

IN RE ARBITRATION BETWEEN:

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

and

UNIVERSITY OF MINNESOTA

**DECISION AND AWARD OF ARBITRATOR
BMS CASE # 07-PA-506**

JEFFREY W. JACOBS

ARBITRATOR

January 29, 2008

IN RE ARBITRATION BETWEEN:

AFSCME Council 5,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case # 07-PA-506
Sharon Emry Grievance matter

University of Minnesota.

APPEARANCES:

FOR THE UNION:

Sandra Curtis, Business Representative
Sharon Emry (Foy), grievant
Ruth Davenport, UMPD
Roxanne Wilebsky, Sr. Traffic Enforcement Officer
Marty Erickson, Sr. Parking Attendant
Jeremy Mlener, Sr. Parking Attendant
Melissa Dewees, former PTS employee

FOR THE UNIVERSITY:

Shelley Carthen Watson, esq.
Scott Anderson, Dir. of Public Parking, PTS
Diane Mahon, Auxiliary Services
Suzanne Greenwalt, Sr. Office Supervisor, PTS
Victoria Nelson, Asst. Director of PTS
Linda Crawford, Customer Service Re. PTS
Stevan Friske, Dept of Central Security

PRELIMINARY STATEMENT

The hearing in the above matter was held on October 24 & 25 and December 3, 2007 at Coffey Hall on the St. Paul Campus of the University of Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated January 16, 2008 at which point the record was closed.

ISSUE PRESENTED

Did the University have just cause to terminate the grievant? If not, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2003 through June 30, 2005. Article 21, section 3 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

UNIVERSITY'S POSITION:

The University's position is that there was just cause to terminate the grievant for her conduct in intentionally manipulating a parking card to allow her boyfriend to get free parking at a University parking amp on multiple occasions in clear violation of a well-stated policy against allowing such free parking. In support of this position the University made the following contentions:

1. The University operates a number of parking facilities under the auspices of Parking Transportation Services, PTS. The grievant worked in the PTS office on the Minneapolis Campus of the University.

2. The grievant, despite her assertions to the contrary, was given ample notice of the clear University's policy against giving free parking. The University pointed to several communications that emphasize and make clear that free parking is specifically prohibited. See University exhibit 4, 7 (PTS New Employee Manual), 8 11, and 30. All of these communications clearly state that all employees and persons coming to park at University facilities must pay for parking.

3. As late as 2004 the grievant was specifically counseled not to give free parking when she set up a contract for a student who had graduated in another student's name thus allowing free and/or discounted parking. Once the student graduated she was no longer eligible for discounted student parking yet she went to the grievant, her former supervisor, and asked her to set up a student contract for her in another student's name thus allowing discounted parking. When the University discovered this subterfuge it took immediate steps to stop it. The grievant was coached not to set up contracts in other people's names.

4. Undeterred, the grievant apparently did it again when she set up a contract also in the summer of 2004 for a student in someone else's name who was gone for the summer. The grievant was again coached no to set up contracts in other people's names. The students were required to turn in their key cards and get their own contracts and in one instance the employee was reprimanded.

5. Moreover, as Exhibits 4 and 10 show, the University reminds employees in their newsletter called “As the Wheels Spin” that there is no free parking. Exhibit 10 could not be clearer: “PTS does not tolerate overcharging, undercharging, allowing free parking without PTS Director approval, or taking cash or property. These kinds of acts will result in termination and prosecution.”

6. The University countered the grievant’s assertion that she was never trained or told of this by pointing to the testimony of Linda Crawford, the grievant’s co-worker who indicated that these policies are well known throughout the department and that free parking is a serious violation of policy. The University asserted in the strongest possible way that the grievant knew what she was doing was wrong and a serious violation of policy. It was theft pure and simple.

