

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

In the Matter of

Washington Federation Of State Employees Union,
("WFSE")

"Union"

and

OPINION AND AWARD OF THE
ARBITRATOR

The Washington State Department of
Labor and Industries, Division of
Occupational Safety and Health

"Employer"

Grievance: Trent Elwing: Discipline

APPEARANCES.

For the Union

Thomas P. Keehan, Esq.
Younglove & Coker, PLLC.
Olympia, Wa. 98507-7846

For the Employer

Thomas R. Knoll, Esq.
Assistant Attorney General
State of Washington
Olympia, Wa. 98504-0145.

Impartial Arbitrator

Richard M. Humphreys, J.D.
Vancouver, Washington.
Award Date: July 13, 2020

Statement of the case.

This matter came on for oral hearing on February 25, 26, and 28, 2020 in

the city of Olympia Washington at the offices of the Washington State Attorney General. It arose as a result of a decision by the state of Washington, Department of Labor and Industries (“L&I”) Division of Occupational Safety and Health, (“the Employer” or “DOSH”) to terminate the employment of Trent Elwing, (“Grievant”) who was serving in the capacity of an Industrial Hygienist 4 (“IH4”) in the Division. The grievant was an 18 year employee who had been promoted to the position of IH4 in 2012. The termination from employment became effective on September 18, 2018.

The Washington Federation of State Employees (“The Union”) challenged this termination by filing a grievance alleging that the termination occurred without just cause as required by Article 27 of the collective bargaining agreement in effect between the parties (“hereinafter, the CBA”). The parties attempted to resolve this matter short of arbitration under the provisions of Article 36 of the CBA. They were unable to reach agreement. As a result, the union filed a demand for binding arbitration under Article 36 of the CBA. The undersigned was mutually selected to act as the neutral arbitrator. This opinion and award is submitted pursuant to the provisions of Article 36 of the CBA and the rules of procedure of the American Arbitration Association.

Statement of the Facts

Grievant occupied the classification of Industrial Hygienist 4. (“IH4”). That position required him to conduct safety and health workplace inspections using Process Safety Management (PSM) protocols to identify compliance with Washington State Worker Industrial Safety and Health standards (“WISHA”) to mitigate and eliminate occupational hazards to employee safety in the workplace. The work of the IH4 focuses on hazards in facilities that store, handle and process highly hazardous chemicals.

The Industrial Hygienist 4 is responsible for the identification of long-term workplace occupational hazards such as hearing loss or asbestosis as opposed to the work of safety specialists who occupy the same classification but who focus on the identification of episodic hazards such as injuries sustained from the use of table saws or punch presses.¹ The grievant scheduled regular workplace inspections working in tandem with the responsible management officials of the particular workplace to complete the required safety and health inspections.

To the extent that safety violations and hazards were identified, grievant was responsible to issue safety violation notices and work with the Employers to eliminate the safety hazards within a prescribed period of time. This position required considerable travel away from the office and required the considerable exercise of independent judgment working in concert with supervision of the subject workplaces throughout the state.

The grievant’s home office was located in downtown Seattle (“The Seattle Office Building”). The grievant reported to Perry Tamarra whose office was located in Bellevue Washington. Tamarra was also an IH4. He reported to Venetia Runnion, who occupied

¹ Testimony of Susan Rue, Tr.235, Lines 16-25. Tr. 236, Lines 1-13.

the position of Industrial Hygiene Compliance Manager for Region 2 in the state of Washington. Ms. Runnion's office was located in the Seattle Office Building approximately 50 feet away from the office cubicle occupied by the grievant.

At the outset of the relevant events in this dispute, grievant was assigned to a work schedule from Monday through Thursday, 9:30 a.m. to 7:30 PM. His supervisor, Mr. Tamarra, operated under a 6:30 AM to 2:30 PM work schedule out of his office in Bellevue. The Seattle office maintained a "Whiteboard" on which employees recorded their daily appointments and travel locations. Additionally, employees were required to record their whereabouts in their individual software "Outlook" calendars. Ideally, the whiteboard and Outlook software allowed supervisors such as Tamarra and Runnion the ability to pinpoint the whereabouts of the employees at all times during work hours.

The parties differ over how the initial investigation of the behavior of the grievant began and how it widened to include the charges that ultimately led to his termination. The union alleges that the investigation began by "happenstance" when Wendy Drapeau, a colleague of the grievant informed Venetia Runnion that grievant sent her a late night work related email. The facts seem to suggest a sequence of the events that generated investigations. First, on March 16, 2017, grievant sent an email to his supervisor essentially rejecting his request to participate in a process management inspection along with a colleague.²

On April 25, 2017, grievant sent an email to Catherine Seelig, a human resource consultant coworker stating "please be less deceptive in the future"³. On June 23, 2017, he sent an email to Venetia Runnion, the Compliance supervisor, essentially accusing her of initiating a "disrespectful gotcha fact-finding investigation"⁴ regarding his behavior. On June 26, 2017, he sent an email to his union representative and copied Mr. Bruce Christiansen on the email. Bruce Christiansen is the supervisor of Venetia Runnion. The email states "I have low expectations for Bruce being reasonable in this matter.... Lastly, if Bruce continues to defy common sense....."⁵

On December 21st, 2017, grievant sends an email to his direct supervisor, Perry Tamara stating "I am hanging onto all these emails for future reference, should I be asked about your work performance".... "It is your responsibility to ask questions when they need to be asked. Apparently, you continue not to ask questions when they need to be asked. Apparently, you continue not to ask the questions necessary to satisfy Venetia and Bruce"... why has it taken you so long to implement basic supervisory techniques and tools similar to what you described below?" In a second email on that same day, he says to Tamara, "I kept the email related to this instance in which I cut you some slack for your screwup"⁶ On December 22, 2017, grievant sends another email to Tamarra stating

² Employer exhibit 2, enclosure A Page 12 – 13

³ Employer exhibit 2, enclosure B, Page 14 – 15

⁴ Employer exhibit 2, enclosure C, Page 16

⁵ Employer exhibit 2, enclosure D, Page 18

⁶ Employer exhibit 2, enclosure E and F, Page 19, Page 21.

“Please read my emails more carefully and be more diligent about reviewing my Outlook calendar so as not to mistake other subordinates for mine”⁷

Complicating these actions were certain events that occurred on April 17, April 18, April 20th, and April 21, 2017. On April 17th and 18th, Venetia Runnion, noticed that grievant was not in his office at his prescribed time of 9 AM and his outlook calendar did not reflect any scheduled appointments. On April 20, Wendy Drapeau an IH4 colleague of grievant contacted Runnion at 10:53 AM, one hour and 53 minutes past the scheduled start time for the grievant. She notified Runnion that she was unable to contact grievant.

Runnion contacts Tamarra, his direct supervisor who informs Runnion that grievant had not contacted him to inform that he would be late, nor did he have appointments scheduled in his Outlook calendar. Wendy Drapeau also informed Runnion that grievant sent her an email on Friday, April 21, 2017, at 1:31 AM, some six hours after the end of his scheduled workday. On May 10, 2017, during an interview with Tamarra, grievant disclosed that he was at his office taking work calls at 10:30 PM.

This raised concerns that grievant might have continued to enter the L&I building after work hours without prior authorization. This unauthorized access had been discussed with the grievant previously by his supervisor on January 6, 2016 February 2, 2016 and February 5, 2016. When the Employer checked to ensure that grievant had entered time for work performed on that evening of May 10, the Employer discovered that grievant had also entered the Seattle Office location without authorization at 1:23 AM on Saturday, April 29, 2017. Although the grievant logged on to his work computer at 1:23 AM and submitted a timesheet, he failed to submit hours work for April 29, 2017.

These accumulating events led the Employer to expand its fact-finding investigation. That expansion included reviewing the grievant’s key card access to the Seattle and Tukwila offices, his computer logon history and his Internet logon history.⁸ additionally, in light of the fact that grievant continued to report late for work after the designated start of his agreed flextime without prior authorization, his flex work schedule was changed to a standard schedule by Venetia Runnion on July 7, 2017.⁹

The fact finding investigation was ultimately transferred from Catherine Seelig, who resigned her position, to Susan Rue in May of 2016.¹⁰ Ms. Rue did not complete this investigative assignment for the reason that the grievant filed a complaint against her alleging a potential conflict of interest. The department reassigned the investigation to Lynn Buchanan for completion.¹¹ After this reassignment, Susan Rue, along with a coworker Cari Anderson, a human resource consultant, continued to provide support for the investigation by compiling, printing and organizing data and materials and interviewing grievant.¹² The Lynn Buchanan

⁷ Employer exhibit 2, in Enclosure F, Page 21

⁸ Employer exhibit 2, enclosure G, Page 22 – 49

⁹ Employers exhibit Notebook 2 of 2, OHR Investigation Report, Finding of Fact No.9, Page 118 of 436.

¹⁰ Testimony of Susan Rue, TR 240, line 22 – 23

¹¹ Ibid. TR 240, line 22 – 25, TR 241, line 1– 25, TR 242, line 1– 17.

¹² Employer Exhibit 6, Book 1 of 1, Page 103 of 436.

investigation, formerly entitled "Final OHR investigation report was completed on July 9, 2018. The report cited to a litany of alleged violations of DOSH policies including:

The July 9, 2018 Final OHR Investigation Report/Allegations.

Failure to adhere to established hours of work.

"The grievant may be working out of his work schedule of Monday through Thursday 9 AM a.m. to 7:30 PM p.m. without prior permission from his supervisor. Grievant has failed to use his Outlook calendar to specify his whereabouts, sometimes cannot be located and has not requested permission for an alternative work schedule. Effective July 17, 2017 management was required to change the grievant's work schedule to Monday through Friday 9 AM a.m. to 5:30 PM with one half hour lunch.

Time and attendance report:

It is alleged that the grievant is not accurately reporting his hours worked on his time and attendance report. As a result, he may be owed wages, or could owe the state on earned wages and/or overtime compensation. There were 14 instances where the grievant's whereabouts could not be determined during his workday and sometimes during entire workdays. The alleged dates in question are June 1, June 5, and June 14, 2017.

Misuse of state resources.

The grievant is alleged to have accessed the Seattle Service location outside of his regularly scheduled worktime without prior notification or permission to do so.

Electronic equipment:

Grievant is alleged to have used his state issued computer to electronically access nonwork related websites, to send and receive personal emails, make a personal purchase, and to visit Internet sites that could be interpreted as racially motivated, allegedly without seeking prior permission from his supervisor. Based upon a forensic review of the grievant's computer usage for the time period of June 26, 2017 to September 22, 2017, the Employer determined that he accessed such websites on 1091 different occasions. On behalf of the Employer, Susan Rue examined 6703 items from his state issued computer hard drive and removed all DOSH sanctioned visits. She determined that the remaining 1091 visits were nonwork related.

Use of state time:

The grievant improperly used state time while on the clock and using electronic state issued equipment to access nonwork related Internet sites and to send and receive personal emails for the purpose of his own benefit and without seeking prior authorization.

