IN RE ARBITRATION BETWEEN:

CITY OF NORTH ST. PAUL, MN

And

TEAMSTERS LOCAL #320

DECISION AND AWARD OF ARBITRATOR

BMS CASE # 23-PA-1015

JEFFREY W. JACOBS

ARBITRATOR

September 7, 2023

IN RE ARBITRATION BETWEEN:

City of North St. Paul,

And

DECISION AND AWARD OF ARBITRATOR
BMS # 23-PA-1015
Hetherington grievance

Teamsters Local 320

APPEARANCES:

FOR THE UNION:

Kevin Beck, Attorney for the Union
Erik Hetherington, grievant

FOR THE CITY:

Leah Koch, Attorney for the City
Randy Miller, Public Works Supervisor
Ron Ritchie, Public Works Manager

PRELIMINARY STATEMENT

The matter was bifurcated and the procedural arbitrability/timeliness issue was agreed to be heard and decided first before the merits would be presented. The matter was determined to be arbitrable and would proceed on the merits of the 3-day suspension at issue in this case. The hearing on the merits was held at the City Offices of the City of North St. Paul on July 25, 2023 and the evidentiary record closed at that time. The parties submitted post hearing briefs on August 25, 2023.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement, CBA, covering the period from January 1, 2022 to December 31, 2024. Article 7 sets forth the grievance procedure.

ISSUE PRESENTED

Did the City have just cause to issue a 3-day suspension to the grievant on the facts of this case? If not, what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 7 - EMPLOYEE RIGHTS - GRIEVANCE PROCEDURE

7.4 **PROCEDURE.** Grievances, as defined by Section 7.1, shall be resolved in conformance with the following procedure:

Step 1. An employee claiming a violation concerning the interpretation or application of this Agreement shall, within twenty-one (21) calendar days after such alleged violation has occurred, present such grievance to the employee's supervisor as designated by the Employer. The Employer designated representative will discuss and give an answer to such Step 1 grievance within ten (10) calendar days after receipt. A grievance not resolved in Step 1 and appealed to Step 2 shall be placed in writing setting forth the nature of the grievance, the facts on which it is based, the provision or provisions of the Agreement allegedly violated, and the remedy requested and shall be appealed to Step 2 within ten (10) calendar days after the Employer designated representative's final answer in Step 1. Any grievance not appealed in writing to Step 2 by the Union within ten (10) calendar days shall be considered waived.

Step 2. If appealed, the written grievance shall be presented by the Union and discussed with the Employer designated Step 2 representative. The Employer designated representative shall give the Union the Employer's Step 2 answer in writing within ten (10} calendar days after receipt of such Step 2 grievance. A grievance not resolved in Step 2 may be appealed to Step 3 within ten (10) calendar days following the Employer designated representative's final Step 2 answer. Any grievances not appealed in writing to Step 3 by the Union within ten (10) calendar days shall be considered waived.

Step 3. If appealed, the written grievance shall be presented by the Union and discussed with the Employer designated Step 2 representative. The Employer designated representative shall give the Union the Employer's answer in writing within ten (10) calendar days after receipt of such Step 3 grievance. A grievance not resolved in Step 3 may be appealed to Step 4 within ten (10) calendar days following the Employer designated representative's final answer in Step 3. Any grievance not appealed in writing to Step 4 by the Union within ten (10) calendar days shall be considered waived.

Step 4. A grievance unresolved in Step 3 and appealed in Step 4 shall be submitted to arbitration subject to the provisions of the Public Employment Labor Relations Act of 1971. The selection of an arbitrator shall be made in accordance with the "Rules Governing the Arbitration of Grievances" as established by the State of Minnesota Bureau of Mediation Services.

7.5 ARBITRATOR'S AUTHORITY.

A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the Employer and the Union, and shall have no authority to make a decision on any other issue not so submitted.

B. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following close of the hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be binding on both the Employer and the Union and shall be based solely on the arbitrator's interpretation or application of the express terms of this Agreement and to the facts of the grievance presented.

C. The fees and expenses for the arbitrator's services and proceedings shall be borne equally by the Employer and the Union provided that each party shall be responsible for compensating its own representatives and witnesses. If either party desires a verbatim record of the proceedings, it may cause such a record to be made, providing it pays for the record. If both parties desire a verbatim record of the proceedings, the cost shall be shared equally.

