

**IN THE MATTER OF ARBITRATION
BETWEEN**

Metropolitan Council Management Association) BMS Case No. 10-PA-1545
)
(“MANA” or “Union”)) Site/Issue: St. Paul, MN/Discipline
)
&) Hearing Date: 10-14-10
)
Metropolitan Council, Minnesota) Brief Submission Date: 10-29-10
)
(“Council” or “Employer”)) Award Date: 12-28-10
)
) Mario F. Bognanno, Labor Arbitrator

JURISDICTION

Pursuant to Article 18 of the parties’ Collective Bargaining Agreement (“CBA”), the above-captioned matter was heard on October 14, 2010 in St. Paul, Minnesota. (Joint Exhibit 1) The parties stipulated that the matter was properly before the Arbitrator for a final and binding decision and waived the CBA language in Article 18, §18.06 requiring an arbitration decision within 30 days of the close of the record. At the request of the Union, all of its witnesses are herein referred to by initials, including the Grievant.

Serving as an assistant under the auspices of the Minnesota Bureau of Mediation of Services’ arbitrator-intern program, Rich Miller, Esq. accompanied the undersigned to the hearing. The record evidence and analytical strategies for deciding the case were discussed with Mr. Miller. In his capacity as intern, Mr. Miller prepared a mock or preliminary draft of a decision. However, the undersigned, as the Arbitrator of Record, was the sole decision-maker in this matter and he alone is responsible for this Decision and Award.

Each party was given a full and fair opportunity to present its case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into

the record. Post-hearing briefs were filed on or about October 29, 2010. Thereafter, the matter was taken under advisement.

APPEARANCES

For the Union:

Phyllis Karasov	Attorney
Martin D. Kappenmann	Attorney
Cammy Johnson	MANA President
P.H.	Grievant
L.B.	Senior Planner
C.O.	Planning Technician
P. B.	Sector Representative

For the Employer:

Diane Cornell	Associate General Counsel
Mark Vander Schaaf	Director, Planning and Growth Management
Beth Reetz	Director, Housing and Livable Communities
Sandi Dingle	Executive Secretary
Victoria Dupre	Senior Planner
Ann Beckman	Manager, Regional Systems, Planning and Growth Strategy
Tom Caswell	Senior Planner

I. Background

At all times relevant to the instant matter, the Metropolitan Council (Employer) and the Metropolitan Council Management Association (Union) were parties to a Collective Bargaining Agreement (CBA), covering supervisory employees who are public employees within the meaning of Minnesota Statutes Section 179.A.03 Subd. 14, but excluding certain employees as described in Article 2 of the CBA. (Joint Exhibit 1)

P.H., Grievant, is Manager, Local Planning Assistance, Planning & Growth Management, Community Development division. She reports to Mark Vander Schaaf, Director, Planning and Growth Management. (Joint Exhibit 2) The Grievant is

responsible for directing a staff of professionals and managing a budget of \$1.5 million. (Union Exhibit #2) Her original hire date with the Council is May 26, 1996. One of Grievant's direct reports is Victoria Dupre, Senior Planner, Local Planning Assistance.

On January 5, 2010, Ms. Dupre and Paul Hansen, GIS Coordinator, Research, were in Ms. Dupre's cubical, discussing a "mapping" project the Grievant had been assigned to perform. This and most of the other cubicles in the office area are open in that they do not have doors and their walls are not ceiling-high; thus, voices from intra-office conversations tend to carry throughout the area. Overhearing their discussion, the Grievant went into Ms. Dupre's cubical and the two engaged in a robust discussion over a project's performance. The Council claims that the Grievant was disapproving angrily of Ms. Dupre's mapping work and referring to Mr. Hansen's GSI mapping data as "garbage." The discussion between the Grievant and Ms. Dupre continued for some time; took place at different locations throughout the office area, including in a conference room and immediately outside of the Grievant's office; and was overheard by numerous other employees, some of whom testified that the Grievant was "yelling" and "screaming" at Ms. Dupre and one of whom testified that the Grievant threatened to "smack" Mr. Hansen. (Employer Exhibits 4, 5, 6, 7 & 8) The Grievant's conduct, the Employer concluded, was unprofessional, seriously disturbed other employees and violated Council Policy 4-6b. (Joint Exhibit 4) Pursuant to Section 17.02 of the CBA, the Employer gave a written reprimand to the Grievant on January 13, 2010. (Joint Exhibit 4) The Union filed a timely grievance on January, 27, 2010. (Joint Exhibit 3)

