IN RE ARBITRATION BETWEEN:

CITY OF WINTON, MINNESOTA

and

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1189

DECISION AND AWARD OF ARBITRATOR

BMS CASE # 12-PA-0867

JEFFREY W. JACOBS

ARBITRATOR

July 13, 2012

IN RE ARBITRATION BETWEEN:

City of Winton, MN,

and

UFCW #1189.

DECISION AND AWARD OF ARBITRATOR
Debbie Maki grievance
BMS # 12-PA-0867

APPEARANCES:

FOR THE UNION:

Tim Andrews, Andrews and Bransky
Debbie Maki, grievant
Tom Cvar, Union Representative
Donna Davis, former bookkeeper

FOR THE CITY:

Kelly Klun, Klun Law Offices
Ann Jackson, Winton City Clerk
Kathy Brandau, Winton City Councilperson
Lee Tessier, Mayor of Winton

PRELIMINARY STATEMENT

The hearing in the matter was held on May 10, 2012 at the Klun Law Offices in Ely, MN. The parties submitted Briefs, which were received by the arbitrator on June 15, 2012 at which point the record closed.

CONTRACTUAL JURISDICTION

The parties' collective bargaining agreement covers the period from January 1, 2011 through December 31, 2012. Article 13 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Bureau of Mediation Services. The parties agreed that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

Did the City have just cause to terminate the grievant? If not what shall the remedy be?

CITY'S POSITION:

The City's position was that there was just cause to terminate the grievant for her actions in this matter. In support of this position the City made the following contentions:

1. The City asserted that the grievant was justly terminated from her employment for lying to the City council about her involvement in an unemployment compensation, UIC, claim filed by a former employee, Ms. DeBeltz, who was also the grievant's daughter in law. The City noted that the grievant was the manager of the City's liquor store and as such had overall responsibility for employment matters pertaining to the employees of the store. The City alleged that, by inference, the grievant was also responsible for any claims for unemployment employees might make. She was directly accountable to the City Council and further had a duty to be forthright, open, honest and candid with the Council about anything and everything pertaining to the liquor store operations.

2. The City asserted that in late December 2010, an employee of the liquor store quit employment and unbeknownst to the Council, filed a claim for unemployment compensation benefits with the State of Minnesota. This claim initially denied but the employee appealed it and a hearing with a Judge was scheduled for early February. The grievant did not notify the Council of the hearing nor of the employee's appeal, but rather delegated the responsibility for handling the claim to her bookkeeper, Ms. Davis. The hearing was held but Ms. Davis failed to appear (for which she was later disciplined as well) and Ms. DeBeltz' UIC claim was allowed. The UIC claim should not have been allowed since the employee quit and the grievant not only did not properly handle the claim but also testified on behalf of Ms. DeBeltz at a telephone UIC hearing on February 3, 2011. The City asserted that the grievant should never have testified on the employee's behalf and that her duty to the Winton Liquor Store, WLS, and the City required her to appear on behalf of the City, not the employee. The grievant's actions cost the, WLS, operations approximately $5,000.00.

3. The City asserted that when asked about this later, when the claim was discovered and the payments were being made to the State of Minnesota, the grievant lacked candor about her involvement and her role in the UIC hearing in February 2011. She was asked to provide documents regarding Ms. DeBeltz' UIC claim, See City Exhibit 10, but her answer was evasive and led the City Council to believe that she had little or no involvement in the matter. See City Exhibit 11.

4. She answered that "to the best of her knowledge" the State initiated arbitration regarding the [UIC] matter, which Ms. DeBeltz subsequently won. See, City Exhibit 11. She did not inform the City of her role in the phone hearing even though she clearly should have and left the City in the dark about this. Further, the City countered the Union's claim that "they never asked her directly" about the grievant's role in the February UIC hearing. The City argued most strenuously that the grievant, as the manager of the WLS, had a duty to make a positive disclosure about the role in the UIC matter and cannot now hide behind the fact that the City did not uncover her misdeeds by asking the right questions when she was apparently trying very hard to hide the facts.

5. The City paid the first invoice from the State, see State Exhibit 29, but never knew the details of what the check was for. They were never fully informed of the appeal nor of the hearing nor of the grievant's role in that hearing. The Mayor trusted that the checks were for legitimate purposes and that the grievant, as manager, had taken all appropriate steps to assure the council that the payments were legitimate. He was never fully apprised when he signed that check and cannot now be held to have known things that were being intentionally hidden from him and the Council.

6. Further, it was not until July 2011 that the City became concerned about the second such payment and sought to investigate the matter further that the facts began to emerge. See City Exhibit 9. As noted above, despite being asked for the documentation and when it became apparent that the City was asking for all the information about the UIC claim, the grievant simply evaded her responsibility and simply said that she did not have the documents any longer and that they had been given to an outside accounting firm.

7. The City took particular exception to the grievant's answers to questions posed to her in the September 1, 2011 investigatory meeting with the Council. She was given a Garrity warning and thus knew she had a duty to be completely forthright and open with the council.