7. The University put on considerable testimony and evidence to establish that the grievant manipulated the computer to activate and then deactivate her boyfriend’s key card allowing him to park for free on those dates when he went to lunch with her. Moreover, she got him in the Washington Avenue Ramp, which has a 10 to 12 year waiting list for contract parking. The PTS office is near that ramp so it was much more convenient to have him park there whereas the general public can virtually never park there since the ramp is full so often.

8. The University noted that the grievant eventually admitted her wrongdoing even after she initially denied it. She lied to investigators by denying that she ever gave free parking to her boyfriend. She at first indicated that her boyfriend always pays for parking and that she never did anything to allow him to park for free but later admitted that she did but then changed her story to say that she was not aware of the policy against free parking and later still that the PTS did not enforce its policies consistently and allowed others to park for free and use the VIP card or parking stamp to allow people to park for free without verifying that they had contract parking.

9. The University asserted that these arguments fall apart upon examination. First, there was no evidence that the grievant ever knew that anyone else was getting free parking. In the one instance where a PTS employee parked his car in a ramp for an extended period of time there was no evidence she ever knew of that prior to her termination. Moreover, her allegations that her supervisor allowed her children to park for free were in stark contrast to the testimony of her supervisor who flatly denied that this ever happened.

10. Further, the use of a VIP card or a parking stamp is very different from what the grievant did here. She intentionally and surreptitiously entered the computer system to activate a card her boyfriend had even though he had no parking contract and had not paid for the card. She would activate it, allowing him to park and take her to lunch and then, after he left, deactivate the card to cover her tracks. It was only because she forgot to deactivate the card on one occasion that her scheme to defraud the University was ever discovered. Her supervisor noticed the card activated without a contract and deactivated it. She simply thought there was some sort of oversight when she first noticed it and had no idea what was really happening. Later, when she discovered the card activated again she recalled the card number and did further checking and eventually discovered the grievant's clever scheme to allow free parking.

11. The essential difference thus is that the grievant was trying to cover her actions but simply got caught. Further, without the key card the boyfriend would never have been able to enter the Washington Ramp, as it was always full when he was there around midday. Thus, she knew that the best way to get him into the ramp without a valid parking contract was using her scheme to get him a card and activate it as he needed it. This scheme was so clearly premeditated and intentional that it can hardly be said that she somehow was not aware of the seriousness of the violation she was committing.

12. Further, the other employees who testified about the improper use of the VIP or parking stamp parking cannot be given much weight. First, the person who testified that she witnesses people getting free or VIP parking in the office was in no position to see that and could never have seen the computer to know whether these people in fact had parking contracts or not. Second, there was sparse evidence that PST supervisors were ever aware of this practice. If they had, it would have been stopped immediately. PTS cannot be held responsible for improper activity of which it was not aware.

13. In the instance where a parking attendant indicated that he allowed other students to park for free when they came to cover his breaks etc., there was again no evidence that his supervisors were aware of this practice. There was no evidence the grievant knew of it or was somehow relying on it when she engaged in her scheme to allow free parking for her boyfriend. Finally, there was no hard evidence that the grievant's supervisor allowed her family members to park for free, a fact the supervisor hotly denied.

14. The University argued too that the traditional measure of “just case” is not necessary in this instance given the language of Article 22, section 7, which provides in relevant part as follows:

The Employer shall have the right to discharge an employee who:

D: Is judged by the Employer to be guilty of serious violations of generally accepted standards of employee conduct such as, but not limited to, theft, fraud, willful or careless destruction of Employer property, gross insubordination or falsifying documents.

F. Engages in behavior other than A-E above which in the Employer's judgment meets accepted just cause termination tests.

15. The University argues that the grievant's situation falls squarely into the language of D cited above as here she was guilty of theft, serious violations of generally accepted standards of employee conduct and falsifying of documents. She essentially stole money from the University by allowing free parking, falsified the computer system by manipulating the key cards and clearly violated generally accepted standards of employee conduct. Accordingly, a traditional just cause analysis is not necessary and inapplicable here.

