

In the Matter of the Arbitration Between

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METROPOLITAN COUNCIL,
The Employer,

BMS Case No. 07 PA 1034

and

Subject: Termination of the
Employment of Linda O'Connor

AFSCME MINNESOTA COUNCIL 5, LOCAL
UNION NO. 668, AFL-CIO,
The Union

Arbitrator: Sherwood Malamud

APPEARANCES

FOR THE METROPOLITAN COUNCIL:

Parker Rosen, LLC, Attorneys at Law, by Andrew Parker, 133 First
Avenue North, Minneapolis, MN 55401, by Andrew D. Parker.

FOR AFSCME MN COUNCIL 5, LOCAL 668:

Nola Lynch, Union Representative, and Cynthia Nelson, Co-Chair Union
Representative, AFSCME MN Council 5, 300 Hardman Avenue
South, South St. Paul, MN 55075, appearing on behalf of the
Union and Grievant.

DATES OF HEARING: October 8 and 9, 2007

RECORD CLOSED: November 16, 2007

DATE OF AWARD: December 18, 2007

Jurisdiction

AFSCME MN Council 5 and the Metropolitan Council selected Sherwood Malamud to serve as the Arbitrator from a referral list provided by the Bureau of Mediation Services, State of Minnesota, to hear and determine the discharge grievance of Linda O'Connor. The Union filed the grievance on February 5, 2007. The parties processed the grievance through the grievance procedure. Hearing on the grievance was held at the Metropolitan Council's offices at 390 Robert Street, St. Paul, MN on October 8 and 9, 2007. The parties submitted their original briefs and the Employer submitted a reply brief on November 13. The Union advised the Arbitrator on November 16 that it chose not to submit a reply brief, at which time the record in the matter was closed. The Arbitrator has considered the testimony and documentary evidence submitted and the arguments presented by the parties in rendering the award that follows.

PERTINENT LANGUAGE EXCERPTED FROM THE JANUARY 2005 - DECEMBER 31, 2007 LABOR AGREEMENT

ARTICLE 16 DISCIPLINE FOR JUST CAUSE

Section 16.01 - Discipline for Just Cause

The Employer will discipline employees for just cause only. Discipline will be in one of the following forms: . . .

e. Discharge

ARTICLE 19 GRIEVANCE PROCEDURE

Section 19.06 - Arbitrator and Mediator Authority

The arbitrator or mediator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this Agreement. The arbitrator or mediator 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.

The arbitrator's decision shall be submitted in writing thirty (30) calendar days following the close of the hearing or with the submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision 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 and shall not be in conflict with the law.

BACKGROUND

Linda O'Connor, Grievant herein, began her employment with the Metropolitan Council, hereinafter the Council or the Employer, in 1974. She left that employment in 1981 and returned to the employ of the Metropolitan Council in 1982. She has been continuously employed as a full-time employee since 1982 to the date of the termination of her employment by the Council on February 2, 2007.

The events leading to Grievant's discharge occurred on January 2, 2007, and following through January and into February of this year. On January 2, Grievant reported for work. She is required to report by 7 a.m. She approached the building on Robert Street at 6:40 a.m. From the time she approached the building, after alighting from public transit and crossing mid-street to one side of the Robert Street building, she traversed along the side of that building and around it to the entrance door and the key swipe that employees use to enter the building before the building is open to the public. It took Grievant 54 seconds to proceed from the view of security camera 2 to the range of Camera 3 that is fixed on the entrance to the building.

Soon after the work day began, Grievant sent the following e-mail to her supervisor, Mark Linnell, who was not at work on January 2. In material part, the e-mail reads as follows:

. . . I thought you better know the (sic) I fell in front of the building this morning on the ice. My legs if (sic) all scratch (sic) up and foot hurt but I think I am fine. I just wanted to make sure someone new (sic) I fell. (Employer Exhibit No. 2)

At approximately 8 a.m., Pancho Henderson, a supervisor covering for Linnell's absence this day, stopped by the Information Services (IS) desk staffed by Grievant to greet the employees. At this time, Grievant informed him that she fell outside the building, but on the Employer's property. From her work station she pointed generally to the side of the building where she fell. Henderson did not ask her to specify the location of the fall nor did he ask her to go outside with him

and show him where she fell. Henderson alerted Karels, the Building and Central Services Manager, to the existence of ice outside the building on the Council's property.

The Employer's security camera number 3 picked up Karels exiting the entrance to the building at approximately 8:15 a.m. holding what appears to be a coffee can full of salt. At this time, Karels did not know the exact location where Grievant fell. Security camera number 2 picked up Karels just at the second pillar from the street. He did not walk between the wall of the building and the pillar supporting the building in the walkway traversed by Grievant earlier that morning. Outside of pillar two, the security camera picks up an empty coffee can in his hand. Karels turns and returns to the building. He reported to Henderson that he did not find any evidence of ice in the area between the outside wall of the building and the pillar supporting the structure. For some reason unexplained in the record, Henderson asked Karels to pull and preserve the security tapes of cameras 2 and 3 covering the morning of January 2.

