

IN THE MATTER OF ARBITRATION BETWEEN

CITY OF MOUNTAIN IRON, MN  
(City/Employer)

and

DONALD V. KLEINSCHMIDT  
(An Individual/Former Employee)

DECISION AND AWARD  
(Contract Interpretation -  
Application: Benefits)  
BMS Case No. 12-PA-1304

ARBITRATOR: Frank E. Kapsch, Jr.

THE RECORD: In lieu of a hearing, the Parties submitted a Joint Stipulation of Fact to the Arbitrator on October 23, 2012. The record was formally closed on November 29, 2012.

RECEIPT OF POST-HEARING BRIEFS: Both Parties submitted timely initial briefs on November 14, 2012 and reply briefs on November 29, 2012.

REPRESENTATION

FOR THE EMPLOYER/CITY:  
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FOR DONALD V. KLEINSCHMIDT:  
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JURISDICTION

The Parties have stipulated that this Arbitrator has been properly selected and appointed, pursuant to the provisions of Article XI, Section C, Step 4 of the applicable labor agreement and thereby possesses the authorities, responsibilities and duties set forth therein to resolve this dispute. The Parties also stipulated that this Arbitrator may formulate the Statement of the Issue.

THE ISSUE

Is the City in violation of its Employment Agreement with Donald Kleinschmidt by refusing to; 1) pay him for accrued sick leave, 2) to pay him for accrued compensatory time, 3) to pay him for accrued personal business time and 4) for

refusing to pay for his post-retirement health insurance coverage following his discharge on July 20, 2011 for egregious misconduct? If so, what shall the remedy be?

### THE CITY/EMPLOYER

The City of Mountain Iron is located in St. Louis County in northern Minnesota. The City is in the heart of the historic Mesabi Iron Range. It is the third largest city in the State of Minnesota by geographic size; covering some 52 square miles and including six lakes. According to the 2010 census, the current population is approximately 2,900. The City employs some 35-38 full- and part-time employees, with about half working in the Public Works and Parks and Recreation Departments. The American Federation of State, County and Municipal Employees (AFSCME) is the current collective bargaining representative for the majority of the City's employees.

### DONALD V. KLEINSCHMIDT

Mr. Kleinschmidt is a former employee of the City. Specific details of his employment history with the City are set forth below in Background Facts - A Summary. During his tenure of employment with the City, Mr. Kleinschmidt was employed in a non-bargaining unit managerial position and, accordingly, was never covered by the labor agreement or required to be a Union member.

### THE UNION

The Union is neither a formal nor a direct Party in this matter. However, because certain elements of Mr. Kleinschmidt's individual Employment Agreement reference and incorporate provisions of the applicable labor agreement between the City and AFSCME Council 65, the Union is, at least informally, considered to have an interest in this matter.

The Union, AFSCME, Council 65, is located in Nashwauk, MN and serves as the collective bargaining representative for thousands of public employees employed by various counties, cities, municipalities and political subdivisions thereof, throughout the State of Minnesota. As noted above, Council 65 also represents certain employees employed by the City of Mountain Iron.

### COLLECTIVE BARGAINING HISTORY

The collective bargaining relationship between AFSCME, Council 65 (also referred to as Local 435) and the City of Mountain Iron goes back many years and has been reflected in an ongoing series of labor agreements. The Parties have stipulated that the relevant and applicable agreement in this matter is the labor agreement that was effective 5/1/2009 and scheduled to expire on April 30, 2011.

## BACKGROUND FACTS - A SUMMARY

As indicated in the Statement of the Issue, this matter involves Donald V. Kleinschmidt, an Individual, and former employee of the City.

Mr. Kleinschmidt commenced employment with the City on July 1, 1981 in the position of Assistant Director of the Public Works Department. He was promoted to Director of the Public Works Department in 1993. He was excluded from the contractual bargaining unit, in each of those positions, as a manager/supervisor.

In 2002 the City suggested that it and Mr. Kleinschmidt consider entering into a formal written employment contract with respect to his position as Director of Public Works. Such an agreement would provide a measure of assurance to the City that it would retain Kleinschmidt's services into the future and would also provide him with a clear picture of his status and standing and a measure of job security.

On October 21, 2002, the City and Mr. Kleinschmidt jointly entered into and executed a formal Employment Agreement. The Agreement covered economic issues in detail and was to continue in full force and effect through June 1, 2006 and, thereafter, could be "reopened" by Mr. Kleinschmidt with a thirty (30) day written notice to the City. There is no evidence that it was subsequently reopened.

On July 19, 2011, the Mountain Iron City Council held an emergency meeting and went into "Executive Session" to discuss recently disclosed allegations and evidence indicating that Mr. Kleinschmidt may have misappropriated funds and property belonging to the City. The Council also learned that there was an active criminal investigation being conducted by the St. Louis County Sheriff Office with respect to the allegations.

Upon consideration of the allegations and evidence and in recognition of the ongoing criminal investigation, the Council voted to place Kleinschmidt on immediate unpaid leave. Such leave was pursuant to the provisions of the Employment Agreement and the City's Personnel Policy. The Council left the precise period of the "leave" indeterminate due to the ongoing criminal investigation.

The following day, July 20, 2011, Gary Skalko, the City's Mayor, issued a letter to Mr. Kleinschmidt informing him of the allegations against him and the decision of the City Council that he be placed on an indefinite leave, pending a formal determination with respect to the ongoing criminal investigation. Skalko pointed out that the Council's action was taken pursuant to Section 30 of the City's Personnel Policy. He also noted that Kleinschmidt, per that Policy, had a right to a hearing in connection with the matter.

July 20, 2011 was effectively Mr. Kleinschmidt's last and final day of employment with the City. At that point, 1) he was no longer being paid as an employee, 2) he was no longer accruing seniority/longevity, 3) he was no longer accruing sick leave, paid vacation time, compensatory time or personal time off and 4) was no longer receiving paid health insurance through the City's insurance program.

On August 16, 2011, Mr. Kleinschmidt was formally charged with the following criminal counts:

1. Felony embezzlement of public funds. (Minn. Stat. §609.54)
2. Felony theft. [Minn. Stat. §609.52.2(1)]

According to the charges, Mr. Kleinschmidt was purchasing construction tools and supplies through City vendors and was taking these items for personal use for projects in the development of family lake property. He wasn't personally paying for those items and was making the purchases in violation of City policies. In reviewing purchase invoices and records originated by Kleinschmidt during the period January through June, 2011, the City Administrator estimated that he made about \$4000 in unauthorized charges to the City.