7.6 WAIVER. If a grievance is not presented within the time limits set forth above, it shall be considered "waived". If a grievance is not appealed to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the Employer's last answer. If the Employer does not answer a grievance or an appeal thereof within the specified time limits, the Union may elect to treat the grievance as denied at that step and immediately appeal the grievance to the next step. The time limit in each step may be extended by mutual agreement of the Employer and the Union.

RELEVANT PORTIONS OF THE CITY POLICY MANUAL:

G. Access to and Use of City Equipment

… Employees are responsible for the safekeeping and care of all such equipment. Every employee is expected to use City property in a responsible and safe manner. Misuse of City property, mishandling of City records, appearances of impropriety or violations of laws and ordinances may result in disciplinary action ….

PARTIES' POSITIONS

CITY'S POSITION

The City took the position that there was just cause to issue a 3-day suspension on the facts of this case. In support of this position the City made the following contentions:

1. The City asserted that the overall record, circumstantial though it may be, is that the grievant stole a set of expensive head lamps. The City noted that the documentary record shows clearly that the grievant ordered a set of lightbulbs that were delivered by NAPA to the City of North St. Paul.

2. On October 4, 2022, the grievant's supervisor noticed the bulbs had been delivered to the City garage and questioned whether they could even be for City owned vehicles as they are a specialized and quite expensive bulb. The City noted that there was no apparent dispute that these bulbs are somewhat special and are not typically used in any City vehicles. In fact the City noted that there was no dispute that it was later discovered that these bulbs did not fit any City vehicle.

3. The City further noted that Mr. Miller, the grievant's immediate supervisor accepted the delivery, but noticed both the expense and that they were specialized bulbs not typically used in City vehicles. The City also noted that they were ordered for the truck assigned to the grievant, listed on the invoice as PO #300. It was thus reasonable to assume that the grievant ordered these bulbs. Miller than placed the bulbs on the grievant's work desk and took pictures of them for later verification.

4. He also notified his supervisor, Mr. Ritchie, of the delivery, which the City asserted undermined the claim that Mr. Miller somehow took the bulbs. The City noted that if Mr. Miller had intended to take the bulbs he would not have taken photos of them and notified his supervisor that the bulbs had been ordered and delivered.

5. The City then noted that instead of confronting the grievant at that time, the two supervisors decided to simply let the matter “play out” and see where the bulbs ended up. The city asserted that there was no prior decision that the grievant was guilty of anything. However, after reviewing the work orders, it was discovered that the grievant put on the work order that the bulbs had been installed in the grievant's work truck. See Exhibit 5 and 6. The City asserted that there can be little question that the grievant completed the work order dated October 4th and that comparing the documents found in Exhibits 5 and 6, it is clear that the grievant was the only person who could have indicated that the bulbs were installed on the City’s vehicle.

6. The grievant's name appears multiple times on these documents, as well as a time stamp, so there can be little question that the grievant himself certified that he installed the bulbs in his assigned work truck.

7. The City was quick to point out though, that in fact the bulbs were never installed on that truck and that after an investigation these bulbs could not be found on any City vehicle.

8. The City and its witnesses asserted that they did not “alter”’ the work order forms, as the Union suggested, and that the grievant filled the work orders out, indicating the same serial numbers of the bulbs that were delivered. The City noted that there is a unique password for the MTC Pro work order system and that only the permitted user, here, the grievant can sign in to input work on that form.

9. The City also noted that the investigation took several weeks due to both Miller and Ritchie being out of the office on vacation. The City noted though that they checked to see if these bulbs could be used on any City vehicle and determined that they could not be. Further, upon checking, it was discovered that the bulbs were nowhere to be found. They brought their concerns to the City Manager on October 26th after Miller and Ritchie had returned from their respective vacations.

10. The City asserted though that this delay did not prejudice the investigation nor adversely impact the grievant in anyway.

11. The City asserted that the grievant's claims that he never saw nor touched those bulbs is not credible. He first indicated that he never saw them yet claimed that he must have installed them. His claim was later changed to a claim that "everyone makes mistakes."

12. These comments raised serious credibility concerns for the City and they determined that the grievant was being evasive in his comments and was not telling the truth about where those bulbs ended up. They concluded that he must have taken them and did not install them in any City vehicle as the document showed. He thus falsified those documents to hide the fact that he took them.

