STATE OF MINNESOTA

BUREAU OF MEDIATION SERVICES

In Re the Arbitration between

Minnesota Teamsters Public & Law
Enforcement Employees' Union, Local 320
Grievant,

and

BMS Case No.: 10-PA-0976

City of Corcoran, Minnesota
Respondent.

DECISION AND AWARD II

BEFORE	Bernice L. Fields, Arbitrator
APPEARANCES:	
For: Labor Union Local 320	Patrick J. Kelly and Kevin M. Beck, Attorneys at Law Kelly & Lemmons, P.A. 7300 Hudson Blvd., Suite 200 Saint Paul, Minnesota 55128
For: City of Corcoran	Margaret A. Skelton, Attorney at Law Ratwik, Roszak & Maloney, P.A. 300 U.S. Trust Building 730 2nd Avenue South Minneapolis, Minnesota 55402
Place of Hearing	Corcoran, Minnesota
Date of Hearing	July 8-9, 2010
Date of Award	September 10, 2010
Relevant Contract Provisions	Articles IX, XXIV and Corcoran Police Department General Regulations
Contract Year	2009-2010
Type of Grievance	Discharge

I. INTRODUCTION

This matter came on for hearing pursuant to a collective bargaining agreement between the parties effective January 1, 2009 - December 31, 2010. A hearing occurred on July 8-9, 2010 in a conference room of the Corcoran, Minnesota City Hall. Attorneys Patrick J. Kelly and Kevin Beck represented the Minnesota Teamsters Public & Law Enforcement Employees' Union, Local 320, hereinafter Union. Attorney Margaret A. Skelton represented the City of Corcoran, Minnesota hereinafter Employer.

The hearing proceeded in an orderly manner. There was full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The advocates fully and fairly represented their respective parties.

The parties stipulated that the matter had been properly submitted to arbitration and that there were no issues of substantive or procedural arbitrability to be resolved. The arbitrator officially closed the record upon receipt of briefs from the parties on August 13, 2010.

ISSUE

WHETHER THE GRIEVANT'S DISCHARGE WAS FOR JUST CAUSE? IF NOT, WHAT IS THE APPROPRIATE REMEDY?

STATEMENT OF THE FACTS

The Employer is the City of Corcoran, Minnesota. Grievant is Corcoran Police Officer [Redacted], hereinafter, Grievant. Grievant's immediate supervisor who initiated the charges is Corcoran Police Chief, Sean Gormley, hereinafter, Supervisor. Chief Gormley was appointed Chief of Police in June, 2006.

Grievant has been a Police Officer for fifteen years, thirteen years in the City of Corcoran. During his tenure in Corcoran, he received "consistently meets standards and above standards" evaluations from his current and past supervisors. His evaluations also honestly reflect areas in which Grievant needed improvement and from year to year supervisors noted improvement. In addition, Grievant's evaluations indicate his preference for community policing over paperwork tasks. His personnel file is replete with compliments from individuals and businesses on which he had a positive impact. In none of Grievant's evaluations is there an indication of instances of untruthfulness or questionable ethics.

In 2006, when his current Supervisor was appointed Chief, Grievant held responsible positions in the department. He was Field Training Officer, Defensive Tactics Instructor, Range Officer, and Department Training Officer. He has been especially praised for mentoring younger officers.

He was discharged on January, 15, 2010 from the Corcoran Police Department for violations of Corcoran Police Department General Regulations: 2000.24 Untruthfulness; 2000.57Authorized Expenses; 2000.18; False Reporting; Misconduct of a Police Officer/Employee, M.S. §609.45, and Theft, M.S. §609.52.

There are two other incidents of discipline in Grievant's personnel file. In October, 2006 he was suspended without pay for three days when he was arrested for DWI after a Police athletic function. In October, 2007 he was suspended for four hours for the way Grievant handled a DWI arrest. Concurrent with the October, 2007 discipline, the Supervisor also removed Grievant from his positions as Field Training Officer, Defensive Tactics Instructor, Range Officer, and Department Training Officer, and he lost the pay associated with those

positions.

The Union grieved the issue of whether the Employer had good cause to remove him from these Training positions in addition to a four hour suspension without pay. In August, 2008 Grievant's case was heard by Arbitrator Gerald Wallin who decided that the removal of those positions was not discipline but within the discretion of the Employer. From this point the relationship changes.

There is a marked difference in Grievant's 2007, 2008, and 2009 evaluations. In 2007, the Supervisor rated him "Above Standards" and stated: "Grievant is dependable and requires little supervision; has the ability to communicate effectively; [Grievant] had one incident of discipline this year. He has the ability to shape and mold the police department."

In 2008, the Supervisor rated him "Consistently Meets Standards" and stated:

> [Grievant] has made strides in the latter part of 2007 to make changes,
> He was asked in his Performance Plan to try and improve communication through email, ask for help when needed, stay positive and follow through on all assignments. [Grievant] has shown improvement in all these areas. [Grievant] is a valuable employee and member of the Corcoran Police Department. Grievant needs to continue to make strides to use his years of experience and lead by example. Not taking shortcuts when given assignments or when completing reports.
> [Grievant] had one discipline in 2007. A report he filed on a DWI was not completed to standard and an internal complaint was filed and founded. He received a 4 hour suspension and training in Standardized Field Sobriety.
>
> Grievant commented:
> I feel the evaluation is a fair representation as to how the [Supervisor] views my performance…The performance plan that we put together for me was for our professional relationship to improve and "get on the right track" together. I had sat down with the [Supervisor] and asked if he was willing to take the time to sit down and put a plan together with me. I believe this will be beneficial to us. Another part I expressed is the desire to continue with education, training, and working toward a supervisory position in the future. The [Supervisor] was very receptive of these goals."

In 2009, after Grievant was unsuccessful in his arbitration challenging the removal of his Training positions, the differences became more pronounced. Grievant was not rated "Above Standards" in any area. The Supervisor writes:

> "[Grievant's] reports have become more consistent and accurate…He needs to write more detailed reports and he and I have discussed this area. [Grievant] has the ability to solve complex problems and needs to apply himself more in this area.

Grievant commented:

> I feel my scores are lower than the standards that I hold myself to. I believe I work for the good of the department and its high reputation of being a community oriented department. That reputation has brought us to where we are today. I also believe that my job performance and knowledge are acknowledged by officers in many other departments because officers from this agency and other agencies continually call me and ask questions at incident scenes as to how to handle situations and calls. This is not brought forward, so often times it is not known that this occurs. However, with the continued development of newer officers in this department, if they were consulted as to how much I have helped them in their development I believe it would be seen as to how much I contribute to their advancement. Without having very good knowledge of what the job entails, I would not be able to assist other officers as much as I do."

