

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME, COUNCIL 5**

and

CITY OF ST. PAUL

DECISION AND AWARD OF ARBITRATOR

JEFFREY W. JACOBS

ARBITRATOR

MAY 4, 2015

IN RE ARBITRATION BETWEEN:

AFSCME Council 5,

and

City of St. Paul.

DECISION AND AWARD OF ARBITRATOR
Mary Montgomery grievance

APPEARANCES:

FOR THE UNION:

Jeff Fowler, Union representative
Mary Montgomery, grievant
Koami DaCruz, Chief Steward
Larry Zangs, Union Steward

FOR THE CITY:

Rachel Tierney, Attorney for the City
John Ross, DSI Inspector
Wendy Lane, Zoning Administrator
Robert Humphrey, Assistant to the Director
Ricardo Cervantes, Director DSI Dep't

PRELIMINARY STATEMENT

The hearing was held on April 1, 2015 at the Bureau of Mediation Services in St. Paul, Minnesota. The parties presented oral and documentary evidence at that time and submitted briefs dated April 24, 2015 at which point the record was closed.

ISSUES PRESENTED

Was there just cause to terminate the grievant? If so what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from 2013 to 2015. Article 6 provides for submission of disputes to binding arbitration. The arbitrator was selected from a permanent panel maintained by the parties.

CITY'S POSITION

The City's position is that there was just cause to terminate the grievant for her actions in entering information on the AMANDA computer system in May 2014 on her own property. In support of this position the City made the following contentions:

1. The City asserted that the grievant is a long time city inspector within the Department of Safety and Inspections, DSI, who knows what is permissible and appropriate in the course of her duties as a City of St. Paul inspector. The City noted that the grievant was extensively trained in and expected to know the zoning and other relevant regulations, including those related to property maintenance, for the City, including off street parking and parking surfaces.

2. The grievant certainly should know not to access the AMANDA system in order to enter comments on her own property. While there is no formal rule against this, the City asserted that it is common knowledge and common sense not to do this and that accessing the computer system to enter information on one's own property is in the nature of a police officer "fixing" a traffic ticket.

3. Pursuant to a citizen complaint about the grievant's property, located within the City of St. Paul, Inspector Ross visited the grievant's property and determined that there were code violations related to vehicles parked on her driveway and the Class 5 gravel on the driveway. He did not immediately notice that the property belonged to the grievant and indicated that when he saw the grievant's name on the AMANDA system entry he simply assumed that she had been the inspector who first got the call. It was not until later that he noticed that the property belonged to the grievant.

4. The City asserted that the violations were prohibited conditions under City code and that it was appropriate to write them up. The City maintained throughout this proceeding that the grievants driveway is not a legal non-conforming use and that the grievant was simply incorrect about that even though she asserted that it was. The City also maintained that no one ever told the grievant that her driveway was legal non-conforming and that as an experienced inspector she should have known it was not.

5. The City put Ms. Lane on to testify that she did not tell the grievant her driveway was legal non-conforming nor would she. She would have researched the issue thoroughly before doing so and could not recall saying or even intimating that to the grievant at any time.

6. Mr. Ross, the Inspector who visited the property, told the grievant he was going to write up orders on her property after he discovered that it belonged to her. The City argued most adamantly that the grievant should not have accessed the AMANDA system in order to influence the outcome of the orders or to influence Mr. Ross' decision to write orders on her property. The City maintained that it was common knowledge that a City inspector with a fiduciary duty to the public, should never access that system for their own purposes or to influence the outcome of a particular case – especially on one's own property.

7. The City's main argument was that the grievant knew or should have known that she was not allowed to access the AMANDA system to influence Mr. Ross' decision, yet she did and placed a message that read as follows "one vehicle belonging to (recently deceased) father in law being parked next to garage short term with neighbors permission. All other vehicles being driven daily. Driveway is legal non-conforming. No vehicles parked on street. Household belongings currently in garage due to water damage and repairs in process. (See front porch stove sofa tables under tarp.)"