Communications-Labor and Industries Core Competencies and policies:

Safety: Understands and is fully committed to creating and maintaining a positive safety culture by behaving safely. Mr. Elwing is at risk and placing the agency at risk by entering the agency building without notifying his supervisor.

Treats others with respect and courtesy:

At all times respects and values others. Makes no racist, sexist, ethnic, or demeaning comments. Mr. Elwing is alleged to have communicated disrespectfully to other staff.

Accountability and dependability:

Acts within guidelines and accomplishes his job assignments; accepts personal responsibility. Performs duties in a way that reflects public-service accountability. Mr. Elwing is alleged to be unaccountable for his whereabouts during work time. Mr. Elwing is alleged to have documented or failed to document accurate time work on his time and attendance records.

Judgment and problem solving:

Draws sound sensible conclusions, makes informed decisions to resolve issues.”

The final report alleged the following violations of labor and industries policies:

L&I Policy 3.00:

Compliance with ethics laws and rules. This policy emphasizes the duty of department employees to maintain high standards of ethical conduct at all times.

L&I policy 3.30: Private use of state resources.

L7I policy 3.32: proper use of computer resources, email and the Internet.

L&I policy 3.50: Leave. Unauthorized leave or failure to comply with this policy provisions maybe in violation of WAC– 357 [this charge is vague– Dismiss]

L&I policy 3.53: Time and attendance record.

The responses to the allegations:

The grievant was interviewed by Susan Rue on July 5, 2017. When asked to identified what his regularly scheduled work hours were, grievant replied that he had no schedule. Further, and depending on an Employer’s schedule, grievant may have to work outside of his regularly prescribed hours if interviews could only be conducted at a certain time. According to the grievant he was not aware that he needed prior approval from his supervisor to change his schedule and he does not know how to change calendar entries in outlook on his iPhone. He uses his iPhone as his office. According to him, there have been many times when he sent emails from his iPhone while at home. With regard to his late arrivals and late-night entries into the office, the grievant stated that the safety committee asked him to clear the space underneath his desk. There were a lot of papers that he was required to sort through before tossing them out, but he did not count this as worktime.

Moreover, he helped with the organization of the AIHCE conference and he was not compensated for those hours. Finally, grievant stated that he was experiencing “issues” with his sleep patterns and that he was tired from his recent residential move. Grievant admitted that there have been times when he has been sleeping in the office for an hour or so. On the issue of disrespectful communication, grievant states that he has not been coached on respectful communication. The Employer also undertook interviews with the grievant on March 15, 21, 22, and April 11, 2018. At these interviews, grievant reviewed the emails, internet site visits and was asked to identify which materials were work-related or personal. Grievant maintained that he visited some sites for social purposes and that other sites were clicked on accidentally.

Grievant admitted that he visited 17 different internet sites that involved racial themes and commentary. His position was that each of the website visits were work-related. According to the grievant, if he is working in the field, he may happen up on racists and the websites help him to know how to better communicate with, and recognize, racist people. The grievant visited numerous websites with sports related themes, primarily football and baseball teams and sports figures.

He visited these websites so that he could participate in “water cooler banter” with coworkers and employers in the field. As a result, the internet visits were justified as work-related. The grievant declined to provide the names of coworkers with whom he would socialize at the watercooler and he acknowledged that he did not seek prior approval to visit any of the sports related websites on his work computer. Of the listed computer visits, the grievant stated that 280 of these visits were accidental clicks, 63 were for coworker conversational purposes, 134 of the websites were visited for personal gain not work-related and he visited 555 sites that he claimed to be work-related.

Internet purchases online.

Grievant admitted to making online book purchases covering topics of residential carpentry, chart framing, plumbing, and electrical work through Amazon.com from his work computer. An example of such a purchase occurred on August 16, 2000 17th at 5:21 PM. The grievant denied making the purchase until he was shown a “thank you for your recent purchase” email invoice from Amazon. Grievant stated that he did not seek prior approval to make any purchases from his work computer however he personally paid for the books. Other websites visited by the grievant included articles on global warming, car accidents, Swiss hotel requiring Jewish guests to shower, a large quantity of newspaper articles, real estate for sale on Redfin, employment search sites from Oregon, and employment issues involving workers’ wages in Disneyland. The grievant claimed these to be work-related visits.

Personal taxes and emails.

The investigation also revealed that grievant used his work computer to prepare his personal taxes, prepare a personal camera rebate, and to send and receive personal emails including an email from his residential home inspection. Grievant acknowledged that these were done both during work

time and outside of work time all without prior authorization from his supervisor. Grievant alleged that he needed to look at these websites because he had not received prior training as an industrial hygienist 3. However, his training record shows that he has attended 23 different training courses from 2014 to the point of termination.¹³ Additionally, his records show that he had taken skills training in Interpersonal Communication, Verbal Akido training and Eliminating Disrespect in the Workplace.¹⁴ the Interpersonal Communication Skill training was taken in 2002. He was promoted from the position of IH3 in 2012.

The final summary of the investigative report found a documented history of disrespectful communication toward others, lack of accountability, failure to follow establish hours of work, and continued unauthorized entrance into building premises during nonwork hours. The investigation found a “continuance of previously documented behaviors along with new evidence of misuse of state resources through unauthorized internet site visit visits, many that Mr. Elwing admitted to be personal”.

The investigation further found that grievant had received multiple coaching sessions and expectations, counseling memos and a reprimand for similar issues. He has been the subject of a fact-finding, and three formal investigations. Despite receiving prior corrective actions and admonishments, the grievant has continued with behaviors that previously have been documented and addressed. On two separate days, April 17, 2017 and April 18, 2017, the grievant did not report to work and when asked to justify his time on those days, he replied “You got me”.

As a result of the Final OHR investigation, the Employer issue a pre-disciplinary letter to the grievant on July 31, 2018. That letter announced the intention of the Employer to move forward with discipline based on the findings in the investigation report. A pre-disciplinary meeting was scheduled for August 17, 2018. Grievant declined to appear at the meeting and instead submitted his response and defense in writing. The investigative report along with the results of the pre-disciplinary meeting were submitted to Anne Soiza, Assistant Director of Occupational Safety and Health for her review and final action. On September 18, 2018, Anne Soiza notified the grievant in writing, of his dismissal from his position as an IH4 in the Compliance Section of the Division of Occupational Safety and Health, effective immediately.¹⁵ The articulated grounds for this discipline were as follows:

1. Violation of agency core competencies—treat others with respect and courtesy.
2. Violation of agency core competencies— accountability and dependability.
3. Violation of Agency core competencies—judgment and problem solving.
4. Violation of L & I policy 3.30 –private use of state resources.
5. Violation of L& I policy 3.32 –use of computer resources, E-Mail % Internet.
6. Violation of L & I policy 3.53 – time and attendance reporting.
7. Violation of L & I policy 3.00-Compliance with Ethics Laws and Rules

¹³ Booklet 2 of 2, Exhibit 6, at page 117 of 436.

¹⁴ Ibid, Page 113 of 436.

¹⁵ Union Exhibit 4, Page 1 of 14.

8. Failing to comply with supervisory and agency expectations and directives.

The Washington Federation of State employees [“The Union”) filed timely grievances to this action.

Issued presented for decision

Did the Compliance Section, Division of Occupational Safety and Health, Department of Labor and Industries, have just cause to terminate Trent Elwing from employment as an IH4 on September 18, 2018. If not, what is the appropriate remedy?

Relevant provisions of the Labor Agreement

Article 27-Discipline

27.1. The Employer will not discipline any permanent employee without just cause.

27.2. Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and discharge. Oral reprimands will be identified as such.

The Positions of the Parties

The Position of the Employer.

The discipline given to the grievant in this case was appropriate in light of the seriousness of his misconduct. Moreover, the discipline did not violate Article 27 of the CBA. Article 27 of the CBA requires that discipline be for just cause. The Washington State Supreme Court has defined just cause as” fair and honest cause or reason, regulated by good-faith on the part of the party exercising the power. We further hold a discharge for ”just cause” is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence and (2) reasonably believed by the Employer to be true.”

Baldwin v. Sisters of Providence in Wash., Inc. 112 Wn. 2d. 127, 139, 769 P2d 298. (1989)

In determining whether or not just cause exists, the arbitrator might consider whether the Employer followed appropriate procedures, including a thorough investigation, whether the Employer proved its charges against the employee, and whether the penalty is reasonably related to the seriousness of the proven charges, the employees disciplinary record and any mitigating or extenuating circumstances. The Employer has the burden to prove that the grievant committed the allegations for which he has been charged and that termination is an appropriate penalty.

Conversely, the grievant and the union bear the burden of proving the existence of procedural irregularities. In this case the Employer is not required to prove that he made a proper investigation, the grievant must prove that the Employer failed to make a proper investigation. In this case, the arbitrator should, as most arbitrators do, apply the

preponderance of the evidence standard in this case. Especially since in this case, the conduct at issue is neither criminal nor a stigmatizing.

The department of labor and industries spent a total of 14 months to complete a thorough investigation into the charges against grievant. During the course of that investigation, the grievant was given six separate opportunities to be interviewed. The investigation began with a simple set of facts but expanded when new and important concerns arose. Examples of these new concerns were the unauthorized access by the grievant to his State office building and his use of the Internet for nonwork related purposes.

The Union never raised lack of due process during the grievance steps in this matter. Other than questioning the assimilation by Susan Rue of the data received from the forensic review, Union did not offer testimony to indicate that the investigation was deficient. The Employer had just cause because it proved that the grievant accumulated **multiple** violations concerning agency core competencies, Agency policies and failure to follow supervisory policy and agency directives. A core competency of the Department of Labor and industries is that employees must “At all times respect and value others”.

The grievant has a long history of being disrespectful to others, especially in his email communications. In 2014 the grievant received a counseling memo because of his disrespectful email communication. In that same year, during his annual performance evaluation he was reminded to refrain from engaging in this disrespectful email communication. In July 2016, he received a second counseling memorandum which addressed the need to be respectful of others. On October 28, 2016 the grievant was disciplined with a letter of reprimand for the same offense.

The grievant wrote three disrespectful emails to his supervisor, two after knowing he was again under investigation. The grievant authored an email attacking Catherine Seelig when she tried to arrange and an initial investigative interview. This investigation involves a total of six different emails. No reasonable person could conclude that these emails were appropriate to be sent to supervisors and upper management. The grievant will contend that the email simply states facts and are direct. He might also claim that the emails were written under stress because he was being investigated for disrespectful email writing. The grievant is attempting to avoid accountability for behavior that he refuses to change. The emails written by the grievant display a flagrant disregard of the core competency of respect for others in the workplace. The content of the emails speak for themselves. The behavior of the grievant demonstrates that he had no interest in developing a healthy working relationship with his supervisor and with upper management.

Core Competency–Accountability and Dependability: Judgment in problem solving.

