

BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between

**STATE OF MINNESOTA and its DEPARTMENT
OF REVENUE**

and

**THE MINNESOTA ASSOCIATION OF PROFESSIONAL
EMPLOYEES**

Grievant:

Arbitrator: Sharon K. Imes

APPEARANCES:

Carolyn Trevis, Minnesota Management and Budget, Assistant State Negotiator, State of Minnesota, appearing on behalf of the State of Minnesota and its Department of Revenue.

Kathy Fodness, Business Representative, the Minnesota Association of Professional Employees, appearing on behalf of the Minnesota Association of Professional Employees and the Grievant.

JURISDICTION:

The State of Minnesota, referred to herein as the State or the Employer, and The Minnesota Association of Professional Employees, referred to here as MAPE or the Union, are parties to a collective bargaining agreement effective July 1, 2011 through June 30, 2013 and which shall be automatically renewed from biennium to biennium thereafter unless notice is given by either party in accord with Article 34 of the agreement. Under Article 9, Section 3 of this agreement, the undersigned was selected to decide a dispute that has occurred between them. Hearing was held on April 23 and April 24, 2013 at the Bureau of Mediation Services in St. Paul, Minnesota. The parties, both present, were afforded full opportunity to be heard. The hearing was not transcribed and was closed with oral arguments on April 24, 2013.

STATEMENT OF THE ISSUE:

Did the Employer discharge the Grievant for just cause pursuant to Article 8 of the agreement between the parties? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

**ARTICLE 8
DISCIPLINE AND DISCHARGE**

Section 1. Purposes. Disciplinary action may be imposed on employees only for just cause and shall be corrective where appropriate.

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Section 3. Disciplinary Action.

Discipline includes only the following, but not necessarily in this order.

1. Oral reprimand (not arbitrable)
2. Written reprimand
3. Suspension, paid or unpaid: The Appointing Authority may, at its discretion, require the employee to utilize vacation hours from the employee's accumulated vacation balance in an amount equal to the length of the suspension. All suspensions must be served away from the worksite.
4. Demotion
5. Discharge

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

When any disciplinary action more severe than an oral reprimand is intended, the Appointing Authority shall, before or at the time such action is taken, notify the employee and the Association in writing of the specific reason(s) for such action.

Section 4. Investigatory Leave. The Appointing Authority/designee may place an employee who is the subject of a disciplinary investigation on an Investigatory leave with pay provided a reasonable basis exists to warrant such leave. The Appointing Authority shall, as soon as practicable upon placing an employee on Investigatory leave, notify the employee and the Association in writing of the reason(s) for such action and provide the name of the agency contact person. If the Investigatory leave extends past thirty (30) days, the employee shall be notified of the reason(s) for the continuance of the leave including the status of the investigation.

Section 5. Discharge of Employees. The Appointing Authority shall not discharge any employee without just cause. If the Appointing Authority believes there is just cause for discharge, the employee and the Association will be notified, in writing, that an employee is to be discharged and shall be furnished with the reason(s) therefore, and the effective date of the discharge. The Appointing Authority shall notify the employee that he/she may request an opportunity to hear an explanation of the evidence against him/her and to present his/her side of the story and is entitled to Association representation at such meeting. The right to such meeting shall expire at the end of the next scheduled work day of the employee after the notice of discharge is delivered to the employee, unless the employee and the Appointing Authority agree otherwise. The discharge shall not become effective during the period when the meeting may occur. The employee shall remain in his/her normal pay status during the time between the notice of discharge and the expiration of the meeting. However, if the employee for any

reason was not in pay status at the time of the notice of discharge, this shall not apply. All employees, no matter if they are in or out of pay status at the time they received notice of discharge, shall be in pay status for the actual time they spend in the afore-mentioned meeting.

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

An employee found to be unjustly discharged shall be reinstated in accordance with the conditions agreed to between the parties if appropriate or the decision of the Arbitrator.

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ARTICLE 9 GRIEVANCE PROCEDURE
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Section 1. Intent: The purpose of this procedure is to secure, in the easiest and most efficient manner, resolution of grievances. For the purpose of this Agreement, a grievance shall be defined as a dispute or disagreement as to the interpretation or application of any term or terms of this Agreement.

Section 2. Operating Terms, Time Limits, and General Principles.

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7. **Fees and Expenses.** The fees and expenses for the Arbitrator's services and proceedings shall be borne by the losing party. In the event of a split decision, the charges to the parties shall be determined by the Arbitrator. However, each party shall be responsible for its own witnesses' and representatives' compensation, expenses and fees. If either party desires a verbatim record of the proceedings, it may cause such a record to be made, provided it pays for the record. If both parties desire a verbatim record of the proceedings, the cost shall be shared equally.

8. **Implementation.** Within a reasonable period of time after the grievance settlement or arbitration award, the settlement or award shall be implemented.

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Section 3. Procedure.

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Arbitration Panel. The arbitration proceeding shall be conducted by an Arbitrator to be selected by lot from a permanent panel of six (6) Arbitrators. Prior to October 1 of each even numbered year of the contract, the State Negotiator and the Association may, by mutual agreement, select the members to serve on the permanent panel. If the parties fail to agree, they shall prepare a list of fifteen (15) Arbitrators selected from a list of available Arbitrators supplied by the Bureau of Mediation Services. The members of the permanent panel shall be selected from the list by the following method: the Association and the State Negotiator shall each strike a name from the list. The parties shall continue to strike names until the six (6) members of the permanent panel have been selected. If a vacancy on the permanent panel occurs during the life of this Agreement, the vacancy shall be filled by mutual agreement of the State Negotiator and the Association. If the parties fail to agree, the vacancy shall be filled from among the remaining names on the original list by the same method of selection detailed above.

Section 4. Arbitrator's Authority. The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of the Agreement. The Arbitrator shall consider and decide only the specific issue submitted in writing by the Employer and the Association and shall have no authority to make a decision on any other issue not so submitted to him/her.

The Arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law. Except as indicated in Section 5 below, the Arbitrator shall submit his/her decision in writing within thirty (30) days following the close of the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision shall be based solely on the Arbitrator's interpretation or application of the expressed terms of this Agreement and the facts of the grievance presented. The decision of the Arbitrator shall be final and binding on the Employer, the Association and the employee(s).

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ARTICLE 28 WORK RULES

An Appointing Authority may establish and enforce reasonable work rules that are not in conflict with the provisions of this Agreement. Such rules shall be applied and enforced without discrimination. The Appointing Authority shall discuss new or amended work rules with the Association, explaining the need therefore, and shall allow the Association reasonable opportunity to express its views prior to placing them in effect. Work rules will be labeled as new or amended and shall be posted on appropriate bulletin boards at least ten (10) working days in advance of their effective date if practicable.

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OTHER RELEVANT DOCUMENTS:

**MINNESOTA - REVENUE
CODE OF CONDUCT**

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POLICY STATEMENT

The Code of Conduct applies to all Minnesota Department of Revenue employees. The term "employee" means fulltime, part time, seasonal, temporary, interns, contractors/consultants, and student workers. It includes all members of the commissioner's staff, division directors, supervisors, and classified or unclassified positions.

You are individually responsible for complying with this Code of Conduct and must avoid all conduct that is, or could be seen as, inappropriate or as a conflict of interest.

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OTHER PROHIBITED ACTIVITIES

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Soliciting for Private Gain

You may not conduct private business, sell or attempt to sell, or buy any commercial product or service during work hours in any working area or any taxpayer locations for business or personal gain or profit. You may make isolated and occasional sales of personal items but you may not use the regular electronic mail system, interoffice mail or any other state equipment or supplies in the process.

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USE OF STATE PROPERTY

General

You should not use state time, facilities, equipment, or property for personal use. That includes, but is not limited to, paper, computers, photocopiers, fax machines, state vehicles, and telephones. State equipment should not be used for personal projects or outside employment - even on your own time.

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COMPUTER SECURITY

The department's computer data and resources are to be used only for authorized work purposes. Access to computerized information is limited to only those who need the information to perform assigned duties.

