

IN THE MATTER OF ARBITRATION BETWEEN

CITY OF INVER GROVE HEIGHTS, MN)	BMS Case #13-PA-0605
)	
("City" or "Employer"))	Site: Inver Grove Heights, MN
)	
&)	Hearing Date: 07-12-13
)	
)	Briefing Schedule:
)	◊ City's Brief 07-26-13
American Federation of State, County and Municipal Employees, Council No. 5, Local 1065)	◊ Union's Reply Brief 08-09-13
)	◊ City's Final Response 08-16-13
)	
("Union" or "AFSCME"))	Award Date: 09-16-13
)	
)	Arbitrator: Mario F. Bognanno
)	

JURISDICTION

The parties to the above-captioned matter are the City of Inver Grove Heights, MN, and the American Federation of State, County and Municipal Employees, Council 5, Local 1065. Said parties are signatories to a calendar year 2012 Collective Bargaining Agreement ("CBA") that was in effect when the disputed matter arose. (City Exhibit 1)

On December 14, 2012, Joe Lynch, City Administrator, notified the Grievant, herein identified as J.M., that he would be laid off effective January 1, 2013. (Union Exhibit K & City Exhibit 4) On October 13, 1997, J.M. was hired by the Employer's Inspections Division ("ID") as a Combination Building Inspector ("CBI"). This was J.M.'s job classification when laid off.¹ Among other duties, CBIs review construction plans, issue permits assuring that construction plans

¹ The Grievant was hired on a probationary basis. His "Six Month Probationary Performance Evaluation" was issued on April 30, 1998. Characterized therein as a hard worker, Brian Hoffman, J.M.'s first supervisor, nevertheless, identified three performance areas that needed improvement, namely: (1) arriving late for inspections, much to the displeasure of contractors; (2) using an undiplomatic tone/manner in communicating potential building code violations to contractors; and (3) having strained relationships with staff and colleagues. (City Exhibit 6) On October 5, 1998, J.M.'s "One Year Probationary Performance Evaluation" was issued. Therein, Mr. Hoffman noted that over the previous six months J.M.'s performance had "significantly improved," and, as a consequence, he was being promoted to regular full-time status. (City Exhibit 7)

comply with state building codes and city ordinances, and conduct on-site inspections. The ID is presently headed by Franklin Martin, Chief Building Officer. Mr. Martin reports to Tom Link, Director, Community Development Department (“CDD”). J.M. was the bargaining unit’s most senior CBI when laid off. The only other unit CBI, herein identified as D.N., was hired on May 11, 1998, six months after J.M.’s hire date. (City Exhibit 5)

Article 12.1 of the CBA provides:

Employees shall be laid off on the basis of job classification seniority only when the job-relevant qualification and performance factors between employees are equal.

(City Exhibit 1) On December 20, 2012, the Union filed a grievance. Therein, the Union alleged that the City violated Article 12.1 when J.M. was laid off because “Employees shall be laid off on the basis of job classification seniority...,” and J.M. had more job classification seniority than D.N. (Union Exhibit M) On January 3, 2012, the City acknowledged that J.M. was senior to D.N. Nevertheless, it denied the Union’s grievance. Alluding to Article 12.1’s partial phrase “... only when job-relevant qualification and performance factors between employees are equal,” the City claimed that J.M. and D.N. were not “equal” in terms of relative performance. The City’s denial letter stated in part:

... there are documented disciplinary actions and performance issues going back to the first six months of [his] employment, and through three different supervisors. I am attaching copies of these disciplinary actions and performance reviews (originals contained in [J.M.’s] personnel file).

... the City hired a job coach over this past summer to work one-on-one with [J.M.] She left him with a list of things to work on to help him improve in his performance. Despite that, complaints are still being logged from contractors on his inability to relate in a positive manner with customers, and complaints from co-workers on his inability to carry an equitable share of plan reviews in a timely manner.

The other Combination Inspector does not have any negative performance related documentation in his personnel file.

The City's decision with respect to the order of lay-off in this job classification stands.

(Union Tab N)

The parties' interpretation of Article 12.1 seemingly is that seniority controls in layoff decisions, but only as a "tie breaker" (i.e., when "... job related qualification and performance factors ... are equal"). Nevertheless, the Union asserted that the Grievant's relative qualifications were superior and, further, although J.M. may have had performance issues, their relative significance was minor, and it was dwarfed by the arbitral weight customarily granted "seniority." The instant dispute pits the City's claim that seniority does not play a "tie breaking" role in the present case because D.N. was the superior performer against the Union's claim that seniority does play a "tie breaking" role because J.M.'s "... qualification and performance factors ..." are either equal to or greater than those of D.N. As remedy, the Union asked that J.M. be reinstated, observing in its statement of the grievance that "The least senior Combination Inspector should be layed [sic] off first." (Union Exhibit M) The Grievant expanded on the requested remedy, writing:

It is my request that through arbitration, I be re-instated [sic] to my position, accrued vacation and personal leave be re-instated [sic], and that I be made whole with respect to my lost compensation, seniority, and other benefits.

(Union Exhibit O) Unable to resolve J.M.'s grievance, the dispute was processed to arbitration for final resolution.

The undersigned heard the disputed issue on July 12, 2013, in Inver Grove Heights, MN. Appearing through their designated representatives, the parties received a full and fair hearing. Witnesses were neither sequestered nor sworn; however, they were cross-examined and a large number of often voluminous exhibits were accepted into the record. At the hearing, the

parties stipulated that the disputed issue was properly before the Arbitrator for final resolution. Although the Union proffered direct testimony from the Grievant about his disciplinary history, the parties agreed and understood that the bulk of the Union’s record of evidence would be in the form of a lengthy memorandum that was prepared by J.M. Said memorandum goes beyond the Grievant’s direct testimony and in J.M.’s own words it is “... [his] response to the layoff.” Therein, J.M. addresses his qualifications and censures the performance-based claims brought by the City: Claims upon which it based its decision to lay him off. (Union Exhibit O)

At the hearing, the parties stipulated to a briefing schedule. On July 26, 2013, the City filed a timely brief that included an extensive rebuttal to the facts and assertion in the Grievant-prepared memorandum. On August 9, 2013, the parties advised the undersigned that additional closing remarks would not be filed. Thereafter, the matter was taken under advisement.

APPEARANCES

For the Company:

Scott M. Lepak
Jenelle Teppen
Tim Link
Frank Martin

Attorney at Law
Assistant City Administrator
Community Development Director
Chief Building Official

For the Union:

Cynthia M. Nelson
J.M.

Field Representative
Grievant

I RELEVANT CBA PROVISION

Article 6.6

If a grievance is not presented within the time limit set forth above, it shall be considered “waived.” If a grievance is not appealed to the next step within the specified time limit or an agreed extension thereof, it shall be considered settled on the basis of the Employer’s last answer. ...

Article 10.5

If no disciplinary action is taken against an employee for three (3) years following a written reprimand, all records of such written disciplinary action shall be considered inactive and removed from the employee’s personnel file. Such records shall be maintained for record-keeping purposes only in a separate file.

Article 12.1

Employees shall be laid off on the basis of job classification seniority only when the job relevant qualification and performance factors between employees are equal.

(City Exhibit 1)

II. ISSUE STATEMENT

The parties jointly stipulated to the following statement of the issue:

Whether the City violated Article 12.1 of the CBA in its decision to lay off the Grievant?
If so, what is the appropriate remedy?

III. FACTS AND BACKGROUND

In May or June of 2012, the Inver Grove Heights City Council began its 2013 budget-setting process. Shortly after Labor Day, 2012, the City’s Budget Team informed Mr. Link that the CDD’s 2013 budget would be reduced. In consultation with Jenelle Teppen, Assistant City Administrator, Mr. Link testified that he decided to absorb his 2013 budget cut by reducing a clerical position from full-time to three-quarter time, and eliminating a CBI position. Elsewhere, the City’s Police Department reduced a Community Service Officer position from full-time to three-quarter time, without benefits. (Testimony by Mr. Link and Ms. Teppen)

In addition to the 2013 reduction, Mr. Link testified that in 2009 and 2010, respectively, the ID lost a full-time CBI position, a temporary CBI/Planner position. Continuing, he stated that at one time there were four or five CBIs on payroll but, by 2012, only two bargaining unit CBIs remained on staff, namely, J.M. and D.N.

Mr. Link and Ms. Teppen, whose responsibilities include human resources and labor relations, testified at length about J.M.'s performance problems, which began in 1998, as described in footnote #1, *supra*. (City Exhibit 6) Ms. Teppen testified that in early 2002, the Grievant exhibited a spate of performance problems and, thus, as subsequently discussed, the City paired him with Barbara Strandel, a professional job coach, the goal being for J.M. to modify specific behaviors in order to meet performance expectations.