8. The City asserted that the grievant admitted placing that message there but that she as both unapologetic about it and maintained that it was appropriate for her to do so in order to simply inform Mr. Ross of the current situation.

9. The City asserted that the grievant's story is not credible. The City asserted that she was not simply transferring information to Mr. Ross and that there were other better and more appropriate ways to do that. The City argued that in fact she was attempting to use her position as a city employee in the inspections department to pressure Mr. Ross to change his mind about writing up orders on her property.

10. The City also noted that Mr. Ross is an active union member yet he was very uncomfortable with what the grievant had done and reported it. He also wrote up orders on the grievant's property. See exhibit 5. The City also noted that the notice/correction order has an appeal procedure written on the face of it that the grievant should have known about and should have followed. Instead she accessed AMANDA, which only city inspectors can do – the general public has no access to that system.

11. The City argued that the only reasonable conclusion based on these facts is that the grievant was attempting to avoid an enforcement action. The City also noted that the mere fact that there is no formal rule against accessing AMANDA is immaterial and points to the City's ethics rules and general rules regarding appropriate conduct. The City asserted most adamantly that the grievant is lying – that she did not intend to simply transfer information and that she knew her property was not legal non-conforming yet she lied in the investigation as well as to her supervisors about what she did and why she did it. She also fabricated the story about Ms. Lane telling her that her property was legal. The City argued that the grievant can no longer be trusted.

12. The City argued too that the investigation was both thorough and objective and showed that the grievant placed the message in the AMANDA system then lied about it multiple times. The grievant was also increasingly indignant about her conduct, which also demonstrates that her aversion to following appropriate workplace conduct cannot be trusted.

13. The City relied on Civil Service Rule 16B that prohibits Commission of an immoral or criminal act; willful violations of any of the Civil Service Rules; Conduct unbecoming a City employee; Commission of an act which amounts to insubordination, or to disgraceful conduct; incompetent or inefficient performance of the duties of the employee's position; Inducement or attempt to induce a City employee to ... act in violation of any lawful and reasonable regulation or order; and any false statement or fraudulent conduct or deception, ... engaging in any fraudulent conduct, or in attempting any deception in any official City business.

14. The City argued that the grievant's actions in accessing AMANDA was for the obvious purpose of avoiding an enforcement action and to unduly influence the actions of another inspector. This was disgraceful, immoral, unethical conduct and brings the entire department into disrepute.

15. The City asserted finally that termination is the only appropriate result here given what happened. The city asserted that the grievant's obvious and overt untruthfulness and use of her position as a City employee to avoid enforcement is inexcusable and cannot be ignored or condoned in any way.

16. The City also countered the claim that the City Council "agreed" with the grievant with respect to her property. The City noted that the Council merely granted a variance for the gravel driveway with conditions and did not legislate that the property was legal non-conforming. Thus the grievant is simply incorrect despite the ruling by the Council, see Exhibit 7. Moreover, the question of whether termination is appropriate here does not depend on the Council's action, but rather based on the clear fact that the grievant attempted to use her position as a City employee by accessing a system that only city employees can access for the purpose of influencing an enforcement action.

17. The City further asserted that it has terminated other employees for the same or even lesser forms of untrustworthy conduct. Whenever there is a finding of lying or unethical behavior, such as operation of a City vehicle without a valid driver's license, falsifying or forging time records either by punching in inappropriately or stealing time have all resulted in termination. The sole person who was not terminated was both apologetic and contrite about his behavior. The grievant was anything but that and in fact became even more aggressive and indignant as the investigation unfolded. The City asserted that this is not the attitude of someone who should be entrusted with access to sensitive records and must be trusted to be honest and ethical in all her dealings with the public.

