

IN THE MATTER OF ARBITRATION ) GRIEVANCE ARBITRATION  
 )  
 between )  
 ) Patricia Wellvang -  
 City of Ely, Minnesota ) Termination  
 )  
 -and- ) BMS Case No. 10-PA-0913  
 )  
 Ely Supervisory Employees )  
 Association ) August 23, 2010  
 )))))))

**APPEARANCES**

**For City of Ely, Minnesota**

Kelly M. Klun, Attorney, Klun Law Firm, Ely, Minnesota  
Terri Boese, Clerk-Treasurer  
Warren Nikkola, City Council  
Roger Skraba, Mayor  
Trisha Schreffler, Clerical Clerk  
Mary Lee Erickson, Accounting Consultant  
Heidi Omercz, City Council  
Gordon Sheddy, City Council  
Frank Salerno, City Council  
Archie Manning, Former Police Chief

**For Ely Supervisory Employees Association**

R. Thomas Torgerson, Attorney, Hanft Fride, Duluth, Minnesota  
Patricia Wellvang, Grievant

**JURISDICTION OF ARBITRATOR**

Article 13, Grievance Procedures, Step 4 of the 2007-2009  
Collective Bargaining Agreement (City Exhibit #4; Association  
Exhibit #2) between City of Ely, Minnesota (hereinafter  
"Employer" or "City") and Ely Supervisory Employees Association  
(hereinafter "Association") provides for an appeal to arbitration  
of properly processed disputes through the grievance procedure.

The Arbitrator, Richard J. Miller, was selected by the Employer and Association (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation Services. A hearing in the matter convened on May 11 and June 29, 2010, at 8:30 a.m. in the Fireside Lounge at the Vermillion Community College, Ely, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his personal records. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions. The Parties elected to file post hearing briefs with an agreed-upon submission date of July 30, 2010. The post hearing briefs were submitted in accordance with those timelines and received by the Arbitrator by e-mail attachment. The Arbitrator then exchanged the briefs by e-mail attachment on that same day to the respective representatives.

In addition, legal counsel for Ms. Wellvang (Mr. R. Thomas Torgerson) submitted by e-mail attachment on July 30, 2010, an Affidavit In Support of Ms. Wellvang's Request For An Award Of Attorneys' Fees. This was forwarded by e-mail attachment to legal counsel for the City (Ms. Kelly M. Klun). It was agreed by the representatives at the conclusion of the hearing that Ms. Klun would have until August 13, 2010, to respond to Mr. Torgerson's request for attorneys' fees. Ms. Klun complied with

that deadline date by submitting her Opposition To Attorneys' Fees on August 13, 2010, after which the record was considered closed.

The Parties agreed that the grievance is a decorous matter within the purview of the Arbitrator, and made no procedural or substantive arbitrability claims.

#### **ISSUES AS DETERMINED BY THE ARBITRATOR**

1. Did the City have just cause to suspend and later terminate the Grievant? If not, what is the appropriate remedy?
2. Whether the City provided due process to the Grievant? If not, what is the appropriate remedy?

#### **STATEMENT OF THE FACTS**

The Parties are signatories to a Collective Bargaining Agreement, which endured from January 1, 2007, through December 31, 2009. (City Exhibit #4; Association Exhibit #2). The Union represents classifications of supervisory or confidential employees hired by the City, as appearing in Appendix A and B of the Contract, including the Deputy Clerk,

The Grievant, Patricia Wellvang, was hired by the City on February 16, 1977. She worked primarily as a Deputy Clerk. During this time, Ms. Wellvang performed her duties within the City Clerk's office and reported to the Clerk-Treasurer, as well as to the Ely City Council ("Council").

The basic components of Ms. Wellvang's job as Deputy Clerk was the statutory clerk and treasurer duties. Ms. Wellvang was responsible for collecting receipts or payments by customers within the Clerk's office. Additionally, Ms. Wellvang was responsible for making sure timely bank deposits were made and that the City was properly recording revenue into the City's computerized point-of-sale system ("POS"). The POS system is the primary accounting record system for receipts and deposits made within the City. Furthermore, Ms. Wellvang was tasked with additional responsibilities dealing with personnel, some treasurer duties, coordination of numerous special projects, and other City-wide matters. (Employer Exhibit #2). Ms. Wellvang was mandated by law to uphold the statutes of the State of Minnesota. Id.

The Deputy Clerk's direct supervisor is the Clerk-Treasurer. There were times during Ms. Wellvang's employment that a Clerk-Treasurer was absent from the workplace. When this occurred, many of the Clerk-Treasurer's duties, as well as her duties as Deputy Clerk, were the responsibility of Ms. Wellvang. Ms. Wellvang was not compensated for working those extra duties. During those times, Ms. Wellvang never received any discipline and she repeatedly received praise from her superiors, the mayors, and Council members for her work and loyalty.

(Association Exhibit #11). She also received excellent performance evaluations. (Association Exhibit #12).

