

**IN THE MATTER OF ARBITRATION BETWEEN**

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**AFSCME Council 65**

**Union,**

**Jordan Suspension Grievance**

**and**

**BMS Case No. 23-PA-2684**

**City of Rochester, MN**

**Employer.**

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Arbitrator: Gregory L. Failor

Hearing Date: September 26, 2023

Hearing Location: Rochester, MN

Post-Hearing Briefs Received: October 13, 2023

Date of Decision: October 27, 2023

**APPEARANCES**

For the Union: Jolene Kjelshus

For the Employer: Susan K. Hansen

**PROCEDURAL BACKGROUND**

AFSCME Council 65 and the City of Rochester are parties to a collective bargaining agreement (CBA). The Grievant, Heidi Jordan, is an Assistant Clerk I with the City of Rochester, Minnesota, and is represented by Council 65. On January 26, 2023, the Grievant was issued a five-day suspension without pay for performance related deficiencies. The Union filed a timely grievance on February 9, 2023, contesting the discipline under the CBA's grievance procedure. The parties were unable to resolve the grievance short of arbitration. As a result, a neutral arbitrator was selected utilizing a list of arbitrators provided by the Minnesota Bureau of Mediation Services. A hearing was conducted at Rochester City Hall on September 26, 2023. The parties agreed that the matter was properly before the arbitrator and that there were no concerns related to arbitrability of the grievance. The parties each produced one witness at the hearing. Heidi Jordan testified on behalf of the Union. Ms. Jordan's immediate supervisor, Deputy City Clerk, Kimberly Gierach, testified for the Employer. The parties waived closing arguments and instead opted for submitting post-hearing briefs. The briefs were timely received by the Arbitrator on October 13, 2023. The record was closed on that date.

## **ISSUES**

The parties stipulated to the following issues:

1. Did the Employer have just cause to issue a five (5) day suspension to the grievant Heidi Jordan?
2. If not, what is the appropriate remedy?

## **RELEVANT CONTRACT LANGUAGE**

Article 31—Discipline

No employee shall be disciplined except for just cause.

## **FACTS**

The Grievant is an Assistant Clerk I in the city clerk's office for the City of Rochester, Minnesota. She has been employed in this capacity since 2014. The Assistant Clerk I is stationed at the front desk of the city clerk's office and is generally the first point of contact with the public. The job description for the position states that employees assigned to this position may "encounter disgruntled or challenging customers on a regular basis." Employees in this position are expected to become proficient and knowledgeable with respect to a myriad of procedures, policies and work directives related to the functions of the city clerk's office, particularly with respect to licensing, permitting, city contracting and the processing of payments of fines and taxes.

Employees of the clerk's office are expected to learn and work independently as much as possible. Much of the communication regarding new office procedures and policies is done by e-mail or Teams messaging. On February 21, 2022, City Clerk Kelly Geistler sent an e-mail to all staff in the city clerk's office which read in part:

I want to set an expectation now so there is no confusion: Emails and Teams messages from myself and Kimberley in particular, as well as the rest of your team, should be read, digested, and followed-up upon. Follow-up may include an action or just noting a piece of information.

Our responsibility as part of a team is to take in and process the information we are given when it is provided, take action steps where necessary, and ask questions when we don't know. Making people repeat themselves is inefficient and inconsiderate. Saying "I don't know" or "I must have missed that" regarding information that was clearly communicated in an email will no longer suffice as an excuse for a critical task or piece of information being missed.

Failure to meet this standard could result in coaching, performance improvement, and potentially even discipline.

To recap:

1. Read your e-mail and Teams messages.
2. Respond for effective communication, even if just to acknowledge receipt.
3. Take action as needed.
4. Be a problem solver, and think it through.
5. Ask questions when you are unsure and you have exhausted problem solving strategies.
6. Maintain this practice starting immediately and on-going forever.

On February 22, 2022, the Grievant acknowledged that she had read this entire e-mail and understood its contents.