13. The City also noted that the retail cost of those bulbs is $126.02, yet the City paid only $64.99 for them. Thus, there is an economic incentive and a "motive," for ordering the bulbs through the City and using them for other purposes in the hopes that no one would notice.

14. The City acknowledged that the burden of proof in a case of this nature is greater than the preponderance of the evidence standard usually applied to contract disputes, and that a clear and convincing standard should be used here. See, *State of Minnesota and AFSCME Council 5*, (Crump 2016, BMS 16-PA-0773) where the arbitrator ruled that the employer must show by at most clear and convincing evidence that the grievant committed the act as alleged. See, also Elkouri & Elkouri where the authors note that arbitrators may require proof by clear and convincing evidence even where the violation is of a criminal nature or impugns the employee's character. Elkouri & Elkouri, *How Arbitration Works*, 2010 Suppl. Ch. 8.9.E. and Ch. 15.3.D.ii.a.

15. The City countered any claim that the "beyond reasonable doubt" standard should be used. That is reserved for criminal cases; whereas this case involves a 3-day suspension.

16. The City also countered the claim by the Union that there is only circumstantial evidence to support the discipline and asserted that there is far more than a mere suggestion or circumstantial evidence to support the charges.

17. There is clear evidence that the grievant's City vehicle is referenced on the invoice for the bulbs. There is clear evidence that the MTC Pro work orders have the grievant's name on them multiple times and that no one else could have or would have put his name there and the claim that they did was simply too fanciful to be believed.

18. See also, Elkouri 2010 Supplement, at section 9.9 E and *AFSCME 65 and Fairview Hospital,* BMS 08-RA-0368 (Jacobs 2008) where it is noted that in some cases circumstantial evidence can be as strong or even stronger proof than direct evidence. The City asserted that here, the evidence can only be read in one reasonable way – that the grievant took these bulbs.

19. There is clear evidence that the bulbs were never installed on any City vehicle and that they are essentially gone. There is also clear evidence that the grievant when confronted with these facts was evasive and gave conflicting answers during the meeting with the City Manager and supervisors on October 26th.

20. The City noted that the grievant and the Union made a bald faced assertion during the hearing that Mr. Miller may have taken the bulbs and then doctored the work order forms to hide his crime. The City scoffed at this, noting that Mr. Miller had already shown the pictures of the bulbs to his manager, which makes it extremely unlikely that he would have then taken the bulbs himself.

21. Further, the City asserted that it is not possible to doctor or alter the MTC Pro work order forms as the Union suggested. The City asserted that this allegation was never made during the investigation and that the Union's claim in this regard must be rejected.

22. The Union's argument should further be rejected since there was no evidence beyond the simple possibility that someone else could have done all this, i.e. ordered the bulbs using the grievant's truck as the reference on the invoice, forged the grievant's name on the MTC Pro Work order form in two separate places, even though the City's witnesses indicated that they absolutely did not do that and probably could not do so even if they wanted to and that some unknown person absconded with the bulbs even though they were placed on the grievant's desk.

23. The City asserted that the only reasonable conclusion is that the grievant ordered these bulbs through the City and did not install them on any City owned vehicle even though the documentary evidence points solidly in that direction.

24. Finally, the City asserted that the 3-day suspension for this was lenient and should be upheld. Indeed, in many cases, such a theft would result in outright termination. See, *Sherburne Co. and MPEA*, BMS 15-PA-0036 (Miller 2014) and *Hennepin Co. and AFSCME 2822*, BMS 20-PA-2611 (Jacobs 2020).

25. Here, the City decided to give the grievant another chance and changed the procedures to prevent such activities in the future. Thus, the mere fact that the grievant was allowed to continue to order parts on the City's account does not establish that the grievant was not guilty. It merely affirms that he was caught, given very light consequences and that steps were taken to disallow such actions in the future.

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

UNION'S POSITION

The Union took the position that there was not adequate proof of the alleged misconduct and that there was no just cause for discipline in the matter. In support of this position, the Union made the following contentions:

1. The Union maintained that the grievant did not take or steal the bulbs, and that he in fact never even saw them. The Union asserted too that there is not even proof by the preponderance of the evidence standard and that the level of actual proof put forth by the City fell far short of a clear and convincing quantum of proof.