While Karels was throwing salt around the perimeter of the building, Henderson proceeded to Human Resources to ascertain how to proceed. HR took Henderson to Risk Management. He learned there that he should complete with Grievant a First Report of Injury and urge her to make an appointment to see her physician.

Henderson returned to Grievant's work station. He sat with her at her computer. Each took turns filling in the sections of the First Report of Injury form. They printed a copy which both signed. Henderson took the completed form to the Chief Financial Officer (CFO), Widstrom-Anderson. She signed the form, as well.

In the meantime, at Henderson's urging, Grievant called and obtained an appointment to see her physician that day. She called a friend who picked her up and took her to the doctor appointment.

Grievant's physician, Dr. Gilbertson, diagnosed that Grievant suffered a soft tissue injury and swelling to her ankle. He directed that she remain off work for the balance of Tuesday, January 2, and continue to remain off work on Wednesday through Friday, January 3-5. He released her to return to work on Monday, January 8.

Grievant received a letter dated January 4 from Risk Management acknowledging receipt of her First Report of injury Form. The letter clearly indicates that the form would be processed as a Worker's Compensation benefit claim.

Grievant returned to work on January 8. Her ankle swelled, because of her inability to keep her foot elevated. She took off on January 9 and returned to work on January 10. While off work on January 9, Becchetti, a Worker's Compensation Claims Representative employed by the Council that self insures its Worker's Compensation program, contacted Grievant by phone about her claim. Grievant told Becchetti how she fell on January 2. She told him that when she got off the bus, she was concerned that it might be icy. She walked by the building and around it to the entrance of the building by walking in the area covered by the upper floors of the building and supported by pillars at the outside margin of the building. Nonetheless, she slipped. She asked Becchetti if she could claim parking on the mileage form that she would submit as part of her Worker's Compensation claim. Becchetti approved her doing so. Her mileage claim amounted to approximately \$135.00.

On January 16, Karels checked the security tape. He discovered that the security tapes document that Grievant took the path around the building described above, however, the security cameras did not show that Grievant fell. Karels showed the tape to Henderson, the Supervisor who covered and interacted with Grievant back on January 2. Both of them took their discovery to the CFO Widstrom-Anderson. She, in turn, turned the matter over to the Council's Director of Internal Audit, Kathleen Shea, to investigate.

Shea began her investigation by interviewing Karels and Henderson. She talked to Becchetti concerning Grievant's worker's compensation claim. She alerted the Risk Management representative handling the claim that the security tape of January 2 did not show nor confirm Grievant's account of a fall. Shea, herself, reviewed the videotape. She testified at the hearing that she did not detect in Grievant's gait or pace that Grievant had fallen. She timed Grievant's progress from camera 2 which showed her by the building right after crossing the street to her approach to the key swipe area by the front entrance of the building. She timed Grievant at 54 seconds.

On January 17 Becchetti sent a letter to Grievant denying her worker's compensation claim.

First thing on the morning of January 18, soon after the beginning of her work day at 7 a.m., Shea interviewed Grievant about the fall. At the outset of the interview, Shea had Grievant read and sign a Garrity notice. The pertinent section of the notice reads, "If you refuse to answer questions or do not answer truthfully and completely, you might be subject to disciplinary action including dismissal." Shea advised Grievant that this was an investigatory interview. It was conducted in the presence of her Union Steward Bob Paddock, his first such participation in an investigatory interview, and in the presence of Information Service Supervisors Linnell and Henderson.

During the interview, they all walked outside to permit Grievant to physically demonstrate what she had described during the interview as the location of where she fell. In the course of this interview on January 18, Grievant repeatedly identified the same location as the spot where she fell. She described it as the area just past the first pillar between the first and second pillars. This location was fully within the view of security camera 2. The tape does not disclose or show that Grievant fell at this location on January 2 at 6:40 a.m.

As part of her investigation, Shea asked Becchetti to obtain the physician's notes of his examination of Grievant. The notes submitted to Risk Management and obtained by Shea contained the following physician note:

I am going to have her off work for a couple of weeks, it is about a mile to walk to work, which would be unattainable on her ankle currently.

Nonetheless, the doctor gave Grievant a doctor's slip excusing her from work from January 2 through January 5.

Shea called Grievant back for an interview on January 22 to explore this physician note concerning her walk to work and the impact that statement had on the physician's treatment of her injury. Chief Steward Uttley attended the January 22 investigation interview conducted by Shea. Shea taped the second interview, as she did the first one.

