

The Grievant's name and some witness names have been changed to preserve privacy.

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<b>ARBITRATION IN THE MATTER</b>	*	<b>Grievant: Frank Smith</b>
	*	
<b>Between</b>	*	
	*	<b>Issue: Termination of Employment</b>
	*	
<b>San Diego Convention Center Corporation</b>	*	<b>Arbitrator: Judy A. Gust</b>
	*	
<b>and</b>	*	
	*	
<b>Service Employees International Union Local 2028</b>	*	

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### **PRELIMINARY STATEMENT**

The above-captioned parties, herein "Union" and "Company", are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. In accordance with that Agreement, a hearing was held on October 24, 2002, in Conference Room 21 at the San Diego Convention Center, 111 W. Harbor Dr., San Diego, California. Although the Arbitrator audio-taped the hearing, her notes are the official record of the hearing. The parties agreed that the matter was properly before the arbitrator for a final and binding decision. The record of this case was closed on December 4, 2002, upon receipt by the Arbitrator of the parties' post-hearing briefs.

### **APPEARANCES & WITNESSES**

#### **For the Company**

Richard M. Freeman . . . . . Spokesperson and Counsel, Sheppard Mullins  
Thomas M. Mazzocco . . . . . Vice President, Human Resources  
Marcella Damours . . . . . Human Resources Representative  
Jeff Greene . . . . . Service Worker  
Jesse Craft. . . . . Service Worker  
Jerry Lee Bean. . . . . Lead Service Worker  
Rick Di Carlo. . . . . Facilities Service Manager  
Betty Wilmington . . . . . Assistant Facilities Service Manager

#### **For the Union**

Paul Pechter . . . . . Spokesperson, Senior Field Representative, SEIU  
Manuel Ruiz. . . . . Senior Worksite Organizer, SEIU

Frank Smith ..... Grievant

**BACKGROUND AND FACTS**

On January 16, 2002, Jeff Greene and other employees found a cartoon that was drawn on the inside of an advertising tent card that was displayed on a table in the employees' lunchroom. The cartoon depicted a person bent over looking backwards between his legs. Printed just above the cartoon was the number "42" and the word "Jumbo". (Jt. Ex. 5) Mr. Greene complained to his manager about the cartoon that he understood to be making fun of him. Management and Human Resources conducted an investigation and concluded, based upon circumstantial evidence, that Frank Smith was responsible for drawing the cartoon. Smith's manager, Rick Di Carlo, assessed 85 penalty points for the incident that, when added to the 15 points still of record for Smith, brought him to a total of 100 penalty points. That accumulated total of points, according to the Company's disciplinary guidelines, calls for discharge from employment. (Jt. Ex. 3, pp. 80) Following assessment of the points and pending further investigation, the Grievant, Frank Smith, was discharged on March 7, 2002. A timely grievance was filed and a second step grievance meeting was held on April 23, 2002. No resolution was reached at that meeting and the dispute proceeded to arbitration.

**ISSUE**

The parties could not agree upon an issue statement. The Union submitted its proposed issue as: Did the Employer have just cause for disciplining and terminating the Grievant for the incident of January 16th, 2002? If not, what is the appropriate remedy? The Company proposed that the issue be: Did the Company have just cause to terminate the Grievant? If not, what is the appropriate remedy?

The parties ultimately gave the Arbitrator authority to frame the issue. Having reviewed the record, the Agreement, and the parties' proposed statements of the issues, the Arbitrator sets forth the issue as follows:

Did the Employer have just cause for disciplining and terminating the Grievant for the incident of January 16th, 2002? If not, what shall be the appropriate remedy?