During the first five years on the job the Grievant was discipline free and from all appearances was performing her job adequately. Starting in March 2020, the Grievant has received the following discipline and non-disciplinary actions related to her on-going job performance:

- On March 17, 2020, the Grievant was issued a Performance Improvement Plan (PIP) by her former Supervisor Kelly Geistler who is currently the City Clerk. The PIP identified several areas of concern and required the grievant to bring her performance up to required standards or face possible disciplinary action.
- On May 18, 2020, the Grievant was issued a written reprimand for poor performance. The disciplinary letter noted the specific factual basis for the discipline as failing to acknowledge Teams communications despite being instructed to do so; not meeting the standards outlined in the PIP with respect to monthly credit card reconciliation and professional communication skills; and failing to record incoming calls in a log even though the PIP directed her to maintain accurate call logs. The Grievant was advised that continued poor job performance would result in further disciplinary action. This disciplinary action was not grieved.
- On December 17, 2021 the Grievant was issued a written reprimand for poor job performance related to certain data entry errors and poor customer service. The letter set future performance standards related to completing a task checklist daily and to filling out customer service logs denoting each interaction with a customer. The Grievant was directed to limit her personal phone use to lunch and breaks. The Grievant was advised that continued poor job performance would result in further disciplinary action. This disciplinary action was not grieved.
- During a meeting on February 8, 2022 between the Grievant and her supervisor Kimberly Gierach, the Grievant was informed that while her performance had improved temporarily after receiving the December 2021 written reprimand her current performance was showing signs of eroding again. The Grievant received a follow-up e-mail from her supervisor denoting the areas that were discussed that were of concern to her supervisor including several examples of failure to complete assigned work tasks,

inattention to detail and personal phone use during work time. The Grievant was informed that continued unsatisfactory work performance may result in disciplinary action. No discipline resulted from this meeting.

- On March 31, 2022 the Grievant was issued a one-day suspension without pay for continued poor job performance. The letter directed the Grievant to avoid unnecessary disruption of other teammates, engage in active listening to better understand work requirements and to provide customer service in a courteous and helpful manner. The Grievant was advised that continued poor job performance would result in further disciplinary action. This disciplinary action was not grieved.
- During the Grievant's July 14, 2022 annual performance evaluation she was given a new PIP by her supervisor Kimberly Gierach. The new PIP directed the Grievant to problem solve before engaging her co-workers or setting tasks aside; completing quality work and assigned projects; and processing checks in the morning and auditing data processing in the afternoon. Again, the Grievant was advised that failure to meet these performance expectations would result in disciplinary action.
- On September 12, 2022 the Grievant was issued a two-day suspension without pay due to concerns with her on-going job performance. The disciplinary letter directed the Grievant to work independently, follow instructions, adhere to departmental policies, and provide consistent front desk coverage. The Grievant was advised that continued poor job performance would result in further disciplinary action. This two-day suspension was not grieved.

The Grievant did not involve her union for any of the above listed disciplinary actions until the present matter.

This brings us to the current situation and the subject of this arbitration proceeding--the five-day suspension without pay that was issued to the Grievant on January 26, 2023.

On January 12, 2023, the Grievant met with representatives of the Employer and was provided with a "Notice of Intent to Take Disciplinary Action" letter. The Grievant did not request that a union representative be at this meeting. The letter noted that the Employer had not yet made a final disciplinary decision. In other words, the discipline to be imposed, if any, was open ended at this point. The letter provided the following grounds for seeking to impose discipline on the Grievant:

The reasons for the proposed disciplinary action are based on the following violations:

- City of Rochester Core Value Statements and Standards—Customer Service, Respect, Excellence
- City of Rochester Organizational Policy—Disciplinary Action
- Departmental Expectations

The specific reason for the disciplinary action is the continued pattern of errors in your performance of several routine job functions; including, but not limited to:

- Work independently by relying on standard operating procedures, city website, team meeting agendas, and other resources.
- Take time to evaluate information before you respond or involve additional resources to understand how to process incoming requests appropriately.
- Keep your supervisor informed of issues that could require follow-up, including documentation in the Teams log.

