

IN THE MATTER OF ARBITRATION BETWEEN

Minnesota Teamsters Public and Law Enforcement Employees, Local No. 320)	
)	Issue: Termination of Employment
)	
("Union"))	Hearing Site: Minneapolis, MN
)	
)	Hearing Date: August 12 & 13, 2015
)	
&)	
)	Briefing Date: September 4, 2015
)	
City of Minneapolis, Minneapolis Convention Center)	Award Date: November 4, 2015
)	
)	Mario F. Bognanno, Arbitrator
("City"))	

I. BACKGROUND AND JURISDICTION

The Parties to the above-captioned matter are the City of Minneapolis ("City") and Minnesota Teamsters Public and Law Enforcement Employees, Local No. 320 ("Union"). The Parties are signatories to a Collective Bargaining Agreement ("CBA") that covers the Minneapolis Convention Center ("MCC") and has an effective term of January 1, 2013 to December 31, 2014. Jt. Ex. 1.

The Grievant, identified by the initials A.D., was initially hired by the MCC in March 2002 as a full-time Operations and Maintenance Specialist ("OMS"). In 2005, his employment status changed to part-time intermittent OMS. Approximately thirteen (13) years later, on February 27, 2015, MCC terminated Grievant's employment. On January 19, 2015, he caused the discharge-provoking incident. His misconduct allegedly violated Minneapolis Civil Service Commission Rules ("MCSCR") 11.03 B: 5, 6, 18, 19 and 20. Prior to this incident, Grievant received several performance reviews. His 2009, 2010 and 2011 performance reviews are in

evidence and, in each he received MMC's highest rating, namely, "Satisfactory." Union Ex. 4. Prior to his termination, A.D. had never been disciplined.

Pursuant to Article 4 of the CBA, the Union filed a Step 2 grievance on February 27, 2015, challenging MCC's discharge decision. Jt. Ex. 1; City Ex. 11. The Parties were unable to resolve this grievance in Steps 2 and 3 grievance negotiations. City Ex. 12 at 1-2. On April 2, 2015, the Union advanced the grievance to Step 4, Arbitration. City Ex. 13.

On August 12 and 13, 2015, the undersigned heard the grievance in Minneapolis, MN. The case record was opened on August 12, 2015, when, appearing through their designated representatives, the Parties entered into the following stipulations: (1) the grievance was properly before the Arbitrator for final and binding resolution; (2) Grievant was to be identified by the initials A.D.; (3) witnesses were to be sequestered; and (4) the Parties waived the provision in Article 4, Section 4.01 of the CBA, requiring a decision within thirty (30) days following the close of the record. Next, the Parties introduced exhibits and made opening statements. On August 13, 2015, the Parties presented witness testimony that was both sworn and cross-examined, and the undersigned was given an escorted site visit.

On or about September 4, 2015, the Parties filed timely post-hearing briefs. Thereafter, the Arbitrator took the matter under advisement.

II. APPEARANCES

For the Union:	Kevin M. Beck Curtis Swenson A.D.	Attorney-at-Law, Kelly & Lemmons, P.A. IBT, Local 320, Business Agent Grievant
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For the City:	Trina R. Chernos Jeff Johnson Mark Zirbel	Asst. City Attorney, City of Minneapolis, MN Executive Director, MCC Director, Event Services, MCC
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III. RELEVANT CBA CLAUSES and MINNEAPOLIS CIVIL SERVICE COMMISSION RULES

CBA CLAUSES:

Article 5, Section 5.01 – Just Cause

Disciplinary action may be imposed upon an employee who has satisfactorily completed the initial probationary period only for just cause.

Article 5, Section 5.02 – Progressive Discipline

Disciplinary action shall normally include only the following measures and depending upon the seriousness of the offense and other relevant factors, shall normally be administered progressively in the following order:

Subd. 1. Reprimands, either oral or written;

Subd. 2. Suspension from duty without pay;

Subd. 3. Demotion in position and/or pay or discharge from employment.

If the Employer has reason to reprimand an employee, it shall normally not be done in the presence of other employees or the public.

Jt. Ex. 1.

MINNEAPOLIS CIVIL SERVICE COMMISSION RULES:

11.04 Types of Disciplinary Action

... The following types of disciplinary action are listed in order of their increasing severity.

A. Warning ...

B. Written Reprimand ...

C. Suspension ...

D. Demotion ...

E. Discharge

Discharge of an employee is appropriate for ... severe initial misconduct.

City Ex. 1.

IV. ISSUE

The Parties jointly stipulated to the following Issue statement:

“Whether A.D. was discharged for just cause? If not, what is an appropriate remedy?”

V. FACTS AND BACKGROUND

Except as nuanced, the facts of the case are not in dispute.

The MCC provides the city of Minneapolis with \$250 million in hospitality business annually. The convention center is an enormous facility spanning thirty-seven (37) acres. It houses four (4) cavernous exhibit halls and eighty-seven (87) meeting rooms. Events held at the MCC often require the re-sizing of exhibition halls, using so-called “air walls,” “air wall panels,” or “panels.” The panels are very large. Each is 30-feet high and weighs 1,300 pounds. Each panel is suspended from rollers on overhead tracks attached to hall ceilings. The January 19, 2015 incident involved these panels. A.D. and his OMS co-workers are the MCC employees who roll-out (i.e., “set-up”) the portable room dividers prior to MCC events and who roll-back (i.e., “tear down”) same when events end. City Ex. 9.