The Department of Labor and Industries requires its employees to accept “personal responsibility” and “make informed decisions to resolve issues”. The grievant clearly failed to follow these competencies. He asserted that there was nothing wrong with the e-mails that he sent and that they only contain facts. Conversely, if the emails were offensive, it ought to be understood that they were written while under the “stress” of the pending investigation. At the oral hearing, the grievant blamed his outlook calendar problems on the failure of his iPhone to sync with the Outlook program. He also denied knowing about Computer login warnings that prohibits personal use of the Internet. He also denied Labor and Industry trained him properly on Internet usage and maintains that Article 33.2, supports his conduct in viewing 1092 non-work-related websites.

Policy 3.30 – Private use of State resources:

Labor and industries policy 3.30 requires that “State equipment.... And other resources are for state business only.” The evidence in this case establishes that the grievant used his computer to surf the Internet for non-work related topics in violation of this policy. According to the Labor and Industries investigation, grievant visited 1091 websites for non-work related purposes in less than a three month time span. These searches were not accidental. Grievant had to physically type these search terms into his browser. 1091 searches in less than a three month time span clearly establishes that grievant violated policy 3.30.

Policy 3.32-Use of computer resources, E-mail and Internet.

This policy prohibits any personal use of state private network resources without supervisory or management permission. The policy also prohibits making personal purchases. Violations of the policy will be regarded as a serious offense, subject to corrective or disciplinary action, up to and including termination, as appropriate. Grievance repeatedly took the position during investigation that he could visit the Internet as he wished. Policy 3.32 forbids such a position. The policy requires that permission from management be obtained before such searches occur and that the search meet all six elements listed in policy 3.32. The forensic review of the hard drive belonging to the grievant’s computer reveals significant use of the Internet for nonwork related purposes. During the oral hearing, the grievant never asserted that he was given permission to use the Internet for his own interest, including purchasing books on Amazon. This clearly establishes that grievant violated policy 3.32.

Policy 3.53 – Time and Attendance reporting.

Policy 3.53 states that” overtime eligible employees are required to submit time and attendance records showing **total** hours worked, plus leave and overtime”. State exhibit 5G establishes that the grievant was present in the Seattle office building on 14 occasions but failed to report hours worked during those 14 occasions. Additionally, on July 6, 2016, the grievance received a counseling memo for not reporting hours worked on December 31, 2015 and January 2, 2016. When directed by HR to report the hours for those two days, the grievant sent a rude email refusing to submit time.

Failing to report time not only violates policy 3.53, it places the Department of Labor

and industries at risk with regard to the Fair Labor Standards Act.¹⁶ The grievant refused to comply despite the clear directive in the time and attendance policy. In one instance, on February 23, 2017, the grievant insisted at arbitration that an hour's worth of work did not need to be submitted to timekeeping despite being directed to do so. TR 466, line 8 – 18. See also State exhibit 5G at 25. The grievant's previous history regarding failure to record time, the time report data found at State exhibit 5G, and his admission that the February 23, 2017 time did not need to be submitted is sufficient proof that the grievant violated policy 3.53.

Failure to comply with supervisory and agency expectations.

The grievant refused direction from his immediate supervisor and/or Labor and Industries in general in the areas of maintaining a consistent Outlook calendar and requesting approval to enter his assigned office building before or after his regularly scheduled hours of work. In 2016, the grievant received a counseling memo from his supervisor, John Stebbins. Prior to that time, his supervisors struggled to know where he was and what he was doing throughout the work week. This gave rise to the 2016 counseling memorandum. Stebbins instituted the use of the Outlook calendar to track his whereabouts.

His next supervisor, Mr. Perry Tamara, testified that the problem with knowing where the grievant was continued during his tenure as the grievant's supervisor. In an effort to track where the grievant was during his workweek, Mr. Tamara re-instituted the use of the Outlook calendar. The grievant failed to consistently put adequate details in his Outlook calendar. Rather than using his Outlook calendar, grievant continually insisted that people call his cell phone if they needed to find out where he was. Grievant refused to follow this simple Outlook calendar request and was unwilling to use the sign in & sign out whiteboard used for the floor of his office building. Grievant insisted that if he used the whiteboard, "someone might knock off his dot on the "board."

In short, the grievant did not want others to know where he was during the day so that he could come and go as he pleased. Proper use of his Outlook calendar was essential for Mr. Tamarra to be able to track his whereabouts since he[Tamarra] worked out of the Bellevue office building. Based on the evidence, the Department of Labor and Industries proved that the use of the Outlook calendar was essential for his supervisor to be able to track his whereabouts since Tamara worked out of the Bellevue office building. The evidence proves that the grievant did not comply with the Outlook calendar directive.

The evidence in this case also established that between January 6, 2017 and August 2, 2017, the grievant entered the Seattle office building 45 times. By his own admission,

¹⁶ First, the agency is at risk of violating the fair labor standards act by reason of inability to track whether grievant turned in more than 40 hours' worth of work in a week since he refused to properly document his positive timekeeping record, the hours that he worked at certain weeks. Second, as an overtime eligible employee, he is entitled to overtime pay and the Employer is required to pay him that overtime pay even if he did not have permission to work overtime. That overtime cannot be calculated, unless the grievant reports the overtime. This, the grievant failed to do. TR 344, Lines 16 – 25. TR 345, line 1 – 3.

the grievant knew that this was against the expectations of the Department of Labor and Industries¹⁷ This was done without obtaining prior approval. The expectation to obtain prior approval had to do with safety in the Seattle office building. Despite receiving a counseling memo on the subject in 2016, grievant never asked for prior approval to work late hours. The Employer proved at the arbitration hearing that the grievant knowingly and intelligently violated the after hours prior approval directive.

The discipline of termination is reasonably related to Mr. Ewing's proven charges.

The grievant's 18 years of service to Labor and Industries did not provide any excuse to disregard agency core competencies, policies and directives. He should have been setting a positive example for what it means to be an Industrial Hygienist within the Department of Labor and Industries. Instead grievant chose to be combative in his email communications, remain unaccounted for during regularly scheduled working hours, ignored management directives, and blatantly ignored Labor and Industries computer use policy by searching hundreds of non-work related websites.

Grievant will undoubtedly argue that something less than termination would be reasonable discipline. Perhaps he will argue for a letter of reprimand or a short suspension. If this argument is made, it is important to note that multiple memos of counseling and one letter of reprimand had no effect on changing the behavior that ultimately led to this termination. To concede that some discipline short of termination is appropriate in this situation is inconsistent with the evidence at arbitration. The grievant never accepted responsibility for any of the charges proved by the Employer. In fact, his unwillingness to accept responsibility for his own poor behavior is a significant barrier to any continued employment with labor and industries. Any arbitration decision imposing less than termination will only embolden grievant's continued efforts to resist instructions from management and the Labor and Industries policies and procedures.

In light of the evidence in arbitration, this grievant blamed everyone else for his own shortcomings. His excuses are almost endless. If the grievant did not have someone to blame about a particular topic being investigated, he was more than happy to argue about the merits of his position. This was particularly true with the extensive personal use Internet searches he conducted. For instance, he maintained that the "naked granny walk" was a term of art in industrial hygiene. Another argument propagated by the grievant was that de minimis worktime as he defined it should not be reported despite instructions from HR that he should do so. The above descriptions of the behavior of the grievant along with specific examples of inappropriate conduct clearly established that termination fits the proven charges.

The Position of the Union

Although proof by a preponderance of the evidence is most often used by arbitrators in discipline cases, some arbitrators have held that a higher standard of proof is appropriate in a discharge case given the seriousness of the penalty and regardless of

¹⁷ TR 542:19– 544:3

the reason for discharge[117 LA 161, 166,(Monat, Arb. 2002) period. The Employer did not establish just cause for the termination of the grievant. The Employer deprived the grievant of due process protections inherent in just cause because its investigation was procedurally flawed, biased and incomplete, and the discipline itself was substantially disproportionate to the facts alleged.

Misconduct by the investigators in this case irreparably undermined confidence in the investigation. The decision to terminate the grievant rested entirely on the OHR investigation report dated July 9, 2018. Susan Rue, investigations manager is listed as a recipient of the report. Anne Soiza, the Assistant Director of DOSH had previously ordered Rue off the investigation because of a conflict of interest. The fact that Susan Rue's name is listed as a recipient of the report would not be cause for concern if that were the only post- recusal involvement of Susan Rue. During the course of her investigation of the grievant, Rue was told that the grievant had filed a complaint against her alleging a potential conflict of interest. Although Anne Soiza did not personally convey her recusal order to investigator Rue, she directed her staff to carry out the order of recusal. Her purpose in ordering recusal was to avoid either the fact or the appearance of partiality on the part of the Employer or that the investigation of the grievant would be tainted by the involvement of investigator Rue.

Unfortunately, Investigator Rue did not share the commitment of Soiza to ensuring that disciplinary investigations are not only free from conflicts of interest, but also free from apparent conflicts of interest. Susan Rue testified that after the recusal, her involvement in the investigation was substantial. She created the spreadsheet that was admitted into evidence as Employer Exhibit 20. She also testified that her involvement included filling in numbers and data for "the date, the weekday, computer login data, and then all of the badge access points and the Time sheet" column. Cari Anderson made superficial changes to the spreadsheet, but investigator Rue had already filled in all of the data.

Employer Exhibit 5G was attached to the termination letter issued to the grievant on September 18, 2018. Employers Exhibit 20 was admitted on Day 1 of the oral arbitration hearing. These are identical documents with the exception that Employers Exhibit 20, introduced on Day 1 of the oral arbitration hearing contains handwritten corrective notes made by Cari Anderson **after Day 1** of the arbitration hearing. The fact that the corrections were not made until after the first day of the grievance arbitration concluded bears repeating.

Susan Rue's description of the superficial differences between Employer Exhibits 5G and Employer Exhibit 20 are not wrong. However, her description downplays and overlooks the significant difference between the original exhibit 5G and the modified exhibit 20. The Employer had already relied on exhibit 5G, the spread sheet containing errors that were later corrected through the admission of the modified employers exhibit 20. The Employer already relied on 5G when assessing whether that evidence constituted just cause for discipline. Additionally, Employers exhibit 5G, the flawed and

uncorrected spreadsheet

had already been relied upon as evidence by the Employer when determining the appropriate level of discipline to impose upon the grievant. Penciling in corrections during an arbitration hearing is truly too little, too late.

The improper involvement of investigator Rue did not end with Employer exhibits 5G and modified Exhibit 20. She testified that she was directed to transfer the case to Lynn Buchanan by December or January 2017. Nevertheless, on cross-examination, she admitted that despite being ordered to recuse months earlier, she continued involving herself with the investigation through February 14, 2018. The allegation that grievant improperly accessed the Internet to make purchases from Amazon was based upon the document introduced as the Employer Exhibit 24. That document bears the date of February 14, 2018. Her explanation for her transgression was simply "I promised Ms. Buchanan that I would not have her do it, and just finished that part of it so I could give her the entire bunch".

The blame for this reckless disregard of the order of Assistant Director Soiza does not rest on investigator Rue alone. Her explanation for her continued involvement in disregard of the order of the assistant director was that she "promised" to keep helping Lynn Buchanan. This admission exposes a fundamental due process violation at the center of the grievant's termination.