On January 26, Shea issued a report, Employer Exhibit No. 19, titled "Findings of Facts: Worker's Compensation Claim of Linda O'Connor." In her first finding, Shea notes that an employee must provide complete information and return to work as soon as medically possible. Shea concluded:

Linda O'Connor provided inaccurate information to the Council regarding an alleged Worker's Compensation injury and failed to return to work when medically able.

In her second conclusion, Shea found that:

Linda O'Connor provided false information to the Council regarding her alleged fall on January 2.

In finding three, Shea notes:

Council Procedure 4-6d on Fraud stipulate that acts constituting fraud include, 'any action which misrepresents the facts or is otherwise dishonest.' By providing false information to her supervisors and the Council Risk Management Department, Ms.

O'Connor violated the Council's Fraud Procedure and damaged the trust relationship between employer and employee.

In her fourth and last finding, Shea found that Grievant violated the Labor Agreement Section 15.04, as follows:

Employees who are absent without authorization for more than three working days shall be considered to have resigned their position with the Metropolitan Council. Linda O'Connor has been absent without approved leave on two occasions within the last month.

In the conclusion section of her report, Shea observed:

Information Services staff members have considerable access to Council information including sensitive, private or confidential data. In a sensitive position with great access, the trust between employer and employee is paramount. Ms. O'Connor abused that trust by falsely submitting a Worker's Compensation claim for an alleged fall that did not take place as she reported it, nor was it on Council property as she claimed.

Shea submitted her report to Information Services Supervisors Henderson and Linnell and to the Council's Department of Human Resources. Based solely on Shea's report, CFO Widstrom-Anderson, sent Grievant a "Notice of Intent to Terminate Employment." In material part, the Notice substantively provides as follows:

The Metropolitan Council intends to terminate your employment. The reasons for your proposed discharge are summarized as follow (sic):

- You alleged a Worker's Compensation claim for lost time due to an injury which you alleged to have occurred on the property of the Metropolitan Council at 390 North Robert Street. The injury could not have happened as you alleged.
- You provided false and contradictory testimony to the Internal Auditor of the Metropolitan Council after being advised that doing so could result in discipline, up to and including discharge.

Pursuant to the Notice, Grievant requested a Loudermill meeting. It was held on February 2. Later that day the CFO confirmed her decision to discharge Grievant for the reasons set out in the "Notice of Intent to Terminate" quoted above.

O'Connor timely filed a grievance claiming that the Employer did not have just cause to terminate her employment. The Union and the Employer processed this grievance through the grievance procedure. It is properly before the Arbitrator.

ISSUE

The parties were able to stipulate to a statement of the issue to be determined by the Arbitrator. It is:

Was there just cause for the termination? And, if not, what is the appropriate remedy?

POSITIONS OF THE PARTIES

The Council Argument

The Employer highlights certain facts in this case. It addresses the defenses presented by the Union. The Employer maintains that Grievant was familiar with the Worker's Compensation claim process. She had submitted a claim in 2002 and in the mid-1990s on two occasions. The letter she received dated January 4 clearly indicates that Risk Management considered the First Report of Injury as a request for Worker's Compensation for the injury suffered on the Council's premises. She spoke to Becchetti, the Claim Representative, and asked him if she could add parking to the mileage claim portion of the Worker's Compensation submission. This evidence the Employer maintains, clearly establishes that Grievant was not confused and she fully intended to submit a Worker's Compensation claim for the twisted ankle she suffered on January 2.

The Employer addresses the Union's claim that the architecture of the building confused Grievant and made it difficult for her to pinpoint the location of her fall. The Union emphasizes that it was dark when Grievant arrived at work. The Union maintains that she fell at a location on the Council's property off camera. The Employer asserts that Grievant identified the location just past the first pillar in between the first and second pillars as the location of the fall on no less than six occasions on January 18 during the course of the investigation. When Shea brought everyone outside the building on the morning of January 18, Grievant indicated where she fell. The location that she identified is clearly within the view of camera 2. The security tape from the morning of January 2 clearly establishes that Grievant did not fall. In addition, her account of what occurred – slipping and having three items drop out of her purse, picking those up, putting them back in the purse, getting up, and continuing on to the front entrance would take longer than 54 seconds. The passerby she mentions in her account does not appear on videotape. These all suggest that the injury did not occur on the Council's property.

Grievant submitted a claim for an injury that did not occur on Council property. It is a fraudulent claim. The Employer consistently discharges employees for making fraudulent Worker's Compensation claims. It did so in this case.

In her account of how the incident occurred, she claims it took five to six minutes for her to traverse from the sidewalk by the first pillar to the key entry swipe area by the front door. The clock timer on cameras 2 and 3, that Shea checked for accuracy, demonstrate that it took her 54 seconds, not five or six minutes, to proceed from the point where she first accesses the outside of the building to the point of entry to the building.

The Employer maintains that only after Grievant met with the Union representative, Uttley, in May 2007 and she viewed the video, did Grievant change her story to maintain that she fell at a location on the Council's premises, but off camera.