Computer system access codes and authorities are issued to individual employees. You must not share access codes. We all have an obligation to protect data from unauthorized disclosure, modification, transfer, or destruction and to ensure that computer information is kept accurate, complete and current.

We all must comply with published computer security policies and procedures. If you have any questions, contact your supervisor or work group manager.

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DISCIPLINARY AND OTHER REMEDIAL ACTION

Violations of the Code

If you violate this Code of Conduct, you may be subject to disciplinary action, up to and including dismissal. Violations of law may result in civil or criminal prosecution.

The department may also reassign you or change your duties to avoid a conflict and/or require you to stop an activity that conflicts with your work. You have specific appeal rights under law and/or your collective bargaining agreement if disciplined for violating this code.

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Statewide Policy: Appropriate Use of Electronic Communication and Technology

The State of Minnesota provides a variety of electronic tools for employees whose job performance requires or would be enhanced by the use of its technology.

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The State faces the challenge of making maximum use of the benefits of such tools, meeting legal requirements for access to information, and providing adequate protection for proprietary information. This policy memorandum governs access to and the appropriate use of State-provided electronic tools and technology at all times, including both work and non-work time, by State employees in the executive branch, consultants and/or contractors.

Employee access to and use of electronic tools is intended for business-related purposes. Limited and reasonable incidental use of these tools for occasional employee personal purpose that does not result in any additional costs or loss of time or resources for their intended business purpose is permitted. Incidental use is defined as minimal duration in length and frequency.

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M. S. 43A.38, Subd. 4 provides "Use of state property":

- a. An employee shall not use or allow the use of state time, supplies, or state-owned or leased property and equipment for the employee's private interest or any other use not in the interest of the state, except as provided by law.

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M. S. 43 A.39, Subd. 2 provides "Noncompliance":

- a. Any employee who intentionally fails to comply with the provisions of Chapter 43 A shall be subject to disciplinary action and action pursuant to Chapter 609.

Managers and supervisors are responsible for ensuring that employees appropriately use all electronic tools through training, supervising, coaching and taking disciplinary action, when necessary.

Each agency is responsible for establishing internal policies regarding password management, encryption, data practices, monitoring access, records retention, and the like, and for communicating those policies to staff. Each agency will ensure that the responsible authorities within their agencies know who can access what, using what technology, and under what conditions.

Appropriate Use: State employees need to use good judgment in the use of all State-provided electronic tools and technology. They are expected to ensure that messages conveyed are appropriate in both the types of messages created and the tone and content of those messages. Employee use of all State-provided electronic tools and technology must be able to withstand public scrutiny without embarrassment to the agency or the State of Minnesota.

Examples of inappropriate use include, but are not limited to:

1. Illegal activities
2. Wagering, betting, or selling
3. Harassment, disparagement of others, stalking, and/or illegal discrimination
4. Fund-raising for any purpose unless agency sanctioned
5. Commercial activities, e.g., personal for-profit business activities
6. Promotion of political or religious positions or activities
7. Receipt, storage, display or transmission of material that is or may be reasonably regarded as violent, harassing, discriminatory, obscene, sexually explicit, or pornographic, including any depiction, photograph, audio recording, or written word
8. Downloading or installing software (including games and executable files) unless agency sanctioned
9. Unauthorized accessing of non-public data
10. Non-State employee use (e.g., family member or friend) at work or away from work
11. Uses that are in any way disruptive or harmful to the reputation or business of the State
12. Purposes other than state business, except incidental or minimal use

Engaging in any of the above listed activities may subject an employee to discipline, up to and including discharge.

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While employees may make personal use of State technology such as e-mail and Internet access, the amount of use during working hours is expected to be de minimis. De minimis use is defined as small or minimal in difference that it does not matter or the law does not take it into consideration. Excessive time spent on such personal activities during working hours will subject the employee to disciplinary action.

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**Department of Revenue Policy
Electronic Communications Usage - December 2008**

Introduction

The Department of Revenue (DOR) uses electronic communications tools in conformity with best practices for government agencies as defined by the DOR Information Policy Team and the Office of Enterprise Technology. Each DOR employee is responsible for familiarity and compliance with the expectations set forth in this policy.

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Purposes and Restrictions

Electronic communication tools are provided for agency business purposes. Employees are expected to limit their personal use of State technology during working hours to incidental use. Whether for personal or business use, they are expected to use the tools appropriately and adhere to the highest ethical standards and to follow the Code of Ethics and related State statutes applicable to executive branch employees. It is a supervisory responsibility to oversee use of electronic communication tools and to determine if usage is appropriate. Inappropriate use is taken very seriously and will be addressed by management.

Examples of inappropriate use include, but are not limited to:

1. Illegal activities;
2. Wagering, betting, or selling;
3. Harassment, disparagement of others, stalking, and/or illegal discrimination;
4. Fund-raising for any purpose unless agency sanctioned;
5. Commercial activities, e.g., personal for-profit business activities;
6. Promotion of political or religious positions or activities;
7. Receipt, storage, display or transmission of material that is or may be reasonably regarded as violent, harassing, discriminatory, obscene, sexually explicit, or pornographic, including any depiction, photograph, audio recording, or written word;
8. Downloading or installing software (including games and executable files) unless agency sanctioned;
9. Unauthorized accessing of non-public data;
10. Non-State employee use (e.g., family member or friend) at work or away from work;
11. Uses that are in any way disruptive or harmful to the reputation or business of the State; and
12. Purposes other than state business, except incidental or minimal use.

For further information see:

- [Code of Ethics for State Employees in the Executive Branch](#)
- [Statewide Policy on Appropriate Use of Electronic Communication and Technology](#)
- [Minnesota Department of Revenue Code of Conduct](#), specifically the sections on the Use of State Property (page 21), Confidentiality of Data (page 23) and Computer Security (page 24)

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BACKGROUND AND FACTS:

The Grievant, a fourteen-year employee with the State of Minnesota's Department of Revenue (DOR), was an Information Technology Specialist (ITS) 4 on the Enterprise Collaboration team in the Information Systems Division (ISD) at the time of his discharge on June 14, 2012. Assigned this position in approximately August 2011, he was one of three

SharePoint¹ administrators and the site owner for the ISD website. In addition, he worked on SharePoint development and miscellaneous projects for the team.

The Grievant was discharged following an investigation into his DOR computer activity which was commenced when a co-worker reported seeing pictures of young women on the Grievant's State-owned computer; overhearing a conversation between the Grievant and a co-worker about the photos, and being asked for a copy of Killdisk, a software program that erases computer hard drives to DOR's Human Resources Director. When the investigation began in February 2012, the Investigator, a computer forensics specialist from the Department of Human Services (DHS), was asked to search the Grievant's laptop for pictures of young women stored there. In his search of the Grievant's laptop, the Investigator not only looked for pictures stored on the Grievant's State-owned computer but reviewed the Grievant's Internet activity and history; his registry files to identify user activity including URLs; his last accessed documents; multi-media files which the investigator believed relevant and the Grievant's entire drive to find keywords designed to detect information considered relevant to the co-worker's report of potential child pornography. The Investigator also identified all of the Grievant's Internet based e-mail accounts; all installed chat clients and related chat logs; recovered all chat remnants; identified and reviewed all encrypted documents which the investigator considered relevant, and filtered and analyzed log files which he considered relevant. In addition, the Investigator identified the Grievant's work schedule and reviewed a turnstile report and the Grievant's payroll records.

A draft report of this investigation was prepared by the Investigator and presented to the Human Resources Director on April 5, 2012. In that report, the Investigator made the following findings:

- That the Grievant used the State-owned laptop to store and edit three series of digital pictures depicting young females in sexually suggestive poses;
- That the Grievant used DOR assets to create, edit, research, collect and store files and pictures associated with his commercial business and websites;
- That the Grievant may have downloaded and installed unauthorized programs on his laptop;
- That the Grievant stored files associated with his personal business and websites on his DOR network storage share, many of which were created and edited using DOR software during working hours;

¹ SharePoint is a browser-based collaboration and document management platform from Microsoft that allows groups to set up a centralized password protected space for document sharing. In SharePoint, documents can be stored, downloaded and edited, then uploaded for continued sharing.