The Grievant was informed in the “Notice of Intent to Take Disciplinary Action” letter that if she believed that disciplinary action is not warranted, she had the right to provide an explanation in writing. She provided the following response to the Employer without consulting with her union:

I am writing in response to the letter I received on January 12, 2023. I honestly don't even know where to begin. I have been sitting here and trying to really grasp everything that was mentioned. One thing I can say as in the letter I wrote in an earlier meeting. I was serious on stressing how important my job is to me and how I want a complete understanding of me so I can work and perform my job as expected. I also mentioned if there are any problems that may occur with my performance to bring it to my attention right away so that I can correct it and not make that mistake twice.

I do take responsibility of the fact that when I was handed the assessment check as I was leaving instead of just placing it on the desk I should have let the team know its location. I placed it out in the open where it would not be missed and also place things to be entered when I'm not around. In which other people leave checks and parking ticket payments on my desk regularly when I'm away from office. I'm just concerned about being singled out and I'm welcome to a more secure system for the placement of checks that need to be processed.

I have been working very hard on things that were brought up in previous meetings. I was a little blindsided by this meeting. So I'm very lost for words. I was unaware that some of the things that were mentioned were problems that I needed a disciplinary action for. If I knew the importance of them I would have addressed them differently. I would like to know going forward especially communicating with council members when I should bring things to Kimberly's attention or when I should mention it in Teams.

With all that being said, I am willing to do whatever it takes to get a better understanding of what is expected of me so that I can be comfortable fulfilling my job duties to the fullest. I can sign up for some trainings. I will do what it takes to get a better understanding of what is expected of me in my position. I feel that I have built more confidence in my work and also have taken it upon myself to find my answers to questions instead of always asking first.

After receiving the Grievant's response, the Employer imposed its final disciplinary decision on January 26, 2023 citing the same grounds for discipline contained in the January 12, 2023 notice of intent to impose discipline letter. The final disciplinary decision to impose a five-day suspension without pay was reached by consensus among three city employees, City Clerk Kelly Geistler, the Grievant's current supervisor Assistant City Clerk Kimberly Gierach and a

representative of the city's Human Resources Office. The letter noted that the final decision regarding the level of appropriate discipline considered the Grievant's prior disciplinary record and other non-disciplinary measures taken to improve the Grievant's job performance.

Notably, the actual incidents of poor job performance that led to the Employer's decision to discipline the Grievant were not described in either the "Notice of Intent to Take Disciplinary Action" letter of the final disciplinary letter issued on January 26, 2023. During the arbitration hearing the Employer provided testimony and exhibits related to six incidents of poor performance that led to its January 26, 2023 disciplinary decision. These incidents are listed in chronological order:

October 18, 2022 Failed to look for a credit card receipt in the credit card receipt file before engaging her supervisor. On this date the Grievant e-mailed the City Clerk about a credit card receipt. The City Clerk responded that the receipt was in the credit card folder for October as it pertained to a charge made on October 4<sup>th</sup>. Ms. Gierach testified that the Grievant has been told on numerous occasions to independently solve problems before engaging others and that if she had done that here she would have easily found the receipt. Ms. Gierach noted that the Grievant has been told repeatedly to take the initiative and be self-reliant and to reach out to others only after she has first tried to solve the problem herself.

October 18, 2022 Accepted a paper contract at the clerk's front counter without the necessary contract execution request form. On October 21, 2021 the staff of the city clerk's office including the Grievant were directed to not accept contracts drafted by other city departments unless a contract execution request form was attached to it. This e-mail directive was followed up by the adoption of a formal Standard Operating Procedure (SOP) in March, 2022.

October 31, 2022 Did not process parking ticket payment checks received in the mail on October 31 until the next day November 1. In a July 14, 2022 PIP the Grievant was directed to process parking ticket checks that were received via US Mail in the morning and audit her work in the afternoon. This directive was reinforced by Ms. Gierach in a follow up e-mail to the Grievant on July 21, 2022. On November 2, 2022 Ms. Gierach spoke to the Grievant about this incident. She testified that the Grievant told her at that time that she was unable to get to the checks on the 31<sup>st</sup> and when that happens, she places the checks in the vault and processes the checks the next day.