On September 14, 2011, Mr. Kleinschmidt sent a letter to Mayor Skalko stating that he deemed himself "terminated" from his position as Director of Public Works for the City as of July 20, 2011. He also included a copy of his final salary payment statement and noted that it showed the number of hours of accumulated vacation, sick, compensatory and personal time that he was credited with at the time of termination.

In the letter, Kleinschmidt went on to note that he would be applying for his Minnesota Public Employee Retirement Association (PERA) pension and looked forward to receiving "*my severance payment, accrued vacation payment, sick leave payment, personal leave payout and comp. time payout*". He also asked for confirmation that the City would be providing him with his City retiree health insurance coverage as of October 1, 2011.

The City subsequently accepted Mr. Kleinschmidt's September 14, 2011 statement of termination pursuant to Section 3B of his Employment Agreement, but withheld a decision on whether he was terminated for Just Cause and eligible for payment of benefits, pending the outcome of the criminal proceedings.

On March 18, 2012, Kleinschmidt pleaded guilty to one count of Felony Theft and pursuant to the plea agreement, the charge of Felony Embezzlement was dismissed. According to the court record, on May 7, 2012, he was convicted of a Felony, sentenced to 30 days in the county jail, 2 years probation and was ordered to pay costs and restitution.

On June 4, 2012, the City Council, in recognition of Mr. Kleinschmidt's felony theft conviction, formally terminated his employment relationship for just cause.

At the point of his effective termination on July 20, 2011 Mr. Kleinschmidt's hourly rate of pay was \$35.0261 or a salary of \$72,854.29 per annum. As of that same date he had accrued, 1) Vacation time valued at \$8,336.21; 2) Sick Leave (1106 hrs.) valued at \$35,738.87; 3) Compensatory Time (129 hrs.) valued at \$4,518.37 and 4) Personal Time Off (97 hrs.) valued at \$3,397.53.

Given the above figures, Mr. Kleinschmidt claimed that the City owed him a Total of approximately \$54,990.98 in payment of his accrued leaves and related time off.<sup>1</sup> The City has denied that he is entitled to any payment for sick leave, comp time or personal time off.

Additionally, he contends that the City is required to pay the premiums for retiree health insurance for him, beginning August 1, 2011. Since that date, he has been personally paying the full premium of \$1,695.50 per month to maintain his City health insurance coverage. He is seeking reimbursement for those payments that he has continued to pay to date. The City denies that it has any obligation to pay for Kleinschmidt's post-termination health benefits.

Kleinschmidt applied for to MN Public Employee Retirement Association (PERA) for retirement benefits in about August, 2011 and PERA subsequently concluded that his age and years of service did qualify him for retirement benefits. He began receiving those retirement payments from PERA on October 1, 2011.

Attempts by the Parties to informally resolve the issue of the accrued leave and time off payments and the health insurance situation were unsuccessful. As a result, the Parties jointly agreed to submit those issues to mediation-arbitration via MN Bureau of Mediation Services and in accordance with the provisions of Step 4 of the Grievance Procedure in the applicable labor agreement.

As noted in the Statement of Issue, this Arbitrator is being asked to determine whether the City is contractually obligated to pay Kleinschmidt for the following post-discharge benefits:

1. Pay for his accrued sick leave.
2. Pay for his accrued compensatory time.
3. Pay for his accrued personal time off.
4. Pay the premiums for his post-discharge/retirement health care insurance.

## SUMMARY OF THE PARTIES' POSTIONS AND MAJOR ARGUEMENTS

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<sup>1</sup> Counsel for Mr. Kleinschmidt now concede that, based on applicable contract language, he has no valid claim for payment for his accrued vacation time nor does he have a valid claim for payment of severance pay.

The Employer:

On July 20, 2011 the City discharged Donald V. Kleinschmidt, its Director of the Public Works Department, upon discovery of considerable evidence indicating that he used his employment position to steal money and and/or goods and supplies, estimated to be worth about \$4,000.00. The stolen items and materials were allegedly used for construction projects and repairs at his lake home. His theft was directly from the City and its citizens, who had trusted and employed him for more than 29 years.

His egregious theft situation subsequently resulted in him being criminally charged with two (2) felony counts. He later pled guilty to one felony count and the other was dismissed as a result of a plea bargain.

It is the City's current position that because of the egregious nature of Mr. Kleinschmidt's offenses and the fact that he was discharged for Just Cause, it is refusing to pay the current amounts being claimed by Kleinschmidt for accrued leave/time off and is refusing to pay for retiree health insurance coverage for him.

The City acknowledges that if Kleinschmidt had left his active employment with the City, either voluntarily or involuntarily, but in good standing, and concurrently opted to take his earned retirement, he would be paid all of the claimed benefits. However, he did not leave the City's active employ for the purpose of retiring, but instead was discharged for Just Cause; thereby immediately and fully severing all aspects of the employment relationship. As a direct result of the egregious nature of his employment misconduct, he subsequently became a convicted felon.

1. Payment for accrued Sick Leave.

Both the City and Mr. Kleinschmidt are in agreement that at the time of his discharge on July 20, 2011 he had accrued 1106 hours of Sick Leave. The subject of "Sick Leave" is specifically addressed in Section 11B of Kleinschmidt's Employment Agreement;

*B. "...The Employee shall earn 15 days of sick leave per calendar year; all said days shall be credited to the Employee on January 1 of each calendar year. Sick Leave accumulation in excess of 130 days shall only be surrendered, by the Employee, at the end of the calendar year. All other sick leave provisions shall be the same as provided other employees under the Collective Bargaining Agreement between the City and AFSCME Local 453."[emphasis added]*

Accordingly, a review of the applicable labor agreement, specifically, Article VI Sick Leave, reveals only a single provision regarding the

disposition of accumulated sick for employees leaving the employ of the City. That reference is found in Article VI, Section K which states;

*Section K. "An employee who retires [emphasis added] with a minimum of ten years service shall receive the following amounts of their accumulated unused sick leave as severance pay:*

*With 10 or more years of service - 30% of unused sick leave*

*With 20 or more years of service - 40% of unused sick leave*

*With 30 or more years of service - 50% of unused sick leave*

The specific language of Section K, makes it clear that in order to qualify for this specific benefit, referred to as "severance pay", the employee must be "retiring" from service with the City.