16. However even if the arbitrator uses a just cause standard it is clear that the facts here justify termination. The University argued that there is ample cause for the grievant's termination since she finally admitted that she manipulated the key card and allowed the free parking. There is now no question that it was in clear violation of policy. The sole argument by the Union is that this should be excused somehow because others did similar things and were not terminated. As noted above, though, the University argued that this argument fails because there was inadequate evidence to support many of them, and no evidence that the grievant ever knew this was going on and no evidence that she relied on it even if it did.

17. The essence of the University's case is that the grievant tried to defraud the University, got caught, lied about it at first, finally admitted it when it became obvious she had been caught and there was no way to argue her way out of it and is now attempting to manufacture facts to show that what she did was somehow OK and should be excused. By any analysis, just cause or otherwise, termination for such a serious breach of policy must be sustained.

Accordingly the University seeks an award of the arbitrator denying the grievance in its entirety and upholding the discharge.

UNION'S POSITION

The Union's position was that there was not just cause for the termination and that the University's action was too harsh under these circumstances. In support of this position the Union made the following contentions.

1. The Union argued that the grievant has been with the University for some 11 years and has a very good work record. Her evaluations show that she is an excellent worker and either met or exceeded expectations. See Union exhibit 3. She was described by supervisors as someone who understands and follows orders, willingly accepts direction, maintains accurate logs and records is on time and keeps to her scheduled breaks and work times. She has never knowingly or intentionally defrauded the University or anyone else for that matter.

2. The Union also asserted that the grievant was never properly trained for her job and that she learned on the job as she went. Her co-worker, Linda Crawford was not there the day she started and there never was a formal orientation given to her.

3. Moreover, the grievant alleged that she did not always see copies of “As The Wheels Spin,” the newsletter nor is she required to read it and was not aware of the articles and other policies the University pointed to as giving her notice of the policies she was alleged to have violated.

4. The Union acknowledged that the grievant manipulated the computer system to allow her boyfriend to park without paying. There was thus no dispute that the grievant's boyfriend did not have a contract for parking, did not hold a valid parking key card, and that the grievant would activate it shortly before he came to pick her up on occasion for lunch. The Union representative acknowledged this in the disciplinary meeting and the Union in its Brief did so as well by noting that the issue in the matter was not whether the grievant used the computer system to allow free parking but rather whether the penalty here was too harsh. The Union further asserted that the grievant made no attempt to hide what she was doing because she never thought it was against policy and never imagined that it would get her fired.

5. The Union also pointed to the 2004 incidents with the students and took a very different position than the University. The grievant they alleged merely did her job; she was told to set up a contract and she did. In June of 2004 two students were found to be using the same parking card. As a result of this, the student was required to turn her duplicate set of key cards in but was allowed to continue her contract for parking. The practice of allowing students to set up a contract in anyone's name was stopped at that time. The Union argued that the students violated this policy not the grievant. The Union asserted that rather than serving as clear notice of what to do and what not to do, these incidents only served to confirm her belief that violations of policy would not be enforced; certainly no disciplinary action would come of it.

6. The Union first alleged that there exists a culture of lax enforcement of the rule against free parking and that many PTS employees, including supervisors have used the VIP and general parking stamp to allow people to park for short periods of time for free. The Union introduced testimony from witnesses who testified that on many occasions people would enter the PTS office for various reasons such as that they may have forgotten or lost their cards and wanted to park for free to get that issue straightened out. There were many times when their parking entry tickets were simply validated without checking to see if indeed these people had valid parking contracts; they were just given a stamp on their word alone and then they would leave.

7. Further, the grievant's own supervisor stamped her daughter's ticket to allow free parking when the daughter was there for lunch on at least one occasion. The grievant as well as another objective witness testified that they witnessed this personally and that the grievant therefore quite reasonably thought that allowing friends or family to park for short periods was acceptable.

