

IN THE MATTER OF ARBITRATION BETWEEN

CITY OF THIEF RIVER FALLS, MN	)	
“Employer”	)	
AND	)	BMS Case No. 05-PA-1121
	)	Discharge (Wayne Johnson)
IBT, LOCAL NO. 320	)	
“Union”	)	

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: March 21, 22, 2006; Thief River Falls, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: May 3, 2006

APPEARANCES

FOR THE EMPLOYER: Cy Smythe, Representative  
Labor Relations Associates  
7501 Golden Valley Road  
Golden Valley, MN 55427

FOR THE UNION: Patrick J. Kelly, Attorney  
Brent E. LaSalle, Attorney  
444 Cedar Street, #2350  
St. Paul, MN 55101

## STATEMENT OF JURISDICTION

Minnesota Teamsters Public and Law Enforcement Employees Union, Local No. 320 (the "Union") and the City of Thief River Falls have been signatories to a series of labor agreements. This arbitration addresses two incidents leading first to the suspension, and ultimately to the discharge, of the Grievant, Wayne Johnson. The first incident, which occurred November 15, 2004, involved a verbal exchange with co-worker Doug Martell, and led to the Grievant's suspension from his position with the City. The Union filed a grievance on behalf of Johnson on December 7, 2004. While progressing through the grievance process, the second incident at issue in this arbitration occurred.

On July 15, 2005, the Grievant was arrested for conduct occurring outside of his employment and away from his work place. The arrest led to his pleading guilty to Disorderly Conduct. The City continued to employ the Grievant for approximately six weeks after his arrest, but terminated his position on August 24, 2005 and the Union immediately filed a grievance on his behalf.

John J. Flagler was selected as arbitrator and the hearing was held on March 21 and 22, 2006. Both parties have had an opportunity to present evidence in support of their respective positions. Post-hearing briefs were filed by postmark of May 1, 2006 and the record closed as of May 1, 2006.

## PARTIES WRITTEN STATEMENTS OF ISSUES BEFORE THE ARBITRATOR

### City Statement of Issues

First Grievance: Was the Grievant disciplined for just cause for his behavior on November 15, 2004 given his prior written reprimand for similar behavior on July 30, 2002?

Second Grievance: Was the Grievant disciplined for just cause for his behavior on July 15, 2005?

### Union Statement of Issues

First Grievance:

Was a three day, unpaid, suspension for a verbal confrontation with a coworker in keeping with the principles of corrective and progressive discipline or was it unduly harsh?

Did the City follow proper procedure when executing its investigation into this matter?

Was discharge appropriate for a conviction for Disorderly Conduct given that it occurred away from the workplace and given the steps the Grievant has taken to address his anger issues?

Did the City fail to provide the Grievant due process as is his constitutionally protected right?

Second Grievance:

Did the City of Thief River Falls follow proper procedure in discharging the Grievant after he pled guilty to Disorderly Conduct relating to an off-duty incident?

Is the Grievant's discharge inappropriate in light of the fact that he is engaged in anger management counseling and that he poses no threat to any person?

Did the City of Thief River Falls commit a Loudermill violation by failing to provide the Grievant with a hearing prior to his dismissal?

## RELEVANT CONTRACT PROVISIONS

### ARTICLE 10

#### Discipline

10.1 The Employer will discipline employees for just cause only. Discipline will be in the form of:

- A. Oral Reprimand;
- B. Written Reprimand;
- C. Suspension;
- D. Demotion; or
- E. Discharge

10.2 Suspension, demotions, and discharges will be in written form.

10.3 Written reprimands, notice of suspensions, notices of discharges, which are to become part of an employee's personnel file, shall be read and acknowledged by signature of the employee. Employees and the Union will receive a copy of such reprimands and/or notices.

10.4 Discharges will be preceded by a five (5) day suspension without pay.

10.5 Employees will not be questioned concerning an investigation of disciplinary action unless the employee has been given an opportunity to have a Union representative present at such questioning.

## STATEMENT OF THE FACTS

The Grievant was employed by the City of Thief River Falls for sixteen years before being dismissed in August, 2005. In 2002, the Grievant received a written reprimand for his involvement in an incident with the Mayor of Thief River Falls. In his position with the Water Department, he turned off the water supply for a number of area homes and a local restaurant in order to service a water main. This particular restaurant had previously lost access to its water supply while the City performed work on the street. The restaurant's owner was upset when the water was shut off and contacted the Mayor about the problem. The Mayor came to the worksite where he and the Grievant engaged in a heated argument involving the use of profanity by both men. This argument ended with the Mayor insisting the Grievant apologize to the owner in front of the restaurant's patrons. As a result of his confrontation with the Mayor, the City issued the Grievant a written reprimand. Initially he filed a grievance related to the incident with the Mayor but later agreed to drop the grievance.

A second incident occurred, involving Doug Martell, at the end of 2004. The Grievant and Martell engaged in a shouting match over comments made by Martell about a project on which the Grievant was working. During the course of this argument many profanities were exchanged between the two men. During this exchange, the Grievant suggested that Martell engage in oral sex with Lyle Olson, Martell's supervisor because "Dolby says that's the only thing you're good at." Martell demanded that his supervisor, Lyle Olson, take action against the Grievant.

As a result of the complaint registered by Martell, the City began an investigation. Arlo Rude, the Grievant's superior, sought to obtain the Grievant's version of the exchange with Martell. The Grievant declined to discuss the exchange with Rude without Union representation. The City never attempted to interview the Grievant again (with Union representation) and at the conclusion of the investigation suspended him for three days without pay, and gave Martell an oral reprimand. In the letter of suspension, Rude stated that the severity of his punishment was due to the fact that he had previously been reprimanded for his earlier exchange with the Mayor.

