

<b>IN THE MATTER OF ARBITRATION</b>	}	<b>OPINION AND AWARD</b>
	}	
<b>between</b>	}	
	}	
<b>The City of Paynesville, Minnesota</b>	}	
	}	
<b>(the "Employer")</b>	}	<b>BMS CASE No. 10-PA-0071</b>
	}	
<b>and</b>	}	
	}	
<b>Council 65 of the American</b>	}	
	}	
<b>Federation of State, County and</b>	}	<b>EUGENE C. JENSEN</b>
	}	
<b>Municipal Employees (AFSCME)</b>	}	<b>NEUTRAL ARBITRATOR</b>
	}	
<b>(the "Union")</b>	}	

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Advocates

**For the Employer:**

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**For the Union:**

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Witnesses

**For the Employer:**

Renee Eckerly, City Administrator  
  
Bill Spooner, City Attorney  
  
Kent Kortlever, Chief of Police  
  
Jeffrey Thompson, Mayor  
  
Belinda Ludwig, Accounting Specialist

**For the Union:**

Jennifer Berg, Cashier  
  
Renee Topp, Grievant

### Hearing Date and Timeline for Briefs

An arbitration hearing was held on December 16, 2009, at the Paynesville City Hall, 221 Washburne Avenue. The parties agreed to submit simultaneous post-hearing briefs to the Arbitrator on January 22, 2010. In addition, the parties agreed to extend the timeline for the submission of the Arbitrator's award from twenty (20) to thirty (30) calendar days, as per Article 6, Section 5 of the collective bargaining agreement.

### Jurisdiction

In accordance with the Minnesota Public Employment Labor Relations Act (PELRA), the rules of the Minnesota Bureau of Mediation Services (BMS), and the language of the 2007 through 2009 labor agreement between the parties, this grievance is properly before the Arbitrator.

### Issue

Did the Employer have just cause to discipline the grievant? And if not, what shall be the remedy?

Relevant Contract Language**Article 4, Employer Authority**4.1 Right to Manage

The Union recognizes the prerogative of the Employer to operate and manage its affairs in all respects in accordance with its management rights, existing and future laws and regulations of the appropriate authorities. The prerogatives or authority which the Employer has not officially abridged, delegated or modified by this Agreement are retained by the Employer.

4.2 Management Authority

Except as limited by the specific provisions of this Agreement, the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the Employer in all of its various aspects, as set forth in the Minnesota Public Employee Labor Relations Act of 1971, as amended. Nothing in this agreement shall limit the City's management right to discontinue functions, utilize technology, restructure, consolidate, subcontract and take other actions that may result in the elimination of a bargaining unit position or positions.

**Article 5, Discipline**5.1 Just Cause

The Employer shall have the right to impose disciplinary actions on employees for just cause only.

5.2 Disciplinary Action

Disciplinary actions by the EMPLOYER shall include only the following:

- a. Oral reprimand;
- b. Written reprimand;
- c. Suspension;
- d. Demotion, or
- e. Discharge.

### 5.3 Right to Appeal Disciplinary Action

Employees who are disciplined shall have the right to appeal such disciplinary actions through the grievance procedure as established by Article 6 (Grievance Procedure). . . .

### 5.4 Written Notice

Notices of suspension, demotion and discharges will be in written form and will state the reason(s) for the action.

### 5.5 Union Notification

The EMPLOYER will notify the union of any and all disciplinary actions taken in writing, unless requested by the employee to not notify.

## **ARTICLE 6, Grievance Procedure**

### 6.1 Definition

A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this agreement. . . .

### 6.4 Procedure

Step 4. A grievance unresolved in previous steps and appealed to Step 4 by the Union may be submitted to arbitration subject to the provisions of the Public Employment Labor Relations Act within ten (10) working days. The selection of an arbitrator shall be made in accordance with the Rules and Regulations as established by the Bureau of Mediation Services. . . .

### 6.5 Arbitrator's Authority

A. The Arbitrator shall have no right to amend, modify, mollify, 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 issues 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 20 calendar days following close of the hearing submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be binding on the employer and the employee, and the arbitrator's interpretation or application of the express terms of this agreement and the facts of the grievance presented. . .