Throughout the grievance process and in sworn testimony before the Arbitrator, the Grievant adamantly denied she had engaged in any of the alleged misconduct. In

the hearing, the Union called three employees, in addition to the Grievant, who were in the vicinity of the Grievant-Dupree discussion. All three witnesses denied hearing “yelling,” “screaming” or “threatening” comments but they did hear “elevated” voices and/or “heated” discussions. The Union claims that the Employer denied the Grievant’s due process rights by failing to interview her and by not interviewing all employees in the vicinity of the discussion prior to deciding to issue a written reprimand to the Grievant. The Union seeks to have the written reprimand reversed and all record of it removed from the Grievant’s personnel files.

Failing to resolve the grievance, the parties advanced the matter to arbitration for a final and binding determination.

II. **STATEMENT OF THE ISSUES**

Did the Employer have just cause to discipline the Grievant? If not, what is the proper remedy?

II. **RELEVANT CBA PROVISIONS & COUNCIL POLICY GUIDELINES**

A. **CBA:**

Article 17, §17.01 – Discipline for Just Cause

The Employer shall have the right to impose discipline on employees for just cause.

Article 17, § 17.02 – Disciplinary Actions

Disciplinary actions shall include only reprimands, suspensions, demotions, and discharges.

(Joint Exhibit 1)

B. **POLICY GUIDELINES**

Policy-Employee Conduct

I. Policy

It is the policy of the Metropolitan Council to provide a respectful work environment and deliver public services in a manner that instills public confidence in Council business transactions and is free from violent, unethical or offensive conduct. The Metropolitan Council expects all employees while in the performance Council-related business to:

- Abide by all laws;
- Treat all people with respect and courtesy;
- Adhere to high professional standards and moral principles;
- Provide high standards of public service.

* * *

Any individual found through an inquiry to have violated the employee conduct policy in the performance of their job, in the employment setting or while on Council premises, shall be subject to disciplinary action up to and including discharge.

* * *

IV. Definitions

A. Violence

Violence is defined as the abusive or unjust exercise of power, intimidation, harassment and/or threatening or actual use of force which results in or has a reasonable likelihood of causing hurt, fear, injury, suffering or death.

* * *

C. Offensive Conduct

Offensive conduct may include, but is not limited to, such work related actions as: rudeness, exclusionary behavior, angry outbursts, inappropriate joking, vulgar obscenities, name calling, disrespectful language or the intentional filing of an unfounded complain (sic) under this policy.

* * *

(Employer Exhibit 2; Section/Number 4-6 Effective 9/11/98, Revision No. (1) 9/27/06)

Procedure – Workplace Violence Prevention

E. Responding to Incidents or Threats of Violence

* * *

1, Employees

- a. An employee who experiences or witnesses a threat, an act of violence or a weapons policy violation must report the incident immediately to his or her supervisor, or the designated Facility Responder.

* * *

- c. All reports will be treated with discretion and confidentiality to the extent possible.

* * *

(Employer Exhibit 2; Section/Number 4-6b Effective Date 9/11/98, Revision No. (1) – 11-01-00, (2) – 09-27-06 and (3) 01-26-07)

IV. BACKGROUND AND FACTS

Before January 5, 2010, the Grievant had an unblemished record. The Grievant has consistently been given remarkably high scores on performance reviews. Most ratings are at the top of the rating scale, for example, “Exceptional Performance” and “Surpasses Expectations.” The lowest was “Achieves Expectations.” (Employer Exhibit 1; Union Exhibits 3, A – H) The Grievant’s most recent performance review is dated November 11, 2009. In the section of that review entitled “Supervisor Comments”, Mr. Vander Schaaf stated:

P.H. has helped make 2009 a memorable high point of my career. I’m very proud of the work of Council staff on the comprehensive plan update review process, and grateful to P.H. for her indispensable contributions as the orchestrator of the process.

