

IN THE MATTER OF ARBITRATION)
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) between)
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City of Starbuck, Minnesota)
) Diana Schlief - Discharge
) Grievance
)
)
) -and-)
)
) BMS Case No. 13-PA-0267
)
AFSCME Council No. 65,)
)
Local 2022 (Supervisor's)
)
Unit)) February 14, 2013
))

APPEARANCES

For City of Starbuck, Minnesota

Joshua M. Heggem, Attorney, Pemberton Sorlie Rufer Kershner
 PLLP, Fergus Falls, Minnesota
Sarah C. Duffy, Attorney, Pemberton Sorlie Rufer Kershner PLLP,
 Fergus Falls, Minnesota
Jeannie Pladsen, City Council - Personnel Committee
Michael Moen, City Council - Personnel Committee
Sunny Bjorklund Schultz, City Administrator, Acting
 Clerk/Treasurer

For AFSCME Council No. 65, Local 2022 (Supervisor's Unit)

Teresa Joppa, Staff Attorney
Serena Vergin, Staff Representative
Mary Pischke, Former Pope County Auditor/Treasurer
Marilyn Booen, Former Part-Time Clerk
Randy Peterson, Former Assistant Superintendent for Public Works
Bryan Klassen, Former Police Officer
Jim Minion, Police Chief
Diana Schlief, Grievant

JURISDICTION OF ARBITRATOR

Article 7, Employee Rights - Grievance Procedure, Section
7.3 Procedure, Step 4 of the 2011-2013 Collective Bargaining
Agreement (Joint Exhibit #1) between City of Starbuck,
Minnesota (hereinafter "City" or "Employer") and AFSCME Council

No. 65, Local 2022 (Supervisor's Unit) (hereinafter "Union") provides for an appeal to arbitration of disputes that are properly processed through the grievance procedure.

The Arbitrator, Richard John Miller, was selected by the Employer and Union (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation Services ("BMS"). A hearing in the matter convened on December 6, 7 and 19, 2012, at City Hall, Starbuck, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his personal records. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions.

The Parties' legal counsel elected to file electronically post hearing briefs, with receipt by the Arbitrator no later than January 16, 2013. The post hearing briefs were submitted in accordance with that deadline date. The Arbitrator then exchanged the briefs electronically to the Parties' legal counsel on January 17, 2013, after which the record was considered closed.

The Parties agreed that the grievance is a decorous matter within the purview of the Arbitrator for decision.

ISSUE AS STIPUATED TO BY THE PARTIES

Did the City have just cause to discharge the Grievant, Diana Schlieff? If not, what is the appropriate remedy?

STATEMENT OF THE FACTS

The Grievant, Diana Schlieff, has been employed by the City as the City Clerk/Treasurer since August 11, 2008. In the fall of 2008, the Union became the exclusive representative for supervisory employees, including Water/Street/Maintenance/Wastewater Department Head, Chief of Police, and Clerk/Treasurer ("supervisor unit"). (Joint Exhibit #1, Article 2.1). There were also two other non-supervisory units organized by the Union at that time. The negotiations between the Parties for the first-year collective bargaining contracts were difficult and time-consuming. The City hired legal counsel to represent their interests in negotiations.

On February 6, 2009, City Mayor Steve Dinsmore requested from the Grievant copies of three years of W-2's from City employees. The Grievant believed that Mayor Dinsmore's request violated private employee data. The Grievant communicated her concern to Union Representative Serena Vergin, who then sent an e-mail to the City attorney and a letter to the Mayor.

In early September of 2010, the Parties reached tentative agreements for the three units, only awaiting a ratification vote from Union members and final adoption by the City Council. On September 23, 2010, City Council member Jeannie Pladsen decided to have another lawyer from another law firm review the three tentative contracts. On October 11, 2010, the legal

services of the first lawyer were terminated and the City Council hired the second lawyer. This meant that the entire negotiations process began anew. Eventually, the Parties reached tentative agreements, which were ratified by Union members, and on February 14, 2011, the contracts were adopted at the City Council meeting.

In March 2011, the Grievant reported to Union Representative Vergin that there were data practices law violations committed by the Mayor and City Council. These violations were then reported to the City's attorney by Union Representative Vergin. The incident concerns a former City Police Officer who suffered a disability on duty while working for the City. The former Police Officer learned that the Mayor had gone to his new employer to ask questions about the disability and why the City still pays his health insurance (required by law). The Mayor denies going to the former Police Officer's new employer. The former Police Officer complained about discussion of his health conditions and data privacy violations at his work place, City Council meetings, and in the newspaper. This issue was never adjudicated.

There were disputes between the Parties with respect to the supervisor unit with regards to calculation of back pay, insurance contributions, and holidays taken. In fact, the Union filed grievances over back pay and insurance issues, which were

denied by the Employer on May 10, 2011. On May 16, 2011, the Union petitioned for grievance mediation with BMS. The grievances were ultimately resolved with the Union making some concessions.

On May 23, 2011, the Grievant received her first performance evaluation conducted by the members of the City Council's Personnel Committee, Ms. Pladsen and Michael Moen, with approval of the evaluation by the City Council. The evaluation reports many "satisfactory" ratings, one "excellent" rating, and a number of "unsatisfactory" ratings. Performance evaluations are not technically discipline, but an evaluation might indicate whether or not an employee is able to follow instructions or improve his or her performance if there are deficiencies.

In the May 23, 2011 performance evaluation, the City Council indicated that there were some concerns with the Grievant making timely deposits and payments and balancing the budget, and hinted that some on the Council thought she had difficulty agreeing to the demands of the Mayor or some Council members. These concerns, however, never rose to a level that needed discipline at the time they occurred.