8. The City pointed to the answer she gave in response to the specific question by the City's attorney regarding the lack of notice to the City of the UIC hearing and whether the grievant had knowledge of the initial application for Ms. DeBeltz' benefits in which the grievant simply answered, "that was not part of my job description." See Union Exhibit 3 at page 7. In fact, the City noted, that was her job and she was intentionally evasive about her answer to mislead the City about her role in that hearing. See City Exhibit 2, which shows that the grievant, as manager of the WLS, is to "hold weekly staff meetings to review policies, address problems, etc." as part of her job description. The City argued that this means she is responsible for all employee related matters and for overseeing all issues pertaining to WLS operations.

9. The City also noted that in the past, the grievant has in fact handled UIC claims and that she is well aware of how to handle them and what an appeal means. See City Exhibit 31. The grievant was responsible for handling another employee's claim who had been found guilty of theft of pull-tab receipts. That employee was immediately terminated and the grievant handled that claim. See Union Exhibit 33 at page 10.

10. The City countered the claim that Ms. Davis "handled all the UIC claims" and noted that at the September 1, 2011 meeting, Ms. Davis acknowledged that she did in fact tell the grievant about the UIC filing by Ms. DeBeltz, despite the grievant's denial that she had much if anything to do with it. See, Union Exhibit 33 at page 10, where the grievant testified that she "knew" of the filing but little else, and page 19 wherein Ms. Davis indicates that she talked to both the grievant and Ms. DeBeltz about the filing "otherwise I never would have completed it…" Clearly the grievant knew a lot more about this than she was telling the council and despite the fact that it was clear that the council wanted the whole story – not just little tidbits of it based on specific questions.

11. The City placed the grievant on suspension by letter dated October 3, 2011 for making inconsistent and fraudulent claims to the Council at the September 1, 2011 meeting. The City conducted a thorough investigation by contacting the State to find out what had happened with the DeBeltz UIC claim and discovered that the grievant had in fact testified on her behalf at the hearing in February. The City even contacted the State Auditor's office and the St. Louis County attorney to see if criminal charges against the grievant were appropriate. See City Exhibit 19.

12. The City attempted to appeal the original decision of the UIC Judge once they discovered the fraud but by the time they discovered what had happened it was too late and the City remains liable for Ms. DeBeltz' UIC benefits.

13. The City asserted that the grievant's actions in this matter constituted a clear breach of her duty of loyalty to the employer and constituted fraud on the City and that the grievant's lack of candor at the September 1, 2011 meeting as well as her clear breach of her duty to the City in the entire DeBeltz UIC matter has undermined the trust the City has in her and that she cannot be trusted to manage the City's Liquor Store operations.

14. The City further asserted that the grievant has a prior 2-day suspension in her file for improperly fixing prices that was given to her in January 2011. The underlying facts of that matter were that the grievant was changing the stated process for drinks for one particular patron and that a citizen sent a letter of complaint to the City about it. The City asserted that this too was taken into account and that her actions to testify on behalf of Ms. DeBeltz followed within weeks of her suspension. The Union did not grieve that action and it must thus be taken as part of the grievant's overall record and be taken into account in determining whether termination is appropriate. The City claimed that discharge is appropriate since the suspension letter in January clearly informed her that the next conduct offense would result in termination. See City Exhibit 5.

15. The City also asserted that there is no personal animus toward the grievant and that despite several incidents between her and two council members, the City's actions were based on the breach of the duty of loyalty in testifying against the City at the UIC hearing, the grievant's lack of candor throughout the process, especially at the meeting of September 1, 2011 and for her overall record, including the 2-day suspension issued in January 2011.

16. The City's witnesses asserted that they must be able to rely on the WLS manager to be honest with them and to act in the best interests of the City and not to take actions that cost the City money. The City of Winton is a small city in danger of losing its LGA funds and that a payment of $5,000.00 is a very large loss for the City to sustain given its small size and budget. Moreover, the point is that they cannot trust the grievant any longer since they felt she lied to them, intentionally hid facts and that it appeared as though this was something of a conspiracy to get unwarranted UIC benefits to the grievant's daughter in law.

17. The essence of the City's case is that the grievant lied to them during the investigatory meeting, acted contrary to the City's best interests in her role as manager and has a prior warning on her record that any further violations will result in her termination. That, coupled with the lack of trust issue, dictates that she be terminated from employment.

The City seeks an award of the arbitrator denying the grievance in its entirety.

UNION'S POSITION

The Union's position was that there was no cause for the termination. In support of this position the Union made the following contentions:

1. The Union claimed first and foremost that the grievant is not guilty of the charges against her. The Union asserted that she was never deceitful, never lied and never hid any information from the City. She gave the City all relevant information regarding the DeBeltz UIC claim, including the invoice indicating what it was for and the check. Further, the Mayor and Council had this information and approved it all at its May 2011 meeting.

2. Further, the Union asserted that the grievant virtually never handled the paperwork for UIC claims – that was Ms. Davis' job when she was the bookkeeper. Further, when Ms. Davis functioned as the bookkeeper, she reported directly to the council, not to the grievant, even though the grievant's job title was manager of the WLS.

3. The Union pointed to the grievant's job description, See City Exhibit 2, and noted that handling UIC claims or employment matters is specifically not listed there. Further, when the grievant was asked to provide her job duties to the City as they were drafting job descriptions, she indicated right at the top that she believed she was "responsible for the overall running of the bar." That was obviously changed by the City when they typed up the actual job description and that duty does not appear at all in the actual adopted job description. Moreover, the line on which the City relies to assert that the grievant was responsible for all employment matters, is the line that reads "hold weekly staff meetings to review policies, address problems, etc." The Union asserted that only by the most strained reading can that clause be interpreted to mean that the grievant is responsible for UIC matters.

