

IN THE MATTER OF THE ARBITRATION BETWEEN

CITY OF PRINCETON)	
)	
)	BMS NO. 06-PA-0801
)	
“EMPLOYER”)	
)	
And)	DECISION AND AWARD
)	
AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES UNION COUNCIL 65)	RICHARD R. ANDERSON NEUTRAL ARBITRATOR
)	
“UNION”)	JULY 8, 2006
)	
)	

APPEARANCES

Employer

John M. LeFever Jr., Attorney
Mike Karnowski, City Administrator
Ben Zawacki, Princeton Police Officer
Todd Russ, Maintenance Employee
Ann Bien, Deputy City Clerk
Jason Baumunk, Maintenance Employee
Ronald Affeldt, City Resident

Union

Teresa L. Joppa, Staff Attorney
Steve Smith, Grievant
Richard Bein, Former Maintenance Supervisor

JURISDICTION

The hearing in above matter was conducted before a panel of arbitrators including Employer Arbitrator Ann Antonsen, Union Arbitrator Dean Tharp and Neutral Arbitrator Richard R. Anderson on June 5, 2006 at the City Hall in Princeton, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. The hearing closed on June 5, 2006. Post-Hearing Briefs were simultaneously mailed on June 19, 2006 and received from the Employer on June 20, 2006 and from the Union on June 21, 2006. The Arbitration Panel convened on July 5, 2006 to discuss this matter. Thereafter, it was taken under advisement.

This matter is submitted to the undersigned pursuant to a Veterans Preference Act [Minn. Stat.197.46 *et seq*]. The parties stipulated that the matter is properly before the Arbitration Panel for final and binding decision. The parties further stipulated that there are no procedural arbitrability issues present.

BACKGROUND

The City of Princeton, hereinafter the Employer or the City, is a municipality located in Milaca County in Central Minnesota. The Union represents a unit of non-essential public employees including maintenance employees employed by the Employer. There are thirteen employees in the unit. The parties have a history of collective bargaining dating back to early 2000.

The Grievant, Steve Smith, was discharged on October 14, 2005 for alleged theft of City property (fuel).¹ Thereafter, on December 5, 2004, the Grievant filed a timely request for a Veterans Preference Act hearing to contest his termination.² The undersigned was notified of being selected as the neutral Arbitrator by letter dated March 2, 2005 from the Employer's Arbitration Panel member Ann Antonsen.

THE ISSUE

The parties stipulated that the issue before the Arbitration Panel is, "Whether the Employer terminated the Grievant, Steve Smith, for just cause, and if not, what is an appropriate remedy?"

RELEVANT VETERANS PREFERENCE ACT PROVISIONS

197.46 Veterans Preference Act; removal forbidden; right of mandamus.

Any person whose rights may be in any way prejudiced contrary to any of the provisions of this section, shall be entitled to a writ of mandamus to remedy the wrong. No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing. Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge. The failure of a veteran to request a hearing within the provided 60-day period shall constitute a waiver of the right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement.

Request for a hearing concerning such a discharge shall be made in writing and submitted by mail or personal service to the employment office of the concerned employer or other appropriate office or person.

The Veterans Preference Act provides that a covered veteran may be discharged from public employment only for "incompetency or misconduct." The Minnesota

¹The termination letter also apprised the Grievant of his veteran preference rights pursuant to the Veterans Preference Act.
Joint Exhibit No. 1

²Joint Exhibit No.2

Supreme Court has interpreted these grounds as the equivalent of a “just cause” standard for discharge.³ The Court explained that, “the cause [for discharge] must be one which specifically relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office”.⁴

The burden of establishing the statutory grounds for discharge lies with the public employer.⁵ The Court also has clarified the responsibilities of the hearing officer in applying this standard. The Court stated that, “[in] conducting a veterans preference hearing the task of the hearing board is twofold; first, to determine whether the employer has acted reasonably; second, to determine whether extenuating circumstances exist justifying a modification in the disciplinary sanction”.⁶

FACTS

The Grievant, received an honorable discharge from the U.S. Navy after approximately four years of active duty.⁷ This service qualified him for coverage under the Veterans Preference Act. The Grievant, who had previously worked in a machine shop and for various construction companies, was hired by the Employer in June 2002. During his tenure, he worked in the Public Works Department as a maintenance man doing street sweeping, snow plowing, sewer cleaning, park and cemetery maintenance

³AFSCME Council 96 v. Arrowhead Regional Corrections Board, 356 N.W.2d 295, 297-98 (Minn. 1984)