During the time relevant, the Employer provided an annual $700.00 use-or-lose uniform allowance to Corcoran officers for authorized uniform/equipment items. Officers access the allowance by having the vendor bill the Employer directly or by paying for the item and seeking reimbursement. Testimony established that it takes four to six weeks for the Employer to process a reimbursement.

Grievant submitted two Expense Reports in May, 2009. In mid-May, he submitted an Expense Report requesting reimbursement of $257.14 consisting of these items:

05/08/09	Boots re-soled	$ 89.00 (receipt attached)
05/11/09	Driving to/from training in Blaine (no receipt required)	$48.48 (96 miles/$.505)
05/12/09	Driving to/from training in Blaine (no receipt required)	$48.48 (96 miles/$.505

05/13/09	Driving to/from training in Blaine (no receipt required)	$48.48 (96 miles/$.505
05/12/09	Lunch during Training	$ 9.68 (receipt attached)
05/13/09	Lunch during Training	$ 13.02 (receipt attached)
Total		$257.14 Requested

The Supervisor reviewed this Expense Report, spoke with Grievant, and disallowed the $145.44 mileage allowance and the $22.70 for meals even though the Expense Report form is set up specifically to capture mileage and meal reimbursements. The Supervisor testified that "we recently decided to disallow mileage/meal reimbursements so we would have more money for training." The form, however, was not revised and Grievant had no knowledge of the change and based on past practice requested reimbursement. So although Grievant had legitimate expenses of $257.14, he received only $89.00. His un-reimbursed expenses were $168.14.

On May 28, 2009 Grievant purchased Oakley safety glasses, an authorized uniform item from a local vendor. The retail price of the glasses was $250.00, with tax, $266.56. Oakley is a national vendor who discounts specific equipment items for law enforcement officers up to fifty percent of the retail price. Grievant knew of and had used the Oakley discount on previous purchases.

The vendor did not have the safety glasses in stock and the clerk did not know the specific amount of the Oakley discount since this was a new item, or how to process the discount. She told Grievant that the discount would be applied when he picked up the glasses. No deposit was required by the vendor. The safety glasses were expected to be in stock in seven to fourteen days. Grievant asked for and received a "Held Invoice." A Held Invoice is the vendor's internal document denoting an item on order and is not usually given to customers

unless requested. Grievant requested the Held Invoice which reflected only the $266.56 retail price of the purchase. The Held Invoice has a very prominent all caps, large font, bold title which states:

-- HELD INVOICE --

-- NOT A COMPLETE INVOICE. --

The same day of his purchase, Grievant turned in his second May, 2009 Expense Report and attached the Held Invoice. He requested reimbursement in the amount of $266.56, the retail price. Grievant testified he attached the Held Invoice "to get the ball rolling on the reimbursement." He testified he believed the safety glasses would be delivered and paid for long before he received the reimbursement. He did not adequately explain his plan for adjustment of the surplus that a reasonable Police Officer could foresee from submitting an invoice for the retail price.

On June 3, 2009 the Supervisor was reviewing Expense Reports and was alerted to Grievant's Expense Report because of the high cost of the safety glasses billed. The Supervisor testified he did not notice the prominent Held Invoice title in bold, large font, and all caps. He alleges that he spoke with Grievant and asked:

> "I specifically asked you if you received the Police discount available under the Oakley Company Program. You stated you had not received the discount, so I processed the claim as submitted by you." (January 15, 2010 Discharge Letter)

The Grievant has maintained that he has no recall of this conversation with the Supervisor.

The Supervisor has given several versions of this conversation. In his personal "timeline" of this case and in his conversation with the Hennepin County Detective assigned to

do a criminal investigation of this matter the Supervisor said Grievant stated "he forgot to ask for the discount," yet the Supervisor left this potent statement out of the Discharge Letter. The Supervisor told former Police Chief Dean Mooney, hired as a Special Investigator in December, 2009, that when the Grievant was asked whether he received the Police discount, Grievant stated "he had not received the discount." Grievant's Discharge Letter repeats only this statement. At the arbitration hearing, the Supervisor testified that Grievant stated in response to a direct inquiry "that he was not offered the discount and that he paid full price for the safety glasses." The Supervisor did not process Grievant's Expense Report on June 3, 2009. It sat on his desk until June 10, 2009.

On June 10, 2009 the Supervisor asked his Corporal to investigate the matter further because he could not understand why Grievant had not received the Oakley discount. The Supervisor had still not noticed the prominent, all caps title of the Held Invoice. The Corporal called the vendor and learned that the Oakley discount had not been applied to Grievant's purchase because the item was a new item and the discount was not known when Grievant was in the store. The Held Invoice Grievant submitted was for the full retail price of the safety glasses. Here, the Corporal activated his recording advice. Further, the vendor told the Corporal the discount would be applied when the safety glasses arrived in the store. Lastly, the vendor told the Corporal that Grievant had made no payment for the safety glasses.

An hour later, the Supervisor and his Corporal went to the vendor's store for further investigation. They confirmed the same information relayed earlier to the Corporal. The Supervisor warned the vendor not to let Grievant know of their visit or investigation.

Immediately on returning to the Police station, the Supervisor telephoned the Hennepin

County Sheriff and asked them to conduct a criminal investigation of Grievant's conduct. The Supervisor wanted the matter charged as Theft of Public Funds, a felony. He was told that there was no crime until Grievant received the overpayment and cashed the check.

Despite absolute knowledge that Grievant's invoice was inaccurate, the Supervisor authorized Grievant's Expense Report for $266.56 and submitted it to the Employer for payment. The Supervisor testified that he submitted the Expense Report for normal processing. Normal processing of reimbursements takes four to six weeks, the Supervisor had Grievant's reimbursement check expedited and issued the next day, June 11, 2009.

On June 12, 2009 Grievant picked up the check from his mailbox, but instead of cashing the check, he put it in the visor of his car where it was found and deposited by his father on or about July 6, 2009. Grievant testified that he intended to use the check to pay for the safety glasses which he thought would arrive in one or two weeks. At no time during next three weeks before Grievant's massive heart attack did the Supervisor mentioned the investigation to Grievant with whom he worked on a daily basis.

On June 15, 2009 the Supervisor called Michael Carlson, Deputy Chief Sheriff in Hennepin County to inform him that the safety glasses had not arrived at the vendor's store. The Supervisor notes in his "timeline" that he advised Deputy Chief Carlson that he wanted to wait for the transaction to be completed before beginning the investigation. His timeline notes indicate that "[Grievant] still has time to correct the accounting error." However, the Supervisor never notified Grievant of the perceived "accounting error."

On June 23, 2009 the Supervisor called the vendor to see whether the glasses had come in and was told the order had not been received.

On July 2, 2009 Grievant had a massive heart attack requiring quadruple bypass surgery. He went on medical leave until December 7, 2009. He was still unaware he was under investigation.