**RELEVANT PROVISIONS of the COLLECTIVE BARGAINING AGREEMENT and of COMPANY RULES**

**COLLECTIVE BARGAINING AGREEMENT**

*ARTICLE 16 – MANAGEMENT RIGHTS*

*16.1 It is recognized that the Corporation maintains the sole and exclusive right to manage its business in such a manner as the Corporation shall determine to be in the interests of its employees and guests, subject only to those express provisions of this Agreement which specifically limit or qualify this right. All functions and prerogatives not expressly modified or restricted by specific provisions of this Agreement are vested exclusively in the Corporation. The Corporation's right to manage its business includes, but is not limited to, the right to hire, transfer, change assignments, promote, demote, suspend, discipline, reprimand, discharge, lay off and assign duties to employees, maintain discipline and efficiency of all employees, determine the size and make up of the working forces, establish work schedules and make changes thereto, determine the starting and quitting times, determine the qualifications of employees, establish the number and type of shifts, determine the necessity for overtime work, determine the Corporation's business hours, establish and enforce work rules not in conflict with specific terms of this agreement.*

*ARTICLE 17 – COMPANY RULES*

*17.1 The parties recognize that rules and regulations are necessary for the efficient operation of the Corporation's facilities. Therefore, it is agreed that the Corporation may establish such rules and regulations, as it deems necessary, provided they do not conflict with the provisions of this Agreement, or state or federal law. Corporation rules are outlined in the SDCCC personnel guidelines and the SDCCC Employee Handbook, as both documents exist from time to time. In the event of a conflict between the Personnel Guidelines, Employee Handbook and/or the Agreement, the Agreement shall control.*

*ARTICLE 20 – GRIEVANCE AND ARBITRATION*

*20.9 The parties agree that disciplinary actions by the Corporation shall be administered in a timely manner. All such discipline in order to be timely should be issued to the employee within twenty-one (21) days from the date of the facts giving rise to the disciplinary action. In such event that the time limit provided herein falls on a day the employee is not scheduled or has called off scheduled work, the discipline shall be issued on the first day the employee returns to work after the twenty-one (21) day limit. The twenty-one (21) day limit shall be extended by notification by the Corporation to the Union.*

## COMPANY RULES

Policy 502 – STANDARDS OF CONDUCT (Jt. Ex. 3, pps. 70-80)

...

*Good judgment, fairness and personal integrity are the foundations and essence of ethical conduct. They are the qualities to which SDCCC employees must adhere. Administrative Policy No. 12, Code of Ethics and Conduct, contains SDCCC's current policy on ethical standards. This Personnel Policy provides additional ethical guidelines as Standards of Conduct and describes disruptive behavior that is inconsistent with the smooth operation of SDCCC and the positive employee relations climate that SDCCC wishes to foster.*

...

*Where doubts exist about the propriety of any proposed action or situation, it is the individual's responsibility to discuss the matter with his/her supervisor.*

...

*2. Disruptive Behavior: The following list specifies types of behavior which are disruptive to the smooth operation of SDCCC and to the positive employee relations climate that SDCCC wishes to foster. Such behavior will be cause for appropriate disciplinary action up to and including termination. The types of behavior listed are examples of behavior that is not condoned. The list is not meant to be all inclusive or complete and may be amended by the Corporation. Where a point range is indicated, points are to be given at the discretion of management and may be decreased or increased, within the point range, depending upon mitigating circumstances.*

...

*2.21 Intimidation, coercion or harassment sexual or otherwise, of other employees.*

*35-100 Points                      First Occurrence*

...

### *3. Employee Counseling/Discipline*

*3.1 It is the Corporation's intent to apply corrective counseling procedures rather than disciplinary procedures when resolving behavioral problems. However, certain conduct such as described in Section 2 above may result in an employee entering into advanced counseling and discipline, including termination, without the application of the progressive corrective counseling procedures. . . .*

*3.4 An employee who receives a Counseling Notice shall be assessed penalty points for violation of the Corporation policies and/or rules in accordance with Section 2 of this Personnel Policy 502 and shall be subject to the following disciplinary action.*