The Grievant responded on June 7, 2011, to the concerns listed in the May 23, 2011 performance evaluation and enumerated many misstatements in the evaluation. The Grievant pointed out

that the City Council, not the City Clerk/Treasurer, decides which payments to make; that the Council did actually authorize the employee hired (the evaluation said she paid an employee who had not been approved for hire by the Council); and that the whole Council is responsible for the overall city budget, not just the City Clerk/Treasurer, so if the Council over spent the budget in the preceding year, the Council holds that responsibility. The Grievant also pointed out that her portion of the budget, Administration, came in under budget. She points out that the City Council did receive notice of the garbage rate increase contrary to the statement in the evaluation that they did not receive notice of the increase. As to the assertion that she was not working with all of the City Council, the Grievant stated she never refused to work with anyone, but agrees the request of the Mayor for employee W-2's was turned down (due to private data on the forms). The Grievant also pointed out that she had been providing the City Council with a "cash balance statement" at every Council meeting and that this should give the Council a "trial balance" from which to work. On many items, the Grievant objected to the unsatisfactory rating and explained why she should have received a "satisfactory" rating instead.

The Grievant questioned whether the City Council was violating Open Meeting laws, which ultimately prompted a letter

from Union Representative Vergin to the Commissioner of Administration and the Information Analysis Division on June 27, 2011, seeking an advisory opinion as to concerns about City Council meetings and Council members' behavior. The State fails to investigate the Union's concerns at this time due to the State shutdown.

On July 29, 2011, the Personnel Committee sent to the Grievant a Clarification of Expectations of City Clerk/Treasurer Job Duties. This clarification states: the Clerk/Treasurer is responsible to participate in City Council meetings by advising the Council on items on the agenda; responsible for all payments made to vendors and employees; must need to stay apprised of state and federal laws, along with City policy and bargaining unit contracts as to wages and benefits owed to these employees; must balance the City budget and present a budget on a monthly basis; must develop and maintain a healthy working environment with the Mayor and City Council members; and must create and foster customer relations with everyone and make City Hall a welcome place for all.

On August 25, 2011, a Special City Council meeting was held, with certain City Council members not being aware of the calling of this Special meeting. This resulted in Union Representative Vergin sending a letter on September 16, 2011, to the Information Policy Analysis Division alleging a violation of

the Open Meeting Law and also noting that due to the state shutdown, she was resubmitting the original materials sent on June 27, 2011, to the Division.

On or about August 26, 2011, a file cabinet incident occurred involving the Grievant and another City employee. The file cabinet belonged to the Personnel Committee and they possessed the only two keys to open the cabinet. The file cabinet door was malfunctioning so the Grievant called a representative from the company that sold the file cabinet to the City to attempt to fix the problem. The representative pulled the door to the cabinet open. This angered the Personnel Committee, since the cabinet allegedly contained private data with respect to City employees. This incident was investigated by legal counsel for the City.

On October 19, 2011, the Grievant received a written reprimand. This reprimand was received shortly after the file cabinet incident was investigated by legal counsel. Another City employee received an oral reprimand involving the file cabinet incident.

The written reprimand alleges that the Grievant is not properly administering the timecards and city payroll, (relating to the on-going dispute over how the City Police Officers should record their shifts which overlap dates when they work at night), that she provided inaccurate or incomplete budget

information, and she did not provide the City Council with adequate instruction concerning the Open Meeting Law. Also mentioned is a dispute about when the City Council received notice about some trees that needed trimming at the City airport. Finally, the City Council criticizes the Grievant for the file cabinet incident, alleging that she should have called the Personnel Committee before she called for repairs on the door of the file cabinet.

The Grievant grieved the written reprimand and had Union Representative Vergin respond with a letter dated October 25, 2011, outlining the inaccuracies in the written reprimand. Each and every item mentioned in the written reprimand was disputed. The tree trimming issue was addressed with the Planning and Zoning and Street Department, the Open Meeting Law information was shared previously, the City Police Department time sheet issue was an on-going dispute between the Personnel Committee and the Police Chief and his Police Officers and the Grievant was stuck in the middle.

The grievance was processed throughout the steps contained in the contractual procedure, after being denied by the Employer. The grievance, however, was not appealed to binding arbitration for final resolution.

On December 5, 2011, Union Representative Vergin once again sent a letter to the Information Policy Analysis Division

alleging that the City violated the Open Meeting Law with regard to refusing to close meetings for discussion of non-public health and medical data and medical records, by failing to maintain recordings for closed and Special meetings and negotiations, and failing to provide copies of mandatory tape recordings upon request.

The Personnel Committee submitted a second performance evaluation with respect to the Grievant on December 19, 2011. This performance evaluation resulted in many "satisfactory" marks, a few "can't assess" marks, and quite a few "unsatisfactory" marks. In this document, the Grievant was criticized for not being more flexible about late utility payments by citizens, for not updating the ordinance book, for allowing typographical errors in the City Council minutes, for not developing an annual budget, and for the file cabinet incident. Yet, there were several comments in this evaluation which said the Grievant had "shown improvement in working with the mayor and council," improvement in "setting goals," and in "sharing knowledge with the mayor on payroll checks." There was also improvement noted in "being receptive to constructive criticism."

On December 27, 2011, Union Representative Vergin sent a letter to the Personnel Committee with regard to the layoffs (reduction of hours) pertaining to the Deputy Clerk and a Police

Officer. Ms. Vergin indicated that the laid off employees have the right to assume some of duties of the casual, temporary, and seasonal employees hired by the City (Ms. Pladsen's brother is a seasonal employee) to avoid a reduction in their own time.

On January 20, 2012, the Grievant and Union Representative Vergin sent a letter to the State Auditor's Office regarding City Council members double-dipping on per diems and time clock problems.

On January 31, 2012, Union Representative Vergin filed a grievance concerning the take back and withholding of a step increase to the Deputy Clerk. The City decided to honor the step increase on February 13, 2012, but blamed the Grievant for the confusion surrounding this matter.

A second written reprimand was issued to the Grievant on February 22, 2012. Again the Personnel Committee reprimands the Grievant for the manner in which the Police Department accounts for their time worked and when they receive premium pay for being on-call or for holiday. A step increase for a City employee was implemented by the Grievant in accordance with the Collective Bargaining Agreement, yet this gets labeled a "failure to communicate" with the City Council in this lengthy written reprimand. A bank charge of \$4.00 and whether a particular account is allowed to earn interest at the bank is also criticized in the reprimand, as was a survey in the water

bills and how it was done, and updating the zoning code, Ordinance 154. This written reprimand is signed by Ms. Pladsen.