### Background

The Employer is the City of Paynesville, Minnesota. The Union is Council 65 of the American Federation of State, County, and Municipal Employees (AFSCME). The Grievant is employed by the City as a Senior Liquor Store Clerk. The job site is the municipal liquor store that the City operates.

An incident at the liquor store in May of 2009, involving two employees (not the Grievant) prompted the City Manager to have the Chief of Police review the surveillance recordings within the liquor store. The chief noticed behaviors related to the Grievant on the recordings that he reported to the City Manager. They included: ripping down a memo that the City Manager had taped to the wall of the liquor store, foul language that was seemingly directed at the City Manager in absentia, and discussions about a slush-fund used to balance the books.

The recordings were reviewed by the City Manager, Mayor, City Council Members, and the City's Attorney. The City Attorney conducted an investigation

and reported the results to the above-mentioned parties. Following several meetings regarding this topic, the Mayor and council disciplined the Grievant by suspending her for eight (8) hours. The Union grieved the suspension, and that grievance is the subject matter of this arbitration award.

### The Employer's Position

*ARBITRATOR'S NOTE: The following statements are excerpts from the "Facts" section of the Employer's post-hearing brief:*

On May 22<sup>nd</sup>, the City Administrator witnessed interpersonal difficulties between certain employees at the Liquor Store. After the weekend of the 22<sup>nd</sup>, the Grievant indicated to the City Administrator that there were additional incidents related to these interpersonal difficulties that occurred somewhere in the time frame of May 21 – May 23, 2009. . . . [T]he City Administrator requested the Chief of Police to come to the Liquor Store and view the surveillance video tape in order to find out what was going on between an employee who quit on May 26<sup>th</sup> and another employee. . . .

[H]e, [Chief] came across behavior on the part of the Grievant that caused him concern. He then asked the City Administrator to review the conduct. Subsequently, the Chief of Police made three copies of the video . . . that were held as evidence . . . until he later released them to the City's attorney. . . .

[T]he two employees discuss a recently released memo from the City Administrator to the Liquor Store Employees regarding overages and shortages for the Liquor Store tills. (*Employer Exhibit 6*) The video further reveals the Grievant instructing an employee to take four cents out of her till and throw it in a dish. The instruction states "if we ever come up a penny or two short, take it out of there. So any time we are over, throw it in that dish. I will bring in another container so that they don't see it." (*Employer Exhibits 12 and CD*)

The video further reveals that the Grievant was clearly frustrated by the memo issued by the City Administrator. She then uses a number of expletives as she is tearing down the memo, crumpling it up, and throwing it in the waste paper basket. (*Id.*) (Pages 3-4, Employer's Post-hearing Brief [EPB])

The City essentially argues that they have the contractual right to impose discipline for behaviors that are inappropriate and that their personnel policy clearly outlines reasonable behavioral expectations:

Employees are expected to:

1. Be courteous at all times and display a cheerful, polite attitude;
2. Be neat, keep their work place as neat as possible, and dress appropriately for their respective jobs;
3. Be dependable and accountable;

Overall, employees should exhibit conduct that is ethical, responsive, and of high standards becoming of a city employee. (p. 22, City of Paynesville Personnel Policies)

The City also argues that the Union's issue statement, given to the Arbitrator at the beginning of the hearing, implies that the Grievant had knowledge of the audio recording system, and "that indeed the comments of the Grievant were directed at the City Administrator." (p. 8, EPB)

The City goes on to defend the appropriateness of recording the Grievant's actions (verbal and non-verbal) without her knowledge. It argues that the statute restricting such recordings does not apply to municipal governments, and that the Grievant should not have expected that conversations would be private in a

public environment. Anticipating a counter argument, the City further states that even if the recording was improperly obtained, the Grievant “admitted to the conduct and admitted that the statements were made about her supervisor.” (p. 10, EPB)

And finally, the City argues that the level of punishment was appropriate for the offense: foul language directed at the City Administrator, tearing down the memo and throwing it away in the presence of another employee, using a slush fund to balance the till, and instructing another employee to hide the dish does not support the Union’s claim that the punishment is too severe.

#### The Union’s Position

The Union, in its post-hearing brief, outlined its “Summary of Facts” and those facts, for the most part, correspond to the Employer’s “Facts” in its post-hearing brief. The Union’s arguments, however, are significantly at odds with the City’s arguments.