- That the Grievant stored picture and music files that violate the State's policy on appropriate use of electronic communications and technology.

After this report was issued, the Investigator and a Personnel Representative interviewed the Grievant's current supervisor; his previous supervisor; two other DOR employees identified only as witnesses 1 and 2, and the Grievant regarding the findings. During the interviews, the Grievant was questioned about falsifying employee time reporting; using State time and equipment to access non-work related Internet sites, and using State time and equipment to create, modify, and promote non-work related personal websites and to create, store and modify non-work related files and images. On June 4, 2012, after the interviews were completed, the two interviewers issued a final report and submitted it to the Co-Directors of the ISD. Following are findings made in that report:

- That there is a discrepancy between the hours the Grievant reported on his timesheet and the building turnstile on February 17 and 29, 2012 and on March 5, 2012; that the Grievant provided no explanation for the discrepancies, and that the Grievant's supervisor had no documentation supporting the reduced work schedule on those dates;
- That the Grievant's signed work schedule lists his start time as 8:00 a.m. and his normal work shift as eight hours daily between Monday and Friday;
- That there is an informal arrangement which allows the Grievant to come to work late due to a medical condition but his supervisor states he expects the Grievant to inform him of any change to his work hours or his late arrival before the shift starts and to advise him whether he will use sick leave or stay later to make up the time;
- That between February 6 and February 22, 2012, the Grievant spent, on average, one hour and twenty minutes viewing non-work related Internet sites on his State-owned laptop and during work hours;
- That the Grievant spent at least three hours viewing non-work related Internet sites on his State-owned laptop and during work hours on March 1, 2012;
- That between March 1 and March 30, 2012 the Grievant used his State-owned laptop to access his personal website, ratcellar.com, 7,421 times;
- That the Grievant's current supervisor had not authorized the use of ratcellar.com as a "learning lab" since he should have been using a DOR-provided "sandbox" to prototype solutions for the SharePoint system;
- That the Grievant had registered two Internet domain names owned by him using his DOR contact information and that there is evidence that one of the sites was used for commercial purposes as recently as December 2010;
- That RR Imaging was, at one point, the Grievant's commercial photography business;
- That a Conflict of Interest determination was never submitted;
- That the Grievant had a sandbox environment available to him but used ratcellar.com as a SharePoint learning lab during work hours without supervisor authorization;
- That the DOR sandbox contained some work-related materials and some files that appear related to the Grievant's personal interests;
- That the Grievant had established RDP sessions between his State-owned laptop and his home computer and that the sessions represent a potential security issue to the DOR systems since they were programmed to transfer files to and from the DOR network;
- That the Grievant was told at least twice by a former supervisor to not establish RDP sessions with his home computer;

- That the Grievant's current supervisor confirms no employees should establish RDP sessions with personal computer networks;
- That the Statewide Policy on Appropriate Use of Electronic Communication and technology states an employee is not allowed to use State time, supplies or State-owned or leased property and equipment for private interests, and that the Grievant had created at least five documents with DOR-owned software and placed them on ratcellar.com in violation of this policy;
- That the Grievant had instructed a co-worker to go to ratcellar.com to share copyright protected material;
- That DOR was exposed to potential liability with the release of unvetted and unapproved content created and associated with DOR but released publicly through ratcellar.com;
- That the Grievant's job duties did not require extensive use of graphics/images and that there is no need to use copyright protected materials;
- That the Grievant used DOR software to create and edit images which appear to be related to his personal interests/business rather than to work;
- That there were at least sixty-six non-work related images found on the Grievant's laptop and that thirty-three of them were images of rats;
- That the Grievant confirmed that two images stored on his computer in a user-created folder were inappropriate;
- That music files stored on the Grievant's computer depicted violence and used explicit language;
- That photos of three young women in sexually suggestive poses who are non-custodial minors were stored on the Grievant's laptop and represent a potential liability to DOR;
- That the Grievant had asked co-workers about a copy of Killdisk;
- That the Grievant's use of his laptop; SharePoint system; Internet and time exposed DOR's computer systems to potential malware, security violations, data breaches and liability;
- That as a SharePoint administrator, the Grievant had the ability to restrict access to his SharePoint files and folders and, therefore, could create folders used to store non-work related content.

Upon receipt of the above findings, one of the Co-Directors advised the Grievant, by letter dated June 13, 2012, that he was being terminated at the end of the workday on June 14, 2012 for violating the Department's Code of Conduct relating to inappropriate use of state computers; the Statewide Policy on the Appropriate Use of Electronic Communication and Technology, the Department of Revenue's Electronic Communication Policy and for falsifying reported work time. In the letter, the Co-Director listed eleven items which he indicated were findings made in the investigation; stated that he had reviewed and concurred with the findings in the investigator's report, and that the Grievant's actions "demonstrated untrustworthy behavior"; "jeopardized the integrity" of the Department, and shows he cannot be trusted to be employed with the Department. Below are the investigation findings the Co-Director stated had been made:

- That the Grievant had misrepresented the number of hours he had worked; that he had failed to follow procedures associated with changes to his work schedule;
- That he had used his state-owned computer extensively throughout the workday to view non-work related Internet sites; that he had used his role as a SharePoint administrator, State time and resources to access or manage personal external servers, computers, storage or sites associated with ratcellar.com, rrimaging.net and rickreynolds.us;

- That he had also used State time and resources to promote and support personal interests from he may have profited by registering personal websites with DOR contact information, by creating, editing and storing personal files and documents related to his personal websites, and by promoting his personal website with his DOR email account;
- That he had used State-owned software for unauthorized and unassigned work;
- That he had installed and operated non-standard software on his State-assigned laptop without authorization;
- That he had used State resources to store, edit and create digital images which are not acceptable in the work environment;
- That he had used State resources to store files that depicted violence and contained explicit language;
- That he had refused to respond to questions pertaining to some of the digital images and had attempted to place blame for their presence on an "unlikely third party", and
- That he had refused to answer questions pertaining to his outside personal business regarding current operations, profit/loss and tax status.

On June 29, 2012, the Minnesota Association of Professional Employees (MAPE) timely filed a grievance challenging the DOR action at Step 2 of the grievance procedure. The Step 2 grievance meeting was held on August 3, 2012 and the grievance was denied at Step 2 on October 30, 2012. While it appears the parties discussed the findings made by the Co-Director in the termination letter at the Step 2 meeting, it also appears they discussed at least some of the more specific findings reported in the June 4, 2011 report. Further, in denying the grievance at Step 2 of the grievance procedure the Human Resources Director denied the grievance stating that she had run a turnstile report for the period between October 4, 2011 and April 3, 2012 and found forty-seven days when the report showed the Grievant worked less than 8.5 hours a day and forty-one days when the report showed the Grievant had worked more than 8.5 hours; that the Grievant had been granted a sandbox for testing purposes and that his supervisor had said there was no reason for him to access other mock-up sites; that there is evidence ratcellar.com is a "publicly accessible hobby website" that contains views, opinions and offensive content unrelated to DOR; that the Grievant had been told twice that accessing his home site using RDP sessions was prohibited; that the photos found on his computer were not of his stepdaughter and he had no reason to store them on his laptop since he has a highly sophisticated computer system at home, and rejected the Grievant's assertion that he had been isolated while carpeting was being installed in the department. She also listed ten other findings made in the June 4th report which she concluded were factual and concluded there was just cause to discharge the Grievant.

The record indicates that MAPE advised DOR that it was advancing the grievance to arbitration on September 11, 2012. This date predates the DOR Step 2 response which was

issued on October 30, 2012. Nonetheless, neither party has raised a challenge to this discrepancy and both agree the grievance is properly before the Arbitrator. Consequently, it is this discharge that is before the Arbitrator.