The final incident at issue occurred on July 15, 2005. The Grievant's son, a student at the University of North Dakota, had dental surgery performed the previous year. He had not removed his son from his insurance policy and was having difficulty getting the insurance company to pay for the surgery. The Grievant went to Bakke Insurance Company, who handled City Employees' insurance, in an attempt to deal with this issue in February of 2005. He believed that the issue was resolved at that time, but on July 14, 2005 the Grievant received a bill for the surgery. On the morning of July 15, 2005, at approximately 9:30 a.m., during his break, the Grievant returned to Bakke Insurance in an effort to resolve this issue.

Ms. Chellie Kruse, an employee at Bakke Insurance, assisted the Grievant in February and he sought out her support again on the morning of July 15<sup>th</sup>. The interaction started out pleasantly. However, after some continued confusion the Grievant grew frustrated. According to testimony from Kruse, the Grievant became agitated and she felt that his body language was threatening. The Grievant then uttered a phrase that he testified was "somebody ought to get the gun for this." Kruse testified that he said "do I need to get my gun," which she interpreted as a

threat. Kruse then informed the Grievant that she would continue to try to find out more information regarding his claim. He stated that he would be back to see if the matter was settled.

The Grievant left Bakke Insurance and returned to work. He testified that he thought nothing of the events that had just occurred, because he had no intent to cause fear in Kruse, and consequently it never occurred to him that she had been made to feel afraid. He completed his shift, and, before returning home, stopped back at Bakke Insurance. He and Kruse engaged in heated discussion, during which the Grievant requested to speak to Kruse's boss. Kruse's boss was on the phone in his office and unable to field the Grievant's questions. The Grievant then left Bakke Insurance.

In the parking lot outside Bakke Insurance, Johnson informed his coworker Jason Kempert that he was going to perform yard work for his church and "take his frustrations out on the lawn." Kruse felt that the Grievant's behavior was threatening and she contacted his superior, City Administrator Jodie Torkleson, who contacted the police.

The Grievant returned home to find a message that the police were looking for him. He contacted the Department and spoke with the Chief of Police, Kim Miller, who asked him to come to the station. Upon arriving at the station, the Grievant learned that the reason he had been called in was to address the incident with Kruse. After a short discussion, Chief Miller informed the Grievant that he was being held on felony charges of terrorist threats and he was arrested.

Ultimately, this arrest led to the Grievant's pleading guilty to the reduced charge of Disorderly Conduct. Because he was arrested late in the afternoon on a Friday, the Grievant spent all of Friday evening, all day Saturday, all day Sunday, and much of the day Monday incarcerated.

The Grievant testified that, while this experience has been difficult for him, some positives have come out of it. He voluntarily entered anger management treatment. The Grievant testified that he had never seen himself as an intimidating person, but, after anger management treatment, he now understands how others might be intimidated by him.

The Grievant returned to work the Tuesday following his arrest. He performed all of the same duties and worked without incident for the next six weeks. On the afternoon of August 23, 2005, he was summoned to Rude's office where Rude informed him that the City Council was meeting that evening and that the Council was going to vote to terminate him. Rude testified that he never informed the Grievant of his right to attend the Council meeting but conveyed to him that his firing was a certainty.

The Grievant left the Water Department on August 23, 2005, under the impression that he had been terminated. He received a call on the morning of August 24, 2005 asking why he was not at work. He went to work. At that time Rude provided him with the final letter, dated August 24, 2005 notifying that he was being placed on five days, unpaid, suspension which would be followed immediately by termination.

## POSITION OF THE CITY

## First Grievance

The history of written disciplinary actions taken against the Grievant for abusive behavior coupled with profanity and insubordination began on August 22, 2002. “Written reprimand for insubordinate action to an elected official including the use of profanity” specifically warned the Grievant, as a public employee, that he was “...not allowed to use profanity when speaking with anyone or to be insubordinate to an elected official, supervisor, co-workers and the public.”

The reprimand additionally stated that he was: “hereby notified that any future acts on your part for the use of profanity and showing disregard for elected officials supervisors, co-workers or the public shall result in disciplinary action which may include suspension without pay.” This disciplinary action was grieved but was not pursued.

On November 14, 2004, the Grievant violated the 2002 written reprimand prohibition against the use of profanity and showing disregard for supervisors and co-workers. He used language against a fellow employee which, in any setting or with any group of persons, would be regarded as morally degrading, obscenely vile, and abusive. While the words were so insulting that they invited a physical response, the recipient, Martell, did not so respond. Rather, he made a complaint with City management against the Grievant for his use of such insulting expletives.

The result of the abusive profanity and language on November 14, 2004 was the discipline specifically warned he would receive for any repeated offense in 2002 written reprimand – a suspension without pay.

Importantly, the discipline given also contained an effort by the City to assist the Grievant to recognize that his abusive behavior and use of profane language required behavior modification on his part if he desired to preserve his job with the City.

The City, therefore, as part of its disciplinary action offered the Grievant the opportunity, at City expense, “...to work with a local medical professional for training in anger management.” Additionally, he was provided the benefit of scheduling such training during City scheduled hours of work. This City offer was a significant opportunity to avoid any repeats of the behavior he exhibited in 2002 and repeated in an escalated form in 2004. The City again warned the Grievant of additional disciplinary consequences of such behavior in the future.