The Grievant grieved this reprimand on February 28, 2012. The grievance was denied by the Personnel Committee on March 19, 2012. The grievance was never appealed by the Union to final and binding arbitration.

The Grievant also received on February 28, 2012, a sexually offensive e-mail, which allegedly was sent by the Mayor. An investigation ensued, but the Mayor claims that he never sent the offensive e-mail to the Grievant on his computer.

In June 2012, the City Council hired a new City Administrator, Sunny Bjorklund Schultz, who previously had been the City of Greenfield Administrator.

The City Council, at a Special Meeting held on July 25, 2012, directed Administrator Schultz to conduct an investigation into the allegations of unsatisfactory job performance on the part of the Grievant. Administrator Schultz's report (with redaction for private data purposes) is as follows:

ALLEGATIONS, EMPLOYEE RESPONSES AND INVESTIGATOR'S VIEW

The following 11 allegations of unsatisfactory performance on the part of employee Diana Schlieff, City Clerk/Treasurer were read, considered and responded to individually. For each allegation, a summary of the employee's response is provided, together with any additional comments or direction provided (i.e. suggested people to consult with further and/or suggested source materials to review). A statement as to the investigator's view is provided for each, as well.

1. Relates to employee timecards - it is alleged that instead of figuring back pay for employees that Diana had the supervisors calculate it and had one employee calculate his OWN back pay.

Employee Response:

Ms. Schlieff acknowledged that (former) employee --- had overseen payroll calculations for employees working in maintenance, water/sewer, Hobo Park and at the Beach. Prompted by Ms. Vergin, for clarification, Ms. Schlieff stated that although --- had performed calculations for back pay for affected employees, she had also calculated as a means of double-checking --- work.
work.

When asked if there were any changes as a result of her calculations, Ms. Schlieff stated we would have to review the documentation.

Ms. Schlieff stated that she had performed calculations for the Police Department and that those calculations had been reviewed and approved by Chief ---

As to Hobo Park and Beach employees, Ms. Schlieff stated that the City Council had approved the rate increases retroactively.

Suggested people for further interview were --- and Police Chief ---. As stated earlier, suggested documentation for review were the time cards.

Investigator's View:

This allegation stands in that Ms. Schlieff acknowledges supervisor calculations for all but the Police Department. Mr. --- is a former employee and was not interviewed. Police Chief --- was asked, "Who calculated back payrolls for his department?" Chief --- stated that it was a combination of my office staff [Ms. Schlieff] and he, and that if there were problems I should let him know. I assured him it was merely a question.

An attempt to review time cards, specifically those pertaining to back pay, was unsuccessful because filing was not current. For example, the payroll file for one employee was found to have only one time card in it, that being for the pay period ending June 17. A cursory review

of other payroll files ended with the same pay period end (June 16 or 17, depending on the department).

As Payroll files were subsequently updated on Monday, August 20, 2012 by the part-time temporary office employee, additional review was conducted. These individual files showed the manual transfer of information in Ms. Schlief's handwriting as additions to previously approved time/pay calculations (for the pay period ending July 1 or June 30, depending on the department). I found no evidence of any changes to those calculations submitted by Mr. --- , and, specifically, no change for Mr. ---.

A review of the paperwork to support back pay calculations for the Police Department reflects advisory post-it notes from Chief --- so Ms. Schlief's assertion that she had, in fact, calculated back pay for part-time officers is confirmed. That Ms. Schlief disagreed on back pay for one part-time officer is noted. [See Attached Exhibit C].

2. Failure to communicate with the council - it is alleged that the city has rejected an invoice being submitted each month with the bills for a past city council member. Yet, knowing that the city has rejected this bill each month, it is alleged Diana was involved in phone conferences concerning this individual with the City Attorney and the individual himself regarding how to get the city to pay the invoice. The City Attorneys bill was then submitted for payment. The council was never advised as to any of the above.

Employee Response:

Ms. Schlief stated that she had nothing telling her not to bring [the invoice] to the Council. Schlief stated that the city's attorney, John Lervick, had received a fax directly from the individual to whom this allegation pertains and had initiated the phone call to Ms. Schlief. Ms. Schlief acknowledged that the phone conversation between herself and the attorney appeared on the attorney's bill, which was submitted to Council for payment, but reiterated that the call was initiated, not by her, but by the attorney. Ms. Schlief stated that she has seen the fax because it was part of a bill subsequently submitted by the individual to whom this allegation pertains.

Mr. John Lervick was suggested as a person for further interview. Suggested documents for review were the fax in question and phone records.

Investigator's View:

This allegation stands. There is nothing in Ms. Schlieff's response to abate the primary allegation of "failure to communicate with the Council." As Mr. Lervick is irrelevant to the allegation itself, I saw no reason to consult with him at charge to the City, nor did I consider the fax in question or phone records.

3. Sales tax audit - failure to communicate with the council. It council recently learned that there has been an ongoing sales tax audit taking place since December of 2011. It is alleged that when the audit was finally disclosed, the mayor sought information from the city clerk and she did not respond. The mayor then contacted the state to gather information. He learned that 2 extensions had been sought by the city clerk in responding to the audit and that the city has a substantial liability, penalty and interest owing. The council first learned of the audit in July 2012.

Employee Response:

Ms. Schlieff stated that the Sales Tax auditor's first visit was in December 2011, with an indication that they would return in January. Schlieff stated that she requested an extension because she was finishing up with items for the City's financial audit and that, thereafter, delays were the result of the State upgrading their computers for which the auditors had training commitments and a subsequent six-week leave of absence by one of the two auditors. The City was not revisited by Sales Tax auditors until May of 2012.