Ms. Wellvang, being the most tenure employee within the Clerk's office, was considered the "go to" person within the City. Ms. Wellvang instructed new staff members on standard operating protocol within the office and in specific with regard to the handling of City monies. Furthermore, pursuant to Ely Code Section 2.10, the Deputy Clerk is responsible, as determined by the City Clerk, for a portion of the bookkeeping duties associated with the City. (Employer Exhibit #1).

There were no formalized written procedures with regard to the handling of cash and/or deposits within the Clerk's office. There were, however, informal procedures with regard to said monies. In specific, petty cash was generally kept in the vault and separate from monies collected for bank deposit. Petty cash was used to purchase small items necessary for the day-to-day operations of the office. Additionally, it was not common practice for employees to use City receipts or monies, which were to be deposited and kept in the front drawer for purchases by the Clerk's office. It is undisputed that it would be concern of City employees if they saw another City employee take money out of the front counter drawer for use other than deposit or purchase of goods for the City.

Ms. Wellvang made deposits on a somewhat random basis and seldom deposited all cash and checks that were available to be deposited. With regard to payments collected by the City, Ms. Wellvang's standard operating procedure was to issue a manual, hand-written, pre-numbered receipt, but only to customers who requested one. A payment was generally not immediately entered into the POS system, but rather the cash or check was placed in the top drawer of the front counter in the Clerk's office for later deposit. This drawer did not have a lock on it, however, it contained monies which were to be deposited on behalf of the City. When deposits were to be made, Ms. Wellvang then would create a hand-written list of the receipts within the drawer. Upon finishing, she would then enter the transactions into the POS system, print out the report, and then write out the bank deposit slip. Often Ms. Wellvang would take the deposit to the bank. However, on an infrequent basis she would have other employees take the deposit bag to the bank for the deposit.

In August 2008, the City hired a new Clerk-Treasurer, Terri Boese. Prior to the hiring of Ms. Boese, the City had several Clerk-Treasurers. The last Clerk-Treasurer held the position roughly one year prior to Ms. Boese's arrival. For nine months Ms. Wellvang worked for Ms. Boese. During those nine months: (1) Ms. Boese did not tell Ms. Wellvang that she had concerns about

her work; (2) Ms. Boese did not tell Ms. Wellvang that she had engaged in misconduct; (3) Ms. Boese did not discipline Ms. Wellvang for any alleged misconduct; and (4) Ms. Boese did not implement any written policies to change how things had been done for the many years before Ms. Boese started work with the City. Since Ms. Boese was new to the Clerk-Treasurer position, she decided to observe Ms. Wellvang's practices before expressing her concerns to Ms. Wellvang.

But unbeknownst to Ms. Wellvang, Ms. Boese did indeed have concerns with the manner in which Ms. Wellvang was handling funds in the Clerk's office as follows:

- (1) In September 2008 Boese had concerns with the form of receipt Ms. Wellvang was using to request reimbursement for stamp purchases. Ms. Boese believed that Ms. Wellvang cut off the bottom portion of the postage receipt, which detailed that the purchase was made with the City credit card, and then submitted said receipt for reimbursement of petty cash funds;
- (2) In September and October 2008 Ms. Boese had concerns about Ms. Wellvang's handling of fireworks donations. There was a Folger's coffee can, filled with substantial amount of cash, sitting unattended for a considerable amount of time in the Clerk's office. The cash within the can was collected by the Ely fire department for the purchase of fireworks, and was to be receipted and deposited by the Clerk's office. It was Ms. Wellvang's responsibility to deposit this money. This deposit was eventually made by Ms. Wellvang, but there was concern by Ms. Boese and others that there was less cash in the can than when initially counted and witnessed in the office in late September. However, based on the number of individuals who had access to the Clerk's office, Ms. Boese was unable to

attribute this loss to any one person. Therefore, in October 2008, Ms. Boese ordered that the locks be changed on the Clerk's office door in order to limit the number of City employees and Council members who had access to the office. Based on timing, the installation of the locks did not occur until the last week of December 2008;

- (3) In February 2009 Ms. Boese had concerns over Ms. Wellvang's reimbursement of the petty cash fund;
- {4) In February 2009 Ms. Boese had concerns over Ms. Wellvang's handling of Mayor Skraba's health insurance payments. In a nutshell, Mayor Skraba paid for his health insurance premiums in cash. Ms. Wellvang took \$600 in cash and then later submitted a \$600 personal check to the City and coded this \$600 personal check as payment towards Mayor Skraba's insurance coverage. She utilized the cash on her desk, which was being held for receipt towards Mayor Skraba's health insurance, to cash her personal check. Ms. Wellvang did not notify Ms. Boese that she cashed a personal check nor has she ever given employees permission to cash personal checks within the Clerk's office. This incident resulted in the City placing a hidden video camera in the Clerk's office. The camera was only known to Ms. Boese and the police department.
- (5) In early April 2009, Ms. Boese had concerns over Ms. Wellvang's use of funds located in the front drawer of the Clerk's office. A video recording on April 1, 2009, at approximately 4:45 p.m., shows Ms. Wellvang putting on her coat and then walking to front counter where cash receipts for deposits were held. She then took money from the drawer, placed it in her coat pocket, and then left the office. Additionally, hidden video footage, shows that on April 3, 2009, Ms. Wellvang left for lunch at approximately noon. Ms. Wellvang put on her coat, walked to the front counter drawer where cash receipts were held, took money out of the drawer, put the money into her coat pocket, and left the office. Finally, a video tape of April 17, 2009, shows Ms. Wellvang removing an envelope from the front counter drawer at approximately 6:13 p.m. She

quickly ripped it open, taking all cash contents without counting said monies, placing them in her purse and subsequently left the office for the weekend. (City Exhibit #10).