8. There were also several instances when supervisory employees parked their own vehicles in University ramps and facilities sometimes for weeks on end without paying. These individuals were not terminated even after their actions were discovered. The Union pointed to the Ian Thompson situation wherein he parked his private vehicle in a ramp for weeks without paying. Moreover, while the total cost to the University of the parking allowed by the grievant for her boyfriend was some \$48.00, what Mr. Thompson did took away a parking spot for weeks and was far more egregious in all ways, not only cost but in time. He abused his position as he was the person assigned to monitor the ramp for improperly parked cars. He was eventually suspended, but not fired.

9. On another occasion, supervisor Jeff Boulet parked his motorcycle in the Washington Ave. Ramp without paying for it. He was even called on this by another University employee yet never was disciplined for this. The fact that upper management at the department may not have known of this is no excuse; Mr. Boulet was already a supervisor.

10. Mr. Mlener testified that he allowed students to park for free even though they did not have a valid contract for particular ramp when they came to cover his break. He told his supervisor about this and while she protested it neither Mr. Mlener nor the students were ever disciplined for this.

11. Further, even the highest levels of the department uses their parking privileges as a perk of the job. The Union pointed out that Ms. Nelson, while espousing enforcement of the rule against using an “Any Facility” parking permit in lots of less than 20 spaces, admitted that she used her Any Facility permit to park in a lot of less than 20 spaces when she came to the arbitration. She then tried to back pedal away from being caught violating her own policy by asserting that this was a “preference” and not a “policy.” The Union asserted that the alleged difference shows the duplicitous nature of the culture of this department.

12. The Union argued that the grievant was well aware of these incidents and the general practice regarding the use of the parking stamps and of allowing various people to park for free and just how lax enforcement of the so-called no free parking rules was at PTS. She was not only not placed on notice that her actions would result in discharge but was in fact placed on notice of the opposite; that it was overlooked even condoned by the very people who are now trying to fire her.

13. The Union introduced witnesses who testified that the department does not enforce its rule against free parking uniformly and allows liberal and unchecked use of the VIP stamp without checking to see how it is used or by whom. The Union argued that there is in effect no difference between the grievant’s actions to allow free parking for perhaps an hour versus what several other employees did with the full knowledge of the department yet they were not terminated. Moreover, the amount of free parking given to the grievant’s boyfriend was approximately \$48.00 while the cost to the University of the free parking these various supervisors received was many times that.

14. The essence of the Union's claim is that while the grievant did what was alleged she never got any clear notice that it would result in discipline much less termination. PTS has a long history of lax enforcement of its rules regarding free parking and the grievant as a long time employee of PTS was aware of it and never had any idea that doing what she did would result in discharge.

The Union seeks an award of the arbitrator sustaining the grievance, overturning the discharge and making the grievant whole for any lost time or accrued benefits.

DISCUSSION

Despite the initial admission by the Union that the grievant did exactly what was charged, this was no easy matter to decide. This case is a myriad of conflicting facts and conflicting conclusions to be drawn from those facts.

The salient facts that led to the discharge of the grievant were essentially undisputed. The grievant worked in PTS office and had been there for approximately 5 years. She has 11 years with the University having worked for several years at the Department of Facilities Management. At PTS she worked at the service counter doing among other things, answering questions there, answering phones, processing payments for parking contracts, issuing and processing hang tags for vehicles, issuing and processing key cards, which are the cards allowing entry pursuant to a contract at University parking facilities and supervising 2 to 5 student also working at the PTS office. Part of her responsibilities involved setting up parking contracts at various parking ramps and lots around the University of Minnesota campuses. She had access to the computer system as a part of her position.

There was considerable evidence submitted and discussed at the hearing about how it was discovered but suffice it to say that it was clear that the grievant in fact used her position to enter the University's parking computer system to cancel a parking card she had used and issued herself a new one with a different ID number. Card #16241 had been her card but that was apparently deactivated and she was issued a new card, #17681. Instead of deactivating her old card and retiring it as she should have she gave it to her boyfriend.