(Employer Exhibit # 1) In the sections of that review entitled “People Leadership” and “Personal Leadership” the Grievant was given the “Achieves Expectations” rating. Mr. Vander Schaaf’s comment in the People Leadership section was as follows:

Improved relationships within work group and with outside work units – particularly RSPGS. However, there were instances of meetings when genuine

efforts to contribute were met with responses by P.H. that felt intimidating to other meeting participants. In 2010 it will be important for P.H. to channel her commendable passion in ways that adhere to the 'Code of Conduct' that is under development in the division.

(Employer Exhibit 1)

Mr. Vander Schaaf testified that he intended this language to be a warning to Grievant to be less "hostile" or "agitated" when discussing matters with co-employees. Mr. Vander Schaaf's concern arose out of a 2009 meeting among the Grievant, Libby Starling, Research Manager, and himself in which the Grievant allegedly said that certain GIS data was "garbage" and that it did not meet her needs. (Joint Exhibit 4)

The Grievant testified that she did not interpret this language to be a warning. Rather, she believed that her performance was acceptable because her rating in that portion of the review form was "Achieves Expectations." The Grievant suggested that during the performance review process, Mr. Vander Schaaf said nothing to her about their meeting with Ms. Starling. Indeed, in its post-hearing brief, the Employer characterizes the statements made during the performance review as follows: ". . . Mark chided her gently that she needed to work further on improved relationships with the work group, and that she came across as intimidating in meetings." (Employer Brief, page 14)

During the week of December 28, 2009, the Grievant assigned a task to Ms. Dupre. The Grievant, a competent manager, who describes her leadership as being "direct and clear," asked Ms. Dupre to calculate the net developable acres in parcels located outside the "sewered" area in the City of Orono, Minnesota. (Employer Exhibit 7) Specifically, the Grievant asked Ms. Dupre to identify and map a total of 168 parcels that were either outside or inside the existing sewered area and to compare said map

with that which the City of Orono was requesting. The purpose of this assignment was to enable the Grievant to determine the cost to the Metropolitan Council (and ultimately to the City of Orono) of the City of Orono's sewer request.

On Tuesday, January 5, 2010, the Grievant overheard a conversation between Ms. Dupre and Mr. Hansen, bearing on the completion of her mapping assignment. This conversation was taking place in Ms. Dupre's cubical, which was in the vicinity of the Grievant's cubical. (Union Exhibit 4) The Grievant had surmised that Ms. Dupre and Mr. Hansen were using "GIS MUSA" and not "MCES" mapping data, which the Grievant had specifically instructed Ms. Dupre to use. The Grievant interrupted this conversation and informed Ms. Dupre that she was not following instructions. The Grievant was concerned that the data Ms. Dupre and Mr. Hansen were using would lead to a serious underestimate of the cost of providing the increased sewer area for the City of Orono and she was scheduled to meet with the City of Orono in the near future to report on the cost of providing sewage for the requested area. Hence, she became upset upon learning that Ms. Dupre was using the wrong mapping data to make her calculations. Ms. Dupre tried to explain her rationale for using the GIS MUSA data but the Grievant would have nothing to do with it. Similarly, Mr. Hansen's explanatory efforts were rebuked.

Ms. Dupre disagreed with Grievant's assessment and argued that she and Mr. Hansen could adjust the data they were using and produce the correct calculations. The Grievant disagreed, and firmly informed Ms. Dupre that she was off the project. Nevertheless, Ms. Dupre continued to request that she be allowed to correct the presumed error. Breaking off the conversation, the Grievant moved from Ms. Dupre's

cubicle to her office, Ms. Dupre followed and continued to protest. The Grievant next instructed Ms. Dupre to meet with her in a conference room to discuss the matter. While in the conference room, Ms. Dupre continued to request that she be allowed to adjust her data. Eventually, the Grievant broke off the conversation and either while she was proceeding back to her office or while in the doorway to her office, Ms. Dupre grasped the Grievant's arm for the apparent purpose of again explaining her research strategy and/or asking for permission to complete the project. At this point, the Grievant did loudly utter something like, "Don't touch me. Never touch me again." It is undisputed that the volume of Ms. Dupre's and the Grievant's voices became "elevated" during this mobile discussion. However, there is disagreement among the witnesses over the proper characterization of Grievant's utterances. Employer witnesses Ann Buckman, Manager, Regional Systems, Planning and Growth Strategy, Sandi Dingle, Executive Secretary, Tom Caswell, Senior Planner, and Ms. Dupre all stated that Grievant was yelling and/or screaming. Mr. Hansen did not testify. Ms. Buckman's investigatory interview and her testimony, in part, indicate that the Grievant told Mr. Hansen that "If you say GIS one more time, I'll [smack] you." The Employer's fourth witness, Beth Reetz, Director, Housing and Livable Communities, testified that she did not witness the matter under consideration, having become involved after its conclusion. As noted previously, none of the MANA witnesses heard yelling or screaming.

