a 60 day disciplinary suspension.
- One (Brelje) was issued a 30 day disciplinary suspension.

Cardwell stated that on the severity of offense scale (1 – 10); Bebault was a 7 or 8, Yanarely a 7, with mitigating circumstances, and Brelje a 5 or 6.

It has been Bergstrom's and the Union's position that he should receive a 30 disciplinary suspension, as did Brelje. However the Union has failed to present any evidence to challenge or rebut Cardwell's testimony, comparisons and rationale behind the differing penalties, imposed by the Employer.

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<sup>4</sup> Pornography includes not just pictures, but writings as well. Pornography is defined as "the depiction of erotic behavior (as in pictures or writing) intended to cause sexual excitement." Webster's Ninth New Collegiate Dictionary at 915 (1986)

Finally, Bergstrom held the position of Head Custodian and had supervisory authority over nine (9) other custodial, maintenance and janitorial employees. There is no record evidence to indicate that Brelje held such a position or authority. An employer may chose to hold a supervisor or manager to a higher standard of conduct than rank-and-file employees and mete out more severe penalties for similar offenses.

5. Test/Step 7 – Penalty: Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the company?

The answer to this question is a strong “Yes”! Related case law clearly says that a school employee who uses the school technology resources to send, receive, store or gain access to sexually explicit materials or pornography, may be discharged for such conduct; despite an other wise good work record or other claimed mitigating circumstances. See Griggs v. Flint Hills Resources Pine Bend LLC, 2012 WL 2505832 (Minn. Ct. App. 2012) (employee discharged for single incident of forwarding email containing pictures of naked woman to co-worker using employer’s email system); Geissler v. Ind. School District No 2154, A07-1268, (Minn. Ct. App. 2008) (teacher discharged for using school technology to view pornographic websites)

Although a single, sexually explicit email has been found sufficient to justify a discharge, See Griggs, Bergstrom’s misconduct, by comparison, was not a single, isolated incident. He repeatedly composed sexually explicit email that he sent to a number of women over the course of more than a year. Each of those emails prominently displayed his name and other information identifying him as an employee of the St. Paul Public Schools. No reasonable employee would think that such conduct would be acceptable to his employer.

The fact that his emails were sent to individuals outside the District and contained detailed information identifying him as a school district employee, has exposed the District to ridicule and damage to its community reputation.

The Union argues that the discharge penalty is too severe in light of Bergstrom’s stellar work history. However, as the record shows, his work history is not without a couple of blemishes. In 2000 he received a written reprimand for conduct unbecoming an employee and wanton offensiveness in language or conduct toward a co-worker. In 2006 he received a second written reprimand for exercising poor judgment and now he has again used poor judgment in composing and sending sexually explicit emails during work time and using the District’s technology resources.

The arbitrator’s discussion in A. K. Staley Manufacturing Co., 119 LA 1371, appears to be particularly on point and applicable to this case;

*“It is simply disingenuous to argue that employees were blindsided when they were discharged for repeated abuse of the system. There are certain types of conduct so discredited in the workplace that an explicitly articulated list of possible penalties elevates form over substance. The liberal distribution of pornography to numerous sites inside and outside the plant is such a case. The grievant knew that what he was doing was wrong. He should not have had to be told that such misconduct on a continuing basis could lead to discharge.”* [emphasis added]

*The grievant’s conduct was not some isolated frolic. It was an ongoing diversion conducted at times when he knew the likelihood of his being observed was slight. His conduct was damaging in the following respects: (a) He misused Company equipment, (b) wasted time for which he was being paid, (c) disrupted the efficiency of other employees and (d) exposed the Company to risks of liability and disruption of its overall system.* [emphasis added]

*The Union argues that the penalty was too severe for a first offense. But the offense did not occur once, but was a repeated course of conduct over an extended period of time.*

*At the heart of the Union’s arguments is the implication that this conduct was really not so bad and that employees should not be disciplined as if they had engaged in theft, gross insubordination or other common capital workplace offenses for which discharge is routine. Sexually explicit materials are commonplace in today’s real world. If pornography is not acceptable, it is likewise not so aberrant that its presence should result in discharge for the possessors,*

*But that is a judgment that the Company has a right to make. It relies upon its computer system as an integral part of its manufacturing process. It has the right to decide that this system be kept clean and efficient and not as a tool for mischief. ...The company is not the guardian of employee morality. But it is the guardian of workplace standards and its abhorrence of the misuse of its computers on its time is perfectly acceptable.”* [emphasis added]

**Conclusion:** In this day and age, even if the District had no written policy, procedure or rule prohibiting this type of misconduct, or did not give him any training with respect to its technology usage policy, his conduct and behavior, in and of itself, is clearly disgraceful and seriously violated the standards of behavior that the School District had a reasonable right to expect from employees. No reasonable employee could compose these sexually explicit emails asking for and offering sex, sign his name, work title, address and phone numbers and send them on to women using his work email address and account

and seriously think or believe that such conduct would be acceptable to the employer. Bergstrom's conduct would, in fact, be unacceptable in any employment setting. In this instance, his conduct is even more abhorrent because he was a trusted supervisory employee in a public school system who worked daily with children

Based upon the record facts in this matter, the Employer has clearly met its burden of proof sufficient to establish that Jon C. Bergstrom was discharged for Just Cause. Accordingly, the Employer respectfully requests that this Arbitrator deny the Union's grievance and affirm the School District's discharge decision.