⁴Ekstedt v. Village of New Hope, 292 Minn. 152, 193 N.W.2d 821, 828 (1972)

⁵Johnson v. Village of Cohasset, 263 Minn. 425, 116 N.W. 2d 692, 698 (1962)

⁶Schrader, 394 N.W.2d @801-802(Minn. 1986)

⁷Employer Exhibit No. 2

as well as maintenance on equipment such as trucks, mowers, trailers, pickups, front end loaders and tractors. His immediate supervisor is Bob Gerold who reports to Public Works Superintendent Tom Mismash. In addition to the aforementioned supervisors and the Grievant, there are six other full-time maintenance employees. There are also some seasonal employees employed during the summer months. The maintenance employees work a regular shift from 7:00 a.m. to 3:00 p.m. They also take turns coming in at 4:00 a.m. and work until noon, primarily getting equipment ready for the day's use.

The employees report to the main shop facility that consists of a large metal building approximately 180 feet in length where equipment is stored, serviced and repaired.⁸ Going from east to west, there are four doors approximately 12 feet wide by 13 feet in height (bays 1-4), two larger doors approximately 12 feet wide and 15 feet in height (bays 5-6) and two doors approximately 8 feet wide by 13 feet in height (bays 7-8), all of which face south. Bay 5 has the storage cabinet on the west wall near the entrance where the unleaded gasoline and mixed fuel containers are stored in a storage cabinet. Bay 6 has the diesel fuel tank just inside the entrance on the east side. The facility has one small outside light standard approximately 20-25 feet in height that is located on the south corner of the east side of the building approximately 10 feet from the building.

The Grievant lives approximately eight miles east of Princeton where he has a hobby farm and raises cattle. He owns a diesel bobcat or skid loader that he uses on the farm. He also owns two pickups, a full size red and black diesel and a mid-size 1990 red Ford Ranger that uses unleaded gasoline.

⁸Joint Exhibit Nos. 5 and 7

A series of events precipitated the Grievant's termination. During the summer of 2005, maintenance employee Todd Ross testified that the Grievant had a habit of driving his diesel truck into work every time he had the early shift. At times when he arrived to work early, he would sometimes observe the Grievant's truck inside bay No. 6 where the diesel fuel tank is located. According to Ross, employees normally park their vehicles on the east side of the Public Works garage. Ross testified that one morning at approximately 10:00 a.m., he observed the Grievant's diesel truck parked parallel to the open door in bay 6. As he approached the facility from approximately fifty yards away, he observed the Grievant throwing the diesel fuel hose on top of the diesel fuel tank. He assumed that the Grievant was filling up his truck; however, he never actually witnessed the Grievant fueling his vehicle. Ross further testified that on at least two occasions he saw the Grievant taking an empty yellow five-gallon City owned diesel can out of his vehicle and carry it into the building. He stated that he was suspicious and believed the Grievant was taking diesel fuel home for his bobcat; but again, he never actually observed the Grievant filling or putting a full can into his truck.

Maintenance employee Jason Baumunk testified that during the summer of 2005 he also observed that the Grievant had a practice of driving his diesel truck into work whenever he had the early shift. On at least two occasions, when he came in early for his shift, he saw the vehicle parked partially inside the open door right next to where the diesel fuel tank is located. He assumed that the Grievant was fueling his vehicle, however, he never actually observed him doing so. On one occasion he looked inside the cab of the vehicle while the Grievant was driving out of the bay and observed that the fuel gage registered full. Baumunk also testified that on at least two occasions he

observed the Grievant take an empty yellow five-gallon diesel can out of his vehicle, bring it into the shop and deposit it into the fuel storage cabinet in bay 5 where it is normally stored. He also testified that he never saw the Grievant fueling his vehicle or filling a fuel can that he then put into his truck. Baumunk said he discussed the Grievant's suspicious behavior with fellow employees. On one occasion he testified that he told Supervisor Gerold of what he witnessed and his suspicions. During this discussion, he commented that they should "keep a closer eye on the fuel". Finally Baumunk and Ross both testified that the City had three five-gallon unleaded gasoline safety cans that are stored in a closed fuel storage cabinet at the shop.⁹ There were also four smaller red fuel cans that contained a mixture of gasoline and oil for the two cycle engines on some equipment. There are also funnels located on top of the storage cabinet.