18. The essence of the City's argument is that the grievant accessed AMANDA on her own property and that even though there is no formal policy prohibiting what she did, she should have known not to do this just as one does not need a formal policy admonishing people not to steal, assault co-workers or intentionally damage property. There was a thorough and objective investigation that showed that the grievant's true intention was to avoid enforcement. Termination under these circumstances is the only option for this violation and the grievant's indignant attitude toward it.

The City seeks an award denying the grievance in its entirety.

UNION'S POSITION:

The union's position was that there was no just cause for the grievant's termination here. In support of this position the union made the following contentions:

1. The union first noted that the grievant has been with the City for 17 years without any prior disciplinary notices warnings or reprimands of any kind. She is also a recognized excellent employee – as her evaluations and multiple awards show. There is thus no reason to believe that the grievant is untruthful or unethical and the City's assertions in this regard were simply overblown.

2. The union also noted that the grievant's performance evaluations have all been universally positive and that at no point has there ever been any indication that she was untruthful, unethical or dishonest in any way. There is thus no reason to conclude that the grievant would be anything other than that if she were returned. She acknowledged that this was a mistake and that she has learned from this and will not repeat anything like this.

3. The union pointed out that the grievant spoke to Mr. Ross about with the possibility of written orders on and that he asked her to "put something in writing." See Ross testimony. He specifically asked her to respond and gave no further indication of how or where that was to be done. Accordingly the notion by the City that she acted with some sort of malice or nefarious intent to mislead is patently false. See sim responded to Mr. Ross' request to provide written information about her property.

4. The union maintained adamantly that there is no policy or rule whatsoever against providing the information the grievant placed on the AMANDA system in the manner in which she did. Without such a rule or even any stated policy, written or otherwise, prior to the action, the fundamental requirement of adequate notice is lacking as one of the elements of just cause. The union also asserted that the claim that this was somehow “obvious” is absurd. The union vehemently countered the claim that the grievant’s actions were akin to “fixing a traffic ticket” or intentionally altering a time record to fraudulently claim more time than was accurate. This was an action taken in good faith by a person who had been asked to provide some information regarding her property. She simply assumed it would be acceptable to do it on the AMANDA system.

5. The grievant also adamantly denied ever closing the file by her actions in placing comments on the AMANDA file for her property. In fact, the union and the grievant alleged, Mr. Ross saw it within a very short time and knew that he had not placed it there. There was no intent or action to defraud or mislead Mr. Ross, or anyone else for that matter, into believing that he had placed that the comments on the AMANDA entry.

6. The union also pointed out that the AMANDA page the grievant saw and entered her comments on was different from what was produced at the hearing and noted that the fields are different. The union noted that there are actually two versions of AMANDA – one old and one newer - and that the screen the grievant worked with was different from the one produced at the hearing.

7. The grievant maintained adamantly that she did not close the file – nor did she ever seek to. There was no evidence that she attempted to fix this as one might “fix” a parking ticket by making it disappear from the system. The union pointed to the investigation by Mr. Humphrey who indicated that the grievant had not in fact tried to close the file or alter the information on the AMANDA system. She simply responded to the request for information from Mr. Ross in a way she knew he would see and understand. The union claimed that the assertion that she “should have known never to do this” is post hoc and self-serving and an attempt to apply 20-20 hindsight to this entire situation.

8. The union also noted that the information the grievant entered was in fact truthful. She absolutely believed that her driveway was a legal nonconforming use – which the city council later affirmed, see exhibit 7. She also truthfully indicated that the vehicles were operable and that those that were parked near the property line were parked there with neighbors’ knowledge and consent. The union maintained adamantly that the grievant had no intent whatsoever to mislead Mr. Ross but rather was informing him of the situation with her driveway. The union noted that that was done per his request to have the grievant provide written information regarding her driveway and the use of it.

9. The union argued that both union and management witnesses acknowledged that there was no policy in place with regard to any employees prerogative to handle, update or add information or documents to one’s own property file in the AMANDA system. The union further asserted that the presence and knowledge of a rule, and the knowledge that an employee can be disciplined for failure to follow that rule, are two basic tenants of just cause. Here without a rule of any kind or a showing of any verbal counseling or coaching in this regard to the grievant just cause is not shown.