Unfortunately, the Grievant did not avail himself of the City offer to engage in the professional anger management training opportunity

## Second Grievance

The Grievant’s inability to control his anger was demonstrated in a much more disturbing manner on July 15, 2005. On that date, he threatened Chellie Kruse at the Bakke Insurance office with the use of a gun if she did not act to approve an insurance claim he had filed under the City’s insurance program. Shortly afterwards, on the same day, he made a loud direct threat

intended for the Bakke manager that harm could come to him if the claim did not receive immediate favorable adjustment.

The recipients of these verbal threats (Chellie Kruse and Orren Bendickson) perceived an immediate danger to their personal safety sufficiently real to initiate a call for help to the City.

The call for help from the Bakke office was handled personally by the City of Thief River Falls Police Chief. The Chief indicated that the City Police Department “received a report of a terrorist threat made at the Bakke Insurance office. The Chief talked with Kruse and she said the Grievant came into the office around 0930 hours and talked with her about an insurance matter. He became very upset and stated to Kruse, with regard to the insurance claim which involved his son: “this needs to get done this morning or do I need to bring a gun?” This statement alarmed Kruse. At approximately 1115 hours, the Grievant returned to the Bakke office. He was quite irate and stated: “I’m tired of talking, Orren better get this taken care of today or else.” He left the office and Kruse and Orren called the City for help.

In the statement Kruse stated that she “felt intimidated enough and worried enough that she feared he would return and physical harm might be caused to her or others in the office.” Kruse broke down during the taped interview and was very emotional and upset.

The Chief met with Assistant County Attorney Al Rogallaro. The Chief reviewed the facts of the incident and asked for advice. Attorney Rogalla stated he firmly believed sufficient facts existed to charge and “immediately arrest without warrant on a probable cause for terroristic threats.”

Thief River Falls Police Department Investigator Tim Miller conducted an interview with the Grievant and provided him with a Miranda warning. He was booked and placed in the Penn County Jail.

The City’s termination of the Grievant after completion by the Police Department of its investigation of the Bakke Insurance office incident was based on his pattern of verbal abuse and the use of profanity against elected officials, City employees, members of the public and threats to the physical safety of members of the public resulting in arrest for terroristic threats.

Such repeated behavior on the part of the Grievant, which has escalated each time in severity despite discipline and threats of future and more severe discipline, cannot be tolerated.

In regard to the argument that the City denied the Grievant Union representation in the Martell incident, Arlo Rude, Director of Utilities and Ron Lindberg, Public Works Director, indicated that no management person conducted an investigatory interview with the Grievant concerning the incident leading to the Grievant’s discipline.

Rude was informally told by Lindberg that supervisor Doug Martell wanted action taken against the Grievant for his abusive behavior against him on November 15, 2004. On November 16, 2004. On November 16, 2004 Rude asked the Grievant what happened in the lunch room on November 15, 2004. The Grievant said he did not want to talk about it. Rude did not initiate an

investigatory interview with him at that time or subsequently. He said that he would talk with Lindberg and others to get information about the incident.

Rude subsequently talked with all of the persons he believed were present at the incident. Rude found uniform agreement from those present that the Grievant had not only used profanity against Martell; he uttered sexual invectives against him of such an obscene nature that discipline was warranted not only on the facts of the incident but on the basis of the written warning of August 22, 2002.

In the Step II grievance meeting conducted on January 25, 2005, according to the notes, Union representative King stated that the City had “violated the Gerrity and Tenneson warnings.” This statement was obviously both false and irrelevant since no such warnings had been required since no investigation was initiated. Most of the meeting time was then spent by the Grievant complaining that the 2002 discipline was unjustified.

Rude’s note to the Grievant dated February 1, 2005 concerning January 25, 2005 grievance meeting, indicated the meeting concerned his right to have a Union representative present at questioning. Rude reiterated that the Grievant was never denied Union representation; was not subjected to investigatory questioning and never asked for such Union representation during the informal conversation Rude had with the Grievant on November 16, 2004.

City Exhibits 9 and 10 show no investigatory interview or questions asked by City management personnel at any time that would have triggered the need for Union representation under either Article 10.6 of the Agreement or Weingarten.

The Union’s statement of issue asks: “Was the Grievant’s three day unpaid suspension a disproportionate punishment for the verbal argument with Doug Martell?”

The Union description of the incident resulting in the written reprimand and three day suspension as a “verbal argument” is a gross misstatement of the facts. His words to Martell were not an argument; nor were they “shop talk” as the Union attempted to characterize them during the hearing. Rather the words were a degrading and obscene characterization of a supposed sexual act Martell performed on his supervisor. To his credit, Martell did not respond in kind or take any physical action after hearing such words. Martell did get a reprimand for shouting back at the Grievant.

#### Second Grievance Union Statement of Issue

“Did the City of Thief River Falls follow proper procedure in discharging the Grievant after he pled guilty to Disorderly Conduct relating to an off-duty incident?”

This Union statement of issue is factually in error based on the facts of the termination. He was terminated by the City on August 24, 2005. His plea of guilt to Disorderly Conduct was made on November 30, 2005.

The Grievant was terminated after the City conducted an investigation of his behavior at the Bakke Insurance Agency on July 15, 2005. The termination was based on the facts revealed by that investigation and well before he entered a plea in Court.

The Union's statement of issues further asks: "Is the Grievant's discharge inappropriate in light of the fact that he is engaged in anger management counseling and that he poses no threat to any person?"