4. The City further asserted that Ms. Davis acknowledged that she was responsible for UIC matters when they arose and that she virtually always did that. In 17 years as the bookkeeper there were perhaps 6 to 8 UIC claims filed and she handled them. To use her words, "Deb would never have seen it." This referred to any paperwork dealing with Ms. DeBeltz' claim and in fact to any other such claim. See Union Exhibit 33 at page 28.

5. The Union also noted that the sole involvement the grievant had to the Matthes matter wherein that employee was terminated for theft was to investigate the theft itself, meet with the employee and get her to admit to the theft. She did not deal directly with the UIC claim that was subsequently filed.

6. Regarding the DeBeltz matter, the Union asserted that the grievant knew that she had filed a claim but left the handling of that to the bookkeeper, Ms. Davis. She asserted that she did not see the paperwork and left that to Ms. Davis.

7. The Union asserted that the grievant cannot be disciplined simply for giving honest sworn testimony to a Judge. She was asked to testify and did so truthfully. Had she done otherwise it would have been perjury before the State tribunal. Further, she assumed that Ms. Davis would handle the matter on behalf of the WLS and was surprised when she was not available when the Judge tried several times to contact Ms. Davis by phone during the conference. They Union argued that the grievant breached no duty of loyalty to the City by giving truthful testimony.

8. The Union also asserted that Ms. Davis verbally told the Mayor about the UIC claim filed by Ms. DeBeltz in January of 2011, so he had full knowledge her claim had been filed. Further when he signed the check for the first quarter payment, the grievant was justified in assuming that the Mayor and Council knew about the claim and should have assumed it had been approved by the State. See City Exhibit 29.

9. The Union also asserted that the grievant told Councilmember Brandau about Ms. DeBeltz' while the two were at a conference in the Brainerd area in February 2011. The grievant testified that she mentioned it and that Ms. Brandau acknowledged it at the time but later, at the September 1, 2011 meeting, denied that conversation and that she "knew" she would deny it.

10. Ms. Davis also told the Mayor she was unavailable for the February UIC hearing but that he must have forgotten about it and did not appear or ask anyone from the council to appear at that hearing. The Union noted that she also filed a grievance over her suspension but that since she has left employment with the City that is not being pursued. Ms. Davis was the person who was responsible, and has been responsible for UIC claims over time and the grievant knew that.

11. The Union also asserted most vehemently that the grievant fully complied with the requests by Councilmember Jackson to provide documentation regarding the DeBeltz matter. See Union Exhibit 10 and 11. All that was requested was documentation regarding the DeBeltz matter – nothing more. The grievant did not have any documentation at that point and had given it to the Mayor for transmittal to a private accounting firm once Ms. Davis had resigned her post as the bookkeeper.

12. Moreover, the Union asserted, that the grievant is not responsible for the chaos created once Ms. Davis left her job as bookkeeper. Neither is it her responsibility to make sure the Mayor and treasurer or the rest of the council read the invoices attached to the checks before they sign them. Had the City had questions about the check dated May 3, 2011, See City Exhibit 29, it could have and frankly should have asked about it then. No one did.

13. Further, the grievant never lied about anything asked of her at the September 1, 2011 meeting with the Council. They asked specific questions and she gave specific answers in response to those questions. There was never any question about the hearing in February nor any broad question asking about the grievant's involvement in the matter in general. The Union also noted that even if the grievant had told the City in August about her involvement in the February UIC hearing it would still have been too late by then to have perfected an appeal. The grievant asserted that she believed the city already knew about the UIC hearing both because of the conversation she had with Ms. Brandau and because the information regarding the appeal and the check to the State had been submitted and approved by the City Council in May.

14. The Union suggested quite strongly that there is a personal animus between Councilmembers Jackson and Brandau and the grievant. The Union pointed to several examples. First there was an attempt to discipline the grievant for allegedly interfering with the duties of another City employee. The grievant's husband also works for the City and was alleged to have improperly dealt with some weed growth in the riprap on the City's pond and for failing to properly clean a church that the City owns prior to a funeral. The City attempted to discipline the grievant even though she simply contacted neighboring cities to find out how they dealt with those sorts of weeds and contacted the resident to find out if the family had complaints about the cleanliness of the church. The motion, brought by Ms. Brandau and Jackson, to discipline the grievant for these actions failed. See Union Exhibit 34.

15. Further, as Union Exhibits 23 through 27 show, several patrons and residents complained about the manner in which the two council people interacted with the grievant while she was on duty and complained that they were inappropriate and "crossed the line" by essentially making up a story and about the grievant's comments regarding the City's decision to hire a private accounting firm. The Union asserted that this shows that these two will go out of their way to drum up wildly unsustainable charges to "get" the grievant.

16. In July 2011 Ms. Brandau confronted the grievant about the way she was scheduling an employee. This was clearly a matter within the grievant's purview and was an example not only of the councilperson invading the province of an employee but also was quite inappropriate. The Union contends that this clearly shows that there is some personal dislike between these individuals and suggested that this is what has been motivating the dispute between them and underlies the real reason for this entire matter.

