

**In the Matter of Arbitration**

**Between**

**City of Plymouth, MN**

**Employer**

**and**

**American Federation of State, County  
and Municipal Employees, Council No. 5  
Local 3839**

**Union**

**) Issue: Timely Filing of  
Grievance, and 20  
Day Suspension  
of Employment**

**) BMS Case No: 11-PA-0315**

**) Hearing Site: Plymouth, MN**

**) Hearing Date: Nov. 30, 2010**

**) Post Hearing Briefs Filed:  
Jan. 7, 2011**

**) Award Date: Jan. 28, 2010**

**) Arbitrator: Richard J. Dunn**

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**JURISDICTION**

Pursuant to the relevant provisions in the parties' 2009-2010 Collective Bargaining Agreement, this grievance was heard on November 30, 2010 in Plymouth, Minnesota. The City of Plymouth and the Union submitted this grievance matter for resolution by a neutral arbitrator, selecting the undersigned, after a panel was requested from the State of Minnesota Bureau of Mediation

Services. At the hearing the City of Plymouth representative raised the issue as to whether the Union failed to institute grievance arbitration in a timely manner under the Collective Bargaining Agreement, but agreed at the hearing to proceed with the matter for a "final and binding" determination. This is further discussed below. There were no other procedural issues, and the parties stipulated that the matter was properly before the Arbitrator for a final and binding decision.

The Collective Bargaining Agreement Sections 12.4 through 12.10 provide for compulsory binding arbitration proceedings as the final step in the grievance procedure. Section 12.10 requires the following: "All decisions rendered shall be in writing, dated, and shall set forth the decision and reason for the decision and be transmitted promptly to the EMPLOYEE REPRESENTATIVE and to the EMPLOYER."

Both sides were afforded a full and fair opportunity to present their case: testimony was sworn and cross-examined, and exhibits were introduced in the record by both parties. Post-hearing briefs were filed on January 7, 2011. Thereafter, the matter was taken under advisement.

## **APPEARANCES**

For the Employer:

Mr. Roger Knutson, Campbell Knutson, Attorney for the City

Mr. Doran Cote, Public Works Director

Mr. Jim Renneberg, Assistant City Engineer

Ms. Givonna Kone, Human Resources Manager

For the Union:

Mr. Jeffrey Fowler, Field Representative, AFSCME Council 5

Mr. Stephen Deuth, Senior Engineering Technician

Mr. Warren Kulesa, Steward, Local 3839

Mr. Robert Rood, President, Local 3839

## I. FACTS AND BACKGROUND

The American Federation of State, County and Municipal Employees, Council No. 5, Local 3839 (hereinafter "Union") represents clerical, technical and professional employees in the City of Plymouth (hereinafter "City"). This includes employees in the Engineering Division. Mr. Steve Death, the Grievant, is a Senior Engineering Technician working in the Engineering Division. Mr. Death has been employed by the City since 1989, when he began employment as an Engineering Aid. He was promoted to Senior Engineering Technician - Acquisitions in 1999.

The City of Plymouth is a western suburban community of the Twin Cities managed by a City Manager, Ms. Laurie Ahrens, who reports to a Mayor -City Council. Reporting to the City Manager, among others, is the Public Works Department managed by a Director of Public Works, Mr. Doran Cote. The Assistant City Engineer is Mr. Jim Renneberg who reports to Mr. Cote. Mr. Renneberg became Mr. Death's immediate supervisor in March 2008.

The City and the Union are parties to the Collective Bargaining Agreement, which was effective January 1, 2009 through December 31, 2010 (Joint Exhibit One).

Mr. Renneberg suspended Mr. Death in a memo on March 1, 2010 for twenty (20) days without pay beginning March 2, 2010 to and including March 29, 2010 for not performing at the level of a Senior Engineering Technician and violating a City policy. (Employer Exhibit One) On March 19, 2010 the City Public Works Director in a memo to Mr. Jeff Fowler documented a March 12, 2010 meeting where "we agreed the meeting itself would constitute a Step 3 grievance in accordance with the grievance procedure." (Employer Exhibit One) Mr. Cote in the memo upheld the suspension and stated that the grievant "will remain subject to the terms and conditions of the current work plan", and "his performance will be evaluated in 3-4 weeks." He further stated that "If progress is not made towards meeting the requirements for a Senior Engineering Technician, progressive discipline up to and including termination will continue." (Employer Exhibit One)