The Employer concludes that discharge is the appropriate penalty. It is the only penalty that this Employer imposes for such conduct. If the Arbitrator were to consider mitigation of the penalty, Grievant's job performance in the last several years has declined to a marginal level. The Employer directs the Arbitrator's attention to the six awards submitted into the record, particularly the award of Sara Jay who sustained the discharge of a 19-1/2 year employee for filing a Worker's Compensation claim for an injury suffered elsewhere. The Employer maintains that the Arbitrator should deny this grievance in its entirety.

The Union Argument

The Union argues that Grievant is near retirement age. It makes no sense for her to endanger her career in order to collect money for Worker's Compensation when she was not off a sufficient amount of time to collect on that claim.¹ The Union maintains that Grievant completed the First Report of Injury at the direction of her supervisor. She did not realize that her signature on the form would initiate a Worker's Compensation claim. Her Supervisor directed her to go to the doctor to address the injury she suffered.

The Union argues that the Employer discharged Grievant because her medical condition has resulted in increased absenteeism. Grievant is a diabetic. As recently as December 2006, just one month prior to the Council's initiation of these discharge proceedings, Grievant suffered from pneumonia. Her absences for that illness exhausted her leave. She had to request permission from upper management to approve that leave.

The Union reminds the Arbitrator that Grievant slipped and fell on January 2. The investigation did not begin until 16 days later. Grievant naturally did not recall on January 18 the details of what occurred on January 2.

¹In its reply brief, the Council maintains that this line of defense was not pursued in the record. However, Grievant did testify that she was unsure as to whether she was off a sufficient amount of time or there was a minimum amount of time she had to be off before she qualified for Worker's Compensation.

The Union argues that the purpose of the investigation was to confirm that Grievant violated some provision of the Employer's code of ethics rather than ascertain in a neutral manner what occurred. This the Union claims is apparent from Shea's decision to audiotape the two interviews she conducted with Grievant, but refrained from audio taping her interview with Karels, Henderson, or Becchetti. The Union charges that Shea rushed up a ladder of inference to conclude that Grievant engaged in misconduct.

The Union acknowledges that Grievant may not have demonstrably limped when she entered the building on January 2. But there are occasions when it takes some time for an ankle to swell. In addition, the Union argues that Grievant had enough leave to cover her absences from January 2-5 and on January 9.

The Union acknowledges that the Employer demonstrated that Grievant did not fall where she claimed to have fallen on January 2. The security video establishes that fact. However, the Employer has not shown that Grievant's account of her fall did not occur off camera, as she reported.

She did not intend to defraud the Employer. She did suffer an injury to her ankle. She did not intend to file a Worker's Compensation claim. The Arbitrator, therefore, should set aside the discharge penalty and direct that Grievant be reinstated with full back pay and benefits.

Reply Brief

The Employer emphasizes that Grievant identified the location of her fall on multiple times on January 18. She did not have sufficient leave time to cover the hours of her absence from January 2-5 and on January 9. The Employer emphasizes that Grievant was not under suspicion on January 2. Consequently, Henderson did not ask her to identify the location of the fall by taking her outside, at that time. When Shea had gathered sufficient evidence to indicate that the fall had not taken place on the Employer's property, she interviewed Grievant. During

the course of the interview, Shea and all those present went outside and had Grievant identify the location of the fall.

Becchetti denied the Worker's Compensation claim after seeing the videotape.

The Employer emphasizes that the transcript of the two interviews with Grievant are accurate. The Union went to great lengths to challenge the accuracy of the transcripts. However, each and every witness whose statements are quoted in the investigation transcript prepared by Shea, including Grievant herself, noted that to their recollection the transcripts accurately reflect what was said at the January 18 and January 22 investigatory interviews.

The Employer acknowledges that Grievant is a long tenured employee. However, her performance after 2000 began to lag. If the Arbitrator should find that Grievant intentionally filed a Worker's Compensation claim to obtain wages and benefits, when she knew she had no accrued leave sufficient to cover these absences, then discharge is the appropriate penalty for filing a fraudulent and false Worker's Compensation claim. Accordingly, the Employer requests that the Arbitrator deny this grievance in its entirety.

DISCUSSION

Introduction

The Employer discharged Grievant for fraudulently submitting a false Worker's Compensation claim. In addition, the Employer imposed this discipline, because during the investigatory steps taken by the Employer to ascertain the facts underlying Grievant's claim, the Employer maintains Grievant provided contradictory testimony to the Internal Auditor, Shea.

The central issue in this case is the location of Grievant's fall. The statements referenced as the second basis for the administration of discipline are all related to the slip and fall and Grievant's account of that incident on January

2. If the Arbitrator credits Grievant's account of events of January 2, then the discipline must be set aside. If, however, the Arbitrator concludes that the Employer established that Grievant did not slip and fall on its property, but yet she submitted a false Worker's Compensation claim, then the Arbitrator would conclude that her actions subject her to the imposition of discipline.