17. The essence of the Union's claim is that the grievant was under no duty to handle the UIC claim for Ms. DeBeltz, that here was no conspiracy of any sort to defraud the City or to provide false testimony to the State so she would get UIC benefits, and that the City was well aware of the claim Ms. DeBeltz had filed and of the checks that were coming through for that. Further, that the grievant was completely honest with the City and fully answered any and all questions asked of her. She did not have the documents when she was asked for them and told the City where they were (in fact they were exactly where she told them they were, i.e. in a box given to the accounting firm) and that she never defrauded the City in any way.

The Union seeks an award sustaining the grievance, ordering the grievant's reinstatement to her former position and to make her whole for all lost time and accrued contractual benefits.

DISCUSSION

FACTUAL BACKGROUND

The grievant has worked for the City for 10 years and was at the time of her termination the manager of the Winton Municipal Liquor Store, known as "WLS." The City of Winton is a small City and the grievant reports directly to the Mayor and council. Her job description lists a number of duties and the evidence showed that in addition to those she was responsible for updating the council as to personnel related matters as well as the financial affairs of the WLS.[1]

The WLS employs several bartenders as well as the grievant. It was not clear on this record exactly how many full time and part time employees worked at WLS during the relevant time period here but the evidence showed that Ms. Donna Davis worked as a bartender/bookkeeper until March of 2011 when Ms. Davis resigned her post as bookkeeper but retained her bartender status.

As discussed above in the contentions of the parties, the evidence showed that Ms. Rae Ann DeBeltz worked as a bartender until she resigned in December 2010. See City Exhibit 3. She claimed that her resignation was due to work related stress and the failure to make reasonable accommodation of her stress related condition. Significantly, she was also the grievant's daughter in law. The City had no policy against family members working together and no policy or prohibition against family members working in supervisory roles with each other.[2]

Ms. DeBeltz filed for Unemployment Compensation with the State of Minnesota, which was initially denied. She apparently filed an appeal of that initial determination and a phone conference was scheduled for early February 2011. The notice of her filing for unemployment compensation benefits went to "PO Box 27, Winton, MN," which is the post office box of the *WLS*. The *City's* main post office box is PO Box 163.

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[1] There was evidence that the grievant was asked to draw up a list of what she felt her duties were when the City decided to draft a formal job description for her and that the first item was the "overall" running and management of the WLS. The council, when drafting the final version of the job description apparently deleted that when the final draft of the description was submitted as City Exhibit 1.

[2] Ms. DeBeltz did not appear at this hearing.

Accordingly, the Council did not receive formal notice of the initial filing of the unemployment claim nor of the subsequent phone conference to be held with an unemployment compensation Judge. The evidence further showed that typically Ms. Davis handled unemployment matters and that in this situation she filled out the form to be return to the State regarding Ms. DeBeltz' appeal.[3]

The evidence was sufficient to show that with regard to the DeBeltz appeal, the grievant did not handle this – Ms. Davis did. See Union Exhibit 33 at page 28. Ms. Davis testified credibly that the grievant "would never have seen it," referring to the DeBeltz paperwork. Having said that though, it was clear on this record that the grievant knew well that there had been an appeal by her daughter in law and that she was asked to testify at the phone conference with the State's unemployment Judge.

There was conflicting evidence as to whether Ms. Davis told the Mayor about that conference. It was clear that the City did not get notice of it directly, as discussed above, since the notice went the WLS PO box. Ms. Davis indicated that she told the Mayor about the hearing and that he told her he would handle it or words to that effect. He flatly denied ever being told about the conference call and indicated he was not aware there was even a call at all until months afterward and that he discovered it only after the formal investigation had commenced in the early fall of 2011.

On this record it is not necessary to determine which version of that is true or if someone either forgot to mention it or forgot to appear by phone. Ms. Davis received a 3-day suspension for her failure to ensure that someone on behalf of the WLS appeared at the unemployment compensation hearing and it was clear that no one did appear formally on behalf of the WLS at that hearing.

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[3] The City argued that the grievant had overall responsibility for the handling of personnel matters and that she also handled two prior unemployment matters for former employees. The evidence showed though that these were atypical situations and that in one instance the sole issue was to report the earnings for a former employee of WLS since that person's claim fell partially in a time when she had worked for WLS. In the other case, the person was terminated for theft and the grievant was the person who investigated that and fired that other employee. In that instance she filled out the paperwork.

What was clear was that the grievant did appear, not as the manager but rather as a witness for Ms. DeBeltz. It was also apparent from the review of the unemployment compensation transcript that the Judge was aware that the grievant was the manager of the WLS. See Union Exhibit 15 at page 12.

The grievant gave testimony that indicated some confusion and political upheaval within the City. While the Judge's decision did not specifically address this it was apparent from the record as a whole that the fact that the manager of the store would testify on behalf of the employee as she did could well have been a significant factor in the ultimate decision.

Further, even though there was no evidence adduced at the unemployment hearing regarding a request for accommodation of the disability, even assuming there was an actual disability, the Judge awarded benefits. This, despite the clear requirement that there be an actual request for such. See, Union Exhibit 25 at page 3 of 5, where the Judge outlined the requirements for the exception to exist and specifically noted that "This exception only applies if the applicant [Ms. DeBeltz] informs the employer of the medical problem and requests accommodation and no reasonable accommodation is made." This result was curious at best.