Ms. Schlieff feels this allegation is inaccurate. Suggested people for further interview were the two Sales Tax auditors and suggested items for review were the Sales Tax audit file and an e-mail to the Mayor [Steve Dinsmore].

Investigator's View:

Although no agenda for the meeting was found in the Minute book, the minutes for the March 12, 2012 meeting do include reference to the Sales Tax audit, as follows:

"Sales Tax audit started in December 2011 & February 2012 - Auditing 2008 - 2011 years - will be returning in April

2012." (See page 3, paragraph 5). [See Attached Exhibit D].

Nonetheless, this allegation, "failure to communicate with Council," stands in that timeliness is deemed a factor. If the audit began in December, and it is likely the City was provided advance notice of a site visit, then advising Council immediately, say, at the December 2011 or January 2012 meeting would have been appropriate. Not informing Council until the March meeting is unacceptable.

As City Clerk/Treasurer, it is Ms. Schlief's duty to report to Council in a timely manner, particularly on a matter of such significance as an audit, financial or otherwise, and regardless of the potential outcome (payment or refund) to the City.

4. Financial reporting - It is alleged that the Clerk has failed to provide any financial reporting to the council except disbursements and receipts for several months of council meetings. In July the mayor questioned why the sanitary account was increasing in a deficient and Diana responded that maybe the funds were in the wrong account. A subsequent review of the balances of this account reflects major errors in the beginning and ending balances. The council is unsure of what the accurate numbers are at this time.

Employee Response:

Ms. Schlief explained that the City Council may not understand the Cash Balance Statement provided to them. Specifically, the Beginning Balance for each fund represents the beginning balance for the current year. Similarly, the report being provided to Council reflects Year-to-Date (YTD) Receipts, Disbursements and Ending Balances. Accordingly, what might be interpreted as a Monthly report, in fact, is not monthly but rather YTD.

Ms. Schlief stated a now clear understanding as to Council's monthly expectation for reporting.

As to the specifics of the Sanitary [Sewer] Fund, Ms. Schlief reiterated that coding errors were made and those applicable to this specific fund have been corrected.

Schlief stated she was "only one person," suggesting that such coding errors are the result of attempting to perform

work that was formerly performed by two full-time people. Schlieff shared the December 2011 Council action that reduced a former office employee's hours from full-time to 3/4-time effective the end of February or beginning of March and that employee's subsequent resignation in April 2012. It is noted by the investigator that a part-time, temporary employee was subsequently added to assist Ms. Schlieff until the hiring of a City Administrator. That position, filled by the investigator, has been full-time since July 1, 2012. The part-time, temporary staffer's time has been reduced, but continues to date.

There was no suggestion made as to other people for interview.

Suggested documents for review were the time cards/records for employees --- (to ascertain end date) and (to ascertain start date).

Investigator's View:

This allegation stands. Having reviewed materials supplied by the Personnel Committee relative to this allegation, it is clear that regular, monthly reporting has not occurred in the past. Further, despite an indication of understanding by Ms. Schlieff (during this August 9 interview) regarding Council's expectation for monthly reporting, no financial report was available for the August 13 Council meeting.

No additional persons were interviewed and no documents were reviewed because, in the investigator's opinion, those that were suggested for review were deemed irrelevant to the allegation pertaining to financial reporting.

5. Budget - It is alleged that Diana submitted an interim financial report to the council in July which was incomplete and inadequate when the year is 1/2 over. Many accounts showed zero dollars budgeted. The City Council payroll was budgeted at 19,000 with actual expenditure of nearly 120,000. When this was questioned, Diana responded that she had made a bond payment out of the council payroll fund. Council members asked why the money was taken from this account, but Diana refused to respond to the inquiry.

Employee Response:

Ms. Schlieff stated that the City's Chart of Accounts precedes the start of her employment. Nonetheless,

recognizing Council's direction, Ms. Schlieff stated that she has (a) renamed the "Council Payroll" line item to correct any misconception that the account reflects only payroll rather than any/all Council-related expenses, and (b) established a new line item account to accommodate the portion of bond payment paid from the City's General Fund, which was initially coded to "Council Payroll."

Ms. Schlieff suggested speaking with --- of Northland Securities for further information and reviewing the tape of the July City Council meeting.

Investigator's View:

This allegation stands. Having been at the July 9 Council meeting, the investigator can confirm that the interim financial report submitted to Council did show several line items with zero budgeted. The investigator can confirm that Ms. Schlieff failed to answer the question posed by Council, as well. It was not that Ms. Schlieff refused to respond, but rather that she failed to answer the question. Ms. Schlieff's response, repeatedly at the meeting, was to ask of Council, "Where would you like me to put it?"

6. Public hearing - failure to communicate with the council and provide guidance. It is alleged that at a June special meeting where a public hearing was needed to approve ordinance changes, Diana stated that the council discussed holding a public hearing but never passed a motion on it. There is a concern that the city clerk is withholding information and instead of just notifying the council at the meeting that they needed to pass a motion, waited until the failure to do so created a problem.

Employee Response:

Ms. Schlieff denies intentionally withholding information. Schlieff stated that discussion had occurred between the Planning Commission Chair and Council members.

No suggestions were made regarding additional people for interview.

A suggestion to review the tape for the June meeting was made, with the caveat that the specific meeting date would be defined for the investigator.

Investigator's View:

The investigator is unable to rule on this allegation, as I was not present at the meeting, nor was the specific meeting date defined for further review. [See also Allegation #10.]

7. Pay check issues - it is alleged that there continue to be errors related to payroll including issuing two checks to employees when an employee requests vacation pay. This results in a tax break for the employee, but according to the League of Cities it is not a proper method of issuing pay to an employee.

Employee Response:

Ms. Schlieff stated that a former office employee had requested in writing (on her last date of working for the City) that her accumulated vacation pay be issued as a separate check. Given the written request and based on her previous work experience with Pope County, Ms. Schlieff acknowledged writing separate checks as an appropriate method. Nonetheless, Ms. Schlieff stated that practice has been corrected.

