IN THE MATTER OF ARBITRATION	**OPINION & AWARD**
-between-	**Grievance Arbitration**
TEAMSTERS UNION, LOCAL 320	**B.M.S. Case No. 12PA1220**
-and-	**Re: Employee Termination**
THE COUNTY of HENNEPIN **MINNEAPOLIS, MINNESOTA**	**Before: Jay C.Fogelberg** **Neutral Arbitrator**

Representation-

For the Employer: Gregory L. Failor, Labor Relations Rep.

For the Union: Patrick J. Kelly, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties, provides in Article 7 for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial two steps of the grievance procedure. A formal complaint was submitted by the Local on behalf of the Grievant on or about March 28, 2012, and thereafter appealed to binding arbitration when the parties were unable to resolve this matter to their mutual satisfaction. The under-signed was then mutually

selected as the neutral arbitrator by the parties, and a hearing convened on August 30, 2012, in Minneapolis. Following receipt of position statements, testimony and supportive documentation, each side indicated a preference for submitting written summations. These were received on September 20, 2012, at which time the hearing was deemed officially closed.

At the commencement of the proceedings, the parties stipulated that this matter was properly before the Arbitrator for resolution based upon its merits, and that the following represents a fair description of the issue.

The Issue-

Did the County have just cause to terminate the Grievant's employment? If not, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The record developed during the course of the proceedings indicates that the Teamsters Union, Local 320 (hereafter "Union," or "Local") represents, the Custodial, Environmental Services, Maintenance, Food Service and Security workers whose hours of service exceed fourteen (14) per week or sixty-seven (67) work days per year, employed by Hennepin County ("Employer," "County," or "Administration") in Minneapolis. Together,

the parties have negotiated a labor agreement covering terms and conditions of employment for members of the bargaining unit (Union's Ex. 1).

The Grievant, Erik Berkeland, began his employment at the County in 2005 as an Environmental Services Worker ("ESW") assigned to the Property Services Division. At the time of his termination he was working in the County's Forensic Sciences building that houses the Crime Lab and Medical Examiner's offices. His job duties included general cleaning of both areas.

On Thursday, February 16, 2012, Management conducted a search of the three janitorial carts utilized by the Grievant and two other ESWs working at the same facility. The carts are routinely parked in the same area when not in use, and each worker is assigned to the same cart each day. The purpose of the search was to determine whether a can of chewing tobacco had been left by a staff member, as it is not allowed on the premises. In the course of looking for the item, a small box of 22 caliber ammunition was found, "tucked away at the bottom of a bucket underneath some rags" on the Grievant's cart by the Grievant's immediate supervisor, Alan Benoit (Employer's Ex. 17). The finding was then reported to Becky Mengelkoch, the Building Operations Manager, and the Grievant's locker was inspected with Mr. Berkeland present. However, "nothing of any concern" was discovered there (*id.*).

Subsequently, the Grievant was placed on paid suspension and an investigation was ordered. On February 22nd, the Grievant was interviewed in the presence of a Union Representative. Approximately one week later, the Administration held another meeting at which time it was determined that Mr. Berkeland was to be terminated based upon their conclusion that he had taken ammunition from the Crime Lab without anyone's consent. Nor did he have any legitimate business reason for possessing it on his cart. In addition, Management determined that he had entered the Crime Lab in September of 2011, after he had been specifically instructed not to. Finally, they cited his confrontational and abrasive behavior during the investigative interview conducted by the Administration when they were attempting "…to obtain his side of the story" (Employer's Ex. 18).

On March 5, 2012, Berkeland was notified in writing of the Administration's intent to dismiss him (*id.*). Four days later, the Grievant submitted a "written appeal in response to the charges," alleging that the grounds for his termination were unfounded and unreasonable (County's Ex. 19). On March 16th Facilities Manager, Mary Beaque wrote to the Grievant indicating that she had reviewed the investigative record that had been compiled by management, along with Mr. Berkeland's written appeal and "additional inquiries of [her] own" (Employer's Ex. 20). The letter concluded

that the Grievant's version of the events were not credible and therefore he was officially discharged that same day. On March 28, 2012, the Union filed a formal written complaint on behalf of the employee claiming that his termination lacked just cause and seeking a make whole remedy (Joint Ex. 2). Eventually the matter was appealed to binding arbitration pursuant to the grievance mechanism contained in Article 7 of the parties' Labor Agreement.

Relevant Contractual & Policy Provisions-

From the Master Agreement:

Article 9
Discipline & Discharge

Section 1. Employees will be disciplined only for just cause.