On July 6, 2009, the Supervisor called Deputy Chief Carlson and they both agreed to wait until the glasses had been received by the vendor before commencing the criminal investigation.

On or about July 6, 2009 Grievant's father found the reimbursement check in Grievant's car, deposited it into his son's account, and paid the Grievant's bills. The father testified that Grievant had sufficient funds in his account to cover all his outstanding bills and a surplus remained.

On July 21, 2009 the Supervisor called the vendor again and learned that the lenses for the glasses had arrived but not the frames. The vendor let the Supervisor know that Grievant had called to check on the order.

On July 21, 2009 the Supervisor spoke to the Mayor of Corcoran about Grievant's case and requested permission to retain outside counsel to process the case. The Supervisor did not notify Grievant he was being investigated.

On September 4, 2009 the vendor notified the Supervisor that the frames for the safety lenses had arrived and were picked up and paid for by Grievant on September 3, 2009. The Oakley discount was applied to the purchase and the final cost of the safety glasses was $138.73. Grievant had been reimbursed $127.83 more than the cost of safety glasses.

On September 8, 2009 the Supervisor notified Deputy Chief Carlson that the transaction was completed and the investigation could begin. Later that day, the Supervisor received a call from Detective Shawn Gullickson who said he was assigned to the case. That same day,

Detective Gullickson met with the Supervisor and collected all the documentation to begin the investigation. The Supervisor alleged that Grievant was overpaid $127.83 on September 3, 2009 and had not made any adjustment to the City in five days. The Supervisor reasoned that Grievant's conduct should be charged as Theft of Public funds. The Supervisor did not complete a written Complaint for the Hennepin County investigation.

On Friday, September 11, 2009 Detective Gullickson left a message phone message on Grievant's phone to contact him. On Monday, September 14, 2009 Detective Gullickson returned Grievant's call and advised him that he was conducting a criminal investigation regarding a theft of approximately $130.00 from Grievant's uniform allowance.

Detective Gullickson states in his report that "[Grievant] seemed surprised and confused as to what he had stolen." Gullickson asked [Grievant] whether he intended to steal $130.00 from his uniform allowance. Grievant stated "Absolutely not." Gullickson asked if he was even aware that he had been over-compensated. [Grievant], he reported, stated "that it had been two and half months since he ordered the glasses and he had suffered a major medical crisis since ordering the glasses". Gullickson suggested Grievant speak to his Supervisor.

Two hours later, Grievant called Gullickson back to say that he called his Supervisor, but the Supervisor refused to discuss the matter with him.

On September 14, 2009 after refusing to discuss the matter with Grievant, the Supervisor sent an email to all Corcoran Police employees warning them to have no communication with Grievant and stated that Grievant was to have no access to any City of Corcoran buildings, computer, reports or official records.

Having overspent his uniform allowance by $15.27 in December, 2007 and allowed to

reimburse the City, and aware that other Corcoran Police Officers who had been overpaid on their uniform allowances were also allowed to reimburse the City, on September 15, 2009 Grievant wrote a check for $130.00 and asked Union Steward Ryan Burns to submit the check to the Supervisor.

The Steward contacted the Supervisor who agreed to accept the reimbursement check. However, later that day the Supervisor notified the Union Steward that he would not accept the check after all. The Supervisor did not explain to the Union Steward why Grievant's reimbursement was not accepted. At the arbitration hearing, the Supervisor testified he was advised by the Hennepin County that the investigation would not continue if he accepted Grievant's repayment.

Gullickson proceed with his investigation. He interviewed the vendors, obtained bank records, information on the Oakley discount program, the Corcoran Police Uniform Policy, and the Corcoran Police Department General Regulations. The Supervisor, the chief Complainant, did not submit to a Q&A for the Hennepin County investigation. Detective Gullickson's investigative report was submitted to the Hennepin County Attorney's Office for prosecution as a Theft of Public Funds pursuant to M.S. §609(5).

The Hennepin County Attorney's Office declined to prosecute this matter as a felony sometime in September, 2009.

On or about September 25, 2009 the Supervisor and the Corporal searched Grievant's desk looking for other financial transactions between Grievant and the City. They found a confusing December, 2008 Expense Report in which Grievant requested reimbursement for safety glasses ordered on September 12, 2008 ($210.00 retail with tax $224.49) and a

prescription refill paid for on December 31, 2008 ($21.11). Grievant sought inexplicably only $210.00 for the glasses and the actual cost of the prescription, $21.11, for a total of $231.60. Grievant attached a Held Invoice showing he paid $100.00 toward the cost of the safety glasses with a balance owing of $124.49. There is a hand written note on the invoice indicating the glasses were picked up on "9/18 and the balance paid." The handwritten note would indicate to any observer that Grievant paid $124.49 on that date. However, Grievant actually paid only $29.49 in cash in September, 2008 after the Oakley discount had been applied.

Grievant submitted the Held Invoice and the prescription receipt for reimbursement to his Flexible Spending Account, an annual fund use-or-lose $350.00 provided by the Employer for medical co-pays and other medical expenditures. Safety glasses are within the FSA expenditures. However, Grievant was only reimbursed $53.14 since that was the amount remaining in his FSA account. The City administration did not reject or comment on the validity of the Held Invoice when Grievant's submitted it in December, 2008.

Grievant testified he was aware that he would not be fully reimbursed; he just wanted to use up the $50.00 left in his FSA account. Consequently, although Grievant was entitled to a reimbursement of $150.60, he received only $53.14 by submitting the Held Invoice in 2008. Grievant deprived himself of $97.46.

The Supervisor asserted that the December, 2008 submission of another Held Invoice establishes a pattern and practice of intentional misconduct on Grievant's part even though Grievant realized no benefit from the December, 2008 submission.

On or about October, 2009 the Supervisor requested the Crystal, Minnesota City Attorney to review this matter for prosecution as a misdemeanor. After reviewing Detective Gullickson's

investigative report, on October 20, 2009 the Crystal Special Prosecutor declined to prosecute the alleged theft as a misdemeanor. She stated:

> …"It seems to me there are two points of time when theft may have occurred. The first is when the payment was requested. From the fact that the invoice on its face is clearly "not a complete invoice" and there is no receipt required up front, it seems that the office procedure allows for payment up front, and so I do not believe that legally, a theft occurred at that point.
>
> The second point in time is of course when [Grievant] actually paid the lesser amount for the glasses. Personally, I believe he knew he was getting overpaid. And even if he did not actually know, he should have. And my belief that he did know is what made this a hard call, since if he is cutting corners here I am gravely concerned with how he is doing his job more generally. However, when looking at this from the legal standpoint, separated from these concerns, I do not believe that theft could be proven beyond a reasonable doubt, and am not sure that this meets the probable cause standard for the following reasons. First, [Grievant's] claim that this was unintentional is supported by the passage of time between requesting payment and picking the glasses, as well as his intervening surgery and medical situation. Second, it is not clear what the City's policy is on turning in receipts and making later adjustments to the amounts paid, and how much carryover there is in the uniform allowance policy and whether [Grievant] complied with these policies.
>
> While I considered charging the matter and offering [Grievant] a diversion or other agreement, given the morality of the situation, legally I just do not believe this would be warranted."