On January 17, 2002, the Grievant received a letter of commendation from Inver Hills Community College for his inspection work related to the construction of a new classroom building. (City Exhibit 8) But five months later, on June 6, 2002, John Tilton, J.M.'s second supervisor, gave him a Verbal Warning for "unsatisfactory plan review performance." J.M. handled 13 of the 243 building plans received between April 1, 2002 and June 5, 2002, while the City's other two CBIs performed almost 200 plan reviews. (City Exhibit 9) At the arbitration hearing, the Grievant testified about this discipline, remarking that during this period, he was performing inspections on the Dakota County Senior Housing Project, and that a number of unanticipated problems had come up. Further, this work transpired during three of the four time slots that had been set aside for plan reviews. Still further, he pointed out that between April 1, 2002 and April 10, 2002, all plan review work was given to D.N. who was on light duty, recovering from an injury. In addition, J.M. challenged the City's plan review numbers and chided his supervisor for failing to give careful consideration to his explanations. (Union Exhibits A & B) Indeed, the Grievant had previously raised these objections. In reply, Mr. Tilton had previously informed J.M. that the DI's other two CBIs had experienced similar interferences

and, that based on Permit Sign-Out Sheets data, he expected J.M. to perform a proportionate share of plan reviews. (Company Exhibit 9) This matter was not grieved.

Next, between June 5, 2002 and July 3, 2002, Permit Sign-Out Sheets data showed that J.M. had completed only 5 of 112 plans reviews, while J.M.'s peers had completed a total of 97 plans. Again, Mr. Tilton was not persuaded by the Grievant's "busy on other matters" explanation. Thus, on July 10, 2002, he gave J.M. a Written Warning. (Company Exhibit 9) On August 16, 2002, Mr. Tilton completed J.M.'s performance review, finding that J.M. "met expectations" in only three of fourteen performance categories. In said review's "Remedial Development Plan" section, Mr. Tilton directed J.M. to improve his performance by adhering to the following list of corrective measures:

- 1) The employee will perform inspections and complete plan reviews in a timely manner.
- 2) He will begin the morning and afternoon inspections schedules on time.
- 3) He will endeavor to maintain ... inspection schedules, while at the same time showing enough flexibility to comply with requests received in the field for additional inspections, when his inspection schedule allows.
- 4) He will perform a proportional amount of building plan reviews as the other full time combination inspectors.
- 5) The employee will strive to improve his interpersonal skills in order to work with others in the performance of his inspection duties without being perceived as being rude or having a superior attitude.
- 6) The City will provide customer service training. The employee is responsible for attending this training within the 90 day period before the next review and successfully completing that training. The employee must demonstrate improved customer service techniques and attitudes when dealing with the public and fellow employees.

(City Exhibit 10)

The Grievant's objection to this discipline took the form of a written critique, some of which were previously discussed points in regard to his June 6, 2002 Verbal Warning. He maintained that not all plan reviews/inspections require the same time commitment (e.g.,

decks, pools, basements or shed buildings/construction can be quickly inspected, but the senior citizen housing project and sewage system plan reviews, on which he had been working, were more time-consuming). J.M. was also critical of Mr. Tilton's "numbers game" and lack of concern for the "quality" of plan reviews. J.M. did not file a grievance. (Union Exhibit A)

Mr. Link's contemporaneously prepared personal meeting notes show that on August 22, 2002, he met with Ms. Strandel and Ms. Teppen. They discussed Ms. Strandel's situational findings and her recommended pro-active (i.e., corrective) steps that the Grievant should take in order to meet performance expectations. (City Exhibit 11) Ms. Strandel advised Mr. Link that J.M. should be told about these performance-enhancing steps. (City Exhibit 11)

In light of Ms. Strandel's observation that J.M. needed detailed and frequent "feedback," Mr. Tipton followed up his August 16, 2002 performance review of J.M. with another review on October 29, 2002. In this review, he essentially repeated his previously enumerated "list" of corrective steps (i.e., "Remedial Development Plan"). (City Exhibit 12)

Mr. Link also made notes of a June 11, 2003 meeting with Ms. Strandel and Mr. Martin, the Grievant's third supervisor. At that meeting, the notes state that Mr. Martin had observed that J.M. was "... very knowledgeable in codes and an asset, but people skills poor;" Ms. Strandel stated that, *inter alia*, J.M. was "... not aware of how others perceive [him], was not "observant, was a "proud" and "reserved" person who has a "high opinion" of his ability, and was neither "direct" nor "personable." Among Ms. Strandel's remedial suggestions were that J.M. should be given positive feedback, treated collaboratively, met with frequently, "maybe even weekly," and spend time with him "in the field." (City Exhibit 13)

On March 13, 2003, Mr. Martin drafted/presented a letter to J.M., detailing his lists “Behavior/Attitude Expectation” and “Work Product Expectations.” His Work Product Expectations (i.e., performance) were as follows:

1. Communicate daily to the Chief Building Official on daily work schedule, projects, tasks, programs, and work accomplishments through use of a daily work log. Daily log will be turned in to the Chief Building Official at the end of each day. Every other Thursday the logs will be reviewed with the Community Development Director as part of an on-going attempt to work with you.
2. Willingly accept and complete other duties as assigned or apparent; this includes work items pertaining to old permits, or any other areas of need in the division.
3. ... Arrive to work consistently by 8 a.m. ...
4. Coordinate and maintain schedule of daily inspections.
5. Exercise better time management so that you arrive on scheduled inspections on time.
6. Tardiness to work or to scheduled inspections will no longer be tolerated.
7. Communicate with support staff by communicating to the secretaries as to your whereabouts during business day.
8. Maintain an equal number of plan reviews as the other inspectors.
9. When enforcing the Building Codes you will enforce the provisions only. Do not be excessive in provisions that do not specifically relate to what you are inspecting.

(City Exhibit 22) However, according to Mr. Martin, the Grievant’s performance continued to fall short of expectations. Thus, on November 4, 2003, Mr. Martin gave J.M. a Two-Day Suspension without pay. The Grievant was suspended because of his “... continuing inability and unwillingness to show up to work on time and do a commensurate level of plan review.” (City Exhibit 23) J.M. did not grieve this discipline. However, at the hearing, he testified that his Suspension was unwarranted for reasons similar to those discussed in regard to his previous Verbal Warning and Written Warning. In any event, as Mr. Martin testified, J.M.’s suspension and related follow-up communications had their intended corrective effect because he found that J.M. “met expectations” in all fourteen categories of his January 21, 2005 performance review. (City Exhibit 24)

However, Mr. Martin testified, J.M.'s performance began to slip again in the fall, 2008. Thus, dated on September 1, 2009, J.M. was given a Verbal Warning, which indicated that his performance was lagging in three areas. First, from January 1, 2009 through September 1, 2009, J.M. had completed only 19 percent of plan reviews. Second, unlike the ID's other two CBIs, the Grievant arrives "... late to work or stays in the office past 8:00 a.m., thus, arriving late to all [of] his morning inspections." Third, the Grievant's communications with the public should be "... clear, concise, and understandable by the recipient," and "he must stop ... communicating brusquely with staff when they have to remind [J.M.] that he is late for scheduled inspections." (City Exhibits 25 & 26)

J.M. testified that the above-asserted performance deficits lacked merit. Further, he stated that Mr. Martin's use of "numbers" belies supervision's need to develop a credible workload metric. The Grievant acknowledged that he did not grieve this discipline. However, in a June 14, 2011 "rebuttal" letter that primarily dealt with a subsequent disciplinary action, he commented on the September 1, 2009 Verbal Warning. (Union Exhibit O, pp. 22-26) Regardless, on October 26, 2010, Mr. Martin completed J.M.'s annual performance review, concluding that the performance problems identified in his September 1, 2009 Verbal Warning letter had not abated. Too, on the occasion of this review, according to Mr. Martin, the Grievant "met expectation" in only four of fourteen evaluative categories. (City Exhibit 27)

Following a suggestion that Ms. Strandel had previously made, Mr. Martin testified that he began to record complaints received about BCI performance on a so-called "Complaint Against Employee" form that he had designed. City Exhibits 28, 29, 30, and 31 are four such complaints about J.M., which, to paraphrase, indicated the following:

- March 15, 2011 – Kent Baker, Stewart Plumbing, complained that J.M. issued “correction orders” and before doing so would not listen to or consider the views of the Journeymen on the job (City Exhibit 28)
- May 9, 2011 – Clyde Willie, Homeowner, complained that his project did not pass final inspection because J.M. concluded that a smoke detector was incorrectly mounted on a ceiling; J.M. would not tell him where the smoke detector should be relocated to pass inspection; would not return phone calls regarding the scheduling of a re-inspection. (City Exhibit 29)
- May 19, 2011 – Judy Diaz, Homeowner, complained of being frustrated with J.M. after leaving him voicemail messages for three days in a row without receiving a reply. She was in the process of selling her home, which was being held up over the possible need to upgrade its septic system. (City Exhibit 30)
- May 19, 2011 – James Taylor, Woods Construction, complained that J.M. was negligent with regard to the issue of a new home building permit, and that he was generally unavailable. (City Exhibit 31)
- May 20, 2011 – Kay Dickison, Homeowner, complained that J.M. had not returned several calls, pertaining to her new home building permit and well-capping project. (City Exhibit 31)

On May 20, 2011, Mr. Martin met with J.M. to review these complaints. Mr. Martin’s contemporaneously prepared notes and related testimony suggested that J.M. had agreed that the complaints were valid: He had just begun to respond to the prior three weeks of email; was behind in returning phone calls; was late with plan reviews. But, J.M. explained, the reason for these shortcomings was that he was simply too busy to promptly respond to the complainants. (City Exhibit 32) On May 24, 2011, Mr. Martin gave J.M. a Written Reprimand, based on the above-bulleted five complaints and from two other contractor complaints not identified above, as well as complaints from staff who bore the brunt of called-in complaints about J.M.’s late inspections, and who objected to his failure to complete a proportionate share of plan reviews.