Mr. Kleinschmidt did not "retire" from his employment with the City - he was discharged for Just Cause, specifically for engaging in egregious misconduct.

Furthermore, this limited benefit for accumulated unused sick leave is not protected like the vacation pay provision in Article V, Section C of the CBA, to wit;

*Section C. "Upon termination of employment for any cause [emphasis added], employees shall be paid for any accumulated vacation credit."*

Clearly, Mr. Kleinschmidt is asking the Arbitrator to incorporate the more expansive and beneficial language of Article V Section C, with respect to accrued vacation, to Article VI concerning accrued Sick Leave.

It should be further noted that while the language of the CBA, as set forth in Article V, Section C, might have enabled Kleinschmidt to claim payment for his accrued vacation time, as a manager/supervisor, he was covered by the City's Personnel Policy. Under the terms of that Policy, Section 15,

*"Subd. 5 Terminal Leave.*

*Any employee leaving municipal service in good standing [emphasis added] after giving proper notice of such termination of employment shall be compensated for vacation leave accrued and unused to the date of separation."*

Mr. Kleinschmidt readily agrees that the above Policy language eliminates any claim for payment of his accrued Vacation time; because he did not leave the City's employ in "good standing."

2. Payment for accrued Compensatory Time.

It is acknowledged by the Parties that Kleinschmidt had accrued 129 hours of Compensatory Time at the time of his discharge on July 20, 2011.

This benefit arises from Section 6 of Kleinschmidt's Employment Agreement which states;

Section 6. Hours of Work

*A. The City and the Employee recognize that because of the nature of their duties it is inappropriate for the Employee to be governed by standard work schedules and that it is essential that the Employee work those hours necessary to carry out the duties and responsibilities of the position. While it is normally expected that eight hours of work will constitute a normal work day, and five work days a normal week, the employer recognizes that this will vary from day to day and week to week. Therefore, it is agreed that the Employee shall work whatever hours are necessary to perform the duties and responsibilities of the office.*

*B. All hours worked in excess of the normally expected eight hours and five work days a normal week shall be compensated at time and one half rates.*

Section 9, Subd. 5 of the City's Personnel Policy addresses the subject, as follows:

*Exempt Employee Compensatory Time. Full-time exempt employees are eligible for compensatory time under the following stipulations. Each employee would keep track of overtime hours worked on a time sheet. Attendance at meetings contained in their job description...would not count as overtime. Any other time worked per job description outside of regular working hours would be considered overtime. Time sheets will be handed in bi-weekly to the City Administrator.*

*The employee will receive comp time at a rate of 1:1. In other words, the employee will receive one hour of comp time for one hour of overtime.*

*The employee will be required to use the comp time within 120 working days of the day in which it was accrued. ...Comp time not used within 120 days after being accrued will be paid at straight time to the employee.*

The Parties do agree that the City has had a past practice of paying retiring City employees for their accrued compensatory time. However, as noted, Kleinschmidt did not "retire" from the City's employ - he was

discharged for Just Cause. Accordingly, he is not eligible for payment for his accrued Compensatory Time.

3. Payment for Personal Time.

Kleinschmidt had accrued 97 hours of Personal Time as of the date of his discharge.

This benefit arises from Section 11B of Kleinschmidt's Employment Agreement which provides in relevant part:

*"Section 11 B. Holiday and Personal Day provisions shall be the same as provided other employees under the Collective Bargaining Agreement between the City and AFSCME Local 453."*

Article VI, Sick Leave, of the applicable CBA contains a single reference to personal time off in Section G:

*"Section G. Four (4) personal business days shall be allowed to each employee annually and shall not be deducted from the accumulated sick leave of the employee. Employees must have approval for use 5 days in advance."*

There is nothing, in either the Employment Agreement, the Personnel Policy or in the CBA that provides for a "cash-out" for accrued Personal Time. Accordingly, the City has denied Kleinschmidt's claim.

4. Payment for Post-Retirement Health Care Insurance.

Finally, Mr. Kleinschmidt is claiming that the City is obligated to pay the premium costs for post-retirement health care insurance coverage for him and his family.

Section 14 of Kleinschmidt's Employment Agreement contains the following language regarding retirement:

Section 14 Retirement

*Employee shall be covered by the City's retirement system, which is accorded to all other City management employees. The Employee will be eligible for retirement benefits after 25 years of continuous service. The number of years of service shall be accumulated from July 1, 1981.*

The Employment Agreement in Section 12 - Insurance states that the "City agrees to make required premium payments, equal to that which is provided the City employees governed under the provisions of the collective bargaining between the City and AFSCME, Local 453, for insurance policies for sickness, major medical and dependents coverage group insurance covering the Employee and his dependents".

The Section goes on to provide that, during his tenure of employment, pursuant to the Agreement, the City will also make required premium payments, "equal to that which is provided the City employees under the provisions of the collective bargaining between the City and AFSCME, Local 453" for insurances policies for hospitalization, surgical, pharmaceutical and comprehensive medical insurance coverage for him and his dependents; for group dental insurance covering him and his dependents and group term life insurance and disability insurance for him.

Also relevant is Section 15 Other Terms and Conditions of Employment in the Employment Agreement, specifically paragraph B;

*All provisions of Minnesota Statute or the Mountain Iron City Code, and regulations and rules of the City relating to vacation and sick leave, retirement and pension system contributions, holidays, and other fringe benefits and working conditions, as they now exist or hereinafter may be amended, also shall apply to Employee as they would to other employees of the City, in addition to said benefits enumerated specifically for the benefit of Employee, except as herein provided.*

Due to the incorporation of provisions of the applicable labor agreement into the Employment Agreement, we find the following provision in the CBA:

*Appendix D*

*Retiring Employees Insurance Program and Sick Leave Fund*

*Section A.*

*All employees who have twenty-five (25) years of continuous employment with the City of Mountain Iron and who have reached a retirement age acceptable to the MN Public Employee Retirement Association (PERA), Federal Social Security, and/or a retirement age limit set up by the City of Mountain Iron shall, upon retirement from active duty with the City, continue to be insured under the then existing hospitalization and medical program covering active employees of the City and their dependents.*