Ms. Boese was absent from the Clerk's office on April 17, 2009, and subsequently returned on April 22, 2009. Ms. Boese was notified by the Ely police department, during the weekend of April 17th, that they had sufficient evidence to move forward with their theft of City's monies case against Ms. Wellvang, and likewise she could proceed with disciplining Ms. Wellvang. Therefore, when Ms. Boese returned to the Clerk's office on April 22, 2009, she immediately proceeded to call a special emergency meeting of the Council. Ms. Boese indicated that she did not have the authority to discipline Ms. Wellvang, and therefore the Council was the appropriate body to review allegations of misappropriation of funds with regard to Ms. Wellvang's conduct.

On April 22, 2009, at approximately 4:30 p.m. Ely Police Chief Archie Manning and Assistant Chief Saw came to the Clerk's office and asked Ms. Wellvang if she would answer some questions and she agreed. Over the next 4 hours and 16 minutes, the police conducted a criminal investigatory interview of Ms. Wellvang having as the objective getting Ms. Wellvang to admit that she stole funds from the City. The police interview was the first notice Ms. Wellvang received that she had acted in any way

improperly at her workplace. She never admitted to improperly taking funds.

At 6:35 p.m. on April 22, 2009, over two hours into the 4 hour and 16 minute police interview, Ms. Boese came into the interview and presented Ms. Wellvang with a letter. (Employer Exhibit #3). The letter advised Ms. Wellvang that she was subject to allegations of misappropriation of public funds, and that a special meeting of the Council would be called at 7:00 p.m. that night to review the allegations. Being in the midst of a police interview and having no way to retain legal representation in 25 minutes, Ms. Wellvang did not attend the Council meeting, but rather completed the police interview which lasted another hour and a half.

During the Council meeting, Ms. Boese notified the Council that there had been a verifiable abuse of City funds. Council members testified that specific conduct, as described in City Exhibit #10, was discussed with the Council at the closed emergency meeting. During that meeting, Council members testified that they were addressed not only by Ms. Boese, but by Police Chief Manning, City Attorney Klun, and Accountant Mary Lee Erickson. As a result of the April 22, 2009 emergency Council meeting, the Council voted to place Ms. Wellvang on unpaid suspension pending the outcome of an investigation of the

allegations of misappropriation of public funds. (Association Exhibit #4). At that time, the City never advised Ms. Wellvang, in writing or otherwise, that she was being placed on suspension or what were the specific allegations against her that resulted in her suspension.

Upon learning of her suspension through the press, Ms. Wellvang waited for the City to complete its investigation, waited for the City to identify to her the alleged misconduct, and waited for the City to provide her an opportunity to explain the alleged misconduct after its identification. The opportunity never came.

On May 5, 2009, the Council appointed Councilor Warren Nikkola to investigate the allegations against Ms. Wellvang, on behalf of the entire Council. (Association Exhibit #5). As part of Mr. Nikkola's investigation he did not interview Ms. Wellvang, nor did he provide Ms. Wellvang with a written or oral identification of the conduct alleged to constitute misconduct. Mr. Nikkola did not prepare a written report of his factual findings to the other Councilors at any time. Mr. Nikkola, however, as part of his investigation, reviewed certain video tapes that showed Ms. Wellvang taking money out of envelopes and placing those monies in her purse or coat. (Employer Exhibit #10).

Then, on June 16, 2009, at a Council meeting that provided no notice that Ms. Wellvang would be a subject of discussion or action, Mr. Nikkola made a motion to terminate Mr. Wellvang's employment based upon his continued investigation, concluding that he felt confident that the City had just cause to terminate Ms. Wellvang for the specific misconduct, as documented in City Exhibit #10, most notably, the video evidence. In addition, by that time several Council members personally viewed the video evidence. Based on that recommendation, the Council voted to terminate Ms. Wellvang. (City Exhibit #6; Association Exhibit #7). Ms. Boese officially notified Ms. Wellvang of her termination by letter dated June 19, 2009. (Association Exhibit #8).

Ms. Wellvang grieved her suspension and discharge by grievance dated July 2, 2009. (Association Exhibit #1). A Step 1 telephonically meeting was held on August 13, 2009. At that meeting, Ms. Wellvang asked the City to identify the conduct on which it had suspended and terminated her. The City, through Mr. Nikkola, refused to do so, although it was then already four months after her suspension and two months after her termination. (Association Exhibit #9). "Mr. Nikkola asserted that Ms. Wellvang will be charged by the County with theft of public funds in an amount yet to be determined and that, in light of those

forthcoming charges, the City's actions were fully justified."