A.D. normally worked late afternoon shifts. City Ex. 14. However, on January 19, 2015—Martin Luther King Day—he volunteered to work a 6:00 a.m. to 2:30 p.m. shift. City Ex. 14. Supervisor Greg Langford initially assigned Grievant to do “prep work” in Exhibit Halls E and D. Then, around 7:30 a.m., he directed A.D. to help tear down air wall panels dividing Exhibit Halls C and D in preparation for a Boat Show exhibition. Said panels run north and south. Union Ex. 1. Upon arriving, A.D. observed co-workers Jeff Heath, Asha Ennaw and Fardoosah Mohamed already in the tear down process. They were moving panels to the storage cabinet (a/k/a “air wall pocket” or “storage area”) on the north side of Exhibit Hall C. At some point, Ms. Ennaw and Mr. Mohamed began to tear down panels on the south side of the hall, while Messrs. Heath and A.D. continued doing same on the north side of the hall.

The panels and the overhead tracks from which they hung were relatively new and, as A.D. testified, this was the first time he had torn down “new” panels. At first, Mr. Heath walked panels to A.D. who stored them. However, after a relief break, the men exchanged roles with Grievant walking panels to Mr. Heath for storage. The few panels that remained were located in the middle of the divided halls and, thus, at maximum distance away from the north side air wall pocket. Only three (3) panels remained when A.D. began walking them. He testified that he walked the first two (2) panels toward the hall’s north side and then he pushed them toward Mr. Heath to catch and store. In both instances, they stopped short—“30 feet before reaching Jeff.” Therefore, he pushed the last panel “extra hard.” A.D. testimony; City Ex. 2 at 2; City Ex. 10 at 3 & 10-11. It was at around 7:55 a.m. that Grievant pushed the last panel which sent it flying down the track at such speed that Mr. Heath could not catch it: he jumped out of its way and the panel crashed into Exhibit Hall C’s north side wall, causing a “debris field” and \$2,123.96 in damages. City Ex. 2 at 1; City Exs. 6 & 8; City Ex. 7 at 2; City Ex. 10 at 3 & 11.

As soon as he pushed the last panel, A.D. turned around and walked to the south side of the hall to help Ms. Ennaw. Also, he testified, he did not realize the panel had crashed, caused damage and Mr. Heath did not say anything to him about the damage. City Ex. 5 at 2. In fact, A.D. stated in a written account of events, “I was not allowed to view such accident.” City Ex. 5 at 1.

Robert Swanson and Archie Carlos, Manager, Event Operations Manager, and Human Resource Generalist, respectively, investigated the incident. According to their interview notes, Mr. Heath had told them that the crash was “very loud.” City Ex. 10 at 4 & 11. He also told them

that A.D. did not “react,” did not “inspect it” and did not speak to him about the incident. Rather, he walked to the “other end” [of the hall]. City Ex. 10 at 4 & 11.

While working with Ms. Ennaw, A.D. testified that he noticed Mark Zirbel, Director, Event Services, and Mr. Heath talking. Thereafter, Mr. Zirbel approached him and angrily chastised him for the reckless way he pushed the last panel. A.D. testified that Mr. Zirbel did not give him a chance to explain; he was unaware of the crash; he did not laugh about the incident; Mr. Zirbel was intimidating, disrespectful and insulting. City Ex. 5 at 1-4.

Mr. Zirbel testified that he saw A.D. recklessly push the last panel. At the time, he was standing in the south side of Exhibit Hall C; however, from that vantage point, he could neither see Mr. Heath nor see the panel hit the wall. At 9:00 a.m. on the morning in question, Mr. Zirbel e-mailed an incident report to Messrs. Swanson and Carlos. Mr. Zirbel wrote: “[A.D.] was pushing the last section toward Jeff and started running behind the air wall panel to gain maximum speed [and] let it fly fast toward the end of the track. The panel slammed into the wall.” City Ex. 6. Continuing, Mr. Zirbel wrote, A.D. laughed and quickly ran to the south side of the hall to assist Ms. Ennaw. Id. Next, Mr. Zirbel walked to the hall’s north side to speak with Mr. Heath. Mr. Heath understood that pushing air walls at a high rate of speed was unacceptable. Id. Thereafter, Mr. Zirbel walked back to the hall’s south side, spoke to Grievant, expressed his displeasure with what he had observed. Id. He then walked back to the hall’s north side to inspect the damage. Id. From there, he returned to hall’s south side and, with the Grievant, they walked to north side to view the damage site. Id. Next, Mr. Zirbel told Grievant he was being suspended—placed on paid investigatory leave; he would be contacted about the scheduling of a “predetermination meeting;” he escorted A.D. out of the building. Id. Finally,

Mr. Zirbel contacted the Central Alarm Station (“CAS”), requesting an incident investigation and report. Id.; City Ex. 7. At the hearing, Mr. Zirbel stated that Grievant had admitted to wrongdoing.

Based on Mr. Zirbel’s e-mail and the CAS report, the City provisionally determined that A.D. had violated MCSCR 11.03 B: 5, *Willful or negligent damage of City property*. City Exs. 2, 6 & 7. Hence, Mr. Swanson arranged a January 23, 2015 pre-determination meeting at which Grievant was invited to respond to this charge. City Ex. 2. Curtis Swenson, IBT, Local 320, Business Agent, accompanied Grievant.