The Grievant testified that he did indeed drive his vehicle into the shop or park it close to the bay doors on occasion either to work on it, or charge the battery or to use a water hose to clean out the bed of the truck.¹⁰ He adamantly denied fueling his diesel truck while parked there. He also acknowledged borrowing the City's diesel fuel can, but never filled it with City fuel.¹¹ He testified that on occasion he would borrow the empty can, sign the sign-out sheet and fill it up at a gasoline station for use in his bobcat at his farm.

⁹During the course of the hearing the Arbitration panel accompanied the parties on an inspection tour of the shop facility. The safety cans are red with white paint splatters on it. The can is approximately a foot in height and 10 inches in diameter. They have no spouts or nozzles. It has a flip top cover over the flat opening and the opening is an inch and one-half in diameter. In order to pour fuel out of the can, a spring loaded hinged cover has to be depressed.

¹⁰The Grievant and both Ross and Baumunk stated that employees are free to work on their personal vehicles using City equipment.

¹¹The Grievant and both Ross and Baumunk stated that employees are free to borrow City equipment for their personal home use. There is a sign-up sheet in the shop where employees sign for the borrowed equipment.

Ross testified that he never reported this suspicious activity to his superiors. However, he did tell City resident Ronald Affeldt during a banjo lesson of the Grievant's suspicious behavior and his belief that the Grievant was stealing fuel from the City. Affeldt, in turn, reported this to City Administrator Mike Karnowski sometime in late summer or early fall 2005. Karnowski, in turn, discussed the matter with Police Chief Dave Warneke. It was decided to place the Grievant under surveillance when he worked the early shift. Initially a camera was installed, however, this was abandoned when the camera malfunctioned.

Police Officer Ben Zawacki was then assigned to personally surveil the Grievant when he had the early shift. On the morning of Monday October 3, 2005, Officer Zawacki positioned himself in the driveway of an unoccupied house directly west of the shop's driveway entrance where he had a direct sight to the south side of the shop building where the bay doors are located.¹² His squad car had a video camera mounted on the dashboard. According to Officer Zawacki, at approximately 4:00 a.m., the Grievant pulled into the facility and proceeded to a dumpster which was located in the southeast area of the complex. He then parked his vehicle approximately 20 to 30 feet from the southeast corner of the building, walked back to the building and entered through a door. A short time later he exited the building and started walking toward his vehicle. It was difficult to see; but when he passed under the light, he appeared to be carrying a red can that appeared to be heavy from the way he was carrying it. He then proceeded to the driver's side of his vehicle and stood there for a couple of minutes.¹³ Officer Zawacki stated that he could not tell what he was doing because of the dim light

¹²Photograph of the area. Joint Exhibit No. 6

¹³The vehicle was parked nose in facing east.

and his distance from the Grievant's vehicle. The Grievant then walked back into the facility carrying the red can. Thereafter, the Grievant left the facility driving a street sweeper. Officer Zawacki then went over to the Grievant's vehicle and observed that the fuel tank was on the driver's side of the vehicle, the side of the vehicle where the Grievant had been standing.¹⁴

Officer Zawacki then proceeded to where the Grievant was sweeping a street and asked him questions about what he had observed. During the discussion, the Grievant denied carrying a can of fuel out to his vehicle. When asked what he was doing by the side of his vehicle, Officer Zawacki stated the Grievant told him that he was taking something out or putting something into his vehicle¹⁵; and had also urinated. During this conversation, the Grievant denied that he was putting diesel fuel into his truck and told Officer Zawacki that his vehicle used unleaded gasoline. Officer Zawacki then asked the Grievant if there was any unleaded gasoline in the shop to which the Grievant responded there wasn't any.

Officer Zawacki further testified that he proceeded back to the shop thinking it was odd that there would be no unleaded gasoline in the shop. After telephoning Supervisor Gerold, he located the fuel storage cabinet where the unleaded gasoline was located. His testimony indicated there were several red cans in the cabinet and one was empty. In his police investigation report, Officer Zawacki indicated that there were two five-gallon cans, one of which was empty, on the first level of the storage cabinet and four

¹⁴ The Arbitration Panel observed that the gasoline fill tube is located in left fender just behind the cab of the truck. The tube is recessed approximately 1"-2" and has an opening of approximately 1 1/2" in diameter. There is a safety valve or flange inside the fill tube that has to be depressed while fueling. It is possible to put fuel down the fill tube without depressing the safety valve because of small air vents, however, only small amounts of fuel could be dispensed at a time. There is a fuel door cover to the fill tube, which is approximately 5" x 5" that swings out 90 degrees to the left side when opened.

