

determined the grievant was able to return to work with restrictions. However, Article XXV, Section 9, specifically required that the company's physician was to make such determinations with respect to the grievant's right to return to work.

Further, the company contended Article XIV, Section 4, makes clear that a position can be filled only by employees who are qualified to perform the duties of that position. The grievant's physician determined that he was unable to work from November 25, 2002, until May 2003. There are simply no contractual requirements that the grievant be paid for a period that his own treating physician determined that he was unable to work.

It was the company's position that this grievance should be denied in its entirety as being without merit.

Appendix

Applicable Contract Provisions

Article XXIV, Section 4—Sick Leave

1. Employees shall not be removed from the employ of the Company nor lose seniority standing when they are absent on account of disability or sickness provided the Company is notified within five (5) work days of such disability or sickness. . . .
5. Employees must have medical release and give twenty-four (24) hours notice prior to return to work (except Saturdays, Sundays, and holidays).

Article XXV, Section 9—Health and Safety

(Physicals) . . . Any employee may be required to take a physical examination . . . by any doctor selected by the Company to determine general health or physical fitness for certain work . . . If, upon recommendation of a Company doctor, the employee's present job is hazardous to the employee's health, the Company will remove him from the job and the employee may exercise his seniority to place himself on a job he is physically qualified to perform. Where there is a disagreement between doctors the Company shall bear the expense of an evaluation by a third physician . . .

QUESTIONS

1. May the grievant return to work with a medical slip from his own physician? If the company does not agree with the grievant's physician, are there contractual procedures for the company to follow to dispute that medical assessment? If so, what are they?
2. Does the record of evidence show when the grievant was released to return to work? If so when was that release date?
3. How would you decide this case? What remedy, if any, would you award in this matter?

Case 75

Internet Kiddie Pornography at Work: Just Cause for Discharge?

Company Xcel Energy

Union International Brotherhood of Electrical Workers, Local 160

BACKGROUND

Mr. N was issued a notice of termination on November 26, 2002, for violation of policies regarding the use of the company's computer network and the Internet. Specifically, Mr. N was charged with having spent approximately nine hours of his twelve-hour shift visiting child pornography sites on the Internet.

The company conducted an audit of Mr. N's Internet usage and found that he spent nine hours on October 17, 2002, visiting a site where sexually explicit photographs were shown of persons who had not yet reached puberty. Upon completing the audit and determining the nature of the site Mr. N had visited on October 17, 2002, he was interviewed by management personnel. Mr. N was placed on emergency suspension and a thorough investigation was made of the events of October 17, 2002. After due consideration of the facts and circumstances of this case management concluded that there was just cause for the discharge of Mr. N. Mr. N was subsequently discharged for his conduct on October 17, 2002.

A timely grievance was filed by the union on behalf of Mr. N protesting his termination. The grievance was denied, as were subsequent appeals through the grievance procedure. The parties stipulated that the matter was properly before the arbitrator.

POSITION OF THE COMPANY

The company contended it had just cause for the discharge of Mr. N. The company promulgated rules making it clear that illegal conduct and the use of company computers to visit pornographic sites, particularly involving children, would result in termination. During the hearing, Mr. N testified that he knew visiting the offensive site was wrong.

The company noted that it has had several cases in the past where employees were discovered visiting pornographic sites on the Internet, during working hours, and using company equipment. In each of the prior cases, the penalty assigned was termination, except in one case at a nuclear generating plant actually run by another company. That employee, who was not discharged, was given a long suspension, contrary to company policy. The management at the nuclear plant erroneously applied policies that were developed for nonunion employees, which resulted in an inappropriate penalty. Further, it is clear that Mr. N was viewing child pornography, which is a crime, and the employee receiving the suspension was viewing pornography where the models were adults; no children were involved.

It was the company's position that the clear and convincing preponderance of the credible evidence showed that Mr. N was guilty of the misconduct for which he was

discharged, that the Company provided a fair and objective investigation, and that Mr. N was clearly warned of the penalty he could expect for this misconduct. The penalty assessed was administered even-handedly and was appropriate to Mr. N's misconduct.

The company contended that there was just cause for the discharge of Mr. N and that the arbitrator should deny the grievance in its entirety as being without merit.

POSITION OF THE UNION

The union contended that there was no just cause for the discharge of Mr. N. The union claimed that Mr. N was not fairly forewarned of the penalties for this type of conduct. It was the union's contention that discharge was not warranted for those who simply viewed pornographic material, and a written warning was all that was justified by this offense. For discharge, the material had to be transmitted or saved. Further, the Union argued that the rule barring visiting pornographic sites on company equipment and time was not clear, hence not enforceable.

The union claimed that the company conducted a faulty investigation. Management had its mind made up as a result of the computer audit, and hence Mr. N did not get an objective investigation. Further, the evidence presented at hearing did not show that Mr. N was guilty of the offenses he was charged with committing.

The union also alleged that the company had not applied its rules and penalties for their violation in an even-handed fashion. It is clear that at least one other employee engaged in similar conduct and received a lesser penalty. The company bore the burden to prove this case, and has failed to do so, therefore the union requested its grievance be sustained.

The remedy requested by the union was for Mr. N to be reinstated to his former position, and be made whole in all respects for the wrongful termination of his employment.

Appendix

Relevant Contract Language

Article 1, Section 2.

The right, in accordance with the provisions of this Agreement, to employ, promote, discipline and discharge employees and the management of the property are reserved by and shall be vested in the Company. The Company shall have the right to exercise discipline in the interest of good service and the proper conduct of its business. . .

Consequences of Violating Code of Conduct

An employee, who violates the law, the Xcel Energy Code or Xcel Energy policies will be subject to the Positive Discipline Process and possible termination of employment. Additional actions may include reassignment of work duties and limitation in future job opportunities. . .

Appropriate Use

Company information, electronic resources, and networks are provided for Company business purposes, not to satisfy curiosity or for personal gain, or for the direct or indirect gain of other companies or individuals. Incidental personal use is permissible if it meets the following requirements: Use does not violate the acceptable behavior outlined in the Code of Conduct. Use is not for the purpose of accessing, downloading, storing or otherwise processing information of a sexually explicit, violent, vulgar, or criminal nature or which otherwise offensively addresses age, gender, sexual orientation, race, religious, or political beliefs, national origin, or disability.

Disciplinary Guidelines

Termination [for] accessing Internet sites as well as saving and/or sending material that may be illegal (incest/rape/child pornography).

QUESTIONS

1. Did the company prove its case against Mr. N with a preponderance of the evidence? Explain.
2. Was the union able to provide proof supporting any of its affirmative defenses of this grievant? If so, which one, and what was the proof?
3. Was there a clear and applicable rule which Mr. N violated? Was there evidence that others violated that rule? If so, what was that evidence?
4. If you were the arbitrator in this case, how would you rule? Provide the reasons for your decision.