ARGUMENTS OF THE PARTIES:

Arguing that this case is about a Department of Revenue employee who broke the rules and, in the process, exposed the agency to unacceptable risk, including risks of legal liability and serious risks to its data and computer network, the DOR declares that it has just cause to terminate the Grievant for repeatedly and deliberately engaging in this conduct in "blatant disregard for the agency's clear policies and supervisory directives". Continuing, the DOR declares that the Grievant used State time and equipment to work on personal websites, including a photography business he owned, in violation of the Code of Ethics which prohibits employees from using State time and resources for their own private interests.

According to DOR, although the Grievant's performance reviews are generally satisfactory, his performance can be "problematic". Further, it maintains that the Grievant's misconduct discovered during an investigation initiated over concerns about photos viewed on the Grievant's state-owned computer raised by another employee is not acceptable conduct for an employee with elevated access to information in an agency like DOR.

As proof, DOR states the evidence clearly shows the Grievant repeatedly used State time and his State laptop to access non-work related internet sites, including two personal websites, and that in February 2012 he spent, on average, one hour and twenty minutes viewing these sites and others. It also states the evidence shows that the Grievant repeatedly used State time and equipment to administer and modify non-work related websites which were registered using the Grievant's work address at DOR; to store and modify non-work related files and images (two of which were obviously sexist and offensive to women; several of which were images of rats, and several of which were music files that contained violent and explicit lyrics); to create documents that were transferred to and used on his personal websites, and to store several images of young women on his State laptop which can be described as "sexually suggestive". And, finally, DOR declares that although the Grievant was instructed not to connect to his home computer through RDP sessions the evidence shows that the Grievant did connect with his home computer through RDP sessions and argues not only

that this is a serious breach of agency policies but that his actions jeopardized the security of the agency's system by exposing the Revenue network to possible viruses and malware.

DOR also charges that the Grievant was dishonest and deceptive when it attempted to determine the accuracy of the findings made by the Investigator by refusing to answer legitimate questions about his activities during the investigation and that this deception was highly significant to management when it decided the degree of discipline to impose. It adds that the Grievant was not discharged for taking a few photos of young women or for storing the photos on his computer, although storing them on a State laptop is not appropriate, but for misconduct that went way beyond that; misconduct which violates agency and State policies and which warrants the penalty of discharge.

MAPE, however, argues that DOR does not have just cause to terminate the Grievant and declares that when the investigation initiated to determine if the Grievant was storing non-work related images of young girls on his State-owned laptop determined that was not the case, DOR pressed on to find enough petty infractions to terminate him without notice, progressive discipline or supervisory documentation. It also declares that it is hard to understand how a fourteen-year employee whose performance evaluations indicated that his performance was above expectations; who received two achievement awards and a mid-annual raise for demonstrated leadership, initiative and project management, and whose personnel file contains no discipline can "suddenly lose all credibility" and become an employee "engaged in violations egregious enough to warrant termination.

Addressing the charges leveled against the Grievant, MAPE challenges each of those it considers more serious and disputes them. Referring to the allegation that the Grievant misrepresented time worked, MAPE asserts that the allegation ignores the fact that due to a medical condition the Grievant had permission to arrive at work later in the morning as long as he made up the time; that the Grievant's supervisor had instructed him to enter eight hours per day on his timesheet instead of actual hours worked since he was an exempt employee and that he had supervisory approval to balance his hours as an exempt employee and through FMLA. MAPE also contends that the DOR erred when it relied upon turnstile reports to support its allegations since many of the Grievant's work-related activities occurred outside turnstile #1. Further, it states that conduct alleged as misrepresentation of hours worked had

been the Grievant's practice for more than two years during which time his supervisors never talked with him or disciplined him for balancing his hours or flexing his time.

With respect to DOR's assertion that the Grievant's use of ratcellar.com was not authorized nor needed, MAPE states that the Grievant's use of this site was work-related since the Grievant used it to further his knowledge of SharePoint and was needed since the sandbox assigned to him at work was inadequate for testing the program. MAPE also questions why the Grievant's request for a fully functioning test environment was ignored for so long and that if it was not needed, why it was finally assigned to him just before he was put on investigative leave.

Challenging the State's assertion that the Grievant used State time and resources to support a personal interest from which he may have profited MAPE questions when "may" meets the burden of proof for a charge of misconduct. Further, MAPE denies that the Grievant registered personal websites with DOR contact information and states that, instead, the Grievant simply listed his daytime contact as he would have for his doctor or an emergency contact at school. MAPE also declares that the State's charge that the Grievant created, edited and stored personal files and documents related to his personal website using State-owned resources is totally mitigated since the evidence shows the Grievant's use of ratcellar.com was work-related and both supervisors confirmed that a part of the Grievant's job is to edit and create graphics.

As for whether the Grievant used State-owned software for unauthorized and unassigned work, MAPE argues that the way to determine whether work was authorized or assigned is through a current and accurate position description which the Grievant does not and has not had since assigned the position of SharePoint administrator even though such descriptions exist for other employees in the same position. Further, it declares that a problem like this should have shown up in a performance review or warning of some kind and it did not.

Next, MAPE questions whether the Grievant's downloaded music files is a violation of State or Department policies stating that the record confirms employees listen to music during work and that the Grievant's files were for his listening only. In addition, it asserts that the Grievant did not remember the lyrics to the song or two identified by the Investigator as "violent" and containing "explicit language" and that even the Investigator had to look up the lyrics to determine what was said.

Referring to the photos MAPE states that the photos stored on the Grievant's State-owned laptop were not only a small number of photos but photos of his granddaughter and daughters of his former girlfriend with whom he has a very close relationship. Continuing, it states that the Grievant may be guilty of showing poor judgment by having pictures of one of the girls modeling on his computer but that it is "troublesome" that the State charged the Grievant with misconduct for storing these photos since they were not viewed by anyone other than a manager; since the Grievant was neither using them nor sharing them in any way that would make DOR vulnerable, and since these photos were first defined as "child erotica", later defined as "sexually suggestive" and finally defined as inappropriate. It also declares that if the Grievant had been told the pictures were inappropriate he would have removed them.

Finally, MAPE rejects DOR's assertion that the Grievant's actions created a security risk declaring that the record shows the Grievant is a "scrupulous and vigilant protector of network security" and has a "deep knowledge of security protocols." It adds, that each time an e-mail or web page is opened there is a small but real risk of a security breach occurring and that the Grievant can't be held to a standard that no one can achieve and that while the Grievant should have done a better job of keeping his superiors notified of his activities none of his actions were worth blowing the security risk as out of proportion as it was. And, lastly, MAPE concludes the State's allegation of a security risk does not comport with the facts and states as proof that the Grievant used RDP in testing SharePoint when he needed to test what worked and what did not; that he had had approval to access and use the gopher network and that when he was told to no longer use the gopher network he stopped.

In conclusion, MAPE asserts that nothing in the allegations of misconduct could come under public scrutiny nor cause embarrassment to the State. Instead, it charges that what "is embarrassing about all of this" is the "underhanded way" DOR acted in trying to find just cause to terminate the Grievant. As remedy, it seeks the Grievant be returned to his position and made whole in every way.

DISCUSSION:

A finding of just cause requires that an employee being disciplined or discharged be given notice of the charges made and a meaningful opportunity to be heard. Normally, that notice is given in the disciplinary letter. In this case, the charges made against him differ

depending upon who is representing management. The Grievant's termination letter states that he is being discharged for falsely reporting the amount of time worked and for violating three policies, the Department of Revenue's Code of Conduct relating to inappropriate use of state computers, the Statewide Policy on the Appropriate Use of Electronic Communication and Technology, and the Department of Revenue's Electronic Communication Policy.² In the letter, the Co-Director states that a full investigation was conducted and that he has reviewed the findings and concurs with them. The findings the Co-Director listed in the termination letter, however, are not all of the findings made by the Investigator in his June 4, 2011 report and at times combine several findings made in the June 4th report. Further, some of the findings cited by the Co-Director are findings made in the Investigator's draft report on April 5. Noticeably missing from this letter, however, is any reference to the Grievant establishing Remote Desk Protocol sessions between his State-owned computer and his personal computer as well as creating a security risk by doing so although the Co-Director testified at hearing this was the most serious charge of misconduct.