No suggestions for people to interview were given and the only document requested was for the letter from the League [or whatever documentation there is to support the League's position].

Investigator's View:

The allegation stands in that Ms. Schlieff acknowledges prior practice and subsequent correction.

8. Minutes - Failure to prepare minutes in a professional and accurate manner. It is alleged that the minutes are poorly drafted and contain misspellings, undecipherable sentences and errors.

Employee Response:

Ms. Schlieff reviewed the minutes for the May 14, 2012 meeting, original and revised, as provided by the Personnel Committee as an example. Schlieff recalled that during this particular meeting she was called away on a family emergency, but had passed a note to Councilor Ranae Spore and advised Police Chief --- as to why she was leaving. Councilor Logan returned the recorder and Schlieff's other materials to the office following the meeting. Having been absent from the meeting, Ms. Schlieff stated she had relied

on the tape alone to prepare the May 14 minutes. The minutes were not approved at the June Council meeting, but were subsequently revised as requested by Council and approved by Council at the July meeting.

Councilor Ranae Spore and Police Chief --- were cited as other people for interview. No other documents were suggested for review.

Investigator's View:

This allegation stands. As City Clerk, it is Ms. Schlieff's responsibility to keep "a minute book, noting therein all proceedings of the council..." (MN Statute § 412.151). The minutes represent the official record for the City Council and should be sufficient to clearly relay thought process, relevant discussion and decisions made well after the fact.

The investigator found reading minutes of Council meetings to be inordinately cumbersome. I found no correlation between numbering on the agenda and minutes for any given meeting, that is, there is no indication (i.e. sub-title) in the minutes as to topic being recorded. Each paragraph represents a standalone sentence or, often, a series of sentence fragments. In some cases, a motion and second are documented, but no vote. In nearly every case, the reference to a motion simply ends with "MC" presumed to mean that a motion carried, but without reference as to how the action carried; was the vote unanimous and split? (See Council minutes of February 13, 2012).

No additional interviews were pursued because, in the investigator's opinion, the people suggested for interview may have been able to confirm the circumstances of one specific meeting, but otherwise were deemed irrelevant to the overall allegation pertaining to unsatisfactory content and presentation of minutes. Several minutes from the 2012 Council Minutes book were reviewed, including the February 13, 2012 City Council minutes attached hereto as Exhibit E.

9. Insubordination - it is alleged that the council took action directing Diana to prepare a computer based form for expenses as the one being used was very dated. Instead of doing so Diana just whited out portions of the old form and continues to use it.

Employee Response:

Ms. Schlief noted that Council direction was given sometime in April, May or June, but could not recall at which meeting. Having the May minutes in hand from addressing the preceding allegation [#8], it was determined that Council direction did not occur in May. Ms. Schlief did state that, "if I had known this was a hot issue, I would have taken care of it."

No other people were suggested for interview. Minutes of April and June meetings were suggested for review.

Investigator's View:

This allegation stands. Despite knowledge of Council direction, Ms. Schlief did not do as directed and documented in the Council Minutes of April 9, 2012 at page 3, paragraph 4, which she prepared herself:

"Council person Pladsen made a motion to replace old voucher form to a new computer voucher form Seconded by Dinsmore MC."

Only after twice providing Ms. Schlief with a computerized expense form via e-mail and subsequent to this interview were the old voucher forms discontinued and reportedly destroyed. Dates of the investigator's e-mails were: July 20, 2012 at 11:26 a.m. to Diana's "Clerk" e-mail address and Wednesday, August 8, 2012 at 4:15 p.m. to Diana's "Deputy Clerk" e-mail address. Copies of the e-mails and form are attached hereto as Exhibit F.

10. Ordinances - There continue to be issues regarding Dianas [sic] failure to update ordinances.

Employee Response:

Ms. Schlief stated she now knows Ordinances, at original adoption or in changing, require a public hearing, but only since earlier this year when advised by Planning Commission Chair ---. However, Ms. Schlief acknowledged that there was a Public Hearing for the Flood Plain Ordinance prepared by Janell Miersch of the DNR.

Investigator's View:

The investigator is split on this allegation. On the one hand, updating ordinances cannot be accomplished if the ordinances listed by the Personnel Committee are invalid anyway. On the other hand, as the lead administrative

staffer, the Clerk/Treasurer should know that Public Hearings are required for adopting or amending Ordinances.

11. Ongoing issues regarding behavior and attitude. Diana has required city council members to sign a form acknowledging every time they pick up mail that they have received it.

Employee Response:

Ms. Schlieff states the use of "every" is inaccurate, citing the Pemberton invoicing addressed to Jeannie and the Mayor's mail. Staff Representative Vergin stated that Ms. Schlieff has been previously accused of not delivering material(s) that, in fact, had been delivered. Accordingly, Vergin stated Ms. Schlieff, without attitude, began asking for signatures to provide a paper trail and thereby avoid future accusations.

Ms. Vergin also stated that Jeannie [Pladsen] had behaved very "unprofessional at the front counter," behaving in an agitated and hostile manner such that she (Vergin) had been contacted by others. Vergin added that interactions at management meetings carried their own "tone."

When questioned for clarification, Ms. Vergin did acknowledge that "by others" she meant specifically other unionized employees, but that another employee was present at the time.

--- was suggested as a person for further interview. No documentation was suggested for review.

Investigator's View:

This allegation stands in that Ms. Schlieff acknowledges requiring signatures from Council members using a "Receipt" form attached hereto as Exhibit G. However, I believe that particular practice has ceased with the hiring of the City Administrator. Nonetheless, the investigator has observed, and now spoken with Ms. Schlieff about, a lack of respect in addressing Mayor Dinsmore and Council members, particularly at public meetings.

The investigator did interview part-time temporary employee --- as suggested, but is limiting commentary because, in the investigator's opinion, Councilor Pladsen's behavior on a given day is not deemed particularly germane to the

allegation, which speaks to "ongoing issues regarding behavior and attitude" of Ms. Schlieff.