*Employees who retire after July 1, 2006, shall be required to enroll in Medicare/Medicaid upon age eligibility as stated in the Federal Medicare/Medicaid requirements. The Employer shall then furnish a supplemental policy which maintains the level of benefits in effect at the time of retirement of the employee. The retiree shall be required to pay for said hospital/medical premium and/or supplemental policy premium under the same percentage split as*

*the active employees (cap contribution and 75/25 percentage split on the amount above the cap with the employee paying 25%)*

*Employees hired after the ratification date of the 2006 contract shall not be eligible for Employer paid retiree health/dental care benefits. Employees hired after the ratification date shall be enrolled in a Post Retirement Health Care Savings Account, and after one (1) year of service with the Employer shall begin to contribute 2% of their monthly salary into said account, and the Employer shall contribute 1% of the employee's monthly salary into the individual account.*

*For purposes of clarity and legal interpretation, the phrase "reached a retirement age acceptable to the MN Public Employees Retirement Association" shall be defined as any single one of the following minimum requirements as found in PERA regulations:*

- a) You are at least age 55.*
- b) You have thirty (30) or more years of service, regardless of age (if hired prior to July 1, 1989)*
- c) Your age plus years of public service total at least 90 (Rule of 90), If you were hired prior to July 1, 1989*

The City acknowledges that on July 20, 2011, his date of discharge from the City's employ, Kleinschmidt did have 25 years of continuous service and met the "acceptable" retirement age as defined in Item a), above.<sup>2</sup> However, the benefit language above requires more than just meeting those specific criteria; it also requires a decision by the employee to formally "retire" from active duty. The employee must meet the nuts and bolts eligibility requirements for retirement and must actually "retire". Mr. Kleinschmidt did not make a decision to retire on July 20, 2011 - he was effectively discharged on that date for egregious misconduct.

In looking at the dictionary definitions of the words "retire" or "retirement",  
Retire: *To withdraw from one's position or occupation; conclude one's working career. Leave one's job and cease to work, typically upon reaching the normal age of retirement.*  
Retirement: *The action or fact of leaving one's job and ceasing work. Withdrawal from one's position or occupation or from active working life. An act of retiring.*

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<sup>2</sup> In reviewing the record, I note that Mr. Kleinschmidt was born September 5, 1956 and, therefore, was only 54 years old on July 20, 2011, his date of discharge. He would not turn 55 until September 5, 2011. I further note that with his employment start date of July 1, 1981 he had completed more than 30 years of service with the City, as of his date of discharge.

Again, the key is that Kleinschmidt did not choose to retire from his employment with the City but was discharged.

Conclusion: In view of the foregoing and based on the record as a whole, the City respectfully requests that the Arbitrator find each of the Employee's claims to be without merit and appropriately denied.

Mr. Donald V. Kleinschmidt:

As has been stipulated and previously noted, Mr. Kleinschmidt was employed by the City from 1981 to July 20, 2011 at which time he was effectively discharged for egregious misconduct involving the theft of money and/or other things of value from the City. He was also concurrently under investigation by law enforcement authorities regarding potential criminal charges relating to the theft allegations.

Subsequently, Mr. Kleinschmidt sent a letter to the City informing them that due to their action on July 20, 2011, he considered himself "terminated" from his former position as the City's Director of Public Works as of that date.

At the time of his discharge, Mr. Kleinschmidt was employed by the City under the terms of a personal Employment Agreement that he had negotiated in 2002. That Agreement sets forth six (6) specific fringe benefits available to him upon termination of his employment with the City; 1) severance pay, 2) pay for accrued vacation time, 3) pay for unused sick leave, 4) pay for accrued compensatory time, 5) pay for unused personal time off and 6) retiree health benefits.

Mr. Kleinschmidt acknowledges that due to the circumstances of his discharge on July 20, 2011 and the language of the Employment Agreement, he is unable to claim payment for 1) severance pay or 2) accrued vacation time.

However, there are no pre-conditions or prohibitions to him receiving the remaining four benefits. The City's refusal to provide these four benefits is without support in the Employment Agreement and without support in the law. Accordingly the City should be ordered to provide these four promised benefits to him.

1. Payment for Accrued Sick Leave

The payment of unused sick leave is initially addressed in Section 15C of the Employment Agreement;

*C. Employee shall be entitled to receive the same vacation and*

*leave benefits as are accorded other employees, including provisions governing accrual and payment therefore on termination of employment.*

Turning to the provisions of the City's Personnel Policy and the applicable CBA; unlike the provisions governing the payment for accrued vacation which required that the terminate employee leave in "good standing", no such requirement exists for payment for accrued sick leave. Section K of Article VI of the CBA sets forth the following:

*"An employee who retires with a minimum of ten years of service shall receive the following amounts of their accrued sick leave as severance pay:*

*With 10 or more years of service - 30% of unused sick leave*

*With 20 or more years of service - 40% of unused sick leave*

*With 30 or more years of service - 50% of unused sick leave"*

Section 27 - Severance Pay of the City's Personnel Policy recites the exact same language as note from the CBA, as above.

Because Mr. Kleinschmidt had more than 30 years of service with the City as of July 20, 2011, his date of discharge, he is entitled to receive 50% of his unused sick leave. He had 1106 hours of sick leave valued at \$35,738.87. 50% of that would be \$19,369.43.

## 2. Payment for Accrued Compensatory Time

The Parties agree that at the time of his discharge, Mr. Kleinschmidt had accumulated 129 hours of compensatory time valued at \$4,518.37. The Parties have also stipulated that it has been the past practice of the City to pay retiring employees for their accrued comp time.

The Employment Agreement makes no mention of Compensatory Time. However, *Section 9, Compensation, Subd. 5, Exempt Employee Compensatory Time* states:

*"The employee will be required to use the comp time within 120 working days of the day in which it was accrued. The time can be used in one lump sum, or spread out over several days, as long as it is used within the time period. Comp time not used within the 120 days after being accrued will be paid at straight time to the employee."*

Accordingly, Mr. Kleinschmidt's unused comp time constitutes wages for actual time worked. Therefore, in the absence of any limiting language in the Employment Agreement, the CBA or the Personnel Policy, the City is obligated to pay those wages to Mr. Kleinschmidt in the amount of \$4,518.37.

3. Payment for Accrued Personal Time Off

The Parties agree that at the time of his discharge, Mr. Kleinschmidt had accumulated at total of 97 hours of unused Personal Time off. The 97 hours are valued at \$3,397.53.