The Employer identifies in the Notice of Intent to Terminate and in the discharge letter that Grievant's contradictory statements and her presentation of false information provide an independent basis for discipline. One source of concern pertains to the reference her physician made to her need to walk to work and the impact that information had on the physician's treatment of her injury. The Employer treated Grievant's estimate of the time it took for her to recover from her fall and enter the building at five to six minutes. The videotape of that walk established that it took her 54 seconds to get to and enter the building that morning. The other statement that the Employer treats as false is her account of the good Samaritan. Her initial remark indicates that the Samaritan helped her. Just before the interview on January 18 ended, Grievant stated that the Samaritan did not physically lift her up, but he inquired whether she required assistance.

Widstrom-Anderson did not detail which statements described by Shea in her report, the Chief Financial Officer, had in mind when she made her decision to impose the discharge penalty. The CFO indicated in her testimony that she did not read the transcript of Shea's interview of Grievant on January 18 and 22, before the CFO made her decision to issue the notice and confirm her decision to discharge Grievant. However, these statements identified by the Arbitrator above are the ones noted by Shea in her report as contradictory and supportive of her conclusion that Grievant submitted a false Worker's Compensation claim.

In the balance of this section, the Arbitrator discusses the evidentiary standards an employer must meet to make its case. Then, the Arbitrator determines whether the contradictory statements meet the just cause standard as a basis for discipline. The Arbitrator then turns to determine whether Grievant

intentionally submitted a fraudulent Worker's Compensation claim, and if she did, what level of discipline is appropriate.

Evidentiary Standard

The Employer submitted into evidence six arbitration awards between the Employer and the Union representing the bus drivers, the Amalgamated Transit Workers Local 1005. In all of these awards, the arbitrators determined that in order to prevail, the employer had to establish its case by a preponderance of the evidence. The five arbitrators, whose six awards the Employer presented, Arbitrators Holmes, Befort (two awards), Kircher, Jay, and Boyer did not identify the misconduct alleged in each of their respective cases as susceptible to prosecution or as offenses involving moral turpitude. It does not appear that any party raised an issue over the quantum of proof that the Employer must meet. Here, the Union argues that the offense with which the Employer charges Grievant is susceptible to criminal prosecution. It argues, therefore, that Beyond a Reasonable Doubt serve as the measure of proof the Employer must meet to make its case.

An employer, even a public employer, does not have available to it the resources readily available to the "state" when it prosecutes a criminal case in court. More to the point, Grievant does not face loss of her freedom if found "guilty" in these proceedings.

The loss of employment and the stigma associated with the submission of a fraudulent claim should require a higher standard of proof than a preponderance of the evidence. The Employer does not argue that either by statute or under the specific terms of the Agreement that the standard of proof in this case should be a preponderance of the evidence. The Arbitrator concludes that the appropriate evidentiary standard here is clear and convincing evidence.

The Employer must establish each and every element of its case by clear and convincing evidence.²

Contradictory Statements

Shea concludes that Grievant was the source of the reference in Dr. Gilbertson's notes that he submitted to Risk Management as part of the Worker's Compensation claim process, to the effect that Grievant had to walk a mile to work, and therefore, he would excuse her from work for several weeks. In fact, the physician provided Grievant with a "doctor's slip" excusing Grievant from work for the balance of January 2 and for January 3-5. He approved Grievant's return to work on Monday, January 8. Shea concluded that Grievant could have returned to work in a shorter period of time.

The bulk of the evidence does not support Shea's conclusion. Clearly, Grievant sprained her ankle. The radiologist who read Grievant's x-rays taken on January 2 proffered a diagnosis that Grievant suffered a soft tissue injury consistent with a sprain or fall. There is nothing in the doctor's notes that would indicate that the injury in question was an "old" injury, one that occurred at some time other than January 2. Furthermore, there is not a scintilla of evidence that suggests that Grievant should have remained off from work for any period less than three and a half days.

Clearly, Dr. Gilbertson made his remarks in his notes concerning the walk to work. However, his diagnosis and treatment of Grievant does not rely on those remarks. Dr. Gilbertson was not called to testify. There is no way of knowing why these remarks were included in his notes. Accordingly, the medical statements do not serve as a basis for discipline.

²Clear and Convincing Evidence is the evidentiary standard applied by the mainstream of arbitral opinion in cases involving charges such as fraud or theft. *The Common Law of the Workplace*, 2nd ed., 2005, St. Antoine Editor, at pages 191-93; *How Arbitration Works*, 6th ed. Ruben Editor, 2003, at pages 951-953.