¹⁵ Officer Zawacki was unsure of exactly which activity the Grievant stated he was engaged in.

smaller cans on the upper level.¹⁶ After learning from Supervisor Gerold that all the cans should be full, he informed Gerold that he believed that the Grievant had filled his truck thus leaving one of the cans empty.

Officer Zawacki testified that he then walked to the area where the Grievant had allegedly urinated, but could not find any evidence of this activity. After notifying Chief Werneke of what transpired they, along with Supervisor Gerold, went to where the Grievant was sweeping a street. Officer Zawacki then issued him a citation for theft of fuel.¹⁷ [The court date for a hearing on the citation was pending as of the date of the hearing.]

The Grievant denied carrying unleaded gasoline out of the shop and pouring it into his vehicle. He testified that he was standing by the driver's side of his vehicle during which time he was trying to break loose skid forks that were stuck in the bed of his truck. [He had borrowed the forks over the weekend for his bobcat.] The Grievant admitted that he told Officer Zawacki that there was no unleaded gasoline at the shop when he was initially questioned. Later, when Zawacki asked him why he had stated there was no unleaded gasoline at the shop when there was, the Grievant testified he stated that there are no unleaded gasoline barrels, that there are cans but most times they are empty and that they are filled as needed. He also admitted he told Officer Zawacki that he did not carry anything out to or from his truck at the time he was being questioned. Later he remembered that he had carried a filled one-gallon red water jug with a white top [approximately 5 inches in diameter and 12 inches in height] out to his

¹⁶Employer Exhibit No. 3

¹⁷Employer Exhibit No. 4

vehicle.¹⁸ He also remembered that in return he carried a regular one gallon milk jug filled with water and a 12-pack carton of Slim Fast back into the shop and put them in the refrigerator. During the questioning by Officer Zawacki, the Grievant testified that he also told him that his vehicle was almost empty and he could go check it out.

The Grievant was then instructed by Supervisor Gerold to go home and the City Administrator would contact him. Gerold also gave him a ride back to his vehicle at approximately 6:15 a.m.¹⁹ The Grievant testified that he then looked at his fuel gage and noticed it was approximately an eighth full. He then drove to his regular gas station that is approximately halfway to his farm where he filled the tank, which took 14.682 gallons of unleaded gasoline.²⁰

After fueling, the Grievant returned to the shop at approximately 6:45 a.m. to give fellow employee Pete Donner a cutting torch head that he had forgotten to return earlier, which he figured Donner would need that day. He also had a conversation with Supervisor Gerold wherein he told Gerold that he had just filled his vehicle with gasoline and it took almost fifteen gallons. He then told Gerold the tank only holds 17-18 gallons so he could not have taken the unleaded gasoline. [It actually holds 16.3 gallons.]²¹ According to the Grievant, Gerold stated that he had no control over the situation and he was out of it.

The Grievant arrived at City Hall at approximately 9:00 a.m. to meet with City Administrator Karnowski. According to the testimony of Deputy City Clerk Ann Bein, who was not aware of what happened, she asked him why he was there. According to

¹⁸He said that he was going to up north when his shift ended where the drinking water quality was not the best so he filled up the jug with City water.

¹⁹Time card showing he had worked 2 1/4 hours on 10/03/06. Union Exhibit No. 2

²⁰Gasoline receipt dated 10/03/05 at 6:31 a.m. Union Exhibit No. 1

²¹Ford specifications for a 1990 Ford Ranger standard cab. Union Exhibit No. 5

her, he responded saying, "I did something real stupid".²² The Grievant denied making this remark; rather, he recalled saying, "There was some dumb stuff going on, or maybe some stupid stuff". When Karnowski learned that the Grievant was there, he called a number of people including Public Works Director Mismash, the mayor, a councilman and the human resource director of the League of Minnesota Cities and apprised them of what happened. According to Karnowski, they all agreed with him that termination was appropriate.

Karnowski then met with the Grievant. Supervisor Gerold was also present. According to the testimony of Karnowski, he asked the Grievant if he took City gasoline, and the Grievant said he did not. The Grievant stated he took a red jug of water from his truck into the garage because he was going to his cabin and did not like the taste of the water there. The Grievant also stated that the type of unleaded gasoline the City uses could not be used to pour gasoline into a vehicle. The Grievant tried to explain that he could not have taken any City unleaded gasoline because he filled his vehicle up right after the alleged incident, that it took 14.862 gallons and that his vehicle only had a 17-18 gallon tank. He offered the gasoline receipt to Karnowski, which Karnowski felt was not worth looking at. Karnowski further testified that he believed the Police Officer and offered the Grievant resignation, which he refused, saying he would "fight it". Karnowski then gave him a letter stating his intent to recommend to the City Council that the Grievant be terminated.²³

²²Another clerk Mary Lou was also in close proximity, but it is not known if she overheard this remark because she did not testify.