On various occasions she would re-activate the card allowing him to enter the Washington Avenue Ramp on the Minneapolis campus of the University. The evidence showed that the Washington Avenue Ramp is usually very busy and rarely open for public parking due to the high demand for contract parking. There is apparently an 11 to 12 year wait for contract parking there.

The evidence showed that the grievant's boyfriend would use his card to enter the ramp and take the grievant to lunch. He parked for free on those occasions. He never had a valid parking contract nor did he pay for the parking he used on the days in question.

The grievant's supervisor, Ms. Sue Greenwalt, noticed the activation of card #16241 in September 2004 as part of a Monthly Error Report. She noticed that there was no valid contract for that card and deactivated it. She took no further action at that time as it was not unusual to deactivate cards. She also had no idea what the grievant was doing at that time. She noticed the same card activated in April 2005 and deactivated it again. She saw it activated yet again in June of 2005. This time she became suspicious and notified her supervisor. The evidence showed that on at least 9 occasions the grievant entered the computer system, activated and then deactivated the card and allowed her boyfriend to enter the Washington Ramp without paying. The University also did a search of the parking ramp videos of the entry points at the Washington Ramp on the dates in question and found that a vehicle matching the boyfriend's truck and a very close match to the vehicle license plate number. There was no question and no dispute that the grievant activated and deactivated the card as alleged.

When first confronted with this evidence the grievant denied it and claimed that her boyfriend always paid for parking. She further denied that she had accessed the computer for the purpose of activating and deactivating card #16241 claiming that anyone could have accessed the computer. The grievant had to leave that initial investigatory meeting to get home to be with her daughter who was ill. The parties agreed to meet again the following day to continue the investigation. The next day June 29, 2005, the grievant through her Union representative admitted to the actions.

The Union as noted above acknowledged this admission made at the meeting on June 29, 2005 but took the position that termination was too harsh given the facts and what it alleged was lax enforcement and potentially disparate treatment of the grievant when compared to the way the University has treated other employees whose actions were at least as serious or even more so than what the grievant did here.

The first question raised by the University is what the standard of inquiry is. The University asserted that just cause is not required in this case pursuant to the language of Article 22, section 7. That language provides as follows:

The Employer shall have the right to discharge an employee who:

D: Is judged by the Employer to be guilty of serious violations of generally accepted standards of employee conduct such as, but not limited to, theft, fraud, willful or careless destruction of Employer property, gross insubordination or falsifying documents.

F. Engages in behavior other than A-E above which in the Employer's judgment meets accepted just cause termination tests.

Based on this the University alleged that just cause is not even required in his case. The University argued that the grievant's actions constituted at least a serious violation of generally accepted standards of employee conduct and at worst theft. Moreover, clause F provides for just cause only if the employee engages in behavior *other* than paragraphs A-E. Since the conduct that occurred here is covered by paragraph D just cause does not strictly apply. Accordingly, the Employer "shall have the right to discharge the employee" if the employee engages in the behavior covered by paragraph D. The grievant admitted that behavior. The Union did not address this question but a review of the full language of Article 22 shows that just cause does still apply and that analysis will be used to determine the appropriateness of the discharge.

Article 22 Section 1 provides that discipline shall be taken only for just cause. Further, the language of Article 22, section 7 (F) is a catch-all provision that is meant to include any other behavior that also meets just cause standards. It is not meant to exclude the conduct in subparagraphs A-E from the requirement that the University prove just cause. Accordingly, this matter will proceed on a traditional just cause analysis.

Having said that however it is not necessary to examine each of the seven traditional tests used to determine discipline. Here the question is whether there was adequate notice of the rules, lax enforcement of the rules or disparate treatment for those who broke the rules.

The Union acknowledged that the grievant did access the PTS computer to activate and deactivate her boyfriend's card to allow free parking on at least 8 occasions but argued that termination was too harsh for the reasons stated above. The first claim is that the grievant did not receive adequate training and was not therefore aware of the policies against allowing free parking. Further that the grievant did not see the articles specifically warning against free parking in the employee newsletter "As the Wheels Spin."