2. The Union acknowledged that the quantum of proof to be applied here is the "clear and convincing evidence" standard and not the criminal standard of beyond reasonable doubt.

3. The Union noted that the grievant is a long term, very competent mechanic who has no discipline on his record. There were some instances of prior coaching, but those were not considered disciplinary in nature.

4. The Union also asserted that it was apparent that Supervisor Miller pre-determined guilt the moment he saw those bulbs and that the subsequent "investigation" was tainted by his obvious bias toward finding that the grievant was guilty of theft. Indeed, he was the last person to acknowledge having possession of those bulbs and there is every reason to believe that he could have taken them. The grievant asserted that Mr. Miller essentially "has it in" for him and frequently criticizes his work and that he feels that Mr. Miller is biased towards him and set him up.

5. The Union argued that the entire situation could well have been avoided had he simply gone to the grievant the same day the bulbs arrived and asked why they had been ordered or sought some reasonable explanation. The Union asserted that there could well have been a simple error in ordering them, but that Miller was obviously trying to set the grievant up for failure here.

6. The Union also intimated that there was something of a conspiracy between Mr. Miller and Mr. Ritchie, the manager, to "let things play out," as they put it. Had they simply done that this entire scenario would have been avoided, yet they decided to discipline the grievant without any direct evidence of theft at all.

7. The Union cited *Teamsters Local No. 320 and City of Corcoran*, BMS Case No. 10-PA-0976 (Fields, 2010) which also involved a similar scenario where an employee was accused of taking a pair of sunglasses. In that case too, the supervisor approved the invoice and also "let it play out" and then discharged the employee for theft. The arbitrator overturned the discharge saying that "

> [T]he Supervisor should have called Grievant to his office and revealed to him the results of his investigation at the vendor's and asked for clarification of Grievant's conduct. He failed to do this because the Supervisor assumed, incorrectly, that theft of public funds could be the only explanation . . . . A reasonable supervisor would have tested either assumption by simply asking the Grievant to clarify his motives. . . . He made his decision on his assumption that Grievant's motives were nefarious and criminal.

8. The Union asserted that this is exactly what should have been done here and that "letting it play out" was not, as the City suggested, simply a way to show trust in the grievant, but was rather a not to subtle way to set the grievant up for failure. The Union asserted that both Miller and Ritchie assumed the grievant's guilt almost immediately without any evidence at all and that this assumption pervaded everything else that occurred.

9. The Union pointed out too that no one contacted the grievant later that day to inquire about the bulbs and that even though Mr. Miller had the grievant's phone number he never called or contacted hm at all until weeks later. This was not a reasonable investigation and, as Arbitrator Fields noted, not the act of a personnel supervisor.

10. The Union also asserted that the investigation was fatally flawed not only because both Mr. Miller and Mr. Ritchie assumed the grievant's guilt from the very start, but also because they never contacted the grievant in a timely way, as noted. They had the grievant's phone number yet they never called him. They never even asked him that same day why these bulbs had been ordered. Instead they waited weeks to conduct any investigation and "laid in wait" to ambush the grievant weeks later.

11. The Union also asserted that the grievant had no recollection of signing the work orders and never even saw those bulbs. His testimony has been consistent throughout that he never saw nor took those bulbs.

12. The Union was also quick to point out that there is no direct evidence that the grievant actually took these bulbs – no one saw him leave with them or install them in his own personal vehicle, for example. Indeed, the grievant claimed repeatedly that he never saw those bulbs and has no idea where they went. There is no direct evidence at all of the alleged theft.

13. The Union also claimed that the MTC Pro work orders would easily have been altered and pointed out that there is a possibility that someone else could have forged the grievant's name on the documents to make it appear that the grievant was being untruthful in submitting those documents. The Union also asserted that these work orders have been changed in the past by supervisors and that the grievant has observed this.

14. The Union asserted that, at most, this case was one of submitting a work order that was not actually done, since the grievant signed several other work orders at the exact same time the MTC Pro work order documents showed that two other work orders were completed. While this may be an instance of the grievant failing to sign off accurately and may be grounds for a minor reprimand, it does not warrant a three day suspension. Thus, the suspension meted out here is harsh and excessive and should be reduced or eliminated altogether.