In a March 25, 2010 e-mail from Mr. Warren Kulesa, writing on behalf of Mr. Fowler, to Ms. Laurie Ahrens, Mr. Kulesa notified the City that the Union would proceed to the next step in the grievance procedure. (Employer Exhibit One) Further, Mr. Death on March 30, 2010 wrote to

City Manager Ahrens detailing his response to the Public Works Director and requesting to proceed to Step Four of the grievance process. Mr. Deuth in that memo appealed the suspension and requested the twenty (20) day suspension be rescinded. (Employer Exhibit One) The parties met on April 5, 2010 for a fourth step hearing. In a memo to Mr. Deuth, the City Manager on April 12, 2010 wrote a response to this Step Four. The City Manager denied the grievance and concluded as follows:

"My only comment is that each step in this year and a half long process the City has attempted to provide corrective action and assistance to Steve so that he can perform the work of a Senior Engineering Technician consistently. The series of reviews document many more failures than successes. The standard has not changed. The Union has provided no evidence that others are held to a different or lower standard." (Employer Exhibit One)

On April 20, 2010 Mr. Jeff Fowler, Field Representative of AFSCME Council 5, wrote by e-mail to Ms. Laurie Ahrens and Ms. Jeanette Sobania, saying:

"Please let this message serve as notification of the union's intent to arbitrate the grievance filed on behalf of Steve Deuth. The decision of the council's arbitration committee will be the determining factor. A hard copy of this notice will follow." (Employer Exhibit One)

On October 7, 2010 Mr. Fowler e-mailed Ms. Givonna Kone, Human Resources Manager for the City, requesting a grievance arbitrator panel. The Bureau of Mediation Services responded on October 7, 2010 saying the request had been successfully submitted. A panel of arbitrators was subsequently sent to the City and AFSCME Minnesota Council 5 on October 11, 2010 under the signature of Mr. Steven G. Hoffmeyer, Commissioner of the Bureau. (Employer Exhibit One)

## **II. STATEMENT OF THE ISSUE**

Two issues are presented. First, did the Union process this grievance in a timely manner under the 2009-2010 Collective Bargaining Agreement? Second, did the City of Plymouth have just cause to suspend the Grievant for twenty (20) days without pay, and if not, what is the appropriate remedy?

The first issue regarding procedural timeliness of processing the grievance for arbitration will be reviewed and decided first.

### **III. CONTRACT PROVISIONS RELEVANT TO THE PROCEDURAL ISSUE**

The relevant contract provisions include Article 11, Section 11.2 and Section 11.3 of the 2009-2010 Collective Bargaining Agreement. Section 11.2 refers to the five forms of discipline, namely oral reprimand, written reprimand, suspension, demotion or discharge. Section 11.3 states:

Notices of suspension, demotions, and discharges will be in written form and will state the reasons for the action taken. Suspensions will set forth the time period for which the suspension shall be effective. Demotions will state the classification to which the Employee is demoted. The EMPLOYEE REPRESENTATIVE and the Union President will be provided with a copy of all written reprimands, notices of suspension, demotion, or discharge.

Article 12 specifies the grievance procedure. Section 12.2 focuses on the Waiver of Grievance and Section 12.4 refers to the timing of instituting arbitration as follows:

12.2 The time limitations set forth in the Article are of the essence of this Agreement. No grievance shall be accepted by the Employer unless it is submitted or appealed within the time limits set forth in Section 12.3 of this Agreement. If the grievance is not submitted within the timelines set forth in Steps 2 and above it shall be considered to have been settled in accordance with the Employer's last answer.

12.23 The number of days indicated at each level shall be considered as a maximum, and every effort should be made to expedite the process. The time limits specified may be extended only by mutual agreement in writing.

12.4 If the EMPLOYEE REPRESENTATIVE is not satisfied with the disposition of the grievance by the City Manager, the EMPLOYEE REPRESENTATIVE, may institute compulsory binding arbitration proceedings within twenty (20) calendar days according to the following conditions and regulations.

12.6 No decision shall be made by the arbitrator without the participation of the representative of both the aggrieved party and the EMPLOYER, unless, in the judgment of the arbitrator, either the EMPLOYER or the aggrieved party is unnecessarily delaying arbitration proceedings (and after due notice of such judgment by the arbitrator to both parties hereto), in which case decisions may be reached without the participation of the party causing the delay.