While this termination letter should form the basis for determining whether DOR has just cause to terminate the Grievant, the Step 2 response given by the Human Resources Director and the arguments advanced at hearing by DOR's advocate emphasize other misconduct. At Step 2 of the grievance procedure, the Human Resources Director denied the grievance identifying several findings made in the June 4th report rather than those cited by the Co-Director as cause for discharge although some of the findings relate to the same allegation of misconduct. At hearing, the DOR advocate, referencing the June 4th report, argued that it has just cause to discharge the Grievant since he repeatedly engaged in conduct that blatantly violated State and agency policies and supervisory directives and exposed the agency to unacceptable risks, including risks of legal liability and risks to its data and computer network. Given their respective positions, it is difficult to determine the evidence DOR relied upon in deciding there was just cause to terminate the Grievant. Since it appears each management representative relied upon some, if not all, of the findings in the June 4th report as cause to terminate the Grievant and since it appears the Grievant had the opportunity to

² Both the Code of Conduct and the Statewide Policy on the Appropriate Use of Electronic Communication and Technology spell out policies in a number of areas, the letter did not identify which parts of either policy the Grievant had violated.

respond to each of the findings made in that report, it is concluded that a finding as to whether DOR had just cause to terminate the Grievant should be based upon proof as established by the findings in the June 4th report.

Before discussing the June 4th findings as they pertain to whether the Grievant falsified the time he reported working and to whether he violated the Department of Revenue's Code of Conduct relating to inappropriate use of state computers, the Statewide Policy on the Appropriate Use of Electronic Communication and Technology, and the Department of Revenue's Electronic Communication Policy, it should be noted that several of the findings, even though the Investigator stated they were "intended to summarize the facts that were discovered during the investigation and to present all sides of the story", are often overstated and at times not supported by evidence to prove the findings. This is particularly true of the investigator's findings pertaining to whether the Grievant falsified the time he reported; to photos found stored on the Grievant's State-owned computer; to the Grievant's use of the Internet and the websites, ratcellar.com and rrimaging.net; to whether the Grievant is operating a commercial photography business, and to the content of the music files downloaded by the Grievant. The problems with these findings will be discussed as they relate to the allegations of misconduct identified below:

Did the Grievant Falsely Report the Time He Worked?

During the investigation the Investigator examined and compared the Grievant's time and activities with his work schedule and a turnstile report for the period between October 4, 2011 and April 3, 2012 and with payroll records for the same period of time. After interviewing the Grievant and his immediate supervisor, the Investigator made the following findings:

- There is a discrepancy between the hours the Grievant reported on his timesheet and the building turnstile report on February 17 and 29 and March 5, 2012;
- The Grievant provided no explanation for the discrepancies and his supervisor has no documentation from the Grievant to support the reduced work schedule;
- The Grievant's work schedule states his normal start time is 8:00 a.m. and that he works an eight hour day Monday through Friday, and
- The Grievant's supervisor confirms there is an informal arrangement with the Grievant that allows him to come in late due to a medical condition but states the Grievant is expected to inform him of a change to his work hours or late arrival before the start of his shift and whether he will use sick leave or stay later to make up the time.

Based upon these findings the Co-Director charged the Grievant with falsifying the work time reported and concluded the investigation's findings showed that the Grievant had

misrepresented the number of hours he had worked and that he had failed to notify his supervisor or follow procedures associated with changes to his work schedule.

While the record does indicate that there are discrepancies between the hours the Grievant reports on his timesheet and the turnstile report, the evidence does not support the charge implied in the June 4th report or the Co-Director's assertion made in the termination letter. Not only do the turnstile reports not reflect whether the Grievant has attempted to make up time during the day by working through breaks or a lunch hour but the comparison failed to establish whether the Grievant had balanced the number of hours worked during a given pay period as he and others are directed to do as exempt employees.

Further, when the findings were made the record indicates that neither the Investigator nor the Co-Director considered the type of informal arrangement the Grievant may have had with his supervisor as a result of his medical condition. Instead, the Investigator stated in his discussion preceding his findings that the Grievant's supervisor had stated the Grievant is "required to contact his supervisor at the beginning of his shift to tell them if he is sick and if he would be using sick time or starting and staying later" without verifying the accuracy of this statement. At hearing, this supervisor did not testify to such a requirement and there is no evidence that the Grievant was told that this was a requirement. Instead, the only evidence in the record is testimony from the Grievant's previous supervisor that he had allowed the Grievant to adjust start and end times since the Grievant's medical condition occasionally prevented him from starting at his designated time; the current supervisor's testimony that he expected the Grievant to balance his hours and to make arrangements to do that, if needed, and the Grievant's testimony, which remained unrefuted, that he had supervisory approval to balance his hours and his testimony that his current supervisor had said he would honor the informal arrangement established by his former supervisor.

There is also no evidence that the Grievant misrepresented the number of hours reported when he reported eight hours each day on his timesheet. Based upon the fact that the Grievant had listed eight hours each day on his timesheet and the fact that the hours reported were not the same as those indicated in the turnstile report, the Investigator and the Co-Director chose to state that the Grievant had misrepresented the hours reported even though both knew or should have known that this was the practice in the department and that other ISD employees, including the Grievant, had been told to report eight hours a day since

they were exempt employees. The record establishes, not only in the investigator's discussion preceding his findings but in unrefuted testimony from the Grievant, that the Grievant and other ISD employees are exempt employees and have been told to record eight hours daily and to balance their hours within the pay period. Given these instructions and no evidence that the instructions have been changed, one must seriously question why the practice followed by the Grievant which has been the practice in the department would now be considered evidence of falsifying time reported.

Consequently, given the above discussion and evidence in the record, it must be concluded that DOR has failed to prove that the Grievant falsified or misrepresented the time he has reported. Further, based upon this conclusion, it is determined that this charge lacks merit and will not be considered as misconduct for which the Grievant could be disciplined.

The remaining findings in the June 4th report and the policy violations charged in the termination letter relate to the Grievant's use of State time and equipment. In this respect, three separate allegations are made, that the Grievant used State time and equipment to access non-work related Internet sites; that he used State time and equipment to create, modify and promote personal websites, and that he used State time and equipment to create, store and modify non-work related files and images. Accordingly, these allegations will be discussed separately.

Did the Grievant's Use State Time and Equipment to Access Non-Work Related Internet Sites?

Although the Investigator's findings pertaining to this allegation refer to the use of State time and equipment to access non-work related Internet sites most of them are based upon the Investigator's conclusion that two websites the Grievant regularly accessed, ratcellar.com and rrimaging.net, were not work-related sites. Following are the findings made based upon this assumption.

- Between February 6 and February 22, 2012, the Grievant spent, on average, one hour and twenty minutes per day viewing non-work related internet sites;
- On March 1, 2012, the Grievant spent at least three hours viewing non-work related internet sites during work hours;
- Between March 1 and March 30, 2012, the Grievant used his State-owned computer to click on ratcellar.com 7,421 times;
- The Grievant's supervisor had not authorized the Grievant to use ratcellar.com as a learning lab and since he should have been using a DOR provided "sandbox" to prototype solutions for the SharePoint system, there was no work-related reason for the Grievant to access ratcellar.com during the work day.

In the termination letter, the Co-Director concluded, based upon the above findings, that the Grievant had used his State-owned computer "extensively throughout the workday to view non-work related Internet sites". While there is no question that the Grievant did spend an inordinate amount of time on the Internet, the question of whether accessing ratcellar.com or rrimaging.net was non-work related activities must be answered since a considerable amount of the time the Grievant spent on the Internet related to accessing these sites and since conclusions elsewhere and testimony in the record establish that both sites, or at least ratcellar.com, were used by the Grievant as a "learning lab" for SharePoint development. Based upon this evidence, the question is not whether the sites were work-related but whether they were authorized work-related sites.