The Grievant testified that she was very upset with Ms. Dupre not only because she was not using the mapping data specifically requested by the Grievant, but also because of the magnitude of the error and the short time (48 hours) horizon during which the correct calculations needed to be made. It is uncontroverted that had the

Grievant presented to the City of Orono the data prepared by Ms. Dupre, the Metropolitan Council would have lost \$24.4 million in immediate revenues, with approximately \$200,000 in lost revenue each year thereafter.

On that same day of the above-discussed incident, Ms. Beckman along with Ms. Reetz, went to the office of Guy Peterson, Director, Community Development, where they met with both Messrs. Peterson and Vander Schaaf. At the meeting, Ms. Beckman reported her version of the Grievant-Dupre interaction. Following this meeting, the Grievant, who had previously scheduled a meeting with Mr. Vander Schaaf and Guy Peterson, commented on her disagreement with Ms. Dupre, including the fact of Ms. Dupre's "grabbing" her arm at the elbow. The Grievant did not go into great detail, assuming that she would have an opportunity to give a more detailed statement sometime later.

On January 7, 2010, Messrs. Peterson and Vander Schaaf met with the Council's Human Resource ("HR") director and its director of the Office of Diversity and Equal Opportunity ("ODEO"). The purpose of this meeting was to seek guidance in how to proceed with the investigation of the matter. Mr. Vander Schaaf's handwritten notes of this meeting suggest that before it took place, he, or possibly he and Mr. Peterson outlined the three-part agenda quoted below:

1. Need to interview witnesses, or focus on who has approached us? Use of outside interview?
2. Confidentiality vs. staff need-to-know that steps are being taken – Discipline not public information.
3. Appropriate penalty/remedy – anger management plus "must never happen again"?

(Employer Exhibit 3) A sequence of marginalia notes pertaining to these agenda items, as best they could be read, state the following:

- Yo. We have been advised...
- Not tolerated.
- She should impress everyone
- Direct her to meet with her staff (with me and apologize)
- Performance improvement plan
- Recommend DORR or Personnel professional assistance.
- Future includes progressive discipline, up to and including discharge.
Retaliation not tolerated.

(Employer Exhibit 3)

On January 7, 2010, Mr. Vander Schaaf interviewed witnesses Ms. Beckman, Mr. Hansen and Mr. Caswell. The hand written notes of these interviews were introduced as Employer Exhibits 4, 5 & 6. In addition, Ms. Dupre submitted an undated type-written summary of her version of the events. (Employer Exhibit 7) The notes of Mr. Hansen's interview quote him as saying that the Grievant was upset and he "backed away" and when the Grievant grabbed the incorrect data map from him, "he left." Those notes also state that when he met with the Grievant the next day, he "understood the difference between what P.H. wanted and what he provided." Further, in a January 11, 2010 addendum to his interview notes, Mr. Vander Schaaf wrote that Mr. Hansen "Clarified that P.H. was dismissive but not abusive toward him. She did indicate disrespect toward the data." (Employer Exhibit 5) Subsequent to her meeting with Messrs. Vander Schaaf and Peterson, the Grievant was not interviewed again and Mr. Vander Schaaf did not ask Grievant if she knew of any persons with knowledge of the event of January 5, 2010.

The written reprimand was issued by Mr. Vander Schaff on January 13, 2010. (Joint Exhibit 4) In the written reprimand he summarized his investigatory findings and opinion of the event as follows:

* * *

The composite account indicates that Tory [i.e., Ms. Dupre] and Paul were behaving calmly and professionally in trying to explain their work on an assignment that you issued, but that you became increasingly angry as you discussed GIS data that you regarded as unacceptable. In your initial discussion with both Tori and Paul you were dismissive and disrespectful of the GIS data, referring to it as 'garbage.' For a time you met with Tori in a conference room, but then the confrontation moved to your cubicle where it was reported to me that you were "yelling" and "screaming" at Tori in ways that were extremely insulting and intimidating, not just to her but to other staff who observed this behavior. During this time, I was told, Tori continued to attempt to discuss the issue calmly in a professional way.

