**IN THE MATTER OF THE ARBITRATION BETWEEN:**

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**LABORERS LOCAL 132**

**AND**

**CITY OF ST. PAUL**

**BMS Case No. 13PA0122**

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# OPINION AND AWARD OF ARBITRATOR

**Arbitrator:**

**Richard A. Beens**

**APPEARANCES**

**For the Union:**

**Gregg M. Corwin, Esq.**
**Gregg M. Corwin and Associate**
**1660 South Highway 100, Ste. 508 East**
**St. Louis Park, MN 55416**

**For the Employer:**

**Ben Reber**
**Labor Relations Specialist**
**City of St. Paul**
**300 City Hall Annex**
**25 W. Fourth Street**
**St. Paul, MN 55102**

**Date of Award:**
**October 29, 2012**

## JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement ("CBA")[1] between Laborers Local 132 ("Union") and the City of St. Paul, Minnesota. ("City" or "Employer"). The two Grievants were members of the Union and employees of the City.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on October 5, 2012 at the Bureau of Mediation Services offices in St. Paul, Minnesota. The parties stipulated that the matter was properly before the arbitrator. Both were afforded the opportunity for examination and cross-examination of witnesses and for the introduction of exhibits. Final briefs were submitted on October 24, 2012 and the record was then closed.

## ISSUE

The parties stipulated to the issue presented for consideration:

*Did the Employer have just cause to discipline Grievants and, if not, what is the proper remedy?*

## FACTUAL BACKGROUND

The two Grievants worked as laborers for the Saint Paul Regional Water Department, a subdivision of the City of St. Paul charged with constructing and maintaining water supplies to city residents and some of the surrounding suburbs.[2] At the time of the incident, both were relatively new, probationary employees. Water Services has approximately 250 full time employees. It consists of four divisions, Production,

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[1] Employer Exhibit 16.

[2] In addition to the City of Saint Paul, Regional Water Services provides quality water services to Arden Hills-Falcon Heights, Lauderdale, Little Canada, Maplewood, Mendota Heights, Roseville and West St. Paul.

Distribution, Business and Engineering. Grievants worked in the Distribution Division, which has about 60 employees year around and an additional 40 during the construction season. Their principal job is delivering water to new customers and maintaining existing connections. Since all water mains are buried underground in northern climes, the bulk of their work occurs in trenches excavated between in-street water mains and the customer's home or business.

Working in trenches anywhere from five to twenty feet deep can be hazardous due to the possibility of cave-ins. As a consequence, the Occupational Safety & Health Administration ("OSHA") has promulgated regulations designed to ensure worker safety.[3] In compliance with OSHA standards, the Employer has adopted an Excavation and Trenching Program.[4] Pertinent to this arbitration is the requirement that, *"When an employee enters an excavation he/she must be protected from cave-ins by an adequate protective system…"*[5] The first means of protecting workers is the use of trench boxes/shields in all trenches over five feet in depth.[6]

There are two sided and four sided trench boxes. The former was used in the present case. The two-sided trench boxes consist of two vertical metal panels, approximated 8' x 6', connected by two approximately 6' horizontal metal support beams at each end of the vertical panels.[7] Prior to workers entering an excavated trench, these units are lowered into it by a backhoe or other mechanical means. The vertical

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[3] Employer Exhibit 15.
[4] Employer Exhibit 5.
[5] Ibid., Section 8.1, p. 12.
[6] While other protective means such as slope control and shoring are also used, there are not relevant to the present grievance.
[7] Employer Exhibit 8. Presumably, trench boxes come in a variety of sizes. However, the dimensions listed appear to describe the size at use in the incident at issue.

panels abut the sides of the trench, thereby protecting workers from side cave-ins. If the end of the trench box abuts the end of the trench, plywood or metal panels are placed between that end and the horizontal support bars. This panel protects the workers from end of trench cave-ins.

Ensuring a safe and secure working environment is a major goal of Regional Water Services.[8] Periodically, memorandums have gone out to all Distribution Division construction staff outlining the Employer's excavation and trenching safety expectations.[9] A memorandum dated March 1, 2010 states;

> *Expectations:*
> *Employees must be protected when working in an excavation. Although an excavation may be sloped to meet regulations, it is expected that a trench box be used on all excavations. A protective system must be in place on* ***all sides of an excavation*** *and* ***full compliance with OSHA regulations is expected.*** (Emphasis in original.)[10]
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> *Consequences for non compliance:*
> *Failure to follow OSHA standards on excavation and trenching safety will result in significant disciplinary action including multiple day suspension.* (Sic) *In the past disciplinary action has been directed primarily towards the onsite supervisor.* ***Future disciplinary action will apply to the supervisor on site and all employees within the excavation.*** *In addition, staff can expect* ***increased severity of discipline from this point forward*** *for failure to follow OSHA requirements. Disciplinary action will be significantly greater than that issued in the past.* (Emphasis in original.)[11]