A. Discipline, when administered, will be in one or more of the following forms and normally in the following order:

1. Oral Reprimand
2. Written Reprimand
3. Suspension
4. Discharge or Disciplinary Demotion

Circumstances may warrant waiving one or more steps in the progression.

From the County's Property Services Department's Operational Policies:

* * *

9.0 Scavenging

Employees shall not salvage or scavenge any item from any County property. For purposes of this rule, County property includes all County operations whether the actual property is County owned or not and whether controlled or operated by the county or by a contractor.

* * *

Any violation of this policy shall be considered theft of county property.

Positions of the Parties-

The **EMPLOYER** takes the position that their decision to terminate Mr. Berkeland's employment in March of this year was entirely proper and justified under the circumstances. In support of their claim, the County maintains that the Grievant either took the ammunition from the Crime Lab without permission, or he brought the bullets into the workplace. The claim that he found the ammunition in the trash on the loading dock is simply not credible, in the Employer's view. In fact the evidence shows that they had been ordered by the Firearms Examiner, Rick Boelter in 2007, and thereafter stored in an alcove in the lab since that time. To claim that the bullets somehow made their way out to the loading dock of the facility and then discovered in the trash three or four years later is simply not believable. The Administration notes that the Grievant had been briefed on the proper

policies and procedures for the Property Services Department. He knew that scavenging County property of any type was absolutely prohibited and considered tantamount to theft. Nor did Mr. Berkeland show the bullets to his immediate supervisor, Alan Benoit after he "found" them, asking what should be done, as he alleges. Indeed, Mr. Benoit denies ever having any such conversation with the Grievant. In addition, the Administration charges that in September of 2011, Mr. Berkeland was given specific orders not to go into the Crime Lab under any circumstances, as a weapons charge was pending against him at the time, and the Sheriff's Office did not want him in such a sensitive area. Yet he chose to ignore the directive and proceeded to enter the lab on January 13, 2012 while the order was still in effect. Finally, the Employer maintains that the Grievant's attitude and conduct during the course of their investigation also contributed to the justification of their decision to terminate his employment. They contend that he was abrasive, defiant and agitated in the interviews that were being conducted. For all these reasons then, they ask that the grievance be denied in its entirety.

Conversely, the **UNION** takes the position in this matter that Mr. Berkeland's termination was not justified under the circumstances. In support, the Local asserts that the Grievant has been a good employee since he was hired some seven years ago. They point to his performance

reviews as support of their position, noting that he consistently has received favorable marks. Further, the Local notes that his work record is free of any prior disciplinary action. The Grievant maintains that he had found the ammunition among some boxes he was recycling approximately two years ago. The bullets in question were in a small container and he simply put them on his cart until he had the opportunity to show them to his supervisor. When he attempted to do this, however, Mr. Benoit was on the phone and only replied "later." He then placed the box of ammunition into the grey pail he keeps on his cart and thereafter forgot about them. The pail itself is used primarily to hold rags which are folded up and placed on each Environmental Service Worker's cart on a regular basis for use while making their rounds. The small box fell to the bottom of the bucket and he forgot all about it until it was found by management in February of 2012. The Local further argues that when the ammunition was discovered by the Grievant he told his co-worker, Anthony Chicone, about it yet the County failed to interview him in the course of their investigation to obtain his input. With regard to the directive to not enter the Crime Lab issued in the Fall of last year, the Grievant acknowledges that he made a mistake, but maintains that he only did so in order to retrieve a fellow ESW (Chicone) to help him set up a room that was scheduled for a conference. The Local adds that the

charge that was pending (carrying a weapon while under the influence of alcohol) was resolved with a $25 fine and the weapon returned to the Grievant who had a permit to carry it. The Union maintains that the Grievant's version of the events are most credible; that the small box of ammunition was simply forgotten about for an extended period of time, due to its size and the fact it remained concealed under the rags (adding that Mr. Berkeland had another pail on his cart and consequently never used the bucket holding the ammunition other than to place rages in it). They assert that the severe penalty of termination is inappropriate in this instance and while the Grievant acknowledges he should have remained out of he Crime Lab as directed, he should not be dismissed for the mistake in judgment – especially in light of his good work record. For all these reasons then they ask that the grievance be sustained and that Mr. Berkeland be returned to his former position.

Analysis of the Evidence-

The record compiled at the hearing established a number of undisputed facts that bear upon the outcome of this dispute. To wit:

- The Employer possesses a legitimate business need to be able to administer a firm penalty to any employee who is not properly authorized to carry a weapon on the job, and who is found to have ammunition in his/her possession in the

workplace, as it presents a genuine safety issue constituting serious misconduct.

