

AMERICAN ARBITRATION ASSOCIATION  
CASE NUMBER 75 390 00082 12

IN THE MATTER OF THE ARBITRATION BETWEEN )  
)  
WASHINGTON FEDERATION OF STATE )  
EMPLOYEES, )  
Union ) ARBITRATOR'S  
)  
And ) OPINION AND AWARD  
)  
WASHINGTON STATE )  
EMPLOYMENT SECURITY DEPARTMENT, ) GRIEVANT:  
Employer ) YVONNE MCDONALD  
)

ARBITRATOR: ANTHONY D. VIVENZIO

OPINION AND AWARD DATE: FEBRUARY 19, 2013

APPEARANCES FOR THE PARTIES:

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## **PROCEDURAL HISTORY**

The Washington State Employment Security Department is hereinafter referred to as the “Employer,” or “ESD.” The Labor Market and Economic Analysis branch is hereinafter referred to as the “LMEA.” The Washington Federation of State Employees (WFSE) is hereinafter referred to as the “Union.” Collectively, they are hereinafter referred to as “the Parties.”

The Employer and the Union are Parties to a collective bargaining agreement effective July 1, 2011, through June 30, 2013, hereinafter referred to as the “Agreement.” The Union filed its grievance on October 11, 2011. Following unsuccessful attempts to resolve this matter through the grievance procedures set forth in Article 29 of the Agreement, the Union invoked arbitration under Article 29.3, Step 5. Using the services of American Arbitration Association (AAA), Anthony D. Vivenzio was appointed as Arbitrator. The arbitration hearing was held at the premises of the Union, 1800 Cooper Pt. Road SW, Bldg. 16, Olympia, Washington on October 17, 2012. The Parties stipulated that all prior steps in the grievance process had been completed or waived, except for the Employer’s objection as to the arbitrability (Article 29.7, Election of Remedies) of the grievance. That matter was heard on the same day. During the course of the hearing, both Parties were afforded a full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. A transcript was taken of the proceedings by a duly licensed court reporter. The evidentiary record was closed on October 17, 2012. The Arbitrator received timely post-hearing briefs from both Parties on December 18, 2012. The full record was deemed closed and the matter submitted on December 18, 2012.

## **STATEMENT OF THE ISSUE BEFORE THE ARBITRATOR**

At the hearing, the Parties were able to agree to a statement of the issue to be decided in this matter.

The statement of the issue was as follows:

Did the Employer have just cause for its termination of the employment of Yvonne McDonald on September 16, 2011? If not, what is the appropriate remedy?

## **BACKGROUND**

The mission of the branch of the Employer known as the LMEA is to collect employment and wage data involving employers in the state of Washington. The data is utilized for a number of important purposes, establishing unemployment insurance rates and taxation, and economic trending and planning. The branch relates closely to the federal Bureau of Labor Statistics (BLS) and is responsible for submitting accurate data on a strict quarterly basis. The Washington Federation of State Employees represents employees in various bargaining units within the ESD, including the bargaining unit involved in this matter. The Grievant, a Research Analyst 1, was terminated after coworker complaints to her superiors prompted an investigation of her computer usage. The investigation revealed an amount of Internet usage the Employer found to be non-work-related, excessive, and in violation of Employer policies. This arbitration flows from that termination.

## **PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND WORK RULES**

**From the 2011-2013 Collective Bargaining Agreement by and between the State of Washington and Washington Federation of State Employees (WFSE) effective July 1, 2011 through June 30, 2013.**

### **ARTICLE 27 DISCIPLINE**

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

**ARTICLE 29  
GRIEVANCE PROCEDURE**

**29.3 Step 5 – Arbitration:**

If the grievance is not resolved at Step 4, or the OFM/LRO Director or designee notifies the Union in writing that no pre-arbitration review meeting will be scheduled, the Union may file a request for arbitration. The demand to arbitrate the dispute must be filed with the American Arbitration Association (AAA) within thirty (30) days of the mediation session, pre-arbitration review meeting or receipt of the notice no pre-arbitration review meeting will be scheduled.

**D. Authority of the Arbitrator**

**1. The arbitrator will:**

- a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;
- b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it;

**STATE OF WASHINGTON  
EMPLOYMENT SECURITY DEPARTMENT  
POLICY AND PROCEDURE**

**NUMBER: 1016  
PAGE: 1 OF 8  
DATE: 10/19/06**

**SUBJECT:**

**Employee Conduct**

**...4. Integrity and Economy in the Use of Resources**

- a. Employees are expected to abide by state laws, rules and regulations, and agency policy in the use of telephones, vehicles, internet, mail service, and all state-owned equipment. Department facilities, equipment, materials, supplies, personnel and funds are to be used only for official state business.
- b. Employees are expected to be economical in using agency resources. This includes using their time appropriately;...

**STATE OF WASHINGTON  
EMPLOYMENT SECURITY DEPARTMENT  
POLICY AND PROCEDURE**

**NUMBER: 2009  
PAGE: 1 OF 8  
DATE: 05/01/2002**

**SUBJECT:**

**Use of Agency Telecommunications Technology Systems**

**PURPOSE:**

To set forth the Employment Security Department's (ESD) position regarding the proper business and personal use of agency telecommunications technology resources, including cell phones, by employees, contractors, or any other persons using these resources.