Shea concludes that two other statements Grievant made during her interview on January 18 were contradictory. The good Samaritan does not appear on the tape recorded by camera 2 on the morning of January 2. Grievant referred to the passerby on two occasions during the January 18 interview. Grievant said in the initial part of her interview, ". . . so some guy came over to try to help me get up and he fell." Towards the end of the interview in response to a question from Mark Linnell who asked, "I was just curious. The guy that you said before helped you up." O'Connor responded:

No, he asked if I wanted help. He didn't touch me or anything. He just kind of walked by. He didn't touch me or anything. He just asked me if I needed help and I said no.

The Arbitrator does not find the two statements contradictory. In the first one, Grievant states the passerby helped. In the second she clarified her statement to indicate that he did not physically touch her. He called out, and he offered his help. Her response to Linnell clarifies her initial description of what happened. Only a small area outside the pillar is visible on camera 2. It is primarily focused on the walkway between the outside wall of the building and the first two pillars. From the tape taken by the camera that morning, there is insufficient evidence in this record to conclude there was no passerby. As to whether the fall occurred at all on the Employer's premises, that is the matter analyzed below. However, the use of the remarks concerning the passerby as a basis for discipline is not borne out by the record.

The Employer concluded that Grievant provided Shea with false information with an intent to mislead, when in the January 18 interview, Grievant estimated that it took her five to six minutes to traverse from the sidewalk abutting the building down and around the circumference of the building to the front entrance. It is the Arbitrator's experience that individuals' estimates of time and distance are frequently grossly in error. The videotape establishes that it took approximately 54 seconds for Grievant to go around the building to the entrance. Although the difference between 5 to 6 minutes and 54 seconds seems unusually large, it is

equally explained as a grossly inaccurate estimate rather than a statement made to mislead the Internal Auditor.

The Arbitrator finds that the statements, the medical note concerning the distance Grievant must walk, the remarks about the passerby, and Grievant's estimate of time should not serve as an independent basis for discipline. With the exception of the medical notes, the Arbitrator understands that these remarks and statements by Grievant when considered as the totality of her description of the events of January 2 were and should be considered by the Employer and are weighed by the Arbitrator in determining the reliability of Grievant's account of the events of January 2 and the purpose for which she submitted the First Report of Injury.

The Fall

Where did Grievant fall? Did she fall on the Employer's premises? Unquestionably, she twisted her ankle. Did she do so on the walk surrounding the Employer's building between the outer wall and the pillars covered by the overhang of the second story of the building? If she fell, as she claims she did and where she did, it would constitute a proper Worker's Compensation claim. Since the Employer is self insured, it determines in the first instance whether the claim should be paid. An employee's filing of a Worker's Compensation claim is subject to the Employer's rules concerning the filing of fraudulent claims and providing false information on its forms. Many of the Employer's and Union's witnesses did not realize that the completion and submission of a First Report of Injury initiates a Worker's Compensation's claim.

Again, here is what happened on January 2. On the date of the injury, Grievant e-mailed her direct supervisor, Mark Linnell, shortly after 7 a.m. the beginning of her work day, informing him that she slipped and fell "in front of the building this morning on the ice."

At 8 a.m., Grievant informed Henderson, the Information Services (IS) Supervisor, covering for the absent Linnell, that she fell and twisted her ankle. She told Henderson that the ankle hurt. From her work station, she generally pointed to the side of the building where she fell on the morning of January 2. Neither Henderson nor Grievant went outside to attempt to identify the exact location of the fall on the morning of January 2.

When Henderson arrived at work at about 7:20 a.m. he, traversed the same area as Grievant. He did so approximately 40 minutes later than she did that morning. He did not encounter any ice. Nonetheless, at 8 a.m. when Henderson heard that Grievant had slipped and fallen, he called Building and Central Services Manager Karels to alert him to the presence of ice. Karels spread salt. Since he did not know the exact location of where Grievant fell on January 2, as it turns out, he reached a point at the second pillar and outside that pillar on the sidewalk abutting the building. It is at this point that he ran out of salt. He did not reach the location where Grievant would describe a little over two weeks later as the location of the fall. Upon returning to the building, Karels reported to Henderson that he did not observe any ice between the wall and the pillars as he spread salt on the outside sidewalk. Henderson advised Karels to preserve the security tape of that morning. Karels did so.

Apparently, Karels did not review the tape of January 2 until January 16. It is at that point that he reports to Henderson that the tape does not show that Grievant fell. The security camera documents her arrival at the walk after crossing the street and her entrance into the front of the building. Henderson and Karels provided this information to CFO Widstrom-Anderson. She, in turn, asked Shea, the Director of Internal Audit, to investigate the matter.

Shea's findings and Widstrom-Anderson's decision to discharge Grievant are described above. The question remains whether the Employer has established by clear and convincing evidence that Grievant submitted, with an intent to have the Council pay a Worker's Compensation claim for an injury she suffered while off the Employer's premises.

The Employer emphasizes that Grievant identified the location of the fall on multiple occasions on January 18 as a spot fully within the view of security camera 2. The tape clearly establishes that Grievant did not fall at that location.