However, by the time the City found out about this, it was too late to effect an appeal of the eventual determination. The Judge's memorandum reflected the law that an employee may still qualify for benefits even after a voluntary quit where the employee can show that the resignation was occasioned by a medical condition and that accommodation was requested but denied. Here, the facts showed that the employee quit due to her claimed medical condition (whether that was true cannot be determined on this record) it was clear that she did not request accommodation. See Union Exhibit 33 and Employer Exhibit 6, the Unemployment decision and accompanying Memorandum from the Compensation Judge.

Despite this record, UIC benefits were awarded – possibly in part because no one from the City appeared and the Judge treated the matter as a default. As noted herein the fact that benefits were awarded was not, in and of itself, a deciding factor in this decision. What was significant was the fact that the grievant appeared as the manager of the store on behalf of the employee without informing her employer that she was doing so.

As discussed more below, the grievant had an obligation as an employee of the City and as manager of the WLS to at least advise the City Council of her planned appearance at the hearing, which she clearly knew about. There was further some merit to the City's claim that the grievant had a duty of loyalty to testify on behalf of the City.

The Union asserted that the grievant had a right even an obligation to testify at the hearing and that since she was sworn to tell the truth that is all she did – tell the truth. Here while there was no evidence that she lied at the unemployment hearing; that is not strictly the issue. The issue here is that she did not notify the City of the hearing or that she had been called to testify.

Clearly too there was some merit to the City's assertion throughout this matter that the grievant should have notified the City formally that she had been called to testify, even assuming Ms. Davis contacted the City about the hearing. Further, there was some merit to the City's assertion that the grievant could have and should have provided more information to the Judge at the hearing about whom to contact once it was apparent he was having difficulty reaching Ms. Davis during the hearing.

Moving forward in time, once the decision was rendered it, too went only to PO Box 27 so the City Council was still left in the dark as it were about the outcome of the hearing on the unemployment claim by Ms. DeBeltz. However, both the check and the invoice for benefits were given to the City Council and prepared for the Mayor's signature in May 2011 and the Mayor signed the check assuming that it had been properly approved and was a valid charge to be paid. No investigation was done at that time and the Mayor testified credibly that he trusted that the charges when he gets them are legitimate and valid and does not seek to question whether each and every charge or bill is valid.

This is certainly understandable. The Mayor is a part time position and entails a certain level of trust that City employees to be honest and forthright. It was clear that the council does not have the time or the expertise to fly speck every bill that may come across their desk and that they rely on the honesty and loyalty of employees that if a bill is presented it is for legitimate purposes. Further if some explanation of a particular bill is appropriate such explanation will come along with the bill to "red flag' it and bring it to the attention of the Council. It was clear that did not happen here and that both Ms. Davis and the grievant were less than forthcoming in bringing this to the Council's attention in a manner that would have caught their attention.

Having said that though, the information was provided to the City regarding what the bill was for and the expense was approved and the check signed. As the Union noted, Ms. Davis testified credibly that she delivered the appropriate correspondence regarding the UIC claim along with the bills to City Clerk/Councilmember Jackson's home on February 1, 2011. This was only a few days before the UIC hearing but there was some evidence that the City at least had the opportunity to know about this and inquire about it prior to the hearing itself.

Nothing more was said or done about the claim until July 2011 when the City received a second bill for benefits. This time the Mayor did question and asked councilmember Jackson to investigate further. She wrote a memo to the grievant asking for documentation regarding the DeBeltz claim. That memo read in relevant part as follows:

> Please copy the MN unemployment invoice that was paid by check 16777 [(sic – it was clear at the hearing that the actual check # was 16647, City Exhibit 24)] Also find and copy any correspondence related to Rae Ann's unemployment application or benefits that would have been received by WLS or Donna Davis after Rae Ann's resignation." See City Exhibit 10; Union Exhibit 28.

Ms. Jackson sent a second letter on August 5, 2011 asking for similar information that read as follows:

> Please provide me with any documentation regarding this [Ms. DeBeltz'] claim by Monday August 8, 2011. This includes all correspondence from the previous bookkeeper and the department of Employment and Economic Development." See Union Exhibit 29.

The grievant responded by memo, which read in relevant part as follows:

> I have no information regarding this request in my possession, all this information was boxed up by my former WLS bookkeeper Donna Davis and I gave the box to Walker, Giroux & Hahne at a council meeting. … To the best of my knowledge, the State of MN initiated arbitration regarding the matter, which was subsequently won by Mrs. DeBeltz. All paperwork received on this matter is in the possession of Walker, Giroux & Hahne and the State of MN and any request for information should be directed to those parties."

It was also shown that by the spring of 2011 Ms. Davis had resigned as bookkeeper and that new systems were in place for mail so the City was aware of the claim for benefits by Ms. DeBeltz. It was also clear that the City retained a private accounting firm to handle the financial matters and that the information regarding the DeBeltz claim was given to the new firm in a large box containing a large quantity of other paperwork. The City's witnesses were quite frank in their assessment that things were confused around this time due to the resignation of Ms. Davis from her position as bookkeeper and that some things "slipped through the cracks."