At the hearing, the Grievant testified that he was, in fact, too busy to promptly return telephone calls. He pointed out, for example, that during the period in question, he was

directed to update the City's Subsurface Sewage Treatment Systems ("SSTS") code. (Union Exhibits C & E) However, regarding J.M.'s "too busy" explanation, Mr. Martin testified that he checked the schedule for the first three weeks of May, 2011 and found that J.M. had logged more paid hours of work than either D.N. or himself: Mr. Martin rejected J.M.'s explanation. (City Exhibit 33)

J.M. testified that he grieved the May 24, 2011, Written Reprimand. Dated June 14, 2011, J.M. wrote a detailed letter responding to Mr. Martin's findings. (Union Exhibit O, pp. 16-32) J.M. maintained that for the May 2, 2011 – May 20, 2011 period, the City's computerized data files were incomplete, excluding approximately 16 hours of time during which he was in meetings, on sick leave and conducting two inspections. These omissions, he averred, left the false impression that he had time to return calls and email messages when, in fact, he did not. (Union Exhibit O, pp. 9–15) Ultimately, however, the Union's grievance was not advanced beyond the City's Step-2 denial of same. Mr. Martin testified that on June 17, 2011, he directed J.M. to empty his voice mail account, which contained approximately 60 unanswered messages. (City Exhibit 34) Mr. Martin went on to state that no other CBI experienced similar problems.

On August 18, 2011, Mr. Martin completed another J.M. performance review. This one covered the February 1, 2011 – August 18, 2011 period. The review was not good since: The "Needs Improvement" boxes were checked nearly four times more often than the "Meets Expectations" boxes. (City Exhibit 36) In the "Employee Development Plan" section of the review, Mr. Martin advised the Grievant as follows:

1. Be at your work station by 8:00 a.m. every day.
2. Perform a commensurate level of plan reviews as your fellow Combination Building Inspectors.

3. Arrive to scheduled inspections on time, and manage the time at the inspection to maintain your schedule as efficiently as possible.
4. Execute better time management.
5. Write with the intention of being understood.
6. Return phone calls within (24) twenty-four hours.

On September 16, 2011, J.M. acknowledged that he read and discussed this review with Mr. Martin. (City Exhibit 36) On that same day, J.M. and Mr. Martin discussed the content of a specific contractor's September 8, 2011 and September 9, 2011 complaints. In these instances, Mr. Martin testified that J.M.'s positions were "technically correct." (City Exhibits 37 & 38)

However, in February and May, 2012, the inflow of complaints about the Grievant began anew. Mr. Martin commented on each complaint, as paraphrased below:

- February 14, 2012 – Anonymous City staff complained as follows: (1) when in the field, J.M. was inaccessible by cell phone, and, thus, Permit Technicians could not update him on the status of late, cancelled or additional inspections; (2) J.M. behaves rudely toward coworkers; and (3) J.M. does not perform his fair share of plan reviews. With respect to these complaints, after conferring with J.M., Mr. Martin testified that henceforth J.M. would ensure that his cell phone is turned on; that he will not interrupt co-worker conversations; and that his priority "... is to complete all reviews of permit applications in the plan review rack on his dedicated time for plan review PRIOR to working on SSTS [septic] 'stuff.' " (City Exhibit 42)
- February 17, 2012 – Heath Brown, Homes by Tradition, complained that J.M. left his framing and plumbing site without having finished the job's inspection. J.M. concluded that the mechanical and gas line installations passed inspection, but that there were framing errors, and the garage's framing failed inspection: The job's inspection had to be rescheduled and the Grievant was allegedly rude to a subcontractor. Mr. Martin agreed with J.M.'s judgment-calls, but advised him to be aware of the manner and messages he wished to communicate. (City Exhibit 43)
- April 18, 2012 – Matthew Lundberg, Homeowner, complained that J.M. was on premises to close-out a new window permit, but then he made accusatory comments about the homeowner needing permits for work that had been completed by the previous homeowner, and he made accusations about needing permits to finish a basement that the homeowner had not planned to finish. After researching the issues, Mr. Martin closed the file on this matter, apologized to the homeowner. (City Exhibit 44)

- May 1, 2012 – Carol Halloran, Homeowner, observed that she was permitted to perform interior house repairs and build a deck. After discovering wood rot, J.M. gave verbal orders about how the deck’s construction plans should be changed. However, until the new plans were approved, he refused to clear other aspects of the construction that were underway, delaying the entire project by two weeks. She stated that she had called J.M. at least five times, leaving voicemail messages that were not returned; he was abrupt and rude with her; she requested to have another inspector assigned to her project. (City Exhibit 46)
- May 1, 2012 – Tom Klanchnik, Advanced OnSite, Inc., angrily complained that J.M. was not returning calls, had referred him to a website rather than to directly answer his technical questions, and was uncooperative. J.M. admitted to mutual shouting, but said that Mr. Klanchnik started yelling when the Grievant refused to accept a falsified report. Ultimately, because this was the second complaint received that day, Mr. Martin contacted Ms. Teppen, requesting that she schedule professional “communication” coaching. (City Exhibit 45)

Mr. Martin reported these complaints to Mr. Link. Mr. Link testified, and his meeting notes documented, that he and Mr. Martin had met several times during May and June, 2012, to discuss these complaints and the prospect of hiring of a job coach. (City Exhibits 14, 15, 16, & 17) Mr. Martin asked Ms. Teppen to provide the Grievant a job coach, which she agreed to do.² Ms. Teppen testified that a second job coach, Lisa Lynn, was hired in May 2012 to assist the Grievant. In an email dated May 2, 2012, from Ms. Teppen to Ms. Lynn, she thanked her for agreeing to work with J.M. In addition, she indicated that J.M.’s “continuing” issues included:

- Timeliness of returning phone calls and emails
- Issues related to arriving at inspections on time
- Completing his share of plan reviews in a timely manner
- Attitude toward the public

(City Exhibit 2) Ms. Teppen’s email also observed that J.M. had received a Written Reprimand in 2011, and that:

² Ms. Teppen testified that J.M. was the only City employee to date ever provided coaching twice.

By having you work with him, the City is checking off another of the boxes on the road to termination – which you may share with the employee, or you may choose not to – it’s up to you.

(City Exhibit 2) Finally, she advised Ms. Lynn to contact Mr. Martin. (City Exhibit 2)

On May 9, 2012, Ms. Lynn contacted Mr. Martin to speak about the Grievant’s “... strengths and weaknesses as well as desired performance outcomes ...” (City Exhibit 47) Mr. Link’s handwritten notes, dated May 10, 2012, state in part that Mr. Martin “... was being fair and hearing both sides of the issue.”³ (City Exhibit 15)

Ms. Lynn met with J.M. on May 24, 2012, and June 12, 2012. (City Exhibit 48) On June 13, 2012, Ms. Lynn contacted Ms. Teppen and Mr. Martin, commenting that she had given J.M. the Myers-Briggs Type Indicator Form Q and Emotional Quotient Inventory pen and paper assessments to learn about his work style, his areas of strength, and areas needing change. In addition, she indicated that she had given J.M. the following 5-part “homework” assignment:

1. Pre-call folks to let them know he is either on his way and what time he will arrive.
2. Get the easy plan reviews done first and the complex done second. He was using the opposite approach.
3. Stress Management – find ways to recharge so he has the energy and fortitude to continue changes long-term.
4. He will develop a list of projects and his schedule and review with Frank to ensure he is working on the appropriate tasks.
5. Not to respond defensively when others are talking.

(City Exhibit 50) Ms. Lynn’s “Assessment Report” is dated June 18, 2012. (City Exhibit 49) On July 11, 2012, Ms. Lynn sent an “Action Plan” to J.M. that expanded on the elements in her above referenced 5-part “homework” assignment. (City Exhibit 53) On August 29, 2012, Ms.