**RISK STATEMENT:**

ESD employees are obligated to conserve and protect state resources for the benefit of the public interest rather than their private interests. Improper or illegal use of ESD telecommunications resources poses serious risk and liability to both the department and the individual employee. These risks include but are not limited to:

- Loss of public trust in ESD/State services;
- Service and performance interference;

Violation of this policy may subject the employee to disciplinary action by the agency. In addition the Executive Ethics Board may impose sanctions against the employee that include reprimand, recommend removal of employee from the position, financial penalty, and payment of damages and investigative costs.

...Occasional and limited (*i.e. de minimis*) personal use of technology resources by ESD employees is permissible if all the following are met:

- There is no cost to the state;
- The use does not interfere with the performance of the employee's official duties;
- The use is brief in duration and does not disrupt or distract from the conduct of state business due to volume or frequency;
- The use does not compromise the security or integrity of state information or software; and
- The use does not violate the state's **Ethics in Public Service** law (RCW Chapter 42.52) or undermine public trust and confidence....

**STATE OF WASHINGTON  
EMPLOYMENT SECURITY DEPARTMENT  
POLICY AND PROCEDURE**

**NUMBER: 2016  
PAGE: 1 OF 8  
DATE: 08/06/2003**

**SUBJECT:**

**Use of Department Information Technology Resources**

**PURPOSE:**

To set forth the Employment Security Department's (department) position regarding the proper business and personal use of department information technology resources, including electronic mail, and the Internet by employees.

**STEWARDSHIP:**

Employment Security Department employees are obligated to conserve and protect state resources for the benefit of the public interest rather than their private interests. The rationale for this policy is the need to maintain public trust and confidence in state services and protect the integrity of state information technology resources and systems: This policy will help limit risk and liability to both the department and the individual employee. Potential risks and liabilities associated with the use of the department's information technology resources include:

- Loss of public trust and confidence in department/state services;
- Service and performance interference;...

**...INFORMATION TECHNOLOGY AS A STATE RESOURCE**

The department's information technology resources are state resources. They may not be used for personal benefit or gain or for the benefit or gain of other individuals or outside organizations. Personal Benefit or gain may include a use solely for personal convenience, or a use to avoid personal expense. Refer to WAC 292-110-010 Use of State Resources and Examples and Frequently Asked Questions for more information. When all of the following conditions are met, department employees may make occasional but limited personal use of the department's information technology resources (excerpts from WAC 292-110-010(3) :

- There is little or no cost to the state;
- Any use is brief in duration, occurs infrequently, and is the most effective use of time or resources;
- The use does not interfere with the performance of the employee's official duties;
- The use does not disrupt or distract from the conduct of state business due to volume or frequency;
- The use does not disrupt other individuals and does not obligate them to make a personal use of state resources; and...

**POSITIONS OF THE PARTIES**

**Position of the Employer**

The Grievant spent an excessive amount of her work time, at taxpayer expense, using her state-owned computer for activities that were not related to her work. For example, she saved non-work-related files and logged on to her personal Hotmail email account on multiple occasions. She spent much of her time on the Internet looking at sites that had nothing to do with her job duties: sites related to entertainment, shopping, violence, racial justice, sex offenders, and other things unrelated to her work duties. This behavior, her misuse of state resources and work time and violation of policies, led to the Employer's terminating her employment. This was a proper disciplinary measure done with just cause. The Employer has policies addressing the Grievant's behavior and warning of the consequences for violations. The Grievant signed checklists referencing these policies showing that she was aware of their existence. Ms. McDonald was given reminders of the need to avoid such use of state resources by

email and during meetings. She had been previously warned about cell phone usage being an inappropriate use of work time. The Employer has an interest in preventing such behavior, as it damages the public trust, wastes taxpayer funds, decreases morale within the office, and risks compromising its computer systems. When the Employer learned of the allegations concerning the Grievant, it performed an investigation that included two separate data polls to examine her computer history of activity. The results of those data polls showed she had misused her computer, a fact admitted to by the Grievant. Her activities were not work-related, and done on the Employer's time, when there was plenty of work to be done. Lastly, the collective bargaining agreement contains, in Article 29.7, an election of remedies clause. That clause precludes relief in this case because Ms. McDonald also filed an EEOC complaint based on the same claims.

### **Position of the Union**

Ms. McDonald's job involved compiling statistics about employers, requiring her to go online to conduct extensive research. Some confusion of the facts presented by the Employer result from the fact that, while Ms. McDonald admits she did read news articles not directly related to her specific job duties, it is difficult to separate what Internet activity involved specific work-related research and what was personal. Contrary to the Employer's assertion, Ms. McDonald did not have plenty of work to do, and she was begging her Employer to give her more assignments because she had completed all of her assigned work. At times, she would sit at her desk for days on end with no assignments pending. She knew that it was okay for her to access the Internet as part of her job, and believed that there was nothing wrong with her reading news articles. The alternative was to sit and twiddle her thumbs. None of the sites were inappropriate, or could have embarrassed the Employer. Ms. McDonald freely admits that she would read news articles online or read her email when there was no work to do. She was never warned that she wasn't doing work she was supposed to be doing. All of her job evaluations consistently stated that she completed all work assigned to her in a timely fashion.