*3.4.1 The number of points will be assessed for the current Corporation policy and/or rule violation and totaled with points for any previous policy and/or rule violations within the last twelve (12) months. Where the employee has violated multiple company policies and/or rules in a single act, the employee will be assessed those points of the policy and/or rule with the greater number of points.*

*3.4.2 If the accumulated total penalty points are \_\_\_\_ the disciplinary action is:*

<i>10 - 30</i>	<i>Written Employee Counseling Notice</i>
<i>31 - 45</i>	<i>one (1) day suspension</i>
<i>46 - 60</i>	<i>three (3) day suspension</i>
<i>61 - 80</i>	<i>one (1) week suspension</i>
<i>81 - 99</i>	<i>two (2) week suspension</i>
<i>100 and above</i>	<i>Discharge.</i>

### **POSITION OF THE COMPANY**

The Company's position is that Smith was terminated for just cause according to the point system established between the parties. Smith had 15 penalty points previously assessed against him at the time of the January 16th incident. He was then assessed 85 penalty points for the January 16, 2002, incident that brought him to a total of 100 penalty points. The penalty for 100 points or more is discharge. (Co. Br. pp. 1)

Prior to the incident at issue, Smith had a long and checkered history of recalcitrant behavior. Smith had been playing a cat and mouse game with management regarding the demeaning, sexually explicit cartoons about co-worker, Jeff Greene, for a significant period of time. Smith's cruel and harassing conduct toward Greene was proven through many items of evidence and many witnesses, particularly written statements from Jesse Craft and Elisha Camden. These written statements provided in part as follows:

1. Smith frequently drew sexually explicit cartoons at the facility and in fact had drawn one like the one on the tent card on a white board.
2. Smith frequently drew a cartoon of Greene around the facility with two big ears and he would label it "Jumbo" in reference to Greene.
3. Smith had been observed drawing the "Jumbo" cartoon on white boards throughout the facility, on walls inside the facility's restrooms and store rooms.

4. Greene had been exposed to one such cartoon on a "tent card" on or about January 16, 2002, and it had been quite upsetting to Greene. (Co. Br. pps. 2-3)

The Company pointed out Smith's record of discipline before it had knowledge that Smith had been creating sexually explicit cartoons of Greene. That record of prior discipline included incidents such as:

1. his involvement in an altercation with another employee where Smith threw hot cocoa on the employee resulting in a five day suspension from work.
2. his counseling for drinking alcohol in the SDCCC parking lot.
3. his discussion of a pornographic film wherein a woman had been gang raped.

Smith had been counseled about harassing and intimidating other employees, using sexually related words or conduct and, along with other employees, had been warned specifically not to harass Greene. (Co. Br. pps. 3-4)

The Company relied on several other factors to conclude that Smith was the guilty party relative to the "tent card drawing" of January 16, 2002, and other graffiti in the facility. Statements from Jesse Craft, Jerry Bean and Elisha Camden set forth their observations of Smith drawing cartoons identical to the cartoon on the tent card that was found on January 16, 2002. Smith was the only person identified as a cartoonist at the facility, particularly the only sexually explicit cartoonist. In addition to sexually explicit cartoons about Greene, Smith would draw motion picture type cartoons of individuals fornicating. The drawings were on multiple cards that could be fanned to show sexual movements. He would also frequently draw sexual organs. (Co. Br. pp. 4)

Smith teased Greene and did not rebut Greene's description of how Smith kept reminding Greene of the tent card drawing on the following day. Smith had also drawn physically derogatory cartoons of other co-workers with whom he had conflicts. He also discussed graphically sexual topics around his co-workers and admitted discussing a gang rape film with others. Finally, when Smith had drawn the sexually explicit "Jumbo" cartoons in foam on chairs in the past, he thought it was funny and liked other employees to observe the cartoons. (Co. Br. pp. 5)

Although in interview Smith suggested that he knew someone else who had made the drawing, he refused to tell management. Other employees testified that Smith was hopeful that Jerry Bean would be blamed for the tent card and that Bean would be fired for it.