³ Mr. Link testified that Mr. Martin had kept him abreast of this influx of complaints, and that he actually heard J.M. “yelling loudly” over the phone on May 1, 2012, during his conversation with Mr. Klanchnik. Too, Mr. Link’s personal notes dated May 10, 2012, refers to Ms. Lynn as a “... no nonsense type of person.” (City Exhibits 14 & 15)

Lynn met with Mr. Martin to review her coaching report and to discuss further consultative step. (City Exhibit 3)

Dated September 12, 2012, Mr. Martin gave J.M. another memorandum having to do with his performance. Therein, Mr. Martin reviewed his previous contact with Ms. Teppen and the decision to hire Ms. Lynn, the aim being to help J.M. to meet performance expectations through corrective rather than punitive means. However, the memorandum continues, subsequent to Ms. Lynn's coaching, between July 9, 2012 and August 27, 2012, at least six more complaints were reported by contractors and homeowners. (City Exhibit 54) On September 24, 2012, Mr. Martin again wrote to J.M., this time summarizing the content of a meeting that they had previously on September 12, 2012. Among other matters, the Grievant was given four work-related behavioral instructions:

1. Timeliness of [sic] returning phone calls: Phone calls and emails shall be returned within 24 hours.
2. Issues related to arriving at inspections on time: Exercise better time management. ...
3. Completing a commensurate level of plan reviews. ...
4. Attitude toward the public and staff: ...

(City Exhibit 56) Soon thereafter, as Mr. Martin testified, on October 12, 2012, November 6, 2012 and October 24, 2012, he received more complaints. However, following discussions with J.M., Mr. Martin stated that only the October 12, 2012 complaint was credible. (City Exhibits 57, 58 & 59)

Mr. Link testified that on October 26, 2012, he began the process of deciding how his department would absorb its 2013 budget cut. (City Exhibit 19) Mr. Martin testified that sometime in October, 2012, he learned that the ID would be losing a CBI position effective January 1, 2013. On November 27, 2012, Messrs. Link and Martin met to review CBI workload

and related information covering the preceding twelve months. Mr. Martin's notes suggested that at that meeting it was decided that J.M. would be laid off. (City Exhibit 20) On November 28, 2012, Mr. Martin sent a memorandum to Mr. Link, documenting the inspection and plan review data that were reviewed the previous day along with related performance commentary and supporting addenda. (City Exhibit 21) Again, based on these data and related information, Mr. Link had decided that J.M. would be laid off.

Under cross-examination, Mr. Link testified that even though the effort numbers provided by Mr. Martin did not reflect on the "qualitative/substantive" aspects of work performed, he opined that over the long-run, the type and complexity of the inspections and plan reviews handled by each CBI tended to average out. In response, the Union asked about 25 septic compliance inspections that J.M. had performed in 2011 and 2012, and that were not reflected in the Inspection logs. Mr. Link replied, "The septic system assignments were not significant." Also, he acknowledged that D.N. did not work on the septic system project.

Mr. Martin testified that after reviewing the above referenced effort data, and the personnel records of Messrs. J.M. and D.N., he concluded that J.M.'s performance was inferior to that of D.N. (City Exhibit 21) Mr. Martin stated that neither public nor staff complaints about D.N.'s work performance were reported in 2010, 2011 and 2012. Instead, during these three years, two public calls of a complimentary nature and a letter of commendation were received. (City Exhibits 60 & 61) Further, D.N. has never been disciplined. Of relevance is that D.N.'s only possible drawback was that he was not authorized to inspect public projects, and J.M. was. However, Mr. Martin stated that this was not a "practical" drawback because he himself could

handle the public building workload. Of significance, Mr. Martin continued, is that D.N. had expert code knowledge and was the harder worker.

In his November 28, 2012 memorandum to Mr. Link, Mr. Martin made four relevant observations. First, inspection data for the January 1, 2012 – October 31, 2012 period show that J.M. performed 1,710 inspections to D.N.'s 1,610: Each inspection averaging about one-half hour. Second, for the January 1, 2012 – November 27, 2012 period, D.N. had completed 246 plan reviews to J.M.'s 89. Third, during these time periods, D.N. was absent from work for approximately seven weeks compared to J.M.'s four weeks. Finally, Mr. Martin wrote that Ms. Lynn's coaching, and his own multiple discussions and memoranda had not succeeded in improving J.M.'s performance; that he, and J.M.'s two former supervisors, Brian Hoffman and John Tilton, had all stressed, without success, the following four basic expectations:

1. Arrive to inspections on time.
2. Perform a commensurate level of plan reviews.
3. Respond to phone calls and emails within 24 hours.
4. Improve communication skills when dealing with staff, contractors and the public.

In consideration of the Grievant's overall work history, Mr. Martin opined that the City's efforts to develop J.M. over the years has resulted in "... no meaningful change in his work performance." (City Exhibit 21)

IV. POSITION OF THE PARTIES

A. Employer's Arguments

The Employer began by recounting the testimony by Ms. Teppen and Mr. Link, and, specifically, their descriptions of the City's 2013 budgeting process, budget cuts and decision to eliminate a CBI position. The Employer also pointed out that since the onset of the 2008

recession this was the third CBI position to have been eliminated. The Employer maintained that these facts, plus the fact that a CDD clerical position and a Community Service Officer position were reduced contradict the Union's contention that the City's 2013 budgeting process and outcome was an attempt to mask its true intention, namely, to terminate the Grievant's employment. (City Exhibit 19 & Union Exhibit O, p. 9) Further contradicting this "conspiracy theory," the Employer pointed out that J.M.'s 2012 complaints were sufficient to have formed a reasonable basis for suspending him as a precursor to his termination. Instead, the City hired Ms. Lynn to coach J.M. Finally, the Employer argued that the Union did not present a scintilla of evidence to show that the City Council, its Budget Team or the CDD had considered laying-off J.M. when budget deliberations were unfolding: The City cut a CBI position for economic reasons and not for punitive reasons.

Next, the Employer maintained that its decision to lay off J.M. was neither unreasonable nor in violation of Article 12.1 in the CBA. Based on objective personnel-specific documentation and objective statistical data, D.N.'s performance was shown to be superior to J.M.'s. Statistically, in 2012, the Grievant performed 1,710 inspections compared to 1,610 for D.N., but the Grievant performed only 89 plan reviews compared to 246 by DN. In addition, the Employer noted that these statistical data were skewed to favor the Grievant because he missed only two weeks of work during the relevant review period, while D.N. missed seven weeks of work. (City Exhibits 21 & 62) Too, Messrs. Link and Martin testified that both J.M. and D.N. met all "job relevant" qualifications – both BCIs had been on the job for more than a decade. Further, the Employer argued, the Grievant alone had experienced performance problems in 2011 and 2012 that arose *prior* to October 2012, when it became clear that a CBI job classification would be

cut. In fact, the Employer pointed out, the Grievant was *en route* to being seriously disciplined or possibly discharged near the time that it became clear that the CDD's 2013 budget was going to be reduced. Regarding 2011, the Employer pointed to several performance problems, which are summarized as follows:

1. May 24, 2011: Grievant was issued a Written Reprimand. (City Exhibit 33)
2. June 17, 2011: Grievant's voicemail box was full with 60+ messages, prohibiting customers and staff to leave messages: A continuation of one of J.M.'s performance problems. (City Exhibit 34)
3. August 18, 2011: Grievant's performance review exhibited 19 performance criteria marked "Needs Improvement" with only 5 marked "Meeting Expectations." Regarding J.M.'s future development, Mr. Martin essentially repeated the same points he had identified in his October 26, 2010 "Employee Development Plan," namely:

1. Be at your work station by 8:00 a.m. every day.
2. Perform a commensurate level of plan reviews as your fellow Combination Building Inspectors.
3. Arrive to scheduled inspections on time, and manage the time at the inspection to maintain your schedule as efficiently as possible.
4. Execute better time management.
5. Write with the intention of being understood.
6. Return phone calls within (24) twenty-four hours.