The Grievant refused the City offered opportunity for City paid anger management counseling by health professionals on City paid time after he was disciplined with a three day suspension without pay on December 6, 2004. The City made the offer to precisely help him avoid repeating the behavior which caused his discipline in 2002 and 2004. The City saw that the behavior in 2004 appeared to be an escalation from his behavior in 2002 in intensity and use of profane/obscene language. Based on this perceived escalation, the City feared that the next time the Grievant let his temper and anger get out of control, the result could be even further escalation.

The fact that the Grievant saw the wisdom of taking anger management counseling only after his termination does not affect the justification for his termination after the July 15, 2005 Bakke Insurance incident.

Finally, the Union asks: "Did the City of Thief River Falls commit a Loudermill violation by failing to provide the Grievant with a hearing prior to his dismissal?"

The Grievant was provided with the opportunity for a hearing on August 24, 2005 prior to the final decision by the City Council to make a decision concerning his termination. City Administrator Jodie Torkelson stated in cross-examination that the Grievant was informed by Rude that he had the right and opportunity to appear before that City Council in closed session when it considered the recommendation of the City Public Utilities Committee that he be terminated for his behavior on July 15, 2005 at the Bakke Insurance Agency. The Grievant did avail himself of that opportunity.

### Summary and Conclusions

Both grievances involve a continuation of the Grievant's lack of control over his behavior with other persons when he does not get his way. This lack of control led to a written reprimand in 2002 with a warning that any repetition of the use of profanity with other employees, members of the public, or elected officials would result in additional discipline. His egregious conduct at the Bakke office defied the warnings, and the best attempts by the City to correct his abusive language and behavior. The grievances should both be denied.

## POSITION OF THE UNION

The City failed to comply with the concepts of progressive and corrective discipline by a punishment that did not fit the offense and by taking a disciplinary action with no corrective, simply punitive, value. Further, the City failed to follow proper investigative procedure by failing to interview the Grievant after his initial refusal to talk without Union representative present.

The City's position is that the Grievant's behavior was egregious enough to warrant a three day suspension without pay. A three day suspension without pay for a verbal confrontation constitutes a departure from the accepted notions of corrective and progressive discipline.

It is axiomatic that the degree of penalty should be in keeping with the seriousness of the offense. Arbitrators may find the discipline to be excessive if it is disproportionate to the degree of the offense, if it is out of step with the principles of progressive discipline, if it is punitive rather than corrective, or if mitigating circumstances were ignored.

The Grievant and Martell were involved in a verbal altercation. No physical interaction took place. Martell initiated the confrontation by implying that the Grievant was failing to properly perform his job. Yet, the City punished Martell by giving him an oral reprimand, while the Grievant was punished with a three day, unpaid suspension.

The fact that he had previously been issued a written reprimand does not prove that the City properly engaged in progressive discipline. All the witnesses, including Martell, testified that Martell initiated the incident by making a snide comment. The Grievant does not maintain that his reaction was appropriate, but his reaction did not rise to the level that it justified a three day unpaid suspension. Additionally, both Jodie Torkelson, the City Manager, and Merle King, the Union's Business Agent, testified that neither of them could remember a person being suspended for three days without pay in the past.

The Grievant was disciplined one time prior to the incident with Martell when he was involved in a verbal altercation with the Mayor. That verbal altercation involved profanity by both. The City informed the Grievant in a letter dated August 22, 2005 that he was being disciplined because of the language he used and because his position was subordinate to that of the Mayor.

In the current instance, the City provided as justification for its excessive discipline that the Grievant as a foreman, is in a position of authority over Martell. Testimony was conflicted regarding whether he actually was in a position of real authority over Martell. Nonetheless, the City justified its decision by claiming that, as the person in authority, it was the Grievant's duty to walk away. In the previous discipline, the Grievant was disciplined because he was the subordinate party. If the concept of corrective discipline is to have any meaning at all it must be that the employer must have uniform standards for the employee. He cannot receive a harsher punishment in one instance for being subordinate and receive a harsher punishment in a separate instance for being in authority.

The City also notes that the Grievant had been previously warned that use of profanity would lead to more significant punishment. However, arbitrators have not hesitated to disturb penalties where the employer over a period of time has condoned the violation of the rule in the past. Much testimony was given at arbitration regarding the environment in which this confrontation took place. Clearly this is an environment in which profanity is not only tolerated, but used constantly. It is unjust for the City to hold the use of profanity against the Grievant in a situation where all parties were engaged in its use.

As the Arbitrator noted, in an environment where men work on crews, a certain amount of profanity is to be expected. The Arbitrator also noted that certain words or phrases rise above the level of profanity that can reasonably be expected and that those words or phrases constitute "fighting words." There is no question that certain phrases, delivered in particular contexts, are intended to induce confrontation. However, those words vary from situation to situation. Certainly, the use of profanity in this case does not constitute fighting words.

While it has been conceded by all parties that the use of profanity in the context of the Department, does not constitute fighting words, no one would claim that in all contexts the use of profanity would not constitute a "fighting word." Conversely, it is impossible to claim that any word or phrase, even phrases far more offensive than references to oral sex (e.g., racial or religious epithets), always constitute "fighting words." Consequently, it is necessary to look at what causes some phrases, in certain contexts, to become offensive to the degree that they could lead to a physical confrontation. In order for a word or phrase to constitute fighting words, the phrase must not be a common to conversation (or it would regularly lead to incidents of fighting). It is also of paramount importance to examine the intended meaning of the word or phrase.