The Union defends. Grievant was confused. The investigatory interview occurred 16 days after the fall. It was still dark when Shea asked Grievant and the others present for the interview on January 18 to proceed outside to the location of the fall. The sides of the building look alike. Grievant fell at a location along the side of the building, but off camera.

It is entirely possible that Grievant fell at a different location along the side of the building, but off camera. The time sequence, the 54 seconds that elapsed from the point that Grievant comes into view on camera 2 to the point she uses her ID card to swipe and enter the building establishes the Council's case.

As Grievant comes within the view of camera 2, the combination of her winter clothes, the lighting of the walk, and the frames per second shot by the security camera make it appear as if Grievant moves in the manner in which astronauts walked on the moon. As a result, it is impossible to tell if Grievant's ankle was already twisted when she came on the Employer's property.

When she approaches the entrance to swipe her key card in the sight range of camera 3, her movements give the slightest indication that she favored her left foot. The Arbitrator noticed this only after repeatedly viewing the tape and slowing it down. This observation of the tape by the Arbitrator is far from conclusive.

The tape of the two security cameras, two and three, establish that Grievant did not fall at the location she identified on multiple occasions on January 18. By itself, the videotape does not preclude that Grievant fell on the Employer's property, but off camera. What establishes that fact, in the Arbitrator's review of the evidence, is the time sequence, the amount of time it took Grievant to come into view on camera 2 and enter the building in the view of camera 3. The time

elapsed from one camera to the other is between 54-56 seconds depending on where one begins and stops the tape.

Other individuals entered the building just prior to Grievant. One person arrived at 6:35:14 in the view of camera 2 and passed the key swipe area at 6:35:47. A young woman in heels carrying three items in each of her hands came into view at 6:38:32 on camera 2 and came to the key swipe area at 6:39:14, 42 seconds later.

Grievant's description of what occurred when she fell had to have occurred within the time frame specified by her in her account of the events of that morning. The younger woman moved at a much faster pace than Grievant. This is apparent not only from the time differences but in the camera recording of the movements of both the younger woman and Grievant as they traversed the walk and entered the building that morning. Grievant said that she slipped and fell to one knee. Her purse opened and three items fell out. A passerby called out to her to see if she required any assistance. She responded that she did not. With her purse open, she became concerned about the presence of the male passerby. She collected the items that fell out of her purse, returned them to the purse, stood up, and continued to walk to the entry. All this occurred while she proceeded at what must have been no faster than the pace at which she came on the Employer's property, yet she completed the "trip" only twelve seconds slower than the younger woman who walked in the same area one or two minutes before Grievant entered the building.

On January 18, when the group left the building to examine the location of the fall, it took them approximately 39 seconds or 15 seconds less than it took Grievant on January 2. Grievant did not lag behind the group. On January 18, Grievant did not walk cautiously along the outside wall of the building with her hand against the wall, as she did on the morning of January 2.

The 54 second time frame does not provide sufficient time for Grievant to fall, pick up items that fell out of her purse, respond to a passerby, get up and

continue to walk to the entrance. All of this does not conform to a 54 second time frame. Rather, it accounts only for an amount of time that Grievant took to walk cautiously with her hand against the outside wall at a slower pace. When the time frame that Grievant took to traverse from one camera to the other and enter the building is considered together with the absence of a pronounced limp or any other evidence of a fall, the Arbitrator concludes, as did Shea, Widstrom-Anderson, and Director of Human Resources Heinz in the grievance procedure that the fall did not occur on the Employer's property.

The Union's defense continues. It asserts that Grievant did not intend to file a Worker's Compensation claim for the fall. She only completed the First Report of Injury, the form the Employer uses to initiate a Worker's Compensation claim, because she was asked to do so by Supervisor Henderson. She did not understand that it would be used for that purpose. The Employer notes that Grievant had previously filed Worker's Compensation claims in 2002 and in the 1990s. However, that prior experience years before does not necessarily mean that she would recall that a claim is initiated by filing a First Report of Injury.

The record evidence that establishes the Employer's argument that Grievant intended to file and did file a Worker's Compensation claim for the fall is as follows. When the Risk Management Department of the Council received the First Report of Injury, as a matter of course, it mailed Grievant a letter acknowledging receipt of the report. The letter dated January 4 clearly sets out that Risk Management processes the First Report of Injury as a Worker's Compensation claim. Attached to that letter was a mileage claim form. On January 9, Council Claims Representative Becchetti contacted Grievant about this Worker's Compensation claim. Grievant asked if she could include parking with the mileage she was submitting as part of the Worker's Compensation claim. Certainly by January 9, there can be no question, but that Grievant fully understood that the First Report of Injury form she completed on January 2 had initiated the processing of a Worker's Compensation claim for the slip and fall that occurred on January 2.