(City Exhibit 36)

In 2012, the Grievant's performance problems were as paraphrased below:

1. During the February and May, 2012, a number of performance complaints were registered by homeowners, contractors and staff. In a May 2, 2012 memo from Ms. Teppen to Ms. Lynn, the former observed, in so many words, that the Grievant's employment was in jeopardy. (City Exhibit 2)
2. On September 12, 2012, Mr. Martin stated in a memo addressed to the Grievant that rather than suspending him without pay for three days, the last step preceding termination, he would be receiving job coaching. (City Exhibit 54) On September 24, 2012, Mr. Martin issued another memo, which, in part, stated that "... failure to meet established requirements pertaining to these performance issues as documented and discussed will result in further disciplinary actions up to and including termination." (City Exhibit 56)

3. During 2011 and 2012, D.N. had no documented performance issues. Indeed, his September 27, 2012, performance evaluation was good. (City Exhibit 5) D.N.'s only possible limitation was that he was not a good writer and, as a consequence, he could not conduct public sector plan reviews. Yet, this single limitation was never raised on any of D.N.'s performance reviews. (City Exhibit 19)

Further, the Employer argued that J.M.'s 2011 and 2012 performance problems were not an aberration. Rather they represented the tip of a problematic iceberg that began in 1998, during his first six months as a City employee. Even back then, the Employer noted, he was cautioned about (1) arriving late for inspections; (2) contractor complaints; and (3) interacting poorly with co-workers. (City Exhibit 6) By the end of his first year as a City employee J.M.'s performance had improved. However, the Employer observed that by 2002, as J.M.'s August 16, 2002 performance review showed, his performance had slipped badly. The Grievant's subsequent performance reviews cycled from good to poor. J.M.'s October 29, 2002 and January 21, 2005 reviews were good. (City Exhibits 12 & 24) Whereas, his October 26, 2010 performance review was poor, and, therein, J.M.'s was advised:

1. Be at your work station by 8:00 a.m. every day.
2. Perform a commensurate level of plan reviews as your fellow Combination Building Inspections.
3. Arrive to scheduled inspections on time, and manage the time at the inspection to maintain your schedule as effectively as possible.
4. Execute better time management.
5. Write with the intention of being understood.

(City Exhibit 27) Also poor was J.M.'s August 18, 2011 review in which he was advised as above, plus, a numerical 6, namely: "Return phone calls within (24) twenty-four hours." (City Exhibit

36) In contrast, the Employer argued, D.N.'s February 12, 2001, August 20, 2001, January 19, 2005, October 26, 2010 and September 27, 2012 performance reviews were all good reviews

(i.e., the “Meeting Expectations” box was always checked on every evaluative criterion). (City Exhibit 5)

Still further, the Employer observed that the Grievant has been disciplined on multiple occasions for on-going performance problems. Verbal Warning aside, on July 10, 2002, he received a Written Warning; November 4, 2003, he received a Two-Day Suspension; and May 24, 2011, he received a Written Reprimand. (City Exhibits 5, 23 & 33) In contrast, D.N., has never been disciplined. Further, the Employer argued, D.N. has never been the subject of a complaint; whereas, since March 15, 2011, J.M. has been the subject of 13 complaints. (City Exhibits 28, 29, 30, 31, 37, 38, 42, 43, 44, 45, 46, 59 & 57)

Focusing on the qualifications of J.M. and D.N., the Employer argues that both men met the minimum standards necessary to perform CBI work, and that J.M.’s unique standing with the MN Department of Labor and Industry, and his other certifications were not relevant to the performance of said work. What was relevant, the Employer averred, were the Grievant’s secular, on-the-job performance failures, as recorded in numerous performance reviews and in complaints from the public and co-workers, most of which were found to be valid. Time and again, the Employer continued, J.M. has provided a myriad of repeated excuses for his performance deficiencies; whereas, D.N. made no excuses because his performance had never been called into question. The Employer maintained that when repeatedly told to focus on completing plan reviews, J.M. would spend time on, for example, the new sewage treatment system code project even though he knew better. Even the Union, the Employer pointed out, does not deny such non-compliant conduct on the Grievant’s part; rather, it argued that said misconduct was not serious.

Finally, the Employer maintained that all of the charges, challenges and rebukes the Grievant raised in his rebuttal memorandum (i.e., Union Exhibit O) were for naught. First, the Employer produced documents showing that the Grievant has a long and troubled employment history. This documentation, be it in the form of performance reviews, customer and co-worker complaints, disciplinary actions, workload data and so forth, should stand “as is.” Second, only one of the Grievant’s disciplinary events and performance reviews was grieved, and that grievance was subsequently dropped. Third, the City did not present disciplinary documentation in order to prove that said events were for “just cause.” Rather, said evidence was presented to demonstrate that the Grievant has had performance problems, whereas, D.N. has not. Fourth, the Grievant has never accepted the fact that he has performance issues. His attitude has been and continues to be that his supervisors were wrong, which the Employer argued, is precisely why his performance troubles have persisted year after year. Finally, the Employer argued that the Grievant’s disciplinary episodes and poor performance evaluations were not based merely on supervisory opinions. They were also based on objective, tangible evidence – workload data and complaints reported by his customers and co-workers. D.N.’s historic performance evaluations are vastly superior to those of J.M.; D.N. has never been the subject of customer or co-worker complaints, as has J.M.; D.N. has never been disciplined, as has J.M.

For the forgoing reasons, the City urges that the Grievant’s layoff was not an Article 12.1 violation.

B. AFSCME’s Arguments

For several reasons, the Grievant by and through his Union argued that he was wrongly laid off on December 31, 2012. First, Article 12.1 in the CBA requires that employees "... shall be laid off on the basis of job classification seniority..." According to this contractual requirement, D.N., not J.M., should have been laid off because he was hired on May 11, 1998, and J.M. was hired on October 13, 1997. Second, Article 21.1 goes on to state, "... only when the job-relevant qualification and performance factors between employees are equal." Regarding these contractual requirements, the Grievant pointed out that his qualifications were second to none. Unique among J.M.'s qualifications were that he was the:

... only city CBI allowed by the MN Department of Labor and Industry to do plan reviews of proposed construction projects involving: 1) Inver Hills Community College; 2) ISD #199 public school buildings; and 3) facilities such as assisted care facilities.

... only city employee certified by the Minnesota Pollution Control Agency as a SSTS Advanced Instructor that is approved to review, inspect, and issue permits and certificates of compliance for Type IV, V, and Midsized sewage treatment systems.

... only city employee certified by the International Code Council as demonstrating competency in eight separate inspection disciplines (plumbing, mechanical, plan review, etc.)

... one of the most skilled of employees in the Inspections Department in drafting and creating (word processing) documents, templates, and forms used within our department and by the public.

(Union Exhibit O, pp. 2-3)

Third, regarding Article 12.1's "performance" requirement, the Grievant maintained that his "job dedication and performance has been excellent," as the following examples illustrate:

- In 2009, the MN Department of Labor and Industry recognized J.M., from among the City's three CBIs, as the one who completed plan reviews of "acceptable quality."
- J.M. willingly accepted special projects in addition to his special duties, such as, his 2012 assumption of responsibility for administering the City's new operating permit enforcement program.

- J.M. was tasked to complete by March 2011, the creation of a program for the administration of the new sewage treatment system code. He met this deadline and developed an 80 page code information packet.

(Union Exhibit O, p. 2) To summarize, the Grievant argued that because he was the most senior CBI in 2012, and because his qualifications and job performance were excellent, D.N. should have been laid off *per* Article 12.1 in the CBA.

Next, the Grievant observed that the Employer made repeated references to the City's pre-September 1, 2009 disciplinary actions against J.M. even though said actions were immaterial given that Article 10.5 of the CBA provides:

If no disciplinary action is taken against an employee for three (3) years following a written reprimand, all records of such written disciplinary action shall be considered inactive and removed from the employee's personnel file. Such records shall be maintained for record-keeping purposes only in a separate file.

(City Exhibit 1; emphasis added) The City's most immediate pre-September 1, 2009 disciplinary action pertained to the Two-Day Suspension that it issued on November 4, 2003. Therefore, the Grievant urged, neither that nor his earlier disciplines should be considered by the undersigned.

Regarding his past employment history, J.M. vigorously refuted the factual foundations of the City's Verbal Warning (September 1, 2009), performance review (October 26, 2010), and Written Reprimand (May 24, 2011) – all events that were referred to in the City's denial of the J.M.'s grievance at Step 2. The Grievant's specific factual challenges can be summarized as follows:

Written Reprimand (May 24, 2011) – For the 2011 weeks of May 2nd, May 9th and May 19th, the City maintained that Mr. Martin, J.M. and D.N. worked for 100, 114, and 96.25 hours,

respectively, and, therefore, the City concluded that J.M. had ample opportunity to answer customer calls and to perform plan reviews. The bulk of customer complaints during that period were that J.M. did not return their voicemail and email messages.