Despite these admonitions, at least five employees received two-day suspensions for violation of the policy between May 27, 2010 and October 18, 2011.[12] Apparently frustrated with the ongoing violations, one of which resulted in OSHA fining the city

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[8] Employer Exhibit 18.
[9] Employer Exhibits 6 and 7.
[10] Employer Exhibit 6.
[11] Ibid.
[12] Employer Exhibit 13.

$7000, the Distribution Division manager issued a second memorandum to all employees dated January 3, 2012. Prior to issuing the memorandum, the General Manager of Regional Water Services and the Distribution Division Manager met with Union officials to discuss an initial draft.[13] Minor wording changes resulted from the meeting and, although the Union representatives complained about the harshness of the 10-day suspension, it survived unchanged. The final draft reiterates in detail the SPRWS Excavation and Trenching Program safety requirements, defines "Competent Person," and announces the new, mandatory penalty for non-compliance:

***1. RULES AND PROCEDURES***

> *1. The Supervisor, when present, shall be the "Competent Person" on SPRWS excavation and trenching sites. When the Supervisor is away from the excavation site, a designee whom has been trained as a Competent Person will assume the role of the Competent Person. The Competent Person is responsible for ensuring that all employees are protected from the hazards associated with excavation work. The Competent Person shall take prompt and immediate action necessary to correct all recognized deficiencies as they pertain to the safety of the work site and applicable regulations and requirements.*

.....

***5. CONSEQUENCES FOR NON-COMPLIANCE***

> ***…***
>
> ***Failure to follow this policy regarding serious safety violations on excavation and trenching will result in, at a minimum, a ten (10) day suspension for the first offense and for any violations thereafter*** (Sic) ***will be subject to further discipline, up to and including discharge. Future disciplinary action will apply to the supervisor/competent person on site and all employees within the excavation.*** (Emphasis in original.)[14]

In furtherance of the Employer's safety policy, all Regional Water Service

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[13] Employer Exhibit 8.
[14] Employer Exhibit 7.

employers were given a daylong training course which included trench safety.[15] Both Grievants attended the course in February, 2012.[16]

Near noon on May 2, 2012, the two Grievants and their supervisor, Stan Denkinger, were in an excavation at Taylor Avenue west of Prior Avenue in St. Paul. The trench was about 18 feet long, extending from just inside the sidewalk in front of the customer's home to the trunk water main in the street. The crew was replacing a lead service line with one made of copper. The trench box was initially at the customer's end of the trench and had a plywood end panel in place to guard against an end cave-in. No end panel was required at the street end since the box was far enough away to preclude a cave-in safety hazard. The end panel was held up by the pressure of the trench end against the metal crossbars of the box. The crew had just moved the trench box several feet toward the street.[17] During the process of moving the trench box, the supervisor removed the end panel. Absent the pressure from the end of the trench, the panel might simply fall into the excavation. The two Grievants, who testified they were unaware the end panel had been removed, were occupied moving the box and attaching a shutoff valve to the new line. At this point, the Distribution Division Manager, David Wagner, arrived on the scene. He chatted briefly with the crew and then left to observe another crew working a short distance away. Wagner returned about five minutes later and informed the crew they were in violation of OSHA and departmental regulations by working in a

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[15] Employer Exhibit 10.
[16] Employer Exhibit 9.
[17] The trench box has a heavy rope attached to each end of the two top metal crossbeams. The four ropes then extend several feet and attach to a single metal ring that is used to lift and move the trench box, usually by the hydraulic arm of a backhoe. The trench box is moved by lifting it a few inches while the crew "walks" the box to its next location.

trench box without an end panel. He indicated 10-day suspensions would be given to the supervisor and the two Grievants. This was done without interviewing either the supervisor or Grievants. Disciplinary letters were given to Grievants on May 7, 2012.[18] The disciplinary actions were grieved shortly thereafter.[19] Grievants were not asked their version of what occurred until the Step III meeting over two months later. Despite Grievants' subsequent explanations, the Employer denied the grievances and reiterated the mandatory 10-day suspensions.[20] The Union then requested arbitration of the grievances.[21]