• Mr. Berkeland, as an Environmental Service Worker, assigned to clean in the crime lab, could only access the laboratory by knocking on the door to gain entrance from a forensic specialist who remains in the relatively small area, while the cleaning is performed.

• The lab houses, among other items, a variety of ammunition – including small boxes of 22 caliber bullets such as those found in the cleaning cart assigned to the Grievant. The ammunition is kept on unsecured shelves in the laboratory, behind glass doors, and is not routinely inventoried.

• Throughout Mr. Berkeland's employment, and particularly with regard to his duties in the crime lab, there have been no issues with respect to his work product.

• No direct evidence was presented establishing that a box of ammunition was physically removed from the lab by the Grievant without permission. Rather, the charges were based largely upon circumstantial evidence.

• There was no significant challenge to Berkeland's estimation that he had the bullets on his cart somewhere between eighteen months and two years, prior to them being discovered by the Administration.

• When Mr. Berkeland's assigned personal locker was searched, no other County property was uncovered.

• The ammunition found in the cart belonging to the Grievant came from the crime lab. Testimony of Rick Boelter, the Sheriff's Firearms Examiner.

• At the time of the incident, the County had in place the anti-scavenging policy, *supra*, which equated the salvage or scavenging of any of their property to "theft" (Employer's Ex. 1).

The Grievant acknowledged in writing that he had received a copy of the document and was responsible for reviewing and understanding it (Employer's Ex. 5).

• During the 6+ years that Mr. Berkeland was employed by the County as an Environmental Service Worker, he compiled a favorable personnel record. He was considered both trustworthy and a good thorough worker by his superiors.

The foregoing serves as a backdrop against which the balance of the evidence and arguments of the parties is to be examined.

The near universal rule within the field of arbitral jurisprudence holds that the employer must carry the initial burden of proof whenever the issue is one of discipline. While the quantum of evidence necessary to satisfy this assigned obligation may range from preponderant to the criminal standard of proof beyond a reasonable doubt, the tendency of arbitrators is to use a heightened measurement, but one that falls between the two extremes, when charges of a serious nature resulting in the employee's termination are involved. In numerous prior decisions I have applied the "clear and convincing" yardstick whenever the claim being made involves more egregious behavior leading to a dismissal of the accused. Such a measurement, it should be noted, is not as stringent as the criminal standard of proof beyond a reasonable doubt, but at the same time requires a somewhat higher degree of proof than the preponderance test to sustain

the accusation. It is particularly appropriate in situations such as this, where the Grievant's termination is essentially based upon a charge of theft.

The essence of the County's position is that Mr. Berkeland's non-sanctioned possession of the bullets violated their scavenging policy which expressly equates such misconduct to thievery. By concealing the ammunition in his cart, they assert, the Grievant intended to take ownership of the live ammunition for his own use. Summary discharge, according to the Administration, was not only appropriate under the circumstances, but necessary in order to deter other members of the workforce from thinking they have a right to behave in a similar manner.

As previously noted, there is no direct evidence demonstrating that Mr. Berkeland actually removed the ammunition from the crime lab and concealed it, with the intent to possess the Employer's property. Rather, they have based their decision largely on circumstantial evidence. More particularly, they have identified the box of bullets discovered in the Grievant's cleaning cart as part of the crime lab's inventory – a fact that is not disputed – along with the unequivocal evidence that the property was found at the bottom of a bucket on his cart, under a stack of towels. The County has also relied in part on what it believes to be inconsistent statements by Berkeland given to management in the course of their

investigation, about how he came into possession of the bullets, his demeanor while being interviewed, and his failure to report the discovery immediately to his supervisor as is required.

A careful review of the evidence and attendant arguments proffered by the Employer initially suggests that Mr. Berkeland may be guilty as charged. That the ammunition was discovered on his cart, and the bullets traced directly to the crime lab as part of their inventory has been demonstrated. Further, it is clear that he was one of a very few who had access to the lab in order to clean it; that the office was very small, and; that there is a wall in the office that prevents the Firearms Examiners from being able to view the Grievant at all times while he was working there.

The Administration also points to what they deem less than credible defense offered by the Grievant regarding how he came into possession of the bullets in the first place. From the initial search of his locker in mid-February, to the investigative interview five days later, to the Loudermill hearing held on March 14th, the Employer contends that Berkeland changed his story multiple times. The relevant evidence would appear to support their claim.