The decision of the Crystal Special Prosecutor declining to file a misdemeanor Complaint did not satisfy the Supervisor. On November 2, 2009, the Supervisor hired Dean Mooney, former Police Chief in Golden Valley and former Chief of the Metro Transit Police as an Internal Affairs Investigator, hereinafter Investigator. The Supervisor did not provide the Investigator with a written Complaint. The Supervisor and his Corporal met with the Investigator and recounted their version of Grievant's alleged misconduct and provided him with a copy of Detective Gullickson's report. The Investigator was not given a copy of the Crystal Special

Prosecutor's letter. The Supervisor testified he did not tell the Investigator about the Grievant's attempt to repay the overpayment.

The Investigator confirmed in testimony that he did not know of Grievant's repayment attempt. Nor, the Investigator testified, was he told that that it was common practice to allow officers to repay overpayments of the uniform allowance.

The Investigator duplicated Detective Gullickson's investigation. He interviewed the same vendors, Grievant, and had "extensive" conversation with Corporal Hamilton who wrote a history of the incident although he was not the Complainant. There was no recorded Q&A interview with the chief complainant, the Supervisor.

In mid-December, 2009 the Investigator allowed the Supervisor to review and suggest changes in his draft report. Then on December 18, 2009 the Investigator submitted his report which sustained every allegation proposed by the Supervisor. He found that Grievant had violated Corcoran Police Department General Regulations:

> 2000.17 Untruthful in three instances:
> a) On May 28, 2009 when he submitted an Held Invoice for $266.56 and misrepresented the claim to the [Supervisor];
> b) On May 28, 2009 when he submitted his claim for reimbursement when he knew the amount would be 50% of the retail price;
> c) On December 28, 2008 he submitted a FSA Expense claim for $210.00 when he had paid only $129.49.
>
> 2000.20 Unlawful Conduct
> Grievant was reimbursed $127.83 more than the final expenditure for safety glasses purchased in May, 2009.
>
> 2000.57 Authorized Expenses
> Grievant submitted bills in excess of expenses incurred and therefore unauthorized.

The Supervisor accepted all of the Investigator's findings and on his own authority added the felony criminal charges the Hennepin County Attorney and the Crystal Special Prosecutor had declined to charge. He also enlarged on the Investigator's findings by adding that Grievant also violated CPD General Regulation 2000.18 False Reporting:

> Members of the department shall not knowingly make false reports, or knowingly enter or cause to be entered in any departmental book, record, or electronic recording any inaccurate, false, or improper information.

The criminal counts the Supervisor added to the independent Investigator's Report were: Misconduct of a Public Officer, M.S §609.43(4) which make it unlawful to make a "return certificate, official report or other document having knowledge it is false in any material aspect," and Theft, M.S. §609.52

On January 14, 2009 the Supervisor presented the Internal Affairs Investigation Findings with his additions to a closed meeting of the Corcoran City Council and recommended that Grievant be discharged. The City Council agreed with the Supervisor's recommendations. Grievant was not notified of this meeting or provided with an opportunity to present his position on the charges against him to any Corcoran official, including his Supervisor before final agency action.

On January 15, 2010 the City of Corcoran on the Supervisor's letterhead provided Grievant with a Notice of Discharge effective immediately. Only at this time did Grievant receive a copy of the charges against him and the Investigator's Report. Grievant filed a grievance through his labor union and the case proceeded through the grievance procedure to arbitration.

RELEVANT CONTRACT PROVISIONS

ARTICLE IX. DISCIPLINE

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

A. Oral reprimand;
B. Written reprimand;
C. Suspension;
D. Demotion; or
E. Discharge.

ARTICLE XXIV. UNIFORM ALLOWANCE

24.2 For calendar year 2009 each employee shall be entitled to an annual uniform allowance of $700.00. …The uniform allowance shall be used only for items identified in the Uniform Policy, or with prior approval from the Police Chief.

CORCORAN POLICE DEPARTMENT REGULATIONS

2000.1 General Regulations

…

These regulations are not designed to make every irregular, mischievous, or improper act a disciplinary offense, but to correct conduct which is prejudicial to good order, discipline, morale and efficiency, and which tends to destroy public respect and confidence.

2000.3 – BREACH OF POLICY, ORDER OR PROCEDURE

Members shall not act nor fail to act in such a fashion that constitutes a breach of policy, order, or procedure outlined in other section of the manual. They are responsible for knowing the contents of the policy manual issued to them, and for filing in their manual all material issued by the department for inclusion.

2000.4 – EQUAL PROTECTION

Members of the department shall not act in such a manner as to deprive any member of the community of the equal protection of the laws, and shall not evidence bias in the performance of their duties.

2000.7 – DISRESPECT FOR SUBORDINATES

Supervisors shall not act so as to exhibit disrespect for subordinate members of the department.

2000.16 – SUPERVISORY RESPONSIBILITY

Supervisors and/or senior officers shall not knowingly permit members of their command to violate any law, department policy, or procedure.

2000.17 – UNTRUTHFULNESS

Members of the department are required to speak the truth at all times and under all circumstances, whether under oath or otherwise. This regulation prohibits perjury, the withholding of evidence from judicial proceedings, false public statements, untruthful statements made within the department, and any other misrepresentation.

2000.18 – FALSE REPORTING

Members of the department shall not knowingly make false official reports, or knowingly enter or cause to be entered in any departmental book, record, or electronic recording any inaccurate, false, or improper information.

2000.57 –AUTHORIZED EXPENSES

Bills for authorized expenses incurred by members of the department in connection with their official duties shall be promptly submitted and shall include a brief written explanation for the expenses incurred.

POSITION OF THE PARTIES

POSITION OF THE UNION

The Collective Bargaining Agreement (CBA) limits the Employer's power to discipline or discharge without just cause. The burden of proof is on the Employer to show by clear and convincing evidence that just cause exists for discharge. The Employer failed to produce that quantum of proof in Grievant's case.

Grievant's purpose in submitting proof of an ordered uniform item was "to get the ball

rolling on the reimbursement." Normally, reimbursements take four to six weeks, but the ordered safety glasses would be in stock and paid for in one or two weeks. Grievant admits that submitting the Held Invoice to expedite the reimbursement was poor judgment, but his actions cannot be construed as intentional theft.