The Union argues that the Grievant’s behavior is not atypical for the workplace:

**Most employees express frustration with a supervisor or boss at some point in the[ir] working life.** For some, it is a rare occurrence, for others it is daily. They often express this frustration to a person they feel they can be safe in keeping their words confidential; a friend, a spouse, or a co-worker who shares their point of view. No one expects that the boss is secretly tape recording the employees so that the boss can catch them saying

bad things about work, policies, the boss themselves. (p. 5, Union's Post-hearing Brief [UPB])

The Union asserts that the City violated the law when they made the recordings that are the subject matter of the arbitration:

There are federal and state laws regarding eavesdropping or wiretapping. . . No one can legally tape record another person's conversation without being present and a party to the conversation themselves – unless they have consent of one of the parties participating in the conversation.

In addition to it being illegal to tape record others without their consent or knowledge if you are not a participant in the conversation, it is just plain unfair to tape record employees without their knowledge and consent if you are going to use that tape recording to check up on them and possibly impose discipline. (p. 5-6, UPB)

In addition, the Union argues that the cup with coins (or cigar box) till balancing behavior should not rise to a punishable level because the practice pre-dated the employment of the Grievant, and there was no indication of illegality or misuse of public funds.

Finally, the Union believes that the punishment's severity far out distances the objective to modify the behavior of a long-term good employee.

#### Discussion

Essentially, the facts in this case are not in dispute. The Grievant complained about the City Manager and her style of supervision, and she used foul language

in the process; and this occurred during a conversation with a co-worker at the worksite. She did tear a memo off the wall, and she did throw it in the trash. She also admitted to using an unorthodox method of balancing the till, and she did ask another employee to remove incriminating evidence from the worksite.

The Arbitrator's decision in this matter balances on three factors: 1) the reasonableness of the rule, 2) the fairness of the investigation, and 2) the level of discipline the Employer administered.

It is quite easy to understand why the City Manager was unhappy with what she discovered on the recorded audio and video account. Supervisors and managers are not immune to hurt feelings, disappointments and anger. To find that a subordinate is so unhappy with you that they would swear when referencing you is hurtful.

Knowledge of an employee's dissatisfaction with his/her management can come to light in many different ways:

- The employee can be face to face with the boss and state their views.
- The employee can be overheard swearing at their boss.
- A co-worker can go to the boss and say that a certain employee has been using foul language when describing the boss.
- The employee can use foul language in an e-mail or some other correspondence.

- The employee can be off the worksite and directly swear at the boss, etc., etc.

The Arbitrator uses the above list to demonstrate the various scenarios and levels of impropriety one might confront in relation to this issue. Any item in the list would be further complicated if a customer was present. In the instant case, the Grievant used foul language at work in front of another employee – with no customers present -- and the other employee did not complain to management. The other employee testified that the Grievant was stressed out and “went off the handle.” She stated that the Grievant was “normally not that type of person” to use foul language.

Swearing and venting frustration vociferously is not uncommon in the workplace, especially when management is not around to hear. As an employee, a boss, a labor relations practitioner, and as an arbitrator, I have personally witnessed or been privy to multiple occurrences similar to the matter at hand. How many of us have not, on at least one occasion, either done or heard the same? Such behaviors typically increase in frequency when employees are stressed or frustrated, and there is little doubt that the Grievant was both stressed and frustrated:

- Her previous boss quit abruptly, thus removing a layer of management between her and the City’s administration.
- New procedures were being put in place and there were difficulties associated with the transition.

- Demands were placed on her and others to balance the tills to the penny.
- A highly critical work directive (Joint Exhibit 6) was posted at the job-site in plain view.
- The City Manager had just left the worksite and the Grievant felt unjustly accused and minimized.

Blowing off steam is not unusual in a supposedly safe environment, and some might argue that it is a positive way to let off pressure that might otherwise result in poor customer relations or more serious confrontations with the boss.

A more significant factor in this matter is the level of fairness or “just cause” associated with the discipline.