10. The union flatly rejected the assertion that this was something “everybody should know.” The union asserted that this is not obviously a violation at all and that this is one of the first and only times an inspector has used the AMANDA system to enter information on their own property. Without a more apparent rule just cause has not been shown.

11. The union also supported the claim that the grievant’s property is legal non-conforming and that her direct supervisor had confirmed this and told her that. In fact it was the subject of good-natured discussion among the other inspectors. The union claimed that the grievant thus had every right to inform Mr. Ross of that fact – even though she did not put that message in the AMANDA system. The union asserted that this fact shows that she was not trying to influence the decision or curry favor with the inspector or exert some sort of inappropriate power in entering the information she did in the AMANDA system

12. Further the union asserted that the mere fact that the grievant was not contrite was a hollow argument by the City. First, she was not terminated for her demeanor during the investigation of this case. Second she had some right to be perturbed by the action taken because she in good faith believed that her property was legal non-conforming (a fact that was eventually confirmed by the City Council) and she was justifiably non-apologetic during this process. Had she known her actions were prohibited she would not have done it but she had never been apprised of that – it's as simple as that.

13. The union claimed that there is an ulterior motive here and that the City is using this minor incident as a pretext to terminate the grievant. The union pointed to the 2012 evaluation which was less than satisfactory – despite years of excellent evaluations and the grievant's injury as the true basis for this action. The City simply seized on a tiny incident and blew it out of proportion.

14. The union pointed to the grievant's re-assignment from more meaningful and fulfilling work to the pigeon coop detail as evidence that the City was simply trying to get the grievant to retire. When that did not occur the City contrived specious claims against her in an effort to pressure the grievant out the door. The union argued most vehemently that the arbitrator should not be blind to this reality and treat the City's actions accordingly by rejecting them summarily.

15. Finally, the union asserted that the investigation was neither fair nor unbiased. It pointed to various statements made by the Director that it claimed showed that the result was pre-ordained before the investigation ever started.

16. The essence of the union's claim is that the grievant had a mere lapse in judgment but that there is no rule or policy against what she did. She knew and had been told her property was legal non-conforming and that she attempted merely to tell the inspector that she knew that as he was investigating the complaints on her property.

Accordingly the union seeks an award of the arbitrator sustaining the grievance in its entirety, reinstating the grievant to her position with full back pay and contractual benefits.

DISCUSSION

FACTUAL BACKGROUND

The grievant is a city inspector responsible for code compliance for properties located within the City of St Paul. She has been with the Department of Safety and Inspections, DSI, for 17 years. During that time her evaluations have been satisfactory and included positive comments about her performance and commitment to duty. See union exhibits C, D, E, F, G and H. There was also no evidence of any prior discipline on her record and no evidence that the grievant has any propensity to be dishonest or untrustworthy. There were also a number of congratulatory comments and awards for her diligent and good work performance submitted by the union. Other than this incident there was no evidence of prior problems with her performance or her ethics.

The grievant raised concerns about her 2012 evaluation and had inserted comments in response to some comments in it from her supervisor but even that rated her at a satisfactory level. There was insufficient evidence that the City had any personal animus toward the grievant or that her re-assignment was for some ulterior purpose. While it was shown that she was placed on a less desirable work assignment, that fact alone did not establish on this record that she was singled out for disparate treatment as the result of the re-assignment itself.

The evidence showed that issues having to do with inspections are kept on a computer system known as AMANDA. It was clear that members of the general public do not have access to this system and that only those authorized, such as the grievant and other DSI inspectors have access to it. The AMANDA screen fields shown at the hearing list various pieces of information such as property address, the inspector involved and the code issues or complaints. There was evidence that the AMANDA fields used now are somewhat different. Compare union exhibit O and Joint exhibit 3, showing the AMANDA screen shots.