His Supervisor had a duty to reject Grievant's attempt to expedite his reimbursement pursuant to Corcoran Police Department General Regulation 2000.16 which prohibits senior officers from knowingly permitting an officer under his/her command to violate any law, department policy, or procedure. Here, the Supervisor knew when he approved Grievant's Expense Report that the amount requested was inaccurate because it had yet to be determined.

Earlier in the same month, the Supervisor had disapproved Grievant's first May, 2009 Expense Report by bringing the disallowed items to Grievant's attention in a personal conversation. The Supervisor did not explain why he deviated from that procedure with Grievant's second May, 2009 Expense Report and decided instead to seek felony charges.

Then the Supervisor rejected the decision of the Hennepin County Attorney who declined to charge Grievant's error as a felony. Next the Supervisor rejected the detailed decision of the Crystal Special Prosecutor that no theft had occurred. The Supervisor testified "he had a better understanding of the case because he was personally involved."

Finally, the Supervisor hired a private investigator to review the Grievant's case under CPD General Regulations. The internal investigation was subjective and incomplete. The Supervisor decided on June 10, 2009 that Grievant was guilty of theft and pointed the internal Investigator in that direction by failing to provide material information. For example, the Supervisor failed to tell the Investigator that other officers who had been overpaid on their

uniform allowances were allowed to repay the overage, but Grievant's attempt to repay was rejected. In addition, the internal Investigator was not provided a copy of the policy manual or a copy of Grievant's personnel file. The Internal Investigator reached the outcome the Supervisor intended.

Lastly, Grievant was never given an opportunity to refute the charges against him to his Supervisor or other Corcoran official before final agency action. Although the Grievant requested a meeting with the Supervisor on September 14, 2009, the first day he was made aware that he was being investigated for theft, the Supervisor refused to meet with him to discuss the charges.

Grievant has a property right in his continued employment pursuant to *Cleveland Board of Education vs Loudermill, 476 U.S. 532 (1985).* Pursuant to *Loudermill* Grievant is entitled to 1) notice of the charges against him, 2) an explanation of the evidence against him, and, 3) an opportunity to present his side of the story. Grievant was not afforded these rights enshrined in Article X of the CBA. The interview with the Internal Investigator does not meet the *Loudermill* requirement because an investigation is not a pre-termination hearing. *Winegar vs Des Moines Independent Community School District, 20 F3d 895,902 (8th Cir. 1994).*

On January 14, 2010 the Corcoran City Council met with the Supervisor in closed session to discuss Grievant's case. Grievant had no knowledge of this meeting, nor was he invited. The Supervisor presented the Investigator's Report and recommended Grievant's termination. The City Council accepted the Supervisor's recommendation and voted to discharge Grievant.

On January 15, 2010 Grievant received a Discharge Letter effective immediately and for the first time, a copy of the charges against him. The Supervisor ignored progressive discipline.

Grievant was never put on notice that a Held Invoice was unacceptable as a receipt. The day after Grievant was notified of the discrepancy between his reimbursement and the amount he paid for the glasses, Grievant wrote a check for the overpayment. The Supervisor agreed to accept the check, and then later rescinded his agreement because he was warned by Hennepin County that reimbursement would end the criminal investigation. Clearly, the Supervisor was not interested in rehabilitation.

Discharge is excessive, disproportionate to the offense alleged, and punitive rather than rehabilitative. Grievant's record as a whole discloses no other instance of dishonesty or untruthfulness. The former Corcoran Police Chief who supervised Grievant for six years and officers from surrounding jurisdictions with whom Grievant worked testified to his ethics and integrity. Discharge, usually reserved for the most serious offenses, is inappropriate considering the mitigating factors in Grievant's case. Grievant's record does not justify discharge.

EMPLOYER'S POSITION

Grievant has been disciplined on two other occasions in the last five years. In 2006, Grievant was suspended for three days for his arrest on a DWI with a blood alcohol concentration of .17. On October 30, 2007 Grievant was again disciplined, suspended four hours for his handling of a DWI arrest. Grievant was removed from his positions as Field Training Officer, Defensive Tactics Instructor, Range Officer, and Department Training Officer. In addition, he lost the pay associated with those positions. Grievant has never been reinstated to these positions. Grievant filed a grievance for the lost of his training positions, but the Employer's discretion was upheld in arbitration.

In this latest incident, Grievant submitted as proof of payment a Held Invoice to his May

28, 2009 Expense Report even though he had made no payment for the safety glasses ordered from a local vendor earlier in the day. Having submitted numerous Expense Reports, Grievant testified he was aware of the correct procedure, knew he was required to make an expenditure before submitting expense reports. Further, he testified he had taken accounting courses and understood the meaning of "reimbursement."

On June 3, 2009 the Supervisor was reviewing Expense Reports submitted by Officers at the end of the month. The Supervisor spoke to Grievant and asked if he received the Oakley Police discount on the safety glasses. Grievant stated he forgot to ask for the discount. The Supervisor asked Grievant if he paid full price. Grievant informed the Supervisor that he paid full price for the glasses. Therefore, the Supervisor processed the reimbursement.

It is undisputed that Grievant submitted an inflated invoice for goods he had not paid for. He received $266.56 in reimbursement, but admitted he paid only $138.73 for the glasses. The Supervisor and the Union Steward both testified it is CPD policy that the Police officers must pay for goods before submitting receipts for reimbursements. Thus, Grievant defrauded the City of $127.83.

This is not Grievant's first instance of submitting inflated Expense Reports. In December, 2008 Grievant submitted another Held Invoice for a pair of safety glasses which he purchased in September, 2008. The retail price of the glasses was $210.49. Grievant made a $100.00 deposit, received a Held Invoice since the glasses were not in stock. When the glasses arrive at the vendors in late September, 2008 Grievant paid another $29.49 in cash after the Oakley 50% discount was applied.

In December, 2008 Grievant submitted an Expense Report to his Flexible Savings

Account for $210.00 for his September sunglasses purchase and for a prescription in the amount of 22.11. He attached the Held Invoice showing his deposit and a pencil notation showing that the balance was paid 9/18 and a receipt for the prescription. He sought a reimbursement of $231.11. Since Grievant had only $53.14 in his FSA account his fraudulent submission did not result in a loss to the City, but demonstrates Grievant's pattern of misrepresentation.

Even though the Hennepin County Attorney and the Special Prosecutor appointed by the Crystal City Attorney declined to file criminal charges against Grievant, the Supervisor felt the criminal investigation revealed a disturbing course of conduct that warranted further investigation. Consequently, the Supervisor hired a respected retired local Police Chief as an Internal Affairs Investigator on November 2, 2009.

The Investigator interviewed Grievant on December 10, 2009. Grievant appeared with his Union representative. Prior to answering any questions, they were permitted as much time as needed to review Detective Gullickson's 70 page investigation. During the interview Grievant was given the opportunity to respond to all the allegations against him. After interviewing other witnesses, the Investigator sustained the following violations of CPD General Regulations: 2000.17 Untruthfulness; 2000.20 Unlawful Conduct; and 2000.57Authorized Expenses.