The Union:

It is the Union's position that based upon the record testimony evidence and evidence in this matter, the Employer has clearly failed to meet its burden of proof to establish that Jon C. Bergstrom, an employee, was discharged for "just cause" pursuant to the requirement of ARTICLE 21 DISCIPLINE, of the applicable labor agreement. In support of that position, the Union wishes this Arbitrator to specifically consider the following:

1. Use of the District email system during work time for non-work related email messaging.

Among the District's allegations of misconduct by Bergstrom, is the allegation that he used his District email account to send personal email during work time and while on duty. During the hearing, however, several District managers testified that while the District's Information Technology Usage and Safety policy #520.00 doesn't specifically authorize use of the District's email system for personal messaging, the District does acknowledge that employees, for purposes of convenience, may choose to use the system for personal purposes. Examples; checking the weather on the Internet to find out about approaching storms, using email to communicate with family members about scheduled activities (dinner, kids' athletics, reminder of medical appointment, etc.) or responding to a neighbor about an invitation to a barbecue. Certain of those managers readily testified that they compose and send personal email messages while on duty and at their work station. They stated that the understanding seems to be that such use of the District email system is permitted as long as employees keep such usage within reasonable and prudent limits.

However, contrary to the foregoing, the District, among its reasons for discharging Bergstrom, specifically stated in the discharge letter that he had opened, read, and/or sent many of the above-described messages "during work time", including instances when he opened, read and/or sent such messages "during extra duty assignments" for which he claimed and was paid overtime pay.

Why is the use of his District email account for personal messages during work time considered misconduct for Bergstrom, but not for other employees?

2. The District's lack of training and failure to promulgate its email and internet policies.

As was acknowledged in the hearing, the District maintains two (2) separate written policies governing the use of its Information Technology resources, including email and Internet access. One is the *Information Technology Usage and Safety policy 520.00* and the second is the *Information Technology Usage Procedure 520.00*.

While the policies obviously apply to students, parents or guardian and District employees, only parents or guardian are required to sign a form acknowledging receipt and acceptance of those policy documents.

While all custodial employees are granted access to the District's email and Internet resources, it is undisputed that during the Grievant's tenure of employment, 1) the District did not provide any direct training to custodial staff regarding any email or Internet policies and 2) the District did not promulgate paper copies of the email or Internet policies to custodial staff or ever notify the custodial staff that such policies even existed.

Bergstrom stated that he never knew that the Information Technology policies existed until he learned that his District email account was already under investigation in August, 2011. Evidence introduced in the hearing also showed that the District knew that it needed to implement an email training program in February, 2011, but District manager Jean Ronnei conceded that such a program wasn't actually implemented until the fall of 2011, after Bergstrom was discharged.

The Employer pointed out that employees are routinely told that they are individually responsible for keeping abreast of the policies and procedures issued by the Board of Education and the District administration and points out that all such policies are routinely posted on the District's website. However, in the hearing it was shown that the Information Technology Usage and Safety policies are not listed in the Staff section of the website policies list, but instead appears in the Student section.

The District admits that it never made any specific effort to inform custodial staff about the existence of these policy documents nor did it provide them with information on how to find them on the District website. Moreover, the District never informed custodial employees that they could be immediately discharged for violating those policies.

3. The Employer's 2010-2011 E-mail Investigation.

The record in this case reflects that many employees, including this Grievant, have been summarily discharged for allegedly violating the Information Technology Usage and Safety policies, even though the District wholly failed to provide even minimal training to employees regarding those policies.

Eileen Cardwell, the District's investigator in the email situation testified that, as she recalls, she conducted investigations of some 20 District employees for inappropriate use of the email system. Those investigations involved approximately seven (7) employees in the Union's custodial bargaining unit with the remaining employees working in other department and areas of the District. With respect to the custodial bargaining unit, of the seven (7) employees (six males and 1 female) investigated, four (4) resigned when in the course of the investigation, two (2) (including this Grievant) were discharged and one (1), the female employee, received a 30 day disciplinary suspension.

Ms. Cardwell further testified that of all the District employees found to have violated the District's Information Technology policies by opening, receiving, ending and/or storing inappropriate emails using their District email account; all the women were still employed by the District, but all the men were either discharged or voluntarily resigned.