This situation is covered by Article IV - Holidays, Section C; "*When a Holiday falls during an employee's scheduled day off or during his vacation period, he shall receive an additional days pay.*"

As with the compensatory time, these are straight wages earned and there is no limitation on payment of the accrued personal days. Accordingly, the City is obligated to pay Mr. Kleinschmidt \$3,397.53 for the accrued Personal Leave time.

4. Payment for Post-Retirement Health Insurance Premiums for Mr. Kleinschmidt

Kleinschmidt's Employment Agreement makes provision for perhaps the most important fringe benefit - payment of Post-Retirement Health Insurance premiums. Sections 12 A and B of the Agreement require the City to make those insurance premium payments equal in amount to those which are provided to City employees in accordance with the provisions of their CBA for sickness, major medical, hospitalization, surgical, pharmaceutical and comprehensive and dependents coverage group insurance for him and his dependents.

Next we turn to Section A of Appendix D of the CBA (recited previously herein) which sets forth the City's obligation to pay health insurance premiums for retired employees.

It is undisputed that Mr. Kleinschmidt had over 30 years of continuous employment with the City and it is undisputed that he had reached a retirement age acceptable to MN PERA as of July, 2011. Accordingly, the City is obligated to pay for Mr. Kleinschmidt's retiree health insurance benefits, as specified in Appendix D of the CBA.

We expect the City to assert that Mr. Kleinschmidt is ineligible for that health coverage because he did not "retire" from the City's employ. There is no support for that position in that his employment was effectively terminated by the City on July 20, 2011 and he has ceased working for the City since then. Therefore, he is "retired" from active duty with the City. It doesn't matter whether his retirement was voluntary or involuntary - the word "retirement" simply means the cessation of work with the employer.

It is undisputed that on July 20, 2011, the day he ceased working for the City, Kleinschmidt was of retirement age. This is consistent with the definition of "Retirement" in the 6th Edition of Black's Law Dictionary, where the term is defined as "[t]ermination of employment, service, trade or occupation upon reaching retirement age".

We also expect that the City will argue that Subd. 3 of Section 10 of the City's Personnel Policy somehow controls whether Kleinschmidt is eligible for retiree health insurance. But Kleinschmidt's Employment Agreement specifically references the CBA with respect to health insurance provided to retirees, not the Personnel Policy. Furthermore, the health insurance benefit that Kleinschmidt bargained for is not the right of an employee to pay for continued coverage for 18 months after termination, as outlined in Section 10, Subd. 3. Subd. 3 simply restates the "COBRA-like" provisions regarding continuation of health care coverage following termination as they are contained in Minn. Stat. §62A.17. Accordingly, the language of Section 10, Subd. 3 of the Personnel Policy is not relevant.

Kleinschmidt acknowledges the Personnel Policy language that limits payment of accrued vacation time to employees who leave the City's employ in "good standing" and the language in the Employment Agreement that states that he is not eligible to receive severance pay if he is convicted of an illegal act involving personal gain to him. There are no such restrictions or conditions in Appendix D of the CBA that prohibit him from receiving the retiree health insurance benefit set forth therein.

As we have already noted, Mr. Kleinschmidt is not contesting the fact that he was terminated for just cause by the City. However, the City seems to have confused the distinction between disciplinary action and denial of a contractual obligation. It is as though the City believes that the maximum discipline allowed under the contract - termination/discharge - is not sufficient and is attempting to go beyond the maximum discipline permitted by withholding contractual benefits that he is properly owed by the City.

Both case law and arbitral law agree that extraordinary measures imposed as part of "discipline", such as "docking" an employee's pay for damage/loss or ordering an employee to work without pay are not appropriate or reasonable forms of discipline. Withholding work or denying overtime have also been found to be improper forms of discipline.

The common thread is that, unless specifically allowed, an employer cannot withhold contractual benefits as a form of disciplinary action. In Mr. Kleinschmidt's case, the City has imposed the maximum discipline allowed for a capital offense - termination/discharge - and the contract permits it to lawfully withhold nearly \$45,000 of termination benefits from

him, due to the nature of his misconduct. However, the City has no contractual authority to withhold the retiree health coverage or the other three benefits that he is properly claiming.

We have been unable to find any Minnesota cases which permit the denial of contractually bargained for termination benefits, in the absence of limiting contractual language, but there appears to be a general principle appearing in a number of cases to the effect that termination benefits are contractual and earned and are not gratuities. This principle clearly applies to Mr. Kleinschmidt's claims.

With respect to a "forfeiture" argument by the City with respect to the claimed benefits, it is well established law that a party arguing such has the burden of proving that forfeiture is the unmistakable intent of the parties to the document. There is no language in the Employment Agreement, the Personnel Policy or the applicable CBA that would demonstrate such and intent. Obviously the parties to those contracts knew how to formulate forfeiture provisions and did, in fact, include such language for certain, specific benefits.

Conclusion: When Mr. Kleinschmidt and the City negotiated his Employment Agreement in 2002, the City wanted certain of the provisions of the contract to deter him from engaging in malfeasance or dishonesty for personal gain. Accordingly, the parties agreed to several provisions that result in the forfeiture of significant termination benefits; which are currently estimated at nearly \$45,000. As a result, Mr. Kleinschmidt cannot and will not seek/claim those termination benefits.

What he seeks in this grievance and what he should be awarded are those remaining termination benefits for which he bargained back in 2002 and which he has earned pursuant to the contract.

Specifically, the City should be ordered to pay the following items to Mr. Kleinschmidt: 1) Pay for 50% of accrued Sick Pay = \$19,369.43, 2) Pay for accrued Compensatory Time = \$4,518.37; 3) Pay for accrued Personal Leave = \$2,397.53 and 4) Reimburse him for post-retirement health insurance premiums of \$1,695.00 per month, that he has been paying since August 1, 2011 to date of award and pay his monthly post-retiree health insurance premiums in compliance with the provisions of Appendix D of the CBA, from the date of the award forward.

### ANALYSIS, DISCUSSION AND FINDINGS

The underlying dispute in this case involves the interpretation and applicable of contract language to specific questions as to the rights of a party to the contract,

in this instance, to specific benefits set forth therein. The language of the contract will determine the answer. The outcome and ultimate resolution in such situations comes only after several preliminary analytical steps are completed. The start is a studied and critical examination of the precise language and wording, not only of the sections, paragraphs, etc. that are nominally at the heart of the dispute. However, as an arbitrator, I also have to look to and at the overall document to, hopefully gain insight into the intentions, purposes and motivations that jointly led the parties to formulate and agree to the language, wording and overall structure of the document. Finally, I look at how the parties have acted or behaved, in the past, with respect to the disputed contract items and/or language with respect to similar or related types of events. There are, inevitably, some situations where additional analytical tools and sometimes a different perspective may be more suitable to the resolution of the matter.