When Berkeland's locker was being searched, both Security Officer Mark Pearson and Operations Manager Becky Mengelkoch recall the

Grievant telling them that he found the bullets in the trash inside the crime lab. Pearson and Mengelkoch both testified that the Grievant's claim initially was that he found the ammunition in the trash "….inside the Crime Lab" Their recollections were further buttressed by each of their respective written reports submitted (Employer's Exs. 3 & 13). In the subsequent investigative interview Mr. Berkeland makes no mention of finding the bullets in trash discarded by the crime lab either in the lab itself or on the loading dock (County Exs. 8 & 13). Rather, the documented evidence demonstrates that not until the Grievant's March 9, 2012 letter to Mary Beaque, did he maintain that the ammunition was first discovered "…in an empty box that was set out on the property service dock area to be broken down for recycling" (Administration's Ex. 19). I would agree with the Employer that there is a difference between finding the bullets in the trash inside the crime lab and on the loading dock of the facility in a box to be broken down for recycling. The conflicting versions of the discovery is problematic.

The Grievant's credibility has also been compromised somewhat by his claim that he attempted to bring the matter to the attention of his supervisor, Al Benoit, on the same day he found the ammunition. According to Mr. Berkeland, he approached Benoit in his office to inform him of the find, but that he was on the phone at the time and "waived him off." The

Grievant testified that thereafter he forgot about showing the bullets to his supervisor again.

At the hearing, Mr. Benoit, stated that he was never told about the find by Berkeland, and that he would have remembered if he had. Under direct examination he offered the following:

> County: "Are you positive that the Grievant never came to you with the bullets?
>
> Benoit: I am positive."[1]

The witness also indicated that he was "shocked" when he subsequently discovered the bullets on the Grievant's cart.

The County has stated that the dispositive fact in this case which ultimately led them to terminate Mr. Berkeland's employment, was not so much how he came acquire the box of bullets in the first place, but rather his subsequent retention of live ammunition in the workplace. They charge that once he had the bullets the Grievant proceeded to place them under a high stack of towels kept in a bucket on his cart so that they were clearly concealed from plain view. According to the Employer, the Grievant's claim that he simply forget about the ammunition after placing the box in his

[1] At the hearing, Tony Chicone, also an Environmental Service Worker and a friend of the Grievant, testified that although finding bullets was "not out of the ordinary" within the building where they both worked, he "believed" the Grievant was going to show them to his supervisor (Benoit) and that they had discussed the matter. However, he could not state with any certainty whether Berkeland did in fact attempt to do so.

bucket for up to two years is not credible. Rather, the more reasonable conclusion to be drawn from the evidence is that Berkeland deliberately attempted to conceal the box from plain view.

It is at this juncture that the Administration's position begins to lose altitude.

Mr. Berkeland estimated that the box of bullets remained in a bucket on his cart for at least eighteen months (if not longer) before they were discovered by his supervisor. This fact was not seriously challenged by management. The evidence demonstrates that the box contained twenty-two caliber inexpensive ammunition that could be purchased at a Walmart store. Further the Grievant testified, without contradiction, that he did not own a weapon that could use the ammunition in question. I would concur with the Union's argument that the location of the small box, whose dimensions were 1" X 3" X 1" in height, on a cart that was routinely stored in a secured facility belonging to the Employer for such a relatively long period of time, does not adequately support a claim of possession.

Black's Law Dictionary, 9th Ed., West Publishing, defines "possession" to include "intent to own; possess as an owner" (at p. 1283). The fact that the box sat at the bottom of a bucket routinely used to store rags for several months, and that it was consistently stored in the supervisor's office at the

end of the workday, does not, in my judgment, rise to the level of theft.[2] Equally important, it does not meet the assigned standard of clear and convincing evidence in this instance. The Grievant did not have exclusive control of the bullets. The evidence demonstrates that they were not inventoried, and were treated as a somewhat ordinary commodity by the crime lab. However, the evidence fails to adequately demonstrate that they were deliberately hidden by the Grievant. While it may well be fair to question why the ammunition was not simply placed on the cart in plain view in the first instance, it does not necessarily follow that Berkeland had made a conscience decision to retain and conceal the ammunition. Accepting his version of the events, that he simply put them in the bucket containing rags and thereafter forgot about them, is also plausible. Mr. Chicone and the Grievant as well, testified that cleaned and folded rags are periodically added their buckets by another employee whose responsibility it is to replenish them. The relatively diminutive size of the box containing the ammunition and the inordinate amount of time that passed before they were discovered, is supportive of the Union's version of the events. Moreover, both witnesses testified, without challenge, that they do