## CONTRACT PROVISIONS[22]

### Collective Bargaining Agreement[23]

### ARTICLE 5 -- MANAGEMENT RIGHTS

*5.1 The Union recognizes the right of the Employer to operate and manage its affairs in all respects in accordance with applicable laws and regulations of appropriate authorities. The rights and authority which the Employer has not officially abridged, delegated, or modified by this Agreement are retained by the Employer.*

*5.2 A public Employer is not required to meet and negotiate on matters of inherent managerial policy, which include but are not limited to, such areas of discretion of policy as the functions and programs of the Employer, its overall budget, utilization of technology, and the organizational structure and selection and direction and number of personnel.*

### ARTICLE 6 -- SAFETY

*6.1 Accident and injury free operations shall be the goal of all Employers and employees. To this end the Employer and employee will, to the best of their ability, abide by and live up to the requirements of the several State and Federal Construction*

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[18] Employer Exhibit 1.
[19] Employer Exhibit 2.
[20] Employer Exhibit 3.
[21] Employer Exhibit 4.
[22] Only those provisions deemed relevant to the present case have been included.
[23] Employer Exhibit 16.

*Safety Codes and Regulations.*

*6.2 To this end the Employer shall from time to time issue rules or notices to his employees regarding on the job safety requirements. Any employee violating such rules or notices shall be subject to disciplinary action. Nor employee may be discharged for refusing to work under unsafe conditions.*

**ARTICLE 7 -- DISCIPLINE PROCEDURES**

7.1 *The Employer will discipline for just cause only.*

**OPINION AND AWARD**

It is well established in labor arbitration that, where an employer's right to discipline an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proof. Although there is a broad range of opinion regarding the nature of that burden, the majority of arbitrators apply a "preponderance of the evidence" standard. That standard will be applied here.

In determining the question of whether the employer acted with "just cause," the arbitrator is called upon to interpret the phrase as a term of art that is unique to collective bargaining agreements. While the arbitrator may refer to sources other than the contract for enlightenment as to the meaning of just cause, his essential role is to interpret the contract in determining whether a given action was proper.

A "just cause" consists of a number of substantive and procedural elements. A review of discipline for alleged employee misconduct requires an analysis of several factors. First, has the employer relied on a reasonable rule or policy as the basis for the disciplinary action? Second, was there prior notice to the employee, express or implied of the relevant rule or policy, and a warning about potential discipline? A third factor for

analysis is whether the disciplinary investigation was thoroughly conducted. Were statements and facts fully and fairly gathered without a predetermined conclusion? Finally, did the Grievants violate the work rule in question?

Was the Employer relying on a reasonable rule or policy? There is no question the Employer's goal to, *"Ensure a safe and secure working environment,"* is a necessary and prudent objective.[24] Safety rules, while sometimes inconvenient, benefit both employers and employees. On-the-job injuries result in economic loss to both parties even with Workers Compensation coverage. Employers' insurance rates go up with an increased number of injuries to their workers.[25] Injured employees may recover only a fraction of their lost wages through Worker's Compensation.[26]

In the present case, where virtually all work is done in excavations, trench cave-ins are an obvious and omnipresent danger. The Employer's requirement that employees may only enter excavations having in place an adequate protective system is reasonable and clearly required by OSHA regulations and common sense. However, the basic safety work rule is not the thrust of the Union objections in this case. They take issue with the mandatory, minimum ten (10) day suspension for a first violation and argue that the Employer committed an unfair labor practice in adopting the discipline provision. I disagree.

While the NLRB customarily defers to arbitrators in first determining unfair labor practice claims in the private sector,[27] the same is not true under Minnesota's Public

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[24] Employer Exhibit 18.
[25] See M.S.A. §79.55.
[26] See M.S.A. §176.101.
[27] See John C. Truesdale, *Distinguished Speaker: NLRB Deferral To Arbitration: Still Alive and Kicking,*

Employers Labor Relations Act ("PELRA"). District Court in the County where the alleged unfair labor practice occurred has sole jurisdiction to decide the issue.[28]

While I do not have the power to decide public sector unfair labor practices, per se, I would note that a public employer under PELRA has the, *"...obligation to meet and negotiate in good faith ...regarding grievance procedures...* (Emphasis added.).[29] There is no question an arbitrator has the authority to interpret the parties' resulting CBA. Articles in the present CBA indicate the Employer has already complied with the statute. First, Article 10 of the CBA sets out a detailed map for handling employee grievances. Second, in Article 6, Section 6.2, the parties have agreed that,

> *"..the Employer shall from time to time issue rules or notices to his employees regarding on the job safety requirements. Any employee violating such rules or notices shall be subject to disciplinary action. No employee may be discharged for refusing to work under unsafe conditions."*

This provision clearly cedes to the Employer a right to issue work rules such as the January 3, 2012 directive relating to safety, .[30] While the mandatory ten (10) day suspension included for a first violation may sometimes be problematic for reasons to be discussed later, I believe it's adoption lies within the power granted the Employer by Article 6, Section 6.2.