These cases are never easy. Before it comes to me, the parties, themselves, have probably spent months trying to reach agreement on the meaning of the language (which they negotiated), obviously without success.

The dispute is somewhat unusual in that, unlike a more typical contract interpretation - application case where there is a single contract or relevant document, here we have three (3);

First, we have the Employment Agreement executed by Mr. Kleinschmidt and the City of Mountain Iron in October, 2002.

Second, we have the City of Mountain Iron Personnel Policy document; which purportedly covers all employees of the City, including Mr. Kleinschmidt. Section 15 B of the above Agreement states;

*"All provisions of Minnesota Statute or the Mountain Iron Cit Code, and regulations and rules of City relating to vacation and sick leave, retirement and pension system contributions, holidays, and other fringe benefits and working conditions as they now exist or hereinafter may be amended, also shall apply to Employee as they would to other employees of the City, in addition to said benefits enumerated specifically for the benefit of Employee, except as herein provided."*

So, this language, in the Employment Agreement, says that Kleinschmidt is subject to applicable state law and the City's Code, rules and regulations as any of them may relate to fringe benefits and working conditions provided to other City employees and that any fringe benefits specifically set forth in his Employment Agreement are additional and specific to him.

Third, the Employment Agreement makes several references to the applicable collective bargaining agreement (CBA) between the City and AFSCME, Local 435:

1. Section 2A Term - Specifies that in the event of disciplinary action against Employee, including termination, he can invoke

either the process in the Personnel Policy or the Grievance Procedure in the CBA. In the instant matter, we are using the CBA Grievance Procedure.

2. Section 11B Vacation, Sick Leave and Holidays - States that Holiday and Vacation Day provisions shall be the same as provided other employees under the Collective Bargaining Agreement (CBA) and that all other sick leave provisions shall be the same as provided under the CBA.
3. Section 12 Insurance - Essentially says coverage, policies and premiums paid for Employee and his dependents shall be in accordance with the those set forth in the CBA for other employees.

Having now read and reviewed each of the three documents, as above, I am now going to try to put them into some sort of order.

1. I regard the Employment Agreement document as negotiated and executed by the City and Kleinschmidt in 2002 as the Primary Contract document. It was apparently drafted and reviewed by the Parties, prior to execution, to insure that it did not conflict with existing statutes, laws, City Code or City rules and regulations. The fact that it remained unchanged for about nine years, indicates that no notable problems or disputes arose between the Parties during that period.

2. Kleinschmidt during his entire tenure of employment with the City served in non-bargaining unit, managerial/supervisory positions. Accordingly, he was also designated as an Exempt employee per the Minnesota Fair Labor Standards Act, Minn. Stat. §177.22. At all times material herein, he occupied the position of Director of Public Works for the City of Mountain Iron and, in addition, was responsible for oversight of the Parks and Recreation Department - making him a major manager in the City's organizational hierarchy. That status makes the City's Personnel Policy the next relevant document for him.

3. Finally we have the Collective Bargaining Agreement between the City and AFSCME, Local 435 as referenced in the Employment Agreement. In reviewing the specific references, I find that it was the joint intent of the Parties to use certain specific provisions of the CBA as administrative standards to insure that Kleinschmidt, the contract Employee, received at least the same level or amount of the specified/referenced benefits as those received by other City employees (his subordinates) covered by the CBA. In a sense, the CBA establishes a minimum for the specified benefits, but the

Employment Agreement and/or the Personnel Policy can increase and/or clarify them.

The following specific facts and events appear to be relevant and directly related to the analysis of the dispute:

- Mr. Kleinschmidt commenced employment with the City on July 1, 1981.
- On July 19, 2011, The City Council held an emergency executive session at which time they reviewed and considered specific allegations and evidence indicating that M. Kleinschmidt had misappropriated City funds and property. They also learned that, based on probable cause, the St. Louis County Sheriff was conducting a formal criminal investigation into the matter and that investigation was ongoing. The Council decided to immediately place Kleinschmidt on unpaid leave and to await the outcome of the criminal investigation.

I find that the Council had sufficient credible evidence on July 19, 2011 to establish Just Cause, under a preponderance of evidence standard<sup>3</sup>, to terminate Kleinschmidt. However, they deferred that formal decision, to await the outcome of the concurrent criminal investigation.

- On July 20, 2011, Mayor Skalko issued a formal letter to Kleinschmidt informing him of the unpaid indefinite "leave" and the specific reasons behind the action. He was also advised that he had the right to a hearing on the matter, but he never requested a hearing.

I find that based on the established Just Cause, as above, that Mr. Kleinschmidt was effectively discharged/terminated on July 20, 2011 and that his employment relationship with the City was formally severed on that date.

- On August 16, 2011, St. Louis County prosecutors formally charged Kleinschmidt with two (2) criminal Felony counts: 1) Felony embezzlement of public funds and 2) Felony Theft.
- On September 14, 2011, Kleinschmidt sent a letter to Mayor Skalko stating that he, Kleinschmidt, "*...deem myself 'terminated' from my position as the Director of Public Works...as of July 20, 2011*". He went on state that he would be immediately applying for his pension with PERA. He further stated that he looked forward to receiving his fringe benefit payouts. Finally, he asked for confirmation that

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<sup>3</sup> An employer, in making disciplinary determinations, is typically held to a lesser standard of proof than "beyond a reasonable doubt". The reasonable doubt standard is required in criminal proceedings, but it is recognized that the typical employer does not possess the powers or investigative resources and technologies of law enforcement agencies and would not be able to meet that standard. The preponderance of evidence standard requires that the employer possess sufficient evidence to establish that it is more likely than not that the employee is guilty of the alleged offense.

the City had commenced providing him his retiree health insurance as of October 1, 2011.

- On May 7, 2012, Kleinschmidt pled guilty to one count of Felony Theft (the other Felony count of embezzlement was concurrently dismissed, as part of a plea agreement).
- On June 4, 2012, the City Council formally "terminated" Kleinschmidt for Just Cause, based on his criminal conviction.