Id.

By letter dated October 13, 2009, the City sent Ms. Wellvang a letter denying her grievance and setting forth the reasons for suspending and then terminating Ms. Wellvang. (City Exhibit #10). The letter was the first notice Ms. Wellvang had received from her Employer identifying the specific allegations against her. The letter was prepared by Ms. Boese and City Attorney Klun and represented that the Council had made the misconduct determinations set forth in the letter.

On October 14, 2009, City Attorney Klun sent to Ms. Wellvang's legal representative, Attorney Torgerson, many of his information requests contained in his August 13, 2009 letter to Ms. Klun, including the October 13, 2009 grievance response, copies of the documents, which support the reasons for suspension and termination of Ms. Wellvang, and CD copy of the April 22, 2009 interview between Ms. Wellvang and Police Chief Manning. The videos showing Ms. Wellvang taking money out of envelopes in April 2009 were not presented at that time because the County Attorney had them in his possession.

The contractual grievance procedure in Step 3 mandates that the Parties partake in mediation before a grievance can be processed to arbitration. A mediation session was held between

the Parties without resolution. As a result, the Association advanced the grievance to final and binding arbitration, the last step in the contractual grievance procedure.

#### **CITY POSITION**

The City had just cause when it made its determination to suspend and later terminate Ms. Wellvang. The City was not required to utilize progressive discipline because Ms. Wellvang was guilty of theft of City monies, a dischargeable first-time offense. The video evidence of April 1, 3 and 17, 2009, clearly shows Ms. Wellvang taking cash out of the front drawer and leaving the office, without ever paying back the stolen money. The Council based its decision to terminate Ms. Wellvang's employment on the specific conduct contained in City Exhibit #10, most notably, the video evidence.

The City complied with the requirements of due process when it made its determination to suspend and later terminate Ms. Wellvang. Based on the specific facts that theft had occurred, and that it was likely to continue if swift action was not taken, Ms. Wellvang, was afforded due process with regard to the emergency special Council meeting on April 22, 2009. Ms. Wellvang had the opportunity to appear before the Council, but refused to do so. Similarly, the Employer's delay in notifying Ms. Wellvang of the specific conduct creating the basis for

suspension and termination was not a denial of due process. The City had to wait until the ongoing criminal investigation was completed before it could release the specific conduct creating the basis for Ms. Wellvang's suspension and termination.

The City complied with due process and all formal requirements set forth in the Collective Bargaining Agreement. The City appointed Councilor Nikkola as the Employer representative, as required by the Contract. The City also followed all of the steps contained in the contractual grievance procedure, including mediation.

In light of the foregoing, the Arbitrator should deny the grievance and all requested remedies.

#### **ASSOCIATION POSITION**

Contrary to the Collective Bargaining Agreement and the City Handbook that required the City to take action to improve and correct any perceived deficient conduct or practice, Ms. Boese did not address these concerns with Ms. Wellvang as they arose. Ms. Boese's failure to timely address those concerns with Ms. Wellvang deprived Ms. Wellvang of the opportunity to respond to the issues while the incidents were fresh in her mind, deprived Ms. Wellvang of the opportunity to understand Ms. Boese expected standards, and deprived Ms. Wellvang of an opportunity to improve and correct her performance under Ms. Boese's new expectations.

The Council terminated Ms. Wellvang without providing her the contractually required written notice of the allegations against her, without hearing from her, and without giving her an opportunity to be heard after knowing the allegations against her. It terminated her without hearing the results of Mr. Nikkola's investigation, without making any findings or determinations of misconduct, and without considering how the City had handled other alleged instances of misappropriation of City property.

The City failed to prove just cause for Ms. Wellvang's suspension and termination. It failed to prove that Ms. Wellvang had notice of the disciplinary consequences of her actions when she had engaged in similar conduct for many years. It failed to prove it undertook a fair and objective investigation, it failed to prove any conduct justifying discipline, it failed to prove that it applied discipline progressively and uniformly, and it failed to prove that termination was the appropriate degree of discipline.

For the reasons stated herein, the Association respectfully request that Ms. Wellvang's grievance be sustained. Ms. Wellvang had planned to retire on October 1, 2009, and does not seek an award past that date. As a result, Ms. Wellvang seeks to be granted relief in the form of an award making her whole in all

respects including, but not limited to, reinstatement for the period April 22, 2009, through September 30, 2009, payment of back pay from April 22, 2009, to September 30, 2009, compensation for all lost benefits for the same period, reinstatement of all benefit accruals for the same period, reinstatement of seniority for the same period, removal from her personnel file of all disciplinary action or other material related to the events underlying her unpaid suspension and termination, along with an award of \$938.04 to compensate Ms. Wellvang for the PERA buy-up credits she was forced to incur, and an award of \$19,827.50 in attorneys' fees and \$1,110.63 in costs and disbursements.