If the intention of the party delivering the word or phrase is to convey the most offensive possible meaning, then the phrase is more likely to qualify as a "fighting words." If, however, the phrase is being used as a cruder form of a less offensive phrase, then it is less likely to rise to that level. Finally, it is necessary to look at the subjective reaction of that person being insulted.

There was testimony from Blair Gustafson, Jason Kempert, Roger Meunier and the Grievant, that references to oral sex, in multiple forms, were common place in the Water Department and in the shed. In fact, the testimony from the witnesses to the event indicates that nobody thought much of his comment because of how common that particular phrase was in the shed. Gustafson and Meunier testified that this was perhaps a heated moment, but not an unusually contentious incident. In fact, Kempert testified that the incident was so far from unusual that he continued to read the bulletin board outside the room. In the context of the Water Department and the shed, the references to oral sex were not literal, and were not intended to as references to anyone's sexuality. Instead, the references to oral sex were always intended to imply obsequiousness. It is possible that certain implications about an individual's sexuality could be construed as "fighting words," however, it is unlikely that, generally speaking, calling another person a brown nose would have the effect of initiating a fist fight between adults. Finally, while Martell was clearly offended by the comments, the comment did not cause him to act out physically; he simply decided to demand that the Grievant be disciplined.

While the City took into consideration the Grievant's previous history as an aggravating factor in determining the level of discipline appropriate the City failed to look at the Grievant's previous accomplishments as a mitigating factor. The Grievant has had two verbal altercations with other employees or members of the City's staff in sixteen years. Neither of these verbal exchanges escalated to physical altercations. He came to work for the City in 1989 and was an outstanding employee per job evaluations. He started as a part-time worker and worked his way up to the foreman position. He received a Certificate of Appreciation from the City of East Grand Forks for his service to that city during the floods occurring in April of 1997. Clearly, his experience and positive attributes sufficiently mitigate two instances where he acted inappropriately.

The City did not afford necessary due process by failure to conduct a proper investigation into the incident. Numerous arbitrators have also set aside disciplinary acts when the grievant was not allowed the opportunity to present his or her side of the story. Rude testified that, in the days following the November 15, 2004 incident, he attempted to conduct an investigation and that he contacted the Grievant to ascertain his side of the story. Upon hearing from Rude that he would be required to answer questions regarding the incident of November 15, the Grievant exercised his right, under the Labor Agreement, to not be interviewed without union representation. At that point, the City made no further attempts to interview him in its investigation.

Rude testified that he examined the Grievant's personnel file before rendering a decision, but he did not examine Martell's file. At arbitration, testimony from Gustafson indicated that Martell had been involved in these sort of disputes in the past. Had Rude closely examined the background of Martell, he would doubtless have learned of Martell's ongoing issues with coworkers which would serve as a mitigating factor for the Grievant.

Article 10.6 of the Labor Agreement reads "Employees will not be questioned concerning an investigation of disciplinary action unless the employee has been given an opportunity to have a Union representative present at such questioning." Rude had an affirmative duty to inform the Grievant that he would be questioned regarding the incident of November 15 prior to instigating the questioning, in order that the Grievant could contact his Union representative. Instead, Rude simply attempted to get him to answer questions on the spot. Despite the Grievant's claim that he did not want to answer any questions without Union representation, Rude continued to ask until he made a short statement.

To conclude that the City satisfied its duty to investigate simply by inquiring as to the Grievant's position would be to render Article 10.6 meaningless. If 10.6 guarantees the right to Union representation in questioning, then it follows logically that an employee cannot waive the right to questioning simply by invoking 10.6.

#### Union's Position on the Discharge

The City denied the Grievant's procedural rights when it failed to give him a Loudermill hearing. Further, his behavior was mitigated by the fact that it took place away from the workplace and when he was not on duty. Finally, the Grievant has taken affirmative steps, in the

form of anger management counseling, which shows that he poses no threat to the City or co-workers.

The first incident, which occurred around 9:15 a.m., happened when the Grievant was on his break. The second incident, which occurred around 11:15, happened after his shift concluded. Consequently, it is necessary to examine the rules for misconduct occurring when the employee was off-duty and away from employer's work place. Generally, arbitrators have recognized three situations under which an employee can be disciplined for behavior occurring off-duty and off premises:

1. The behavior harms the Company's reputation or product;
2. The behavior renders the employee unable to perform his duties or appear at work, in which case the discharge would be based on inefficiency or excessive absenteeism;
3. The behavior leads to refusal, reluctance or inability of other employees to work with him.

Some arbitrators have recognized a fourth justification: where the off-duty conduct undermines the ability of the Employer to direct the work force.

None of the conditions above are present in the current instance. It is hard to imagine how his behavior could cause any injury to the City's reputation as it was completely unrelated to his City employment. He entered Bakke Insurance Agency as any normal citizen; trying to solve a problem over his work break. To hold that his subsequent behavior harms the City's reputation, when his actions were entirely unrelated to his employment, would render this prong meaningless.

Presumably the second prong relates to extended incarceration or injury. As the result of his arrest and conviction, the Grievant was forced to miss one day of work. Excessive absenteeism has never been a problem for the Grievant and this incident is settled and will not cause him to miss any more work.

The final prong was addressed at arbitration. None of the witnesses who testified indicated that they would have any problem working with the Grievant in the future. To the contrary, Kempert indicated that he found work to be very difficult without the Grievant and that he would be enthusiastic about his return to work. Additionally, Barry Fralin and Leanne Lund both indicated that, in the several years each of them has worked with the Grievant, they never found him to be an angry person and always found him pleasant to work with. Fralin further indicated that the Grievant is such a superb employee, that if he is not reinstated that all other City employees are in jeopardy of losing their positions.