The Investigator also made the following concluding remarks:

> "[Grievant's] manipulations of the reimbursement process by using "ordering documents" called "Held Invoices" to make inflated claims of personal expenses to the City raise serious ethical questions concerning fitness for duty. These were not clerical errors on his part, but rather a planned scheme to enrich himself at the cost his employer."

The Supervisor accepted all the Investigator's recommendations and added the criminal charge of Misconduct of a Public Officer/Employee, M.S. §609.43(4) under which it unlawful

for a public officer to:

> "… make a return, certificate, official report or other public document having knowledge it is false in any material respect."

After review of the findings of internal affairs investigation, the Supervisor recommended Grievant's discharge to the Corcoran City Council in closed session on January 14, 2010. The Council accepted the Supervisor's recommendation and voted to discharge Grievant. The Supervisor met with Grievant the next day and handed him his Discharge Letter on the Supervisor's stationery.

The Employer had just cause to discharge Grievant because he intentionally defrauded the City. He violated the trust that is integral to the functioning of a Police force, and negatively impacted his ability to perform his job in the future. Despite knowing that the correct procedure required payment for authorized uniform expenses, Grievant submitted a fraudulent "Held Invoice" to manipulate the process for personal gain.

Termination is the only appropriate remedy because "the image of integrity and trust is essential to the performance of a Police Officer's duties." There must be public confidence in law enforcement. *City of Minneapolis vs Moe, 450 NW2nd 367, 370 (Minn. Ct. App 1990).* Other arbitrators have found theft by a police officer grounds for immediate termination. In re IBT and County of Wright, BMS Case No.: 88-PP-144-B, p.14 (Ver Ploeg, September 2, 1988):

> "Finally, I fully agree with the proposition that once it is established that an officer of the law has engaged in theft, no matter the dollar amount of the items in question, discharge is the only possible penalty. To hold otherwise would be to severely damage the credibility of any law enforcement organization forced to retain an employee whose effectiveness has been so destroyed."

Grievant's fraud on the City affected the integrity of the City's Police Department,

demonstrated a lack of the necessary qualities (i.e., integrity, honesty and good judgment) which all Police Officers must possess. Grievant is not entitled to progressive discipline given the fraudulent character of his actions. Moreover, Grievant received progressive discipline twice before when was suspended for three days on a DWI and again when he was suspended for four hours because of his mishandling of a DWI arrest. Given the nature of the conduct at issue, he is not entitled to further progressive discipline.

The arbitrator's authority is limited to the express terms of the CBA. The arbitrator has no authority to decide the Union's claim that Grievant was denied a *Loudermill* hearing. Even if the Union's *Loudermill* claim was properly before the arbitrator, the *Loudermill* case does not mandate any particular type of pre-termination hearing. Grievant testified he was well aware of the allegations against him before he answered questions during the internal affairs investigation. He also admitted that he did not require additional information to respond to questions during the investigation. Lastly, he was provided a complete copy of the Hennepin County 70 page investigation before the internal affairs investigation. Grievant received all the process he was due.

The arbitrator is also without authority to decide Open Meeting Law and Peace Officers Discipline Procedures Act claims. Both issues are outside the scope of the arbitrator's jurisdiction, misinterpret the applicable legal standard, and without merit.

ANALYSIS AND FINDINGS

There is a fundamental understanding between the parties in the employment

relationship.[1] A potential employer is willing to part with its money only in return for something it values more highly, the time and satisfactory work of the employee. The potential employee will part with his/her time and work only for something he/she values more, the money and fulfilling work offered by the employer. This fundamental understanding of the employment relationship can be easily summarized: both parties realize that the employer must pay the agreed wages and benefits and that the employee must do "satisfactory" work.

"Satisfactory work" in this context has four elements: (1) regular attendance, (2) obedience to reasonable work rules, (3) a reasonable quantity and quality of work, and (4) avoidance of any conduct, on or all duty, that would interfere with the employer's ability to operate the business successfully. The main addition to the fundamental understanding that Unions seek in collective agreements is job security. Most frequently, the agreement protects job security by limiting the employer's power to discipline and discharge.

The fundamental understanding, as amended in the collective bargaining agreement, can be stated as follows: employees will provide "satisfactory work" in return for which the employer will pay the agreed wages and benefits, and will continue the employment relationship unless there is "just cause" to terminate it.

"Just cause" is obviously not a precise concept. It cannot be applied to a particular dispute by an employer or an arbitrator without careful analysis and exercise of judgment. There will never be a simple definition of "just cause," nor even a consensus on its application to specific cases, but this does not mean the phrase is devoid of meaning. On the contrary, it is

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[1]This discussion on the fundamental understanding follows the theory of Professors Laura Cooper, Dennis Nolan and Richard Bales in *ADR in the Workplace. (2000)*

possible to make sense of the term and give it substance. This can be done by viewing the just cause standard as an amended form of the fundamental understanding. Just cause, in other words embodies the idea that the employee is entitled to continued employment provided the employee attends work regularly, obeys work rules, performs at some reasonable level of quality and quantity, and refrains from interfering with the employer's ability to efficiently conduct its business with activities on or off the job. An employee's failure to meet these obligations will justify discipline up to and including removal.

There are three inquires to determine whether just cause exists. The first is whether the evidence establishes that the Grievant committed the offenses forming the basis of discipline. The second is whether the Grievant was afforded due process. The last inquiry is whether the penalty is appropriate considering the nature and severity of the offenses and any mitigating factors.

A. DOES THE EVIDENCE ESTABLISH THAT THE GRIEVANT COMMITTED THE OFFENSE FORMING THE BASIS OF DISCIPLINE?

1. The Employer Did Not Establish By Clear and Convincing Evidence That Grievant Submitted An Inaccurate Expense Report With Nefarious or Criminal Intent.

In the universe of conflicts there are only three categories. The first and most common category is the conflict of values. All the familial, interpersonal (co-worker/co-worker/supervisor), age, gender, race, national original, harassment, threats, and workplace violence disputes fall into this category. On one side of a values conflict is a person with a firm vision of how he or she should have been treated. On the other side of a values dispute is a person with a firm vision of how the other person should have acted.

The second category is instrumental conflicts: how should things work? These conflicts involve interpretation of the universe of organization procedures i.e., work rules, seniority, craft differences, etc. Usually work rules are well defined in the collective bargaining agreement and employers' written policies, but ambiguities based on interpretation still arise that require good faith negotiation to resolve. The last and most difficult category of conflicts to resolve are disputes over the division of scarce resources, i.e., time, money, human resources, and space.