Karen Brelje, the female custodial employee, in her disciplinary suspension letter, was alleged to have;

*"[O]pened and sent inappropriate, offensive and unacceptable materials at work, using school district equipment and technology resources, including, but not necessarily limited to: messages with content that was derogatory and belittling to members of one or more protected classes; discriminatory content; photographs, pictures, slide shows and or videos with nudity; and messages with crude or vulgar language and/or sexual content."*

Ms. Brelje was further alleged to have sent emails to co-workers within the District using her District email account.

For this, rather than discharging her, as was the case with the Grievant, the District gave her a 30 day suspension and informed her that, "*Help for dealing with problems is available to you through the District's employee assistance program.*"

Obviously, neither the Grievant nor his other male co-workers were afforded the leniency or offer of Help as granted to Ms. Brelje.

4. The Penalty of Immediate Discharge is Disproportionate To The Offense. In cases involving discharge, it is "*axiomatic that the degree of penalty should be in keeping with the seriousness of the offense.*" Capital Airlines, 25 LA 16 (Stowe, 1955) Workplace offenses are generally considered to be of two

classes: “those extremely serious offenses such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc...[and] those less serious infractions of plant rules or of proper conduct...” Huntington Chair Corp. 24 LA 490, 491 (McCoy, 1951). It is the Union’s position that this case falls within the latter category of less serious infractions *“where arbitrators are very likely to change or modify an employer’s discipline, if such discipline is too harsh for the offense committed.”* See How Arbitration Works, Elkouri & Elkouri, 6<sup>th</sup> Ed. 2003, 966, (citing Clow Water Sys. Co., 102 LA 377 (Dworkin, 1994)

In this case, the penalty of discharge is too harsh for the nature of the offense committed. Sending personal email to third parties located outside the school district, even some of a sexual nature; where the recipient is a consenting participant, is simply not a “capital” workplace offense on the same level of stealing or violence. The emails in this case were sent to third parties that the Grievant met through online dating sites, the emails did not contain unlawful content and the participants were all consenting adults. In light of the District’s failure to notify employees of its email policies, Mr. Bergstrom and other similarly situated employees were under the reasonable assumption that no one from the District would ever see them. Under such circumstances, the summary discharges of a seasoned employee, like Bergstrom with his stellar work record, is wholly inappropriate and must be set aside.

It also warrants brief discussion that other local arbitrators have recently overturned discharges based on inappropriate sexual email and/or Internet use. In State of Minnesota, Dept. of Human Services, BMS Case No. 10-VP-0948, p. 5 (Befort, 2010), Arbitrator Stephen Befort ordered the reinstatement of an employee discharged for sending and receiving *“sexually explicit emails while using his work computer.”* Arbitrator Befort ruled in that case:

*“The purpose of progressive discipline is to correct inappropriate behavior. While immediate discharge is appropriate for serious misconduct such as theft or violence, this ultimate penalty is not appropriate if a less severe disciplinary step is likely to correct the grievant’s behavior. [emphasis added]*

*These principles do not support the employer’s discharge decision. The Employer gave [the grievant] no warning that his work performance was deficient. He was not counseled or placed on a performance improvement plan. He was not subject to progressive discipline. While it is not certain that these steps would have led to an improvement in performance, a long-term employee with a good work record should have been afforded the opportunity to shape up rather than being fired immediately upon return from protected FMLA leave. [emphasis added]*

In the instant matter, a penalty less severe than discharge is highly likely to change the Grievant's behavior. He credibly testified at the hearing that he understands his mistakes, would never again send these types of emails through his District account and moreover wants to take personal action to insure that his co-workers clearly know the rules and will not have to go through what he's gone through.

In view of the foregoing, it is the Union position that this Arbitrator should find that discharge is too harsh a penalty for the nature of the offense and in light of the Grievant's past service and work record and should overturn or reduce said penalty.

5. The District Has Not Enforced Its Email Policies Evenhandedly.

Just Cause also requires that the employer enforce its policies evenhandedly. As quoted in the Elkouri treatise, "[T]here must be reasonable rules and standards of conduct which are consistently applied and enforced in a non-discriminatory fashion. It is also generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; thus *all employees who engage in the same type of misconduct must be treated essentially the same.*" Elkouri, supra, at 996. [emphasis added]

The evidence in this case demonstrates that the District has failed to assess discipline equally where employees have also used the District email system to send sexually explicit and other inappropriate information. Although the District witnesses repeatedly argued that the District cannot tolerate employees that send sexually explicit content through the District system, the evidence clearly shows that the District does not always resort to immediate termination, as it did with this Grievant.

The most apparent example of such disparate treatment is Karen Brelje, one of the Grievant's custodial co-workers, previously referred to in section 3, above.