She was authorized under her job description to use the Internet for work. While sites she looked at had nothing to do with her specific job assignments, her supervisor cultivated a culture of reading articles, for example, in the Wall Street Journal, for information about economic trends. Her activities did not compromise work that she should have been performing. With regard to Article 29.7, discrimination on the basis of race forms no part of the case before the arbitrator. The only presentation being made is argument involving whether or not just cause existed to terminate Ms. McDonald. Finally, her voluntary presence in the arbitration hearing means she has elected her remedy.

## **DISCUSSION**

### **Article 29.7 of the Collective Bargaining Agreement**

Before proceeding to the merits in this matter, it is necessary to resolve an issue raised by the Employer concerning the Union's ability to proceed to arbitration in this matter, citing Article 29.7 of the Agreement. In pertinent part, the Article provides that:

Pursuit of a claim before the Equal Employment Opportunity Commission (EEOC)... constitutes a waiver of the right to pursue the same claim to arbitration under this Article.

The Employer argues that the Grievant's filing of a complaint with the EEOC, alleging that its failure to observe progressive discipline prior to her termination was due to her race and in retaliation for protected activities, was a pursuit of such a claim as to come within the ambit of the Article. The Union argues that there is no overlap between the filing of that administrative proceeding and this arbitration, and that they have elected their remedy by proceeding here in arbitration. At the hearing, the Union's presentation, as they had represented in their opening statement, contained no evidence or reference to racial discrimination. Asserting the preclusion of a claim by an opposing party is an affirmative defense in arbitration, with the burden of proof for the contractual interpretation supporting that assertion resting with the party seeking preclusion, here, the Employer. The required elements of proof are 1) an identity of the thing sought for in both actions; 2) identity of the cause of action; and, 3) an identity of the



parties. *Elkouri, Sixth Edition, p. 387.* Item # 3 being clearly satisfied here, the other two items bear discussion. A “claim” consists of two parts: 1) A “cause of action,” challenging a right wrongfully withheld, a legal capability to require a positive or negative act of another; A “cause of action” is further defined as what in the law justifies a tribunal to render a decision and grant relief; facts necessary to support a right, or a state of facts to which law, sought to be enforced against a person, applies; and 2) What one is seeking as a remedy from a tribunal. *Black’s Law Dictionary.*

The “Particulars” stated within the “Charge of Discrimination” filed by the Grievant and on June 1, 2012, state:

I, the undersigned, charge the Employer identified above with engaging in unlawful employment practices that violate Title VII of the Civil Rights Act of 1964...prohibiting retaliation, by signaling (sp) me out for investigation for my use of computer network services and by wrongfully terminating my employment on September 16, 2011 prior to any progressive discipline on the bases of my African-American race and in retaliation for opposing employment discrimination.

The remedies one obtains if successful in their charge before the EEOC are described as follows:

...the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred. The types of relief will depend upon the discriminatory action and the effect it had on the victim. For example, if someone is not selected for a job or a promotion because of discrimination, the remedy may include placement in the job and/or back pay and benefits the person would have received. The Employer also will be required to stop any discriminatory practices and take steps to prevent discrimination in the future. A victim of discrimination also may be able to recover attorney's fees, expert witness fees, and court costs. Compensatory and punitive damages may be awarded in cases involving intentional discrimination based on a person's race, color, national origin, sex (including pregnancy), religion, disability, or genetic information. Compensatory damages pay victims for out-of-pocket expenses caused by the discrimination (such as costs associated with a job search or medical expenses) and compensate them for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life). Punitive damages may be awarded to punish an Employer who has committed an especially malicious or reckless act of discrimination. *From EEOC website.*

The grievance, filed on October 11, 2011, alleges as its basis that the Employer “violated, misapplied and/or misinterpreted: (Agreement Article) 27.1,” stating as its facts:

The agency terminated the employment of the Grievant on September 16, 2011, without just cause, in violation of CBA article 27.1. The level of discipline is inappropriate for the

circumstances, and there are concerns with the validity of the investigation, and the criteria the agency used to determine the level of discipline.

The Union seeks as its remedy:

Reinstatement for her position as a Research Analyst 1 in LEMA, or another division in the same geographical area, restoration of all lost pay and other benefits, the Grievant be made whole, any other remedy agreed upon by the agency and the union.

The “claims” brought in each tribunal possess significantly different elements as their basis. Before the EEOC, statutory provisions addressing discrimination are paramount. Contractual concerns are secondary at best. The citation of lack of “progressive discipline” is asserted in the EEOC complaint as an element of the alleged discrimination, with discrimination standing as the core evil. By contrast, an assertion of a lack of observance of progressive discipline is core to, and may itself alone, be dispositive of the adjudication of a grievance claiming a contractual violation of lack of just cause for a termination. Similarly, while there is similarity in areas of remedy between the two tribunals, the EEOC applies federal law to prescribe an array of remedies that are either unavailable or unusual to arbitrators, e.g., injunctive relief, certain fees, costs, compensatory and punitive damages, and the like. Arbitrators applying arbitral practice within a contractual context considering just cause may consider front pay, restricted or alternative work assignments, and other tailored remedies not countenanced by the EEOC and federal law. Based on the foregoing, I find that Article 29.7, upon the particular facts of this case, does not impose a bar to the arbitration of the grievance at issue.