December 27, 2022 Left the office early for the day with a \$13,633 property tax assessment check on her desk without notifying her supervisor or co-workers. The check had been delivered to the Grievant by an employee of the city's assessment office late that morning. A city employee in another department inquired about the check in the early afternoon as she had not seen it entered in the system. The check was located on the Grievant's desk and entered in the system. Staff of the city clerk's office including the grievant were informed that the city was closing the books on December 29<sup>th</sup> at 4:00pm and that all property tax payments received by the city needed to be processed and entered in the system by that time. Ms. Gierach testified that if the

deadline for entry of the check had been missed the taxpayer would have been assessed a penalty.

January 6, 2023 Did not log an interaction that occurred at the front desk with a City Council member and a constituent over a parking ticket the constituent received. The Grievant is required to enter all interactions at the front desk of the clerk's office in a daily Teams log. Ms. Gierach testified that the grievant has been reminded of this requirement in previous disciplinary memos. The daily log for the front desk for January 6<sup>th</sup> was introduced into evidence and it contained details on many interactions with others but not the interaction with this council member. The Grievant provided the council member with accurate information regarding his questions. Ms. Gierach testified that the interaction with the council member was important to log in Teams as she reviews these logs and would have been made aware of the interaction as to not be surprised if it was raised by the council member at a City Council meeting.

January 10, 2023 Did not complete the paperwork for an oath of office. In August 2022 the clerk's office adopted a new SOP for Oaths of Office. Filling out the oath paperwork was previously the responsibility of the Account Clerk II position. Under the new SOP, the Grievant's position, Account Clerk I, was now responsible for filling out the paperwork for the oath. The completed paperwork is to be given to the city staff person who is scheduled to administer the oath. Ms. Gierach testified that the new SOP was sent by her to all staff in the clerk's office including the Grievant via Teams messaging. In her view, the SOP is straight-forward with easy-to-follow instruction on how to complete the oath of office form. On this date, the Grievant approached a co-worker in the clerk's office for help indicating that she did not know how to complete the oath of office form.

In addition, substantial testimony was given with respect to two acts committed by the Grievant's supervisor Kimberly Gierach that involved the Grievant. The first was the posting of a couple of *memes* above the Grievant's work station depicting characters from the television shows "The Office" and "SpongeBob Squarepants" with the sayings "If you don't know Google it" and "So Yeah if you could just Google it that would be great." Ms. Gierach testified that she posted these items above the Grievant's desk to encourage the Grievant to work independently by seeking answers before involving co-workers. She noted that in her previous employment with another employer she found these postings to be helpful reminders for herself and others. These posting had been above the Grievant's work station for a few years. Later, the Grievant's work station was moved to an area near the front of the city clerk's office. The postings were moved to this new location and posted on the wall near the Grievant's desk. The Grievant and Ms. Gierach both testified that they did not move the postings to the new work location and did not know who did. Ms. Gierach testified that the Grievant did not complain about these postings at her work station or that the postings bothered her and that if she had the postings would have been removed.

The second act involved a text Ms. Gierach sent to the Grievant while the grievance process was underway regarding the 5-day suspension issued on January 26<sup>th</sup>. The text depicted a *meme* with the following caption: "Accountability feels like an attack when you are not ready to acknowledge how your behavior harms others." Accompanying the *meme* was the text authored

by Ms. Gierach stating one word: “BOOM.” Ms. Gierach testified that the text was sent by mistake to the Grievant and she had intended to send the *meme* to her supervisor City Clerk Kelly Geistler. Evidence was introduced by the Employer that Ms. Gierach and Ms. Geistler were scheduled to do a presentation about accountability and the book they were reading entitled “Reality Based Leadership: Ditch the Drama, Restore Sanity to the Workplace and Turn Excuses Into Results.” Ms. Gierach testified that when she saw the *meme* about accountability, she thought it was perfect for the presentation and she wanted to share it with her co-presenter. The Grievant filed a complaint with the city’s human resources office regarding the text she received. Ms. Gierach testified that she did not know she sent the text inadvertently to the Grievant until she was questioned by human resources about it.