An examination of the evidence in this case makes it hard to believe that the grievant would not have been aware of these policies or the admonitions, in writing at least, against free parking or allowing discounted parking.

The Union also pointed to the incidents involving the students in the summer of 2004 who were using a single key card for two people. The evidence showed that the grievant setup a student parking contract in another student's name. The evidence further showed that both the student and the grievant were unaware of any policy against this and that it was done frequently. As a result, the University changed its policy of allowing student parking contracts to be issued in another student's name. There was some conflicting testimony about this but the evidence showed overall that the grievant was not disciplined for her actions in this incident and was counseled not to do this in the future.

The evidence showed that she has not violated this specific direction and has not issued student contracts in other students' names since 2004. The Union argued that the grievant was simply doing her job as requested and set up the contracts and not placed on any sort of notice that her subsequent actions in accessing the computer were serious enough to result in her termination. There was some conflicting testimony and argument about this as well but overall the evidence showed that the coaching was about the student contracts. As University exhibit 13 shows, the reprimands involved in the incidents were given to the students, not the grievant.

The more troublesome and difficult claims however were not so much about notice but rather about whether there was a lack of enforcement of the rules that were in place and whether there existed a culture in PTS that was different in practice from the stated policy against free parking. The Union pointed to multiple examples that suggested that the department was quite lax in enforcing the no free parking rules and that the grievant was aware of this and felt that she was doing nothing wrong in allowing her boyfriend to park for free as she did.

The Union pointed to a scenario where a supervisor, Ian Thompson, left his car parked in the Washington Avenue Ramp for weeks without paying. This was also at the same time period as the grievant's action leading to her termination. The University alleged that upper management at PTS was not immediately aware of Mr. Thompson's actions and once they were they took immediate action. The evidence did not support that however. Ms. Wilebski gave credible testimony that she reported the apparently abandoned vehicle to another supervisor yet the vehicle was allowed to sit for a long period of time.

Moreover, while it is certainly true that there is a difference between manipulating the computer and what happened with the Thompson vehicle, the essential feature of this incident was that a person charged with the duty of sweeping the lot for abandoned vehicles left his own car there for weeks or even months without paying. Significantly, he was given a 3-day suspension and required to reimburse the University for the parking charges.

The Union also pointed to another incident involving supervisor Jeff Boulet who apparently parked his motorcycle also in the Washington Avenue Ramp without the appropriate parking tag for it. The evidence showed that this was another instance of a person in a supervisory capacity charged with the responsibility for enforcing the rules against free parking using their position to skirt that very rule.

Mr. Anderson gave credible testimony that he was not aware of this incident and that discipline would have been appropriate if he had. This was very likely true and Mr. Anderson likely would have imposed discipline if this had been brought to his attention. However, the same essential feature rings true here as well: Mr. Boulet was a supervisor and the department is charged with the knowledge at some level of the actions of its supervisors. There may well have been some distinction if this had been the surreptitious acts of a line employee but on these facts that was not shown to be the case.

The Union also pointed to the testimony of Jeremy Mlener who indicated that he allowed students who were coming to relieve him at his parking facility to park for free even though they did not have the correct key for that particular ramp. He apparently informed his supervisor of this practice and was told he should not do it. He was never disciplined for this even though he continued to do it anyway. It was also clear that his supervisors were aware of this practice yet took no disciplinary action against anyone involved. Mr. Mlener reasoned that it was ludicrous to require students who already had valid contracts at parking facilities someplace else to pay to park in the facility they were coming to allow him to take a break. Maybe so, but there was a rule against that action that was not enforced.

The latter action was not of as much evidentiary significance as the first two since Mr. Mlener's actions were distinguishable from what the grievant did here. The fact that he was not disciplined might be explained here on the basis of a rational response to a rule that likely did not make very much sense in that context. As to the first two instances however, it was clear that these occurred and were not treated with the same sort of penalty as was meted out to the grievant.