### **Just Cause Analysis**

It is well established in labor arbitration that where, as in the present case, an Employer's right to discipline an employee is limited by the requirement that any such action be for “just cause,” the employer has the burden of proving that the suspension or termination of an employee was so supported by the evidence upon which it based its action. Therefore, the Employer here had the burden of persuading the Arbitrator that its termination of the Grievant, Yvonne McDonald, was for just cause.

"Just cause" consists of a number of substantive and procedural elements, but their essence may be summarized as follows: Primary among its substantive elements is the existence of sufficient proof that the grievant engaged in the conduct for which he or she was terminated or disciplined. The second area of proof concerns the issue of whether the penalty assessed by the Employer should be upheld, mitigated, or otherwise modified. Factors relevant to this issue include a requirement that an employee knows or is reasonably expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or termination, the existence of a reasonable relationship between an employee's misconduct and the punishment imposed, and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

These considerations were summarized, and then popularized, in what has become a commonplace in labor arbitration, known as the "Seven Tests," pronounced by Arbitrator Carroll Dougherty, in Enterprise Wire Co., 46 LA 359 (1966), and set forth below.

I have studied the entire record in this matter carefully and considered each argument and authority cited in the Parties' briefs. That a matter has not been discussed in this Award does not indicate that it has not been considered. The discussion which follows will center on those factors which I found either controlling or necessary to my decision.

I begin my analysis with a review of the work processes in which the Grievant was engaged. I find the following to be an accurate portrayal of the work of the Labor Market Economic Analysis branch of the Employer in which the Grievant was engaged based upon evidence adduced at the hearing:

### **The Work**

The overall mission of LMEA branch is to collect employment and wage data from employers. This data is used to inform governmental economic responses such as taxation. A master list of employers is broken up and shared among branch analysts, of which the Grievant was one. Among their

tasks is processing quarterly Multiple Worksite Reports (MWR) solicited by ESD and completed by Employers. These reports should show all the work activities and locations for a given Employer. Edits are performed on the information received to determine the accuracy of information and consistency with an Employer's history of reports. When wage or employment data is received that is outside prescribed parameters (problem accounts) a list of those accounts are sent to the assigned analyst who is then to respond to the edit. Editing involves setting parameters to be applied to data, resulting in, for example, an error code of "127" for abnormal wages, suggesting errors in accounts; the analyst goes through every assigned account with a given error code. For the analysts, including the Grievant, handling multiple accounts, balancing can be an issue. An analyst may have reported one sum for the Master Account total, but their individual entries of an Employer's locations and employment data might add up to a different amount, thus requiring "editing" the account. The job of an analyst in the Grievant's position is to perform an initial review of reports submitted by employers to check consistency with existing data. Later, a Multi-Annual Refile Survey is conducted to identify and gauge changes in individual employer activity, consistent with industry codes given to analysts for entry. There are quarterly deadlines for submitting final and accurate data to the federal Bureau of Labor Statistics. The Grievant's job-related activities and duties are found in the Employer's Performance and Development Plan Expectations, *Er. Ex. 7, for the period 9/1/2010 to 8/31/2011*, and the Employer's Position Description Form, *Er. Ex. 6, Dated March 16, 2011*.

Having reviewed the subject work process, I now consider whether there was just cause for the Grievant's termination, considering the Grievant's actions in light of his working environment and subsequent events and procedures. In so doing, I refer to the "Seven Tests" as a basic framework for his analysis:

**1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?**

The answer to this question is “yes.” Employer policies numbers 1016, 2009, and 2016 set forth detailed expectations for employee conduct and the use of technology systems including the Internet. Employees are expected to be economical in using agency resources, including using their time, appropriately. *Policy 1016, Er. Ex. 2, Tab F.* Employees are obligated to conserve and protect state resources for the benefit of the public interest rather than their private interests. *Policy 2009, Er. Ex. 2, Tab G,* states that, “Violation of this policy may subject the employee to disciplinary action by the agency.” This policy includes email among the Employer’s resources that are to be conserved and utilized for the public interest. There is a *de minimis* allowance for usage where there is no cost to the state; the use does not interfere with the performance of the employee’s official duties; the use is brief in duration and does not disrupt or distract from the conduct of state business due to volume or frequency; the use does not compromise the security or integrity of state information; and, the use does not violate the states Ethics in Public Service Law or undermine public trust and confidence. A third policy reiterates the expectation of utilizing Employer resources for the benefit of the public interest, referencing electronic mail and the Internet. *Policy 2016, Er. Ex. 2, Tab H.* These resources may not be used for personal benefit, which may include use solely for personal convenience. Employees may, however, “make occasional but limited personal use” of such resources when such use poses “little or no cost to the state...is brief in duration, occurs infrequently, and is the most effective use of time and resources... does not interfere with the performance of the employee’s official duties... does not disrupt or distract from the conduct of state business due to volume or frequency, and does not disrupt other individuals.” The policy goes on to state in pertinent part, “violation of this policy may subject the employee to disciplinary action by the department.” The Grievant acknowledged by signature to a series of “Required Policies” lists over a number of years that she reviewed these policies on-line, or had been provided with a copy of the policies and procedures, discussed these policies with her supervisor or manager, and asked any questions. Further, she attested that she read, understood, and agreed to adhere to the standards set forth in each of these policies and procedures.