²³Notice of intent to remove dated 10/04/05. Employer Exhibit No. 10

Karnowski also testified that there was a sufficient basis to recommend the Grievant's termination. He believed Officer Zawacki's conclusion that the Grievant had stolen City unleaded gasoline. Also, he believed that this was not the first time that it happened based on what Affeldt had told him. Finally, City employees often go into businesses and private homes, and the public needs assurance that their personal property would not be stolen. Karnowski further testified that he did not look at the Grievant's personnel file before he made the decision to recommend termination. At the hearing, Karnowski testified that there is no record of any discipline in the Grievant's file.

Karnowski further testified that a day or two later the Grievant came in and asked to talk to him. According to Karnowski, the Grievant offered to accept any form of discipline other than termination and he would not fight it, wherein Karnowski informed the Grievant the matter was in the hands of the City Council. The Grievant acknowledged Karnowski's testimony; however, he said he made the offer not because he was guilty, but because anything was better than discharge if it would resolve the matter.

Thereafter, the City Council met on October 10, 2005. After hearing the facts and allowing the Grievant to speak, the Council unanimously decided that termination was appropriate. The official letter of termination was issued on October 14, 2005.²⁴

The evidence also disclosed that maintenance employee Baumunk had filled up all three unleaded gasoline cans on Thursday afternoon and put them in the fuel storage cabinet at the end of the workday.²⁵ According to Baumunk, he asked all the other employees if they had used unleaded gasoline on Friday or Saturday and none of them

²⁴Employer Exhibit No. 12

²⁵Gasoline receipt dated 9/29/05 for 13.945 gallons. Employer Exhibit No. 8

had.²⁶ The Grievant testified that they were using a rented "trencher" on Thursday and also believes it was used on Friday. The "trencher" was returned that Friday and had to be returned full of unleaded gasoline according to the rental agreement.

The evidence disclosed through the testimony of both maintenance employees Ross and the Grievant that there was "bad blood" between them. Neither one liked the way the other one worked nor liked each other's attitude on the job. This resentment culminated in a shoving match that took place in the summer of 2005 at the shop over who was going to operate the sweeper one morning. Thereafter, their relationship deteriorated.

The evidence also disclosed that, due to the dim light the video tape of Officer Zawacki's surveillance is of such poor quality, it is impossible to verify either Officer Zawacki's or the Grievant's rendition of what happened on the morning of October 3, 2005.²⁷ Officer Zawacki also testified that he never interviewed any of the Grievant's fellow employees during the investigation. City Administrator Karnowski also acknowledged that none of the employees were interviewed prior to the Grievant's termination and his suspending of the Grievant was based on what Officer Zawacki had reported.

The Employer has a disciplinary provision in its City manual, which includes an oral reprimand, written reprimand, suspension with/without pay and dismissal.²⁸ Section 7.2 states as follows:

7.2 Suspension and/or Dismissal

²⁶Ross was the only maintenance employee who testified. He indicated that he had not used any gasoline after it was filled on Thursday.

²⁷ Video tape. Joint Exhibit No.

²⁸ Joint Exhibit No. 4

The City Administrator, in conjunction with the appropriate department head, may suspend or, with the approval of the Council, dismiss any City employee. Such dismissal or suspension shall separate the employee from pay status. In so doing, the employee's supervisor shall state the cause for the suspension in writing. An employee so dismissed is entitled to a hearing before the City Council if requested by the employee or their representative within ten (10) days after the notice of the dismissal. Just cause for suspension and/or dismissal includes, but is not limited to, any of the following:

1. Incompetence or ineffective performance of duties.
2. Involvement in the commission of a misdemeanor involving moral turpitude, in the commission of any gross misdemeanor, or in the commission of any felony offense.
3. Insubordination.
4. Violation of any lawful or official rule, regulation or order, or failure to obey any lawful direction made and given by a supervisor.
5. Intoxication on duty or the consumption of alcoholic beverages or non-prescription drugs while on duty.
6. Physical or mental defect which, in the judgment of the appointing authority, incapacitates the employee from the proper performance of their duties (an examination by a licensed doctor may be required and imposed by the appointing authority).
7. Wanton use of offensive conduct or language toward the public, municipal officers, supervisors, or fellow employees.
8. Carelessness and negligence in the handling or control of municipal property
9. Inducing or attempting to induce an officer or employee of the municipality to commit an unlawful act or to act in violation of any lawful and reasonable official regulation or order.
10. Deliberately filing or making a false report or official statement.
11. Proven dishonesty in the performance of duties.
12. Violations of the provisions of these policies.