#### **IV. EMPLOYER POSITION**

First as to the timeliness issue for instituting arbitration, the City argues that the Union did not make a decision to arbitrate this grievance in a timely way consistent with the time limitations set forth in the Agreement. The City argues "The Union did not actually decide whether or not to arbitrate for several months." The April 20, 2010 e-mail from Union Field Representative Fowler was only a notification of the Union's intent, claims the City. The City representative states: "The Union cannot unilaterally extend the time limits of the agreement as it has attempted to do here." (Employer Post-Hearing Brief)

Further the City argues the Union did not seek nor did it receive an extension of time for this arbitration. "Simply expressing an indefinite desire to arbitrate and dissatisfaction with the City Manager's decision is insufficient to meet the demands of the Collective Bargaining Agreement." (Employer Post-Hearing Brief)

The City representative goes on to say: "Binding arbitration was "instituted" when the Union requested the list of arbitrators from BMS. The City had by then concluded that the Union was not pursuing the grievance. If the notice of intent was sufficient to institute arbitration, nothing would prevent the Union from proceeding six years not just six months later. A prolonged delay in resolving a grievance undermines the purpose of progressive discipline." (Employer Post-Hearing Brief)

#### **V. POSITION OF THE UNION**

With regard to the timeliness issue for instituting arbitration, the Union argues that the City did not raise a timeliness issue concerning arbitrability at any point. Nor was this issue raised, according to the Union, in the pre-hearing conversations.

Further a Union e-mail on April 20, 2010 from Union Field Representative Fowler to City Manager Ahrens notified the City of the Union's intent to arbitrate. The Union contends this e-mail was sent in a timely manner consistent with the Agreement provision of Section 12.4, which specifies that arbitration proceedings may be instituted within twenty (20) calendar days of the disposition of the grievance by the City Manager, which occurred on April 12, 2010 in her letter to Field Representative Fowler.

## **VI. DECISION**

As to the timeliness of instituting the arbitration by the Union, there is a disagreement about whether the Union complied with the Agreement with respect to "instituting" the arbitration within twenty (20) days of the disposition of Step Four of the grievance by the City Manager. The Union notified the City of the "intent to arbitrate the grievance" on April 20, 2010 which was within the twenty (20) day period after the April 12, 2010 Step four communication of the conclusion by the City Manager upholding the decision of the Public Works Director.

After the passage of several months, on October 7, 2010 Mr. Fowler forwarded an e-mail on October 7, 2010 to Ms. Giovanna Kone indicating the request for an arbitration panel in the S. Dueth suspension. The Union asked the Bureau of Mediation Services for a list of arbitrators. But the City had apparently at some intermediate point unilaterally, without consulting the Union or those who gave notice of the intent to arbitrate, concluded that the Union was not going to pursue arbitration despite the Union's e-mail notification on April 20, 2010.

During this passage of time, the City and the Union apparently did not confer as to the Union's expressed intent to arbitrate. Nor did the City raise the issue, according to the testimony of the Union Field Representative, until the day of the arbitration hearing, on November 30, 2010 when the City surprised the Union with raising the timeliness procedural issue. The parties at the hearing discussed the issue and concluded by asking the undersigned to consider this procedural matter and factor it into the decision after also hearing the merits of the case.

The BMS provided the list of arbitrators to the Union and the City on October 11, 2010, acting in good faith that the parties were proceeding to arbitration. Both parties reviewed the list of arbitrators and concurred on the selection of one arbitrator, and sent notification of the selection

of the undersigned arbitrator. There was no protest by the City at this point on the arbitrability issue.

When this issue was presented at the hearing by the City representative, after some discussion of the issue, he and Mr. Fowler agreed to proceed with testimony and presentation of exhibits for a full hearing as to the merits of the suspension of the Grievant, while asking the arbitrator to decide later on this procedural matter.

While there was a delay of many months between the Union notice of intent to arbitrate and their request for an arbitration panel, no damage was incurred by any party during this period. The Union gave notice of the intent to arbitrate but there was a delay in instituting the arbitration. The Union had a reason to consult with the Council's arbitration committee. The delay extended the time before action on the issue which had already been developing over several years.

During the time period after the Union gave notice of intent to arbitrate there were opportunities for the parties to make a good faith effort to confer as to the Union's expressed intent to arbitrate.

Therefore there is some reason in this case to proceed on the merits of the case, and to treat the April 20, 2010 Union notification of intent to arbitrate as in compliance with the Agreement.