**2. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the employee?**

The answer to this question is, "Yes." Policy 1016 speaks to cooperative relationships with coworkers...making appropriate use of time and resources (defining) standards of conduct that comply with RCW 42.52 Ethics in Public Service, and notes that "Teamwork is critical to the agency's success. Employees are expected to constructively participate in their work teams..." Employer Policies 2009 and 2016 are concerned with the risk and liability to the Employer and to individual employees from the improper use of its resources, including loss of public trust in ESD/State services, and service and performance interference. The Employer's policies, aimed at promoting and preserving these values, appropriate use of time and resources, teamwork, the avoidance of liability, maintenance of the public trust, and consistent service and performance, are reasonably related to the orderly and efficient and safe operation of its business and to the performance it properly expects of an employee.

**3. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?**

The answer to this question is, "Yes." The essence of this test is to ensure that the Employer, rather than relying upon hunch or rumor, utilized the sources of information available to it, weighed that information in good faith, and provided an opportunity for the Grievant to be heard, before making its decision regarding discipline. In this case, management first received information from several people, Grievant's coworkers and superiors, concerning the Grievant's activities and images viewed on her computer screen at random times, coupled with issues concerning work product. *Tr. p. 137.* A "data pull" performed in 2010 revealed little, if any, non-work related activity by the Grievant. Additional reported observations of the Grievant's activities prompted a second, more intensive "data pull" in July of 2011, the results of which formed the basis of the Employer's decision to terminate the Grievant. By letter of August 2, 2011, the employer notified the grievant that it was considering taking disciplinary action, indicating, "The purpose of this letter is to provide you an opportunity to respond to these

allegations, and to present any other information you believe should be considered.” The letter set a pre-disciplinary meeting and confirmed to the Grievant her right to have a union representative attend the meeting. In sum, receiving information from people in the Grievant’s work environment, commissioning an investigation and analysis of her computer usage, and providing an opportunity to be heard with a union representative present, represent an appropriate effort to discover whether the Grievant did violate a management rule.

#### **4. Was the Employer’s investigation conducted fairly and objectively?**

The answer to this question is, “Yes.” Witnesses Forbord, Royston, Webster, Lindley and Weeks, interviewed by the Employer and testifying at the hearing, relayed incriminating information concerning the Grievant’s work habits and activities, but none registered personal dislike or other bias that emerged at the hearing. The Grievant was involved in the investigatory process, and was given an opportunity to be heard in a pre-disciplinary *Loudermill* hearing at which she was afforded the right to Union representation. The Information Technology Specialist who examined the Grievant’s computer was somewhat familiar with her name, and “may have had Yvonne McDonald in the training” he has participated in, *Tr. p. 75*, but he had not had any personal contact with her. A flaw in the analysis of the “data pull” performed on the Grievant’s computer explored by the Union concerned the methodology by which the witness determined whether or not a website visit was work related. No one had told the witness, for example, that the company, “Supercuts,” was among those assigned to her for research and analysis. No one had given the witness a list of her assigned companies, whose websites would be work-related. *Tr. pp. 104, 105*. As for time spent, “feeds” populate automatically, and do not register user action, and thus, time. Also, a “click” does not accurately reveal the time spent on a given screen image. There is no way to estimate time, and 15 clicks could involve 60 seconds. However, those factors bear weight only to the extent that an exact number of work hours spent in non-work-related computer activity and an exact list of prohibited site visits is required to support the Employer’s

discipline of the Grievant. An exact quantification is not a requirement as opposed to a reasonable assessment of activity.

**5. At the investigation, did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?**

The answer to this question is, “Yes.”

**The Charges:**

In responding to this item, it is appropriate to first clarify the allegations facing the Grievant.

The Employer’s letter of dismissal cites violations of:

Policy 1016, *Er. Ex. 2, Tab F* provides that employees are expected to be economical in using agency resources, including using their time appropriately. They are expected to abide by... agency policy and the use of... the Internet. Department... equipment is to be used only for official state business.

Policy 2009, *Er. Ex. 2, Tab G*, likewise emphasizes conservation of state resources for the benefit of the public interest and states that, “Violation of this policy may subject the employee to disciplinary action by the agency. In addition the Executive Ethics Board may impose sanctions against the employee that include reprimand, recommend **removal of employee from the position**, financial penalty, and payment of damages and investigative costs.” This policy includes email among the Employer’s resources that are to be conserved and utilized for the public interest. There is a series of de minimis allowances set out in the policy.

Policy 2016, *Er. Ex. 2, Tab H*, reiterates the expectation of utilizing Employer resources for the benefit of the public interest, referencing electronic mail and the Internet. *Policy 2016, Er. Ex. 2, Tab H*. These resources may not be used for personal benefit, which may include use solely for personal convenience. A series of de minimis allowances are set out in the policy, which states that violation of the policy may subject the employee to disciplinary action by the department.