The City has never claimed his actions at the Bakke Insurance Agency in any way undermine the City's ability to direct the work force. Consequently, the Grievant's behavior does not fall under the seldom employed fourth prong.

In cases where employees have been disciplined for criminal proceedings arbitrators have employed a four prong test to determine if the criminal action is sufficient to warrant the

discipline. If, after a good faith investigation, the management concludes that the employee has failed the four pronged test laid out below, then discipline is justified. Failure of prong one of the test, and of either prong two, three or four, by the employee, provides the employer justification for termination. The test is:

1. The charge gives rise to a legitimate concern for the safety of employees or property; and
2. The employer determines that the misconduct disqualifies the employee from directly rendering his or her services; or
3. The employer determines that the misconduct impairs the employee's usefulness to the employer; or
4. The employer determines that the misconduct is likely to have an adverse effect on the employer's business. Elkouri, 943.

Arbitrators have also set aside the discharges of employees in cases where the criminal charges stem from off-duty conduct that is completely unrelated to the employees employment.

Furthermore, arbitrators have set aside disciplinary steps where the employee has recognized that he or she has a mental or emotional issue that causes them to take inappropriate actions and the employee takes steps to overcome that mental or emotional issue. The Grievant was not convicted of the crime of terroristic threats. The County Attorney, after review of the case file, reduced it to the lesser offense of disorderly conduct. The Grievant was given no jail time (aside from the time he served after he was initially arrested) and was afforded a disposition which allows for the charge to be removed from his record if he successfully completes probation.

On his own initiative, the Grievant sought out professional help after his arrest. He went through the difficult process of working through his anger management issues with his psychologist, Dr. Paul Adams. The Grievant engaged in these anger management sessions despite the fact that they are nearly prohibitively expensive. His commitment to addressing these issues is obvious since, despite being out of work, he regularly pays the \$140 per session. These issues constitute the root of all of his problems, and having addressed this problem the Grievant is prepared to return to work and is confident that he is an asset to the City. Dr. Adams stated, in a letter dated March 16, 2006, that the Grievant posed no threat to his coworkers or to the public generally.

The City failed to provide the Grievant with a hearing prior to his termination in violation of Loudermill. In Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487 (US S. Ct. 1985), the U.S. Supreme Court ruled that public employees possess a property right in their employment. Consequently, before they can be deprived of that right, the governmental agency must provide, at a minimum, "oral or written notice of the charges against him, an explanation of the employer's evidence against him, and an opportunity to present his side of the story." Loudermill at 546. While Loudermill affords the City some flexibility in the form the hearing takes, "absent special circumstances, however, there can never be a complete elimination of predisciplinary due process."

At no time did the City provide any opportunity for the Grievant to present his side of the story. Instead, Rude waited to inform the Grievant of his impending termination until the last possible moment, removing any possibility of the Grievant presenting his side of the story. In fact, testimony from Rude and Torkelson indicated that the City, aside from the police investigation, performed no meaningful investigation at all.

Any claim by the City that the situation with the Grievant constitutes "special circumstances" is absurd. The City knew of his arrest on July 15. He was terminated on August 24; allowing the City six weeks to offer the Grievant a Loudermill hearing. Instead, the City waited until the last minute to even provide him notice of his termination. The City Council never had the opportunity to hear this Grievant's defense, and consequently, the City provided a grossly unfair process leading to the discharge.

#### Request for Relief

Having conclusively shown that the City of Thief River Falls inappropriately disciplined the Grievant for the events of November 15, 2004, Teamsters Local No. 320 prays the Arbitrator for the following relief that:

1. The Grievant's suspension be set aside.
2. The Grievant be made whole through reimbursement of salary, benefits and seniority for the days of his suspension.

Having conclusively shown that the City of Thief River Falls inappropriately discharged the Grievant for the events of July 15, 2005, Teamsters Local No. 320 prays the Arbitrator for the following relief that:

1. The discharge be set aside.
2. The Grievant be immediately returned to his previous position with the City of Thief River Falls.
3. The Grievant be made whole through reimbursement of salary, benefits and seniority for the period of time since his discharge on August 24, 2005.

#### DISCUSSION AND OPINION

The first grievance presented in this matter challenges the three day unpaid suspension of the Grievant for his role in a verbal exchange with co-worker Doug Martell. Both parties submitted their preferred statement of the issue. Either statement adequately focuses the core of the dispute and permits for the full and fair hearing of all relevant evidence and argument.

As in many disciplinary cases, the instant matter poses both procedural considerations and findings of fact. In regard to the due process challenge, the Union argues that the City failed to follow proper investigative procedures by not interviewing the Grievant after his initial refusal to talk without a union representative present.

Article 10.6 of the Labor Agreement states “Employees will not be questioned concerning an investigation of disciplinary action unless the employee has been given an opportunity to have a union representative present at such questioning.” The testimony of the Grievant and Director of Utilities Arlo Rude was in agreement that the Grievant stated he would answer no questions without a Union representative present concerning the November 15, 2004 shouting match with Doug Martell.

The Grievant did not, however, request that a Union representative be summoned nor did he volunteer to contact one on his own. Rather, he left the meeting after making a short statement but without responding to any of Rude’s direct questions.

### Analysis and Conclusion

It is difficult to understand how this procedural matter was not settled on the spot when the Grievant declared that he would not answer questions without Union representation. Both he and Rude must share in the failure to move the matter forward at that point either by Rude inviting the Grievant to call his union representative to the interview or by the Grievant offering to do so.