* * *

There have also been reports of similar behavior on your part as an ongoing pattern in past years. In 2009, I took the following steps to address such behavior:

- In a meeting with you, me and Research Manager Libby Starling you became increasingly agitated over GIS data that did not meet your needs, referring to it as 'worthless.' At that time, I indicated that your behavior was becoming hostile and needed to stop.
- Partly because of your behavior issues, I worked with Community Development Director Guy Peterson to arrange a day-and-a-half workshop for you and other managers in the Community Development Division on reducing workplace conflict and stress, led by international expert Anna Maravelas. The workshop contained much insight into how to prevent expressions of toxic anger and hostility occurring through the process of 'flooding' (being overwhelmed with negative emotion). It resulted in a Code of Conduct that you helped to create, and agreed to follow. This code was finalized in November and December. It included commitments to 'avoid personalizing disagreement and 'flooding' and to 'express views in non-threatening and healthy ways.' The workshop emphasized that from the time of the Code of Conduct forward, our managers would be held strictly accountable for behavior that violated it.

- In your end-of-year performance review, I noted that 'in 2010 it will be important for P.H. to channel her commendable passion in ways that adhere to the 'Code of Conduct' that is under development in the division.'

* * *

As part of this disciplinary action, I am also directing you to undertake the following actions:

- Participate in an ongoing performance improvement plan that I will manage, with the assistance from Learning and Organizational Development staff.
- By Friday January 22, offer to meet individually with the following staff to apologize for your behavior: Tori Dupre, Paul Hansen, Libby Starling, Ann Beckman. Your apology needs to include reference to both the January 5 incident and similar behavior in the past that may have affected each person and/or their staff (in the case of managers), and to stress your commitment to never let such things happen again.
- By Friday, January 29 (but after the aforementioned individual meetings), meet with staff of the Local Planning Assistance work unit in a group meeting that I will also attend as an observer. This meeting too must be for the apologizing for the January 5 incident and for similar behavior in the past, and to stress your commitment to never let such things happen again.

* * *

(Joint Exhibit 4) The Local Planning Assistance work unit consists of all of the persons reporting to the Grievant. There were about seven persons in this work unit. (Joint Exhibit 2)

The Code of Conduct referred to in the written reprimand was introduced as Employer Exhibit 15. The Grievant testified, in great detail, of the steps she took to comply with the Code of Conduct before, during and after the confrontation on January 5, 2010. The Grievant also testified that she was never told, nor did she have any idea that her conduct was one of the reasons for the workshop referred to in the written reprimand. The Grievant provided the Employer with her response to the written

reprimand in a document dated March 8, 2010. (Employer Exhibit 10) Her response was as follows:

Overview

- I adamantly deny the allegation that on January 5th I was involved in a verbal confrontation that included “screaming and yelling.”
- I am not aware of specific warnings from 2009 that would result in disciplinary action.
- I disagree with the WR [i.e., written reprimand] that the steps required by the WR are not meant as punishment. Disciplinary action is punishment.
- I was not interviewed for my account of what happened. I did inform my Director’s (sic) immediately of the interaction and was left with the impression that I would have an opportunity to discuss this further at a future time. I was not given the opportunity to offer my full account.

* * *

The events outlined in this memorandum have left me saddened and letdown by the organization. The WR has marred my career of over 18 years at the Council and caused me irreparable embarrassment towards others including peers in management and higher management.

(Employer Exhibit 10)

In addition to the Grievant, the Union called three witnesses. Although each heard at least some of Grievant-Dupre discussion, none heard anyone screaming, yelling or threatening to “slap” or “smack” anyone. In fact, Cheryl Olsen, Planning Technician, testified that she witnessed the whole event. She noted that Grievant unsuccessfully urged Ms. Dupre to terminate the discussion and attempted to withdraw from it. Ms. Olsen denied hearing either Grievant or Ms. Dupre scream or yell or say anything inappropriate.