Now for consideration of each of the specific items which are the subject of this dispute.

1. Claim for payment of accrued Sick Leave. As previously noted, the Parties agreed that the value of the accumulated 1106 hours of sick leave is \$35,738.87.

A review of the Employment Agreement, with respect to Sick Leave, contains no language as to the disposition of accumulated Sick Leave other than a reference in Section 11B to the effect that, "*All other sick leave provisions shall be the same as provided other employees under the...*" CBA. Section 15C contains a statement to the effect that, "*Employee shall be entitled to receive the same vacation and sick leave benefits as are accorded other employees, including provisions governing accrual and payment therefore on termination of employment.*"

Turning to the CBA, the only reference to disposition of accumulated Sick Leave occurs in Article VI, Section K:

*"An employee who retires with a minimum of ten (10) years of service shall receive the following amounts of their accumulated unused sick leave as severance pay [emphasis added]: ...With 30 or more years of service - 50% of unused sick leave"*

That language clearly indicates that the unused sick leave is not being routinely "cashed out", but, instead, is being converted into "severance pay" for certain departing City employees.

Turning back to the Employment Agreement, we find that the subject of Severance Pay is succinctly addressed in Section 3A:

*"In the event Employee is terminated by the City Council before expiration of the aforesaid term of employment and during such time that the Employee is willing and able to perform the duties of Director of Public Works, then in that event the City agrees to pay Employee a lump sum cash payment equal to six months aggregate salary; provided, however, that in the event Employee is terminated because of his conviction of any illegal act involving personal gain to him, then, in that event, City shall have no*

*obligation to pay the aggregate severance sum designated in this paragraph."*

This language clearly indicates the intent of the Parties to provide for a distinct severance pay package for Kleinschmidt and it also clearly states that he would forfeit that severance pay package, if he were convicted of a crime involving "*personal gain*".

Turning back to the language in the CBA, to give force and effect to that severance pay provision, in the face of the specific language regarding severance pay in his Employment Agreement, would allow Kleinschmidt to bypass or avoid the clear intent of the City that he forfeit severance pay due to his Felony conviction.

In view of the foregoing, I find that there is no contract language providing for any direct cash out or pay out for accumulated Sick Leave for Kleinschmidt or any other City employee. I further find that the language of the CBA does provide for a conversion of portions of accumulated Sick Leave into severance pay for certain departing City employees. However, by virtue of the language in his Employment Agreement with the City, I find that Kleinschmidt forfeited his right to severance pay as a result of his criminal conviction.

Question for the Parties to ponder; if Kleinschmidt had not been convicted of the felony, would he have been eligible for payment by the City of the severance pay package in the Employment Agreement and the severance pay provision in the CBA?

2. Claim for payment of accumulated, unused Compensatory Time.

As previously noted, the Parties are in agreement that the value of the claimed 129 hours of Compensatory Time is \$4,518.37.

A review of the Employment Agreement finds no mention whatsoever of "compensatory time". However, Section 6B states that, "*All hours worked in excess of the normally expected eight hours and five workdays a normal week shall be compensated a time and one-half rates.*"

Turning to the Personnel Policy document, specifically Section 9 - Compensation, there is a provision in Subd.5 concerning Exempt Employee Compensatory Time. Essentially it states that full-time exempt City employees, such as Kleinschmidt, are eligible for compensatory time. It provides that compensatory time is earned at the rate of 1:1, not 1 times one and one-half. It doesn't specifically limit the amount of time that can be accrued, but does require that any comp time earned must be used within 120 days of the date earned.

Whether one points to the Employment Agreement or to the Personnel Policy language, the common theme in both is that the City clearly agrees to compensate exempt employees for work performed outside of their regular workday or workweek. The City argues that because Kleinschmidt was discharged for Just Cause, that caused him to forfeit this claim. I find no support for that position in any of the documents. Instead, as contended by Mr. Kleinschmidt, the City is apparently denying this claim merely as additional disciplinary punishment, beyond his discharge.

I fully agree with Mr. Kleinschmidt that such action by the City cannot be permitted, as he is merely asking to be paid for undisputed work performed. Accordingly, I find that the City's refusal to pay Kleinschmidt for his earned and accrued overtime/comp time work constitutes an improper and unreasonable form of discipline. I also find that the City is, by law and equity, obligated to pay Kleinschmidt for all authorized work performed. I further find that the City and Kleinschmidt jointly agreed in his Employment Agreement that, notwithstanding the 1:1 rate set forth in the Personnel Policy, he would be compensated at a one and one-half rate for all overtime hours worked. Applying that rate, \$52.54, to the 129 hours accrued comes out to a total of \$6,777.66.

### 3. Claim for payment of accrued, unused Personal Time Off.

The Parties are in agreement that at the time of his discharge, M. Kleinschmidt had accrued a total of 97 hours of unused Personal Time Off, valued at \$3,397.53.

A review of the Employment Agreement reveals only one reference to "Personal Day" and that appears in Section 11B which reads, "*Holiday and Personal Day provisions shall be the same as provided other employees under the [CBA].*"

A review of the CBA finds a reference in Article VI - Sick Leave, Section G which states, "*Four (4) personal business days shall be allowed to each employee annually and shall be allowed to each employee annually and shall not be deducted from the accumulated sick leave of that employee. Employees must have approval for us five days in advance.*"

The Personnel Policy, in Section 17 - Personal Business Days, uses the exact same language as the CBA with respect to "Personal Business Days", but only allows three (3) per year, rather than the four in the CBA.

None of the documents indicate any terms, conditions or limitations which would justify or require forfeiture and there is no language concerning accrual or accumulation of personal day hours. Accordingly, I find that the City has no contractual authority or basis upon which to deny Kleinschmidt's claim for payment of the accrued, unused hours of

Personal Business time. Also, I find it unnecessary to address the apparent conflict between "3" and "4" days, as above; since the Parties are in agreement as to the total number of hours at issue.

4. Claim for reimbursement for post-retiree health insurance premiums paid and for City-paid post-retiree health insurance coverage.

Mr. Kleinschmidt is specifically claiming reimbursement for payment of premiums for health insurance coverage for him and his dependents in the amount of \$1,695.50/month; which he has been paying since August 1, 2011 to date. Additionally, he is contending that the City should be providing him and his dependents with the post-retirement health insurance benefits as set forth in Appendix D of the CBA (See relevant language above).