Lynn Buchanan was not a minor actor in the investigation. She is named as the sole author of the confidential "Investigation of Trent Elwing" report. When due process violations undermine the integrity of an investigation, prejudice must be presumed.

Prior to the decision to terminate the grievant on September 18, 2018 the most severe discipline in his record was a letter of reprimand dated October 28, 2016. Although a few counseling memos were introduced into evidence, counseling memorandums are not defined as discipline under the parties collective bargaining agreement. Despite the testimony of witnesses for the Employer who described the grievant's performance as subpar and incapable of improvement, these assertions were contradicted by the evidentiary record. During cross-examination, testimony was admitted to establish that for the performance and appraisal form time period covering July 1, 2016 through June 30, 2017, the grievant had improved in several areas of performance matrices over his last evaluation. In fact he closed 19 inspections (1.58 inspections per month) compared to 5.4 inspections per month in the previous evaluation., an improvement of over 300%.

Similarly, Perry Tamarra's critique of his performance during the latter half of 2017, and documented in his performance and appraisal form for July 1, 2017 through December 31, 2017, failed to substantiate allegations that the grievant failed to meet his inspection goal. In fact, the evidence on cross examination established that "during the last half of 2017, the grievant performed inspections in Regions 1,2 and 3. He completed eight inspections. Moreover, Tamarra commented that "Trent is making a better effort to document activities in Outlook." Ordinarily, notice and an opportunity to improve, together with the imposition of

increasingly severe disciplinary penalties, are at the heart of progressive discipline as applied by arbitrators.

Here however, Tamara never directed the grievant to engage in trainings that might have been helpful. He only suggested that the grievant attend a time management class. Additionally, he only suggested that the grievant take productivity classes or training. Moreover, Tamara testified that he became the supervisor for the grievant after receiving an unsolicited request to accept a lateral transfer into a position that would require him to supervise the grievant. When he accepted this position, he “got the impression that management wanted me to prove I could manage a team the DOSH way”. For the majority of the approximately 2 years that he served as the grievant’s supervisor, the grievant was subjected to ongoing disciplinary investigations. Ultimately he was terminated on September 18, 2018. Shortly thereafter, Tamarra was apparently rewarded with a long sought promotion to Region 2 Safety Compliance Manager effective January 16, 2019.

The evidence at the oral hearing demonstrated that grievant completed the appropriate number of inspections despite lack of support from management. The grievant did not always adhere to the stated preference to consistently use Outlook, but the record is far from clear on whether Mr. Tamara enforced this expectation. Additionally, the testimony of Mr. Tamarra indicates that grievant had demonstrated a willingness to improve. Indeed, the Employer failed to provide the grievant with an iPhone that he could synchronize with his calendar until sometime in 2017, thereby hindering his ability to consistently use Outlook.

The grievant voiced his frustration at not being able to access his calendar from his phone and his supervisor at the time, John Stebbins, admitted that “It is cumbersome”. Not only was Perry Tamarra not a stickler for precise billing and calendaring practices, he emphasized that it was his belief that his work and production should speak louder than minor time discrepancies in his working schedule. According to Perry, accounting for one’s time is not unimportant, but if production is lacking a supervisor has no explanation for an employee’s activities leaving them exposed to scrutiny. These statements are substantially at odds with the testimony of Tamara and Venetia Runnion regarding the imperatives that were allegedly disregarded by the grievant.

While arbitrators generally hold that acquiescence by one party to violations of an expressed rule by the other party precludes actions about past transactions, they do not consider that acquiescence precludes application of the rule to future conduct. Arbitrators consider whether the Employer has condoned a work rule violation in fashioning a remedy. In one case, an arbitrator found that the employers tolerance of a practice contrary to its rules, but from which it derived a substantial financial benefit, constituted condonation of the work rule violation and provided an adequate foundation for reversal of a five day layoff.

Throughout Venetia Runnion's testimony, she betrayed her extensive knowledge of the penchant of the grievant for occasionally working after hours, and in some instances, late into the night, because it benefited the Employer.

Ms. Runnion testified that she had actual knowledge of these facts well before Mr. Tamara was hired as Mr. Elwing's supervisor. On direct examination when asked whether she knew that grievant had been entering the building after hours, she replied:

" Yes. Yes. I knew it was occurring actually before the investigation even started, but not as often as it was, because we would—John Stebbins and I would get emails from Mr. Elwing at, you know, 11:30 at night or one in the morning, and we both thought that was unusual that—thought, well, maybe he's using his computer from home. You know, we weren't---although at that time I'm not sure if we---no, we have laptops, yeah, so he could have been doing it from home, but....."

Ms. Runnion further testified that she would receive emails from the grievant that pertained to work related issues. When asked whether she actually knew that grievant was coming into the office, she testified that. *" We were thinking that he may, or maybe that he's stayed late. I mean, I worked fairly late. My—or sometimes. I mean, I would work 8:30. I would be in—sometimes I would work until 7:00, and he would still be there when everyone else was gone. So, we don't know, you know, how long he stayed. "*

Under these circumstances, it is fundamentally unfair to punish the grievant for conduct that Ms. Runnion unequivocally testified that she had been aware of for many years. Perry Tamara replaced John Stebbins as the grievant's supervisor during the fall of 2016. According to the testimony of Venetia Runnion, she clearly recalled discussing the grievant's late night work related emails with John Stebbins. They both knew that the grievant was not using a laptop computer because the Employer did not provide one. Moreover, Runnion admitted that she also worked as late as 7 PM and would see grievant working in his cubicle well after all of his coworkers were gone.

The Employer must have actual or constructive knowledge that the rules are being violated in order to be charged with lax enforcement. Testimony that certain conduct has occurred without punishment only begs the question. The fact that some employees have engaged in misconduct and have not been punished is not significant unless the Employer had knowledge of the transgressions. Arbitrators impute laxness of rule enforcement to the Employer through the actions of its supervisors.

In cases where the misconduct is blatant, the Employer may be presumed to have knowledge, even if it maintains that it was unaware of the misconduct. As with any argument of constructive knowledge, the evidence must show that a reasonably alert Employer should have known of the conduct. The honesty of Venetia Runnion during the arbitration hearing demonstrates the fundamental unfairness in initiating and encouraging a disciplinary action with the goal of terminating the grievant.

The union respectfully requests that the arbitrator find in the union's favor add make the grievant whole by reinstating him into his previous position, repaying back wages, and all other relief to make the grievant whole. Additionally, the union respectfully asserts that principles of industrial due process and Waiver and Acquiescence prevent the Employer from discharging the grievant.

Discussion and Analysis.

The Precursor Events:

On or about July 9, 2018, the Department of Occupational Safety and Health completed a final confidential "OHR" investigation report with regard to the behavior and performance of the grievant during his 18 ½ year tenure as an employee. At the time of completion of the report, the grievant had been performing the duties of an industrial hygienist 4 since 2012. The following recitation of facts are not in dispute between the parties and they serve as factual backdrop and context for the disciplinary action taken by the Employer on September 18, 2018. In 2015, the grievant was counseled about sending emails which were disrespectful in their tone. The counseling was received during the course of his yearly PPAF performance review which covered the period from July 1, 2014 to June 30, 2015. This begins the cascade of events leading to the termination of this grievant.

In April 2016, the grievant was the subject of an investigation. That investigation found that grievant had an ongoing behavior pattern of sending disrespectful email communication, entering into the Seattle Labor and Industries service location without prior authority and failing to correctly report hours worked on his TAR (Time and Attendance Report). This investigation was triggered, when the Employer reviewed security videos of the Seattle service location and determined that grievant was present in the building during unscheduled hours.

In July 2016, grievant received a counseling memo from his supervisor John Stebbins. Grievant had been coming into his office for considerable periods of time outside his normal work hours and outside of the established business hours of the Seattle office. The grievant did not seek prior permission nor was he given prior approval for these activities. The counseling memo admonished the grievant to review his TARS report to ensure that it was accurate and to maintain consistent office hours for conducting office tasks.

On July 19, 2016, grievant received a second counseling memo from John Stebbins. That memorandum found that grievant was disrespectful of supervision and management, failed to work his regular work hours, failed to attend the trainings and meetings and failed to coordinate work and complete work in a timely manner. Grievant was told that he was required to adhere to expectations regarding work hours, attendance, and timely completion of work.

On August 4, 2016, Susan Rue, was assigned the responsibility to investigate allegations that grievant continued to disrespect coworkers supervisors and managers

and was insubordinate when given direction to correct his time and attendance record (TAR) to reflect overtime that he worked during the new year holiday period of December 31, 2015 to January 2, 2016. This investigation found that in spite of receiving a second counseling memo on July 19, 2016 which addressed his disrespect and lack of professionalism toward coworkers supervisors and managers when sending email communication, grievant again sent two emails on July 20, 2016 using disrespectful language to a coworker and to a Human Resource Consultant for the Department of Occupational Safety and Health.¹⁸ Further, the grievant failed to submit overtime hours worked for the holiday of December 31, 2015 and January 2, 2016. ([115/ 436]. On October 28, 2016, grievant was given a letter of reprimand for failing to comply with agency core competencies including failure to treat others with respect and courtesy, failure to display accountability and dependability and failure to comply with the expectations set forth in his PPAF performance review dated November 2, 2015.

The above listed events are precursor to the next sequence of events that triggered a July 9, 2018 confidential OHR investigation and set the stage for the eventual termination of the grievant. The precursor events have no evidentiary significance to a determination of whether the acts alleged by the Employer constituted grounds for eventual termination. These events do have significance for the purpose of assessing whether, prior to the events leading to his termination, the grievant was placed on notice of particular behavior that the Employer considered inappropriate and unacceptable and was given notice of the expected future standard of behavior and the disciplinary consequences of failure to comply with the expected standards of behavior.

The events that triggered the progression of the Employer toward termination of the Grievant's employment.

On March 16, 2017, the grievant sent an email to his direct supervisor Perry Tamara. The email was sent in response to a request from Tamarra that a coworker, also an industrial hygienist 4, take part in a PSM inspection for which the grievant was responsible. The intent was to add to the inspection experience base of the coworker. The email response of the grievant was "Regarding the PSM inspection how do you and Kenya anticipate being helpful to me?".¹⁹ On April 25, 2017, he sent an email to Catherine Seelig, a coworker. That email read "please be less deceptive in the future".²⁰

On April 17, 2017, Venetia Runnion noticed that grievant was not in his office and his outlook calendar did not reflect any scheduled appointments. The data from his key card access and computer log on indicated that he did not scan into the office until 11:22 AM on April 17, 2018. (See Enclosure G.) Again, on April 18, 2017 Runnion noticed that

¹⁸ See Exhibit 3, Exhibit 4, at Book 2 of 2, at pages 295 and 296 of 436.)