According to Messrs. Swanson’s and Carlos’ interview notes, A.D. stated, *inter alia*: he gave the last panel an “extra push” so it would reach Mr. Heath; Mr. Heath did not catch the panel to prevent it from hitting the wall; Grievant walked to the south side of the hall; after speaking with Mr. Heath, Mr. Zirbel approached Grievant “wagging his finger” and in a disrespectful and angry manner he scolded him and would not allow him to explain what happened; he had not been trained to move the air walls in question; he felt “discriminated against;” he “cares for [MCC] equipment;” and he “did not laugh” when the panel hit the wall. City Ex. 2 at 2-6.

After interviewing Mr. Heath and learning that damage repairs would cost \$2,123.96, the set of provisional charges brought against A.D. was expanded. He now was being charged with violating MCSCR 11.03 B: 5, 6, 18, 19 and 20. City Exs. 10, 8 & 3. Hence, to give A.D. the opportunity to respond to these charges, a follow-up pre-determination meeting was scheduled for February 27, 2015. At this meeting, A.D. presented a written statement in which

he responded to each alleged violation. Grievant's written response to each MCSCR 11.03 B charge is summarized as follows:

5 *Willful or negligent damage of City property.*

After having worked for the MCC for many years without having damaged its property, it is disheartening to learn the Employer now believed I willfully or negligently damaged its property and that I am a "bad" employee. Mr. Zirbel did not allow me to view the "accident" scene and his intimidating and abusive treatment was uncalled for. While I have a happy disposition, I would never laugh about causing any type of damage.

6. *Interference with the work of other employees.*

I have never disrupted the work of co-workers. I did not intend to interfere with Mr. Heath's work. Mr. Zirbel should have allowed me to view the damage scene.

18. *Violation of department rules, policies, procedures or City ordinance.*

I was unaware of the alleged damage and Mr. Heath did not mention it to me; thus, how can it be said that I violated MCC rules and City ordinances.

19. *Knowingly making a false statement of material fact to a City representative during an investigation.*

A Muslim and devout believer in Islam, I am an honest person. I am a role model for my children, family and friends. The January 19, 2015 incident should not discredit my employment record and my honesty. I would never willfully be negligent or damage MCC property.

20. *Other justifiable causes as specified.*

I did not intend to harm Mr. Heath or any other co-worker over the years. Safety is a concern of mine and I respect MCC's safety regulations. We all make mistakes. "I hope that I have learned from this isolated incident." This was not a "small issue." But the incident was not intentional and "[I]t will definitely be [a] learning experience for myself."

City Ex. 5 at 1-4¹.

VI. POSITIONS OF THE PARTIES

A. City's Positions:

Grievant was discharged for "just cause" as required by Article 5, Section 5.01 of the CBA and for "severe initial misconduct" as specified in section 11.04 in MCSCR. Jt. Ex. 1; City Ex. 1. There is uncontroverted evidence of Grievant misconduct on January 19, 2015. Initially, the MCC found Grievant to have violated MCSCR 11.03 B: 5, *Willful or negligent damage of City property*, for "laughing at what had happened and, instead of inspecting the damage, [he] quickly ran the other way, to the south end of the hall." City Ex. 2. At the January 23, 2015 pre-determination meeting, the MCC heard Grievant's side of the story. Subsequent to interviewing Mr. Heath and receipt of additional evidence (e.g., the cost of damage repairs), the MCC leveled more allegations of MCSCR violations and scheduled a second pre-determination meeting on February 27, 2015 to, again, hear A.D.'s side of the story. Said violations of MCSCR 11.03 B are paraphrased below:

5. Willful or negligent damage to City property.

At the January 23, 2015 pre-determination meeting, Grievant admitted giving "extra push to the last panel," Mr. Heath was unable to stop the fast moving panel that loudly slammed into the building wall, creating significant damage. Further after the crash, Grievant was observed laughing at what happened and then walking to the south end of the hall instead of inspecting the damage, checking on Mr. Heath's welfare, and

¹ On February 28, 2015, A.D. gave the City a second written statement. City Ex. 5 at 5-7. This statement repeats many of the arguments A.D. had previously articulated. A.D. is a "respectful employee;" he had never before caused damage; angrily, Mr. Zirbel told A.D. he was "finished in this building." Mr. Zirbel's treatment of A.D. was prohibited personnel management; it was an accident.

reporting the crash to supervision. Alone, Mr. Heath swept away the debris. City Ex. 4 at 1.

6. *Interference with the work of other employees.*

Grievant deviated from the usual practice of handling and storing air walls, causing the resulting damage. Deviating from his initially assigned task, Mr. Heath cleaned up the debris. Id. at 2.

18. *Violation of department rules, policies, procedures or City ordinance.*

Grievant knows how to safely set-up and tear down panels. Previously, he had walked “old” panels and, just before the incident, he and Mr. Heath had walked “new” panels. Grievant’s “extra push of the last panel” was an unsafe act. Id. at 2.

19. *Knowingly making a false statement of material fact to a City representative during an investigation.*

Grievant did not “take ownership” of the crash. At the January 23, 2015 pre-determination meeting, Grievant asserted that the incident was an “accident,” that “accidents can happen” and that he had “not been trained in using the new walls.” Id. at 2-3.

20. *Other justifiable causes as specified.*

Mr. Heath got out of the way of the speeding panel to avoid being hurt. Mr. Heath could have suffered serious injury. Too, Grievant failed to report the damage he caused to MCC property. Id. at 3.

The evidence adduced, the City argued, is “just cause” for terminating Grievant’s employment.

Jeff Johnson, Executive Director, MCC, testified that employee, customer and attendee safety is a paramount organizational value. In 2006, the Parties established a joint Labor Management Committee that covers “all matters of mutual concern including health, *safety* and working conditions...” Jt. Ex. 1 (emphasis added). Safe behaviors are continuously communicated to bargaining unit employees, Mr. Johnson testified. Relatedly, he also stated Mr. Zirbel was visibly “upset” by the incident. Shortly after its occurrence, Mr. Zirbel told Mr.