The Union argues that it would be foolish for O'Connor to put her career with the Metropolitan Council on the line for a few days pay. The Union continues this argument along this line. Grievant had not exhausted all her leave time. She had sufficient time to cover her absences that resulted from the fall for January 2-5 and on January 9. Furthermore, Grievant did not collect any funds that she should not have. The Employer denied her claim.

The evidence submitted by the Employer is weakest on the matter of motive, as to why Grievant filed the claim for this fall. As to the amount of leave Grievant had, it is true that by mid-January, she had sufficient leave to cover the days she was absent. It is not clear in the record that she had sufficient time at the time she took leave from January 2-5, a leave excused by a doctor's slip, to cover those absences and the additional absence due to the swelling she encountered at work on January 8 that caused her to take off on January 9.

The Employer argues that Grievant submitted the Worker's Compensation claim because she did not want to lose pay. The Employer points to her telephone call to Fitzgerald to ascertain why her paycheck was short. The Employer points to the blank left for the period of January 2-5 on her time sheet as further evidence of Grievant's motive to obtain pay for the days of leave taken. Linnell, Grievant's direct supervisor, signed that time sheet with the blanks on it. In fact, he directed her to submit it in that form and allow payroll to fill in the blank. Although the evidence of motive is the weakest element in the Employer's presentation, it is not a necessary element to establish its case. The Employer has established that Grievant intended to file a Worker's Compensation claim whether or not she so intended to do so on January 2, when she completed the First Report of Injury. Certainly by January 9, after talking to Becchetti, she knew that the Employer was processing that form as a Worker's Compensation claim. She did not tell Becchetti that she did not want the report of injury to be treated as a Worker's Compensation claim. In addition, the great weight of the evidence establishes that Grievant did not fall on the Employer's property. The two significant acts, the report of the fall and the submission of the Worker's

Compensation claim, were undertaken by Grievant with an intent to obtain Worker's Compensation benefits.

In a case, such as this one, where the case turns on credibility, the Arbitrator as the finder of fact must make inferences based on the weight of the evidence. Only Grievant knows what occurred on January 2. The weight of the evidence presented indicates that the fall did not occur as reported by Grievant on the Employer's property.

Shea, in her thorough investigation of all events that occurred relative to the Worker's Compensation claim and all bases for discipline noted that Grievant's absences on January 2-5 and January 9 were not accounted for by available leave time. Grievant would have to request for a second time within one month authority from the Employer to take the leave and avoid the consequences of Section 15.04 of the contract that treats unauthorized leave unprotected by some form of leave time as a resignation.

Furthermore, Linnell, Grievant's supervisor, let it be known, erroneously, that Grievant was not eligible for FMLA leave. He informed Becchetti of this as the Claims Representative began to process Grievant's submission of the First Report of Injury. He so advised Shea, he may well have advised Grievant of his opinion that she was ineligible for FMLA leave. This would be a different case, if Grievant had acknowledged to the Employer even as late as the Loudermill hearing that she filed the First Report of Injury in an attempt to account for the absences that would result from her sprained ankle through FMLA leave. However, Grievant insisted, even at the arbitration hearing, that when she fell, she fell on the Employer's property. As discussed above, the evidence simply does not support such a finding.

The Penalty

The Employer based its discharge decision on two charges. The Arbitrator concluded that Grievant's alleged contradictory statements do not serve as a basis

for discipline. However, those statements are so intertwined with the filing of the Worker's Compensation claim that the Arbitrator finds it would be inappropriate to reduce the discipline due to the Employer's failure to establish one of the reasons it gave for imposing the discharge penalty.

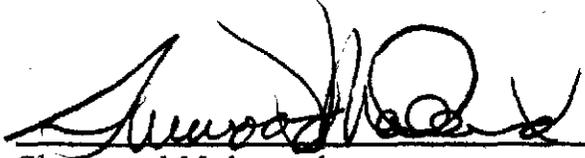
Grievant's long and exemplary service over the many years up to the last two years prior to her termination does not provide a basis for mitigating the penalty imposed by the Employer. The Arbitrator concludes above that she filed a Worker's Compensation claim for a slip and fall that did not occur on the Employer's premises. The Employer established that it consistently discharges employees who submit false claims for Worker's Compensation. This is the first occasion that such an event has occurred under this contract between AFSCME and the Council. It has occurred under the contract between the Amalgamated Transit Local 1005 and the Council. In those cases, the Employer imposed the discharge penalty for such claims. Although this is the first such case in this bargaining relationship, the Union has failed to establish a contractual or any other basis for the Arbitrator to set aside the Employer's discharge decision.

Based on the above Discussion, the Arbitrator issues the following:

AWARD

The Employer had just cause to terminate the employment of Linda O'Connor. Accordingly, this grievance is denied.

Dated at Madison, Wisconsin, this 18th day of December, 2007.


Sherwood Malamud
Arbitrator