Instead each now blames the other for not fulfilling the intent and purpose of 10.6 to have disciplinary interviews include Union representation. Perhaps dozens of disciplinary interviews are conducted daily across the state under such common contact language without any of the useless wrangling over whose call it is to arrange union representation that occurred in this case.

To simplify matters, it is technically true that the City never denied the Grievant his right to such representation. It is also true that the Grievant had the right to be heard before the disciplinary decision was made. It reasonably follows that the Grievant has no right to refuse to be heard on his side of the story unless accompanied by his Union representative and then neglects to get his story out due to his failure to call his representative.

In sum, the responsibility for compliance with 10.6 falls on the employee who invokes the right to Union representation. The City never violated the right guaranteed in 10.6 because Rude did not, in fact, seek to question the Grievant after he refused to be interviewed on the spot, nor did he deny him the right to summon representation.

Accordingly, the Union’s procedural challenge based on its 10.6 claim is denied.

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I am well aware of the reluctance of co-workers and fellow union members to give adverse testimony against a grievant. This tendency obviously feeds much of the evasions and minimizing observed at the hearing. There were some basic consistencies in testimony, however, which permitted reconstruction of the credible underlying facts. Without identifying any of the witnesses, out of respect for their wishes not to be seen as taking sides against the Grievant, the following approximation of the truth of the matter emerges.

The Grievant and co-worker Gustafson were discussing certain work at the “pond” when Doug Martell made some disparaging comment about this work being wasteful and unnecessary. These comments angered the Grievant who loudly challenged Martell saying, in effect: “Do you think you could do it better? Fuck you.”

Martell responded with a shouted “Fuck you” whereupon the Grievant said words to the effect that, “Why don’t you go suck Tiny’s cock, that’s what Dolby says you do best.” This sparked further shouting and profanity from Martell, including “I don’t have to take this bullshit. Something’s gotta to be done about this.”

Martell then approached Street Supervisor Lyle Olson, who was present at the scene, and demanded that the Grievant be reprimanded for his language and conduct that day. Olson asked Martell to “sleep on it” before proceeding. On the next morning, however, Martell indicated to Olson that he “wanted to pursue the issue.” Events subsequent to Martell’s complaint ultimately brought this matter to the present arbitration.

Analysis: Despite my admonition at the hearing that the Grievant’s language to Martell to “Go suck on Terry’s cock, that’s what Dolby says you do best,” constituted “fighting words,” the Union argued extensively in its brief that in the context of custom in this workforce this was mere “shop talk.”

Despite the voluminous commentary on the difference between shop talk and fighting words found in numerous arbitration decisions and in the professional literature, there appears to be little in the way of a bright line distinction between the two. Perhaps the following observations can contribute to making that distinction clearer.

Most arbitrators use the term shop talk to describe the casual vulgarities, profanities, and obscenities which clutter common discourse in most workplaces. While this kind of crude language may be offensive to some people, it rarely stirs angry, hostile response because it is not intended to insult, disparage, or threaten anyone in the work group.

By contrast, fighting words are intended to attack the person or persons against whom they are directed. Fighting words include but are not limited to racial slurs, sexually demeaning insults, ethnic and familial disparagements. The distinguishing feature of fighting words resides in their abusive nature which can inflame escalating responses with the risk of ultimate violence.

As such, fighting words need not be profane but merely intentionally demeaning and provocative. Thus, calling someone a liar, thief, cheat or coward for instance does not rely on profanity to provoke passionate anger. In like vein, it is not the mere obscene reference to sucking cock or brown nosing which raised the Grievant’s insult at Martell to the level of fighting words. Rather, it was the anger provoking nature of his calculated insult with its graphic imagery which would risk quick escalation to physical confrontation which raised these demeaning slurs to the level of fighting words.

In this regard, I call to the attention of the parties the recently published HRI sponsored research suggesting that as many as 16 million American or 7.3% of the adult population suffer

from “intermittent explosive” syndrome – the main underlying cause of road rage, spousal battering, physical child abuse and violence in the workplace. (See Minneapolis Star Tribune lead article, Monday, June 5, 2006.) Further documentation of the spread of violence in the workplace can be found in the oft-quoted Prudential Insurance study which examined a broad spectrum of industries and geographic locations.

The Prudential Study revealed that one in four workers have suffered from threats of violence in their workplaces and one in sixteen will actually experience some type of physical confrontation in their working lives. Taking but one industrial example, violence in the nation’s post offices became so wide spread that the term “going postal” became common short hand for rageful behavior. The research data reveals that the postal service is far from the most violent work setting (eighth place) – yet the US Postal Service and its four major unions have established joint labor-management committees in post offices nationwide designed to reduce the incivilities and hostilities among postal employees which may lead to workplace violence.

Based not only on these sobering data but on personal experience laboring in such diverse jobs as foundry man, railroad section hand, over-the-road trucker, and construction heavy equipment oiler, I have witnessed how the kind of degrading insult made by the Grievant to Martell prompted an angry response sometimes leading to physical confrontations. In fifty plus years as arbitrator, virtually dozens of discharge for fighting on the job cases have come before me involving escalation from fighting words even less provocative than those used by this Grievant.

It must be observed that the testimony and argument that the words used by the Grievant were merely innocent shop talk are unpersuasive. The plain truth of the matter is that it’s an increasingly uncivil and dangerous world we all inhabit and, in view of this fact, employers have a legal and moral responsibility to provide its employees as safe a workplace as possible. This means taking positive action to prevent conduct which can lead to violence in the workforce.