15. The Union also asserted that a 3-day suspension was overly harsh and that the City failed to follow progressive discipline in this instance. The grievant has no prior discipline and should have been given every benefit of the doubt here – especially given the clear delay and evidence that the two supervisors could have handled this very differently.

The Union seeks an award sustaining the grievance and ordering That Grievant Erik Hetherington's 3-day suspension be set aside and he be made whole through reimbursement of salary, benefits, and seniority for the period of time during his suspension; or in the alternative, any remedy the Arbitrator considers appropriate.

MEMORANDUM AND DISCUSSION

The facts were fairly straightforward, but the conclusions to be drawn from them were hotly contested. The grievant is a mechanic and has worked of the City of North St. Paul since May 2020. By all accounts he is a very capable and competent mechanic and has no prior discipline on his record.

The City uses a software program known as MTC Pro which is a password protected system by which work completed is entered showing the time of the work and the nature of the work done. See City Exhibit 5.

This case involves a set of headlight bulbs and the alleged theft of them. The record was clear that on October 4, 2022 a blister pack of two Night Vision headlamp bulbs were delivered to the City by the local NAPA store. These bulbs were expensive, costing $64.99. The retail price on the invoice for them showed that would have cost $126.02 and the evidence was that the City gets a discount when items of this nature are purchased.

Mr. Miller, the grievant's direct supervisor, saw these bulbs and noted their expense and further questioned why they were ordered since no City vehicle uses them. He was somewhat suspicious and took pictures of the invoice and of the bulbs themselves. See City Exhibits, 1, 2 and 3. The invoice has a reference vehicle listed at PO #300, which was shown to be the grievant's assigned work vehicle – a 2008 Chevy pickup truck.

There was clear testimony that this truck does not use the bulbs at issue in this case. It was also clear that the serial number for the bulbs is on the blister pack as BP9004NVX2-N. The pack contained two bulbs. They are Super White Night Vision high intensity bulbs and there was no dispute that they do not fit in any of the City vehicles.

Miller testified credibly that he became concerned as to why these bulbs were ordered and that he then showed the picture to his Manager, Mr. Ritchie, and inquired what to do. Both decided to simply do nothing and let things play out, as they put it.

Mr. Miller then placed the bulbs and the invoice on the grievant's desk. Significantly, the grievant was not at his desk at the time and was apparently unaware that Mr. Miller had seen the bulbs or taken pictures of them.

There are two work order documents that were significant in his case, City Exhibits 5 and 6. These are the MTC Pro work orders. Both documents show that the grievant's name appears as the person who installed these particular bulbs in the 2008 Chevy pickup truck. See City Exhibit 5 which has both the 2008 truck, the grievant's name and the exact same serial number listed above for the bulbs in question. There is also a notation under "task" – "head lamp out."

Further, on City Exhibit 6 there is a notation indicating that work was completed at 11:43 on October 4th that showed the "headlamp bulbs" with again reference to the grievant's name, his assigned work truck and the serial number of those particular bulbs.

The evidence also showed that during that week, Mr. Miller began checking City vehicles to see if those bulbs, which are unique in that they have a blue coating on the end of them, were installed in any City vehicle. There was no dispute that these bulbs were never found on any City vehicle and that they are in fact missing at this point.

Both Miller and Ritchie were out of the office for a few weeks and on October 24th they met with managers at the City to discuss the issue. Several City representatives met with the grievant and his Union steward on October 26th to discuss what happened to those bulbs.

The grievant at first claimed that he must have installed them, but did not recall which vehicle it was. On this record, that seemed reasonable in that it was several weeks before. At that point, the group went into the parking lot to see if they could find the bulbs in any vehicle – especially the one the grievant signed off on – the 2008 Chevy pickup. They were never found in any City owned vehicle.

The evidence showed that upon the group's return to the office the grievant claimed that "everyone makes mistakes," but it was unclear what he meant by that statement. The grievant was issued a 3-day suspension due to the allegation that he took the bulbs.