Johnson, "You wouldn't believe what just happened." Then, Mr. Johnson and he inspected the crash scene. Mr. Johnson concluded the panel had hit the wall with excessive, unsafe force.

On February 27, 2015, Mr. Johnson signed A.D.'s discharge notice. City Ex. 4 at 6. He did so for several reasons: first, the incident was witnessed by a member of his leadership team; second, he personally viewed the damage that would be costly to repair²; third, Messrs. Swanson's and Carlos' investigation did not produce exculpatory evidence; fourth, Grievant's misconduct risked a co-worker's safety; fifth, after pushing the panel Grievant was observed laughing and then leaving for the south side of the hall; sixth, when the fast-moving thirty (30) foot tall panel weighing 1,300 pounds hit the wall it caused a loud crashing sound, a cloud of dust and debris and significant damage, yet Grievant maintained he neither heard the sound of the crash nor saw the damage, which is highly unlikely; seventh, Grievant commented at length about Mr. Zerbel's alleged mistreatment and about not being trained to move the "new" panels³, but not about his decision to recklessly push the panel in question; eighth, Grievant did not exhibit remorse or utter "I'm sorry;" and finally, Grievant had lost upper management's "trust" and his proven misconduct rises to the level of a first occurrence dischargeable offense.

Grievant's claim that his conduct was an "accident" is disingenuous: his shoving of the last panel was purposeful; Mr. Heath witnessed Grievant's running push of the panel; and Mr. Heath was forced to jump out of the way because he could not stop the panel, it was moving

² The photographs in City Ex. 7 at 3-7 are accurate depictions of the scene he witnessed.

³ Robert Swanson manages the MCC's set-up and tear down activities. On direct examination, he testified that A.D. had never mentioned the need to be trained on how to safely move the "new" air walls. Further, he opined, there was nothing uniquely different about walking panels whether "old" or "new."

too fast. City Ex. 10 at 3-4 & 10-11. Mr. Zirbel also saw A.D. “running behind the air wall panel to gain maximum speed and then let it fly toward the end of the track;” after the panel smashed into the wall, Mr. Zirbel said Grievant laughed. City Ex. 6. After the panel hit the wall, A.D. stated he walked to the south side of the hall to help a co-worker. However, this too was disingenuous, the City argued. First, the task of storing all of the panels on the north side was incomplete. The last panel had not been stored. Second, the crash left debris to be cleaned up: a task Grievant left for Mr. Heath to perform. Third, after the impact, Mr. Heath told investigators he could not recall Grievant reacting in any specific way other than that he failed to ask if he was O.K. before walking to the south-side of the hall. City Ex. 10 at 4

Next, the City urged the Arbitrator to reject the Union’s plea for pre-discharge progressive discipline. First, MCSCR 11.04 E unambiguously provides for the discharge of an employee for “severe initial misconduct.” City Ex. 1. Grievant’s January 19, 2015 behavior amounted to gross misconduct or “severe initial misconduct,” resulting in upper management’s loss of trust in him. A.D. acted improperly in complete disregard of reasonable standards of workplace conduct and, thus, his actions warranted immediate discharge, not progressive discipline. Second, Article 5, Section 5.02 in the CBA provides that discipline “shall normally” require progressive measures, “depending upon the seriousness of the offense.” Jt. Ex. 1. In the present matter, Grievant’s misconduct was egregiously serious and anything but “normal;” hence, there is no contractual requirement for progressive discipline in this instance.

Mr. Johnson assigned heavy, negative weight to the following factors: (1) damage to MCC property; (2) safety, Mr. Heath could have been injured; (3) Grievant laughed as if “it didn’t matter” and then ran off; and (4) Grievant deflected responsibility for his misconduct and

expressed no remorse over the calamity⁴. As a thirteen (13) year employee, he should have known better, he alone was at fault. His deflecting behaviors were “red flags,” suggesting if he was returned to work the likelihood of repeat misconduct would be high.

Further, citing *Elkouri and Elkouri* and arbitral precedent, the City continued, it is the Union who bears the burden of proving “disparate treatment,” if same is argued. The Union’s burden is to show that A.D. was treated differently than others and to establish that the *circumstances* of his offense and his employment record are substantially like those of the comparable others. At the hearing, the Union relied on John Zasada’s May 21, 2015 “written reprimand,” and Desmond DeVos’ April 15, 2014 “termination” as proof of disparate treatment. Union Exs. 2 & 3. However, the *circumstances* of Messrs. Zasada’s and DeVos’ offenses and their employment records compared to those of A.D.’s are as dissimilar as “apple and oranges.”

Finally, the City concluded, Grievant’s proven misconduct violated multiple sections of MCSCR 11.05 B. *Inter alia*, Grievant damaged MCC property; Grievant compromised the safety of a co-worker; Grievant repeatedly failed to take responsibility for his actions; Grievant is untrustworthy and corrective discipline would not have resulted in positive behavioral change. The grievance must be denied in its entirety.

B. Union’s Positions:

The CBA limits the City’s authority to discipline and discharge its employees. Specifically, as Article 5, Section 5.01 states, the City may take disciplinary action but “only for just cause.”

⁴ Grievant deflected responsibility. He criticized Mr. Zirbel’s conduct; his post-January 19, 2015 commentary was self-focused—“I felt worthless”—rather than about his misdeed and its adverse consequences; he claimed to lack requisite training; he argued that had Mr. Heath caught the panel, damage would have been averted.