Employee's Final Interview Comment

In concluding the investigative interview, I asked Ms. Schlieff if she had any ending comment(s) she'd like to make. Ms. Vergin stated that Ms. Schlieff feels she has been and is being treated unfairly. Using the union contract [increases allowed by Ordinance despite contracts not yet ratified) as an example, Ms. Vergin explained that even when Ms. Schlieff clearly attempts to follow the law, she (Schlieff) is subjected to disciplinary action. Ms. Vergin suggested that "attitude with tone" was applicable to others, not Ms. Schlieff.

CONCLUSION

The investigator feels that Ms. Schlieff wants to do well. She is studious, pleasant to work with and, as noted in prior evaluations, is punctual. Although somewhat disrupted recently, her attendance record is satisfactory and the investigator has appreciated Ms. Schlieff's commitment to opening the office and her willingness to adjust appointments around the investigator's schedule. Yet, there are some areas of concern from the City Administrator's perspective, which are directly related to this report.

The duties for both City Clerk and Treasurer are specified by MN Statutes § 412.141 and § 412.151. (See attached Exhibit H). As City Administrator, I am not convinced that Ms. Schlieff fully understands her role(s) or is adequately qualified for them. I understand that Ms. Schlieff has been employed by the City of Starbuck as its Clerk/Treasurer for four years, and has attended the Clerk's Conference and at least one other training opportunity, for payroll. If the employee was not fully qualified for the statutory positions she was hired for, the City Council must accept some responsibility. However, four years is more than sufficient time for obtaining additional knowledge, skill and abilities to perform at a higher level. Past evaluations and grievance responses document a willingness on the part of the City Council to provide assistance to Ms. Schlieff upon request, but to my knowledge, no such request has been made by Ms. Schlieff. It is acknowledged that Ms. Schlieff absorbed many new tasks at the departure

of the other regular office employee, which would seem all the more reason for accepting an offer of assistance when extended.

Specific to the foregoing allegations, there appear to be three significant areas of responsibility for Ms. Schlieff, which are not being performed satisfactorily: Legal/Statutory Requirements; Finance and Budget, including reporting and payroll; and Communication, including insubordination in cases of clearly ignoring Council's official action.

My sense is that Ms. Schlieff has been more forthcoming with me, perhaps, than with certain Council members. Nonetheless, in conducting the interview, I found a repeated and disconcerting tendency by Ms. Schlieff to evade a direct response to the allegation itself, instead choosing to focus on the example cited.

Given the findings of the report, I believe further discipline is deemed appropriate.

(City Exhibit #20).

On September 26, 2012, Administrator Schultz informed the Grievant by letter that her employment with the City as City Clerk/Treasurer was effectively terminated by the City Council on September 25, 2012. Administrator Schultz did not provide any reasons for the Grievant's termination in the letter, but it is assumed that her previously published report was the basis for the discharge.

The Union filed a written grievance on October 1, 2012, protesting the Grievant's termination. The grievance was denied by the City. The grievance was ultimately appealed by the Union to final and binding arbitration, the last step in the contractual grievance procedure.

UNION POSITION

This is classic case of mudslinging by an Employer. Each of the allegations in the City Administrator's report, each of the reprimands, and each of the performance evaluations was meant to be "mud" and the City is hoping against hope that some of it might stick to the Grievant. The mud the City is slinging, however, easily washes away when examined closer. No alleged wrong-doing by the Grievant is supported by sufficient facts to justify any discipline, let alone termination. The real offense in this case has been committed by the City because the real reason for the Grievant's termination is retaliation for the multiple reports of law violations. The Grievant is a whistle-blower and she did not deserve to be fired for standing up and doing the right thing in reporting the offensive e-mail by the Mayor, by reporting the double dipping on the per diems, by reporting data practices, and Open Meeting Law violations.

The grievance should be sustained and the Grievant should be returned to her full time job as City Clerk/Treasurer; the personnel files and other City records should be purged of all documents and records related to this case. The Grievant should be made whole in all ways: pay, benefits, pension contributions, sick or vacation leave, etc. and the Arbitrator is asked to order the City to place a notice to citizens in the City newsletter and in the town newspaper that the Grievant has

been cleared of all wrong-doing and restored to her full-time job.

The Arbitrator is also asked to retain jurisdiction in this case for 90 days in order to insure that this award is carried out in full and to resolve potential disputes between the Parties about it.

CITY POSITION

This case can be summarized with a simple question: "How long?" How long must an employer wait and hope for an employee to improve her performance, conduct, and communication? How long does the City Council need to course, correct, explain, remind, and discipline for the very same issues, especially when direction given is in some cases flat out ignored. How long does the City Council have to try to improve communication from someone who does not communicate with them?

On September 25, 2012, the City terminated the Grievant's employment. This came on the heels of multiple instances of performance reviews notifying the Grievant of her deficiencies, deliberate/clear clarifications of the Grievant's job duties, expectations for her, and consequences of a failure to meet those expectations, as well as disciplinary actions taken with respect to the Grievant in the form of two separate written reprimands for conduct that remained strikingly similar throughout. The conduct can be broken down into four

categories: (1) Communication, (2) Budget/Finance, (3) Insubordination, and (4) Attitude. All together, there were seven written instances over the course of the past year and a half where the Grievant was again reminded of her need to change in these four areas, and change did not occur.

The record proves that the Grievant's termination was appropriate in light of her conduct, especially the complete lack of recognition of the need to change even after repeated warnings and discipline, and her inability to communicate with the City Council regarding important matters such as the budget, finances, procedures for approving ordinances, timecard discrepancies, and many others, despite the fact that some of these things, such as the requirement for a public hearing on ordinance changes, she knew and could have communicated those things at the appropriate time. The decision to terminate was therefore reasonable and was only taken after considerable chances, course corrections, job description clarifications, offers for additional assistance/training, discipline issued more than once for the exact same deficiencies, and due process given to the Grievant.