However, J.M. argued, the City's analysis did not account for the fact that he spent 8½ hours in meetings, 6 hours on sick leave, and that he had worked two "late" inspections, which amounted to another 1½ hours. Further, during this three-week period, JM claimed that he had received an extraordinary number of phone and email inquiries, and that he covered inspections for co-workers who were taking time off from work. J.M. maintained that if the City had considered these accumulated 16 hours, it would have understood why he had neither the time nor opportunity to answer customer calls and to perform the desired level of plan reviews. (Union Exhibit O, pp. 9 – 15) Moreover, the Grievant pointed out, the amount of office time available to perform office work, such as answering inquiries from customers, had fallen by about five hours/week over the past decade; the City was unwilling to authorize the overtime hours needed for "catch-up" work; and during the three-week period in question, he experienced a random "burst" in customer calls. (Union Exhibit O, pp. 16-17)

In addition, J.M. claimed that although the City's disciplinary actions recounted complaints from customers, the City failed to recognize positive comments that he had from the field. Too, the Grievant admitted that he has been late for some inspections, but, he observed, "Performing inspections isn't like piece work on an assembly line." Each inspection is unique as to the amount of time required, the nature of the questions customers raised, and the "problems" that can arise. For kindred reasons, the Grievant maintained that an accurate comparative analysis of the level of plan reviews conducted is difficult, at best, and the

allegation that he did not perform an equitable share of plan reviews was patently false. Moreover, as J.M. pointed out, he alone was given major additional duties, such as, reviewing the SSTS capacity compliance inspection reports, and administering the new SSTS operating permit enforcement program. Further, the Grievant asserted that the co-worker complaints the City referred to were inconsequential non-complaints, such as, a report from the clerical staff about the status of plans awaiting reviews. Still further, the facts asserted by homeowners and contractors as reported on "Complaint Against Employee" forms were often in error: Factual errors that J.M. had attempted to correct for the record time and time again. (Union Exhibit O, pp. 17-22)

Performance Review (October 26, 2010) – The Grievant pointed out that he signed this review on January 31, 2011, and, at that time, he observed that his problems with the review were that it set unrealistic deadlines and overstated certain areas that allegedly needed improvement. The Grievant claimed that Mr. Martin set the unrealistic deadline of April 2010 for him to complete a draft of the new SSTS ordinance for the MN Pollution Control Agency's review. The Grievant noted that he completed the draft ordinance by May 2010, but only because he worked 36½ uncompensated hours on this project, and Mr. Martin continued to expect him to perform all the other BCI duties, and, thus, wrongly admonished him, while seriously overstating his presumed time-management problems. Too, J.M. maintained that subsequent SSTS ordinance issues arose that needed attention and, again, Mr. Martin set unrealistic deadlines, while not always granting him compensation time for his off-duty work on these issues. Finally, the Grievant accused Mr. Martin of being totally unreasonable when he was tasked with reformatting the new SSTS code and developing related forms and

instructional information. In the midst of this task, for example, Mr. Martin advised the Grievant that he would be reprimanded if he continued to log extra hours to complete it. Thus, the Grievant claimed that he spent 145 uncompensated hours on this phase of the SSTS project, even though he attempted to accomplish this phase of the project during work hours, which was impossible, as well as to perform other BCI duties. Mr. Martin wrongly considered J.M. to have time management problems, the Grievant concluded. (Union Exhibit O, pp. 22-24)

Verbal Warning (September 1, 2009) – The Grievant claimed that the City’s accusation that he was late for work and inspections were impervious to the fact that at the time the Wakota Bridge construction created unpredictable traffic delays, which contributed to his episodes of tardiness. Further, regarding the Employer’s charge that he was not performing a commensurate level of plan reviews, the Grievant maintained as follows: (1) the City failed to recognize that the State of Minnesota recognized the superior quality of his reviews *vis-a-vis* the City’s other two CBIs; and (2) he conducted state authorized reviews that were relatively more time consuming, which D.N. was not authorized to perform. Still further, the City’s claim that J.M. needed to upgrade his communications with staff and the public were, according to the Grievant, simply mistaken. J.M. claimed that he was appreciative of his co-workers and what they did; he did use carbonless Correction Orders; and, yes, “...written correspondence should be clear, concise, and understandable by the recipient...,” provided that time permitted clear writing and editing. (Union Exhibit O, pp. 24-26)

Continuing, the Grievant maintained that his layoff was actually a covert termination based on the following considerations: First, the IDs level of activity has been increasing in recent years, as indexed by mounting secular revenues and the value of construction activities.

Second, the 2013 tax levy rate or budget cut decisions were made after Ms. Teppen had told Ms. Lynn that J.M. was "... on the road to termination." (City Exhibit 2)

Finally, J.M. argued that his job performance weaknesses certainly did not warrant disciplinary actions. Moreover, he stated:

Many allegations are based on false assumptions or misperceptions rather than the facts. And others appear to be based on deliberate mischaracterizations and half-truths. There are complaints wrongly written up against me that were actually complaints about actions of or problems caused by my supervisor. Some appear to be based on my supervisor's selective memory as to prior directives and assignments. Other allegations appear to be just hyperbole used to embellish a complaint.

(Union Exhibit O, p. 6)

For all of the above reasons and arguments, the Grievant requested that his grievance be sustained.

V. DISCUSSION AND OPINION

The record of the present case is voluminous, with facts and arguments that pose several analytical questions, requiring answers. This discussion begins with the interpretation of Article 12.1., which is easily done because its language is unambiguous and its meaning is not in dispute. Article 12.1 provides:

Employees shall be laid off on the basis of job classification seniority only when the job-relevant qualification and performance factors between employees are equal.

(City Exhibit 1) This is a "relative ability seniority" clause that provides that the senior employee shall not be laid off if his or her "ability" (i.e., "... job related qualification and performance factors ...") is at least equal to that of the junior employee.

Based on this interpretation of Article 12.1, it follows, at least *conditionally*, that the City did not violate Article 12.1, if D.N.'s "... job related qualification and performance factors ..." were superior to those of J.M., as it claims. However, if this is not the case, and because J.M.

was senior to D.N. by about six months, the City should have laid off D.N. and not J.M., as the Union claims. These opposing positions suggest that to determine the present issue the undersigned need only compare J.M.'s and D.N.'s "... job relevant qualification and performance factors ..." and, based on the comparative evidence, determine whether "seniority" alone should have controlled the City's layoff decision.

However, the foregoing analysis was qualified, as the italicized term "conditionally" was meant to imply. The condition being whether the Grievant's "layoff" was actually a "wrongful discharge," in disguise, as the Grievant claimed; and, if so, the need to examine J.M.'s and D.N.'s relative qualifications and performance factors would be removed, and the present issue would be determined in the Union's favor. Thus, at this point, the analysis turns to the question, "Was the Grievant wrongfully discharged?" The Grievant's evidentiary support for his "covert termination" allegation is as follows: first, there was no need to layoff a CBI because the dollar value of construction activity was increasing and, thus, J.M.'s layoff was not motivated by a decline in CBI workloads; and, second, in a May 2, 2012 email, Ms. Teppen told Ms. Lynn, that J.M. was "... on the road to termination." This exchange, the Union observed, preceded the City's 2013 budget setting process that ultimately resulted in the Grievant's "layoff," the clear implication being that J.M.'s termination was the City's intent all along.

The Employer convincingly rebutted the foregoing Union's inferences. First, it is uncontestable that from the onset of the 2008 recession, three CBI positions have been cut, including the Grievant. Hence, it is reasonable conclude that all three of these layoffs were motivated by diminished financial or economic circumstances, and not by punitive City intent. Moreover, this was why other non-CBI City employees had their positions reduced since 2008.

Second, Ms. Teppen's "termination" remark can be also interpreted as well-intended. There is no suggestion in the record that Ms. Lynn's coaching services were retained for any reason other than to help J.M. improve his performance *via* corrective, not punitive, means. Thus, the undersigned concludes that this was why Ms. Teppen advised Ms. Lynn to share her "termination" remark with J.M. if, in her professional judgment, she thought it would be beneficial to do so. Continuing, arbitral notice is made of the fact that before Ms. Teppen's email to Ms. Lynn, the Grievant was already on a "road" that could have resulted in his "termination." Note: on September 9, 2009, Grievant was given a Written Warning for poor performance; Grievant had amassed several 2011 and 2012 performance-based complaints from the public and co-workers; and Grievant's numerous post-2009 performance reviews were all poor. For these reasons, the Arbitrator concludes that J.M.'s allegation that he was "wrongfully discharged" was insufficiently backed by either reasoned inference (circumstantial evidence) or credible direct evidence.

Hence, return now to the above-discussed need to conduct a comparative evaluation of J.M.'s and D.N.'s "... job relevant qualification and performance factors ..." in order to determine whether "seniority" alone should have controlled the City's layoff decision. The Employer maintained that seniority did not control because D.N.'s job-relevant qualification and performance factors dwarfed J.M.'s. To prove this claim, the Employer marshaled supervisory opinions, performance reviews, disciplinary records, documented customer and co-worker complaints, and from objective workload data and related statistical information. Whether any one of these sources of information is an acceptable and sufficient basis for making valid inter-employee comparisons certainly can be persuasively contested. However,

when supervisory opinions, for example, are corroborated by external informational sources, such as investigated complaints by third parties (i.e., the “public”) and/or objective data, such as the relative number of plan reviews completed per unit of time, then the contest is much less persuasive and, therefore, it may reasonable to conclude that the inter-employee comparative outcome is valid.