Upon the grievant's return from the suspension, new procedures were put in place to prevent further incidents of this nature. The grievant was allowed to continue ordering parts on behalf of the City. The Union filed a grievance that was processed through the appropriate steps of the grievance procedure.[1]

QUANTUM OF PROOF TO BE APPLIED IN THIS CASE

There was no dispute about the level or quantum of proof necessary. Both the City and the Union asserted that the evidence required here must meet the "clear and convincing" standard in order for the discipline to be sustained. Some discussion of what that actually means in a context such as this is of some importance. Elkouri notes as follows:

> "The quantum of proof required to support a decision to discipline or discharge an employee is unsettled. Arbitrators have primarily imposed one of three standards, listed below from the to the greatest burden:
>
> 1. Preponderance of the evidence;
> 2. Clear and convincing evidence;
> 3. Evidence beyond a reasonable doubt
>
> Concerning the quantum of required proof, many, if not most arbitrators apply the 'preponderance of the evidence "' standard to ordinary discipline and discharge cases. However, in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a 'clear and convincing evidence 'standard, with some arbitrators imposing the 'beyond a reasonable doubt' standard. But, even in cases of criminal behavior or socially stigmatizing conduct, some arbitrators require only a 'preponderance of the evidence.'
>
> … One arbitrator observed, in general, arbitrators probably have used the 'preponderance of the evidence' rule or some similar standard in deciding fact issues before them, including issues presented by ordinary discipline and discharge cases. But the arbitrator also noted that a higher degree of proof frequently is recognized where the alleged misconduct is 'of a kind recognized and punished by the criminal law' and he concluded:
>
> > It seems reasonable and proper to hold that alleged misconduct of a kind that carries the stigma of general social disapproval as well as disapproval under accepted canons of plant discipline should be clearly and convincingly established by the evidence. Reasonable doubts raised by the proof should be resolved in favor of the accused. …[2]
>
> Concerning the quantum of proof to be imposed in a case involving theft, an arbitrator stated:

[1] There was a claim that the matter was not procedurally arbitrable and the parties presented separate arguments to that effect. The matter was determined to be arbitrable and the matter proceeded to a hearing on the merits.

[2] *Kroger Foods*, 25 LA 906, 9078 (Smith 1955).

> I agree with the Union that a discharge for theft has such catastrophic economic and social consequences to the accused that it should not be sustained unless supported by the overwhelming weight of the evidence. Proof beyond any reasonable doubt, even in cases of this type, may sometimes be too strict a standard to impose on an employer; but the accused must always be given the benefit of substantial doubts. [3]

…Generally three factors are considered in determining the standard of proof necessary , though none alone seems to be determinative. Specifically, arbitrators consider whether the employee's conduct constitutes criminal behavior, whether it involved moral turpitude or social stigma, and whether the sanction imposed was discharge or some lesser discipline. In cases of potential unlawful conduct, the greater weight of authority favors 'clear and convincing evidence' or 'preponderance of the evidence,' as opposed to 'beyond reasonable doubt.'" Elkouri 8th Ed at 15.3.D.ii.a, pages 15-27-28.

In addition, Professor St. Antoine in *The Common Law of the Workplace* BNA Books 2D. Ed. 2005 Section 6:10 at page 192, observes as follows:[4]

> When the employee's alleged offense would constitute a serious breach of law or would be viewed as moral turpitude sufficient to damage an employee's reputation, most arbitrators require a higher prequantum of proof, typically expressed as 'clear and convincing evidence.' Some require proof 'beyond a reasonable doubt,' but, absent an express contractual provision to the contrary, most hold that the criminal law standard of 'beyond a reasonable doubt' has no place in an informal dispute resolution mechanism like arbitration.

Ultimately, the question is whether there is enough proof to satisfy the arbitrator that what the employer has alleged really happened or is there some other plausible and reasonable explanation that leads to a different conclusion.

How that is measured though is hardly a mathematically precise endeavor. Perhaps one of the most interesting commentaries about the problem of what exactly constitutes "enough" evidence to meet these varying levels of proof comes from *An Effort to Describe One's Personal Decisional Thinking*, 33rd Annual Meeting of the NAA, 1980. The arbitrator who drafted this noted as follows:

> I also have the perception that one has to be cautious about prematurely turning to 'burden of proof' ideas in the course of decisional thinking. It is susceptible to self-indulgent use to foreshorten the persistence of puzzlement, itself often enough an unpleasant and irksome experience, which sometimes is necessary to in order to break out of the underbrush of contention and loose ends of circumstance that clutter up and obscure the route of the tried to this reconstruction of events. As with legal conceptual reasoning in general, the relief supplied by invocation of the concept of burden of proof is experienced because further painful attention to the dilemma of irresolution has thereby been obviated; the need to be concerned about analysis has thereby been removed.