Like the Grievant, Brelje was also found to have used her District email account to send, among other things, "*photographs, pictures, slide shows and/o videos with nudity; and messages with crude or vulgar language and/or sexual content.*" She apparently also sent such content to her co-workers within the District system. However, unlike the Grievant, the District did not discharge Brelje, but instead, issued her a 30 day disciplinary suspension and informed that "[i]f there are further problems, more serious disciplinary action may be taken." The District also pointed out to her that "[h]elp for dealing with problems is available to you through the District's employee assistance program."

In the hearing, Cardwell attempted to distinguish Brelje's case by arguing that Brelje had changed her behavior, prior to being the subject of investigation,

and had received training on email usage from the Union. But the Grievant had also informed the District that he had changed his email behavior on August 3<sup>rd</sup>, 2011, as soon as he received the notice of investigation letter from the District, yet the District did not consider that fact in making its discharge decision. Further, the fact that Brelje received subsequent email training and Grievant did not supports a **reduction** of the Grievant's discipline. Finally, the District did not explain why it considered mitigating factors in Brelje's case, while refusing to do so with respect to the Grievant.

Also, Cardwell testified that, since 2009, she has investigated approximately 20 District employees for inappropriate use of the District email system. Of those 20 employees, she said about 7-8 were summarily discharged, while 5 or 6 received disciplinary suspensions and others resigned in the course of the investigation. Her testimony on the actual number of employees in each category of discipline was somewhat inconsistent and confusing, but it is clear that not all employees who violate the email policies are summarily discharged by the District.

More troubling, however, is Cardwell's testimony suggesting that the District has assessed discipline for email misuse more or less severely, based on gender. She testified that out of all 20 or so employees alleged to have engaged in email misconduct, she could not think of any male employee that was allowed to keep his job; while, on the other hand, she could think of no female employee who was fired or resigned in lieu of discharge.

Based upon the foregoing, it is clear that the District has not imposed discipline evenhandedly with respect to these email offenses and thus lacks Just Cause to discharge this Grievant.

#### 6. The District Failed To Demonstrate That The Grievant Violated The Harassment Policy.

As a final matter, in addition to its information technology usage policies, the District has alleged that the Grievant also violated its harassment policy. In relevant part, the harassment policy prohibits conduct directed to other District employees that "[h]as the purpose or effect of creating an environment that is intimidating, hostile, or offensive with respect to that individual or otherwise adversely affects the individual's employment, educational opportunities, or access to a benefit from the school district" or is "sexual harassment."

However, of the Grievant's emails that the District entered into evidence, very few were sent to co-workers and of those, none were of a sexual nature. The District failed to plausibly explain how those few emails violated the harassment policy. Indeed, those emails appear to be, at worst, joke emails of the type historically tolerated by the District. In any event, even if these emails to co-workers do, in fact, violate the harassment policy, they certainly

do not contain any content that could be considered so inflammatory and offensive that the Grievant should be summarily fired, without an opportunity to change his behavior. Also, there is no evidence that any co-worker ever complained to the District about any of those emails. Accordingly, the District has failed to demonstrate that the Grievant actually violated the harassment policy.

Conclusion: The Union has not argued that the Grievant is totally innocent in this matter and the Grievant, himself, has readily admitted his misconduct. He acknowledges that, given his misconduct, some level of discipline is proper and appropriate under the circumstances. In view of the Grievant's long tenure, outstanding work record, his immediate apology and acknowledgement of his mistake to the District, his offer to train his co-workers re: the proper use of the email system and his promise to never again use the District's email system for personal purposes; an appropriate disciplinary suspension should be imposed upon him, in lieu of discharge. Outright termination of a dedicated and long serving employee where the Employer neglected the most basic policy education is manifestly Unjust.

Thus, the Union respectfully requests that the Arbitrator sustain this Grievance, order the Employer to reinstate the Grievant to his position as Custodial Engineer V with back pay and benefits, and to the extent that the Arbitrator feels some level or suspension or other discipline is warranted, that the Award accordingly reflect that.

### ANALYSIS AND FINDINGS

As an Arbitrator, I am keenly aware that discharge cases are among the most important situations that I am called upon to determine. Discharge decisions have significant psychological, economic and legal effects on all parties involved.

As is typical in most labor contract situations, this labor agreement conditions Discharge or Disciplinary action upon "...*just cause*" and like most labor agreements, this one contains no other statements, standards or definitions as to exactly what constitutes "*just cause*".

Despite the absence of an actual, formal definition of "*just cause*" within the labor agreement itself, one would expect that - given the myriad of discharge cases that labor arbitrators have had to deal with over the course of many decades - the labor arbitrators themselves would have certainly reached a clear consensus as to the meaning of those terms. Wrong! The situation was aptly explained by a seasoned, veteran labor arbitrator who observed that neither he nor his esteemed colleagues have ever been able to reach agreement on an universally accepted definition of the term "just cause", but he noted that he and every other

labor arbitrator could readily recognize the presence or absence of “just cause” in any particular case.