In the present case, the Employer relied on multiple sources of information that converged to produce a comparative outcome that the undersigned finds to be reliable, although this finding assumes that the information in question is true, complete and accurate. Regarding the relative *qualifications* of J.M. and D.N., Messrs. Link and Martin both testified that the two met minimum BCI qualifications. The undersigned has no reason to question these supervisory opinions, but he is reminded of the Union’s assessment that the Grievant is “more qualified.” It was uncontested that J.M., as distinct from D.N., was (1) authorized to perform plan reviews for the MN Department of Labor and Industry, (2) certified by the MN Pollution Control Agency to review, inspect and issue compliance statements on sewage treatment systems and (3) certified by the International Code Council as competent in eight separate inspection disciplines. Nevertheless, the Employer asserted that these distinctions were largely irrelevant with regard to the routine work performed by a CBI. This assertion is difficult to weigh because there is insufficient record evidence on point. Further, Mr. Martin did testify that since D.N. was not authorized to inspect public projects, he would be doing that work as a result of J.M.’s layoff. However, since J.M. and D.N. have been in the CBI job classification for more than a decade, the undersigned is persuaded that both were minimally qualified to

perform the required work in question, as Messrs. Link and Martin testified. In addition, it is concluded that J.M. was better qualified than D.N., as the Union asserted.

Regarding the relative *performance* of J.M. and D.N., Messrs. Link and Martin opined, without equivocation, that D.N.'s job related performance was superior to J.M.'s. On the one hand, with performance review documents for the years 2001, 2002, 2005, 2010 and 2012, the Employer showed that D.N.'s supervisors have consistently rated his performance highly. (City Exhibit 5) Further, the Employer averred that D.N.'s personnel file was void of any on-the-job performance complaints as well as any disciplinary actions. The Union did not contradict this evidence, and, overall, even though D.N. was J.M.'s junior by only six months, his record of performance with the City, which spanned about fourteen years, was without any tangible discredits.

On the other hand, the Employer showed that the Grievant's performance problems dated back to 1997–1998, during his first six months of employment with the City. Through this part of his probation year, he was censured for displeasing contractors for arriving late for inspections, using “undiplomatic” tone/manner in communicating with the public, and having strained relationships with co-workers. These poor performance themes, which are incontestably “job related,” and others that subsequently arose, such as, completing a disproportionately small number of plan reviews, performance complaints received from homeowners, and his failure to reply to cellphone and email messages timely, were repeated often over the course of the Grievant's fifteen years on the job. Consider the following time-line of performance-related events:

1. June 6, 2002 – Mr. Tilton gave the Grievant a Verbal Warning for completing a disproportionately smaller number of plan reviews. He completed 13 of the 243 plan

reviews in the rack, while his two CBI colleagues completed 200 plan reviews, during the relevant time period.

2. July 10, 2002 – Mr. Tilton gave the Grievant a Written Warning for completing a disproportionately small number of plan reviews. He completed 5 of 112 plan reviews in the rack, while his two peers completed 97 plan reviews, during the relevant time period.

3. Midyear, 2002 – Ms. Strandel began coaching the Grievant.

4. August 16, 2002 – Mr. Tilton completed a performance review. The Grievant's performance was sub-par and the review included several remedial steps that J.M. should take, such as performing timely inspections, completing a proportionate number of plan reviews, and improving his interpersonal relationship skills.

5. October 29, 2002 – Mr. Tilton completed a performance review – the content of which replicated that of point 4 above.

6. March 13, 2003 – Mr. Martin provided a list of performance expectations to the Grievant. Said list included items, such as, arriving to work by 8:00 a.m., arriving at scheduled inspections on time, maintaining a proportionate number of plan reviews, and not be "excessive" in the conduct of inspections.

7. November 4, 2003 – Mr. Martin gave the Grievant a Two-Day Suspension for his "... continuing inability and unwillingness to show up to work on time and do a commensurate level of plan reviews."

8. January 21, 2005 – Mr. Martin completed a performance review that showed that the Grievant was meeting expectations.

9. September 1, 2009 – Mr. Martin gave the Grievant a Verbal Warning for completing only 19 percent of plan reviews, arriving late for morning inspections and communicating brusquely with staff.

10. March 9, 2011 through May 20, 2011 – Four "Complaint Against Employee" forms were compiled by the ID, citing contractor and homeowner complaints about negligent behavior by J.M., and other missteps in the field as well as unanswered voicemail messages.

11. May 24, 2011 – Mr. Martin gave the Grievant a Written Reprimand based on the complaints referenced in point 10 above, plus two others complaints that were subsequently reported.

12. August 18, 2011 – Mr. Martin completed a performance review that showed the Grievant was not meeting performance expectations. The related “Employee Development Plan” included advice such as, arriving at work by 8:00 a.m. and at inspection sites on time, completing a proportionate number of plan reviews, communicate to be “understood’ and return phone calls within 24 hours.

13. February and May, 2012 – Five “Complaint Against Employee” forms were compiled by the ID, citing contractor and homeowner complaints about J.M.’s negligent behaviors and other missteps in the field, rudeness toward co-workers and unanswered voicemail messages.

14. May 9, 2012 – Ms. Lynn retained to coach the Grievant.

15. July 11, 2012 – Ms. Lynn delivered an “Action Plan” to the Grievant with suggested “homework” steps for improving his performance.

16. July 9, 2012 though August 27, 2012 – At least six “Complaint Against Employee” forms were filed with the ID. Another credible form was filed on October 12, 2012.

17. September 24, 2012 – In the form of a memorandum, Mr. Martin gave the Grievant four behavioral instructions:

1. Timeliness of [sic] returning phone calls: Phone calls and emails shall be returned within 24 hours.
2. Issues related to arriving at inspections on time: Exercise better time management. ...
3. Completing a commensurate level of plan reviews. ...
4. Attitude toward the public and staff: ...

(City Exhibit 56)

18. November 28, 2012 – Mr. Martin gave Mr. Link a memorandum indicating that from January 1, 2012 to October 31, 2012, J.M. had performed 1,710 inspections to D.N.’s 1,610 inspections, and that from January 1, 2012 – November 27, 2012 D.N. had completed 246 plan reviews to J.M.’s 89. To put these workload statistics in perspective, Mr. Martin noted that D.N. had missed seven weeks of work to J.M.’s four weeks of work during the latter period.

The case record includes documents about the referenced complaints – complaints that were investigated and discussed with the Grievant – as well as the routinely maintained data that formed the basis upon which Mr. Tilton and Mr. Martin concluded that the Grievant

completed an unacceptably low share of plan reviews. Further, Mr. Martin's testimony about J.M.'s relatively poor performance was documented in the performance reviews he administered. Still further, the record shows that although it was Mr. Link who decided that J.M. would be laid off, he was not a casual middle manager, two steps removed from the shop floor. Rather, he followed the Grievant's performance problems closely, maintaining communications with Messrs. Tilton and Martin as well as with the Grievant's two job coaches. Thus, Mr. Link's opinion about J.M.'s and D.N.'s relative standing represented more than a kneejerk acceptance by upper management of line-management's opinion.

The Employer's opinion that D.N.'s work performance was superior to J.M.'s was based on diverse and mutually reinforcing informational sources. As such, said evidence leads the undersigned to accept, at least *provisionally*, the City's comparative analytic outcome as being reliable and valid. The provision being, the Union's claim that the informational sources upon which the City's lay off decision was based were not always true, complete and accurate. In this regard, the Grievant forcefully charged that many of his alleged shortcomings were "... based on false assumptions or misinterpretations rather than the facts. And others appear to be based on deliberate mischaracterizations and half-truths. ... "(Union Exhibit O, p. 6)

Summarized examples of J.M.'s charges are as follows:

1. June 6, 2002, Verbal Warning – That the Grievant completed disproportionately fewer plan reviews because of the disproportionately larger amount of time it took him to perform inspection tasks on the Dakota County Senior Housing Project. This work encroached on time that he otherwise had scheduled to complete plan reviews. Also, D.N. was given disproportionately more plan reviews to complete because he was office-bound, working light duty.
2. July 10, 2002, Written Warning – That the Grievant completed disproportionately fewer plan reviews because he worked on disproportionately more plan reviews and

inspections that were particularly complex; the City's workload metric failed to measure the complexity and quality of work performed.

3. March 13, 2003, "Work Product Expectations" letter and November 4, 2003 Two-Day Suspension – That the Grievant challenged the letter's and discipline's underlying facts for reasons akin to those discussed in points 1 and 2 above.

4. September 1, 2009, Verbal Warning – That the Grievant challenged the factual basis for the letter and discipline for reasons similar to those discussed in points 1, 2 and 3 above. The Grievant's was tardy from work and inspections because of unprecedented traffic delays caused by the Wakota Bridge construction project; his interpersonal relations with staff and colleagues were considerate; clear written communications are important but same requires sufficient drafting and editing time.