Jt. Ex. 1. In the present case, the City failed to prove just cause for discharging A.D. Moreover, as Article 5, Section 5.02 states, the administration of disciplinary action shall “normally” be progressive. Jt. Ex. 1. Yet, rather than to have reprimanded, suspended or demoted A.D., the City chose to terminate his employment. Citing *Elkouri and Elkouri* and arbitral precedent referenced therein, the Union pointed out that discipline should be in keeping with the seriousness of the offense; not be punitive; be progressive; give weight to mitigating circumstances. When employers fail to have previously reprimanded or warned an employee about conduct that could result in discharge, arbitrators routinely set aside or reduce the discharge penalty. Progressive or corrective discipline is an important principle in any analysis of just cause. In the present matter, the MCC failed to make any attempt to rehabilitate A.D. through use of progressive discipline. Progressivity would have put A.D. on notice for unacceptable behavior and it would have allowed the City to keep a trained employee.

Regarding mitigations, Mr. Johnson did not review Grievant’s personnel file prior to discharging him. Had he done so, he would have learned that A.D. was a thirteen (13) year employee, with no prior discipline. Too, he would have been impressed by the Grievant’s performance reviews. Over the years, A.D.’s supervisors have continuously found his work to be “satisfactory,” which is the highest overall performance rating attainable. In A.D.’s most recent review, the “comment summary” of his supervisor was “[A.D.] is an experienced employee, which shows in his performance.” Union Ex. 4 at 1022.

That the MCC’s disciplinary action was punitive rather than corrective is an established fact and, too, it was prohibitively discriminatory. Consider, for example, the corrective disciplines that were meted out to Messrs. Zasada and DeVos. Mr. Zasada was given a “Written

Reprimand” for his inability and unwillingness to satisfactorily perform job tasks and for being insubordinate: a most serious employee offense. Union Ex. 2 at 1012-1013. Mr. DeVos had previously received a “Written Memo,” “Written Reprimand” and “Three (3)-Day Suspension Without Pay,” within one (1) year of being terminated for attendance-related reasons. Union Ex. 3 at 1007. Mr. Johnson preemptively stated he had “lost trust” in Grievant, without giving him a chance at corrective behavior, as was given to Messrs. Zasada and DeVos. The record evidence is that A.D. did not consider the incident to be “small” and he stated it was a “learning experience.” City Ex. 5. Additionally, A.D.’s thirteen (13) years of employment, excellent work record without prior warnings and discipline contradict Mr. Johnson’s assumption that “good employees don’t make these decisions.” The MCC’s disregard of progressive discipline is not only a violation of Article 5, Section 5.02, but it disregards the universally accepted principle that discipline should be corrective.

Mr. Johnson’s discharge decision was clouded by the personal involvement of Mr. Zirbel who is the MCC’s second-in-command. Mr. Johnson acknowledged that Mr. Zirbel’s “eyewitness account” had a “huge bearing” on his discharge decision. Mr. Zirbel was hardly a dispassionate observer of the incident in question. According to Mr. Johnson, Mr. Zirbel was “upset,” “visibly shaken” when, several minutes after the incident, he reported the incident to him. This testimony corroborates A.D.’s statement that Mr. Zirbel was “yelling ... so close to my face that every piece of spit that came out of his mouth landed directly on my face.” City Ex. 5 at 5. Mr. Zirbel’s fuming oral reprimand happened within hearing distance of Ms. Ennaw and possibly others in violation of Article 5, Section 5.02, which cautions supervisory management not to reprimand an employee “in the presence of other employees or the public.” Jt. Ex. 1.

Because of Mr. Zirbel's involvement in the matter, Mr. Johnson testified about being personally involved in the incident's investigation. For example, he wanted to be "kept up to date" and he attended Grievant's January 23, 2015 pre-determination meeting, which he stated he rarely does. Further, after Mr. Swanson had charged A.D. with a single MCSCR violation on January 23, 2015, Mr. Johnson "pushed back strongly." Thus, by February 19, 2015, four (4) more MCSCR violations were added. The Union maintained that Mr. Zirbel's eyewitness account and his comment to A.D. that he was "finished in this building," in combination with Mr. Johnson's personal involvement in the investigation and his disregard of Grievant's personnel file, imply that prior to investigating the incident, upper management had decided to discharge A.D. On point, the MCC did not interview Grievant until *after* it had concluded that he was guilty of violating MCSCR 11.03 B 5—*Willful or Negligent Damage of City Property*. City Ex. 2.

Mr. Johnson based his discharge decision on four (4) factors, namely: (1) Grievant's damage to MCC property; (2) Grievant laughed and ran away; (3) Grievant endangered a co-worker; and (4) Grievant side-stepped responsibility. First, the City did not prove Grievant laughed about the incident. Messrs. Swanson and Carlos did not interview Mr. Zirbel who authored the incident report—where the laughing allegation first appeared—that he e-mailed to them on January 19, 2015. City Ex. 6. However, they did interview Mr. Heath. Critically, Mr. Swanson's interview notes state: "[Grievant's] reaction: went to the other end ... don't recall any specific reaction." City Ex. 10 at 4. Mr. Carlos' notes state: "No reaction from A.D.; he went to the other end; did not inspect it; no reaction..." City Ex. 10 at 11. The notes of neither

investigator indicate that Mr. Heath had told them that he saw Grievant laughing. Too, Grievant adamantly denied laughing about the damage. City Ex. 5 at 1.