¹⁹ [Enclosure a]" [Others find email demeaning]

²⁰ [others find email demeaning and insulting] see enclosure b at union exhibit 2.

grievant was not in his office at his schedule start time nor was there anything scheduled on his Outlook calendar. His key card access data indicated that grievant did not scan into his office until 11:17 AM and did not log onto his computer all day. These occurrences caused concern with the Employer.

On April 20, 2017, a coworker, Wendy Drapeau, attempted to reach the grievant regarding a PSM inspection. Miss Drapeau contacted Venetia Runnion at 10:53 AM because she could not reach the grievant. On April 29, 2017, grievant submitted a timesheet from his work computer which indicated that he was in his office at 1:23 AM, outside of his normal work hours on April 29, 2017.

The emails of March 16, and April 25, 2017, combined with the unaccounted absence of the grievant on April 17, April 18, and April 20, 2017 and the April 29, 2017 time submission gave rise to a fact-finding investigative interview conducted by Perry Tamara and Sandra Rue. That investigation took place on May 10, 2017. During the course of that investigation grievant, indicated that he did work past midnight on April 20, 2017 but he could not account for his time prior to 11:25 AM.

Grievant also admitted that he had been in his office making work calls at 10:30 PM and that he was present in the Seattle office building outside of regularly scheduled working hours. This led the Employer to believe that grievant may have continued to access his office outside of work hours without prior permission. After the May 10, 2017 fact-finding investigation, the grievant continued to report to work after his agreed starting time. As a result, on July 7, 2017 Venetia Runnion, changed his work schedule to a standard five day – eight hour work week.

Additionally, the Employer commenced a wider investigation which examined grievant's key card building access records and his Internet browsing activity on his office computer. This investigation covered the time period from January 6, 2017 to August 2, 2017. This wider investigation culminated in the Final OHR investigation report dated July 9, 2018, completed by Lynn Buchanan. The results of the Final OHR investigation report led the Employer to issue a notice of consideration of disciplinary action against the grievant dated July 31, 2018. A pre-disciplinary meeting was scheduled on August 17, 2018 and grievant was notified of his right to be present at the hearing and to have representation.

Objections to Exhibits.

Exhibits 5G and Exhibit 20: Exhibit 5G contains the exact Computer logon times for April 3 and 4, 2017. The Employer concedes that the identical computer logon times was an error. Once the error was discovered by the Employer, it called a witness who offered State Exhibit 20 into evidence to amend State exhibit 5G. This exhibit designated where additional days of entry by the grievant could have been listed on the original state exhibit 5G but were not.

The objection by the Union to the attempt by the Employer to cure the defects of Exhibit

5G through handwritten notation at the oral hearing was that this was not a defensible effort to bolster the exhibit. **State Exhibit 20 is given no weight.** Nevertheless, even discounting Exhibit 20, Exhibit 5 establishes that grievant entered the Seattle office building 45 times without prior authorization. The grievant failed to present evidence tending to rebut the multiple entry times discovered by the Employer and reflected in Exhibit 5G.

State exhibit 5H

This objection concerns the seizure by the state of the grievant's computer in order to construct a forensic examination. In this case, the computer was seized by the state and the computer hard drive was furnished to its computer analyst, who conducted the forensic examination and provided an electronic report to the state. In this case the computer remained physically in the custody of the state and the computer hard drive was furnished by the state to WaTech for the purpose of completion of the forensic examination of the hard drive. WaTech is an instrumentality of the state. The grievant did not establish that the time period during which the hard drive was in the possession of WaTech, an instrumentality of the state, constituted a break in the chain of custody.

The objection is overruled.

State Exhibit 21:

The union objects to state Exhibit 21 on the grounds that no foundation for the admission of the exhibit was established and the interview of November 28th, 2017 reflected in the document did not take place. Additionally, State Exhibit 21 was not provided to the grievant during the grievance process. **The admission of State Exhibit 21 is denied on the grounds that the document was not received by the grievant nor reviewed, during the grievance hearing process.** Nevertheless, it should be noted that the factual content represented by state Exhibit 21 is also contained in state Exhibit 5 H, which the grievant did have the opportunity to review during the disciplinary process. This means that any facts established in state Exhibit 21 which were also contained in State Exhibit 5H and for which supporting testimony was received can be considered into evidence.

State Exhibit 23:

State exhibit 23 is the is the Digital forensics services analysis report completed by the office of Cybersecurity, State of Washington (WaTech). This report acknowledges that the office of cyber security received a request from the Department of Labor and Industries to perform a forensic analysis of the hard drive data associated with user" ELWT 235". The evidence in this case establishes that this user designation refers to the hard drive in the computer furnished by the state to the grievant. The report confirms the receipt of the forensic review request from the Department of Labor and Industries and the data parameters of the review. State Exhibit 23 serves as confirmation that a request for a forensic review of the grievant's computer hard drive was made

and that the review was completed.

Moreover, the data produced as a result of the forensic review was outlined at State Exhibit 6, which is the investigative report prepared by Lynn Buchanan, and distributed to the grievant in the disciplinary materials. **Given the capsule nature of the report and the fact that the results of the report itself were contained in the investigative report and distributed to the grievant, the arbitrator admits State Exhibit 23 as evidence that a request for a forensic review of the grievant's computer's hard drive was made and that the hard drive was furnished for review and that the forensic review was completed.**

Analysis of The Case.

Almost all collective bargaining agreements in the unionized employment context contain limitations on the Employer's power to discipline or discharge employees. The most common limitation is that an Employer may not discipline or discharge an employee unless "Just Cause" is established. In the CBA at issue in this case, that limitation can be found at Article 27.1. Just cause is best understood as a fundamental understanding between the Employer and the Employee.

Both parties understand that the Employer must pay agreed wages and benefits and that the employee must do satisfactory work. Satisfactory work on the part of the employee means regular attendance, obedience to reasonable work rules, and the avoidance of any conduct that would necessarily interfere with the Employer's ability to operate the business successfully. This is a fundamental understanding that is captured in the proposition that the employee 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.

Simply put, "just cause" means that the employee is entitled to continued employment, provided he attends work regularly, obeys work rules, performs at some reasonable level of quality and quantity and refrains from interfering with the employer's business by his activities on or off the job. A violation of any one of these fundamental obligations could provide "just cause" for termination.

The nature and severity of the employee's proven offense will determine what form and degree of discipline is appropriate. The more egregious the proven offense, the more severe is the warranted discipline. Additionally, in this case, Article 27.2 of the collective bargaining agreement requires that when discipline is applied, that it be progressive in nature.

Specifically, under that Article, progressive discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and finally, discharge. This framework is designed to bring to the attention of the employee the fact that he or she has either failed to attend work regularly, failed to obey work rules, has performed at an unreasonable level of quality and quantity, or has interfered with the employer's business by his activities on or off the job. Progressive discipline allows the employee

the opportunity to correct his or her behavior rather than risk increasingly more harsh penalties leading ultimately to termination.

The Burden of Proof

In this case, the Employer has taken the steps to terminate the employment of the grievant. As a result, it must shoulder the burden to establish the existence of just cause by a preponderance of the evidence. Therefore, the arbitrator must turn to an examination of the allegations advanced by the Employer as just cause for termination and the evidence in the record that supports those allegations.

Did the Department of Occupational Safety and Health prove by a preponderance of the evidence that the grievant failed to treat others with respect and courtesy?

The evidence in support of this allegation consists of seven (7) documented emails which cover a period of time between March 16, 2017 and December 22, 2017, approximately nine months. A brief synopsis is in order:

March 16, 2017: the grievant sends an email to his direct supervisor Perry Tamara saying “regarding the PSM inspections, how do you and Kenya anticipate being helpful to me? This email was written response to a request that he allow a fellow Industrial Hygienist 4 (“Kenya”) to join him as he conducted a PSM inspection. The intent was that by doing so, Kenya could broaden her experience base with regard to conducting PSM inspections.²¹

April 25, 2017: The grievant sent an email to Catherine Seelig, a coworker. In the email, he tells Seelig, “please be less deceptive in the future.”²²

June 23, 2017: The grievant sends an email to Venetia Runnion, who supervises his direct supervisor Perry Tammara. The email states as follows: “...If you think I should be somewhere and am not ,just give me a call. No need for a disrespectful gotcha fact finding investigation which wastes time and money of ratepayers ”.²³

June 26, 2017: the grievant sends an email to his union representative and copies a coworker. In the email , grievant makes the following remark about that coworker “I have low expectations for Bruce being reasonable in this matter... “Lastly, if Bruce continues to defy common sense....”²⁴.

December 21, 2017 :: The grievant sends an email to his direct supervisor Perry Tamarra containing the following statement “I'm hanging on to all these emails for future reference., should I be asked about your work performance”... “it is your responsibility to ask questions when they need to be asked. Apparently, you continue not to ask questions when they need to be asked. Apparently, you continue not to ask the

²¹ Employers Notebook 1 of 1, Enclosure A.

²² Ibid, Enclosure B

²³ Ibid, Enclosure C

²⁴ Ibid, Enclosure D

questions necessary to satisfy Venetia and Bruce ". "why has it taken you so long to implement basic supervisory techniques and tools similar to what you described below? ".²⁵

December 21, 2017: The grievant sends a second email to Tamarra containing the following statement "I kept the email related to this instance in which I cut you some slack for your screwup".²⁶

December 22nd, 2017 : The next day he sends an email to Tamarra which states as follows "please read my emails more carefully and be more diligent about viewing my outlook calendar so as to not mistake other subordinates for mine ."²⁷

The employer reached the conclusion that this series of emails was disrespectful to his coworkers and supervisors. In the course of investigating reactions to these emails , the employer discovered that Perry Tamarra and Catherine Seelig, supervisor and co-worker, felt that the emails addressed to them were "uncourteous and disrespectful".

One of the agency core competencies cited by the employer is the core competency that requires employees to "treat others with respect and courtesy: at all times respect and values others." The question is whether the evidence in this case, specifically enclosures A through G, and the testimony at the oral hearing, prove that grievant failed to treat others with respect and courtesy and in a manner that valued his coworkers and supervisors. Based on the record, the arbitrator concludes that the employer proved that the grievant violated this agency core competency.

What is apparent in the series of emails written by the grievant is a sense of defiance of and lack of respect for co-workers and, indeed, his superiors. The tone of these emails convey the perception that grievant believes that he answers to no one, and values and respects his own beliefs and opinions to the exclusion of others including his supervisors and coworkers. In his defense, the grievant counters that he was merely expressing fact. To express to a coworker that you have "low expectations" is a demeaning subjective expression of opinion which may or may not have been correct. Similarly, to refer to one's direct supervisor as a "screwup" is a discourteous colloquial and again a subjective expression of opinion which may or may not have been correct. Additionally, when expressed to a supervisor, that expression borders on insubordination.

The justification of the grievant that he was speaking factually and that he did not believe that his emails were discourteous or disrespectful cannot carry the day. At the oral hearing, grievant offered nothing more than his perception that he was merely speaking factually when he authored the emails. Here the reactions of his supervisors and coworkers who were the target of these emails does carry the day.

²⁵ Ibid, Enclosure E.