5. March - May, 2011, "Complaints Against Employee" and May 24, 2011 Written Reprimand – That the Grievant admitted to being behind in returning voicemail and email messages, and acknowledged that he was late with plan reviews, but only because he was "busy" working on other BCI tasks, such as the City's SSTS code. Further, the City suspiciously failed to maintain complete and accurate files on how J.M.'s time was spent, thus, wrongly concluded that he had sufficient time to address the performance issues in question. Still further, that office time previously available to return customer calls and complete plan reviews had been reduced over the decade, that Mr. Martin was unwilling to authorize overtime hours to perform "catch-up" work and that the number of J.M.'s customer calls had randomly spiked. Finally, that customer complaints were often baseless, incomplete, motivated by bias and the record of positive comments from the field were not recorded. In addition, co-worker complaints were actually staff reports.

6. October 26, 2010 Performance Review – That the Grievant challenged the performance review's findings, arguing that during the time in question he was working under unreasonable time constraints and that the his alleged time-management problem was overstated – to complete SSTS-related duties timely, he was compelled to work uncompensated hours.

In addition, to the foregoing information-based charges, the Union persuasively argued that the City wrongly considered the Grievant's pre-September 1, 2009 disciplinary actions when it compared J.M.'s disciplinary record to D.N.'s in building its "relative performance" case. Pointing to the language Article 10.5 of the CBA, the Union urged that said disciplinary actions were immaterial in determining the present matter because:

[I]f no disciplinary action is taken against an employee for three (3) years following a written reprimand, all records of such written disciplinary actions shall be considered inactive and removed from the employee's personnel file. Such records shall be maintained for record-keeping purposes only in a separate file.

(City Exhibit 1) The literal interpretation and application of this language is unambiguous and it is neither harsh nor nonsensical. The record evidence shows that slightly more than six years had lapsed between the Grievant's November 4, 2003 Two-Day Suspension, and the Verbal Warning he was given on September 1, 2009. Hence, applying Article 10.5, the record of J.M.'s November 4, 2003 disciplinary action and the records of all prior disciplinary actions were "inactive," meaning that they should have been removed from his personnel file, and maintained in a separate file "... for record-keeping purposes only ...:" An employee reward, if you will, for multiple years of discipline-free work. Where said disciplinary records exist they do so exclusively "... for record-keeping purposes only ..." (emphasis added). As the Union correctly argued, this means that the City was precluded from using said "inactive" disciplinary actions when it chose to use discipline as a performance factor under Article 12.1.

Return now to the Grievant's aforementioned list of charges about the City's reliance on false assumptions, misinterpretation of facts, half-truths and deliberate mischaracterizations when determining that his job related performance was inferior to D.N.'s. Some of these accusations go back several years. Further, many were previously raised with supervision, but to no avail. For example, on May 20, 2011, Mr. Martin met with J.M. to review complaints he had received from the field about negligent conduct and failure to return customer calls. J.M. proffered that he was "too busy" but, nevertheless, three days later Mr. Martin gave J.M. a Written Reprimand that referred to these and a few other customer and staff complaints, plus he censured J.M. for late inspections and for failing to conduct his share of plan reviews. Mr.

Martin investigated J.M.'s "too busy" explanation, learning that during the time period in question the Grievant had logged more hours at work than either D.N. or himself. Mr. Martin found the Grievant's explanation to be incredible.

Moreover, J.M. filed a grievance, challenging this Written Reprimand. The record is not unequivocally clear on point, but it suggests that in relation thereto, J.M. again explained that he was "too busy," and he alleged that the City had suspiciously lost track of 16 hours of his work and sick leave time that it thought was available for work on plan reviews and to answer calls. This was the Grievant's only formal pre-layoff grievance. Nevertheless, it was dropped after the City's Step 2 denial of same. Messrs. Link and Martin did not accept J.M.'s explanations as credible.

Regarding the Grievant's fact-based accusations, the undersigned is in no position to conduct an independent investigation on each to determine its validity. Indeed, at the time, the fact-finders of record were Messrs. Martin and Link – fact-finding was a part of their supervisory responsibilities. On point, the Grievant charged that complaints from the field were often baseless, incomplete or motivated by bias, that positive comments from the field were not recorded, and that co-worker complaints were actually staff reports. However, these charges contradict record evidence that Mr. Martin followed-up each of the referenced complaints with a telephone call, in-person conversation, review of office records and/or site visit. Further, he discussed each complaint or, as best discerned from record evidence, the vast majority of complaints with the Grievant before resolving each complaint, closing its file.

To the extent the Grievant believed that his contractual rights had been violated or, for instance that Mr. Martin's fact-finding was unsatisfactory, J.M. had the right to grieve under

Article 6 of the CBA, which he did once, only to withdraw his grievance after receiving the City's Step 2 denial. *Inter alia*, the City enjoys the inherent management right to review and evaluate the performance of its bargaining unit employees and to discipline them for poor performance. In turn, the City's bargaining unit employees have the right to challenge said City initiatives by grieving. Generally, with respect to a *specific* adverse performance-based censure, performance review, customer or co-worker complaint, and discipline action, if an aggrieved employee – J.M. in the present case – failed to file a timely grievance or decided not to pursue a grievance once filed, then the contested matter is considered to be waived and settled on the employer's terms. Indeed, the essence of this arbitral doctrine is expressed, at least in part, in Article 6.6 of the parties CBA, which is partly quoted below:

If a grievance is not presented within the time limit set forth above, it shall be considered "waived." If a grievance is not appealed to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the Employer's last answer. ...

(City Exhibit 1)

For the above-discussed reasons, it is the opinion of the Arbitrator that the Grievant's charges of incomplete, false or biased information dealt with matters that were settled – waived because the Grievant either failed to bring them to the fore through the CBA's grievance vehicle or, when grieved, failed to settle them on favorable terms. J.M.'s documented testimony and feisty accusations were, therefore, substantively waived and, thus, the undersigned removes the provision previously placed on his conclusion that the City's relative performance finding was valid – a finding that sustains even though the Grievant's pre-September 1, 2009 disciplines were found to be immaterial.

Corroborating the foregoing conclusion is that on April 30, 1998, Brian Hoffman, the Grievant's first supervisor, found that J.M. was late for inspections, related poorly to customers and his relationships with co-workers were strained; on August 16, 2002, John Tilton, the Grievant's second supervisor, found that J.M.'s performance was deficient for these same reasons, plus that his plan reviews were not timely; on March 13, 2003, Franklin Martin, the Grievant's third supervisor, identified performance problems that paralleled those of his predecessors, plus found that J.M. was late in returning customer email and voicemail inquiries. That three different supervisors identified an intersecting set of performance problems over a fifteen year period calls into question the credibility of J.M.'s fact-based accusations. Moreover, the fact that these same supervisors did not associate D.N. with similar performance failings certainly diminishes the Grievant's case, and so, too, does the fact that over this same time period D.N. had no recorded episodes of disproportionately small numbers of plan reviews, customer and co-worker complaints or backlog of unanswered messages from customers.

The evidence that J.M.'s performance was inferior to that of D.N. is substantial and the fact that said performance differences have sustained for so long only serves to anchor this conclusion. Mr. Martin opined that J.M.'s performance was inferior to D.N.'s; Messrs. Tilton's and Martin's performance reviews support Mr. Martin's opinion; J.M.'s work record from September 1, 2009 onward includes disciplinary blemishes in contrast to D.N.'s work record; relative to D.N., J.M. had been the exclusive subject of complaints from the ID's customers and from co-workers. In addition to these performance comparisons, the City had a perceived need to employ a job coach in 2002 and then again ten years later, in 2012, to help J.M. improve his

on-the-job performance: D.N. has never been the subject of performance-related coaching.

These conclusions lend credibility to Mr. Martin's observation:

... that Ms. Lynn's coaching, and his own multiple discussions and memoranda have not succeeded in improving J.M.'s performance; that he, and J.M.'s two former supervisors, Brian Hoffman and John Tilton, have all stressed, without success, the following four basic expectations:

1. Arrive to inspections on time.
2. Perform a commensurate level of plan reviews.
3. Respond to phone calls and emails within 24 hours.
4. Improve communication skills when dealing with staff, contractors, and the public.

(City Exhibit 21)

On balance, the undersigned finds that the sum of J.M.'s job related qualifications plus performance factors are less than D.N.'s corresponding sum.

VI. AWARD

For the reasons discussed above, the Union's grievance is denied: The City's decision to layoff the Grievant did not violate Article 12.1 of the CBA.

Issued and Ordered on the 16th day of September, 2013
from Tucson, Arizona.

Mario F. Bognanno, Labor Arbitrator & Professor Emeritus