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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1748**

State of Minnesota,
Department of Corrections,
employer,
Relator,

vs.

Steven Hammer,
Respondent,

Bureau of Mediation Services,
Respondent

**Filed June 11, 2018
Reversed
Worke, Judge**

Bureau of Mediation Services
File Nos. 17-VPO-0521, 17-PG-0350

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Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Worke,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Relator Minnesota Department of Corrections (DOC) challenges an arbitrator's order requiring it to reinstate respondent to employment. Because the arbitrator erred in determining that the DOC lacked just cause to terminate respondent, we reverse.

FACTS

In December 2011, respondent Steven Hammer began serving as warden at Minnesota Correctional Facility (MCF)-Rush City (RC). In 2015, Hammer transferred to become warden at MCF-Stillwater. In August 2016, the human-resources (HR) director at MCF-RC, reported to a deputy commissioner that Hammer engaged in inappropriate behavior during a meeting with an employee when Hammer was at MCF-RC.

According to the HR director, in April 2014, she, Hammer, and the employee met to discuss a harassment complaint that the employee had filed. Hammer "snapped," called the employee "a f-cking worthless employee . . . [and] a bully," and tore up the complaint, saying "this is what I think of your complaint. It is not worth the paper it is written on." The HR director reported Hammer's conduct to her supervisor, who reported the incident to Hammer's supervisor at the time. Hammer also called his supervisor after the meeting and told him that it did not go well and that he "lost his temper." Hammer's supervisor was unaware of the allegation that Hammer tore up the complaint.

The HR director also reported to the deputy commissioner that other employees documented additional instances of Hammer's inappropriate behavior. The HR director's report was forwarded to Hammer's supervisor. During a preliminary review, Hammer's

supervisor spoke with Hammer's former executive assistant who had administrative rights to Hammer's state email account. The executive assistant reported that she started collecting some of Hammer's emails after noticing inappropriate emails. Several emails exchanged with females contained sexual content. For example, Hammer sent an email to a female asking, "Face time naked?" Hammer responded to a female asking if he would make her his secretary, "HmMMM secretary? I'm thinking naughty thoughts." He sent an email to another female stating, "Friendship and naked pics is a good start." In response to an email from a female asking Hammer, "Your what misses me?" he replied, "Head heart body penis not necessarily in that order." Hammer also engaged in an email exchange with a female arranging a "nooner," a meeting that he was "very excited" about.

Two emails exchanged with male employees also contained sexual content. In response to an email that Hammer received from a male employee complimenting his personality, Hammer replied, "You think that's good you should see me naked." In an email exchange with a male correctional officer (CO) who had been injured on the job, the CO stated, "My jaw hurts I feel like a pussy now," to which Hammer replied, "There's nothing about you that's pussy except when you're getting some."

The executive assistant also provided emails that were not sexual in nature. In these messages, Hammer disclosed private information about employees to a female MCF-RC employee. For example, regarding a male employee, Hammer stated, "I think I might have a suspension waiting for him." Hammer also sent an email disclosing an employee's plan to cancel a vacation, he forwarded the email exchange with the CO who had been injured

on the job, and sent an email explaining what transpired during a meeting with three employees.

The MinnCor Industry Director at MCF-RC, who is part of the warden's executive team, also documented Hammer's inappropriate behavior. The MinnCor director reported an incident when Hammer looked inappropriately at a young female intern, and asked the MinnCor director if he thought the intern was good looking. The intern was Hammer's executive assistant's daughter. Hammer's comment bothered his executive assistant, and her daughter stated that the incident was "a little creepy." The executive assistant did not raise the issue with Hammer at the time, because she did not know how to address it. The MinnCor director also recalled an incident when Hammer showed him a photo of a woman and asked, "How would you like those long legs wrapped around you?" In the fall of 2014, the MinnCor director discussed Hammer's inappropriate behavior with Hammer's supervisor.

An examination of all relevant information led to the decision to conduct an investigation into Hammer's conduct. An investigator reviewed documents and forensic data from Hammer's state devices, including his cellphone and computers. The investigator recovered a Word document that related to a request from the Minneapolis Police Department (MPD) regarding a background investigation on a former female employee. Although this request was to be completed by HR, Hammer emailed a response, indicating that the former employee left the DOC in good standing when she had actually been non-certified during her probationary period and had been reprimanded for making sexually inappropriate comments to a coworker. The investigator also discovered that

Hammer had forwarded a female MCF-RC employee information about an offender who was assaulted. Hammer also sent this female employee an email related to the termination of an employee, indicating that the termination was due to alcohol use.