City Administrator Karnowski testified that it was his opinion that Item No. 2 and Item No. 11 in the above Policy applied. However, he added that the reasons for termination are not limited to only the twelve aforementioned offenses, that the Policy states, "Just cause for suspension and/or dismissal includes, but is not limited to, any of the following:"

POSITION OF THE EMPLOYER

It is the position of the Employer that it had just cause to terminate the Grievant under the provisions and Court interpretations of the Veterans Preference Act. The Employer argues that it has sustained its required burden of proof that the Grievant engaged in theft of City property, which is a ground for termination. Theft is serious misconduct, especially where the employee had responsibility over the property being stolen, as the Grievant did here. The Employer further argues that Section 7.2 of the Employer's personnel policies provides that just cause for dismissal includes but is not limited to No.2. "Involvement in the commission of a misdemeanor involving moral turpitude..." Theft is the type of misdemeanor that implies dishonesty or moral turpitude. Likewise, theft also implies No. 11 of Section 7.2, "Proven dishonesty in the performance of duties." Moreover, theft is such a basic violation of the Employer's trust and expectations that it constitutes just cause even if it was not in the Employer's personnel policy.

The Employer argues that the evidence clearly demonstrates that the Grievant engaged in theft of City gasoline. Officer Zawacki observed him carrying a full can of gasoline out to his truck and returning with it empty. In addition, this was not the first time that the Grievant engaged in theft of City property. Fellow employees observed him parking his diesel truck in the bay where the diesel fuel tank is located on mornings when he worked the early shift. On one occasion, a fellow employee observed him throwing a diesel hose away from his vehicle onto the diesel fuel tank while it was parked next to the bay where the tank was located. Fellow employees also observed him taking an empty City diesel can out of his vehicle and bringing it back into the shop.

POSITION OF THE UNION

It is the Union's position that the Employer did not have just cause to terminate the Grievant. The Union argues that the Employer failed to sustain its burden of proof that the Grievant engaged in any misconduct that would warrant termination. The Union states that situations where the misconduct is of a nature that is also recognized and punishable under criminal law and one that carries a stigma of social disapproval, as is the situation here, should be clearly and convincingly established by the evidence.

The evidence failed to establish that the Grievant engaged in theft. None of the employees who accused him of theft ever witnessed him engaged in stealing any City fuel. In fact, one of the fellow employees and the Grievant never got along and had engaged in a shoving match over who would operate a street sweeper. The only evidence that the Grievant engaged in theft of City property was Officer Zawacki's surveillance of the Grievant on the morning of October 3, 2005. The Officer claimed that the Grievant was carrying a red gasoline can to and from his vehicle. A tour of the facility showed how far away the Officer was from the Grievant when the alleged activity occurred. It was also very dark when the surveillance took place. There was only one street lamp that lit up a small area between the shop and the Grievant's parked vehicle. The videotape of the incident reflects this. You can barely distinguish a person moving away from and then back to the shop. There is no way to identify this individual or if the person is carrying a gasoline can. Due to the distance and the dim light, it is entirely possible that what Officer Zawacki thought he observed was in reality the Grievant carrying a red water jug, as he claimed.

The Union further argues that the Employer failed to conduct a full and fair investigation of the facts

The Union also argues that the Employer failed to conduct a fair, objective and impartial investigation after it learned that the Grievant was allegedly stealing fuel. The Employer relied solely on what a City resident reported and did not interview any employees to substantiate what Affeldt reported. It then relied solely on the report of Officer Zawacki to establish the Grievant's alleged theft of City unleaded gasoline. No employees were interviewed to determine if they actually witnessed any theft of fuel or if any unleaded gasoline was in fact missing on the day in question. When it suspected that the Grievant was involved in theft of fuel, it could have measured the tanks and cans prior to the Grievant's shift. It could also have put up monitoring cameras to record the Grievant's activity. It could have also engaged in more surveillance, rather than relying on one incident as it did. Finally, the City Administrator failed to consider or investigate the Grievant's side of the story.