These facts notwithstanding, Mr. Johnson insisted he had no reason not to believe Mr. Zirbel's laughing allegation. Ultimately, the Union argued, the City failed to meet its burden of proving that A.D. laughed. Moreover, since Mr. Zirbel was not interviewed, it is doubtful Mr. Johnson knew he did not actually see the last air wall hit the north side wall. This material fact was disclosed at the hearing. In addition, Mr. Zirbel testified that on the morning in question, the Boat Show client had complained that the partition between Exhibit Halls C and D was still up. Hence, it is also doubtful that Mr. Johnson knew the report he was given incorrectly stated there was no "urgency to getting the panels stored." City Ex. 12, at 7.

Second, the City failed to show Grievant knowingly made false material statements during its investigation. A.D. was cooperative, forthright and gave a consistent explanation of January 19, 2015 events during the two (2) pre-determination meetings and during the Step 3 grievance meeting. City Exs. 2, 5 and & 12. Grievant variously stated, "I do not make little of this incident," "I don't consider this to be a small issue," "I hope that I can learn from this isolated incident," and "It will definitely be learning experience for myself." City Ex. 5 at 1 and 4. The MCC twisted Grievant's statements. Mr. Johnson refused to see that A.D. accepted responsibility for the accident. Grievant did make statements such as Mr. Heath did not catch the last panel or that he was not trained on moving the "new" panels, but these statements were made in an attempt to explain what had happened and not attempts at deflecting blame. These statements were part of his side of the story, which is what the MCC investigators

wanted from him. A.D. admitted giving the last panel an extra shove. A.D. was not “knowingly making false material statements.”

Third, Mr. Johnson testified extensively about “safety.” He characterized the incident as a “near miss.” Yet, there is no record evidence of the MCC having ever discharged an employee because of a “near miss.” Mr. Heath’s testimony does not support the claim that he “barely escaped suffering serious injury.” City Ex. 4 at 3. The simple fact is he was not injured. Grievant is safety-conscious. City Ex. 5 at 3. Grievant accepted responsibility for his mistake.

Fourth, Mr. Johnson testified that the damage caused by Grievant was a paramount factor in his discharge decision. However, the south wall’s damaged sheetrock must not have been all that problematic because as of August 13, 2015 the wall was still in disrepair. The damage was cosmetic and there is no evidence that it has caused the MCC to lose business. To discharge a long-term, good employee for such damage is, at the very least, excessively harsh.

Finally, Grievant’s admitted misdeed was unintended. Additionally, as Mr. Swenson testified, the new air wall system resulted in better mobility: the panels move with greater ease, a fact about which A.D. was neither trained nor instructed. Mr. Johnson had pre-determined Grievant’s guilt and, as such, saw no reason to review his personnel file. If he had, he would have discovered Grievant was a long-term employee with no prior disciplinary incidents and that he was a good employee. Other employees have received progressive discipline for greater offenses. For these reasons, the Union requested the grievance be sustained, Grievant be reinstated as an OMS, Grievant’s discharge be reduced to a Written Reprimand, and Grievant be “made whole” for wages and economic benefits that he would

have earned as well as seniority that would have accrued if A.D. had not been wrongly terminated.

VII. ANALYSIS AND OPINION

The fact that Grievant gave the infamous last panel an “extra push,” as he stated, is not in dispute. A.D. testimony; City Ex. 2 at 6. However, Mr. Zirbel’s description of Grievant’s action was more nuanced. He maintained he saw Grievant “running behind the air wall panel to gain maximum speed” and then “let it fly.” This claim appears in the January 19, 2015 incident report he prepared and e-mailed to Messrs. Swanson and Carlos. Zirbel testimony; City Exhibit 6. Mr. Heath corroborated Mr. Zirbel’s nuanced description. Messrs. Swanson’s and Carlos’ notes of their interview with Mr. Heath variously stated that Grievant took a “running start [and] pushed the wall,” “[Grievant] pushed the last panel differently” and, when asked, “Did you see him do a running start on the wall,” he answered, “Yes.” City Ex. 10 at 3, 5 & 11. These descriptions of Grievant’s pushing action are consistent and are determined to be more accurate than Grievant’s description. Mr. Heath’s account is particularly credible because he and Grievant were co-workers and fellow Union members. As such, his account is contrary to self-interests.

Given each panel’s large size and weight, it is reasonable to conclude that the panel “loudly” slammed into the building’s north wall between Exhibit Halls C and D, damaging the north side storage area wall. City Ex. 7 at 1-7; City Exhibit 10 at 4, & 11. Sheetrock replacement, carpentry, sanding and painting repairs are required, costing about \$2,123.96. City Ex. 8. Moreover, it is undisputed that Mr. Heath “couldn’t catch it,” and “I’m a pretty big guy and I can stop the wall, but sorry it was moving too fast.” City Ex. 10 at 3 & 13. During his

investigatory interview, he is also reported to have said: "I got out of the way; too fast, you know I couldn't stop it." Id. at 10.

For several years Grievant had set-up and torn down "old" air wall partitions, and immediately prior to letting the last panel fly, he and Mr. Heath had removed all but three (3) of the panels on the hall's north side, with Grievant initially receiving and placing them in the wall's storage pocket. With only three (3) panels remaining, the men changed roles, with Mr. Heath receiving and storing the panels and Grievant delivering them. Regarding these panels, Grievant pushed the first two (2) toward Mr. Heath, but they stopped short of where he was standing by about four (4) or five (5) feet and, as reported in Messrs. Swanson's and Carlos' investigatory notes, Mr. Heath stated "I'd walk it [them] the rest of the way." Id. at 13-14. To insure the last panel reached Mr. Heath, A.D, as he stated, gave it an "extra push." At one point during his interview, Mr. Heath apparently remarked, "I don't know why he pushed so hard." Id. at 3.