## **ARGUMENTS OF THE PARTIES**

### **Employer Position**

The five-day suspension imposed by the Employer is warranted and meets the just cause standard for the following reasons:

- The Grievant has demonstrated a pattern of on-going performance deficiencies despite repeated coaching, regular supervisor check-ins, management intervention, performance improvement plans and the use of progressive disciplinary action.
- The performance deficiencies for which the Grievant received the five-day suspension is of the same nature as the conduct and performance for which she has been repeatedly counseled and disciplined in the past.
- The City’s performance expectations have been clearly and repeatedly communicated to the Grievant together with the consequences of failing to demonstrate and sustain satisfactory performance on an on-going basis.
- The Grievant has demonstrated a continued pattern of deficiencies in the performance of routine job duties.
- The previous discipline of the Grievant was not grieved and therefore is conclusive evidence of the Grievant’s past performance and conduct and may not be relitigated in this proceeding.

### **Union Position**

The Union does not believe that the Employer had just cause to discipline the Grievant at the level imposed and requests that it be reduced or rescinded in its entirety for the following reasons:

- The factual basis for imposing the 5-day suspension is not well-defined in the two disciplinary letters received by the Grievant in January 2023. Certain performance deficiencies relied upon by the Employer to discipline the Grievant were never discussed



with the Grievant. The Employer is trying to bolster its disciplinary decision by “stacking trivialities that has previously not warranted mention.”

- There is no reason for the Employer to assume that the Grievant would not have processed the \$13,000 property tax assessment payment the next working day on December 28<sup>th</sup> when she returned to work. As a result, the City’s argument regarding the potential of missing the deadline for processing the payment by the close of business on the 29<sup>th</sup> is overblown.
- The Union disagrees that the Grievant has been given clear and consistent work direction by her supervisor. The use of intermittent e-mail and Teams messages containing work directives and SOPs does not constitute even a basic level of management oversight.
- The postings above the Grievant’s work station and the text sent to her were unprofessional intended to shame the Grievant. Ms. Gierach has never apologized to the Grievant for sending her the text.
- The Grievant has been treated unfairly and the city has engaged in a desperate compilation of minutia regarding the performance of the Grievant who is performing as well as other similarly situated public employees that are engaged in a public facing job in a busy environment.
- Inherent in any entry level job such as the Grievant’s is the likelihood that the employee will need significant supervisory assistance to be successful. Mandates such as “work self-directed” are overly simplistic and unrealistic for the type of position held by the Grievant.

### **DISCUSSION AND DECISION**

I generally use the following analytical framework in discipline matters and will do so in this case:

1. Did the Employer prove by a preponderance of the evidence that the Grievant engaged in the conduct alleged by the Employer that led to the decision to discipline the Grievant?
2. Did the discipline imposed by the Employer and the disciplinary process used by the Employer comport with the just cause standard of the labor agreement?

Much of the hearing and exhibits/documents presented at the hearing dealt with the efforts the Employer has made to improve the performance of the Grievant. The approach utilized by the Employer is virtually a textbook example on how to deal with an employee’s performance deficiencies in a unionized environment. Ms. Gierach’s testimony combined with the numerous documents introduced at the hearing show that the Employer since March 2020 has utilized training, counseling, supervisory check-ins, PIPs, the performance review process, referrals to employee assistance combined with progressive discipline to improve the Grievant’s performance. Progressive discipline is an important feature in a unionized environment when dealing with performance issues not only because the just cause standard of the labor contract demands that it be done but formal progressive discipline indicates to the employee the

seriousness with which the Employer regards the employee's work deficiencies. Prior to the current suspension that is being contested in this matter, the Grievant, since March 2020, has received two written reprimands, a one-day suspension, and a two-day suspension. These disciplinary actions were not grieved.

As the Employer pointed out in its brief the general rule among arbitrators is to not relitigate the prior discipline in the current proceeding. To the Union's credit they did not do so.