There have been a number of attempts and efforts, over the years, to define, codify or systematize the term and concept of “just cause”; unfortunately, none have found universal acceptance. Personally, I find that at least two of them do help me to organize information and also provide at least a basic analytical framework for looking at Just Cause issues.

As noted by the Employer and the Union, one of those was formulated by Arbitrator Carroll R. Daugherty, in an appendix to one of his Decisions. He articulated what has become known as the “The Seven Tests of Just Cause”. According to Daugherty, a “no” answer to one or more of seven specific questions normally signifies that just and proper cause did not exist:

1. *Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?*
2. *Was the company’s rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company’s business and (b) the performance that the company might properly expect of the employee?*
3. *Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?*
4. *Was the company’s investigation conducted fairly and objectively?*
5. *At the investigation, did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?*
6. *Has the company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?*
7. *Was the degree of discipline administered by the company in a particular case reasonable related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the company?*

I, personally, find Daugherty’s “Test” to be a useful tool in organizing and analyzing the facts and evidence that come to the fore in discipline cases. However, like many arbitrators, I find that it is rigid and overly mechanical in its application as a true test of “just cause”; in that it fails to recognize and allow for the weighing of the myriad of factors and nuances that are involved in a typical discipline situation.

An alternative view of the “just cause” situation was set forth by Roger I. Abrams and Dennis R. Nolan in “*Toward a Theory of ‘Just Cause’ in Employee Discipline Cases*”, 85 Duke Law Journal 594 (1985). The authors begin by setting forth what they refer to as “The Fundamental Understanding” in the employment relationship:

*A potential employer is willing to part with his money only for something he values more highly, the time and satisfactory work of the employee. The potential employee will part with his time and work only for something he values more, the money offered by the employer.*

The Fundamental Understanding can be and is modified by collective bargaining agreements and the congruent interests of unions and employers. From the point of view of employees, collective agreements can correct what they perceive to be the major flaw of the Fundamental Understanding – the insecurity of the employment relationship. Thus, the main addition to the Fundamental Understanding that unions seek in collective bargaining agreements is job security through limitations on the employer's power to discipline and discharge employees. Therefore, the basic Fundamental Understanding is modified by a particular collective bargaining agreement, as follows:

*Employees will provide 'satisfactory' work, in return for which the employer will pay the agreed wages and benefits, and will continue the employment relationship unless there is **just cause** to terminate it.*

This modification of the Fundamental Understanding obviously limits the employer's power to discipline and discharge pursuant to the common law concept of "Employment at Will", which essentially permits the employer to discipline or discharge employees for any reason or for no reason whatsoever.

Under the modified Fundamental Understanding employee discipline should only be used to fulfill one or more of management's rational interests; 1) rehabilitation – the objective being to cure a specific problem and restore the employee to "satisfactory" work, 2) deterrence – the objective being to deter the errant employee from repeating a certain error by imposing one penalty and threatening to impose a harsher one in the future and 3) protection of profitability – certain employee conduct, though perhaps not prohibited by a specific rule, may still interfere with the employer's operation of the enterprise. This category is something of a catch-all and many of the situations falling within its confines involve off-duty conduct by employees.

Like management, unions also have certain interests and expectations with respect to discipline and discharge of employees. A rational union acknowledges that an employee's failure to meet his or her obligations works to the detriment of other employees as well as the employer. In the short run, an unsatisfactory employee simply makes the jobs of co-workers more difficult. In the long run, continued tolerance of substandard work performance by an employee will endanger the employer's competitive position, and that, in turn, will threaten the wages and even the jobs of the rest of the workforce. Therefore, the economic welfare of the workers, the union and management is interdependent.

The primary interest of the union and the employees in disciplinary matters is fairness. First, they seek fairness in disciplinary procedures; that is employees must have actual or constructive notice as to their work obligations. Secondly, they seek fairness in the administration of discipline. Disciplinary measures must be based on facts; management must ascertain what actually happened before it imposes discipline and must give the employee an opportunity to explain his or her view of the situation and must allow union representation during the investigation if the employee so requests. Thirdly, discipline should be imposed in gradually increasing degrees, with the exception of certain “capital offenses” and, finally, proof by management that just cause exists for the discipline.

The foregoing concerns for procedural fairness in discipline situations might be termed “Industrial Due Process”.

The employee is also entitled to “Industrial Equal Protection” which requires like treatment of like cases. But, related, is the requirement that an employee is entitled to individualized treatment. Distinctive facts in the employee’s record or regarding the discipline must be given appropriate weight.

Like Daugherty’s “Test”, the Abrams & Nolan theoretical construct for Just Cause serves as a useful analytical tool for organizing, assessing, evaluating and considering the numerous facts and pieces of evidence involved in a typical discipline or discharge situation.