The fact that Martell took the mature course of reporting the Grievant’s provocative insults to management does not mean that those remarks were in any sense benign. To a more volatile person, those same words could certainly have sparked physical aggression.

## DECISION

Based on these findings and conclusions, the Grievant’s past disciplinary reprimand and warning for similar use of profanity, the suspension grievance is, hereby, denied.

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The second grievance challenges the city's termination of the Grievant for his misconduct at the Bakke Insurance Agency office on July 15, 2005.

The threshold issue in this case was raised by the Union's asking: Did the City fail to provide Mr. Johnson due process as is his constitutionally protected right? Specifically, the Union contends that the City failed to comply with the due process requirement by the U.S. Supreme Court to provide "oral or written notice of the charges against him, an explanation of the employer's evidence against him, and an opportunity to present his side of the story." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985).

Even before the publication of Loudermill, however, arbitrators had routinely recognized the obligation of an employer to provide an opportunity for the employee to give his explanation and defense of events before reaching a decision to discharge. While much debate continues over the interpretation and application of Arbitrator Carroll Daugherty's seven tests of just cause,<sup>1</sup> consensus certainly exists among arbitrators on the absolutely minimal requirement that the employer in a discharge case must conduct a fair and objective investigation into the facts, including hearing the Grievant's position and the charges.

So firmly is due process requirement embedded in both constitutional and contractual law that failure to provide an employee under investigation for a dischargeable offense, a full and fair hearing that arbitrators generally treat such a procedural flaw as a fatal defect mandating dismissal of charges and reinstatement of the employee. Exceptions to this general rule may occur under the harmless error principle. In instances of harmless error findings, the arbitrator may be able to note that, given the opportunity to tell his side of the story at the hearing, the grievant was unable to produce any new evidence or explanation which could have made any difference to the mind of a reasonable person even if heard before the decision to terminate had been made. Such exception does not apply in this case. The Grievant did, in fact, present explanation and potentially mitigating circumstances never received by the City Council.

With the foregoing precepts in place, the review then focuses on the two major considerations which govern the Union's procedural challenge in this matter. In question form those two concerns ask:

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<sup>1</sup> See Daugherty's awards in *Grief Bros. Cooperage Corp.* 42 Lab. Arb. 555 (1964) and *Whirlpool Corp.*, 58 LA 421 (1972).

- Did the City, in fact, fail to provide the Grievant with the opportunity to tell his side of the story before the termination decision was reached?
- If so, under the facts of the case, did such failure amount to a harmless or to a fatal due process error?

In regard to the factual issue, the Grievant steadfastly testified that nobody in City management ever informed him that he had the right to state his case at any time before he received notification of his discharge. The City contends in its brief that “City Administrator Jodie Torkelson stated in cross-examination that Mr. Johnson was informed by Arlo Rude that he had the right and opportunity to appear before the City Council in closed session when it considered the recommendation of the City Public Utilities Committee that he be terminated for his behavior on July 15, 2005 at the Bakke Insurance Agency. Mr. Johnson did not avail himself of that opportunity.”

Ms. Torkelson’s recall of what Mr. Rude had reported to her constitutes hearsay, of course. While hearsay is routinely admitted into the record in arbitration, it has no probative value in the absence of the declarant, unless under one of the exceptions to the hearsay rule. No exception occurs in this instance because Arlo Rude was available on the second day of the hearing and did testify on the question of the alleged Loudermill notice to the Grievant.

Arlo Rude testified plainly and unequivocally that at no time had he ever informed the Grievant that he had the right to present his case to the City Council. The only mention of the City Council that Rude recalled making to the Grievant was when he stated his opinion that “The City Council is going to vote to terminate you.”

While Ms. Torkelson testified to her good faith belief that Rude had met the City’s Loudermill hearing notice requirements, Rude’s dispositive admission that he had not done so resolves the factual issue in the Grievant’s favor.

The final question, plainly stated, becomes – if the Grievant had given his explanation of his behavior at the Bakke Insurance Agency directly to the City Council before it made the decision to discharge him, might the Council have reached a different result?

It stands as a matter of record that no one involved in the decision to recommend discharge to the City Council had considered any potentially mitigating factors such as his 16 years of good service to the City with but a single prior disciplinary action; his several commendations, or his consistently good to superior performance evaluations. Neither did the council members have the opportunity to hear of the frustrations that prompted his ill-advised remarks at the Bakke Agency or to witness his remorse for his admittedly bad judgment or his self-financed recourse to anger management treatment.

The Loudermill doctrine contemplates that all these elements and aspects of the Grievant's side of the story must be given the opportunity to be heard and weighed by the ultimate decision makers. Would these mitigating considerations have made a difference in this case? We will never know because these considerations were never heard by the City Council – which is precisely the point of the Loudermill requirement. It certainly cannot be said with any degree of assurance that these significant concerns are patently lacking in capacity to persuade Council members to a different result.

Because the mitigating factors in the Grievant's position may well have moved individual council persons to view the matter in a somewhat different light, the failure of the City to provide him this opportunity constitutes a harmful, and indeed, fatal due process error.

### DECISION

Due to the failure of the City to provide the Grievant a Loudermill hearing under the facts of this case, his termination must be vacated.

His grievance, therefore, is sustained in full, and the City is directed to make him whole for all lost wages and benefits attributable to his discharge.

The Arbitrator retains jurisdiction for three calendar months, solely to resolve any disputes over the remedy herein directed.

June 19, 2006  
Date

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John J. Flagler, Arbitrator