#### **ANALYSIS OF THE EVIDENCE**

Article XII, Discipline, Section 12, Due Process, of the Contract provides that "[d]isciplinary action may be imposed on Employees who have completed their probationary period for just cause." It is generally the function of an arbitrator in interpreting a contract provision which requires "just cause" as a condition precedent to discharge not only to determine whether the involved employee is guilty of the wrongdoing as charged by the employer, but also to safeguard the interests of the discharged employee by making reasonably sure that the cause for discharge was just and equitable. The term "just cause" implies a standard of reasonableness under the unique circumstances of

each case. An employee will not be discharged by action which is deemed by an arbitrator to be arbitrary, capricious, unruly, discriminatory, harsh, or disproportionate to the proven offense committed by that employee.

There are generally two areas of proof in an arbitration of an employee's discharge case. The first involves proof of actual wrongdoing, the burden of which is always placed upon the employer when the contract requires just cause for discharge. The second area of proof, once actual wrongdoing is established, is the propriety of the penalty assessed by the employer.

Ms. Wellvang's specific conduct, as described in City Exhibit #10, was the basis for her suspension and later termination from the City. The City alleges in the October 13, 2009 document that Ms. Wellvang is guilty: (1) of knowingly and cunningly altered postage receipts, presented it to the City for payment, and allowed for payment to be made by the City in order to swindle the City from funds in a process known as double-dipping; (2) of intentionally mishandled, misappropriated, and retained possession of some or all of the cash in the Folger's coffee can which had been presented by City Fire Chief Louis Gerzin for deposit into the fireworks fund.

In addition, the City alleges in the October 13, 2009 document that Ms. Wellvang's lack of documentation regarding the

allocation of petty cash for use within the Clerk's office leads the Council to believe that Ms. Wellvang took funds from petty cash.

The City alleges in the October 13, 2009 document that money was clearly missing and unaccounted for in the receipt of the health insurance premiums paid in cash by Mayor Skraba. Ms. Wellvang must have been aware of the discrepancies; however, she failed to report the missing funds to her supervisor, Ms. Boese. Further, Ms. Wellvang took \$600 in City cash and then later submitted a \$600 personal check to the City and coded this \$600 personal check as payment towards Mayor Skraba's insurance coverage. She utilized the cash on her desk, which was being held for receipt towards Mayor Skraba's health insurance, to cash her personal check. Ms. Wellvang did not notify Ms. Boese that she cashed a personal check nor has Ms. Boese ever given employees permission to cash personal checks within the Clerk's office. Ms. Wellvang's remittance of a personal check shows that she was aware of the missing money and was attempting to conceal the discrepancy by replacing or returning some of the funds, rather than alert her supervisor or Council. According to the Council, Ms. Wellvang knowingly and cunningly altered records in an effort to defraud the City of funds. Her misconduct leads the Council to believe that Ms. Wellvang intentionally mishandled,

misappropriated, and took some or all of the cash which had been presented to the Clerk's office.

The burden of proof rests with the City to prove that Ms. Wellvang was guilty as charged involving the four allegations set forth above. The City has failed to meet this burden of proof. The evidence, as to Ms. Wellvang's involvement or guilt with respect to these four allegations, was inconclusive. There is no convincing evidence that Ms. Wellvang intentionally mishandled, misappropriated, or retained possession of some or all of the cash that was missing or not deposited as to the reimbursement of purchased postage stamps, fireworks fund, petty cash, or Mayor Skraba's health insurance premiums.

The fifth and last reason cited in the October 13, 2009 document, as justification to suspend and later terminate Ms. Wellvang, is that contained on the video tapes. A hidden video camera was placed in the Clerk's office by the police department in order to capture on tape the person(s) responsible for stealing City monies. Ms. Boese was the only other City employee that knew of the hidden video camera. On April 1, 2009, at approximately 4:45 p.m., the video tape shows that Ms. Wellvang put her coat on and then walked to the front counter where cash receipts are held, she took money out of the drawer, put it into her coat pocket, and then she left the office. On April 3, 2009,

before leaving for her lunch break around noon, the video tape shows Ms. Wellvang put her coat on, she walked to the front counter where cash receipts are held, she took money out of the drawer, put it into her coat pocket, and then left the office. On April 17, 2009, at 6:13 p.m., the video tape shows that Ms. Wellvang pulled an envelope from the front counter drawer, quickly ripped it open, took all of the cash, and placed it in her purse. Police Chief Manning testified that this envelope had been presented to the Clerk's office by him, and at the time of presentment, it contained \$100 cash.

The video tape ran for the next five days. Ms. Boese testified, and as was documented by City Exhibit #12 (the daily copies of drawer contents), Ms. Wellvang did not replace or return the cash prior to her suspension on April 22, 2009. On April 22, 2009, Ms. Wellvang made a deposit that did not include the \$100, which had been presented to the Clerk's office by Chief Manning. Furthermore, Ms. Erickson testified that she was responsible for clearing the desk of Ms. Wellvang upon her departure. Ms. Erickson testified that she did not find Ms. Wellvang's alleged \$80 personal check made payable to the City on her desk or within the Clerk's office to cover this re-payment of cash from the envelope. Ms. Wellvang testified that said check had not been receipted and/or deposited by the City.