The City has waited long enough to make this decision. The Grievant's conduct bogged down the City's resources, hurt the City financially, and most importantly, did not allow the City to function adequately and do its job because it could not rely

on its City Clerk/Treasurer to give it complete financial information or do her job in a satisfactory manner. The City's decision to terminate the Grievant was for just cause. The City has tried long enough to improve this situation, and the City respectfully asks the Arbitrator to deny the grievance and uphold the decision to terminate.

ANALYSIS OF THE EVIDENCE

Article 10, Discipline, Section 10.1 of the Collective Bargaining Agreement provides:

The City Council will discipline employees for just cause only. Discipline will be one of more of the following forms:

- A. Oral Warning
- B. Written Warning
- C. Suspension
- D. Demotion
- E. Discharge

This "just cause" requirement means that the Employer must act in a reasonable, fair manner, and cannot act in an arbitrary or capricious manner when administering any of the above forms of discipline. This "just cause" standard required the Employer to be fair, firm and patient and give the Grievant a fair opportunity to succeed at her job as City Clerk/Treasurer even if she was struggling to do her job either due to misconduct or incompetence, as alleged by the City. The City was expected to take the necessary steps through training, supervisory counseling or coaching, and ultimately discipline to see if any

of these approaches assisted the Grievant to succeed in her job. If these approaches were not successful, either individually or collectively, in changing the Grievant's behavior or work performance, the Employer would be deemed to have sufficient "just cause" to discharge the Grievant, and is well within its contractual right to do so.

There are generally two areas of proof in an arbitration of an employee's discipline case. The first involves proof of actual wrongdoing, the burden of which is always placed upon the employer when the collective bargaining agreement requires just cause for discipline. The second area of proof, once actual wrongdoing is established, is the propriety of the penalty assessed by the employer.

Section 10.2 of the Collective Bargaining Agreement provides that "[d]isciplinary actions shall generally be progressive; however, the Employer reserves the right to use the form it deems appropriate under the circumstances." The purpose of progressive discipline is to put employees on notice of improper behavior or poor job performance in order to give them a chance to correct these deficiencies.

The concept of progressive discipline requires that management withhold the final penalty of termination from errant employees until it has been established that the employee is not likely to respond favorably to lesser penalty.

Progressive discipline imposes upon management a twofold burden of firmness and patience. It requires management to adopt a reasonably firm attitude against minor violations and not allow them to be excused with simple admonition or complete oversight. Management is also obligated to put an employee on notice by penalties of increasing severity, emphasizing that such conduct was not being condoned. It does not permit an employer to go back to their "little black books" and advance, as grounds for present discharge, misconduct of earlier occurrence which was not taken note of and properly punished at the time.

Progressive discipline is mutually beneficial, in that it allows employees the chance to correct their deficiencies and allows the employer to keep trained employees. Discipline is considered excessive and not within the principle of progressive discipline if it is punitive rather than corrective or if mitigating or extenuating circumstances were ignored by the employer when discharging employees.

In this case, the City did not follow progressive discipline, as outlined in Section 10.1 (i.e., oral warning, written warning, suspension, demotion, discharge), since the City never imposed suspension without pay or demotion before discharging the Grievant. Accordingly, the issue that remains

is whether the City had "just cause" to bypass the progressive discipline forms of demotion or suspension without pay in the Grievant's case.

The record establishes that demotion was not a viable option in the Grievant's case because she was essentially performing all or most of the duties of the City Clerk/Treasurer without assistance from any other full-time City employee. Whatever assistance the Grievant may have received in performing her assigned duties were from part-time clerk employees, and those employee hours had been reduced or eliminated by City Council action before her discharge. In fact, since the Grievant's discharge, Administrator Schultz has been performing part of the duties previously assigned to the Grievant and the rest of the Grievant's duties are being performed by part-time employees. Thus, demotion to a full-time clerk position did not exist in this case and could not be considered as a form of discipline by the City under Section 10.1.

This leaves suspension without pay as the last remaining form of progressive discipline, short of discharge, as outlined in Section 10.1, since the Grievant had already received two written reprimands regarding her job performance shortcomings.

The Union argues that the Arbitrator should consider the merits of the written reprimands, which were not processed to arbitration by the Union. Whether or not the written reprimands

were justified is not properly before the Arbitrator, since the timelines to process these written reprimands have expired under the contractual grievance procedure and the Parties agreed that the issue before the Arbitrator is whether the City had just cause to discharge the Grievant, and not whether there was just cause to issue the written reprimands to the Grievant.

Discharge and suspension are separate and distinction penalties. Suspensions are corrective measures designed to rehabilitate employees who have been found to have shortcomings in their job performance. Discharge, on the other hand, is the severance of an employee relationship for the sole purpose of eliminating an individual from the workforce whose conduct has become intolerable. Simply, discharge is designed to abolish the employee-employer relationship; disciplinary suspension without pay is designed to improve it through the rehabilitation of the employee.

The general accepted principle of progressive discipline requires that where a number of minor disciplinary infractions occur, the employee should first receive a verbal or written reprimand, but if his/her conduct fails to improve, further disciplinary penalties, including suspension with pay must be imposed. The purpose of increasing the penalty is to remind the an employee that his/her conduct must improve and conform to accepted employer policies and standards. A suspension without

pay constitutes a reminder that termination will be the ultimate result if an employee does not improve his/her conduct.

There is no evidence in the record that the Grievant consciously or knowingly or deliberately committed the shortcomings and errors noted in her two written warnings, including the City's responses to the grievances filed by the Grievant, two job performance evaluations, and Clarification of Expectation Letter as to communication, budget/finance, insubordination and attitude categories listed as the reasons for her discharge. There is not even a suggestion of any evidence that she willfully "laid down" on the City Clerk/Treasurer job or wantonly committed irregularities and errors to spite the City Council members, including the Personnel Committee members or her supervisor, Administrator Schultz.