The Parties agree that on July 20, 2011, the date of his discharge from his employment with the City, that Kleinschmidt;

- a. Was 54 years of age and would be 55 on 9/5/2011.
- b. Had completed 30 years of continuous service with the City.
- c. Was actively enrolled and participating in MN PERA.
- d. Was eligible by age and years of service to formally apply for and obtain his earned PERA retirement benefit payments.
- e. Recognized or was reasonably aware that he was effectively being terminated from his employment with the City on July 20, 2011.

According to the stipulated record, as outlined previously, for whatever reason, Kleinschmidt did not formally apply for his PERA retirement benefit until September, 2011. Following application, he began receiving his PERA retirement payments on about October 1, 2011.

Also, as noted previously, on September 14, 2011 he notified the City that he was requesting payment for certain accrued fringe benefits and asked for confirmation that he was covered by the City's retiree health insurance program as set forth in Appendix D of the CBA.

The City has subsequently denied Kleinschmidt's requests with respect those items.

While the subject heading of this section, above, appears to involve two separate issues, its really only one - *Is Mr. Kleinschmidt covered by the City's retiree health insurance program, as set forth in the CBA?*

The current positions of the Parties on that question can be summarized to their essence as follows:

The City - The City says that it effectively terminated Mr. Kleinschmidt on July 20, 2011 for Just Cause as a direct result of his egregious misconduct. That termination immediately severed all aspects of his employment relationship with the City, including any subsequent basis for his claim for retiree health benefits. The City points out that he never "retired" from service with the City; that he was summarily discharged for stealing from the City and community which employed him. His offense against the City also constituted a felony crime. Accordingly, Kleinschmidt didn't "retire" from the City, he was thrown out and is not entitled to the benefits he is claiming. He essentially forfeited his right to those items by his morally reprehensible behavior.

Mr. Kleinschmidt - Kleinschmidt says that on the date of his discharge, he was basically "involuntarily retired", because he had no choice or option to continue his employment with the City. He says he "retired" because on July 20, 2011, he met all the basic requirements and qualifications for retirement. He contends that the fact that his retirement was involuntary, isn't relevant for purposes of the retiree health insurance program because as the contract language indicates, it doesn't restriction, limit or specify the manner in which one has to "retire" from active duty with the City. It simply requires that the relevant employee meet the specified qualifications which are that one must have 25 years of continuous City service and have reached a retirement age acceptable to PERA. On July 20, 2011, he clearly met those requirements.

It should be noted that the City's retiree health insurance benefit, as outlined in Appendix D, is separate and distinct from the PERA benefit.

PERA is a state-wide retirement plan covering public employees working in cities, counties, schools, other political subdivisions, etc. PERA is "portable" in the sense that a public employee can carry his PERA status from one participating public employer to another. Also, if the individual has vested in the system, but isn't currently eligible to qualify for benefits and isn't working in a covered public position, s/he can let the benefit lay dormant until the qualifications to draw benefits are met.

On the other hand, the City's retiree health insurance program is strictly limited to those City employees who have a minimum of 25 years of continuous employment with the City. Additionally, having met that condition, an employee must also be eligible to retire under PERA. Note: the employee isn't required by the contract language to actually formally retire under PERA, just be eligible to do so.

As Mr. Kleinschmidt points out, the contract language does not draw any distinction as to the manner in which the employee "retires" - voluntary or involuntary, nor does it provide any conditions under which an otherwise

eligible employee would forfeit the benefit, other than failing to meet the specified requirements. Finally, the contract language does not require any specific action on the part of the employee, other than retirement from active duty with the City, to trigger the implementation of the benefit. Accordingly, contrary to its assertions, the City had no basis in the contract language or in law or equity to refuse to enroll Kleinschmidt in the Retiree Health Insurance Program

Based upon the foregoing, I make the following findings of fact:

1. At the time of his discharge on July 20, 2011, Kleinschmidt's Employment Agreement included Appendix D of the applicable CBA.
2. On that same date, he involuntarily ceased active employment with the City.
3. On the same date, he met the all the requirements and conditions to qualify for the Retiring Employees Insurance Program and Sick Leave Fund as set forth in Appendix D.
4. The City was contractually obligated to immediately enroll him in the program, upon his departure from active duty with the City, and to pay the necessary and required insurance premiums for him and his dependents, beginning August 1, 2011.

### CONCLUSIONS

In view of my analysis, discussion and findings, as above, I conclude that:

1. Mr. Kleinschmidt's Claim for payment for unused, accumulated Sick Leave is without merit.
2. His Claim for payment for unused, accrued Compensatory Time hours is valid, as modified herein.
3. His Claim for payment for unused, accrued Personal Business Time hours is valid.
4. His Claim for coverage under the City's Retiree Health Insurance Program is valid.
5. His Claim for reimbursement of retiree health insurance premiums personally paid since August 1, 2011 is valid.

### DECISION

Having concluded that Mr. Kleinschmidt's Claim for pay for Sick Leave is without merit, it is hereby dismissed.

Having concluded that the City of Mountain Iron MN violated the contract by failing and refusing to pay Mr. Donald V. Kleinschmidt, an employee, for accumulated Compensatory Time, Personal Business Time and for refusing to enroll him in the Retiree Health Program, the following Remedy is appropriate:

## THE REMEDY

The City shall immediately take the following affirmative actions to make Mr. Kleinschmidt whole for the violations found:

1. Pay him \$6,777.66 in wages, less the appropriate deductions for taxes and FICA, for the 129 hours of accrued Compensatory Time.
2. Pay him \$3,397.53 in wages, less the appropriate deductions for taxes and FICA, for the 97 hours of accrued Personal Business Time.
3. Immediately enroll him and his dependents in the City's Retiree Health Insurance Program and Sick Leave Fund, per Appendix D of the CBA.
4. Reimburse him in full for the health insurance premiums that he has personally paid since August 1, 2011 to the date he is fully enrolled in the Retiree Health Insurance Program. Upon request by the City, Mr. Kleinschmidt shall immediately provide appropriate documentation to confirm his past personal premium payments.

Dated this 31st day of December, 2012 at Minneapolis, Minnesota.

Frank E. Kapsch, Jr.  
Arbitrator

Note: I shall retain jurisdiction in this matter for a period of forty-five (45) calendar days from the issuance of this Decision to address any questions or problems related thereto.