²⁶ Ibid, Enclosure F

²⁷ Ibid, Enclosure G

They regarded his emails as discourteous and disrespectful.²⁸ In the context of a professional work environment, the arbitrator finds those perceptions to be reasonable. Viewing these emails in a light most favorable to the grievant, the arbitrator has no reason to second guess the conclusion of the employer that these emails were disrespectful and discourteous and in violation of the agency core competency requiring that the grievant refrain from disrespectful and discourteous communication and “treat others with respect and courtesy” **This allegation is proven by a preponderance of the evidence in the record.**

Did the grievant violate the agency core competency requiring employees to demonstrate accountability and dependability by working outside office scheduled hours without prior approval.?

Proof of the allegations in this claim consist of the testimony of supervisory personnel of the grievant and the review of the grievant’s key card access and computer logon spreadsheet covering the time period of January 6, 2017 through August 2, 2017²⁹. The triggering set of events occurred on April 17 and April 18, 2017. On the morning of April 17, 2017, Ms. Runnion noticed that the grievant was not in his office. She testified that she checked his Outlook calendar and found that his Outlook calendar did not reflect any scheduled appointments. The identical sequence of events occurred on April 18, 2017. Again, Runnion noticed that he was not in his office and his Outlook calendar did not reflect scheduled appointments.

Ms. Runnion testified that On April 20, 2017 she was contacted by Wendy Drapeau at 10:53 AM . This is 1 hour and 53 minutes past the scheduled start time for the grievant. Drapeau also occupied the position of Industrial Hygienist 4. Drapeau notifies Runnion that she was unable to contact the grievant. Runnion then contacts Tamara, the direct supervisor of the grievant, to determine his whereabouts. Tamara informed Runnion that grievant had not contacted him to inform him that he would be late, nor did he have any appointments scheduled on his Outlook calendar.

On April 21, 2017, Drapeau reported that the grievant sent her an email on Friday, April 21, 2017 at 1:31 AM in the morning. This is six hours after the end of his scheduled workday. This discovery prompted the employer to review the key card access record for the grievant to determine when he accessed his office. That review concluded that from January 6, 2017 through August 2, 2017, the grievant entered his office building 45 times before or after his scheduled work hours without prior approval “as previously directed by his supervisor”. Additionally, the review disclosed that he worked outside of his normally scheduled hours 35 times without obtaining prior approval from his

²⁸ Runnion also testified that in the course of oral communication with the grievant he referred to her as a “Pump jockey” and a “Mismanage” as opposed to a “Manager”. It was not surprising and reasonable to hear Runnion testify that she found his remarks to her to be “insulting”. Additionally, the arbitrator finds that they were defiantly insubordinate.

²⁹ See State’s Exhibit 5G.

supervisor "as previously directed".³⁰ When quizzed during the investigation as to his whereabouts on April 17 and 18th, grievant simply replied "You got me". The arbitrator concludes that this reply constitutes an admission that the grievant had no legitimate excuse for his absence from the workplace on those dates.

Given this sequence of events, Perry Tamara was assigned to conduct a fact-finding investigation regarding the behavior of the grievant. That fact-finding investigation took place on May 10, 2017. Tamara testified about this fact-finding investigation. He testified that during the course of his interview with grievant he stated that he was in the office taking work calls at 10:30 PM. This caused the employer to become concerned that the grievant might be accessing his building after regular work hours without prior authorization. The key card access and computer logon spreadsheet review at states exhibit 5G, confirmed this concern.

On January 6, 2016, February 2, 2016 and February 5, 2016 this issue had been discussed with the grievant by John Stebbins, his supervisor at the time. In the course of a check to ensure that the grievant had entered time for work performed on the evening of May 10, 2017, the employer discovered that the grievant had also entered the Seattle office building without authorization at 1:23 AM on Saturday, April 29, 2017.³¹ The evidence disclosed that although the grievant logged onto his work computer at 1:23 AM and submitted a timesheet, he failed to submit hours worked for April 29, 2017. This caused the investigation into the behavior of the grievance, to escalate. Did the grievant violate the agency core competency requiring employees to demonstrate accountability and dependability by working outside office scheduled hours without prior approval? **The testimony and the record evidence establishes continuing and repeated violations of this core competency.**

Did the grievant violate Agency Core Competencies or Agency Policy by entering his office after hours without prior approval?

The expanded "factfinding" investigation of the Employer included whether the grievant had failed to adhere to established hours of work, inaccurately reported hours worked and whether he had misused state resources. The employer inspected the record of his keycard access to the Seattle and Tukwila office locations . The employer also inspected his computer logon history which revealed Internet sites which the grievant had visited. The inspection covered the time period from January 6, 2017 through August 2nd, 2017 . It revealed the following information:

1. Grievant worked outside of his normal scheduled hours 35 times without obtaining prior approval as previously directed by supervisor.

³⁰ Ibid.

³¹ The grievant's letter of dismissal alleges that he entered the Seattle service location without authorization at 1:23 AM on Saturday, April 29, 2017. States exhibit 5G, establishes that grievant log onto his computer a few minutes earlier at 1:13 AM. In either case, grievant was in his office after regularly scheduled hours without prior approval.

2. The grievant entered the Seattle service location 45 times before or after his regularly scheduled shift without prior authorization.
3. The grievant was in his Seattle office location building and logged onto his computer 14 times and failed to report hours worked.³²

During the investigative phase of this grievance, grievant was asked whether he had received permission to be in the building on late or on weekends. He responded that he did not have such permission.³³ Again, during the investigation interviews, grievant admitted to entering his office to spend the night on Saturday June 3rd, 2017. The key card entry data for the grievant also established that he entered the building at 8:20 PM on June 21st, 2017. Subsequently, he logged onto his computer at 7:30 AM on June 22nd. The keycard entry access records do not show that he reentered the building to log on to his computer on Thursday morning. Additionally, the grievant has no ability to log on to his computer or to access the labor and industries network from home.

Given this evidence, it was not unreasonable for the employer to conclude that without prior permission, he had repeatedly entered his office building after hours. These actions violated Core Agency Competencies of accountability and dependability. It appears from the proven facts that despite being warned previously not to do so, the grievant repeatedly chose to enter his office after hours on multiple occasions. On at least two occasions, April 17th and April 18th, 2017, the grievant, during the course of the investigation into his behavior simply admitted that he could not account for his whereabouts. During the oral hearing, when asked about this admission, Grievant could not recall either making the admission, or the context in which the admission might have been made.³⁴ The denial by the grievant was not credible given the record established in this case.

Moreover, the key card access data for grievant indicated that on April 20, 2017 he did not enter his building until 10:45 AM. His starting time was 9:00 AM. The record also reflects that during the course of the May 10th, 2017 investigation the grievant indicated that he worked past midnight on April 20th, 2017. The grievant could not account for his time prior to 11:25 AM on that same morning. The record reflected that the grievant failed to contact his supervisor to inform him that he would not be arriving at his regularly scheduled starting time of 9:am. He also failed to notify a supervisor that he would be staying in the building on April 20th, 2017, past midnight. Additionally, he did not enter his total work hours worked on his timesheet. Moreover, there were twelve workdays wherein grievant admitted that he took a nap in his cubicle during the day and needed to work to make up that time.

The agency core competency on accountability and dependability requires that the employee understand and follow all job related rules, policies and guidelines. In this case the grievant clearly understood what his work hours were. He clearly understood that he was to abide by those work hours. Nevertheless, it appears that grievant

³² See Enclosure G.

³³ Letter of dismissal page 5 of 436

³⁴ [TR 526 , page line 11 – 13]

“marched to his own drummer”. At oral hearing, grievant made much of the self-starting nature of his work and the need to have a flexible schedule. Here, the grievant simply failed and or refused to adhere to Agency policies despite prior counseling and warnings from the employer that grievant should seek and gain the approval of supervision prior to entering his office building after hours.

Perhaps the rules for reporting to work were somewhat onerous and burdensome. It is the job of the grievant to continue to observe those hours and to file a grievance if he believes that the hours themselves or the hours of work somehow violate the CBA. The grievant simply decided he would not observe those hours . He did so repeatedly after counseling and warnings against such behavior. **The record facts justify the conclusion of the Employer that the conduct of the violated the agency core competencies of accountability and dependability.**

Did the grievant fail to report hours worked?

The investigation in this case entailed a review of the data from the key card access and the computer log on spreadsheet for the grievant during the period of time from January 6 through August 2, 2017.³⁵ That review revealed that grievant entered his office building on 14 occasions, logged onto his work computer, but did not report hours worked on those 14 occasions. The rebuttal of the grievant did not provide sufficient justification for the failure of the grievant to report hours worked. Moreover, after having been given the opportunity to supplement evidence that he performed work, grievant either failed, refused, or neglected to supplement his responses with additional justification. **Based on the testimony in the record and the documentary evidence at Enclosure G, the arbitrator concludes that the grievant did fail to report hours worked.**

Did the grievant falsely claim hours worked?

Like all DOSH employees, grievant was given access to the premises of the Employer using an electronic key card which could be used to gain access. Access by all employees is monitored through data that records entry. Additionally, The state owned computers assigned to employees records when the employee logs on to their assigned computer. The evidence for this claim emerged from a review of the key card access and computer log on spreadsheet from January 6 through August 2, 2017.³⁶ This review established that during this time period, grievant was compensated for 10 hours of work nevertheless the building access records and the computer log on records for the grievant do not establish that grievant was either in the building or logged onto his computer.

The key card access and computer logon records reveal 14 separate instances where the grievant claimed that he worked however, no log on or key card activity exists to support the claim of hours worked. Having found above that the grievant did fail to report hours worked, it does not automatically follow

³⁵ Enclosure G

³⁶ Enclosure L

that grievant falsely claimed hours worked. The falsity claim relies on the fact that the Employers time reporting system is a “positive” time reporting system. It reports time automatically and pays automatically if the grievant fails to record leave. As the arbitrator understands this system, it will automatically report time for an employee whether that employee ultimately enters leave time into their time and attendance report. Here, the allegation is that grievant did not enter leave time on June 1, 2017. The result was that he was automatically paid for time not worked.

The arbitrator is not satisfied that the evidence establishes that the failure to enter leave time on June 1, 2017 was active deceit or falsification intended to secure payment for time not worked. Failure to enter leave time is distinguished from a deliberate attempt to claim time not worked. Grievant may very well have been negligent in failing to enter his leave time on June 1, 2017. However, the arbitrator can find no intentional act.³⁷ This allegation is dismissed.

Did the grievant misuse state resources?

The evidence related to this allegation is based upon an inspection of the grievant’s internet usage for the period of June 26, 2017 through September 22nd, 2017. The time periods during which the grievant was logged on to his computer led the employer to believe that his computer was not being used for business purposes. The employer confiscated the computer and submitted the computer to Washington Technology Solutions(WaTech) for a forensic analysis. That analysis determined that for this time period, grievant visited 1091 web sites for non-work related purposes.³⁸ Among those nonrelated work purposes were the purchase of books from Amazon, forms downloaded for his personal taxes , the preparation of a personal camera rebate and the sending and receiving of personal emails. These Internet visits were conducted both during and outside of his work time without prior authorization from his supervisor.