Smith's cruel and demeaning conduct towards Greene, who was a somewhat naïve and gullible employee, was the stereotypical conduct of a playground bully. Smith's harassing conduct had its desired effect – it made Greene feel anxious, insecure and inadequate. Greene's uncontradicted testimony detailed a history by Smith of efforts to humiliate and upset Greene. Smith's conduct was designed to maliciously hurt the feelings of an innocent and vulnerable employee. Federal and state law compel SDCCC to ensure that this type of conduct does not occur. (Co. Br. pp. 6)

For all of the above reasons, the Company asserts that the termination of Frank Smith was with just cause and asks that the termination be upheld. (Co. Br. pp. 7)

### **POSITION OF THE UNION**

The Union seeks to have this case considered only in light of the January 16, 2002, incident and the stated reason for the discharge as noted in the written discharge notice given to the employee at the time of his discharge on March 1, 2002. That reason was Mr. Smith's violation of the Standards of Conduct 2.21, contained in the Employee Handbook, that prohibits intimidation, coercion or harassment, sexual or otherwise, of other employees. The Union argues that the Employer, at the hearing, sought to expand its reason for termination to include past acts that "created a hostile workplace environment" and that were in violation of a series of other rules and regulations contained in the Employee Handbook beyond 2.21

With regard to the 2.21 standard, the Union contends that the Employer must establish that it was Frank Smith, the Grievant, who committed that act of January 16th. To allow otherwise would permit the Employer two bites at the apple. The Union came to the arbitration hearing prepared to refute the Employer's issuance of 85 points for the January 16, 2002, "tent card" incident, not for other acts allegedly committed at unspecified times in the past. (Un. Br. pp. 1)

The Union further refutes Mr. Mazzocco's testimony that he informed the Union of the modification to their reason for termination. Union Representative Paul Pechter denied that he had gotten such a message. Because Mazzocco did not follow up with a written confirmation of this additional information, the Union argues that his testimony should be discounted. (Un. Br. pp. 2)

As to the question of whether just cause existed for Smith's termination, the Union argues that the interviews conducted during the investigation of the January 16, 2002, incident constitute weak, circumstantial evidence. The witnesses had no direct knowledge of who actually made the "tent drawing" that was placed in the employee cafeteria on January 16, 2002. Although other witnesses testified that they had observed Smith in the past drawing cartoons of "general people" and of one other co-worker, none of these pictures lasted beyond the time it took to draw them. Accordingly, none of these instances fit the criteria of graffiti (that which causes damage to corporation property) as defined by Mazzocco. According to the Union, this cluster of circumstantial evidence does not establish a compelling case for concluding that Frank Smith was the only one who could have made the drawing and placed it in the cafeteria. It also points out that Smith entered the employee cafeteria after the "tent card" was already there, thus making him a less likely suspect than others. Further, hundreds of people have access to the cafeteria that is often open between 7:00 a.m. and 7:00 p.m., suggesting that any one of many others could have placed the tent card drawing there.

The Union also challenges the thoroughness of the investigation conducted by Marcella Demours of Human Resources and the scant evidence presented at hearing. One co-worker who was present in the cafeteria at the time that the "tent card" drawing was discovered was not interviewed. Additionally, only three of the seven persons interviewed testified at the hearing. The Union asserts that Demours' conclusion that all of the employees interviewed thought that Smith had made the drawing was a conclusion based on skewed data. At worst, it was a self-serving attempt to prop up a weak case. (Un. Br. pp. 4)

Although the Union acknowledges that Smith has had prior instances of discipline, it contests the Employer's suggestion that Smith is unemployable. Rather, six of Smith's ten years of service were without any documented instances of discipline. The only discipline for any

remotely similar behavior took place in November 1994. That incident resulted in both employees being disciplined. The more recent example of inappropriate language involving "gang rape" resolved itself with Smith apologizing to the employee who overheard parts of the conversation that was initiated by another employee. These examples do not support a pattern of behavior similar to the behavior of January 16, 2002. (Un. Br. pps. 4-5)

