

The Case of the Suggestive Vegetables¹

1) Overview (Day 1):

The grievant, Joe Jokester, age 61, has been employed with the City for 22 years, most recently as a maintenance worker. His performance has always been very good. Two years ago he was given a written reprimand for hanging a poster of swimsuit model in the shop. He is well-known for sending out jokes to co-workers and supervisors over the City email system. Most—but not all—have been funny and tasteful, but he has never received any complaints about them in the past.

Last week, while investigating another employee's potential abuse of sick leave, HR discovers Mr. Jokester sent a particular email to a group of co-workers, both male and female, some of whom are in the bargaining unit and some of whom are not. The subject line is: "A Matter of Perspective—Keep Your Mind Out of the Gutter." The email contains photographs which at first glance appear to be close-ups of male and female private parts, but the photos are actually cleverly cropped pictures of fruits and vegetables that give them impression of depicting the nude human form.

The City placed Mr. Jokester on leave with pay. Two days later, Joe Jokester was called into an interview by HR about these photos, but did not seek the assistance of a union representative. He admitted sending the email, but said that it was just a joke, and no one who received it was offended. He apologized for the email being sent and said he wouldn't do anything like that again. He also said that many other people at work had used work computers to send inappropriate material, but had never been disciplined. The HR director didn't take any notes during the interview. Within 15 minutes of the end of the interview, the HR director hand-delivers Mr. Jokester a letter dismissing him from employment, stating that he has previously been disciplined for sexually offensive conduct and has now violated the City's Acceptable Use Policy, which includes the following language:

- Use work computers only for authorized purposes
- Do not view or send materials involving obscenity, pornography, or defamation
- Do not send materials with offensive language or images
- Violation of this policy may result in discipline, including dismissal.

The dismissal letter did not acknowledge his 22 years of service or his excellent job performance.

The collective bargaining agreement provides the following:

"The principles of progressive discipline shall be used except when the nature of the problem requires more serious discipline or immediate action. An employee may be disciplined, suspended, demoted or dismissed only for just cause."

The Union has asked you to meet with Mr. Jokester and file a grievance.

¹ Based on a case example presented at the Labor Arbitration Institute conference, March 14, 2014, Seattle, WA.

2) Information from Grievant (Day 10):

The incident two years ago with the poster was completely unfair. There were other guys in the shop who had put similar pictures up, and were never disciplined. My direct manager went after me because I had made a complaint to OSHA and BOLI about workplace safety, and I embarrassed him by raising the concern in an all-department meeting with the head of the whole department. Ever since then, things have been less friendly at work between me and the supervisors, but they still put up with me because I do good work.

The email I sent was just a joke. I heard that one of the co-workers I sent it to, a woman named Sarah Sender, who is not in the bargaining unit, thought it was so funny she sent it on to some of her friends outside of work.

I heard that a few years back, the former Maintenance Department assistant manager named Bob Bossman was caught sending nude images through work email. I'm not sure whether he was disciplined, but he took another job with a private company shortly after.

I really need to keep my job. I'm a few years from retirement. I have two kids in high school, and 1 in college. My wife works but doesn't earn enough to support our family. I have skills, but don't know if anyone will hire me. My salary is \$60,000 per year.

3) Information from Union Representative (Day 30):

The union representative can't think of any other grievances in this bargaining unit involving employees using work computers to view or send inappropriate images. There was a member (Pat Player) about 6 years ago who was disciplined for using work computers to play online poker. The Union initially grieved the discipline and got it reduced from a 5-day to a 3-day unpaid suspension.

Mr. Jokester is an outspoken member of the bargaining unit. He got into trouble a few years ago, and is always rubbing managers the wrong way by second-guessing their work orders and calling them out on improper safety procedures.

4) Employer Response to Union Information Request (Day 60):

The City's investigation consisted of examining the email sent by Mr. Jokester, reviewing applicable policies, and interviewing Mr. Jokester. The City also investigated other individuals who received the email. Of them, Sarah Sender, an employee not within the bargaining unit, sent the email along to some non-work friends with the following message: "I'm not sure I should send these, but this guy at work says it's just the way you look at them. Here goes." She received a 1-day suspension without pay for her conduct, because she had no prior discipline in her file.

The former assistant manager, Bob Bossman, was allowed to resign in lieu of termination for sending nude pictures through company email.

Pat Player, another bargaining unit member, was disciplined under the Acceptable Use Policy 6 years ago, but for using a computer for unauthorized purposes, not for sending/viewing obscene materials. The union and the City agreed to a non-precedential settlement agreement in that case.

No other bargaining unit members have been disciplined for computer-related misconduct.

5) Employer Proposed Settlement (Day 180):

6 months after Mr. Jokester was been dismissed and is still out-of-work, and a week before the arbitration hearing, the union receives a settlement offer as follows:

- Dismissal converted to voluntary resignation
- \$15,000 payment, less withholdings and deductions
- Not eligible for rehire by City
- Terms of the settlement are confidential
- Employee waives all claims of any kind against the City relating to his employment and dismissal
- Settlement is non-precedential