**Evidence**

The central area of contention is the extent of the Grievant’s non work-related computer use. Argument was had concerning the amount of time spent in non-work-related activities. At the hearing, the presentation by the Employer’s forensic investigator, and it’s cross-examination were, as one would expect, detailed, lengthy, and technical. At the conclusion of the hearing, by way of encouraging the Parties to clarify and distill these presentations to the extent possible, I urged them to “pretend I might show it to an IT specialist.” Those comments were by way of suggestion, only, and no reference to any outside source was made in the course of preparing this Award. A comprehensive presentation of the



witness's testimony and forensic report and the technical inquiries posed by counsel are beyond the scope of this Award. What follows is a brief summary.

Witness Giachetti, the IT specialist, had conducted a data pull for a 29 day period in 2010 and found little, if any non-work-related activity, *Tr. p. 75*. In the course of the July, 2011 examination of the Grievant's usage, 21,638 "feeds" to 178 various apparently non-work-related sources were found. A feed has two facets. A person might want to continue to go to a site on a regular basis (subscribe) but not capture that as a "favorite." On website pages there are links to Facebook and other kinds of programs, including a little icon that is a feed. Clicking on a feed puts it in the user's feeds tab in Internet Explorer. Then the user can go to those feeds when they want to look at those sites. Going to a site may result in that site populating up to 4 to 6 other kinds of activities that represent material related to that site. *Tr. p. 85*. When content is updated from a site of interest to the user, it is sent by feed to the user. Feed-related findings for the Grievant included Reproductive Justice, Happiness, Tea Party, and Yglesias, among a sample feed count of 1227. In addition to feeds, actual site visits were detected, including 389 visits to a personal Hotmail account. Of note is the list of actual visits to Internet sites generated by the examination. Some of these sites required the Grievant to log-in in order to obtain access. A number of sites the Grievant visited possessed themes of violence, sex offenders, or racial and discrimination issues. A small illustrative sampling includes: *Level III Sex Offender Registers; Tumwater Level III Sex Offender; Why Is It so Hard to Bring Rapists to Justice; Two Shot at Spanaway Area; Fighting the Culture Wars with Hate, Violence and Even Bullets: Meet the Most Extreme of the Radical Christians; Molestation Suspect Found Dead in Motel*. These were among 237 like-themed "hits." Race and discrimination themed hits numbered 1425, and included titles such as, *Debunking the Affirmative Action Myth; Geronimo Pratt Noted Black Panther, dead at 63*. Also found was an analysis of ESD hires, by race, for 583 hires between August 1, 2009, and March 16, 2010. The significance of "clicks" was explored at the hearing, clicks representing actual visits to websites. Clicks do not indicate actual time spent on a screen image. Witness Giachetti estimated that the Grievant's computer averaged 15

clicks per day that were not work related. He acknowledged that 15 clicks could be registered in 60 seconds if a user was skimming the material. He opined that about 44% of the Grievant's activity related to Internet Explorer was non-work-related. In determining work-related versus non-work related activity, the witness made assumptions based upon what he "believed labor market information people do." He had not been informed that, example, the firm Supercuts was among the Grievant's assigned companies. He noted that the number of accumulated visits registered in his examination does not represent the exact number of visits to a site, and is more indicative of general activity. A great number of images from the Grievant's computer screen, 26 pages' worth, were saved only on July 6, 2011, and had, by any reasonable view, no connection to the Grievant's work. A final distinction was made between "hits" referenced in the witness's report, and "clicks": 6 hits doesn't mean one visited a site 6 times. Visiting once for 16 seconds could generate 6 hits. *Testimony, Giachetti.*

As noted above, this aspect of the Employer's investigation was not perfect in terms of being able to establish with certainty the number of hours in a given period that the Grievant was engaged in non-work-related Internet activity on her computer. Making allowance in the Grievant's favor for areas of inexactness in aspects of the investigator's analysis, and allowing for sites that were arguably related to the Grievant's work, e.g., Supercuts, and firms assigned to the Grievant, and the Wall Street Journal as a source complementary to her work, we are still left with a substantial amount of activity that, considering the time consumed to focus one's attention on a computer and enter its world, "browsing" for what is of interest, acquiring and recording interests in history or feeds, logging-in to access certain sites, including personal email, speaks for itself of a great amount of time that the Grievant spent on her Employer's computer on non-work-related activity. This conclusion is lent support from the Grievant, who, in earlier statements to the Employer in the course of investigation, indicated that everything she viewed except crime was work related. She believed that any research, whether specific to the job or not, was work-related because she was a research scientist. *Er. Ex. 3, Tr. p. 192, Testimony, Lindley.* It is also supported by testimony from a coworker seated close to the Grievant that he frequently saw a lot

of political sites, an Afro-American political site requiring a login, and a site involving sodomy laws during the period from January through early August 2011. Half of the time when he noticed her computer screen, the Grievant was not on a work-related site. *Tr. 50-52.*

Considerable evidence was presented by the Employer establishing the scope of duties and activities expected of the Grievant in the course of her employ. In addition to the Employer's Performance and Development Plan Expectations, *Er. Ex.7, Dated September 29, 2010*, and the Employer's Position Description Form, *Er. Ex. 6, Dated March 16, 2011*, credible testimony was presented by the Grievant's supervisors and coworkers at the hearing. In sum, they testified that the scope of the Grievant's position and associated research was limited to the companies to which she was assigned. By the end of 2009, the Grievant's work had evolved from various special projects to more routine work, and by the end of 2009, the Grievant was doing work associated with the Quarterly Census of Employment and Wages (QCEW). Specific, not general, research was required concerning particular companies, those assigned to the Grievant, to allow completion of the QCEW work of the Labor Market and Economic Analysis Branch of the ESD in its relationship with the Federal Bureau Of Labor Statistics. *Tr. pp. 31,149-151.*