The Employer called Mr. Vander Schaaf to testify. On cross-examination he acknowledged that subsequent to speaking with Ms. Beckman and Ms. Reetz, he next

heard about the events in question from the Grievant. He also acknowledged that the Grievant told him that she was trying to disengage from Ms. Dupre but that the latter continued to follow her. Mr. Vander Schaaf testified that he did not interview Grievant, *per se*.

V. THE EMPLOYER' POSITION

The Employer maintains that it had just cause to discipline the Grievant. It asserts that the Grievant's January 5, 2010 conduct is a clear violation of Council Policy 4-6b. Indeed, the Employer avers that the Grievant's actions constituted unethical, offensive conduct, which in fact disrupted the work of other employees.

Further, the Employer argues, the written reprimand that was issued to the Grievant is the lightest form of discipline that can be meted out and that it was intended, not as punishment, but as an inducement to the Grievant to improve her relationships with subordinates, other managers and her superiors.

Still further, the Employer claims that the Grievant had been warned previously not to engage in argumentative, hostile or dismissive conduct towards other employees. Although the Grievant had improved her relationships with other employees, her shouting, yelling and otherwise dismissive behavior of January 5, 2010, indicates that she needs further, more serious inducements to change her behavior.

Finally, given that the Grievant had been notified and counseled previously to amend her ways, the written reprimand given to Grievant was part of progressive discipline and should be sustained.

VI THE UNION'S POSITION

The Union begins by asserting that the Employer failed to prove that the Grievant was disciplined for just cause. First, MANA claims that the Employer failed to conduct a minimally acceptable investigation of the January 5, 2010 incident: Mr. Vander Schaaf was not trained in the proper conduct of a disciplinary investigation; Mr. Vander Schaaf inappropriately limited his investigation and, as a result, failed to uncover key elements of the confrontation; had Mr. Vander Schaaf conducted a proper investigation, he would have learned that Grievant was acting in a professional manner in accordance with the Employer's own guidelines; and Mr. Vander Schaaf failed to ask the Grievant for her version of the event and to ask the Grievant if she knew of others who were witnesses.

Second, the Union maintains that the Employer's assertion that it was engaging in "progressive discipline" is not supported by the evidence. To properly engage in progressive discipline, the Employer must issue a clear warning to an employee that his or her conduct is not permissible and will result in more serious discipline if continued. The Employer's claim that the Grievant's November 17, 2009 stellar performance review constitutes a warning is misplaced. Thus, the Grievant had no idea that a warning was being given to her when she examined the performance review.

For these reasons, MANA requests that the grievance be sustained.

VII DISCUSSION AND OPINION

In matters of discipline and discharge the burden of proof rests with the employer, who proceeds first with the presentation of its evidence. The union followed with a presentation of its contrary evidence. In this case, the undersigned, after carefully considering the record evidence, finds it to be equipoised, concluding that the Council

did not prove its claim of discipline for just cause by a preponderance of evidence. In addition, the undersigned finds that the Grievant was not given adequate “notice” that the conduct in question was unacceptable and, he concludes that while the Grievant was “angry,” Ms. Dupre was partly at fault.

The Employer issued the written reprimand after concluding that the Grievant’s conduct on January 5, 2010 was “dismissive”, “disrespectful”, “referring to Mr. Hansen’s GIS data as “garbage,” “yelling” and “screaming” and being “insulting and intimidating” all in violation of Council Policy 4-6b. However, for the several reasons, support for this conclusion is not sustained by the preponderance standard. First, consider the testimony below:

- The notes Mr. Vander Schaaf took of his interview with Mr. Hansen do not contain any reference to a threat to “smack” or “slap,” even though Ms. Beckman testified that such threat was directed at Mr. Hansen.¹
- According to Mr. Vander Schaaf’s notes, Mr. Hansen stated that although the Grievant was critical of his GIS mapping data and was “dismissive” of his opinion, she did not direct anger towards him personally. Moreover, Mr. Hansen did not tell Mr. Vander Schaaf that yelling or screaming had occurred. He was not called as a witness. (Employer Exhibit 5)
- The Grievant, both in her written statement and in her sworn testimony adamantly denied yelling, screaming at or threatening anybody. It is undisputed and the Grievant acknowledged that, in so many words, she loudly told Ms.