Applying these tools to the instant matter and based on the record evidence, testimony and briefs:

1. It is axiomatic that an employee shouldn’t be held accountable or disciplined for allegedly violating a policy or work rule that s/he didn’t know about.<sup>5</sup> Was the Grievant herein, reasonably aware of the District’s policy with respect to appropriate use of it email/Internet systems and that violations of the policy would bring disciplinary action?

Employer’s Position: It is unchallenged that the Employer has had its *Information Technology Safety and Usage policy and procedure, 520.00* in place and in effect since about 1999. At all times material herein, those documents have been posted and available for review by students, parents, staff and members of the public on the School District’s website. Those policies, on their face, apply to students, staff and anyone else who has access to and permission to use the District’s technology resources, including

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<sup>5</sup> Parable: Old hand and New Guy sitting in the lunchroom. New Guy says, “*Say Phil, the other day I heard one of the guys mention ‘shop rules’, so I checked my Employee Handbook and the bulletin board but didn’t find anything. Where can I find them?*” Old Hand; “*They’re in their heads.*” New Guy; “*What do you mean...in their heads?*” Old Hand; “*The managers and supervisors have them all memorized in their heads and if you violate one of them, they’ll tell you which one right away!*”

computers, email and Internet systems. All staff members have ready access to the website, via their personal District email/Internet accounts and, as a long-term Staff Member; Bergstrom was reasonably expected to be aware of and familiar with all District policies.

Union's Challenge: While it is true that the District has had those technology policies and procedures posted on their District website, this Grievant credibly testified that he was never made personally aware of their existence and never received any formal training from the District, as to proper vs. improper usage of the District's technology resources. He first became aware of the policy on about August 3<sup>rd</sup>, 2011; when he received formal notice that he was being investigated for alleged inappropriate use of his District email account. He further testified that when he received access to the District's email and Internet systems back in 2003, he was told that this was the only email account he would ever need and that the account was "private". The District failed to properly and fully inform the Grievant of the policy and, therefore, cannot hold him responsible for any alleged violations. Also, the policy isn't even posted for Staff, only for Students on the website.

Analysis and Findings: After full consideration of the record evidence and testimony with respect to this Item, I am compelled to find the Union's challenge to be without merit for the following reasons:

- The posting of the Information Technology Safety and Usage policy and procedure on the District website constitutes effective notice to Bergstrom and all other employees. Employees clearly have routine and ready access to that information and all other District policies, via their District technology access and, additionally, can easily address questions to appropriate District supervisors and managers, via the email system.

While supplemental training for employees regarding technology usage would perhaps be nice, its absence does in no way reduce the effectiveness of the underlying policy to govern the behavior and conduct of employees and others who use the District's technology resources.

- Bergstrom is obviously familiar with the applicable labor agreement and aware of his rights, duties and obligations, as an employee, pursuant to the provisions of that document. I believe that it can also be reasonably inferred that he was aware of Appendix C of the agreement. As noted previously, Appendix C is a Memorandum of Understanding between the District and the Union, effective January, 2011, whereby Union officers, agents and representatives, who have access to the District's technology resources, agree to abide by the District's Information Technology Safety and Usage policy and procedure, in the same manner as all other users of the system, i.e. employees.

- While it is true that the technology policy is posted on the website in the Student section and not the Staff section, I was personally able to quickly locate the policy by simply typing in the query, “email” in the website’s Search box. Viola! Up popped the policy, together with other items related to the District email system. Accordingly, Bergstrom either knew of or reasonably should have known and been aware of the technology policy at all times material herein and his testimony to the contrary is rejected.
- Assuming, arguendo, that somehow he really was unaware of the policy, I note that in the course of his inappropriate email communications, several of his female correspondents “flagged” him about his use of his work email system to discuss sexual matters. Those comments should have reasonably caused him pause and inspired him to check District policies to find out if he might be doing something wrong.
- As to Bergstrom’s assertion that, from 2003 until about August, 2011, he understood and believed that his District email/Internet account was totally “private” and secure from any monitoring by the District; I find that assertion to be totally “unbelievable”. Given the numerous ongoing media reports over at least the past decade of employees routinely being disciplined, discharged and/or criminally prosecuted for inappropriate use of their employer’s email mail/internet systems – Bergstrom would have had to have been living in some blissful state of ignorance to be able to cling to the idea that the District couldn’t really couldn’t monitor or see what he was doing in his District account!
- Finally, I note in passing that the Minnesota Court of Appeals in Brisson v. City of Hewitt, A10-351 (2010) held that the discharge of an employee found accessing pornographic websites using his employer’s computer system involved serious misconduct. The employee argued that his employer couldn’t discharge him for using the computer to access porn, because his employer had no formal policy prohibiting that activity. The Court rejected the employee’s argument and held that by using his employer’s computer to view pornography, such activities were not part of his job duties and that an employer has a right to reasonably expect that an employee will not engage in this kind of activity at work; even though the employer has not enacted a policy that prohibits that behavior. The Court further held that the employee’s behavior constituted serious misconduct sufficient to deny him unemployment compensation.