### **Points Raised by the Union**

Among the factors raised by the Union in defense of the Grievant's conduct is boredom, that is, that the Grievant often did not have enough work assigned to her. She often requested more work to no avail. She would only browse the Internet when she had completed her work, as the alternative was idleness. A Performance and Development Plan Evaluation was signed by the Grievant's supervisor, Tim Forbord, on August 20, 2010, and by the Grievant on September 29, 2010. *Un. Ex. 4.* That evaluation describes the Grievant's editing duties as "completed timely and as assigned using organizational skills." A note therein cites Mr. Forbord's short tenure as the Grievant's supervisor and calls for a more timely and thorough evaluation by the next evaluation cycle, November 2011. In this

evaluation, the Grievant, in comments, requests an accountable workplace that provides equal and fair employment promotional and training opportunities, and abides by fair labor practices. She goes on to request career development opportunities and the opportunity to use her technical public administration skills and policy review experience, and timely response to her requests for reasonable accommodation, to have an equal opportunity to receive a workstation chair modification. The Employer's Performance and Development Plan Expectations for the period September 1, 2010 to August 31, 2011, lays out a substantial menu of its expectations of the Grievant in Part I: Performance Expectations subsection: Key Results Expected, that is too lengthy to be included here.

The content of the Employer's documentation is consistent with the credible testimony of the Grievant's supervisors and a coworker who testified at the hearing, tending to show that:

- Even if multiple worksite reports were completed and balanced, there were other projects to complete;
- QCEW involves a lot of upkeep which is extracted and prioritized;
- Database addresses of employers come from several different sources. Addresses are geocoded which often mismatches; several thousand accounts may have to be examined to determine the proper county location of a given business;
- The BLS unit may ask that hundreds of accounts' industry codes, the North American Industrial Classification System (NAISC), be checked and kept up-to-date;
- There are 250,000 accounts and every quarter they must be edited;
- If there appears to be no work, it is customary to help other analysts with deadlines;
- There's always work, including rechecking data;
- If an employer has not reported in a while, perhaps we're just getting estimates of data so, call the company to verify; analysts have been instructed that if they need more work to start calling such company accounts that are not reporting;
- Analysts are made aware of the fact that they may have material to fix;
- The Grievant frequently had accounts that needed to be "fixed."
- An analyst would become aware of additional work that needed to be done when reviewing the Master compilation of information to compare with the totals of their reports.

*Testimony Forbord, Royston, Webster; Tr.pp.. 38, 68, 70.*

Witness Webster provided an apt summary of the available work situation in the following testimony excerpted as follows:

... They will find work themselves if they have particular accounts. People working on the multiple worksite reports have their own accounts that they are responsible for. So these can always be looked at in more detail. We go through the edits more than once; two or three times.

So the people responsible for editing can always,... start over from the beginning and go through the edits. There is plenty of work out there without being assigned. *Tr. p. 159.*

A coworker stationed closely to the Grievant's workstation related the Grievant's absence from her desk or spending time on her phone with personal calls half of the time. When she didn't consistently "fix" her reports, her coworker would email her, with a copy to the supervisor, that the accounts had not been fixed. When the witness received an account for an editing deadline the day before due, it meant that corrections had not been done by the Grievant for two months. *Tr. pp. 50, 65, 70.* The coworker credibly testified that the Grievant's conduct created additional work for him that should have been completed by the Grievant within known time limits to satisfy BLS deadlines.

The Grievant testified that: she was never told that she was not meeting expectations for the amount of her work production or that she was failing to complete assignments. When she felt she'd finished her work she'd ask for more, and if there was nothing to do, she would read articles online that interested her. She believed that she never used the Internet for anything for which she was not authorized. She was never told not to look at articles that interested her, and if anyone had told her not to look at Internet material not specifically related to her job assignment, she would have said "Okay." As to visiting sites dealing with racial issues, the Grievant testified that she had been asked to serve on a diversity committee and had made public disclosure requests for information. Last, the Grievant viewed a supervisor's suggestion to staff to read the Wall Street Journal as a way to keep abreast of economic issues as opening the door to her further research endeavors. *Tr. pp. 181-194.*

The Grievant appears to argue that if she believed that she had completed her work on any given day, then there was no work-related alternative available to her other than non-work-related conduct. The bulk of previously discussed testimony contradicts this position. There is evidence that the Grievant did request work from time to time. The Employer introduced testimony and documentary evidence tending to show that they attempted meet her concerns with a series of ongoing meetings and coaching. *Tr. pp. 33-38, 147-148.* Moreover, a number of the Grievant's emailed requests were met with her

supervisor's emailed responses offering direction and noting specific areas of work that needed correction or updating. *Er. Ex. 11*. Even without specific direction, it was shown that an expectation within the unit was that an employee would make themselves available to help coworkers or research "non-reporter" employers, or recheck their work.