In the Arbitrator's opinion there is nothing particularly complex about setting-up and tearing down an air wall partition. Its assembly involves walking each panel from storage into the hall where it is latched to an adjacent panel, and its disassembly involves unlatching the panel and walking it to storage. Grievant had assembled/disassembled the MCC's "old" partitions for years. However, A.D. stated, he had not previously disassembled the instant panels and overhead track system, which were "new." Because the panels and overhead track system were "new," handling adjustments may have been in order. For instance, walking or pushing a "new" panel may require less effort, as Mr. Swenson testified. However, adjustments like this are minor and quickly learned. Indeed, prior to the incident, A.D. and Mr. Heath had

been moving “new” panels that morning, and Grievant had already pushed two (2) panels toward Mr. Heath before he gave the last panel a running push. It is reasonable to conclude that this pre-incident work would have resolved any of Grievant’s adjustment needs. On point, Mr. Swanson, the overall manager of the MCC’s set-up and tear down activities, credibly testified, “old or new, there is nothing unusual about walking a panel.” He also testified Grievant had not requested special training on walking the “new” panels.

Lack of experience and know-how, as Grievant had suggested, is not a credible explanation for the incident’s occurrence. A reliable and credible explanation is that at the moment A.D. gave the last panel a running push, he failed to properly carry out his tear down responsibility and, thus, caused damage to MCC property and marginally compromised his workmate’s safety. Mr. Heath could not catch the last panel; it was moving too fast. He was obliged to jump out of the way and, for having done so, he was not responsible for the panel’s crash into the north wall, as Grievant may have suggested. While the crash incident was not intentional, the undersigned concludes Grievant was negligent and his misconduct warranted discipline.

Grievant’s laughter would be an aggravating factor in determining his warranted level of discipline. Mr. Zirbel consistently maintained that Grievant laughed during the incident; whereas, Grievant consistently maintained that he had not. Mr. Heath, could not recall that A.D. reacted in any specific way, such as, laughing. City Ex. 10 at 4 & 11. From the Arbitrator’s perspective, the Grievant’s negligent conduct plus laughter (i.e., manifest indifference) would certainly help to explain Mr. Zirbel’s level of outrage over the incident. Yet, Mr. Heath, a

credible witness, did not mention laughter. Ultimately, the undersigned is divided on this point; he cannot definitively say whether A.D. laughed. The City did not prove said affirmative claim.

Whether Grievant heard and saw the last panel crash into the north side wall is an easier question to answer. A.D. testified, "I did not know the panel hit the wall. So I began to walk away." In his February 27, 2015 written statement he similarly stated, "I would have to say that I was not aware that I caused any damage ..." City Ex. 5 at 2. These statements fly in the face of relevant material facts in evidence. First, Mr. Swanson reported that Mr. Heath said it was "a very loud crash;" Mr. Carlos reported that Mr. Heath said the "crash was loud." City Ex. 10 at 4 & 11. Second, the CAS damage report states in part: "The air-wall panel crashed into the storage area wall creating a damage area approximately 10 feet in length and 8 to 10 inches wide." City Ex. 7 at 2. Finally, Grievant was within fifty-five (55) feet or so of Mr. Heath when he released the last panel. City Ex. 10 at 10. Being within twenty (20) yards or so of Mr. Heath, it is highly improbable that A.D. neither heard the crash nor saw formation of the "debris field." Too, Mr. Heath apparently remarked that A.D. "Did not ask if [I] was O.K." This remark suggests proximity. The undersigned concludes that A.D.'s falsehood on point was likely motivated by his interest in minimizing the seriousness of his misconduct.

On the morning of the incident, Mr. Zirbel did not interview the Grievant; rather, he gave A.D. an oral reprimand. There is no disputing the fact that Mr. Zirbel was very angry and understandably so. It is also true that Mr. Zirbel should have shown more self-restraint. He was loud, intimidating and disrespectful of A.D. According to the written statement A.D. presented at the follow-up February 27, 2015 pre-determination meeting, Mr. Zirbel also told him that he "was done in this building." City Ex. 5 at 1. Too, if Ms. Ennaw was within hearing distance, as

Grievant maintained, Mr. Zirbel's conduct was in disregard of the language in Article 5, Section 5.02 of the CBA that states the Employer normally should not reprimand an employee in the presence of other employees. Jt. Ex. 1.

The Union theorized that Mr. Johnson got caught up in Mr. Zirbel's anger and negative mind-set. From the matter's onset, the Union maintained, Grievant was denied due process. Mr. Johnson wanted to support his second-in-command, Mr. Zirbel, who had already told Grievant that he "was done in this building." City Ex. 5 at 1. Mr. Johnson had prejudged the case, wanting A.D. to be terminated. Mr. Johnson took the unusual step of attending the first pre-determination meeting on January 23, 2015 and, along with Messrs. Swanson and Carlos, he prepared the expanded list of MCSCR violations that appeared in the February 19, 2015 letter from Mr. Swanson to A.D., scheduling the second pre-determination meeting. Swanson testimony; City Ex. 3. Moreover, Messrs. Swanson and Carlos neither interviewed Mr. Zirbel nor Ms. Ennaw.