These facts cut both ways here – the grievant cannot be held accountable for the inability of the City to get a handle on its financial affairs yet this confusion would also have made it even more important the grievant step forward and assist her employer, the City of Winton, to make sure it had all the relevant information it needed to properly handle its affairs. On the other hand, it was clear what the City was looking for and the grievant was quite probably giving intentionally vague answers keeping very close to the letter of the questions but not perhaps the spirit of them. She had some obligation to come forward with information regarding the UIC claim even though the "specific" question was not asked.

The City asserted it was precisely because of this state of flux that the grievant had an obligation to be complete and not obtuse in her responses. It was obvious what the City was looking for – it wanted all the information about the claim, including what the grievant's role might have been. The fact that they did not as of the time of these memos know exactly what that was should not provide a shield behind which the grievant should be allowed to hide. They "did not know what they did not know" and it was the grievant's obligation to provide more complete information.

The result lies somewhere in between, as discussed more below. While the grievant provided the information requested and the evidence showed that the documents were where she said they were, it was also apparent that she knew far more than she was letting on.

The council requested a meeting with the grievant in late August 2011. Due to the unavailability of the grievant's Union representative, that meeting was rescheduled to September 1, 2011. An informal transcript of that meeting was made and appears at Union Exhibits 33. Once again, a review of that reveals that the grievant's answers were strictly limited to what was asked of her. It was also clear that, as of the time of this meeting, the City was unaware of the phone hearing and of the grievant's involvement in that.

The City then contacted the State and found out that the grievant had not only participated in the phone hearing but that she effectively appeared on behalf of the employee even though she was the manager of the WLS, and that the Judge knew she was the manager yet was there testifying on behalf of the employee. City witnesses expressed some shock over this when that was discovered and felt they had been lied to by the grievant since she had not disclosed this in the memos in August nor at any time in the meeting on September 1st. They had been led to believe that the grievant had no involvement in the matter and that Ms. Davis had handled it all. Based on these events the City held a meeting on October 3, 2011 at which they suspended the grievant pending further investigation. The grievant was terminated at a meeting held December 12, 2011 for "dishonesty and lying on an unemployment claim." See City Exhibit 23.

EFFECT OF PRIOR DISCIPLINARY SUSPENSION

The City also asserted that the grievant has a prior discipline on her record for fixing prices at the WLS for an elderly customer who wanted only to pay half price for half a drink. The grievant was suspended for 2 days as a result of this. See City Exhibit 5. The City asserted that this warning informed the grievant that "the next conduct violation will result in termination …" Based on this the City claimed that the grievant was on clear notice that any violation would result in her termination and further asserted that they had followed progressive discipline.

There was however merit to the Union's argument that the suspension occurred prior to the actual date of the collective bargaining agreement and that as such the grievant never had access to the grievance procedure. The evidence showed that this is the first labor agreement between these parties and that even though it's effective date was retroactive to January 1, 2011, the actual date on which it was formally executed by the parties was March 11, 2011, See Union Exhibit 1.[4]

Since the discipline occurred on January 11, 2011, the time limits had already passed to file a grievance over that suspension. Without deciding whether or not this was truly grievable, since that issue is not before the arbitrator. Suffice it to say that while this suspension is now part of her record it cannot be counted as progressive discipline since it was not subject to the grievance procedure. This case must rise or fall on the strength of the evidence regarding the grievant's involvement in the UIC claim and her subsequent actions and statements made to the Council.

GRIEVANT'S TESTIMONY AT THE UNEMPLOYMENT HEARING

One of the bases for the City's action was that the grievant testified on behalf of the employee at the unemployment compensation hearing in February 2011. As noted above, there was no question that the grievant testified on behalf of the employee and even though she identified herself as the manager of the WLS, she made no effort to represent the City in that matter.

[4] There was thus no "continuing contract" under PELRA. Had there been this would have been a different analysis.

Moreover, even though it was shown that Ms. Davis handled most of the unemployment matters at the WLS, it was troubling that the grievant made no effort to explain Ms. Davis' absence from that hearing nor was there any effort to either find her or someone on behalf of the City to represent the City and the WLS at that hearing.

The Union argued that there was no "rule" against her testifying there and that she was sworn to tell the truth there. While true, that misses the point. First, not every possible transgression committed by an employee must be covered by some specific rule. Here the issue was that the grievant spoke on behalf of an employee without notifying the Council of her intention to do so.

In juxtaposition to that was the equally clear fact that the City disciplined Ms. Davis for failing to appear at the unemployment hearing at the same time it asserted that the grievant should have appeared on the City's behalf there.[5]

There was some merit to the Union's claim that the City cannot have it both ways – either Ms. Davis was the person to appear, and she was disciplined for failing to do so, or the grievant was the person to appear, in which case Ms. Davis should never have been disciplined at all. The fact that she was shows that the City acknowledged that Ms. Davis was the person whose job it was to appear at that hearing. Thus the mere fact that the grievant appeared there was not in violation of any rule or underlying duty to the City. The concern here is that the grievant neither advised the City she was going to testify there nor did she advise the Judge if there was someone else to contact when it was apparent that Ms. Davis was unavailable.