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[3] *Columbia Presbyterian Hospital*. 79 LA 24, 27 (Spencer 1982).

[4] Also cited by Elkouri 8th Ed (2016) at page 15-27.

It is by no means completely clear what that meant in this context, but if that arbitrator's point was that most of the discussion about the importance of burden of proof in arbitration is pedantic, intellectual sounding gibberish, his point was well taken.

Applying these tenets to this case, it was apparent that a clear and convincing standard is to be applied. Using the three factors listed above, it was clear that while the alleged conduct involved a possible criminal act and one of stigma that attached to it, the penalty imposed was a 3-day suspension, as opposed to a far greater level of discipline up to discharge. That latter factor was significant.

The question then is whether these facts establish by clear and convincing proof that the grievant took the bulbs as alleged. This required that the City show by adequate proof that the grievant took the bulbs and that this was the most logical and reasonable conclusion to be reached from the evidence available. It did not require that it be the *only* possible solution in the world, but that it was clearly the only reasonable one to be reached from the available testimony and documentary evidence in the record.

WAS THERE ADEQUATE PROOF OF THE MISCONDUCT AS ALLEGED?

The documentary evidence presented a compelling case of circumstantial evidence in support of the City's claims. There is some dispute in the arbitral literature as to the value of circumstantial evidence. Elkouri notes that "circumstantial evidence is evidence from which an "inference with respect to some fact other than the testimony which is offered as evidence to the truths of the matter asserted." *Evidence in Arbitration*, at p. 4. Professor Sinicropi correctly points out however, that one should not assume that simply because circumstantial evidence is offered it must by definition be accorded less weight or that it is somehow suspect. There may certainly be instances where circumstantial evidence may not be afforded much weight; as in the case where there is competent, direct evidence to the contrary offered to counter the assertions made by circumstantial evidence.

Clearly, there are times when arbitrators must decide cases based largely on circumstantial evidence. Elkouri cites several examples of how this might be used. See, *How Arbitration Works*, 6th Ed at pp. 452-53. 8th Ed at 8.4.I.i.

In some sense, circumstantial evidence is not "evidence" at all, but is rather a set of reasonable conclusions that can be drawn from the available direct evidence. Elkouri continues as follows:

> "Circumstantial evidence is often relied upon by arbitrator to decide cases. … Circumstantial evidence may be the only evidence available in some cases, such as theft. Generally speaking, circumstantial evidence is equally as probative as direct evidence. … Some arbitrators have even gone so far as to say that circumstantial evidence may be more persuasive than direct testimony. Elkouri 8th Ed at 8.4.I.i page 8-53-54.

One arbitrator gave the familiar example as follows: "Proof that the defendant was seen standing over the victim with a smoking gun in his hand permits the inference that it was the defendant who pulled the trigger." Elkouri observed that "drawing inferences and factual conclusions from circumstantial evidence has been said to be an arbitrators stock in trade. Elkouri 8th Ed. At page 15-52.

Clearly, the available evidence points to the grievant as ordering the bulbs, likely getting them, since the evidence was that they were placed on his desk, and that they were never installed in any City vehicle despite the work order evidence that they were.

The evidence also pointed to the claim that the grievant claimed they were installed and that he installed them, but that they were never found on any City vehicle. Clearly too, something does not add up here – the bulbs are gone and the grievant's name is literally all over the documents saying that he installed them on a City vehicle, yet they were never found on any City vehicle.

Thus, this is a somewhat classic case of circumstantial evidence, as there is no direct evidence that the grievant was seen leaving with the bulbs in his possession or that they were eventually found installed on one of his personal vehicles. As noted above, the question here is whether there was clear and convincing evidence adequate to conclude that he took them and that there is no other reasonable explanation for the fact that the bulbs are indeed missing and for the documents as described above.

As noted, the documentary evidence is quite compelling, but the Union raised defenses that need to be addressed. The first of which is that Mr. Miller may have taken them since he is the last person who acknowledges having them. On this record, that did not find adequate support.