In view of the above, I find that Mr. Bergstrom knew or reasonably should have known that his inappropriate use of his District email account would result in formal disciplinary action, up to and including discharge.

2. Is the District’s Information Technology Safety and Usage policy and procedure 520.00 reasonably related to the safe, orderly and efficient

operation of the school district and the work performance that it might reasonably expect of its employees?

In the absence of any question or challenge on this item, I find that the District's technology policy and procedure is totally appropriate and valid given the nature of the District's mission of educating children.

3. Did the District conduct a full, fair and objective investigation of the alleged misconduct, prior to considering disciplinary action for Mr. Bergstrom?

I note that the District did indeed conduct a very orderly and logical investigation of Bergstrom's alleged misconduct and further note that he was afforded full Union representation at every step, including the required Loudermill hearing. In the absence of any question or challenge to the conduct of the investigation, I find that it was full, fair and objective in all respects.

4. Did the District obtain sufficient proof, as a result of the investigation, to establish Bergstrom's guilt?

Bergstrom, when initially confronted with copies of his emails, in the initial investigative meeting on August 4, 2011, readily acknowledged that those were his emails and that he was personally responsible for their content. He further conceded that such content, in the emails, was of a nature sufficient to constitute violations of the District's technology usage policy and procedure. Accordingly, I find that Bergstrom's email record, on his District account, was sufficient to establish his "guilt".

5. Has the District applied its policies, rules and penalties even handedly and without discrimination to all employees?

Union Position and argument: As noted above, the Union points specifically to the fact that, unlike the Grievant who was discharged, the District decided that the disciplinary penalty for Karen Brelje, a co-worker of the Grievant, should be a 30 day disciplinary suspension. The Union contends that Brelje's email-related misconduct was that same or similar to that of the Grievant. Additionally, the Union points to Cardwell's testimony wherein she was asked, relative to the 20 some District employees who were found to have violated the District' technology usage policy, whether any of the females involved were discharged. Cardwell said "none". When asked how many of the male employees involved had been discharged or had resigned, she conceded all had resigned or been discharged.

The Union asserts that, it should be construed from those facts, that the District may be exhibiting a gender-based bias against male employees, including the Grievant.

Employer Arguments and Position: Cardwell testified that that when Brelje's case was reviewed for specific discipline, Discharge was considered, but ultimately rejected in favor of a 30 day disciplinary suspension. According to Cardwell, the decision to impose the lesser discipline was based on several mitigating factors in her case; 1) she had, on her own volition, ceased the inappropriate use of her District email account prior to becoming a subject of investigation, 2) her typical inappropriate emails consisted of forwarding and passing on emails containing inappropriate materials received from other parties, rather than creating or authoring such material herself and 3) the volume of inappropriate emails sent, received and stored by Brelje was noticeably less than other offenders. When asked by the Union to rate the overall severity or egregiousness (on a scale of 1 to 10, 10 being very bad) of the email misconduct of several employees, rated Bergstrom's misconduct as a "9" or "10" and Brelje's as a "5 or 6".

Analysis and Findings: Where a party alleges discrimination or disparate treatment, such as here; that party has a burden of proof to clearly establish by a preponderance of evidence that the allegation is true and correct. As noted above, the Union has only established that none of the female offenders were discharged and all of the males were discharged or resigned, but has offered no evidence to establish that the District, in fact, purposely and knowingly engaged in disparate/discriminatory treatment using gender as the sole or primary basis for its specific individual disciplinary decisions. With respect to Brelje, it is clear from Cardwell's testimony that the District made a reasoned and rational assessment of the specific nature of her offenses and found that when compared to other offenders, merited a lesser level of discipline. I also note that the record evidence indicates that Janet Yanarely, a female employee, was, in fact initially discharged by the District for inappropriate use of the email system; but that discharge was subsequently reduced to a 60 day disciplinary suspension, as a result of a grievance settlement.

In view of the foregoing, I find that the Union has failed to meet the requisite burden of proof to establish that the Employer purposely and knowingly engaged in a pattern of gender discrimination with respect to the administration of discipline in this matter. Therefore, I concurrently find that the Employer has, in this matter, administered discipline in an even handed and non-discriminatory manner.

6. Was the degree of discipline imposed up the Grievant, by the Employer, reasonably related to (a) the seriousness of his proven offense and (b) his

record of service with the District?