The University raised one additional concern about these instances that bears comment. The evidence did not clearly show that the grievant knew about these incidents before she acted to access the computer system. The University argues with some cogency that she cannot rely on the notion of lax enforcement or disparate treatment for actions she did not know about. These actions occurred outside of her immediate workplace and did not involve the grievant directly so it is entirely likely she had little or no direct knowledge of them prior to taking her actions involved here. Frankly it was not clear what she knew when she acted and gave some credible testimony that she was aware that others had done things like she had without the same consequence. If this was the sole issue here the result would have been even more difficult to reach.

The University's position on this question is in effect one that requires actual knowledge by the grievant in order for the lax enforcement argument to prevail. The commentators do not support that position. For one thing, the parties to grievance arbitration like this are the employer and the Union. If a rule is to be enforced it must be enforced coincidentally across the bargaining unit. Whether the grievant knows about all of the underlying facts involving someone else's disciplinary action or lack thereof is not strictly relevant. Elkouri notes as follows: "Arbitrators have not hesitated to disturb penalties, assessed without clear and timely warning, where the employer over a period of time had condoned the violation of the rule in the past – lax enforcement of rule may lead employees reasonably to believe that the conduct in question is sanctioned by management." Elkouri and Elkouri, *How Arbitration Works*, 5th Ed. At page 933. No mention is made of the need for an individual grievant to know about the lax enforcement of these rules although there is some need for the employer or its representative to know of the prior violation of the rules in order to be held accountable for lax enforcement of them.

As noted above with the Thompson and Boulet incidents, the employer clearly did know about those rule violations and yet did not act to terminate either of them. It is also quite plausible that word of those incidents were known to the Union members including the grievant. Several of the witnesses who testified at the hearing were quite well known to the grievant, which made it more than likely that the grievant was aware of what happened. While she might well not have known what the eventual outcome was she would certainly have been aware that the people in question were not terminated.

Further, it is highly unlikely that an individual grievant would or even could know those details; especially given the provisions of the Minnesota Data Practices Act. Finally, such a requirement would in effect diminish or even erase the question of lax enforcement and would require a showing that the grievant knew all of the underlying details of another person's personnel file.

The question now is whether the evidence showed a history of lax enforcement of the rules such that it warrants a penalty less than termination. On this record it did. Deciding this case would have been exceedingly more difficult if the sole facts giving rise to the claim of lax enforcement and disparate treatment had been the Thompson and Boulet incidents. There were other facts here of which the grievant clearly would have had personal knowledge that did affect the outcome even more.

The parties were in stark disagreement about whether there was a "culture" within the office at PTS of lax and even sloppy use of the VIP pass and parking stamp. The Union claimed that it was routine to simply stamp people's parking tickets with a parking pass or VIP stamp without verifying who they were or that they indeed had valid paid parking contracts. The Union gave the example of someone who has a valid contract but who forgets or loses their key card, which happens with some regularity. That person can work in a University facility, and go to the PTS office to get a replacement card or to get a parking stamp allowing them to get out of the facility without paying an additional parking fee. The policy was to verify they had a valid contract but several witnesses testified that this was not always done. People would come to the counter tell their story and simply get a pass.

The University witnesses denied that this happened and claimed that the witnesses who testified it did were not in a position to see what was going on at the counter. The photos of the office presented at the hearing show that the office in which some of these witnesses claimed they worked in was partially blocked from view of the counter where the grievant and her co-workers worked. The office was a few feet away, certainly close enough for a conversation in a normal tone of voice to be heard. Certainly too anyone in that office could walk around or have been outside the office or in the waiting area and have had easy opportunity to hear and see everything happening at the counter.

Ms. DeWees gave very credible testimony about this practice. She indicated she was a float employee who often spent time in the office waiting for an assignment. As such she was in a position to see and hear most of what occurred there. She testified that she would many times simply see office staff give out parking passes without verification and that “everybody did it.” While the University supervisors denied they were aware of this practice even if it was occurring it is again hard to believe that in an office of that size the practice occurred without any of the supervisors knowing about it.