[5] It should be stated that Ms. Davis' testimony was quite credible in this regard. Her testimony is both consistent internally and with other statements on the record. Further, even though the City disciplined her for 3 days, there was no reason given as to why she would intentionally neglect her role as the representative of the WLS at the DeBeltz unemployment hearing. At best this was an error of miscommunication between her and the City but there was no evidence of collusion or intentional neglect by Ms. Davis on this record.

On this record, the grievant bore at least some responsibility for her presence at the hearing. She frankly should have advised someone from the Council, that she had been asked to appear and to at least advise the City that there was a hearing, even though Ms. Davis was the person who "officially" had that role.

Second, there was the question of her testimony at that hearing. The City asserted that Ms. DeBeltz should never have been awarded benefits because, as discussed above, one of the major elements of her claim was missing. Further, by the time the City learned the details it was too late; the appeal time had passed. The City further claims that the grievant should have been there to support the City. While this conduct did not arise to the level of a true breach of the common law duty of loyalty,[6] this is one of those situations where a specific rule was likely not necessary.

The manager of an establishment should know that when there is an important hearing that could well affect that establishment's liability for unemployment or other governmental benefits, the manager must at least notify the employer.

The City further asserted that some collusion must be inferred here since the grievant and the employee were related by marriage. The Union asserted that there was no rule against such relationships in the workplace and that the grievant cannot be punished *ex post facto* for a rule that did not exist. Ironically, there is some truth in both those assertions.

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[6] An implied condition in every employment contract is the employee's duty of honesty and faithfulness to the employer. *Hlubeck v. Beeler*, 214 Minn. 484, 489, 9 N.W.2d 252, 254 (1943). Minnesota Courts recognize at least three claims upon which relief can be granted based on a violation of an employee's fiduciary duty to their employers: "(1) soliciting business of the employer prior to leaving the employment relationship, (2) disclosing or misappropriating information that the employer has treated as a secret, and (3) engaging in serious misconduct such as embezzlement or referring customers to a competitor." *Bellboy Import Corporation v. Baghart*, 2004 WL 2711052 (Minn. Ct. App. 2004).

The duty of loyalty, which is a subset of unfair competition, has been characterized as "a general category of torts recognized by Minnesota courts to protect commercial interests." *Midwest Sports Marketing, Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254 (Minn.App.1996), *rev. denied* (Minn. Sept. 20, 1996) (citing *Rehabilitation Specialists*, 404 N.W.2d at 305). The duties of loyalty and unfair competition do not necessarily have specific elements. *Rehabilitation Specialists*, 404 N.W.2d at 305; *see also Prosser & Keeton on Torts* § 130, at 1015 (5th ed. 1984); Restatement, Third, Unfair Competition §1 and comments (1995).

Here no such specific conduct was alleged but there was in the broadest sense, a failure to be totally honest and faithful to the employer. This will be discussed more below in the discussion of the grievant's conduct and statements made during the investigation by the City.

Here there was no specific violation in the testimony that was given. The transcript of the hearing before the unemployment Judge was reviewed and revealed no overt or even covert misstatement or falsehood. On the other hand, as noted above, the grievant should have known the importance of this hearing to the City and what the possible legal consequences were as well as the possible economic benefits to her daughter in law. While one cannot on this record conclude that the grievant intentionally fabricated her story in any way, the mere fact that she was there at all without formally notifying the City was troublesome.

THE INVESTIGATION

The other main assertion by the City was that the grievant either lied or intentionally hid material facts during the investigation by failing to disclose the fact of the phone hearing or her role in that hearing until the City uncovered these facts well after the fact and then only through its own efforts. The thrust of the City's assertion here is that the grievant should have certainly disclosed her role in the unemployment hearing at the time she was first asked about it in August 2011. (The City also asserted as noted above that she should have disclosed it a long time before that as well but certainly she should have understood what the City was asking for when Ms. Jackson sent her the two memos in early August asking for the documentation regarding that hearing.

The City also asserted that the grievant was given a Garrity warning and thus should have known she had an obligation to fully answer all questions posed. Without getting too deeply involved in the nuances of a Garrity warning, suffice it to say that such a warning essentially means that an employee's statement obtained under threat of removal from office cannot be used in subsequent criminal proceedings. The City asked the County Attorney to investigate possible criminal charges but that alone does not alter the fact that the employee is still under the obligation to answer only those question posed to him/her. Thus, the fact that a Garrity warning was given does not in and of itself place a higher duty to answer questions than otherwise.

The Union asserted that the City only asked for the documentation and that the answer to that question was truthful - the grievant had no documentation having given it to a private accounting firm. The Union noted too that the documents were exactly where the grievant said they were and that she told the truth about the whereabouts of the documents. Further, the fact that the City's financial house was in a state of disarray at that time should not be held against the grievant. Also, the Union noted that the grievant was never asked about her role in the unemployment hearing directly nor was she asked a broad question about her knowledge of how Ms. DeBeltz was able to get unemployment benefits. The grievant and the Union asserted that the grievant was told that she should answer the City's questions but only the specific questions being asked and that she not volunteer anything beyond what was asked.

Finally, the Union pointed out that the City had the information regarding the unemployment claim in that the checks and a statement about what it was for was submitted to the council in April and again in July. The Union argued that the grievant gave the City all of the information yet no one even asked her about it until August.