Pertinent to this proceeding, the Employer more than adequately proved that the Grievant has been told not to put off to tomorrow what can be accomplished today; to maintain accurate logs of interactions at the front desk and to read all e-mails and Teams messages from the City Clerk's management team with respect to work directives and work policies and procedures.

There were three performance related incidents in late 2022 and early 2023 that occurred within a matter of two weeks that appear to have prompted the Employer to take the disciplinary action that is currently under dispute. The Employer has shown by a preponderance of the evidence that these three incidents did in fact occur. I also agree with the Employer that these incidents should not have occurred given the Grievant's 8 ½ years' experience in doing her job and the various warnings and notices she has received with respect to performing her work tasks since March 2020.

The first incident involved leaving a \$13,000 property tax assessment check unprocessed on her desk due to leaving work early. Based on previous supervisory interventions, the Grievant should have known the importance of processing a check of that significance on the date she received it. If she was unable to do so because of any time constraints due to leaving work early for the day she should have brought the check to her supervisor's attention. To her credit, when asked about this incident, the Grievant admitted that she should have brought the check to someone's attention before leaving work. The failure of the Grievant to do anything with the check must be viewed in context of all the various attempts by her supervisor to get the Grievant to recognize the importance of processing payments on the date received. She put off essential work to tomorrow that should have been done today. I do agree with the Union that the Employer's argument that the delayed entry of the payment in the system beyond the cutoff date would have exposed the taxpayer to a late payment penalty is a stretch. It is highly unlikely that the City of Rochester would have imposed or pursued a penalty for late payment of taxes against an individual that timely delivered a check to the city. The fault for any late assessment would lie with the City's inability to enter the check in its system in a timely manner not the taxpayer.

The second incident involved the Grievant's interaction with a City Council member at the front desk of the city clerk's office. The Grievant did not log this interaction into the system. The Grievant should have done so particularly after the numerous efforts made by her supervisors to get the Grievant to maintain accurate logs.

The third incident involved preparing the oath of office for a position that required one and inquiring with a co-worker on how to prepare the oath. All staff of the clerk's office have been told by the City Clerk that it is imperative that they read all e-mails or Teams messages from her and particularly from Ms. Gierach. A Teams message was sent by Ms. Gierach to all staff in the

city clerk's office regarding Oaths of Office and the SOP for preparing the oaths. There was some dispute at the hearing whether the Grievant saw the Teams message. The preponderance of the evidence shows that the message was sent by Ms. Gierach. As a result, the presumption is that the Grievant received it when it was sent via the city's Teams messaging system. Upon receipt the Grievant should have read it under the directive issued by City Clerk that it was imperative to read all e-mails and Teams messages from the management team. The SOP on Oaths of Office clearly lays out the procedure for preparing the proper forms. After thoroughly reading the SOP, I am confident that the Grievant could have performed the task of preparing the oath office without involving her co-worker if she had simply read the SOP.

The union argues that the mistakes/omissions made by the Grievant are relatively minor and would likely be made by any other public employee that is similarly situated. After listening to the testimony and reading all the documents submitted by the Employer in this matter there is no doubt that the City Clerk runs a tight ship. Expectations regarding employee performance are high and there is a strong message of accountability for performance. That is the City Clerk's right under the labor agreement. After working as a public employee for nearly 40 years I can attest to the fact that there is a vast continuum of performance expectations and accountability among the various public agencies in Minnesota. Some, such as the Rochester City Clerk, have high levels of performance expectations with tight standards of accountability and others not so much. Each employer has the right to set their own standards relative to performance and accountability and an arbitrator is not free to substitute his judgment for that of the employer in this area. The arbitrator's role comes in under the application of the just cause standard. If there is evidence of disparate treatment with employees within the unit being held to differing standards of performance then it is appropriate for the arbitrator to address the situation. Unreasonable work rules and unreasonable work directives can also be addressed by the arbitrator under the just cause standard. There was no evidence of disparate treatment submitted in this hearing. Ms. Gierach testified that all employees are held to the same performance and accountability standards. The work directives, policies, and procedures that the Grievant is required to perform and for which she was disciplined meet the test of reasonableness.