¹ Mr. Vander Schaaf also interviewed Ms. Beckman. Whether Mr. Beckman told Mr. Vander Schaaf that the Grievant directed her “smack” or “slap” remark at Mr. Hansen or Ms. Dupre is unclear from Mr. Vander Schaaf’s interview notes. However, at the hearing, she testified that the remark was directed at Mr. Hansen. (See Employer Exhibits 4 and 5)

Dupre “Don’t touch me,” but she did so after Ms. Dupre grasped or grabbed her arm at the elbow.

- Even though it was alleged that the Grievant was yelling, screaming and dismissive, as she tried to withdraw and discourage further discussion with Ms. Dupre. However, the latter, undiscouraged, followed her from the conference room and to Grievant’s office in a continuing effort to persuade the Grievant to listen to argument; it was Ms. Dupre who grasped or grabbed the Grievant’s arm and not *vice versa*.
- In addition to the Grievant, the Union called three witnesses. Each was variously present in the area at the time of the dispute. All heard a “heated discussion,” but none heard any yelling or screaming. None heard any threats of any type.

Second, the Union argues that the Grievant’s due process rights were violated because the Employer: (1) failed to interview the Grievant; (2) failed to interview “all” prospective witnesses to the events of January 5, 2010; and (3) appeared to have reached its disciplinary decision before beginning its “formal” investigation of the matter. However, these arguments are largely misdirected. The Grievant did give her side of the story, albeit a truncated version, on January 5, 2010, to both Messrs. Vander Schaaf and Peterson; the Grievant also prepared a written statement that was considered by the Employer; critically, the Grievant was given her “day in court” at the arbitration hearing. Regarding the non-interviewed Union witnesses, they too were given the opportunity to present testimony at the hearing about what they observed and/or heard on January 5, 2010. The fact that the Employer’s investigation was incomplete worked to the Employer’s detriment. That is, failure to interview “key” witnesses who

subsequently appeared on behalf of the Grievant at the hearing exposed the Employer's case to risks that it otherwise would not have run.

The Union's third due process argument stems from the content of the notes Mr. Vander Schaaf took at the meeting that he and Mr. Peterson had with the directors of HR and ODEO. This content is disturbing. It suggests that the allegations leveled against the Grievant, as largely cast by Ms. Beckman, were pre-judged to be valid. Indeed, the record suggests that this judgment was reached even before Ms. Dupre and Mr. Hansen were interviewed. (Employer Exhibit 3) Still, this due process error harmed the Employer, not the Grievant. In full consideration of all the testimony presented at the hearing, it is concluded that the evidence is equipoised and, thus, the Employer failed to prove its case on the merits, procedural challenges aside.

Third, while the evidence about the Grievant's performance evaluations strongly suggested that she is a very good manager, it failed to persuasively support the Employer's contention that the Grievant was on "notice" that the next occurrence of co-worker or subordinate disrespect would result in formal discipline. Therefore, the undersigned concludes that this due process shortcoming is added grounds for overturning the Council's disciplinary action, as the Union urged.

Finally, arbitral notice is taken of the fact that Ms. Dupre is subordinate to Grievant and she failed to follow clear instructions for using a specific map to calculate the cost of providing the additional sewage for the City of Orono. In addition, when told of her error (which potentially could have cost the Metropolitan Council millions of dollars), Ms. Dupre argued with the Grievant and asked for time to correct the error. Moreover, the Grievant attempted to follow the Council's Code of Conduct by

withdrawing and moving the discussion to a private conference room where Ms. Dupre repeatedly refused to follow the requests of the Grievant to end the discussion. As a result, the volume of the conversation escalated and moved throughout the office area. In light of these facts, it is difficult to avoid considering whether Ms. Dupre's conduct was partly responsible for incited the Grievant's anger: A conclusion supported by the record's showing that in the past Ms. Dupre has been a challenging presence in staff meetings led by managers.

VIII AWARD AND ORDER

The undersigned is not persuaded that the Grievant was disciplined for just cause. Hence, the grievance is sustained. The Employer is ordered to rescind the written reprimand and promptly remove all evidence thereof or reference thereto from Grievant's personnel file.

Issued on the 28th day of December, 2010
from Tucson, Arizona.

Mario F. Bognanno, Labor Arbitrator &
Professor Emeritus