In my view, the statutory duty to negotiate a "grievance procedure" is separable from the employer's choice of a particular discipline for a particular violation. The first case relied on by the Union, *International Brotherhood of Teamsters, Local No. 320 v.*

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Proceedings of the NAARB, (2000) p. 55.

[28] M.S.A. §179A.13 Subd. 1 and *AFSCME Local 66 and Council 96 v. St. Louis County*, 281 N.W. 2d 166 (1979).

[29] M.S.A. §179A.07 Subd. 2 (a).

[30] Employer Exhibit 7.

*City of Minneapolis,* 353 N.W.2d 254 (Minn. 1984), is distinguishable and not applicable. It involved an unnegotiated Minneapolis Charter Provision that allowed up to 30-day disciplinary suspensions of city workers without recourse to any grievance procedure. Here, in compliance with PELRA, an extensive grievance procedure has been negotiated which allows workers to grieve any disciplinary action. These provisions insure employee due process in the event of any disciplinary action.

The second case relied on by the Union, *Law Enforcement Labor Services, Inc., Local No. 158 et al v. Sherburne County,* 695 N.W.2d 630, (Minn. App. 2005), is also inapplicable. There, Sherburne County was adopting an random drug testing policy that exceeded the minimum requirements of past practices and a legislatively mandated program . To the extent the new policy exceeded the requirements of the Workplace Testing Act, M.S.A. §§ 181.950 through 181.957, relative to who could be tested, cause for testing, etc., mandatory bargaining would be required. That is not the case here. The Employer's Trench Safety policy follows OSHA standards and was not changed by the January 3, 2012, Memorandum. The only change was the Employer's announced intent to mandate a 10-day suspension for a first violation. I am unaware of any statutory or case law that would require the Employer and Union to negotiate specific disciplinary penalties for specific acts.

More important, the CBA already has a negotiated grievance process in place to protect employee rights. In the first instance, the Employer can apply any discipline it deems warranted. However, the Employer's right to apply a specific disciplinary penalty

is limited by the CBA provision requiring "just cause."[31] The fact that the CBA in this case has negotiated Articles covering both Discipline and Grievance Procedures satisfies the PELRA requirement.

In summary, I find the underlying work rule requiring trench protection to be reasonable. The penalty provision of the rule is best handled later in the course of a just cause analysis.

Were the Grievants aware of the work rule and the consequences for violation? There can be no doubt they were. Both had attended day-long training sessions[32] at which the rules were discussed and both specifically acknowledged receiving copies of the Regional Water Service Excavation and Trenching Policy dated January 3, 2012.[33]

Next, was there a thorough investigation of the facts before imposition of discipline? Were statements and facts fully and fairly gathered without a predetermined conclusion? The short answer is "No." The Division Manager observed Grievants in an excavation with a two-sided trench box having no end panel in place on May 3, 2012. He pronounced 10-day suspensions for both Grievants and the on-site supervisor without making any further inquiries. In fact, Grievants were never asked for their version of the incident until the Step III grievance meeting on July, 9, 2012, more than two months after the incident.[34] *"Most arbitrators require that an employer's decision to discipline .. an employee be based on a meaningful, more-than-perfunctory factual investigation."*[35]

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[31] Employer Exhibit 16, Article 7, paragraph 7.1.
[32] Employer Exhibits 9 and 10.
[33] Employer Exhibit 7.
[34] Employer Exhibit 3.
[35] *The Common Law of the Workplace,* Antoine, Editor, National Academy of Arbitrators, Second Edition, (2005), Section 6.14, pp. 208-210.

While the violation may have appeared obvious to the Division Manager, the 10-day suspension for a first-time violation cannot be treated as a "zero tolerance" rule.