The Union also argues that the posting of the *meme* above the Grievant's desk with the "Just Google It" messages and the text the Grievant received regarding accountability with the message "BOOM" are indications that Ms. Gierach has a certain level of animus towards the Grievant. The preponderance of the evidence introduced at the hearing regarding the text is that the text was sent by mistake to the Grievant. The preponderance of the evidence regarding of the posting of the *meme* shows that it was motivated by trying to remind the Grievant to be a self-starter and not by any ill intentions on part of Ms. Gierach towards the Grievant. More importantly, as noted above, there was no evidence presented at the hearing that the Grievant was being singled out and treated differently than other employees in the Clerk's Office.

The second prong of the analytical framework requires a determination of whether the discipline imposed and the disciplinary process used by the Employer comports with the just cause standard of the labor agreement. This is where the Employer's case falls somewhat short of the mark.

Much has been written about the just cause standard and the tests utilized to determine whether the Employer acted with just cause in disciplining an employee. At its core, just cause is about reasonableness, fairness and fundamental notions of due process and fair play. At a minimum, an employer should give an employee the opportunity to tell their side of the story with respect to the incidents the employer is prepared to use as the basis to discipline the employee before a final discipline decision is made. The Employer did give the Grievant the opportunity to tell her side of the story at its January 12<sup>th</sup> meeting where she received the notice of intent to discipline her before making a final discipline decision. She also responded in writing and presented her side of the story regarding two of the six incidents that they Employer used to justify the imposition of the five-day suspension without pay. What is not clear from the evidentiary record before the Arbitrator is whether the Employer discussed all six incidents with the Grievant. The notice of intent to issue discipline letter and the final disciplinary letter did not provide the factual basis regarding these six incidents relied upon the Employer to discipline the Grievant. No contemporaneous report or writing such as an investigative report was introduced that indicated that these six incidents were discussed with the Grievant to give her the opportunity to respond to them. The testimony at the hearing did not substantiate that all six incidents were discussed with the Grievant at the January 12<sup>th</sup> meeting.

Even if all six incidents were discussed with the Grievant at the January 12<sup>th</sup> meeting, the three incidents that occurred in October, 2022 should be severed from the three other incidents that occurred in late December 2022 and January 2023 and should not be used as a basis for disciplining the Grievant. While the Employer proved by a preponderance of the evidence that the Grievant committed all three October, 2022 performance deficiencies the appropriate time to address those deficiencies was shortly after they occurred and not wait almost three months to deal with them. Once an employer is aware of an incident or incidents that would justify the imposition of discipline it is incumbent that the employer act. Waiting almost three months to deal with these deficiencies is unfair to the Grievant. Three months is a long time in the modern workplace to address performance issues where events seem to move at lightning speed, particularly in a city clerk's office and the significant interaction the Grievant has with the public. The Grievant has moved on and it is not fair to hang these matters over her head indefinitely. In fact, The Employer did meet with the Grievant on November 2, 2022 regarding her failure to process parking ticket payment checks received in the mail on October 31, 2022 until the next day November 1. As far as the Grievant was concerned this put an end to the matter. The time to deal with the October incidents is when they occurred not three months later.

As a result of these deficiencies in application of the just cause standard to the current situation it is appropriate to mitigate the five-day suspension without pay imposed by the Employer to a three-day suspension without pay. This decision allows the Employer to maintain its progressive discipline track with respect to the on-going performance deficiencies of the Grievant while recognizing there were some deficiencies in the application of the labor contract's just cause standard.

**AWARD**

The grievance is granted in part and denied in part. The Grievant's disciplinary suspension is to be reduced from five days without pay to three days without pay. The Grievant's personnel file should be amended to reflect this decision. Any pay, benefits or seniority lost due to serving the five-day suspension without pay instead of a three-day suspension without pay should be restored.

October 27, 2023

Gregory L. Failor  
Arbitrator