## **THE SECOND ISSUE: SUSPENSION**

The second issue is whether the City had just cause to suspend the Grievant for twenty (20) days.

## **VII. FACTS AND BACKGROUND**

Mr. Death testified that he has an employment record in the City Engineering Department extending back to 1989. He had completed an 18 month course in land surveying at the Hennepin Technical Center prior to his City employment. Also previous to City employment, he had worked for Hansen Thorp Pellinen Olson, Inc. as a surveying technician. His salary is \$71,884.80 annually.

The record of performance evaluations of Mr. Deuth indicates that he performed overall satisfactorily, meeting or exceeding expectation from 1999 through December 2007. (Employer Exhibit Three) Performance evaluations for 2008 and 2009 rated Mr. Deuth as needing improvement, and in 2010 as not meeting expectations. (Employer Exhibit Three). These evaluations were generally based on a five point scale, ranging from unacceptable overall performance, needs improvement, meets requirements, exceeds requirements to outstanding performance. (Employer Exhibit Three) The supervisors evaluating Mr. Deuth's performance included three individuals prior to 2008, when Mr. Renneberg began to supervise Mr. Deuth. Mr. Renneberg subsequently completed the evaluations in 2008, 2009 and 2010 (Employer Exhibit Three).

Mr. Renneberg testified that Mr. Deuth for the last one and one-half to two years had not been performing satisfactorily and was unable to meet current responsibilities. He testified about shots not correctly labeled by Mr. Deuth, faulty shots, missed problems during survey work, incorrect labeling of storm sewers and sanitary sewers, inaccurate pipe measurement, including one project where the pipe measurement was off by 3.68 feet, and rewriting of the easement associated with the Highway 55 drainage project.

The City introduced exhibits depicting the training courses in which Mr. Deuth participated from 1989 through 2009. (Employer Exhibit Four) These included technical training courses in areas such as surveying, survey field training, subcutting and pipe installation relating to street reconstruction, erosion control, as well as legally oriented courses such as law and basics for eminent domain, and easement and right of way. There were courses in writing and dealing with difficult people.

There is also a record of discipline as a Senior Engineering Technician, including a documented verbal reprimand on January 5, 2005, a written reprimand on December 23, 2008, a two day suspension on April 14, 2009 and another written reprimand on April 20, 2009, and a ten day suspension on September 14, 2009 subsequently reduced during the grievance process in 2009 to a seven day suspension. (Employer Exhibit Two)

The 2005 verbal reprimand was documented by Ms. Anne Hurlburt, Community Development Director and Acting Public Works Director, concerning Mr. Deuth's unsatisfactory performance

related to the vacation of a road right-of-way. ( Employer Exhibit Two) The 2008 written reprimand related to sod quantity measurements and a \$12,000 payment due the contractor because of an inaccurate method of measuring the sod quantities in a 2008 reconstruction project. Mr. Renneberg testified at the hearing with details about the instructions given to Mr. Death for measuring sod with a measuring wheel, and, in contrast, the actual way Mr. Death estimated the sod required from plat lengths. He did not use the measuring wheel as instructed, resulting in a measurement discrepancy. (Employer Exhibit Two)

Mr. Renneberg also testified that the April 14, 2009 suspension of two days without pay on April 15 and April 16, 2009 resulted from missed survey points on a 2009 street reconstruction project, inaccurate labeling of a storm sewer as a sanitary sewer, inaccurate measurements of storm sewer sizes, and incorrect shots. Mr. Renneberg indicated that these errors were made as a result of not following directions and not taking the necessary time to survey the site. Additionally there was a second incident where Mr. Death did not verify the accuracy of a property description which then led to a revision in the property description with an explanation to a property owner before an easement could be recorded.