Virtually all collective bargaining agreements, and many individual contracts of employment, provide that the employer may discipline the employee only for “just cause” . . . . Although that phrase lacks detail, labor arbitrators have explicated it in tens of thousands of arbitrations awards. (Dennis R. Nolan, Labor and Employment Arbitration, p. 315)

Despite the uncertainty of quantifying just cause, it has come to be the recognized benchmark for maintaining discipline within an enterprise. Arbitrators rely on the concept as a means of determining equity and due process both in procedural aspects concerning disciplinary rules and in the substantive areas of disciplinary infractions. (Grievance Arbitration, Arnold M. Zack, p. 57)

Just cause principles test the fairness of the discipline in several ways:

- Was the rule that was violated fair?
- Was the rule fairly and evenly enforced?
- Was the investigation of the employee’s alleged misdeeds fair?

- Was the level of discipline fair?
- And, more specifically apropos in this case, was it fair to use information that was gleaned for another purpose to discipline the Grievant?

The Union raised the issue of the legality of recording without the knowledge of at least one party to the recording. The Arbitrator will not examine the merits of their legal argument. The surveillance system at the liquor store was installed to assist police investigators in identifying illegal behaviors: robbery, check forgery, underage purchases, embezzlement, etc. It was not installed to review employees' performances, unless of course those behaviors crossed the line and became illegal. To meet a fairness or just cause standard, employees would need to be told that they would be subject to both audio and visual surveillance and that the information gathered would be used to review their performance, and potentially used as a basis for discipline. The equipment was not installed for this purpose, nor should it have been used for that purpose. And, once again, fairness is lacking: the City's other employees were not subjected to this level of scrutiny.

If management is to instill employee faith in the disciplinary code, the employee must be satisfied that all employees are equally subject to discipline for committing the same offense. While the degree of penalty may vary depending on the record, experience, and seniority of the employee, a disciplinary program dictates that a particular infraction will result in some level of discipline whenever it occurs. (Grievance Arbitration, Arnold M. Zack, p. 59)

It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all

employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variation in the assessment of punishment (such as different degrees of fault or mitigating or aggravating circumstances affecting some but not all of the employees). In this regard, Arbitrator Benjamin Aaron has declared: "Absolute consistency in the handling of rule violations is, of course, an impossibility, but that fact should not excuse random and completely inconsistent disciplinary practices. (How Arbitration Works, Elkouri and Elkouri, 3<sup>rd</sup> Edition pp. 643-44)

The information that was gathered by the surveillance equipment was never intended to be used for employee evaluation, and as such, doesn't even approximate a fairness or just cause standard. Even if the employees were aware of the audio portion of the surveillance, and I don't believe they were, I would not lend it credence.

The seventh edition of Black's Law Dictionary defines surveillance: "Close observation or listening of a person or place in the hope of gathering evidence." The second college edition of the American Heritage Dictionary defines it similarly: "Close observation of a person or group, esp[ecially] of one under suspicion." The Arbitrator finds that the City's use of the surveillance recording to be patently unfair. Once again, the surveillance videos were never intended to be used as a tool in assessing an employee's performance, nor were employees told that they would be used in that manner.

This is not to say that recordings can't be used to evaluate performance. If as a customer, you use your phone to order an item and you are informed that your

conversation will be recorded and the recording may be used to improve customer service or for training purposes, both the customer and the employee are on notice that 1) the recording exists, and that 2) the reason for its use is clearly spelled out. The concept of fairness that is enunciated above is met in this instance.

Therefore the Arbitrator will not consider evidence of the Grievant's alleged inappropriate behavior that was gathered through the surveillance recordings. He will, however, consider evidence that was gathered as a result of the City Attorney's investigation in one limited area. The Grievant and her co-worker both told the same story about the whereabouts of the change container, and I find that the Grievant did attempt a cover-up of potential wrongdoing when she asked her co-worker to remove the container from the worksite and take it home.

#### Award

In accordance with the discipline given her co-worker (a written reprimand), the City shall remove the eight (8) hour suspension and replace it with a written reprimand dated the day of suspension. The City shall reimburse the Grievant for the eight (8) hours of pay and make her whole in relation to other benefits provided in the labor agreement. The written reprimand shall be limited in scope and only address the issue of asking her co-worker to remove the change dish in an attempt to obviate its existence.

One final note: It became evident to the Arbitrator that the City values the Grievant's work and that the Grievant appreciates the job she has with the City. This award is not meant to be a judgment of right and wrong or good and evil; it is merely a decision that the parties found difficult to make on their own. I wish all concerned good will in the future.

Respectfully submitted this 11<sup>th</sup> day of February, 2010

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Eugene C. Jensen  
Neutral Arbitrator