The operative facts were relatively straightforward in the regard to the grievant's accessing the AMANDA system. The evidence showed that a citizen complained about the vehicles parked on the grievant's property located within the City of St. Paul. Joint exhibit 1 reflects the following information about the grievant's property: "property line exterior storage of multiple vehicles."

Pursuant to that citizen complaint Inspector John Ross was assigned to investigate. He testified that when he initially looked at the AMANDA system, see Joint exhibit 1, he saw the grievant's name on that document but simply assumed that the complaint had come through her – not that it was about her property. It was not until later that he learned that the property belonged to the grievant. He further testified that he visited the property and saw cars parked on a gravel surface. He opined that the gravel driveway was non-conforming and that there was a vehicle parked in the front of the home, which is also a violation of City code.

The evidence further showed that he spoke with the grievant about her property. There was clear evidence that he asked the grievant to put something in writing, or words to that effect, when she informed him that her understanding of the driveway was that it was a legal non-conforming use. There was no evidence as to how this information was to be provided.¹

As noted above, the grievant then went into the AMANDA system and entered the following message on a comment field on the screen: "one vehicle belonging to (recently deceased) father in law being parked next to garage short term with neighbors permission. All other vehicles being driven daily. Driveway is legal non-conforming. No vehicles parked on street. Household belongings currently in garage due to water damage and repairs in process. (See front porch stove sofa tables under tarp.)" This was in apparent response to both the request to provide information about the property and to the actual complaint itself, which did not actually mention the gravel driveway but rather related to the cars parked on the property, the location of the cars and some exterior storage.

¹ That comment does not appear in Mr. Humphrey's investigative report but Mr. Ross did testify to this effect at the hearing. On this record that statement was credited to have been made as it would not have been unreasonable that such a statement would have been made in response to the claim that the grievant made to Mr. Ross during their conversation

There was no evidence that the grievant attempted to close the file or to alter the Correction Order Mr. Ross wrote up on her property. See Joint Exhibit 5. Neither was there any evidence that the grievant did anything other than to enter the above information on the AMANDA screen such as to speak to Mr. Ross in an effort to get him to change his mind or alter the correction notice in any way.

There was considerable evidence and controversy about whether the grievant's property and driveway is or is not a legal non-conforming use. This frankly was a diversion from the main issue here and much of this evidence was simply immaterial to the discussion of whether just cause existed for the grievant's discharge. What was important was that the grievant believed in good faith that her property was a legal non-conforming use and that her gravel driveway – which was the main subject of the correction order, was legal non-conforming under the City's property code and was allowed.² Further, the fact that there was a correction order issued belied any claim that the grievant somehow closed the file or that she exerted some form of undue influence over Mr. Ross. Part of the City's argument is that the grievant's mistaken belief that her property was legal non-conforming influenced her decision to attempt to sway Mr. Ross. There simply was insufficient evidence to establish that given that the grievant's only transgression was to place the comment on AMANDA.

The correction order has an appeal process on it in the event the homeowner desires to appeal or challenge the order. The grievant must certainly have known about that in her capacity as a DSI inspector but even if she did not, that process is set forth on the form. She availed herself of that process as well and appealed to the City Council.

Eventually the City Council granted the grievant a variance allowing the gravel driveway to remain as long as no cars were parked in the front yard. See Joint exhibit 7. The City argued that this did not grant the grievant the property code relief she sought but the overall record did not support that view entirely.

shortly after the complaint was made that "the driveway was OK. Wendy Lane approved it." He might well have wanted to know more about that and thus asked the grievant to provide something to him about that.

The action of the City Council showed that the grievant was vindicated to some degree in that the driveway was eventually allowed to remain a gravel driveway surface. Having said that however, this fact did not pertain directly to the ultimate question here over whether the grievant's actions in accessing the AMANDA system constituted grounds for discipline or discharge.