OPINION

This issue before the Arbitration Panel is whether the Employer had just cause to terminate the Grievant. For the reasons set forth herein, I conclude, and the Arbitration Panel concurs, that the Employer did not have just cause to terminate the Grievant.

It is the Employer's burden to show that the Grievant engaged in conduct warranting discipline and that the appropriate discipline was termination. The Employer bears this burden by proving by a preponderance of evidence that the Grievant was engaged in the theft of City fuel. The standard of proof by a preponderance of evidence means that the event is more likely to have occurred than not to have occurred.

The only evidence proffered by the Employer that the Grievant engaged in the theft of fuel prior to the morning of October 3, 2005 was the after the fact testimony of maintenance employees Ross and Baumunk.²⁹ Neither employee ever saw the Grievant fueling his vehicle. They saw him parked inside or close to the bay where the diesel fuel tank was located and assumed he was fueling his vehicle. In addition, Ross testified that on one occasion he was driving back to the shop at approximately 10:00 a.m. and observed the Grievant throwing the diesel fueling hose on to the diesel tank, adding that his diesel truck was parked parallel to him. The Grievant acknowledged that he had on occasion parked his vehicle in or partially in or parallel to a bay to work on it, which employees are allowed to do. Both Ross and Baumunk acknowledged that employees are permitted to work on their personal vehicles in the shop.

Both employees also testified that they had seen the Grievant returning an empty diesel fuel can to the shop on a few occasions. Here again, neither employee ever saw him carrying a full can of diesel fuel to his vehicle. The Grievant acknowledged that he had borrowed an empty City diesel fuel can on a few occasions to get fuel on the way home for his bobcat. He further testified that borrowing City equipment is permissible and the City has a sign-out sheet for this purpose, which he routinely signed when borrowing equipment.

The evidence proffered by employees does not establish that the Grievant was engaged in the theft of City fuel. Rather, it amounts to nothing more than mere speculation on the part of these two employees, one of whom had an "axe to grind" with

²⁹ These employees were not interviewed prior to the incident of 10/03/05.

the Grievant. What we have left then is the Grievant's alleged theft of unleaded gasoline on the morning of October 3, 2005, as witnessed by Officer Zawacki.

Officer Zawacki testified that he briefly observed the Grievant carrying a red can that appeared to be heavy by the way the Grievant was carrying it out to his vehicle, stand along the left side of his vehicle for a few minutes and then return to the shop area carrying what appeared to be an empty can. He further testified that he was only able to see the Grievant when he briefly passed under the street light at the east end of the shop building, and could not see what he was doing when the Grievant stood by the side of his vehicle due to the pre-dawn darkness. Although he had the squad car's video camera recording, it failed to capture what he personally observed due to the darkness of the early morning and the camera distance from the Grievant and his vehicle.

The Grievant testified that he did not carry an unleaded gasoline can to or pour it into his vehicle. He testified that he carried a full red with a white top gallon jug of water out to his vehicle, tried to get the forks loose inside the bed of the vehicle, urinated while standing by the side of the truck and returned to the shop carrying a twelve-pack of Slim Fast and gallon milk jug filled with water.

Other evidence proffered by Zawacki included the Grievant denying there was unleaded gasoline at the shop, when in fact a search of the facility disclosed two unleaded gasoline fuel cans, one of which was empty. Also, he confirmed that the Grievant was standing on the side of his vehicle where the fuel door is located. Additionally, he found no evidence of urination, which the Grievant alleged he was engaged in at the time he was standing by the side of his vehicle.

The Grievant acknowledged that he initially claimed there was no unleaded gasoline in the shop; however, he was referring to a fuel tank and not the unleaded gasoline cans, which he claimed are normally empty. He further testified that it would be extremely difficult to pour gasoline into his vehicle from the safety can, and if you did, there would be a lot of spillage.

Evidence was also adduced through Employer witness maintenance employee Baumunk that he had personally filled up the three unleaded gasoline cans and put them in the fuel storage cabinet late Thursday September 29, 2005. Further, he had inquired of other employees and none had used unleaded gasoline on Friday or Saturday.

The Grievant testified that on the previous Thursday he and another employee were using a rented trencher that used unleaded gasoline. He believes that it was also used that following Friday. It was returned to the rental place on Friday. The trencher had to be full of gas when it was returned pursuant to the rental agreement.

Finally, other evidence to support its position was the alleged statement attributed to the Grievant by Deputy City Clerk Bien, "I did something real stupid". Also the Grievant, in discussions with City Administrator Karnowski, was willing to take any discipline short of termination if it resolved the matter.