Having made this distinction, however, does not mean that the Grievant did not violate the Statewide Policy on the Appropriate Use of Electronic Communication and Technology which states that "limited and reasonable incidental use of these tools for occasional employee personal purpose that does not result in any additional costs or loss of time or resources for their intended business purpose is permitted." A review of the findings made in the June 4th report relating to this charge indicate that the first two findings are accurate even if access to ratcellar.com or rrimaging.net is considered work-related access since the data relating to the amount of time the Grievant spent viewing non-worked sites between February 6 and 22, 2012 and on March 1, 2012 indicates that the Grievant also spent several hours viewing news sites, viewing YouTube, conducting personal business such as paying bills online and visiting music sites; canoeing sites and restaurant review sites.³ Based upon this evidence it must be concluded that the Grievant did spend a significant amount of time viewing non-work related sites but not to the extent alleged by the Investigator and accepted as proof of wrongdoing by the Co-Director. Further, based upon this finding, it is concluded that this violation of the Statewide policy is reason to consider disciplining the Grievant.

The same cannot be said for the last two findings made by the Investigator since the evidence does not support a finding that ratcellar.com or rrimaging.net is non-work related

³ Evidence contained in the investigation's April 5th draft report indicates that the Grievant spent approximately 45 minutes on 2/6; approximately 12 minutes on 2/9; approximately 45 minutes on 2/10; approximately one hour and 40 minutes on 2/13; approximately 15 minutes on 2/21, and approximately 41 minutes on 2/22 viewing sites other than ratcellar.com; rrimaging.com or other sites that might be considered work-related.

sites. In determining that these sites were non-work related, the Investigator only acknowledged in his discussion leading to the findings in this allegation that the Grievant's supervisor was not aware of the fact that the Grievant was using his personal website as a learning lab during work hours. While this statement may be accurate it is disingenuous since the Investigator implies the supervisor did not know that the Grievant was using the website as a learning lab and chose to ignore the Grievant's assertion that he believed both his current and previous supervisors knew he was using the site as a learning lab and to not investigate the assertion any further. Here, as with other similar statements made by the Investigator, the finding was found lacking when both supervisors testified at hearing that they knew the Grievant was using the site as a learning lab but not that he was accessing it during working hours. Given this testimony, the Investigator's finding that the Grievant had accessed ratcellar.com over seven thousand times in the month of March, or in other words approximately every minute and half each day he was at work, and that there was no work-related reason for the Grievant to access the site cannot be relied upon as proof that the Grievant was using his State-owned computer "extensively" to view non-work related sites.

Did the Grievant Use State Time and Equipment to Create, Modify and Promote Personal Websites?

This part of the investigation dealt with whether the Grievant was accessing, administering and promoting two websites he had created, ratcellar.com and rrimaging.net, for personal reasons and whether rrimaging.net was a commercial business operated by the Grievant. With respect to this part of the investigation the Investigator made the following findings:

- The Grievant registered ratcellar.com and rrimaging.net using his DOR address, phone number and e-mail as contact information;
- There is evidence that rrimaging.net was used for commercial purposes as recently as December 2010 and that a Conflict of Interest determination was never submitted;
- The Grievant used ratcellar.com as a SharePoint learning lab during working hours even though he was not authorized to do so and had a DOR sandbox available to him;
- The DOR sandbox had files in it that appeared related to personal interests;
- The Grievant established Remote Desktop Protocol sessions between his State-owned computer and his home computer, although he had been told not to twice and no employee is allowed to establish such sessions, and the default settings in the sessions were programmed transfer files to and from the DOR network, thus representing a potential security issue to the DOR system;
- The Grievant created at least five documents/files with DOR licensed Microsoft Word and placed them on ratcellar.com in violation of the Statewide Policy on appropriate Use of Electronic Communication and Technology which states employees shall not use state time, supplies, property or equipment for private interests;

- The Grievant, using DOR e-mail, instructed a co-worker to go to ratcellar.com to share copyright protected material;
- DOR was exposed to potential liability with the public release of unvetted and unapproved content created and associated with DOR through ratcellar.com.

Based upon these findings, as well as data provided in the Investigator's April 5th draft report, the Co-Director found that the Grievant used State time and resources to access or manage external servers, computers, storage or sites associated with ratcellar.com, rrimaging.net and rickreynolds.us and to promote and support personal interests from which he might profit. He also concluded that the Grievant had used State-owned software for unauthorized and unassigned work. Noticeably missing from his findings, however, was any reference to the Grievant establishing Remote Desktop Protocol sessions between his State-owned computer and his home computer as well as several of the investigation's findings that, while accurate, lack foundation as proof of wrongdoing.

The first three findings in the June 4th report reflect the Investigator's conclusion that rrimaging.net was a website for the Grievant's personal commercial photography business R & R Imaging and an implication that the Grievant had violated State policy by not submitting a Conflict of Interest determination when he was running the business. Since there is no evidence that the Grievant currently has a commercial photography business and little evidence that the Grievant actually ever had a commercial photography business, one must question why these three findings were included in this report. While there is no reason to doubt the Investigator's statement that the Grievant told him he used to operate a commercial photography business but no longer operates it, it is hard to understand why the Investigator would continue to pursue questions about the business since the evidence relied is hardly sufficient to establish the Grievant had previously run a commercial photography business.⁴ Further, it is difficult to understand why the Co-Director would have relied upon these findings to conclude that the Grievant was using State time and resources to support a website from which he could profit without evidence that the Grievant was actually profiting from any website he was operating.

⁴ The data to determine the Grievant was running a commercial photography business included a copyright photo dated December 2010; a screen captured whose last activity was in November 2011 in which the Grievant stated he was returning to commercial photography in which the Grievant stated that he was interested in recruiting models, and a "bizfind listing that listed R & R Imaging as a business but had no information about sales or number of employees.

The next five findings under this allegation concern use of ratcellar.com as a learning lab during working hours and his use of his State-owned computer to access ratcellar.com through Remote Desktop Protocol sessions. A review of these findings indicates that the first finding restates the finding made in the previous allegation but adds that the Grievant had a DOR-assigned sandbox available to him which he could have used. The second finding merely states that the DOR-assigned sandbox appeared to contain files related to personal interests, a finding that without evidence that the files did relate to personal interests and that containing personal files is not allowed cannot be relied upon as proof of wrongdoing. The next three findings, however, are some of the more serious findings among the twenty-nine that were made since they concern the Grievant's use of RDP sessions to access ratcellar.com despite the fact that the Grievant was not authorized to establish RDP sessions with his home computer network and had been told not to establish such sessions and that no employee is allowed to establish such sessions.

The DOR advocate argued at hearing that creating RDP sessions opened the door to security risks that cannot be tolerated by the Agency and while this may be true, the evidence in the record does not prove the assertion. While one might accept an argument that the security measures the Grievant has on his computer cannot begin to compare with those on the DOR network, the question of security and the degree of risk created when the Grievant accessed his home computer whether to access his home e-mail or for other reasons was not answered by the Investigator or the Co-Director and it seems to this Arbitrator that the risk may not be any greater than the risk created when employees in the department access the Internet, especially when it is accessed for personal reasons as allowed by State and agency policy. It is clear, however, that department employees are not authorized to establish RDP sessions such as those established by the Grievant and that the Grievant was told at least once and perhaps twice by his former supervisor that he was not to connect to his home computer through RDP sessions. Given his disregard for these instructions and his supervisor's directives, it is concluded that this wrongdoing is cause for discipline even though the Co-Director made no direct reference to this misconduct in the termination letter.

The next finding pertaining to this allegation is that the Grievant created at least five documents with DOR-licensed software and placed them on ratcellar.com for private use in violation of the State Policy on Appropriate Use of Electronic Communication and Technology.