There was also considerable dispute about whether the grievant's supervisor had told her that the driveway was legal nonconforming. Ms. Lane flatly denied ever making such a statement but that again misses the point. The question is whether the grievant was a good faith belief that it was and on this record that piece was shown by the evidence. There was evidence that the inspectors joked about the grievant's driveway and that many knew it has a gravel driveway, leading her to believe in good faith that it was a legal non-conforming use. At the end of the day however this whole discussion was a side bar issue to the main thrust of this case – i.e. whether the grievants actions were so egregious as to warrant her discharge.

There was no question on this record that in response to the discussion with Mr. Ross as discussed above, the grievant accessed the AMANDA system and put the message set forth above on the comment screen. When confronted with this she never denied it but simply said that it was to provide information to the inspector. She took no further action with respect to the AMANDA system nor was there evidence that she attempted to influence Mr. Ross' decision in any other way.

The City has a general policy regarding the ethical and appropriate conduct of its inspectors. There is no rule or policy that specifically covers this situation. Neither was there evidence of a specific rule governing the instances when a DSI inspector can access the AMANDA system even though they might be entering it on their own property or on a property to which they are not assigned or providing any service.

² The actual correction order is set forth at Joint exhibit 5 and essentially requires that the driveway, which was Class 5 gravel, be upgraded to an "improved surface." That meant a tar or concrete surface. There was also an order to cease parking cars in the front yard, since a portion of the driveway allowed for vehicles to be parked there.

The City relied instead on a general statement that a DSI inspector should “know better than to do this” along with the general expectation for inspectors to maintain the highest level of honesty and integrity. See Cervantes testimony. That however could be applied to almost any action that the employer later says should not have happened. For that sort of allegation to be supported, the action must be shown to be sufficiently outrageous or obviously against the law or commonly accepted standards of conduct either societally or within a particular industry as to be painfully apparent to any employee. That simply was not the case here.

Based on these facts, the City concluded that the grievant’s action and her lack of contrition during the investigative process meant that she could no longer be trusted to function in that department and that termination was the only option. The grievant was terminated by letter dated June 30, 2014 after pre-termination notices and a Loudermill hearing was held. The union properly grieved this and the grievance was appropriately processed through the grievance steps culminating in this arbitration. It is against that factual backdrop that the analysis of the matter proceeds.

NOTICE

One of the fundamental elements of just cause is the determination of whether the grievant was placed on notice that certain conduct is prohibited and will lead to discipline. There is no policy governing this situation and no rule or policy against a DSI inspector accessing the AMANDA system on their own property. There was some indication that this precise situation has not arisen before.

Arbitrator Carroll Daugherty in the seminal case on the question of just cause states as follows with respect to notice to the employee and in answer to the question, “did the employer give to the employee forewarning or foreknowledge of the possible disciplinary consequences of the employee’s conduct”:

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing though the medium of typed or printed sheets or books of shop rules and of penalties violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

Note 3: A finding of lack of such communication does not in all cases require a ‘no’ answer to question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may be properly be expected to know already that such conduct is offensive and heavily punished.” *Grief Bros. Cooperage and UMW*, #15277 42 LA 555, 558 (Daugherty 1964).

The City’s claim here is that even though there is no actual specific rule against this, any competent DSI inspector should know not to access AMANDA in this manner and that doing so amounted to a police officer attempting to “fix” a ticket. On these facts, that argument fell short.

First, accessing AMANDA on this record was not shown to be anything equivalent to theft or attempting to “fix” a ticket. There was no effort to make this matter “go away” nor was there any other action taken by the grievant that would lead to that conclusion. The comment was the only action she took and that was shown to have been in direct response to a request for the information about her property. The City’s argument relies on what some arbitrators have called the “any darned fool rule” that essentially holds that anybody in the modern workplace would know never to do this. Offenses such as assault, theft, intentional destruction of company property and the like are in this category. An employer probably does not need a written rule nailed to the wall that says thou shalt not steal, for example. There are certainly other places where such admonitions are well known.