The investigator also received information that Hammer had testified at a lieutenant's arbitration hearing, supporting the lieutenant's ten-day suspension. Following the hearing, however, Hammer sent the lieutenant a text message stating, "Hard day. I hope you get your 10 days back." After the arbitrator reduced the suspension, Hammer sent a text message to the lieutenant congratulating him.

The investigator interviewed several individuals, including Hammer. Hammer revealed that he experienced difficulties with the HR director. Hammer recalled the meeting in 2014 with the employee, and reported that the employee was trying to intimidate him and, at one point, he was concerned that the employee was going to punch him. Hammer denied using profanity or tearing up a document, but admitted that he called the employee a bully. The investigator concluded that Hammer "engaged in abusive, intimidating and disrespectful ways toward employees."

Hammer admitted to sending and receiving the emails containing sexual content and conceded that—although the emails to the male employees were either a joke or not offensive to the receiving party—the content of the emails was inappropriate and in violation of DOC policy. Although Hammer denied looking at the young female intern inappropriately, the investigator concluded that Hammer "engaged in inappropriate and sexually explicit communications (using DOC accounts), and gestures with employees and others."

Hammer admitted to receiving a background-investigation request from the MPD, but reported that he did not recall completing or submitting it to the MPD. The investigator concluded that Hammer falsified an employment reference based on the Word document and the fact that the employee worked for Hammer at the time she received a reprimand.

Hammer admitted to corresponding through his state email account with a female employee, explaining that she was his “personal support person.” Hammer explained that he did not reveal confidential information, however, because the female employee was a union representative and was independently aware of personal situations surrounding the individuals mentioned in the emails. The investigator concluded that Hammer conducted himself in an unprofessional manner by releasing private information about staff and offenders.

Hammer admitted to sending a text message to the lieutenant. Hammer stated that he had recommended a one-day suspension for the lieutenant, but the suspension was increased by leadership. Hammer said that he testified at the arbitration hearing in support of the ten-day suspension after being made aware of the rationale behind it. Hammer stated that he sent the text message to support the lieutenant because the lieutenant appeared upset at the hearing. The investigator concluded that Hammer “had inappropriate communication with a staff member concerning a discipline related arbitration process.”

On October 19, 2016, Hammer was terminated for cause, in accordance with Minn. Stat. § 43A.33 (2016), for violating the DOC’s policies related to personal code of conduct, respectful workplace, sexual harassment, electronic communications, and personnel files.

Hammer was informed that his “actions resulted in a breach of the trust and confidence that are required for [his employment] positions.”

Hammer appealed the termination to the Bureau of Mediation Services. On October 10, 2017, following a two-day hearing,¹ the arbitrator submitted his opinion and award. He determined that “[a]t best, the [DOC] has clearly demonstrated that [Hammer] sent sexually explicit emails in violation of the electronic communications policy.” The arbitrator determined, however, that the DOC failed to prove that Hammer’s policy violations were serious enough to bypass discipline and move directly to discharge. The arbitrator found that the DOC failed to meet its burden of just cause, primarily because the entire case was “built on a falsehood,” finding that the HR director “inappropriately set in motion an investigatory process designed to strike back at [Hammer] for personal reasons and not because she was concerned about compliance with DOC policy and procedures.” The arbitrator ordered Hammer reinstated. The DOC filed a petition for writ of certiorari seeking review of the arbitrator’s award.

D E C I S I O N

Certiorari review is limited to “questions affecting the jurisdiction of the [government body], the regularity of its proceedings, and, as to merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.” *Dietz v. Dodge Cty.*, 487 N.W.2d 237, 239 (Minn. 1992) (quotation omitted).

¹ There is no transcript of the hearing. The facts are as presented in the investigative report.

“As a reviewing court, we will not retry facts or make credibility determinations, and we will uphold the decision if the lower tribunal furnished any legal and substantial basis for the action taken.” *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 303 (Minn. App. 2007) (quotation omitted); see *State ex rel. O’Connell v. Canfield*, 166 Minn. 414, 415, 208 N.W. 181, 181 (1926) (stating that “[n]o evidence is taken” and “no findings of fact or conclusions are made” on certiorari appeal); see also *Zweber v. Credit River Twp.*, 882 N.W.2d 605, 613 (Minn. 2016) (noting that this court cannot weigh evidence as a trier of fact in a certiorari appeal).

The DOC argues that the arbitrator “erred in his application of the statutory just cause standard” and misinterpreted the DOC’s policy allowing for termination. Under the applicable statute, “No permanent employee in the classified service shall be reprimanded, discharged, suspended without pay, or demoted, except for just cause.” Minn. Stat. § 43A.33, subd. 1. “Just cause” “includes . . . consistent failure to perform assigned duties, substandard performance, insubordination, and serious violation of written policies and procedures, provided the policies and procedures are applied in a uniform, nondiscriminatory manner.” *Id.*, subd. 2. The DOC asserts that it had just cause to terminate Hammer for serious violations of written policies and procedures.