The April 20, 2009 written reprimand documented by Mr. Renneberg, concerns mistakes that caused Mr. Renneberg to conclude that Mr. Death was not performing at the level of a Senior Engineering Technician. These mistakes related to: the Cimarron Ponds Survey where the grievant mislabeled shots and failed to label shots; the Wild Wings Survey, where the Grievant missed shots and failed to label shots; the 2008 Street Reconstruction Project Sod requirements for accurate measurements previously discussed; and other mistakes described in an April 20, 2009 memo to Mr. Death as part of a review follow-up. (Employer Exhibit Two)

The September 2009 ten day suspension documented on September 15, 2009 was for a failure by Mr. Death to follow directions, which was interpreted by Mr. Renneberg as insubordinate behavior. Mr. Death grieved this suspension, which was subsequently reduced by Mr. Cote to seven (7) days. After appealing this to the City Manager, Ms. Ahrens in her November 6, 2009 letter to Mr. Fowler upheld the suspension of seven (7) days, and clarified that the central issue was not insubordination, but rather work accuracy, completeness, and competency of performing tasks at the level of a senior engineering technician. (Employer Exhibit Two). The Union

accepted this settlement in an e-mail from Mr. Fowler to Ms. Jeanette Sobania on November 20, 2009. (Employer Exhibit Two)

On November 16, 2009 Mr. Renneberg wrote a memo to Mr. Deuth following up on two assignments to him with regard to the East Parkers Lake Reconstruction Project and project work for the Parks Department. (Employer Exhibit One) Mr. Deuth responded with respect to each project, and detailed his reasons for the approach to work, referencing that he was accessing resources available in the department to assist him with these projects. (Union Exhibit One)

A January 4, 2010 memo from Mr. Renneberg to Mr. Deuth reviewed assignments he was performing, and noted that three assignments did not meet expectations, while one assignment met expectations. In particular, the memo describes the following: that his work did not verify the rock boulder vanes in Wood Creek; incorrect labeling of shots in surveying wetland delineation flags along South Shore Drive; inefficient downloading of data on this project; and inefficient time use in taking additional shots on the project. There was also inadequate performance documented with regard to an assignment on Street Lighting Charge(s). (Employer Exhibit One)

Also during January 2010 there were three pieces of correspondence relating to the idling of a City vehicle for which Mr. Deuth was responsible while conducting field work. On January 12, 2010 Mr. Deuth left the vehicle unattended, unlocked and idling for several hours, when a City resident phoned the Police who came to the scene. The January 12, 2010 Police Report is part of the Employer Exhibit One, along with these other pieces of correspondence relating to this incident. This idling of a City vehicle violated a City policy regarding the use of equipment and vehicle operation safety, dated October 2006, to the effect that vehicles will not be idled unattended unless required by the operation. (Employer Exhibit One)

On February 26, 2010 Mr. Renneberg wrote a performance review covering Mr. Deuth's work since the last review on September 14-15, 2009, concluding again that his performance was not meeting expectations of a Senior Engineering Technician. Mr. Renneberg also testified about matters during this period, including the January 12, 2010 incident where Mr. Deuth left an unattended City vehicle running and unlocked for an extended period of time during field work.

Mr. Deuth responded with undated documentation about the Bass Lake Outlet Survey, the disposal of City owned property, verifying easements, following instructions and running of the vehicle. He wrote: "In the past, city operated vehicles have been started to warm up and kept running during cold winter months in all departments. Since I was informed of now adhering to past policy of vehicles left running, I have started a vehicle only when ready to leave. I have already discussed this with Doran, received a follow-up department email regarding the policy and thought this issue was also resolved." Mr. Deuth summarized his performance with the following:

"With these recent performance reviews, I have been scrutinized regarding my performance. I want to state that prior to my 2008 performance review, I have received meets or exceeds requirements in my job performance as a Senior Engineering Tech. Beginning with the 2008 review, I have received disciplinary action for job performance. My understanding is that those issues have been resolved and I have accepted the disciplinary action. Since September 2009 I have made every attempt to be clear with my supervisor by asking questions, getting further clarification, attending to details, and have worked hard to be accurate and efficient. Based on these current reviews, it was unclear to me when I might be allowed to ask a question or if I am allowed to seek further information in our department. My understanding at this point, just to be clear, is that I am to be speak (sic) solely to Jim for any information on my assignments. I will follow this directive from Jim, and work to clarify solely to Jim, and work to clarify and review each assignment with Jim as stated in the "Feedback" paragraph dated November 6, 2009 from Laurie Ahrens. I am committed to completing work accurately and efficiently as I always strive to do." (Union Exhibit One)