The grievant was questioned during the investigation and he was asked to review the computer printouts from the websites that he visited and indicate whether those websites were work related or personal. When asked whether he had permission to visit The Internet, the grievant replied that he had autonomy in his position and could visit the Internet as he wished. He also stated that since the employer does not provide the training needed for his position, he is required to visit the Internet to remain current . Additionally, grievant denied noticing the popup warning to employees each time you log on about avoiding personal use of the computer.

The grievant also stated that of the 1091 website visits, 280 were visited unintentionally and were “accidental clicks”. The grievant acknowledged that he visited 63 websites containing mostly sports information but also stated that he only visited these sites to have topics to discuss with his coworkers. In the view of the

³⁷ Here the Employer appears to be advancing two mutually incompatible claims regarding the 14 instances that occurred between January 6 through August 7, 2017. First of the Employer claims that grievant did not report hours worked. Second it asserts that the grievant did claim hours worked by reason of the function of the positive time reporting system but did not report them. These claims appear to be logically inconsistent. The Employer cannot have it both ways.

³⁸ (Enclosure H).

grievant, that made these visits “work related”. Grievant did not remember visiting an additional 55 sites and admitted visiting 134 sites for personal reasons. Of the 557 websites that grievant identified as work related, 17 involved racial themes and commentary. Grievant asserted that they were work related because there were times when he had to inspect remote worksites with racist employers or employees. Reading these websites helped him to better communicate with racist employees and or employers.

Labor and Industries Policy 3.32 regarding the use of computer resources, email and the Internet provides that “agency technology is available and intended for official state business use which supports the agency's goals and priorities. The agency prohibits any personal use of state private network resources without supervisory or management permission”. Moreover, Labor and Industries Policy 3.30, relating to the private use of state resources provides that “state funds equipment, supplies, facilities, and other resources are for state business only.

B. misuse of work time or other state resource, regardless of an employee's work hours, is abuse of public trust and is subject to corrective or disciplinary action as appropriate.”

The evidence in this case establishes by a preponderance that grievant used his State issued computer for personal purposes. This constitutes a “misuse of work time or other state resource”. Additionally, the evidence establishes that the purchase of books from Amazon, the downloading of forms for his personal income taxes, the preparation of a personal camera rebate and the sending and receiving of personal email messages constituted a personal use without supervisory or management permission. A notable example of the Internet use pattern of the grievant was revealed when the forensic analysis demonstrated that the grievant visited a website called “The Naked Granny Walk”.

When questioned about the term of art, grievant stated that it refers to the time period that it would take a naked granny to escape from danger by walking after an explosion took place in a facility. The employer checked with the specific worksite to inquire whether, in fact, “naked granny walk” was a term of art used in the business profession that was being inspected. The employer at the worksite confirmed that there was no such term of art in use. Thus, it appears, that the grievant manufactured a work related connection for the Internet visit that in fact did not exist. **The evidence supplied by the forensic analysis provides a legitimate and job-related basis for the conclusion that grievant violated Labor and Industries Policy 3.30: Private use of state resources and Labor and Industries Policy 3.32 - Use of computer resources email & the Internet. The Employer has met its burden of proof as to this allegation by a preponderance of the evidence admitted into the record.**³⁹

³⁹ The letter of termination issued to the grievant dated September 18, 2018 contains a list of specific violations for which the grievant is purported to be disciplined. Among the violations are Agency core competency—judgment and problem-solving and Labor and industries policy 3.00 compliance with Ethics Laws and Rules. However, the letter of termination States no specific violations related to judgment and problem-solving or specific violations related to Ethics Laws and Rules. It may be that the Employer

The Arguments of the Union

In its post hearing brief, the Union argues that the Department of Labor and Industries failed to follow progressive discipline practices. According to the union, prior to the decision to discharge the grievant on September 18, 2018, , the most severe discipline in his record was a letter of reprimand dated October 28, 2016.⁴⁰ The union concedes that a few counseling memos were introduced into evidence, however counseling memoranda are not defined as a discipline under Article 27.2.⁴¹ As posited earlier, the core of the doctrine of progressive discipline is the premise that progressively harsher discipline should be applied to place the employee on notice of unsatisfactory behavior or performance and to give the employee the opportunity to correct that behavior in order to avoid increasingly harsher discipline resulting in termination.

In this case, Article 27.2 is plain and unequivocal. Prior to termination, the Employer was required to progressively discipline the grievant through the use of oral and written reprimands, demotions, suspensions, and finally discharge. When one examines the facts in this case, it becomes apparent that on October 28, 2016, the grievant received a written reprimand. The factual record does not disclose that grievant was ever orally reprimanded, demoted, or suspended even though the nature and quantity of the workplace violations committed by the grievant offered ample opportunity to apply such progressive discipline.

What also becomes apparent upon examination of the facts is that the written reprimand related only to **acts of disrespectful communication** and no other violations.⁴² Thus, when examined as a whole, it is plain and unequivocal that the Employer neglected to provide progressive discipline to the grievant for any of the other multitude of offenses for which he is being terminated. It is equally plain and unequivocal that the Employer violated Article 27.2 by administering one written reprimand for disrespectful communication, followed by a lengthy investigation and then a termination from employment.

This is a “technical violation” of the CBA. Nevertheless, the violation is not unimportant. A technical due process violation should not result in the setting aside of a personnel action unless the employee was prejudiced by the violation, the result of the process was substantially tainted, or absent the violation, a different outcome would have resulted (in either a substantive or a procedural sense) had the violation not occurred. *Bogalusa Community Medical Center*, 84 LA 978 (Nicholas, 1985); *American*

intended that the overall record of the violations committed by the grievant implicated judgment and problem solving and Ethics Laws and Rules.

However, the grievant cannot be charged with violations by unstated implication. The judgment and problem-solving violation and the ethics laws and rules violation are dismissed because the Employer fails to state specific claims as to each violation.

⁴⁰ Employer Exhibit 7

⁴¹ Joint Exhibit 1 at page 76.

⁴² State Exhibit 2, enclosure P.

Shipbuilding Co., 81 LA 243(Everitt, 1983); Steiger Tractor, Inc., *supra*; Central Telephone Co., 76 LA 1137(Mead, 1981); Elkouri and Elkouri, How Arbitration Works, *supra* at 674 – 75; Hill and Sinicropi, Remedies in Arbitration, pp. 262 – 63(2nd. Ed. 1991); Koven and Smith, Just Cause: The Seven Tests, pp. 181 (2nd. Ed. 1992).

A due process violation should not result in the setting aside of a personnel action when the process as a whole was fundamentally fair. Union Oil Co. of California. 91 LA 1206. 1208(K. 1988). In this case, the reasons for the discharge of the grievant were ones which the Employer and grievant had been dealing with for a significant period of time and for which the grievant had ample opportunity to comment on, be heard and to correct his behavior.

Thus, the discharge of the grievant in this case and the reasons for that action came as no surprise. Rather, this discharge resulted from the same substantive matters that had been discussed between the grievant and the Employer as early as February 5, 2016. Under these circumstances, the process as a whole was fundamentally fair and the failure to fully comply with Article 27.2 did not prejudice the grievant, did not result in a substantial taint upon the procedure leading to his termination nor would a different result have obtained if the Employer had complied with Article 27.2. Nevertheless, this is a violation that should not go unpenalized.

To further assess the existence of just cause the question becomes whether, in spite of the unequivocal violation of Article 27.2, the grievant was given advance notice that his behavior was unacceptable thereby providing an opportunity to correct his behavior. The evidence in the record establishes that he had extensive prior notice of the need to correct his behavior. For instance, despite being warned that his agency had no jurisdiction over a BNSF train derailment which occurred on July 25, 2014, grievant wrote emails to the Federal Occupational Safety and Health Administration in Washington D.C. stating “the decisions you make in your remote D.C offices may be detrimental to the safety of individuals living and working in Seattle Washington”.⁴³ The grievant authored this email without receiving clearance or authorization to do so. As a result, Anne Soiza a top official at DOSH was caught by surprise and had to apologize to both the headquarters and the region for his tone and language.

The grievant had been asked repeatedly to speak with Venetia Runnion or John Stebbins and at least copy them or the central office before sending out such emails. Because he had failed to do this again, resulting in repercussions well outside the DOSH central office and Federal OSHA Region 10, a counseling memo was issued. grievant was warned that he was expected to represent the Department of Labor and Industries as an IH4 in a professional manner at all times and in every communication.

Grievant was instructed to interact with both internal and external customers with a high degree of professionalism. He was counseled to treat every individual in a respectful manner and to refrain from acting in a manner that is not in alignment with the goals and missions of the agency and the Department. Any requests for technical assistance or

⁴³ Black Exhibit Notebook, Exhibit 25. Counseling memo dated August 2014.

interpretation of rules from OSHA must be routed through his regional supervisor/manager and compliance operations. Subsequent to this incident, the workplace violations of the grievant only continued into accumulate.

On January 9, 2016, the grievant was given in an **annual performance evaluation** ("PPAF").⁴⁴: This performance planning and appraisal process notified grievant that he was required to treat others with respect and courtesy, ensure accountability and dependability, engage in judgment and problem-solving, exhibit professionalism, and comply with Washington State ethics law, Labor and Industry Policies and the DOSH Compliance Manual. On February 5, 2016 by email,⁴⁵ John Stebbins, his supervisor notified grievant that if he is coming into the office at night or on weekend, he must inform the office manager. The email reads in part: "The office manager is also requesting notification when employees are coming into the office at night or on the weekend. This is for safety and related to recent events in the neighborhood. If you notify me, I can pass it along to her. Or you can see her."

On March 1, 2016, Venetia Runnion sends out an email to all staff including grievant. It specifically states that you must receive prior approval from your supervisor and notify the office manager if working weekends and evenings due to safety concerns. She reiterates that approval from a supervisor is required in advance.⁴⁶

On July 6, 2016 in a **counseling memorandum**, John Stebbins, the previous supervisor of the grievant issued a warning to the grievant about working outside of normal hours. The counseling memo states in part: "you will maintain consistent office hours for conducting in office tasks. Your current agreed-upon work shift is Monday - Thursday from 9 AM to 7:30 PM. Adjustments to the schedule are expected to complete fieldwork, meet with the employees and employers, training classes, and so forth. You will communicate the need for these adjustments with your supervisor and/or management prior to the events".⁴⁷

On October 28, 2016, grievant received a **written reprimand** for displaying inappropriate behavior during multiple email interactions.⁴⁸ A September 1, 2016 investigation interview by Susan Rue listed the allegations: On July 20, 2016, grievant emailed to Sally Buckingham, a fellow IH4, and stated " John has a knack for misinterpreting key points", referring to his supervisor, John Stebbins. On July 20, 2016, grievant sent an email to Cari Anderson, Human Resource Consultant stating "this was very unhelpful, disrespectful response and really lousy customer service. Shame on you for trying to entrap me this way. Please insist Lynn make this determination. I do not know, and I am not going to lie in order to satisfy you".⁴⁹

⁴⁴ See enclosure M

⁴⁵ See enclosure N

⁴⁶ See enclosure O

⁴⁷ See enclosure J

⁴⁸ See enclosure P[enclosure P, listed as Exhibit 7, employers notebook 2 of 2.