As for the "tent card" drawing itself, the Union argues that although the drawings all relate to a single theme, it is very probable that the drawings were made by different people. The Employer presented no analysis of the drawing styles to establish an evidentiary basis that all five drawings came from a single hand, much less from the hand of a competent cartoonist like Frank Smith. The bent over figure is a common type of graffiti executed by many others. The Union argues that the Employer failed to connect Smith to the "tent card" drawing of January 16, 2002.

Finally, the Union argues that the Employer's attempt to show that Smith had a propensity for vulgarness and shocking behavior failed. The only evidence produced was about private conversations that Smith had with other employees. The Employer's weak position on this allegation was demonstrated by the disallowed testimony from a supervisor about her opinion of Smith's female companion at a non-work time holiday party. (Un. Br. pp. 6)

The Union concludes that the Employer failed to meet its burden to show that it was Smith who executed the "tent drawing" of January 16th and, therefore, the 85 points he received on March 1, 2002, should be rescinded, thereby also rescinding his termination.

The Union also challenges the severity of the punishment meted out for the January 16th incident. The amount of damage to company property done by this act was minimal (one cardboard tent card). Further, it being the first offense of this nature by Smith, to assess 85 points out of a possible 100 is disproportionate. Anything less than 85 points would not have resulted in termination. (Un. Br. pp. 7)

The Union asks that the termination be rescinded and Smith be paid full back pay for all time lost as result of the termination. (Un. Br. pp. 7)

## **DISCUSSION**

The pivotal question in this case is whether or not the Company proved that Frank Smith, the Grievant, is the person responsible for drawing the sexually explicit cartoon with the word "Jumbo" and the number "42" on the advertising tent card that was found in the employee cafeteria on January 16, 2002. If so, the secondary question would be was the degree of discipline appropriate to the seriousness of the infraction.

The Union argues that the Company has nothing but circumstantial evidence to support its position and thus its evidence falls short of a clear and convincing standard. Arbitrators differ in their approach to the evidence standard to be used in labor rights disputes. Often, with behavioral situations that lead to discipline, direct evidence is scarce. Employees who violate work rules rarely invite an audience to witness their misconduct. Accordingly, management has the responsibility to make a good faith effort to gather as much evidence as possible via an investigation. However, a clear and convincing standard is not necessarily applicable. In a case such as this one, where the Grievant has a considerable history of behavioral discipline and counseling, the "more likely than not" or preponderance of the evidence standard is sufficient to make a reasoned and fair finding.

Mr. Greene testified that Smith had made derogatory comments and threats to him in the past. Smith made fun of Mr. Greene's assignment to the bathrooms and once said that Mr. Greene was "on his list". Greene also testified that in the past, Smith would point out cartoons and the word "Jumbo" that were on walls and white boards throughout the facility and ask Greene if he had seen them. Greene also observed Smith drawing cartoons on white boards and in the foam used to clean upholstered chairs, once seeing Smith draw a picture of a supervisor hitting another employee. According to Greene, Smith also drew pictures of breasts, penises, testicles and butts.

On January 16, 2002, Mr. Greene was shown the inside of an advertising "tent card" that had a sexually explicit cartoon drawn on it along with the word "Jumbo" and the number "42" written on it. Jumbo is a term that had been used in the past to tease Mr. Greene, whose first

name is Jeff. Mr. Greene also works in Department 42. Greene understood the drawing to be a derogatory joke about him and he was upset by it. After Greene left the cafeteria, Smith encouraged Greene to return to the cafeteria to retrieve the card and report the incident to management. Greene testified that the day after the incident, Smith talked about the card all day long and suggested that he was happy because he (Smith) thought that Jerry Bean was going to get fired because of it.