This is not to say that the Grievant performed all of her assigned job duties and responsibilities as the City Clerk/Treasurer in a flawless manner because she did have some shortcomings, as noted in Administrator Schultz's investigation report, in which she investigated eleven allegations in support of the City's case for termination. Of these eleven allegations, Administrator Schultz could not rule on allegation #6, not informing the City Council of the need for a public hearing on a particular ordinance, and she was undecided on

allegation #10, the Grievant's failure to update the ordinances. The nine other allegations, according to Administrator Schultz, found support in her investigation. The nine remaining allegations were reviewed by the Arbitrator and his findings, based upon the record, are as follows:

- Allegedly allowing employees to calculate their own back pay when a pay raise was due, but note Administrator Schultz did not talk to --- to see if he actually calculated his own back pay, and the Police Chief confirmed the Grievant checked and corrected his work and timecards and post-it notes on them later confirmed this as well. Thus, while it may have been the Grievant's job duty to calculate the back pay, there is no evidence that the back pay calculations completed and/or verified by the Grievant or others were inaccurate and caused any financial loss to the City.
- Repeatedly presenting a bill to the City Council which had been submitted previously and rejected, but the Grievant testified she had no authority to independently reject a bill that had been delivered to the City for payment. Further, Administrator Schultz's report says the City attorney called the Grievant about the bill, not the other way around. Somehow the attorney making a call and giving the Grievant directions to submit the bill to the City Council ends up her fault.
- Allegedly failing to inform the City Council and Mayor about an ongoing sales tax audit. The Grievant maintains she told the Mayor about the audit when it started. She sent the Mayor an e-mail about this and other matters while he was away in Arizona, as he is every winter. The City Council minutes reflect they knew of the audit in March. Administrator Schultz's report states that the Grievant "failed to communicate with the council in a timely manner" about the sales tax audit, which is deemed by the Arbitrator to be a correct conclusion.
- The Grievant's alleged failure to develop budget and accounting documents for the City Council in the format in which they wanted them. This is an on-going dispute with the Mayor who is a retired CPA and the City Clerk/Treasurer

who has to live by different rules set up by the State Auditor's Office for when certain items can be reported in the City's financial documents. There is also an on-going dispute about who is to prepare the annual budget and how it should be prepared. The Grievant admitted she had made a mistake in the Sanitary account line item. Additionally there were plenty of accounting problems that she inherited and some she was still trying to straighten out, along with some staff turnover and a shortage of skilled part-time help.

- An interim financial report had incomplete information; some accounts had zeros and the City Council payroll line item had \$19,000 budgeted and \$120,000 spent. The report prepared by Administrator Schultz says that the Grievant explained the errors and confusion and made some corrections after the City Council meeting where the problem was discovered. Some of the labels used on certain accounts pre-date her employment. City Council "payroll" is really Council expenditures generally. The bond payment was paid from the General Fund. The Arbitrator sustains the findings of Administrator Schultz, as there were errors made by the Grievant in the preparation of the July interim financial report presented to the City Council.

- Issuing two checks to exiting employees in accordance with past practice - this had been done before for employees who were retiring or leaving City employment. The Grievant was never told not to issue two checks and it does not result in any real tax savings or benefit for the recipient. She now knows and has corrected this practice.

- Typographical errors in City Council minutes from May 2012 and other dates. This allegation was sustained as the minutes from some of the City Council meetings were inordinately cumbersome and had no correlation between numbering on the agenda and minutes for any given meeting. It was the Grievant's assigned job duty to prepare readable and accurate City Council minutes, which she failed to do on a regular basis.

- "Insubordination" because the Grievant continued to use an out of date receipt form despite the City Council directing her to update it. The Grievant stated she did not clearly understand that the City Council deemed this update to an electronic format with a more current date as a priority for her time and attention. This allegation is

sustained because the Grievant was given notice in the April 9, 2012 City Council meeting to replace old voucher forms to a new computer voucher form, but did not complete this assigned task until sometime in August 2012.

- Ongoing issues of behavior and attitude including requiring City Council members to sign a form or receipt for mail received. The Grievant determined that it was necessary to protect herself and other City employees from false accusations by City Council members so she had them sign for their mail. This practice, which has now ceased, displays issues of behavior and attitude problems between the Grievant, Mayor, and the Personnel Committee.

In this case, the above analysis and conclusions establish that the Grievant's immediate termination is not appropriate. Nothing in the record supports such a severe standard as to allow the City to circumvent progressive discipline. None of the eleven allegations alone or collectively is so serious that the Contract's requirement of progressive discipline should be ignored by allowing the City to jump from two written reprimands directly to termination.

Clearly on some occasions, the Grievant was guilty of poor work performance and being defiant to the Mayor and the Personnel Committee. While the Arbitrator cannot condone some of her actions, they were justified, to a certain extent, because the City retaliated against certain Union members, especially the Grievant and Union Representative Vergin, for forming a Union and being actively involved in the Union and for multiple reports of law violations. Clearly, the Grievant was a whistle-blower and she does not deserve to be terminated for

taking the proper course of action in reporting the offensive e-mail allegedly sent by the Mayor to the Grievant, by reporting double-dipping on the City Council members per diems, by reporting alleged data practices, and Open Meeting Law violations.

Since the City has taken a lenient attitude toward the Grievant's work performance and did not impose any substantial punishment (i.e., suspension without pay) on the Grievant to convince her of the necessity to reform, it would not be just to permit such infractions to be accumulated and made the basis for a termination. As such, the discharge penalty was too severe and unjustified. The appropriate penalty is a suspension without pay. Whether or not the Grievant has learned her lesson and will benefit from it remains to be seen. In any event, this suspension without pay is a warning that any further misconduct of similar nature shall constitute grounds for immediate termination.

AWARD

Based upon the foregoing and the entire record, the City had just cause to suspend the Grievant without pay for twenty (20) working days. The Grievant is entitled to be reinstated to her former job position with back pay, minus interim earnings and unemployment that she may have earned or received but for her termination. She is also entitled to lost contractual

benefits, including, but not limited to, seniority accrual, vacation, holiday and sick leave accruals and pay, insurance contributions, etc.

Richard John Miller

Dated February 14, 2013, at Maple Grove, Minnesota.