The City has met its burden of proof that Ms. Wellvang is guilty of intentionally mishandling, misappropriating, and retaining possession of some or all of the cash in the Clerk's office, as shown on the video tapes. Ms. Wellvang did not provide in her testimony any valid reason or justification for taking the money. She stated that sometimes the money she takes is used to purchase stamps or "things" for the City. She, however, cannot recall whether she used that money taken by her, as shown in the video tapes, to purchase anything on behalf of the City. In fact, Ms. Wellvang is shown removing cash from the Clerk's office without documentation of the reason for the taking or receipts showing use of the taken funds. Money was clearly missing and unaccounted for, and in her capacity as Deputy Clerk, Ms. Wellvang was obligated not to steal any money from the City. Ms. Wellvang is guilty of theft of City monies on the dates shown on the video tapes.

Since the evidence has shown misconduct on the part of Ms. Wellvang for theft of City monies, which satisfies the first area of proof, the second area of proof is the propriety of the penalty assessed by the Employer.

Section 12-2, Procedure, of the Contract states the following with respect to progressive discipline:

Discipline will normally be progressive in nature as outlined below. The step at which disciplinary actions are originated shall be appropriate to the nature of the alleged offense. All disciplinary actions shall be removed from the Employee's personnel file according to the following schedule: Verbal warning - six months, Written warnings - two years, and Suspensions - three years. Termination - no limit.

Progressive discipline imposes upon the employer a twofold burden of firmness and patience. It requires the employer to adopt a reasonably firm attitude against minor work violations and not allow them to be excused with simple admonition or complete oversight. The principle of progressive discipline requires that the employer withhold the final penalty of termination from an errant employee until it has been established that the employee is not likely to respond favorably to lesser penalty. The only exception to the principle of progressive discipline is when an employee commits egregious misconduct, which can result in immediate discharge for the first and only offense.

The Contract language in Section 2-2 prescribes to the principle of progressive discipline with noted exceptions. The Contract states that progressive discipline "will normally" be adhered to by the Employer, and notes that the appropriate discipline will be determined based on "...the nature of the alleged offense."

In this case, Ms. Wellvang was discharged for theft - stealing monies from the City. Theft is widely recognized as being grounds for immediate discharge, without the need to adhere to progressive discipline. Theft is intrinsically so serious an offense that management cannot properly be required - as a matter of contract obligation - to run the risk of its repetition.

No published work rule is needed to warn employees not to steal their employer's money. That is a "given" in the employment relationship. Indeed, the understanding that theft is a fundamental breach of the employment relationship is quite universal in labor relations, as is the corollary that stealing money, even small denominations, may warrant discharge for the first offense.

The theft of City monies by Ms. Wellvang in the Clerk's Office, the main fiscal agent for the City, is such a serious misconduct and so adverse to the financial operations and well-being of the City that the City should not be required to risk repetition by progressive discipline. The City's decision to suspend and later terminate Ms. Wellvang for proven theft was proper and justified, notwithstanding Ms. Wellvang's many years of employment and her previous lack of discipline. In this case, Ms. Wellvang's theft of City monies was just cause for her suspension and later termination from employment with the City.

The Association alleges that Ms. Wellvang is a victim of disparate treatment, as other City employees have been guilty of misappropriation of City funds, but were retained by the Employer. The testimony of Ms. Wellvang and Mayor Skraba established that the City has had at least two other employees who were alleged to have engaged in misappropriation of City property that were not terminated. City employee Terry Jackson was the General Manager of the Ely Utility Commission. He used City equipment and employees to do personal business at his home in the mid to late 1990s. He was given an opportunity to be heard after he knew the claims against him. The City did not terminate him. Bob Anderson was the City Chief Custodian. He purchased a \$14,000 key machine without authorization for the purchase and had a side locksmith business of his own. He was not terminated.

While there is no specific details with respect to these two previous incidents, it clear from the sketchy evidence that they did not involve an employee stealing City monies, as was the case with Ms. Wellvang. While these two incidents may have involved misappropriation of City funds, they did not involve the theft of City monies. Thus, the two previous incidents are patently distinguishable from Ms. Wellvang's situation of theft of City monies, which is far more serious than apparent misappropriation

of City funds. Clearly, Ms. Wellvang is not a victim of disparate treatment.