Two other employees testified that they had seen Smith draw the same cartoon with the word Jumbo on white boards and in upholstery foam. They testified that Smith frequently talked about sex and his sexual exploits with underage girls. They also revealed that Smith made "motion picture" type drawings on a small pad that could be flipped quickly so that the pictures simulated sexual activity. One of those witnesses also corroborated Greene's testimony that Smith asked Greene, on January 16, 2002, whether or not he had seen the tent card drawing. One of the employee witnesses also testified that he had taken photographs in the past of the Jumbo cartoons that were displayed at various locations throughout the facility. (Co. Exs. 2-5)

Smith's manager, Rick Di Carlo, testified that he had counseled Smith in the past about drawing cartoons, particularly those depicting another employee unfavorably, and about a complaint from another employee who was offended by Smith's participation in a discussion about gang rape.

Marcella Damours, Human Resources Representative, assisted Mr. Di Carlo with the investigation of Mr. Greene's complaint about the January 16, 2002, cartoon. Ms. Damours had to finish the investigation because Mr. Di Carlo became seriously ill and was off work for some period of time. Damours testified that she interviewed a number of employees including eight co-workers of Smith and those present in the employee cafeteria on January 16, 2002. She concluded that Smith was responsible for making the drawing on the tent card that was discovered on January 16, 2002, that upset Mr. Greene. She testified that the basis for her conclusion was that the absence of any knowledge of others who drew cartoons, statements from co-workers about Smith's past behavior in drawing cartoons and other sexually explicit objects, and Smith's disciplinary history.

Mr. Smith testified that he had nothing to do with the cartoon. He stated that he entered the cafeteria for lunch after Greene was already in the cafeteria and noticed that Mr. Greene was angry. Smith stated he was curious and went to look at the tent card. He also testified that he spoke to Mr. Greene later, after the incident, and that Mr. Greene was still upset. Smith then advised Greene to report the incident to Human Resources and retrieve the tent card with the cartoon drawing on it. Mr. Smith also testified that he suspected someone else of making the drawing but that he could not prove it and was not "a rat". He testified that he would not reveal who he suspected "even if it means my job". However, Smith also implicated Jerry Bean by testifying that Bean was angry and called Mr. Greene "that little bitch" after Bean was called into the office and asked about his knowledge of the drawing. Smith testified that since 1995, lots of people "put him down", referring to Mr. Greene. Smith represented Greene as a "whiner" and stated that other people don't like Greene because they want him to accept the jokes they make of him. Smith also acknowledged that "Jumbo" was a term used to refer to Jeff Greene.

On cross exam, Mr. Smith testified that he had drawn cartoons in the past about another employee named Saul. According to Smith, Saul was overweight and he could "draw him real good", representing that even Saul thought the cartoons were funny. Smith testified that Saul didn't care, "he looked like a bum".

Concerning the earlier offensive conversation about gang rape, Smith testified that another employee, whose name he could not remember, had initiated the conversation and that he (Smith) was only asking a question about it. After being counseled about such explicit talk in the workplace, he apologized to the employee who complained and the incident was over.

The Union vehemently objects to the inclusion of Smith's previous behaviors, for which he was counseled or disciplined in the past, as part of the reasons for Smith's termination. This arbitrator, as well, does not view these past allegations as a basis for the termination of Mr. Smith on March 1, 2002. Where these past behaviors are relevant is in determining the probability of Mr. Smith's responsibility for the tent card drawing that was offensive to Mr. Greene on January 16, 2002. The Company has more than adequately shown that Mr. Smith is a cartoonist, supported by testimony from Mr. Smith himself. There was no suggestion of any other employees besides Smith who might be able to draw in a similar manner or with any

history of drawing cartoons and other sexually explicit pictures. Mr. Smith, himself, admitted that he had drawn derogatory pictures of another employee in the past. Further, he evidenced his apparent dislike of Mr. Greene but representing him as "a whiner" who was unwilling to accept the teasing and jokes about him that were made by other employees.