There are also certain types of employments where specific types of actions are well known as offenses for which there need not be a specific written rule – smoking in a gun powder plant might be an example of such a rule. Here though even though as discussed below, the grievant’s actions could well have been regarded as something she should not do, it did not fall into the category of an offense so serious that anybody would know not to do it or that doing so would automatically result in termination.

As Daugherty posits, there are two prongs of the notice requirement. First, there must be notice that the action is contrary to the employer's expectation and will result in discipline of some kind and second, that the offense will result in automatic termination. As discussed below, while the grievant acknowledged that this action was perhaps a lapse in judgment – she regarded it as a “brain fart,” and thus might well have been regarded as something she should not do there was absolutely no evidence that this would result in automatic termination similar to theft etc.

Further, the City's quantum leap conclusion that the grievant can never ever be trusted again despite her long and satisfactory record and the paucity of evidence of any history of dishonest or untrustworthy behavior was simply unsupportable on this record. There was adequate evidence that the grievant learned from this and will never repeat this type of action again. A mistake in judgment, especially in these circumstances, does not result in the termination of employment on these facts.

Second, there was no evidence that the grievant attempted to alter the actual status of the case to close the file so that no action would be taken. Had that been shown the result here might have been different but at its very heart, this was an attempt by the grievant to respond to what she felt was an action that need not be taken and to provide information.

WAS THERE A SHOWING THAT THE GRIEVANT'S ACTION WERE INAPPROPRIATE EVEN THOUGH NOT SPECIFICALLY PROHIBITED.

While there was no evidence she did this to mislead or to falsify a document, the reason to give her some discipline is that her actions could have been construed as attempting to influence the outcome of a pending inspection on the property.

The grievant acknowledged, and Mr. Ross confirmed, that her actions, which were apparently taken in a hurry without much forethought, were inappropriate and that she should not have done it. It gave rise to what lawyers sometimes refer to as the “appearance of impropriety.” It should be noted that the appearance of such impropriety does not equate with actual fraud or other egregious transgression as the City implies in its arguments here.

Thus, the evidence established that if the grievant had thought about it a bit more she would have known not to access AMANDA to provide this information.³ However comparisons to other cases show that her actions did not come close to a dischargeable offense on this record and unique circumstances.

One employee was fired for driving City vehicles on City time without a valid license. There though the fact of not having a driver's license and driving a motor vehicle is both a criminal offense as well as something that the employee would have a hard time denying knowledge of. That does equate with the "any darned fool rule" discussed above. It is axiomatic that operating a motor vehicle without a valid license carries with it an obvious disciplinary consequence, not to mention potential liability to the City that everyone with a driver's license is or should be aware of.

Another employee was terminated for filing a false time report. There the employee had punched in remotely in direct violation of a rule not to and then was apparently less than contrite about it during the investigation. See joint exhibit 14. Theft of time by punching in when not at work is exactly one of those well-known and well-established rules that need not be specifically stated. That action *was* shown to be like punching someone else in or out or lying about one's time.

The grievant's actions frankly did not approach that level. Further, the grievant was completely forthright about her actions here. (The City complained that the grievant was somewhat strident in her claim about her property but she was not discharged for that – rather she was discharged for accessing the AMANDA system. The mere fact that an employee does not apologize is not grounds for discipline generally, especially if the employee has done little or nothing wrong). This grievant never hid the fact that she accessed AMANDA.⁴ Thus, the case is different from the case at Joint exhibit 14.

³ It should be noted too that the truth of the statements on AMANDA was not the issue. As Mr. Cervantes indicated, it was the medium – i.e., the use of AMANDA – rather than the content that was the issue.

⁴ In fact the AMANDA system showed that the grievant as the person who paced the comments that are the focus of this case. See joint exhibit 4. She was forthright about accessing the system throughout the entire disciplinary process. The grievant's claim was that she did not know it was a terminable offense to do it but never asserted that she did not do it.