I have no doubt the Employer has the power to adopt a mandatory ten-day suspension, but they are still obligated to base disciplinary actions on just cause. There are infinite gradations of culpability and one size does not necessarily fit all. At a very minimum, employees should be given the opportunity to explain their actions prior to the imposition of discipline. Failure to do so, while not always fatal to an Employer's case, will commonly be viewed by arbitrators as a denial of due process to Grievants. This case provides a classic example. Immediate interviews would have revealed that the Grievants were busy installing a cut-off valve and unaware that their supervisor had just removed the end panel in the process of moving the trench box to a new position. An immediate gathering of all facts, along with a reasonable application of the safety rule might have led to the conclusion that Grievants bore little, if any, culpability. On the other hand, an immediate questioning of Grievants might also have led to admissions justifying the subsequent disciplinary actions. A reflexive, uninvestigated application of a mandatory penalty does neither party any good. The employees sense injustice and the employer is left with the time and expense of defending what appears to be an improvident and arbitrary decision.[36]

Did Grievants violate the rule in question? Yes, but only in a technical sense.

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[36] The Employer cites two Metro Council Transit arbitration decisions in support of the mandatory 10-day suspension provision. In the first, *Metro Council Transit Operations and Amalgamated Transit Union, Local 1005,* BMS 11-PA-0180 (Neigh, 2011), the arbitrator found a mandatory 20-day suspension for using a cell phone while driving a bus to be a valid management work rule and penalty. Nevertheless, by the time of the second case, *Metro Transit and Amalgamated Transit Union, Local 1005,* BMS 12-PA-0595 (Beens, 2012), the employer had amended the penalty portion of the rule to provide for "up to a 20-day suspension." The amended rule gave the employer the flexibility to handle gray area or *de minimis* rule violations.

They were present in an excavation and working in a trench box without an end panel. However, the normal principles of "just cause" apply to discipline for any infraction, including safety violations.[37] Both Grievants credibly testified they were unaware their supervisor had removed the panel just before the Divisional Manager appeared on the scene. Further it had just occurred during the process of moving the trench box. Even the Division Manager conceded the end panel had to be removed when shifting the box position. The testimony also indicated employees remain in the trench to guide the box during a move. A zero tolerance policy cannot, and does not override the express just cause and related protections of the CBA.[38] The concept of "just cause" for discipline tacitly implies that the employee is somehow at fault. That fault may be one of either negligent or intentional violation of a work rule. The City has proven neither in this case with respect to these Grievants.

The City's assertion that Grievants were also trained as "Competent Person[s],"[39] and therefore equally responsible, defies both their own written safety rule and the real-life, workplace chain of command. The January 3, 2012 directive specifically states,

> *"The Supervisor, when present, shall be the "Competent Person" on SPRWS excavation and trenching sites. ... The Competent Person is responsible for ensuring that all employees are protected from the hazards associated with excavation work. The Competent Person shall take prompt and immediate action necessary to correct all recognized deficiencies as they pertain to the safety of the work site and applicable regulations and requirements."*[40]

Not only was the supervisor, Denkinger, present, he was the one who removed the end

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[37] *The Common Law of the Workplace,* Antoine, Editor, National Academy of Arbitrators (2005), 8.17.
[38] Ibid., 10.24.
[39] Employer Exhibit 3.
[40] Employer Exhibit 7, Rules and Procedures, paragraph 1.

panel of the trench box. He was in charge of the crew and bore the responsibility for their safety.[41] While there is no question the supervisor was appropriately disciplined, the same cannot be said of subordinate employees who were unaware of the hazard their supervisor created.

Last, suggesting that Grievants second-guess their supervisor's actions or orders obscures the line between safety and insubordination. Even if Grievants were aware the end panel had been removed, they would be caught in an intolerable position between rigid adherence to a safety rule and possibly incurring the future wrath of the supervisor. This is particularly true where, as in this case, we have an experienced supervisor and two relatively new employees. While relations between the supervisor and Grievants on this crew were supportive and cordial, in many real-life cases a second-guessed supervisor would find subtle ways to retaliate against a worker he views as insubordinate.

In summary, while the Employer has adopted a reasonable and necessary safety rule and penalty, it must be applied in accordance with just cause standards. That implies a thorough investigation and a reasoned determination of the relative culpability of each employee involved. Based on the facts before me, I find the Employer did not have just cause to discipline Grievants in this instance.

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[41] The supervisor, Tom Denkinger, who is a member of a different union, was also given a 10-day suspension. His subsequent grievance was resolved by the City lowering the penalty to 5 days on the condition his personnel records to continue reflecting a 10-day suspension. The negotiated settlement and apparent necessity of the 10-day "fig leaf" record highlights the managerial difficulties inherent in applying mandatory penalties without regard to the underlying facts of a specific case.

## AWARD

The grievances are SUSTAINED. Grievants shall be made whole with respect to back pay, benefits, and seniority. Further, any reference to discipline in this matter shall be expunged from their personnel files.

DATED:_____ _____

Richard A. Beens, Arbitrator