Again, the truth lies somewhere in between with respect to these arguments. A review of the request for information reveals that only the documents were requested and that the grievant gave an accurate response – they were in the possession of the private accounting firm. She was not asked for anything further at that time. Her response that began with the statement "to the best of my knowledge" was evasive and reasonably led to the conclusion that the grievant had divulged all the information she had. That was not at all the case as it was clear that the grievant knew a great deal more than she told the City at that point. As discussed more below, while this was "the truth" it was hardly "the whole truth" and was a troublesome response and one that could well lead to the inference that the grievant was hiding something she knew well that the City would have been upset about.

With regard to the meeting on September 1, 2011 a careful review of the questions again revealed that the grievant was very careful, even measured, in her responses to the City and that while she did not misstate the truth in any way, she did not go beyond the specific questions being asked.

The City raised the legitimate point that it did not know what it did not know at that point and should not be penalized for not asking the questions, "what did you know and when did you know it?" during the investigation. It was abundantly clear that the September 1st meeting was an investigatory meeting to discuss possible discipline and that the Union properly counseled the grievant regarding her answers. While the grievant's answers could be characterized as coy, they were not untruthful per se.

The question is now what to do with this set of troubling facts. There was some sense that the grievant's loyalties were with her daughter in law rather than with her employer. There was some indication that there may have been some personal animus toward the grievant by certain members of the council. See Union Exhibits 23-27. These were letters from people who did not testify and were not even couched in terms of affidavits. They were hearsay and of no evidentiary value. Thus, the argument that the entire matter was motivated by personal animus found little support in the record.

What was clear was that the grievant testified at a hearing that the City knew nothing about and did so on behalf of a former employee who was her daughter in law. There was no policy against this and there was evidence to show that all appropriate documentation was given to the City in a timely fashion. There was evidence to suggest that the grievant was less than forthcoming in her answers to investigators but that her answers were truthful in response to the specific questions being asked and that her Union representative gave her appropriate information about what to say and what not to say at that hearing. It is also the case that the employer bears the burden of proof and production to establish just cause and to support the level of discipline that was meted out.[7]

[7] In this regard the Union's assertion that there was some personal animus between the grievant and several council people was considered. In some small towns this can be a common occurrence and there was some evidence of bad personal relations between the grievant and at least two of the Council. This however did not erase the fact that she testified at the DeBeltz UIC hearing, did not inform the City she was doing that, did not inform the Judge that there may have been others to appear at that hearing and did not fully disclose everything she knew about her role in that whole affair when asked about it in August. As noted throughout this case, there was some sense that the grievant was complying with the letter of what

Here there was insufficient evidence to establish that the grievant is dishonest or that she poses a threat for theft or other nefarious activity. In fact, in one case, the grievant was the person who ferreted out a theft by a former employee and terminated that employee immediately. There was however the very troubling fact that she appeared at that hearing in the capacity as manager as discussed above.

There was thus a showing of just cause for some discipline given her appearance at the hearing and her lack of full candor in responding to the memos in early August. Given her role as the manager and the implicit but clear requirement underlying all employment scenarios of the duty to support her employer under these circumstances, the grievant should not be reinstated as the manager of the WLS.

On this record it was clear that the grievant may have met the "letter of the law" in what she did but did not fully disclose her actions until well after the fact and only when it was apparent that the City had the information about her role in this case anyway. It was frankly clear what the City was asking for yet the grievant, even though she was the manager of the WLS, was less than completely forthcoming about it. Some discipline for her actions is clearly warranted under these circumstances.

Accordingly, several options were considered. There was insufficient evidence to warrant termination on this record. Had the grievant been found to have made a positive misstatement or an intentional lie to the City, termination would have been the result and the case would be over at this point. By a somewhat slim margin there was insufficient evidence of such misstatements or intentional misconduct. There was however sufficient proof that it would be inappropriate for the grievant to be reinstated as a manager given her lack of full candor in this matter. Under the terms of the labor agreement, demotion is an appropriate discipline and finds support in this record. Accordingly while reinstatement is ordered it will be as a bartender but not as the manager of the WLS.

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was being asked even though it was clear in a common sense way what was really being asked. For that reason, the Union's arguments, while perhaps true, were given little weight on this record.

The question of back pay and benefits was also considered at some length. As discussed below, it would be inappropriate to reinstate the grievant as a manager given her actions in this matter. Reinstatement with full back pay was considered but quickly rejected given the ruling above. Reinstatement subject to some level of disciplinary suspension was also considered. That too was rejected given the severity of the grievant's actions here and the fact that it may well have led directly to the City having to pay out a claim for benefits to a member of the grievant's family under somewhat odd circumstances.

Reinstatement without back pay or benefits was considered the most appropriate and reasonable result here even though such remedies sometimes appear to be a split the baby proposition. Here though, this result is both reasonable and gives effect to the grievant's long tenure with the city and the lack of any proof that she poses a threat for theft or any sort of nefarious activity in any way.

Thus, the grievant is to be reinstated within five (5) business days of this award but without back pay or contractual benefits

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievant is to be reinstated as a bartender without back pay or contractually mandated benefits as set forth above.

Dated: July 13, 2012

City of Winton and USW #1189 AWARD.doc

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Jeffrey W. Jacobs, arbitrator