The Union further alleged that the grievant’s supervisor allowed her daughter to use the parking stamp to park for free when she was there to meet her mother for lunch. The supervisor denied this ever happened. The grievant testified that she witnessed this on at least one occasion. Ms. DeWees indicated that she witnessed this on 2 occasions. Ms. DeWees was shown to be related to the grievant and that was a cause for some concern and required a close examination of her testimony for veracity. On this record though there was nothing to suggest that she was fabricating or exaggerating her testimony to somehow protect the grievant.

On balance and taking the evidence as a whole, it was apparent that while the policies against free or discounted parking was communicated in writing to the employees, the practice was shown to be somewhat different. There was lax enforcement of these rules.

Therein lies the true difficulty in deciding what to do with this. There is no question that there is some difference between using the parking stamp without verification or being lax in checking whether someone who claims to have a parking contract versus entering the computer to activate an invalid card to give a friend free parking. That difference is without sufficient distinction to result in a termination under these circumstances. There is no distinction between that and using the parking stamp to give free parking to a family member and very little distinction between what the grievant did and what several supervisors did in using their positions as supervisors in PTS to gain free or discounted parking for their own personal vehicles.

Having determined that however does not excuse what the grievant did either. There is little question that she bears considerable accountability for her actions. Making false statements about her boyfriend's use of the key card and telling investigators that he always paid when she knew full well he did not was troublesome at the very least. The fact that she did admit to her guilt during the second meeting is to her benefit, and to the Union representative's benefit for that matter.

Several options were considered based on this record. Termination was in fact seriously considered even in light of the fact that there appeared to be something less than strict enforcement of the rules. This would have been based on the grievant's actions during the investigation and the clear attempt to get something for nothing for her boyfriend. The laxity of enforcement of the rules in the Thompson and Boulet incidents as well as the liberal and at times unchecked use of the parking stamp in the office mitigated against that.

Reinstatement with back pay and benefits was also considered. This was frankly quickly rejected due to the grievant's actions and the need to make it clear that working in PTS does *not* grant to those working there the "perk" of getting free parking for themselves, their family or their friends. Giving the grievant a "pass" on this would have seriously undercut the University's right to promulgate the rule that, except in very rare circumstances, there is no free parking at University facilities.

It should be noted that there are some times when free or reduced parking is allowed that are not germane to this case, such as certain weekends, holidays, special occasions and late at night at certain facilities. Those times and dates were not at issue here and are not meant to confuse this issue. This case is about using one's position at PTS to allow free parking at a heavily used parking ramp at times when parking is not free.

The remedy that is most appropriate under these circumstances given the evidence as a whole is reinstatement of the grievant but without any back pay or accrued contractual benefits. Her time off will be considered a disciplinary suspension. In addition, the arbitrator was asked to impose a "last chance" remedy in the event a reinstatement was ordered. That is for the University to deal with as it sees fit and is not for an arbitrator to impose. Arbitrators must be very cautious in setting so called last chance agreements as setting the conditions for them are crucial in determining the rights of the parties in the future. Future cases must depend on future facts and should not be set now.

However, the grievant must now be aware in the clearest possible terms that she not engage in any similar or like behavior in the future and that any failure to adhere to the strict policy regarding free or reduced parking at University parking facilities will very likely be treated most harshly if it ever occurs again. Further, the grievant must also reimburse the University for the cost of the parking given to her boyfriend stemming from her actions in this case as a condition of her reinstatement. It is with that condition and admonition that the grievant's reinstatement is ordered.

AWARD

The grievance is **SUSTAINED IN PART AND DENIED IN PART**. The grievant is to be reinstated within 5 business days of this Award to her former position without any back pay or accrued contractual benefits. The grievant's reinstatement is subject to the statements contained above as well.

Dated: January 29, 2008

U of M and AFSCME Emry.

Jeffrey W. Jacobs, arbitrator