Mr. Smith's credibility must be questioned as a result of his apparent contradiction about being a "rat". He testified adamantly that he would not "rat" to management on another employee that he suspected was responsible for the cartoon – going so far as to say he would remain silent "even if it means my job". However, Smith's later testimony that Bean was angry about being questioned concerning the drawing and that Bean made derogatory comments about Greene implies that Bean was responsible for the drawing. That testimony, when considered along with Greene's testimony that Smith was interested in implicating Bean, corroborates Greene's testimony that Smith was hoping Bean would get blamed for the incident and be fired.

The Union suggests that the January 16th drawing was a common form of graffiti that several others drew. However, no evidence was introduced that would suggest that there were others in the workplace who drew that type of cartoon or any other cartoons. As for the Union's argument that the Company failed to produce a handwriting analyst to prove that all the drawings were made by the same hand and that it was Smith's hand that was responsible, this arbitrator can only reply that although discharge is the most severe form of industrial justice, the customary evidentiary standards do not rise to the criminal standard of proof beyond a reasonable doubt. Similarly, the argument that the Company failed in its duty by not having each witness that was interviewed also testify at hearing is unpersuasive. Repetitive testimony about similar facts only prolongs the hearing and costs. Repetitive or cumulative testimony adds little weight to a fact once proven.

Based upon the above findings, plus Smith's history of sexual banter, assault on another employee, cartoons of another employee, and his interest following the incident by suggesting Bean's role in it, it is clear that it is much more probable than not that Smith is the person who was responsible for drawing the tent card cartoon that was offensive to Mr. Greene.

Additionally, if one looks closely at the violation charged in the discharge paperwork, it is evident that Mr. Smith was not terminated for drawing the cartoon. Rather, he was terminated for intimidation, coercion or harassment, sexual or otherwise, of other employees. Finding that Smith was responsible for drawing the Jumbo cartoon that was found in the employee cafeteria on January 16, 2002, and his continuing interest in prompting Greene to file a complaint about the incident, it follows that Smith was continuing his amusement at the expense of Mr. Greene.

As to the severity of the penalty of discharge, again Mr. Smith's history must be considered. Both Mr. Di Carlo and Ms. Damours testified that Smith had been counseled in the past about sexual harassment talk and cartoons. Mr. Di Carlo testified that the whole work group, including Mr. Smith, had been counseled against teasing, threatening and harassing behavior specifically targeted at Mr. Greene. Given Mr. Smith's history of warnings, one would have expected him to distance himself as much as possible from any involvement in the incident involving Mr. Greene on January 16th in order to protect himself. Rather, he continued to probe Greene following the incident, even continuing his queries the day after the incident. Given Mr. Smith's history of mocking other employees and his unwillingness to curb such behavior after repeated counselings or discipline, it is unlikely that further discipline short of discharge would correct the problem. Di Carlo's assessment of 85 penalty points for the incident is within the guidelines set forth in the Employee Handbook for such an infraction. Assessment of those points, along with Smith's previous 15 points for an unrelated matter, also bring his disciplinary points to 100 which, again, in line with the Standards of Conduct Policy, permit discharge from employment.

In summary, Mr. Smith had a history of taunting and teasing Mr. Greene as well as other employees, he had foreknowledge of the Standards of Conduct expected of all employees including himself, he had been previously disciplined and counseled about the prohibited conduct, and he continued to make and display drawings that were derogatory and upsetting to Mr. Greene. Absent any evidence that discipline short of discharge would be successful, the Company is found to have had just cause for Mr. Smith's discharge from employment.

**AWARD**

Based upon the above facts and reasoning, the grievance is denied.

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Judy A. Gust, Arbitrator  
Ramona, California  
December 14, 2002