Again, the evidence indicates that the Grievant did create documents using DOR-licensed software and did place them on ratcellar.com. There is no evidence, however, that these documents were put there to promote the Grievant's personal interests. Without evidence that the documents were intended to promote the Grievant's personal interests it cannot be concluded that the Grievant violated the State policy or that he used State-owned software for unauthorized and unassigned work as charged by the Co-Director.⁵

The next finding pertaining to this allegation is that the Grievant used DOR e-mail to instruct another employee to go to ratcellar.com to share copyright-protected material. While the Investigator accurately states that the Grievant used DOR e-mail (which is allowed by State policy) to "advise", rather than to "instruct" as the Investigator stated, a co-worker to look at a list of music files on ratcellar.com on that he would be willing to share with the co-worker, there is no evidence that the music files were copyrighted, as the Investigator stated, or that the Grievant shared them with the co-worker. This overstatement, together with the comments the Investigator made in his discussion preceding the findings, suggests the Investigator was intent on finding the Grievant guilty of using DOR-resources for personal profit and/or that his actions had created liability for DOR. Without evidence to support this assertion, however, the Investigator's conclusion is not persuasive and is not considered cause for discipline.

The final finding pertaining to this allegation is that the Grievant exposed DOR to potential liability by publicly releasing unvetted and unapproved content created and associated with DOR. While this finding has the possibility of being a serious charge, the Investigator made no findings as to whether content was actually released, and if so, the "content" that was being released or the type of liability to which DOR would be exposed by such releases. Without this evidence, the finding is "damning" without proof, consequently, it will not be discussed.

Did the Grievant Use State Time and Equipment to Create, Store and Modify Non-work Related Files and Images?

⁵ The Co-Director also charged the Grievant with downloading unauthorized software but the record establishes not the only the Grievant might do that but that other employees do as well and that when it was last discovered no discipline was issued.

This final set of findings made by the Investigator relate to a series of files the Investigator found either in the DOR-provided sandbox or on the Grievant's State-owned computer which the Investigator decided were non-work related. Among the findings are the following:

- Even though working with graphics/images is a small part of the Grievant's job duties there is no need to use copyright protected materials;
- The Grievant used DOR software to create and edit images that appear to be related to his personal interests and/or business;
- There were at least sixty-six non-work related images, thirty-three of which were images of rats, found on the Grievant's laptop and the Grievant confirms that at least two of the images are inappropriate;
- Music files on the Grievant's laptop depict violence and use explicit language;
- Photos of three non-custodial minor females in sexually suggestive poses were stored on the Grievant's laptop and represent a potential liability to DOR;
- The Grievant asked his co-workers about a copy of Killdisk;
- The Grievant use of his DOR laptop; the SharePoint system; the Internet and time exposed DOR computer systems to potential malware, security violations, data breaches and liability;
- As a SharePoint administrator the Grievant's ability to restrict access to his DOR SharePoint files and folders allowed him to create folders that were used to store non-work related content.

Based upon these findings, as well as comments made by the Investigator in the April 5th draft report, the Co-Director stated that the Grievant had installed and operated non-standard software on his State-owned computer without authorization; that he had used State resources to store, edit and create digital images which are unacceptable in the work environment; that he had used State resources to store files depicting violence or containing explicit language and that he had refused to answer questions regarding his knowledge of some of the digital images and attempted to place blame for their presence on an unspecified third party.

The first finding in the Investigator's report pertaining to this allegation is a gratuitous comment made by the Investigator and not a finding of fact. Whether working with graphics is a large or small part of the Grievant's job duties is irrelevant, consequently, there was no need to make this statement as a finding of fact. Further, there is no evidence that anyone other than the Investigator said there was a "need to use copyright protected materials" or that any of the images downloaded by the Grievant were copyright protected materials. Consequently, one must question why this statement was made as part of the findings of fact and can only conclude that the Investigator intended to imply that downloading the images was serious misconduct. Since there is no evidence to support this finding, it is not considered as proof of wrongdoing.

The second and third findings also relate to the images that, in all likelihood, were downloaded by the Grievant and meant, again, to imply wrongdoing. While one might question why the Grievant would choose to download graphic images of rats and a snake to use as a "test page" and how any of these graphics could be used in SharePoint sites, downloading these images is not sufficient reason to discipline the Grievant since there is no evidence that downloading such images were prohibited; were seen by anyone else since all involved agree, including the Investigator, that the Grievant has the ability to restrict access to his SharePoint system, and since there is no evidence that the images were sent to anyone else.

The Grievant's assertion that all of the images on his computer were work-related is less persuasive since he admitted that at least one of the images (the Investigator states two) is not appropriate in the workplace and tried to suggest it must have been put there by someone else and that any number of other people could have downloaded the image on his computer. Nonetheless, nothing in these three findings, including finding an inappropriate image, is proof of wrongdoing sufficient to warrant discharge or even serious discipline.

The same conclusion is reached regarding the Investigator's finding that the Grievant's laptop contained music files that depict violence and use explicit language. While the State's Code of Conduct states that employees must be professional, courteous and cooperative . . . at all times, the Investigator implies and Co-Director concludes that the Grievant violated this policy by listening to music that may or may not depict violence and may or may not use explicit language. While the lyrics submitted as proof of this finding contain lines such as "As Freddy got clipped, man, so did my youth"; "It fucked me up like vodka", and "Traffic out the ass as far as the eye could see", nothing in the State or agency policies address what employees may listen to and there is no evidence that any other employee could hear this music when the Grievant was listening to it. Without proof that the music is offensive to others who hear it or that others can hear it, it cannot be concluded that music downloads for personal use violate any State or agency policy or that it provides a basis for finding discipline is warranted.

The next two findings, and more than likely the third one as well, pertain to the reason for this investigation which was initiated when a co-worker reported seeing pictures of young women on the Grievant's State-owned computer; overhearing a conversation between the

Grievant and a co-worker about the photos, and being asked for a copy of Killdisk, a software program that erases computer hard drive to DOR's Human Resources Director. In his initial findings, the Investigator concluded that no "overtly illegal" materials were found on the Grievant's laptop but added that he had found several photos of "young females in sexually suggestive poses" which the Grievant had edited and stored on the computer that could be considered "child erotica with indications of grooming". In describing the photos in both his April 5 draft report and the June 4th report, the Investigator overstated the "suggestive" content of several photos and attempted to influence how the pictures would be viewed by management by suggesting that a folder labeled "Titties.jpg" had been found even though no picture was in the folder and that the Grievant had asked for a copy of Killdisk implying that the Grievant had images or files on his State-owned computer which he wished to erase. In all, the Investigator found twenty-one pictures which he identified as pictures of "young females in sexually suggestive poses". Further, during the hearing, the investigator continued to assert that the photographs have a sexual content to them. This Arbitrator does not agree with this description.

Eight of the photographs were of the Grievant's eight year old granddaughter. In concluding they could be considered "child erotica" the Investigator stated he made this finding based upon the progression of the photos together with the fact that there was no adult in the pictures. According to the Investigator, the child initially appeared in a blue top and jeans; then was photographed in the bathtub, and, finally, was photographed in the same blue top without jeans "as she exposed her panties while reclining in various poses" on the Grievant's couch. While the Investigator correctly states that the first photo of this child shows her in a blue tank top and jeans; the second and third photos show her wearing a sweat shirt with peace symbols on it; the fourth shows her in the bathtub with bubble bath bubbles up to her neck, and the remaining four photos show her in the blue tank top but without jeans. While it is true that one can see her underpants in two of these photos, only one of the photos clearly shows some of her underpants. In the other photo one must look very carefully to see only the slightest bit of her underpants as she sat on the couch. Further, only one of the eight photos shows her reclining on the Grievant's couch. In three of the pictures she is standing; in three of the pictures she is sitting, in one of them she is in the bathtub and in one she is shown reclining on the couch. Based upon these pictures, it can hardly be construed that the child

"exposed her panties while reclining in various poses". Finally, when one can see the smiles on her face, it is difficult to conclude that any of these poses are "child erotica" or "sexually suggestive" and one must question why the Investigator chose to describe them as such.