The Association alleges that Ms. Wellvang's discharge should be overturned because the City violated her due process rights. Specifically, the Association alleges: (1) the City failed to advise Ms. Wellvang of concerns with her conduct at the time of her conduct; (2) the City failed to give Ms. Wellvang written or oral notice of the conduct constituting the misconduct; (3) the City failed to provide Ms. Wellvang with a reasonable opportunity to respond to her alleged misconduct, including, but not limited to failing to provide her with a Loudermill hearing; (4) the City failed to prove that it undertook a fair, objective, and impartial investigation when it chose not to confront Ms. Wellvang with her conduct at the time it occurred or at any time prior to termination, but instead waited for months for Ms. Wellvang's recollection to fade; (5) the Council terminated Ms. Wellvang without providing her the contractually required written notice of the allegations against her, without hearing from her, and without giving her an opportunity to be heard after knowing the allegations against her; (6) the City terminated Ms. Wellvang without hearing the results of Councilor Nikkola's investigation, without making any findings or determinations of misconduct, and without considering how the City had handled other alleged

instances of misappropriation of City property; and (7) the City failed to provide Ms. Wellvang with an opportunity for legal representation, giving her only 25 minutes to find a lawyer to represent her in the April 22, 2009 Council meeting.

The requirement that the Employer provide "due process" to an employee charged with misconduct is a requirement that procedures be fair and objective. Based upon the specific facts, Ms. Wellvang was afforded due process with regard to the emergency Council meeting on April 22, 2009. Ms. Wellvang's argument that she was only given 25 minutes to find a lawyer to represent her at the Council meeting fails to recognize the fact that she was being interviewed by the police before and after the Council meeting. There is no convincing evidence that Ms. Wellvang had any intention other than to complete the police interview, which lasted 4 hours and 16 minutes, starting at 4:30 p.m. Thus, whether Ms. Wellvang had more time to hire an attorney or have an Association representative present at the Council meeting is moot, since she was being interviewed by the police while the Council met, and she decided to be interviewed by the police without legal or Association representation.

There is no evidence that the Council and the police department conspired to hold the police interviews at the same time as the Council meeting. It was assumed that the police

interview would have been shorter, which would have allowed Ms. Wellvang to attend the Council meeting scheduled for 7:00 p.m.

Furthermore, while it is true that during the emergency meeting, the Council decided to suspend Ms. Wellvang without pay, it was reasonable for the Council to assume that Ms. Wellvang was notified by the police of the Council's decision to place her on unpaid leave, as she was escorted off the premise by the police and chose not to attend the Council meeting.

It was also reasonable to assume that Mr. Wellvang's absence at the Council meeting was her refusal to attend her Loudermill hearing after Ms. Boese interrupted the police interview to personally serve written notice upon Ms. Wellvang of the emergency Council meeting scheduled for 7:00 p.m., and the allegations brought against Ms. Wellvang. The suspension and later termination involved the same alleged specific conduct as discussed in the Council meeting and, as such, the City had no obligation to request a second interview with Ms. Wellvang after the suspension. In fact, the record is devoid of any request made by Ms. Wellvang for a Loudermill hearing before or after her suspension and later termination.

Contrary to the Association's contention, Councilor Nikkola was not procedurally required to notify Ms. Wellvang of his intent to recommend her termination at the Council meeting on

June 16, 2009. However, as required, after the recommendation was acted on by the Council, the City did notify Ms. Wellvang of its decision to terminate in a letter on July 19, 2009.

Similarly, the Employer's delay in notifying Ms. Wellvang of the specific conduct creating the basis for suspension and termination was not a denial of due process. The Employer requested Ms. Wellvang to appear before the Council on April 22, 2009. She declined. However, had she complied with the Council's request, Ms. Wellvang would have been notified of the specific conduct creating the basis for her suspension and later termination, which also created the basis for the ongoing criminal police investigation. Therefore, the City was asked to delay formally notifying Ms. Wellvang of the specific conduct creating the basis for her suspension and later termination. Later, the City provided a written explanation and complete document disclosure of the specific conduct creating the basis for her suspension and later termination to Ms. Wellvang's legal representative on October 13, 2009. (City Exhibit #10).

Although, the video evidence of April 1, 3 and 17, 2009, was not released at the time City Exhibit #10 was released, this evidence was cited in the written explanation, as the specific conduct for the suspension and later termination. The video evidence was released by the County Attorney's office only days

prior to the arbitration on May 11, 2010, and was reviewed by Ms. Wellvang and her legal representative during the hearing. The Arbitrator gave them all the time they needed to review the video tapes and they never asked for a continuance for further review.

The City complied with due process and all requirements set forth in the Collective Bargaining Agreement. Upon suspension of Ms. Wellvang and pursuant to Section 12, the City appointed Councilor Nikkola as the Employer representative. He was tasked and performed the duty of investigating Ms. Wellvang's alleged misconduct. Furthermore, the City complied with the requirement in Section 12.1 of notifying Ms. Wellvang of any charges or allegations against her, as to the specific conduct for her suspension and later termination, as set forth in the October 13, 2009 document.

Minn. Stat. § 13.82 prohibits the disclosure of investigative data collected or created by municipal police departments in order to prepare a case against a person for the commission of a crime. The Association maintains their motion to exclude and strike all information gathered by the police as part of its criminal investigation which, as testified by Chief Manning, included the video tapes and documents copied in the Clerk's office.