Union Argument and Position: The Union contends that the District's decision to discharge Bergstrom is overly harsh and argues that this Arbitrator should step in and mitigate and reduce the discharge to a disciplinary suspension of at least 30 days. The Union specifically points to the following factors as considerations sufficient to justify mitigation:

- Bergstrom has some 15 years of dedicated service to the District.
- He has a stellar record of very satisfactory work performance with the District during his entire tenure.
- He has been very forthright in readily admitting that he was wrong in using his District email account to send the inappropriate emails.
- He has solemnly promised and assured the District that he will never, ever repeat that misconduct.
- He has advised the District that, if permitted to return to work, he will personally act as an informal "trainer", with respect to informing his co-workers about the technology usage policy and specifically what types of communications are permitted and what is definitely not permitted.

Employer Argument and Position: The District was fully cognizant of each of those points and they were fully considered in reaching the decision to discharge Bergstrom. Essentially, the District concluded that those factors were insufficient to mitigate a decision to discharge; when weighed against the following:

- As compared to many other employees, Bergstrom had a large quantity of inappropriate emails on the District system – at least a couple of year's worth.
- Rather than merely forwarding inappropriate jokes, cartoons, and other inappropriate material originated by others, Bergstrom personally authored and created his inappropriate email messages.
- As compared to many other employees, the content of many of Bergstrom's inappropriate emails were particularly sexually vivid and explicit.
- Probably most disturbing, was the fact that in all his inappropriate email messages, Bergstrom included his name, his District job title, the name and address of the District school where he was assigned and working and his work phone numbers along with his District email address and, finally, the messages containing that information were sent to individuals outside the District system.

In considering and assessing potential penalties, the District concluded that for Bergstrom the above "aggravating" factors strongly argued for discharge.

Analysis and Conclusions: Upon full consideration of the Parties arguments and positions and the record evidence with respect to this Item, I can find no relevant or convincing basis for modifying or overturning the Employer's discharge decision, on the basis that it is too harsh or inappropriate to the nature and severity of Bergstrom's offense. Therefore, I find the Union's arguments and position to be without merit. My finding is based, at least in part, upon consideration of the following:

- Current case law indicates that employee abuse and misuse of the employer's technology resources is commonly viewed as a serious or egregious offense sufficient to warrant disciplinary action up to and including discharge.
- Informal evidence, stories and reports in the media and elsewhere indicate that it is not at all uncommon for employers to treat employee misuse of its organizational email and/or Internet systems as a "capital offense".
- In this situation, it appears that the District generally considered "discharge" as the default penalty for employee misconduct involving inappropriate emails or Internet usage; with only relative limited and special circumstances meriting a lesser penalty.

7. Other Items or Issues:

- a) The Union contends that the District improperly found Bergstrom guilty of using his District email account to send personal messages during work time; when it readily admitted that, informally, it does permit other employees to send personal messages, via their District account, during their work time.

In reviewing the record evidence and testimony, with respect to the Union's contention, I believe that the District found that he violated the technology policy by specifically sending personal "inappropriate" emails during work time and that type of usage was not authorized. Therefore, I find the Union's contention to be without merit

- b) The Union contends that the District improperly accused him of violating the District's harassment policy; though there is no evidence to support that accusation. In relevant part, the harassment policy prohibits conduct directed to other District employees that "[h]as the purpose or effect of creating an environment that is intimidating, hostile, or offensive with respect to that individual or otherwise adversely affects the individual's employment, educational opportunities, or access to a benefit from the school district" or is "sexual harassment". The Union points out that there is no evidence that any District employee ever complained to management about Bergstrom or his emails.

In reviewing the record I do find evidence that Bergstrom did have email communications with female co-workers, but the record is essentially silent as to specifically why or how those email exchanges constitute violations of the Harassment policy; as it appears that the Union did not specifically raise this contention in the hearing. Therefore, I am unable to make any definitive finding on the contention.

### DISCUSSION AND CONCLUSIONS

In view of my analysis and specific findings above, I conclude that the Employer/School District has established by a preponderance of the record evidence and testimony that it properly discharged employee Jon C. Bergstrom on September 20, 2011 for Just Cause and that action was fully in accordance with the provisions of the applicable labor agreement. I further conclude that the Union has been unable to demonstrate that the Employer has in any way abused its authority or discretion in its discharge decision or otherwise acted in a totally arbitrary or capricious manner, sufficient to justify a remedy or mitigation of that decision. Accordingly, I conclude that the Grievance in this matter is without merit.

### DECISION

In accordance with my Findings and Conclusions, as above, the Union's Grievance in this matter is denied in its entirety and is hereby dismissed. Concurrently, the Employer/School District's decision to discharge employee Jon C. Bergstrom is hereby sustained.

Dated at Minneapolis, Minnesota, this 29<sup>th</sup> Day of October, 2012.

/s/ Frank E. Kapsch, Jr.  
Arbitrator

Note: I shall retain jurisdiction in this matter for a period of fourteen (14) calendar days from the issuance of this Decision to address any questions or problems related thereto.