That Ms. Ennaw was not interviewed is not proof of bias. She was on the other side of the hall when the incident occurred. Too, if she had exculpatory evidence to offer, the Union would have had her appear at the hearing. Similarly, that Mr. Zirbel was not interviewed is not proof of bias. As happens daily in labor relations, a first-line supervisor or, as in the present instance, a top executive observes a workplace incident (e.g., fighting on-the-job). Thereafter, that person files an incident report. More often or not said filing exempts that person from being interviewed. However, he/she would appear at a subsequent arbitration hearing where his/her report is subject to cross-examination, as in the present matter. The Union's claim that Mr. Zirbel's written report failed to mention certain material facts that might well have caused

Mr. Johnson to follow a corrective course of action is not persuasive. In the final analysis, it is concluded that the threshold of required evidence the Union needed to prove its due process theory was not met.

A.D. did not utter "I'm sorry," as testified by Mr. Johnson. Grievant's apparent lack of remorse was an aggravating factor in his discharge. Indeed, based on record evidence, it is the case that A.D.'s testimony and written statements about the events of January 19, 2015 are anything but explicit about his sense of "remorse." However, Grievant did expressly state that the incident was an accident; was unsafe behavior; that he had learned from the experience. A.D. testimony; City Ex. 5. The undersigned gives weight to these expressions, finding, at the very least, that they border on being terms of remorse. Too, the undersigned is cognizant of the fact that English is A.D.'s second language, and that his culture and ethnicity may color the way he expresses remorse or regret. Nevertheless, the undersigned, like Mr. Johnson, does not find Grievant to be entirely trustworthy. Grievant was not forthcoming when he claimed he neither saw nor heard the consequences of his carelessness. In addition, his claim that Mr. Zirbel did not show him the damage to Exhibit Hall C's north side wall is highly implausible.

Ultimately, having considered the record as a whole, the Arbitrator concludes that A.D.'s misconduct warrants a harsh, first-offense penalty; however, not discharge. Although negligent, the damages resulting from Grievant's actions were accidental. Nevertheless, the damage caused to MCC property and to Mr. Heath's compromised safety was significant, even though said property still awaits repair and Mr. Heath was not injured. Generally, facts like these are immaterial, but not in this case. It would be a miscarriage of justice to give zero weight to Grievant's unblemished thirteen (13) year record of employment at the MCC. The fact that A.D.

was a long-term employee, who had never before been disciplined and whose supervisors though highly of his work product are compelling mitigations that merit some measure of progressive discipline.

Therefore, the undersigned concludes the City did not have “just cause” to terminate the Grievant’s employment. Such a penalty was too harsh and Grievant’s reinstatement is subsequently ordered. The Union commended the Grievant’s reinstatement, and urged that his discharge be reduced to a Written Reprimand. However, such a penalty would understate the significance of his negligent act. As a part-time employee, a one (1) month suspension is a more equitable penalty and same is ordered below. The Union also requested Grievant be “made whole” for all wages and economic benefits lost because of his wrongful termination as well as for seniority that would otherwise have accrued.

Regarding the Union-requested “make whole” remedy, arbitral notice is made of the fact that an employee who claims wrongful termination must attempt to mitigate damages by conducting a reasonable job search while awaiting final resolution of his or her grievance. Coe Mfg. Co., 115 Lab. Arb. (BNA) 625, 626-27 (Lalka, Arb. 2001). As early as 1964, the NLRB has held that employees who fail to conduct *bona fide* job searches or who falsely claim same should be denied back pay. M. J. McCarthy Motor Sales Co., 147 N.L.R.B. 605, 617-18 (1964). Arbitrators have followed this rule. See, for example: Babcock & Wilcox Co. 102 Lab. Arb. (BNA) 104, 110 (Nicholas, Arb. 1994), and American Building Maintenance, 117 Lab. Arb. (BNA) 17, 20 (Herzog, Arb. 2002).

As the following record of Q & A exchanges will make clear, the foregoing analysis is material in determining the Union-requested “make whole” remedy.

A. *City's counsel and A.D. on cross-examination:*

City: "Did you have other sources of revenue from work while working for the MCC?"

A.D.: "Yes, I drove a taxi. The vehicle is mine, but not the taxi license."

City: "After the discharge, Have you continued driving?"

A.D.: "I've been driving."

City: "Have you applied for other work?"

A.D.: "No."

B. *Union counsel and A.D. on re-direct examination:*

Union: "After February 27, 2015, did you drive more?"

A.D.: "No, same amount."

C. *City counsel and A.D. re-cross examination:*

City: "Did you complete the City's 'outside employment' form?"

A.D.: "No."

The Arbitrator concludes that this testimony makes it abundantly clear that A.D. did not conduct an interim employment job search, implying that he did not seek to mitigate the City liability. Therefore, in light of the above-discussed arbitration law and precedent, both back-pay and the Union overall petition for a "make whole" remedy is denied.

VIII. AWARD

For the reasons discussed above, the MCC's termination of Grievant's employment was not for just cause. As remedy, the City is ordered to reinstate Grievant's employment and to reduce his discipline from that of termination to a one (1) month suspension. Grievant's

reinstatement is to be without back pay and other economic and non-economic benefits, such as, accrued seniority.

Grievant is required to fulfill any pre-employment condition normally required by the City such as passing a prohibited drug screen.

The Arbitrator retains jurisdiction for the sole purpose of resolving any disputes over the remedy awarded that the parties are unable to resolve on their own.

ISSUED and ORDERED on the 4th day of November 2015
from Tucson, Arizona.

Mario F. Bognanno,
Labor Arbitrator and Professor Emeritus