On March 1, 2010 Mr. Renneberg took further disciplinary action and suspended Mr. Deuth without pay for not performing at the level of a Senior Engineering Technician and violating City policy. Mr. Renneberg testified that his work was not satisfactory, that he should come to him for information rather than ask others in the City departments, that he should do more of the work himself, and engage in less chatting. Mr. Deuth was expected to use time more efficiently, according to Mr. Renneberg. Upon cross examination by Mr. Fowler, Mr. Renneberg indicated he had to figure out mistakes made during field work by Mr. Deuth, whereas Mr. Deuth

indicated he was doing the job. Mr. Fowler asked if there were confusion in communications, or a need for additional training, and Mr. Renneberg responded that he was not aware of a class on time management specifically for survey work, and that most classes focused on technical survey training. He did not believe training was the answer to accurate shots, labeling items correctly, or failure to label items. Mr. Fowler questioned whether Mr. Death should have been given more information about methodology to do the work, and more information as to how to correct mistakes. Mr. Renneberg testified that he did not refuse any training requested, and did not believe technical survey training was the appropriate remedy to these performance issues.

Mr. Cote testified that he concurred in the suspension of twenty (20) days; that these work problems, such as the idling vehicle, caused the City to incur real costs and perception problems with the public; and also that rework was time consuming and costly, among other issues.

Mr. Death testified under questioning by Mr. Kulesa that at least one other employee also left the vehicle running in the winter during field work so as to warm the equipment and to charge the batteries. Mr. Death testified that he also practiced this. In his March 30 memo to Ms. Ahrens, he indicates that "starting and running vehicles in cold weather conditions has been an ongoing practice and acceptable." He thought the issue of the vehicle was resolved in discussion with Mr. Cote. (Employer Exhibit One)

In his memo requesting the suspension be rescinded, Mr. Death also responds to the matter of the property dispute between the City and a property owner concerning easement information, indicating he had no information about this property dispute situation. He also writes that the issues for which he received disciplinary action have been resolved, and he has accepted these disciplinary actions. He indicates a commitment to completing assignments accurately and efficiently as he always strives to do. He acknowledges negligence with the Street Light Charges Research assignment, and writes "In this project, I did not access the city's search engine to get complete information." (Employer Exhibit One)

At the hearing, Mr. Knutson asked Mr. Death if any training that he requested was denied, and Mr. Death responded that he did not recall. He also testified that he had not told Mr. Renneberg that he did not know how to take shots, that indeed he knew how to take shots. He had requested more time for some tasks, and was granted this time. He testified that instructions were clear,

although he could have asked more questions at times. He also wanted Mr. Renneberg to travel to the field with him to go through some of the tasks. The Arbitrator asked Mr. Death if he were able to solve those problems that Mr. Renneberg had indicated a Senior Technician should be able to solve, and he indicated he was not always able to do so.

Following the March 1, 2010 suspension, there were other memos and letters as noted in the above discussion about procedure towards arbitration. These included a March 19, 2010 letter from Mr. Cote to Mr. Fowler, a March 25, 2010 e-mail from Mr. Kulesa to Ms. Ahrens, an April 12, 2010 letter from Ms. Ahrens to Mr. Fowler, and Mr. Fowler's e-mail response on April 20, 2010 stating the union's intent to arbitrate the grievance. (Employer Exhibit One) Again these were described above in the discussion regarding procedural matters associated with this arbitration.

## **VIII. RELEVANT CONTRACT PROVISIONS**

### Article 11. DISCIPLINE

11.1 New Employees and Employees who have been rehired shall be on a six (6) month probationary period and may be disciplined or discharged by the EMPLOYER in its sole and exclusive discretion at any time during such probationary period. Employees who have completed the probationary period may only be reprimanded, demoted, suspended, or discharged for just cause.

11.2 Discipline may be in one or more of the following forms:

- (a) Oral reprimand
- (b) Written reprimand
- (c) Suspension
- (d) Demotion; or
- (e) Discharge

11.3 Notices of suspension, demotions, and discharges will be in written form and will state the reasons for the action take. Suspensions will set forth the time period for which the suspension shall be effective. Demotions will state the classification to which the Employee is demoted.

The EMPLOYEE REPRESENTATIVE and the Union President will be provided with a copy of all written reprimands, notices of suspension, demotion, or discharge.