The arbitrator determined that the DOC met its burden to prove that Hammer violated only the electronic-communications policy. The arbitrator was not satisfied that the DOC proved that Hammer engaged in abusive and disrespectful conduct toward employees because the main incident supporting this allegation was the meeting that occurred in April 2014. The arbitrator noted that this incident was reported at the time to

Hammer's supervisor, but "none of the[] leaders of the DOC felt compelled to take any action" against Hammer in 2014.

The record supports the arbitrator's determination that the April 2014 incident was reported to several individuals at the DOC and that no investigation into Hammer's behavior was conducted. However, the information provided to Hammer's supervisor lacked detail and did not include a written complaint; thus, no formal decision was made to not take action against Hammer at that time. Hammer's supervisor stated that if he had been aware that Hammer tore up a complaint in front of the complainant, he would have investigated that allegation. The arbitrator stated that the record demonstrated that the HR director "inappropriately set in motion an investigatory process designed to strike back at [Hammer] for personal reasons." Regardless of the HR director's motivation for reporting Hammer's conduct, Hammer engaged in the conduct and admitted to his supervisor that he "lost his temper."

The record shows that Hammer violated the DOC's policy regarding personal conduct of employees, which requires employees to treat fellow employees with "respect and courtesy at all times" and to "respond to conflicts and disagreements in a positive and constructive manner." Additionally, the record shows that Hammer violated the respectful-workplace policy requiring that "all individuals are treated with professionalism and respect."

The arbitrator also found that the DOC failed to prove that Hammer falsified the background report submitted to the MPD. The arbitrator determined that, while Hammer failed to have HR complete the report, the DOC failed to prove that Hammer completed

the information in the Word document. But the document was discovered on Hammer's computer and a forensic analysis revealed that he was the last author. Hammer merely told the investigator that "he did not remember completing the background questionnaire" and "could not recall sending something this lengthy." Hammer was unable to remember completing the report. But he did not deny completing the report. Based on the forensic analysis and no evidence to the contrary, the record shows that Hammer completed the report that should have been completed by HR. And because the report included information that conflicts with the former employee's employment history at the DOC that Hammer would have been aware of, the record shows that Hammer falsified an employment reference.

Hammer admitted that he sent and received emails with sexual content, sent emails containing private and confidential information, and sent text messages to the lieutenant following the arbitration hearing. The arbitrator concluded that Hammer violated the DOC's electronic-communications policy as it related to the emails with sexual content. But the arbitrator determined that the DOC failed to prove that the violation was serious enough to bypass progressive discipline and move immediately to discharge. The arbitrator's rationale was that the emails and behaviors alleged to be sexually inappropriate "relate to events purported to have occurred as many as two years before they were reported, rendering investigatory conclusions meaningless." The arbitrator determined that, despite Hammer's violation of DOC policy, the DOC should have imposed progressive discipline rather than discharge.

Under the DOC's electronic-communications policy, an employee who fails to comply with electronic-communications procedures is subject to disciplinary action. The policy provides that inappropriate use subjects an employee to discipline, "up to and including discharge." In order for the DOC to discharge Hammer for sending the emails it had to prove that the emails fell into a category of inappropriate use. Under the policy, examples of inappropriate use include, but are not limited to: illegal activity, wagering or selling, harassment, fund-raising, commercial activities, political promotion, and receipt or transmission of sexually explicit material. Hammer's electronic-communications violation fell into this inappropriate-use category because it included the transmission of sexually explicit material.

Additionally, Hammer's transmission of private information on employees violated the DOC personnel-files policy and electronic-communications policy. Under the policy, personnel data includes "all data collected on a current or former employee." *See* Minn. Stat. § 13.43, subd. 1 (2016). Under section 13.43, subdivision 4, "personnel data [not listed as public data] is private data on individuals [that] may be released pursuant to a court order." Information that Hammer disclosed in emails—including the likely suspension of an employee, an employee's plan to cancel a vacation, and the termination of an employee likely due to alcohol use—is not public data. *See id.*, subd. 2 (2016) (listing public personnel data). The willful transmission of private data is a violation of the Minnesota Government Data Practices Act. *See* Minn. Stat. § 13.09 (2016) (stating that a person who willfully violates provisions of the act is guilty of a crime and that a willful violation constitutes just cause for discharge of a public employee). Hammer's electronic-

communications violation involved inappropriate use because it included illegal activity. Thus, the DOC was not required to impose progressive discipline when the DOC policy allows for discharge.

Reversed.