The Association's motion is denied. From the time of the suspension and until his recommendation on June 16, 2009 to terminate Ms. Wellvang's employment with the City, Councilor Nikkola testified that he performed an independent investigation with regard to the allegations made against Ms. Wellvang. Councilor Nikkola testified that he spoke in detail with Ms. Boese and City Attorney Klun with regard to the specific conduct, which created the basis for Ms. Wellvang's termination. Councilor Nikkola stated that the conduct documented in City Exhibit #10 was the same conduct on which he made his recommendation to terminate Ms. Wellvang's employment with the City. He testified that he reviewed in full the daily photocopied Clerk's office documentation collected by the Clerk's office in collaboration with the police department, as well as reviewed the video evidence of April 1, 3 and 17, 2009. Based on his investigation, he testified that he was confident that the City had just cause to terminate Ms. Wellvang for the specific misconduct, as documented in City Exhibit #10. On June 16, 2009, Councilor Nikkola recommended to the Council that they terminate Ms. Wellvang's employment with the City. Council members testified that they relied upon Councilor Nikkola's investigation and recommendation and subsequently voted to terminate Ms. Wellvang's employment. Several Council members testified that

they personally viewed the video evidence of April 1, 3 and 17, 2009, prior to voting on Ms. Wellvang's termination, and that the video evidence along with the conduct described in City Exhibit #10 created the basis for termination. Thus, it is clear that the City complied with the due process rights of Ms. Wellvang.

Assuming *arguendo* that Ms. Wellvang's due process rights were violated before, during, or after her suspension and later termination, any defect would have been "cured" by the arbitration hearing. Ms. Wellvang and her legal representative were given the time and opportunity to prove Ms. Wellvang's innocence. They had the right to call witnesses and introduce any evidence that was relevant to proving Ms. Wellvang's innocence. She was given ample opportunity to address any concerns she may have had regarding procedures and unaccounted funds and/or missing or misplaced cash. Unfortunately, the evidence proved that Ms. Wellvang was guilty of theft of City monies. Accordingly, her guilt would supersede any due process violations that may have occurred by the City.

The last issue is attorneys' fees. The Association contends that an award to Ms. Wellvang of her attorneys' fees and cost is necessary to make her whole, as the City acted in bad faith and because the Collective Bargaining Agreement does not preclude such an award.

"While it is not customary to award attorneys' fees against the offending party, where an employer acts in bad faith an arbitrator may choose this remedy to make a grievant whole." Elkouri and Elkouri, How Arbitration Works, 5th Ed. 119, p. 592; Synergy Gas Co. v. Sasso, 853 F.2d59 (2d Cir 1988).

First, the City did not act in bad faith as they sustained their burden of proof by proving there was just cause to suspend and later terminate Ms. Wellvang for theft of City monies. The City was also not guilty of violating the due process rights of Ms. Wellvang and, even if her rights were violated, this was cured at the arbitration hearing, where Ms. Wellvang had the opportunity to present whatever evidence she deemed appropriate in her defense.

Moreover, Article XIII, Step 4 of the Contract provides that "[t]he fees and expenses of the Arbiter's services and proceedings shall be borne equally by the Employer and the Association provided that each party shall be responsible for compensating its own representative and witnesses." The Association avers that this Contract language does not prohibit an award of attorneys' fees, since the term "representative" is not defined to be attorneys.

Attorney Torgerson represented Ms. Wellvang even before the filing of her grievance on July 2, 2009, and throughout the

arbitration, including the filing of this motion and submitting a post hearing brief on her behalf. In his initial letter to the City on May 4, 2009, Attorney Torgerson states he represents Ms. Wellvang. (Attached Exhibit #1 of Attorney Klun's Response To Ms. Wellvang's Request For Attorneys' Fees). In fact, the Association consented to his "representation" of Ms. Wellvang in this matter, as evidenced in his filing of the grievance on behalf of Ms. Wellvang on July 2, 2009. (Attached Exhibit #2 of Attorney Klun's Response To Ms. Wellvang's Request For Attorneys' Fees). In his letter, Attorney Torgerson states "please address all communications to me as Ms. Wellvang's representative at the above-noted address." Id. Finally, other than Attorney Torgerson representing Ms. Wellvang at the arbitration hearing, there was no representative from the Association. Attorney Torgerson was the sole "representative" of Ms. Wellvang, unlike the City who had Attorney Klun and Councilor Nikkola (for most of the proceeding) as the City's "representatives." Therefore, to argue that Attorney Torgerson is not a "representative" in terms of the Contract language in Article XIII, Step 4 is not persuasive. The Collective Bargaining Agreement does preclude an award of attorneys' fees. As a result, Attorney Torgerson's motion for attorneys' fees and costs and disbursements is hereby denied.

**AWARD**

Based upon the foregoing and the entire record, the grievance is denied. All requested remedies, including attorney's fees, costs, and disbursements are hereby denied.

  
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Richard John Miller

Dated August 23, 2010, at Maple Grove, Minnesota.