As to assertions that she believed that she never used the Internet for anything for which she was not authorized, or was never told not to look at articles that interested her, and, if told not to look at Internet material not specifically related to her job assignment, she would have said "Okay." I find that the conduct with which the Grievant is charged is of the kind such that an employee is deemed to "know or should have known" discipline would be a probable result. The Grievant is a bright, well-educated, person, possessing an extensive fund of knowledge and interpersonal and situational sensitivities and skills. I am not persuaded that she did not know her conduct was prohibited or could lead to discipline, including the possibility of termination, or believed that others had the responsibility to inform her of the impropriety of her conduct. The matter of participation in a diversity committee as excusing visits to sites dealing with racial issues was not so developed in the hearing as to base an opinion of its worth. Finally, the Grievant's supervisor's suggestion to view the Wall Street Journal cannot reasonably be expanded to include the conduct here described.

Based upon the foregoing, I find that the Employer has established by a preponderance of the evidence that the Grievant, over a period of months, spent an excessive amount of time, using the Employer's resources, on non-work-related activity, and so did violate its employment policies, specifically, policies 1016, 2009, and 2016, the content of which, and the consequences for their violation, were known to the Grievant.

**6. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?**

The answer to this question is, "Yes."

At the hearing, the then director of the Labor Market and Economic Analysis branch who signed

the September 16, 2011, letter terminating the Grievant, Greg Weeks, testified that three other employees had also been dismissed for their misuse of computers on the Internet. One incident involved visits to pornographic sites, one involved usage for private gain, and a third was for continued shopping online. These incidents were not contradicted by the Union, which made no allegation of disparate treatment among unit employees. The core issue basing discipline in all of these cases, and the one here at issue, is misuse of the Employer's resources, including time, and use for personal convenience.

**7. Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in their service with the Employer?**

The answer to this question is, "Yes."

The goals sought to be protected by the Employer in its promulgation of its policies, and other legitimate Employer interests, include preserving the public trust, exercising appropriate stewardship of public funds, avoiding risk of damage to public resources, avoiding serious risk and liability to the department and to individual employees, and maintaining service and performance. While there was discussion concerning the number of non-work-related site visits, or the uncertainty of the amount of time spent by the Grievant on those activities, the Employer's core factor for termination in this case was excessive time spent on those activities. While there is no absolute threshold for what constitutes an "excessive" amount of time, or an exact calculation of the amount of time spent by the Grievant, a line must be drawn, a line reasonable to the Employer and to an employee. I find that, even indulging reasonable discounts for time spent on arguably relevant websites, and the uncertainty of time calculations, by the sheer quantity and quality of activity, over a six month period, the Grievant egregiously crossed that line. The Employer's legitimate expectations were reasonable and serious, given its mission, and the Grievant's violations were correspondingly serious.

This is a case of repeated violations over a six month period, where the Grievant appears not to have grasped the seriousness of her conduct, calling into question her capacity for rehabilitation, and where similar discipline has been meted out to similarly situated employees. In such cases, an

employee's favorable record does not necessarily serve as a bar to termination, and here it does not.

Arbitrator Whitley McCoy has stated,

The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved-in other words, where they has been abuse of discretion.

In keeping with the Employer's determination to separate the Grievant from their employment, I will fashion a remedy honoring that determination. Additionally, I will take into account the Grievant's time with the ESD and past performance for the purpose of providing a remedy that confirms the Grievant's separation from the Employer, but provides an option that will not unduly encumber her prospects of future employment.

### **CONCLUSION**

Based upon all of the evidence surrounding the conduct of the Grievant, and the subsequent response by the Employer, and applying the "just cause" standard of review bargained by the Parties, I find that the Employer has established by a preponderance of the evidence that the Grievant committed the offense for which she was disciplined. I find that discipline, even severe discipline, was warranted in this case, and that termination of the Grievant's employment was with just cause. Given the Grievant's period of employment with ESD, and some favorable past performance, I will uphold the termination with an option in the Grievant to convert the termination to a voluntary separation from employment. I will enter an award consistent with the above analysis and conclusions.



**AMERICAN ARBITRATION ASSOCIATION  
CASE NUMBER 75 390 00082 12**

**IN THE MATTER OF THE ARBITRATION BETWEEN )**  
**)**  
**WASHINGTON FEDERATION OF STATE ) ARBITRATOR'S**  
**EMPLOYEES, )**  
**Union ) OPINION AND AWARD**  
**)**  
**And ) GRIEVANT:**  
**) YVONNE MCDONALD**  
**WASHINGTON STATE )**  
**EMPLOYMENT SECURITY DEPARTMENT, )**  
**Employer )**

Having heard or read and carefully reviewed the evidence and arguments in this case, and in light of the above discussions, Grievance No. 75 – 390 – 00082 – 12 is dismissed, save for the option provided in Item 2, below:

1. The Employer had just cause to terminate the Grievant, Yvonne McDonald on September, 16, 2011, consistent with Article 27.1 of the collective bargaining agreement between the Parties and associated work rules and policies.

2. The termination of the Grievant, Yvonne McDonald, may be converted to a voluntary separation from employment, and all of the records of the Employer, kept wherever and however, shall be made so to reflect, at the option of the Grievant, to be exercised in writing within 20 calendar days of the date of this Award.

RESPECTFULLY SUBMITTED this 19th day of February, 2013.

\_\_\_\_\_  
Anthony D. Vivenzio, Arbitrator