Likewise, yet another employee was terminated for filing a false time report. See Joint exhibit 15. That employee left early yet falsely claimed that she had worked her entire shift. This was an obvious attempt to defraud the City and was a much different action than that undertaken by the grievant here.

The case that somewhat closely approximates this one in terms of the actions was that of the employer referenced at Joint exhibit 13. That employee also made a knowingly false report about a phone call during an investigation. Frankly, that was arguably worse in that the employee there made a knowingly false statement during an official investigation. Here the grievant has been entirely forthcoming about her actions. She never once tried to hide or deny what she did nor did she attempt to shift blame for it. Her defense, which had some merit, was that there was no rule against this and she would never have done it if there had been.

Certainly the grievant's actions here showed poor judgement. To the untrained eye, entering information as a private homeowner to a system that only city inspectors can access might lead one to believe that there was something awry in the process. The facts though lead to a different conclusion than the one the City leapt to during this investigation. This was exactly what the grievant claimed it was – a lapse in good judgment intended to provide information – nothing more. Her method of doing it was unsound but on this record hardly justifies the termination of her employment especially given her longevity and otherwise excellent work record.

At the end of the day, it was clear that the grievant's actions were a lapse of judgment and that she should not have accessed AMANDA, but to conclude that she can never be trusted again given her truthful, yet somewhat strident behavior, during the investigation is unsupported. The remaining question is the appropriate result.

APPROPRIATE DISCIPLINE

As noted above, the employee referenced at Joint exhibit 13 was issued a 2-day suspension for his actions in being untruthful. Here, even though the grievant was truthful in the investigation some discipline is appropriate for accessing AMANDA in this context.

Several options were considered. Some thought was given to reinstating the grievant with full back pay and benefits without any discipline at all. This could have been justified based on the lack of specific notice or a rule against her actions.

On this record though it was clear that upon reflection even the grievant realized she had done something inappropriate even though the information she entered was based on her good faith belief and was in response to Mr. Ross' request for it. Thus the issue is not the information or the content but the fact that she accessed a system not available to the general public. The grievant testified credibly that she acted hastily and should have thought more about this.

That option was therefore rejected based on the evidence that this could be viewed as a possible use of her position to influence the outcome of those orders even though there was no such evidence on this record. As many ethics professors have noted, perception can sometimes equal reality and the City has a legitimate interest in making sure that its employees are subject to the same laws they enforce and enjoy no special privileges or treatment as the result of their employment.

Some thought was given to reinstatement subject to a reprimand only. That was rejected as insufficient to send the message that no one in the grievant's position should access AMANDA in this manner. A simple reprimand was rejected as insufficient to impress upon the grievant that this should not have occurred in the manner in which it did and should not occur in the future.

Based on the discipline given to the employee referenced at Joint exhibit 13, it was determined that a 2-day suspension is appropriate and will provide ample warning to her and others similarly situated that DSI inspectors must use better judgment should such a situation arise in the future.

Accordingly, the grievant is to be reinstated to her former position subject to a 2-day suspension for her role in his matter. The grievant is to be paid full back pay and all contractual benefits from the date of her termination to her reinstatement pursuant to this award. Back pay is subject to mitigation of damages and any employment or government benefits received by the grievant during the interim period between her termination and reinstatement. The union and grievant shall provide any appropriate documentation to verify the amounts awarded hereunder. Reinstatement is to be made within 10 business days of this award. The arbitrator will retain jurisdiction in order to determine any issues that may arise based on this award.

AWARD

The grievant is SUSTAIN IN PART AND DENIED IN PART as set forth above. The grievant is ordered to be reinstated with full back pay and contractual benefits subject to the 2-day suspension as set forth above.

Dated: May 4, 2015
AFSCME and St. Paul Award

Jeffrey W. Jacobs, arbitrator