The remaining pictures the Investigator found on the Grievant's laptop were pictures of a former girlfriend's two daughters who had lived with him when the girlfriend had lived with him and it is more than likely that these pictures were taken while the three women were living with him since the pictures were taken two years earlier. While several of the poses in these pictures might be considered "sexually suggestive poses" depending upon one's perspective, the former girlfriend testified at hearing that the picture of the seventeen year old was taken by the Grievant at her daughter's request and that her daughter had used it as her graduation picture. She also testified that she had asked the Grievant to take the pictures of the eleven year old, pictures which might be considered "sexually suggestive" because the eleven year old had a friend who was becoming a leg model and her daughter wanted to try to become one too. The remaining three pictures of this young woman show her standing on a deck in pink tee shirt with a lake behind her; in a swimsuit wearing goggles and sitting in a chair with someone's legs on her lap wearing a black tee shirt and jeans. While the young woman does appear to be well-endowed in the picture of her in a swimsuit and she is holding a bottle of Mike's Hard Lemonade in the picture where she is wearing blue jeans, nothing in either picture suggests she was posing in a "sexually suggestive" way. Further, while the Investigator indicated he thought the picture might be of a minor drinking alcohol, the girl's mother testified that her daughter was holding the bottle of Mike's Hard Lemonade for her since she has multiple sclerosis and had given her daughter the bottle to hold as she about to get up.

Since the girlfriend's testimony was very similar to the answer the Grievant gave the Investigator when he was questioned about the pictures, one can only guess why the Investigator would choose to ignore the Grievant's statements and choose to look at them as "child erotica" instead. Without a suggestion that the Grievant might have child pornography stored on his computer, there is nothing in the pictures of the Grievant's granddaughter that could be considered "child erotica" or in the pictures of the other two young women even though they are, technically, not his stepdaughters, unless one was persuaded by the suggestion that the Grievant did have a prurient interest. One must also question why the Co-Director would have concluded the Grievant should be disciplined for storing pictures he

considered unacceptable in the work environment without having talked with the Grievant about the pictures or having asked him to remove them since the Investigator found only twenty-one pictures and only nine of them were provocative and all of them were pictures one might consider part of the Grievant's family. Consequently, since there is no state policy prohibiting employees from storing family photos on their computers, it cannot be concluded that the Grievant should be disciplined for storing these photos.

The last finding pertaining to this allegation is merely a statement of fact and not an allegation of wrongdoing. Consequently, it will not be discussed in determining whether there is just cause to discharge the Grievant.

DISCUSSION OF THE FINDINGS AS THEY RELATE TO THE CHARGES OF MISCONDUCT

In the discharge letter the Grievant was advised that he was being terminated for falsely reporting time worked and for violating three State and/or agency policies, DOR's Code of Conduct relating to inappropriate use of State computers; the Statewide Policy on the Appropriate Use of Electronic Communication and Technology and the DOR Electronic Communication Policy. The termination letter, however, does not specifically indicate which part of any policy the Grievant violated. The Code of Conduct addresses, among other activities, employee conduct which may conflict with the employee's employment or department values; conduct which allows the employee to use a position for private and personal gain; conduct that hinders the department's efficiency; and conduct which lowers the public's confidence in the department's or employee's integrity. The Statewide Policy on the Appropriate Use of Electronic Communication and Technology states that employee access to and use of electronic tools is intended for business-related purposes and that employees are responsible for the appropriate use of all state-owned electronic tools. Included in the policy is reference to M.S. 43A.38, Subd. 4 which states that "an employee shall not use or allow the use of State time, supplies, or state-owned or leased property and equipment for the employee's private interest or any other use not in the interest of the state, except as provided by law", and a listing of activities which are considered inappropriate that may subject an employee to discipline. The DOR Electronic Communication Policy primarily refers to the use of electronic communication tools and their usage.

After reviewing the findings made in the June 4th report; the charges/findings made by the Co-Director in the termination letter and the evidence to support both, it is determined

that only two of the twenty-nine findings in the investigation are relevant in determining whether the Grievant violated the State and/or agency policies and whether his misconduct warrants discharge. The two findings are that the Grievant violated the Statewide Policy on the Appropriate Use of Electronic Communication and Technology by using State time and equipment to access non-work related Internet sites an average of thirty minutes a day and that he violated this policy again when he used his State-owned computer to establish RDP sessions with his home computer without authorization.

As indicated earlier, the allegation that the Grievant used RDP sessions to connect his State-owned computer with his home computer is among the most serious charges of misconduct leveled against the Grievant. The seriousness of the charge lies not only in the fact that the Grievant created these sessions without authorization but that he did so in direct violation of instructions by at his former supervisor to not connect his State-owned computer with his home computer through RDP sessions. Even if it is accepted that the Grievant did not have the right tools in his sandbox in order adequately do SharePoint development, this fact does not allow the Grievant to resort to "self help".

Further, while this Arbitrator has said that she suspects the RDP sessions created no greater risk to the DOR network than employees who connect to the Internet for personal reasons, as allowed by State policy, do, particularly since there is no evidence that the Grievant's home computer was not secure and the Grievant's performance reviews establish that he remains "steadfast in his commitment to maintaining a secure computing environment", one cannot ignore the fact that the Grievant regularly connected with his home computer through RDP sessions and regularly exposed the DOR network to potential security risks by doing so. One also cannot ignore the fact that DOR is greatly concerned about security risks as is evidenced by the fact that it does not allow any ISD employees to establish RDP sessions. Given this evidence, it must be concluded that this misconduct is case for discipline.

Mitigating against a finding that this misconduct justifies termination, however, is that there is no evidence that the Grievant was disciplined in the past for establishing such sessions; that no security risk, other than a potential risk, was proven, and since there is no evidence that the Grievant has been a "problem" employee with a history of discipline prior to this incident. It is also difficult to answer this question since it is obvious that the Investigator attempted to "set up" the Grievant by citing twenty-nine allegations of misconduct, most of

which lacked proof, and the Co-Director accepted the allegations as proof without further investigating them. To say it is so is not proof that it is so.

While arbitrators are not to substitute their judgment for that of the employer, the discipline may be amended when there is evidence that the employer acted arbitrarily or capriciously when it decided upon the degree of discipline to impose. A finding of just cause requires proof that the alleged misconduct occurred and that the degree of discipline imposed is not disproportionate to the degree of the offense; is not out of step with the principles of progressive discipline; is corrective rather than punitive, and that mitigating circumstances were not ignored. In this case, not only did DOR fail to prove that the twenty-nine allegations of misconduct actually occurred but the evidence does not support a finding that the Grievant's misconduct was so egregious that it warranted immediate discharge or that the Grievant was progressively disciplined for this misconduct or any of the other allegations of misconduct. Given these facts, it can only be concluded that DOR acted arbitrarily when it decided termination was the appropriate degree of discipline to impose.

Although failure to provide an employee with notice that certain types of conduct are not allowed and failure to progressively discipline an employee for inappropriate conduct would normally result in a conclusion that disciplining an employee is not warranted, the Grievant's proven misconduct in this case, given DOR's effort to and concern over maintaining a secure network is sufficiently serious as to warrant discipline greater than a warning. While it is true that the Grievant was never disciplined for establishing RDP sessions in the past, the record establishes that he was told by his supervisor that he was not to establish these sessions due to the potential risks they created. Further, there is no reason for the Grievant to believe that these instructions changed when he transferred to his new position even though he was never provided with a job description or performance review once the transfer occurred since even the Grievant acknowledges that his new job duties required he act in a more secure environment than his previous one. Given this fact, the degree of discipline imposed should be sufficient to impress upon the Grievant that he is not free to search the Internet as he chooses or to take things into his own hands even when he believes he has not been provided the tools needed to perform the tasks of the job assigned to him. Accordingly, based upon the evidence in the record; the arguments advanced by the parties; a finding that the Employer failed to prove the twenty-nine allegations of misconduct and arbitrarily relied upon them to decide

termination was warranted, and a finding that the Grievant's misconduct was serious enough to warrant serious discipline even though he had not been previously disciplined for the proven misconduct, the following award is issued:

AWARD

The grievance is sustained in part. As remedy, the Employer is ordered to reinstate the Grievant and to make the Grievant whole for any benefits and wages loss between the time he was terminated and the time he is reinstated less a thirty working day suspension without pay. The Arbitrator retains jurisdiction for the purposes of implementing this remedy.

By: 
Sharon K. Imes, Arbitrator

June 14, 2013
SKI