[2] Under cross-examination, Operations Manager Mengelkoch testified that she did not take into consideration the fact that the ammunition had remained in the bucket on the cart for such a protracted period of time when reaching her conclusion that Berkeland should be terminated.

not routinely use the rags supplied, but rather clean using another bucket that is on the cart as well. Consequently, they would not examine the contents of the pail holding the rags on a regular basis.[3]

Another question posed by the Employer in their argument would appear to be more supportive of the Local's position than their own. They ask why would the Grievant keep the bullets at work for such a protracted period of time (estimated to be up to two years) if he intended to take possession of them? In my judgment, this fact lends as much, if not more, credibility to the Grievant's version of the events than the County's.

The clear and convincing standard is not met where the evidence is nearly in equipoise as plausible contentions have been advanced by each side. That measurement requires the trier of fact to conclude the charges against the employee are highly and substantially more probable to be accurate than not. That has not occurred in this instance.

Unlike the Administration's principle allegation, two other charges leveled against the Grievant in connection with their decision, have been established by the clear weight of the evidence. The record shows that in early September of 2011, Ms. Mengelkoch gave Berkeland a directive not to

[3] The County's assertion that the bucket holding the rags and the ammunition was "staring the Grievant in the face" every day he came to work and removes one to clean, is contrary to the two ESWs' testimony. While Berkeland did allow that he utilized the rags in the bucket from time to time, he added that the number used was relatively small and that he never used all of them.

enter the crime lab portion of the facility until further notice. During the investigation surrounding the ammunition issue, and on cross-examination, the Grievant acknowledged the instruction and understood it (See also: County Exs. 5 & 13). It is undisputed that thereafter, it was discovered through an examination of computer records, that he had violated a supervisor's explicit instruction more than once (Employer's Exs. 6 & 7). Indeed, under direct examination at the hearing, Mr. Berkeland acknowledged that his actions in this regard were "a mistake."

I am also persuaded that the Grievant's demeanor during the course of the County's investigation, does little to bolster the Union's case. Through the testimony of more than one witness, and the introduction of supportive documentation, it was shown that questioning Mr. Berkeland was particularly difficult due to the anger level he exhibited throughout the process (testimony of Nathan Lief, and Christine Mlinarchik; Employer's Exs. 8 & 18).

Award-

In the course of her testimony, the County's Director of Property Services, Judy Hollander, observed that the Administration's decision to terminate Mr. Berkeland's employment, "…really came down to the concealment of ammunition on the Grievant's cart." As indicated however,

the analysis of the testimony and relevant documentation does not adequately demonstrate the Grievant's intent to cover up his finding, via the clear and convincing standard applied. To the extent that the Employer has not satisfied their evidentiary obligation, the Union's grievance is sustained. At the same time however, the Employer has demonstrated insubordination and Berkeland's abrasive and non-cooperative behavior in the course of their investigation – both of which warrant discipline.

Under cross-examination Ms. Mengelkoch was asked whether management took into consideration the Grievant's favorable employment history and the positive statements attributed to his supervisors on each of his performance reviews, during his tenure with the County (Union's Exs. 1-6). She answered "no." Those evaluations, however, included numerous plaudits in reference to the Grievant's approach to his job such as: "thorough at his work," "always willing to help out his coworkers," "works well in all areas," "highly commendable/above and beyond," "fully capable/valued contributor," and "does good quality work" (*id.*). Braided together, this evidence does little to support the Administration's claim of theft – particularly in light of their failure to meet the clear and convincing standard applied.

Accordingly, based upon the foregoing analysis the Grievant's dismissal is reduced to a tw0 week suspension without pay and he is to be forthwith returned to his former position with the County as an ESW, and otherwise made whole. The Employer's financial obligation in executing this remedy, shall be offset by any earnings or income Mr. Berkeland has received in the interim outside the suspension ordered here.

The Administration has asserted that returning the Grievant to his job will send a clear and unmistakable signal to the balance of the workforce that it is okay to possess ammunition at work and that it is not a dischargeable offense. Nothing contained in this decision, however, supports such a conclusion. To the contrary, possession of a weapon or ammunition at work by an employee without proper licensure and the clear approval of the Employer, should not and cannot be tolerated. The remedy ordered in this instance has no bearing on such a prohibition. Rather it has been strictly derived from the particular established facts surrounding this dispute which fell short of meeting the evidentiary standard applied.

Respectfully submitted this 30th day of October 2012.

__/s/_____
Jay C. Fogelberg, Neutral Arbitrator