11.4 Employees may examine their own personnel files at reasonable times under the direct supervision of the EMPLOYER.

## **IX. EMPLOYER POSITION**

The position of the City of Plymouth is that the Mr. Deuth has repeatedly been disciplined for poor performance and was forewarned that such performance would be subject to additional progressive discipline. The City believes it had just cause to discipline Mr. Deuth because poor performance is just cause for discipline. Therefore the City suspended him for twenty (20) days, citing seven (7) tests of just cause that were met. (Employer Post Hearing Brief)

The City Attorney argues that shorter suspensions were deemed ineffective, and Mr. Deuth continues to deny that he has ever made a mistake in his work. The City's attorney writes: "The purpose of disciplining Deuth has been to make him aware that a change in performance is necessary. Deuth refuses to acknowledge this. Progressive discipline is appropriate and necessary."

The City takes the position that the Assistant City Engineer worked with Mr. Deuth for three years to improve his performance, with repeated statements of expectations. The City Attorney writes: "The City has the right to expect satisfactory performance from every employee, especially from a Senior Engineering Technician who is paid \$71,884.80 per year. Deuth's poor performance has delayed and added extra cost to projects, required other employees to do his work, has taken up the time of his supervisors and has embarrassed the City. Given the service demands on the City and its limited resources, the City cannot afford to continue to check and double check everything Deuth does. His unsatisfactory work has harmed both the City and the taxpayers." (Employer Post Hearing Brief)

## **X. UNION POSITION**

According to their post-hearing brief, the position of the Union is that the discipline of Mr. Deuth should be removed from his record and he should be made whole by awarding him his lost wages and any other benefit he lost as a result of this twenty (20) day suspension.

Mr. Deuth, according to the Union, is a dedicated and long term employee of the City who was assigned a new supervisor who found his work unacceptable. Mr. Renneberg did not adequately retrain him on the standards he expected for performance. The Union Field Representative writes: "Mr. Deuth was met at every turn with criticism and punishment for work product that had been found acceptable by at least four other supervisors. When he asked for guidance he was told that a person in his job classification should already know how to do his work, when he attempted to talk with other employees he was told he could not. He was given no type of positive reinforcement or the opportunity to model the habits of another employee. Mr. Deuth was not given this opportunity, he was allowed to continue working how he always had because management could not or would not do the work to change his behavior." (Union Post Hearing Brief)

Further the Union believes meetings to deal with the issues were punitive in nature. Mr. Deuth felt he had to comply with a different standard of performance relative to other employees in the Department, and unusual restrictions were placed on him. Co-workers were not allowed to assist with his work in a way that Mr. Deuth would have considered helpful, and they avoided him and "gave him a wide berth".

The Union Field Representative states in his post hearing brief that they believe the vehicle that was running while Mr. Deuth was in the field, while not condoned, happens with other City vehicles and does not typically result in a call to the police. (Union Post Hearing Brief)

## **XI. OPINION**

In matters of discipline the burden of proof rests with the employer, who proceeds first with the presentation of evidence. The Union followed with exhibits and testimony.

The Union Field Representative writes in his post-hearing brief that management would not or could not do the work to change Mr. Deuth's behavior and work practices. Yet the memos from

Mr. Renneberg, which were introduced as evidence of the performance record, regularly reviewed and critiqued this work. He cited practices and work habits such as time management that needed to change, as well as those that were acceptable. These memos gave direction to Mr. Death. There was positive reinforcement for acceptable work, and negative consequences for the unacceptable performance, including progressive discipline with numerous verbal and written reprimands and suspensions of employment without pay.

The verbal reprimand on January 5, 2005 and two written reprimands in December 2008 and April 2009, as well as the two suspensions in April 2009 and September 2009 gave adequate and sufficient notice to Mr. Death that he needed to change the conduct of his work and work performance. He was given forewarning, both verbally and in writing, from multiple levels of management of the City, including the Assistant City Engineer, the Public Works Director and the City Manager, of possible further discipline due to continued conduct and practices that were not meeting performance expectations. There were follow-up conferences and written reports documenting where Mr. Renneberg gave specific direction to Mr. Death about expected work practices.

There is extensive documentation of Mr. Death's performance, and the facts and circumstances focusing on his performance were adequately and fairly reviewed by three levels of City management. Indeed Mr. Death acknowledges some of these performance issues, such as the negligence to research and obtain complete information with regard to the Street Light Charges Research assignment, and the violation of City policy in idling the City vehicle for a long period of time. For other performance incidents he gave explanations in some cases, but at other times he did not acknowledge the deficiencies in performance which Mr. Renneberg described.