⁴⁹ Enclosure C.

On May 16, 2016 grievant emailed Mike Marshall an official at Federal OSHA. He stated, "Sally overstepped her role as a WA DOSH technical specialist last week." The **letter of reprimand** reminded grievant that he had received previous counseling about acting unprofessionally toward others in the workplace. The PPAF evaluation signed by grievant on November 15, 2015⁵⁰ states in part "During this year he was counseled about inappropriate email communication and the use of a respectful tone in communication."

On July 19, 2016, grievant was issued a counseling memo which stated in part "we have previously discussed respect and professionalism toward your coworkers."⁵¹ On September 1, 2016, during the investigative interview for the written reprimand, grievant insisted that he was only being honest in his written communication with coworkers and management and he did not like to "sugarcoat things". Grievant also informed the investigator that if he received emails in that same tone it would give him reason to pause and reflect on how he could do better.

The investigation found that grievant had been admonished that he represents Labor and Industries and his behavior reflects on the business of the agency. Grievant was admonished that it was imperative that he understand that he cannot continue demonstrating this type of behavior toward others. As future expectations, the letter of reprimand required the grievant to :

- Treat Labor and Industry customers and coworkers with dignity and respect
- Ensure that his manner and tone of voice is always positive, helpful and pleasant.
- Ensure that his conversations with others are appropriate and professional. Do not say things that could be construed by others as demeaning, negative, or confrontational .
- Comply with the labor and industries core competencies at all times.
- Comply with PPAF expectations at all times.

Further, grievant was warned that failure to comply with the expectations set forth in the letter of reprimand would result in further disciplinary action, up to and including dismissal. Finally, a singular email transmission entered into evidence at Employer's Exhibit Booklet 2 of 2 , Exhibit 63a, Page 191 of 436 unfortunately captures the incorrigible obstinance of the grievant toward his direct supervisor. On March 14, 2018,⁵² Perry Tamarra emailed grievant for the purpose of instructing him on the proper work related steps to take to document his activities in completing an inspection summary at a workplace. Grievant emailed the following response:

" Could you rewrite your email into a paragraph of bullet points that I can use as a checklist? **You have a tendency to repeat the same item and describe it differently**

⁵⁰ Enclosure E]

⁵¹ [Enclosure F]

⁵² This is a time period during which grievant is undergoing an investigation with the prospect of discipline clearly on the horizon. In spite of these facts, grievant appears either oblivious to or unconcerned with the impact of his behavior.

and to be too vague. You can use this checklist for all of your subordinates in order to save you time. Managing is not about right or wrong but rather establishing convention that all follow.

Will we still be having the biweekly ROWA meetings? If they were not helpful to you, we should not have them because they would be a waste of time. You had commented earlier that you had frequent phone conversations with other subordinates discussing workload but not with me. You rarely have called me for updates. The biweekly ROWA meetings were meant to feel the void of us not having similar phone conversations. **As a continued reminder, if you ever need to know something or have forgotten something, please call or text me at 2:06 549 6365**

I understand that you rarely if ever had conducted complex field inspections and supervising this process has been very difficult and even confusing for you. Also, you seem to have trouble with newer IT equipment dispersed to us over the past several years which has in some instances led you to believe that I was not maintaining and updating the electronic tools while I actually had been.

3) Could you list a dozen or so of the “many communication issues we have experienced” as you claim in your email. You have a tendency to exaggerate, so, I want to make sure you are certain there are “many communication issues”.

You also have a tendency to do things that may negatively impact my workload without first communicating to me your plans. The most problematic instance was sending out a correspondence to a UNIVAR upper manager last year week regarding violation item abatement at a time when I was actively working with several lower UNIVAR safety managers to finish up abatement activities. **I would not be surprised if your action unjustifiably negatively impacted those safety manager’s annual performance review.** Another lesson damaging instance was you showing up on-site without communicating your plans to participate in the walkaround of seafood plant where the Employer is very concerned about production sanitation. Fortunately, the Employer who had Aaron Owada participate in the tool was accommodating.

As a continued reminder so you do not forget, if you ever need to know something or have forgotten something, please call or text me at 206-549-6365.

4) what is# eleven of my expectations?

Trent

A review of this email demonstrates the fundamental incorrigible nature of the grievant. This email is at once, condescending, demeaning, presumptive and accusatory. This email portrays a grievant who not only does not contemplate reforming his behavior but is bent on establishing the incompetence

of his supervisors, in this case, Tamara, Runnion and Christianson, at every available opportunity. The decisive factor at play here is the perception of the supervisor who was the target of the email. The reply of the supervisor is diffident and focused on avoiding confrontation. Nevertheless, it would not be surprising nor unreasonable for the target of this email communication to

find it unacceptable, unprofessional and in violation of agency core competency.

The lengthy recitation above underscores the abundant advance notification given and the incorrigible response of the grievant to that notification.

The Union points to grievant's record of performance of his duties as evidence that the discipline in this case was overly harsh. Clearly, the grievant was competent in the performance of his duties as evidenced by the ratings received in his performance reviews. However, this case turns on his "behavior" with coworkers and supervisors as opposed to his "performance" with employers and industries served by the Division. **On the issue of behavior, the evidence establishes that grievant was an incorrigible violator of agency rules and policies. The discipline in this case was proportionate to the gravity of the behavior of the grievant. The Employer followed appropriate procedures, including a thorough investigation. The Employer proved its charges against the employee. The penalty was reasonably related to the seriousness of the proven charges and the employees disciplinary record and any mitigating or extenuating circumstances.**

The failure of the Employer to comply with Article 27.2 cannot be justified even though the record contains overwhelming evidence that grievant had ample notice that his behavior was unacceptable, that it had to improve, and that if it did not improve, the result was that he could be terminated. Grievant manifested a pattern of disruptive behavior that could not be corrected by progressive discipline. It would be reasonable on the part of the Employer to conclude that this grievant was incorrigible.

The Union also argues that a reasonably alert Employer would have been aware of the conduct of the grievant and would have taken action to address that conduct. The failure to do so amounts to acquiescence to misconduct and waiver of any right to discipline as a result of the proven behavior of the grievant. During the period of time in which John Stebbins was the supervisor of the grievant, the Employer did take timely and repeated action to address the conduct of the grievant. That much is outlined above.

Should the Employer have been more forceful, and more direct once Perry Tamarra became a supervisor? Yes. Did the supervision of the grievant during this period exhibit elements of reluctance and a distaste for confrontation?

Yes. Does this justify reversing or modifying the discipline in this case? No. The evidence in this case establishes that the violations were repeated, numerous, and indicative of the fact that grievant had no intention of reforming his behavior. The Employer cannot acquiesce in such pervasive behavior nor has it waved the ability to discipline such behavior.

The union argues also that the presence and involvement of Susan Rue after she had been ordered off the investigation impermissibly prejudiced the grievant and tainted the investigation. The union rejects the explanation of Rue at the oral hearing that she promised a coworker that she would finish certain remaining investigatory details so that the incoming investigator would not have to assume that work. It is important to understand nature of the work completed by Rue during the period after she was ordered off the investigation up to and through February 14, 2018. The primary work of Susan Rue was to review the findings of the forensic analysis of the grievant's computer hard drive and make a preliminary determination of whether the 1091 visits to the Internet were work related or not.

Susan Rue made the initial determination. That initial determination was reviewed with and by the grievant to solicit his explanations. At least three separate interviews were conducted to allow grievant to review the findings of the forensic analysis and to express his explanation for the circumstances of his Internet visits. Those explanations were reviewed by Lynn Buchanan who made the final discretionary decision that the grievant had indeed violated workplace policy.

The findings of the forensic analysis establish as indisputable fact that grievant did visit nonwork related websites using his state assigned computer. This conclusion did not require a discretionary judgment by Rue that might be tainted by personal bias that she might have possessed toward the grievant. Therefore, the factual conclusion that the grievant did visit the websites and the documentation of that fact in Exhibit 24 does not place her in the position of having an actual or apparent conflict of interest nor does it demonstrate prejudice. Continued involvement in an investigative process serving in a capacity that precludes the exercise of independent judgment or discretion does not generate a viable claim of conflict of interest or prejudice.

Summary of the response to the argument of the Union.

In this case, the Employer did deprive the grievant of due process protections inherent in just cause standards by reason of its failure to comply with Article 27.2 of the collective bargaining agreement. That failure however did not render the investigation in this case flawed procedurally biased or incomplete. The investigation was fair, and it accorded the grievant every opportunity to present his version of the events in question.

The Remedy and Award

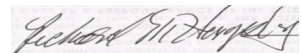
It is beyond argument that the Employer failed to comply with the progressive discipline/ procedural due process provisions agreed to by the parties at Article 27.2. However, nothing in this case leads the arbitrator to the conclusion that this matter would have had a different outcome had the Employer complied with Article 27.2. To set aside the termination under these circumstances would constitute an unduly harsh result unwarranted by the proven facts in this case. Meyer Products, Inc., 91 LA 690(Dworkin, 1988).

Nevertheless, some remedy is appropriate, if only to remind the Employer that due process considerations inherent in the just cause standard of the labor agreement are important and they must be followed. Arbitrators take various approaches to the remedy be provided in such cases. See *Hill and Sinicropi*, supra at 2:45 – 46; *Labor and Employment Arbitration*, supra at 10.09. One of these approaches is to reinstate the employee but not award backpay, thus converting a termination into a lengthy suspension. However, the arbitrator concludes that termination in this case was warranted and for just cause. Therefore, reinstatement would be an inappropriate response to the due process violation. The most appropriate approach, and one that is properly calibrated to remedy the nature of the violation in this case is to uphold the termination of the grievant and award backpay⁵³ from the date of termination until the first day of the oral hearing before the arbitrator. This amount will be offset by any and all interim earnings by grievant from September 18, 2018 to the first date of the oral hearing in this case.

The Award

This grievance is DENIED in part and SUSTAINED in part. The termination was for just cause and the discharge is therefore sustained. However, the just cause standard of the CBA at Article 27.2 was violated by the denial of progressive discipline. As a remedy for that contractual violation, the arbitrator awards backpay from the effective date of the termination to the first day of the oral hearing in this matter offset by interim earnings from September 18, 2018 to the first day of the oral hearing. The arbitrator retains jurisdiction in this matter for the sole purpose of determining any questions with regard to the remedy provided.

It is so ordered



**Richard M. Humphreys, J.D.
Impartial Arbitrator
Award Dated July 8, 2020**

⁵³ This award includes benefits that would have accrued to the grievant had he remained employed after September 18, 2018 up to the first day of the oral hearing.