This is a values conflict between an employee and his supervisor. Values conflicts arise from errors of attribution and perception. One party makes assumptions about confusing conduct or speech, filters the assumption through his/her childhood filters, does not test the assumption by simply asking the other party to clarify their motives or meanings, and finally perceives something negative about the other. Value conflicts can only be resolved through "aggressive communication."[2] Aggressive communication skills, that is over-communication, are essential in the management of a multi-generational, gender, and ethnically diverse workforce. The lack of communication is the genesis of this conflict.

a. The Supervisor's Statements about His June 3, 2009 Conversation with Grievant Are Not Credible.

Except in unusual circumstances, conversations have a natural flow during the exchange of information. Essential elements of a natural conversation are missing in the Supervisor's stories of his June 3, 2009 conversation gleaned from his timeline, statements made to Corporal Hamilton, Detective Gullickson, the Investigator, the Discharge Letter, and his testimony at the arbitration.

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[2] *Managing the Class of Veterans, Boomers, Xers, and the Nexters in Your Workplace, Zemke, R, Raines, C., & Guy, M.E. (2006). New York:AMACOM.*

The Employer's case rests on the platform of Grievant's alleged untruthfulness on June 3, 2009. However, the platform has three wobbly legs. First, the Supervisor alleges in his timeline that Grievant stated: "he forgot to ask for the discount." Immediately, a reasonable mind questions that response. What consumer, especially one familiar with the Oakley discount program, would forget to ask for a fifty-percent discount? That does not ring true. And even if Grievant made such a statement, the natural reply from one charged with fiscal restraint would be: *Well, go back and see if you can still get the discount. CPD does a lot of business with this vendor so they should be amenable to a correction*. If the Supervisor had made this reply then approval of Grievant's Expense would have been delayed.

The second shaky leg of the Employer's platform concerns another alleged statement. In June, 2009 the Supervisor told the "forgot to ask" story to Hennepin County and Corporal Hamilton. He does not tell them, nor does it appear in his timeline his later allegation that when asked directly if he [Grievant] paid full price for the safety glasses Grievant stated: "I paid full price." The first appearance of that more damning statement appears in the Investigator's summary after November, 2009. That such a nuclear effect statement is missing in the Supervisor's timeline and omitted in the Hennepin County report is incredible.

The "I paid full price" statement does not appear, inexplicably, in the Discharge Letter, but appears with muscles in the Supervisor's arbitration testimony. At the arbitration hearing, the Supervisor alleged that Grievant stated: "the clerk did not offer him the discount." The "forgot to ask" story was omitted. At the arbitration hearing, the Supervisor alleged emphatically that Grievant responded to a direct inquiry that he had paid full price. The absence of that direct response in the Hennepin County report and in Corporal Hamilton's history of the

event is too incredible to believe.

Lastly, the Supervisor's failure to submit to a Q&A for Hennepin County and the Investigator or to submit a written Complaint in either investigation is too remarkable to be accidental. How can the chief Complainant in a criminal investigation not have a recorded interview? The Supervisor never allowed his statements and recollections to be tested through questioning by neutral investigators who would leave a record to be examined for consistency. The premise of untruthfulness on which the Employer's case rests is too insubstantial to support its weight.

b. The Supervisor Did Not Test His Assumption That Grievant Acted With Nefarious or Criminal Intent.

When the Supervisor returned from the vendor's on June 10, 2009, he immediately called the Hennepin County Sheriff to request a felony criminal investigation of Grievant, but he was told by the Deputy Sheriff that no crime had occurred because Grievant had not received or cashed a reimbursement check. At this point, the Supervisor should have called Grievant to his office and revealed to him the results of his investigation at the vendor's and asked for clarification of Grievant's conduct. He failed to do this because the Supervisor assumed, incorrectly, that theft of public funds could be the only explanation for submitting the Held Invoice.

The Supervisor did not ask himself the most obvious questions. First, how likely is it that a fifteen year Police Officer with no previous history of dishonesty would concoct a scheme to misappropriate public funds where the profit of the theft was unknown? The Supervisor had learned exactly what Grievant had been told by the vendor on May 28, 2009: that the amount of

the safety glasses could not be determined until the order reached the store.

On the other hand, the Supervisor may have reasoned that since in May, 2009 Grievant had been denied $144.45 in mileage reimbursement and $22.70 in meal reimbursement, both of which had previously been available, Grievant was using this scheme to recoup those denied costs. A reasonable supervisor would have tested either assumption by simply asking the Grievant to clarify his motives. The Supervisor did not give a veteran Officer the benefit of the doubt. He made his decision on his assumption that Grievant's motives were nefarious and criminal.

B. WAS THE GRIEVANT AFFORDED DUE PROCESS?

1. The Grievant Was Denied Essential Minimum Due Process In This Case.

The "fundamental understanding" between the parties embodied in the CBA requires the employer to have just cause before disciplining or discharging a public employee. Therefore, arbitrators have fashioned an "industrial due process doctrine." To satisfy industrial due process, an employee must be given an adequate opportunity to present his or her side of the case before being discharged by the employer. If an employee has not been given such an opportunity, arbitrators will often refuse to sustain the discharge or discipline assessed by the employer.

The primary reasons arbitrators have included certain basic due process rights within the concept of just cause is to help the parties prevent the imposition of discipline where there is little or no evidence on which to base a just cause discharge.[3] This right was in place in

[3] *Lincoln Lutheran of Racine*, Wis., *113 LA 72 (Kessler, 1999) (grievant discharged for using abusive and profane language was reinstated because she never told her side of the story before she was discharged). See also: Gerstenslager Co.,111 LA 238 (Lalka, 1998)(employee's due process rights were violated when she was denied the opportunity to have the union steward present on receipt of her separation notice, she was not given a predisciplinary interview, and*

arbitration long before it was upheld by the United States Supreme Court in *Cleveland Board of Education vs Loudermill, 470 U.S. 532 (1985).*

Immediately after learning of the Supervisor's allegations from Detective Gullickson on September 14, 2009 the Grievant contacted his Supervisor to discuss the Supervisor's concerns, however, the Supervisor refused to talk with him. At no time after that date did the Employer provide the Grievant an opportunity to explain his position to a Corcoran official before final agency action on January 14, 2010. Grievant was not provided with the CPD General Regulations charges allegedly violated until he received his Discharge Letter and the Internal Investigator's Report on January 15, 2010.

On this omission of industrial due process alone, I would sustain the grievance. Just cause demands that the minimum essential, an opportunity to be heard, occur before discharge. It is the process, not the result that is paramount in just cause cases.