The twenty (20) day suspension followed a seven (7) day suspension and other, previous lesser forms of discipline. The most recent suspension at issue represented progressive discipline in an attempt to change performance, which these previous shorter suspensions had not accomplished. The Grievant testified that he did not recall denial by his City supervisor of any training that could have been offered by the City, and in his testimony he did not cite any specific training courses or curriculum that he sought as applicable to his work. Mr. Death could have requested training to address some of these approaches to work, but did not do so. He requested that Mr. Renneberg spend time in the field with him. Mr. Renneberg chose to regularly review Mr.

Death's work products, regularly meet with him, and document and discuss what was expected in his performance, including corrective actions to be taken. When questioned by the undersigned as to whether he was able to solve problems associated with survey work, the Grievant responded that sometimes he was not able to do so. Arbitral notice is taken that Mr. Death did not recall requesting training in problem areas.

The idling vehicle incident was acknowledged by the Union as a practice not to be condoned. It was a clear violation of the City policy.

The Union alleges that a different performance standard was applied to Mr. Death relative to other employees. No such evidence was offered, nor did any witness testify to support this contention. The Union did not introduce any evidence of discrimination in the treatment of Mr. Death. The City consistently used the same five point scale performance evaluation form that was completed for other City employees. This form was the same form that had been used through many years at the City. Again, no Union evidence with respect to a different standard was introduced. The Grievant needed to perform satisfactorily in order to fulfill the employment relationship, as do all City employees.

The most specifically articulated test of the just cause standard was in a case written by Arbitrator Carroll R. Daugherty, which has subsequently been expanded upon in two books.<sup>1</sup> The author of the revised edition of this book, Donald F. Farwell, wrote in "Just Cause - the Seven Tests" that seven key questions each must be answered affirmatively to indicate just cause for disciplinary action.<sup>2</sup>

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<sup>1</sup> The original book entitled "Just Cause, the Seven Tests" was authored by Adolph M. Koven and Susan L. Smith, published by Coloracre Publications, Inc. San Francisco California in 1985. This treatise described the seven test questions and cited numerous cases on which this research was based.

<sup>2</sup> "Just Cause - the Seven Tests", Second Edition, Revised by Donald F. Farwell, and published by the Bureau of National Affairs, 1992.

The intent of this test is to improve the fairness of disciplinary processes. These test questions are:

1. NOTICE: Did the Employer give to the employee forewarning or foreknowledge of the possible or probably consequences of the employee's disciplinary conduct?
2. REASONABLE RULE OF ORDER: Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might properly expect of the employee?
3. INVESTIGATION: Did the Employer, before administering the discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. FAIR INVESTIGATION: Was the Employer's investigation conducted fairly and objectively?
5. PROOF: At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. EQUAL TREATMENT: Has the Employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?
7. PENALTY: Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's *proven* offense, and (b) the record of the employee in his service with the Employer?

Each of these test questions can be answered in the affirmative in this case. Notice of possible or probable consequences has been given by the City through verbal and written reprimands and suspensions previous to this March 1, 2010 twenty (20) day suspension, with several notices that further discipline may be undertaken for poor performance. The City's directives and disciplinary action related to the efficient and safe operation of City surveying and Public Works projects, as well as the performance expectations of the Grievant. For example, the vehicle that was left running and unattended was in violation of safe operation of City vehicles. And again, the Employee needed to perform work duties satisfactorily to fulfill the employment relationship.

There were discussions with the Grievant on numerous occasions to investigate reasons for the approach taken by the Grievant to work, including follow-up reviews and performance reviews

and consideration of the Grievant's written responses. The Grievant was given numerous opportunities to review performance matters and present his rationale for performance and approach to work. He was presented with the opportunity to discuss this with the managers in the City, including the Director of Public Works and the City Manager. The documentation of performance issues was available to the Grievant, who acknowledged the validity of some of the City's reasons for discipline, while taking exception to others. There was no evidence of discrimination introduced in the hearing testimony, nor in the post-hearing brief, although during the hearing there were Union allegations of different treatment of the Grievant relative to other employees. The twenty (20) day suspension was related to the seriousness of continued performance deficiencies, which have been adequately documented.

## **XII. THE AWARD**

For the reasons discussed above, the undersigned is persuaded that the Grievant was disciplined for just cause as provided in Article 11 of the 2009-2010 Collective Bargaining Agreement. Hence, the grievance is denied. The Grievant's disciplinary suspension of twenty (20) days without pay is sustained.

Issued and ordered on this 28th day of January 2010

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Richard J. Dunn, Arbitrator