It was clear that he saw them and testified credibly that he put them on the grievant's desk since the grievant's nae is on the invoice for them. There was also the clear fact that he took pictures of them and showed them to Mr. Ritchie. It is entirely unlikely, in fact implausibly so, that he would then steal them after having acknowledged having them and showing them to his manager. Thus, on this record that allegation did not find adequate evidentiary support.

The Union also asserted that the managers essentially set the grievant up by waiting to see what would happen to the bulbs and letting things play out. The Union was correct in one thing, although it did not affect the outcome, and that was that if the supervisors had simply gone to the grievant the same day these bulbs arrived this entire matter could well have been avoided.

The ultimate question is thus not whether the supervisors could have done something differently, but rather whether the evidence showed by clear and convincing evidence that the grievant took the bulbs. If the grievant indeed had intended to take them and had been confronted with them that same day, the whole thing would have been averted and the bulbs returned to the NAPA store presumably for a full refund. Had it been shown that they were ordered or delivered in error that could have been easily rectified.

The problem with that argument is that the bulbs have never been found and as noted above, literally all of the documentary evidence in this case points directly toward the grievant. His work truck was on the invoice, his name appears in several places on the work orders, the serial number of the bulbs appears on those invoices as having been installed on the grievant's work truck and the evidence showed that they were not found in the grievant's work truck. There is no other reasonable explanation for this and the evidence did not establish the conspiracy by the two supervisors to set the grievant up, as the Union put it.

Clearly too, if there was such a spiteful conspiracy to get the grievant fired, presumably the City would have taken that very action and discharged him[5] The clear fact that the City imposed a 3-day suspension was supportive of the notion that while the City was concerned about the grievant's actions, they did not impose what many have called the "industrial death penalty." This too undermined the claim that the supervisors were out to get the grievant in some nefarious way.

Thus, on this record, while it was clear that the supervisors could have handled this differently and perhaps have averted the whole matter, the fact remains that the bulbs were never found. It should also be noted that even someone assumes guilt in another person, that does not mean they are not guilty. The fact that someone is caught in a sort of "sting" operation does not absolve them from guilt if indeed they are guilty.

The Union also claimed that, at worst, this was a case of an inaccurate completion of the work orders. As noted, the work order for these headlights was completed at 11:43 a.m. on October 4th, the same time as several other work orders had been signed off on by the grievant. See City exhibit 5 showing work order #'s 1299, 1300 and 1302. The Union characterized that as a simple accounting error. That may well have had some merit IF the bulbs had been located and found to have been installed as the documents claimed they were. The problem is that the bulbs are gone and they are not in any City vehicle. That latter fact was significant in that it undermined the claim by the Union that this was a mere paperwork error. The other possible conclusion is that the paperwork error was an attempt to cover up the fact that the bulbs were never installed.

Thus, this is more than a simple paperwork error and it cannot be ignored that the bulbs are missing. Somebody took those bulbs and there was inadequate evidence that anyone else could have or would have taken them. The fact that Miller had them at one point is one thing, but he took pictures of them and showed them to his manager. That undermines any reasonable claim that he took them.

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[5] It has long been held that the amount of money involved or the value of the items taken is not necessarily controlling in a case of theft; it is the loss of trust in the employee.

For the grievant's conspiracy claims to be valid, it would have meant that for reasons that are just too far-fetched to be given any merit, both Miller and Ritchie would have had to order the bulbs for the grievant's truck, as noted on the invoice, hope that the bulbs would be delivered at a time when the grievant would not know they had been delivered, hide the bulbs, forge or fraudulently place the grievant's name on the work orders claiming, in two places, that he had installed them and concocted this entire scenario in an effort to have the grievant suspended for 3 days. That was simply too hard to accept on these facts and this record.

Finally, the Union's claim that the discipline was too harsh had little merit. There are legions of cases where something like this would result in a termination. The 3-day suspension was reasonable and will not be disturbed for the reasons set forth above, not the least of which is that this was not shown to be a simple paperwork error. On this record, the Union's defenses were insufficient to warrant disturbing the discipline issued in this case. Accordingly, the grievance on these unique facts is denied.

AWARD

The grievance is DENIED.

Dated: September 7, 2023

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Jeffrey W. Jacobs, arbitrator

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