2. Grievant Was Denied His Equal Protection Rights Pursuant to CPD General 2000.4 – EQUAL PROTECTION

In addition to the lack of industrial due process, the Grievant was treated differently than other similarly situated Corcoran Officers. The Employer presented no written policy for the exercise of the Supervisor's discretion to allow Officers to repay overpayments of their uniform allowance. In this case, the Supervisor exercised his discretion in an arbitrary and capricious

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she was never able to tell her side of the story); Gemala Trailer Copr., 108 LA 565 (Nicolas, Jr., 1997)(employees who were discharged for shaking a vending machine to get the produce for which they had paid were denied due process because the employer did not question them during the investigation and relied on the judgment and direction of the human resources manager); Boulder Yellow Cab, 102 LA 848 (Watkins, 1993) (cab company violated the due process of seven drivers who were discharged solely because its insurance carrier determined that their driving records made them uninsurable – the company failed to explore several insurance options that might have enabled grievants to keep their jobs and grievants were never warned that the driving records could put their jobs in jeopardy).

manner. The Union presented overwhelming evidence that it is common practice to permit such reimbursements when the Officer is notified of the overpayment:

> December 27, 2007 email from Employer to Ryan Burns: "You have $68.11 in your account – you submitted a $70.00 claim so it [reimbursement] will be just slightly smaller…"
>
> December, 2007 email from Employer to [Grievant] "You owe slightly for going over your clothing allowance. Please make check payable to [vendor]. Steve: $15.27." (A copy of Grievant's check for $15.27 appended.)
>
> May 28, 2008 email to Employer: Corporal John Hamilton: "I have placed on your desk a $72.00 uniform reimbursement for May, 2008."
>
> December 6, 2008 email to Employer: Corporal John Hamilton: "Thanks for the information on my uniform account – I see I over spent (*sic).* I placed a check on the Chief's desk for $72.72 which is what I owe the city."
>
> February 2, 2009 email to Employer/ [Grievant]: Corporal John Hamilton: "Please deduct $19.98 from [Grievant's] uniform allowance." (cc: [Supervisor])
>
> February 3, 2009 email to Employer: Grievant: "Did I go over my uniform allowance last year? I know I just purchased some items last week from [vendor] totaling approximately $175, but I don't remember any of it being $19.98." (cc: [Supervisor])
>
> February 3, 2009 email to Grievant/Employer: Corporal John Hamilton: "…the socks were billed, all back order items billed when shipped." (cc: [Supervisor])
>
> February 3, 2009 email to Corporal John Hamilton: Grievant: "AAAAHHHH, copy that, makes sense." (cc: [Supervisor])

Here, the Supervisor arbitrarily decided that five days after Grievant picked up the safety glasses on September 3, 2009 without making a voluntary reimbursement of the $127.83 overpayment that his conduct moved from "accounting error" to Misappropriation of Public Funds and Misconduct by a Public Officer, serious felonies.

No other similarly situated Officer has been treated in like manner. The Employer

presented no written policy which requires that overpayments of uniform allowance accounts must be repaid in five days. The Employer's past practice has been to notify the Officer of the overpayment and then collect the payment. Grievant was first notified of the $127.83 overpayment on September 14, 2009. He presented full repayment to the Employer through the Union Steward on September 15, 2009.

The Supervisor first agreed to accept and then refused to accept full reimbursement. No explanation was provided to the Steward for refusing Grievant's repayment. The rationale offered at arbitration for refusing Grievant's attempted reimbursement was that: "shoplifters are not permitted to pay for goods after stealing them." Using the Supervisor's rationale would mean that every Corcoran Officer who submits an Expense Report that results in an overpayment of his/her uniform allowance is guilty of Theft of Public Funds and should be discharged.

3. The Employer Did Not Conduct a Full and Fair Investigation into the Circumstances Surrounding Grievant's Conduct.

The internal affairs investigation is discounted in its entirety because the Supervisor loaded the dice against a fair investigation. First, the Investigator was a thirty year acquaintance of the Supervisor, chosen entirely by the Supervisor, and under no written contract outlining his scope. The Supervisor failed to provide the Investigator with information material to his decision.

The Supervisor failed to provide the Investigator with the CPD Policy Manual, instead providing him with the specific regulations the Supervisor alleged were violated. The Supervisor failed to provide the Investigator with the Crystal Special Prosecutor's letter. The Supervisor failed to submit to a Q&A of his allegations against Grievant, instead using the Corporal as a

"straw" Complainant to provide the story. The Supervisor failed to provide the Investigator with Grievant's Personnel file so that the Investigator could see Grievant's work record as a whole.

Then the Supervisor participated in editing and correcting the Investigator's report. No part of the Investigator's work was neutral or fair.

C. WHETHER THE PENALTY IMPOSED IS APPROPRIATE, CONSIDERING THE NATURE AND SEVERITY OF THE OFFENSE AND MITIGATING FACTORS, IF ANY?

Discharge Is Inappropriate Considering the Nature of the Offense and the Substantial Mitigating Factors.

The Employer's Failure to Consider Grievant's Past Satisfactory Work Record Mitigates Against the Penalty Imposed.

An employee's past record is a major factor in the determination of the proper penalty for a new offense. It is very common for an arbitrator to reduce penalties in consideration of an employee's long, good past record.[4] Such mitigation is appropriate here especially since there is evidence that Grievant was an outstanding community Police Officer. His record is replete with complementary letters from individuals and businesses. It is noted that Grievant met with the Supervisor in 2008 and tried to bridge the communication gap "to get our professional relationship to improve and get on the right track…" At this point, professional mediation is necessary to teach the Supervisor aggressive communication skills.

CONCLUSION

At all times relevant Grievant performed "satisfactory work," therefore just cause to discipline has not been established. The CPD regulations are not designed to make every irregular, mischievous, or improper act a disciplinary offense, but to correct conduct which is prejudicial to

[4] *Wayne State Univ., 111 LA 986 (Brodsky, 1998); Mason& Hangar Corp., 109 LA 957 (Jennings, 1998); Pfizer, Inc., 79 LA 1225., 1236 (Newmark, 1982); Stylemaster, Inc., 79 LA 76,78-79 (Winton, 1982); Pinkerton's of Fla., 78 LA 956, 961 (Goodman, 1982).*

good order, discipline, morale and efficiency, and which tends to destroy public respect and confidence. CPD General Regulation 2000.1.

Discharge is entirely inappropriate for the offense alleged. The Grievant did not violate the fundamental understanding of the Collective Bargaining Agreement.

AWARD

After study of the testimony and other evidence produced at the hearing and of the arguments of the parties in post hearing written briefs on that evidence in support of their respective positions, and on the basis of the above discussion, I make the following award:

1. The grievance is sustained;
2. The proper remedy in this case is counseling which is not discipline;
3. Grievant shall be reinstated to his position with back pay since January 15, 2010; and restoration of all benefits and seniority to the place Grievant would have been if this action had not been initiated;
4. This incident shall not be expunged from Grievant's record, but cannot be used against him in future disciplinary action unless the allegations in a new charge are substantially similar to the allegations in this case;

Respectfully,

Dated: 03/17/11

/s/
Bernice L. Fields, Arbitrator