The Grievant testified that he told Bien something to the effect of, "There was some dumb stuff going on, or maybe some stupid stuff". He acknowledged offering to take discipline short of termination, but only to save his job and end the matter.

Based on all the evidence adduced, there is no direct evidence that the Grievant was engaged in theft of City unleaded gasoline. The Grievant's statement, even if you credit

Bien, does not amount to an admission of guilt. Also, his attempt to negotiate a penalty other than termination to save his job does not constitute an admission of guilt.

Although Officer Zawacki found two cans of unleaded gasoline, one of which was empty, does not establish that the Grievant was responsible for the empty can. Three full cans were placed in the fuel storage cabinet on the Thursday before the Monday incident. Although Baumunk testified that he inquired of other employees and none them used any unleaded gasoline, none of these employees were brought forward to corroborate Baumunk's hearsay testimony. Further, the Grievant testified that some unleaded gasoline had to be used in the trencher before it was returned. Also, it appears that the trencher was used on Friday and it is entirely possible that other employees needed unleaded gasoline for their lawnmowers or other equipment when they worked on Friday or Saturday.³⁰ Thus, it is entirely possible that the empty unleaded gasoline can found by Officer Zawacki cannot be conclusively attributed to the Grievant.

It is also possible that the Grievant was doing exactly what he said he was doing by the side of his vehicle the morning in question. The area in question was in dim light or darkness. The distance was 130+ yards from where Officer Zawacki had established his surveillance post. The videotape does not record any recognizable activity taking place there. Finally, Officer Zawacki's own testimony established that he could not see what the Grievant was doing. Officer Zawacki testified that when he returned to the Grievant's vehicle he could not find any evidence of urination by the Grievant's vehicle. A physical check of the area in question where the alleged urination took place disclosed that there is patch of grass there, which would hide any "wet spot". Further, it was established that

³⁰ This would explain why there were only two rather than three unleaded gasoline cans in the fuel cabinet Monday morning.

it would be extremely difficult to pour gasoline into the Grievant's vehicle without considerable spillage. If the Grievant had filled his vehicle, surely Officer Zawacki would have smelled the spilled gasoline upon his inspection of the area. The only way to prevent any spillage is to use a funnel. While there are funnels located on top of the fuel storage cabinet, it would be pure speculation that the Grievant used one. Officer Zawacki never made any mention of the Grievant carrying a funnel.

The Grievant testified credibly that as soon as he was sent home he filled up his tank and it took 14.862 gallons of unleaded gasoline. Given that his tank capacity is only 16.3 gallons, it would have been impossible for him to have poured five gallons of unleaded gasoline into his vehicle as alleged. It is possible that the Grievant could have filled up another vehicle rather than his. However, there is no evidence to suggest this. There is also no evidence that the Grievant owns another unleaded gasoline vehicle. Even if he did, there would have been no time for him to drive home, pick up another vehicle and go back to the gas station based upon the time when he was sent home and the time listed on the gasoline receipt.

Finally, although Officer Zawacki believes what he saw and testified credibly, it is entirely possible, due to the observation distance of approximately 120 yards and the darkness that time of the morning in October, the Grievant could have been carrying a red water jug as he claimed rather than a red unleaded gasoline can³¹

In addition, the Employer's handling of the investigation is questionable. It relied on a resident's report of what one employee had told him, rather than directly interviewing

³¹ The approximate distance from the squad car to the light standard. The light standard only directly illuminated a small area. This was evident when viewing the videotape as the Grievant only appeared briefly before disappearing in the darkness.

employees to determine if a further investigation was warranted. It then relied upon one incident based upon one eyewitness, albeit a Police Officer, to initiate termination action against the Grievant. As the Union points out, the Employer could have done a number of things to ensure that the Grievant was stealing or had stolen City fuel. When it suspected that the Grievant was involved in theft of fuel, it could have measured the tanks and cans prior to the Grievant's shift. It could have put up monitoring cameras to record the Grievant's activity. It could have also engaged in more surveillance, rather than relying on one incident as it did, especially when the video camera failed to record the alleged theft activity. Finally, the Employer failed to conduct an impartial investigation when it failed, as the Union points out, to consider or investigate the Grievant's side of the story, especially the circumstances surrounding his gas receipt and whether it was possible to pour gasoline into a similar vehicle with the safety can without considerable spillage.

In the end, the undersigned can only conclude that although it is entirely possible that the Grievant engaged in the theft of City unleaded gasoline, the fact remains that the Employer did not satisfactorily prove the allegations against the Grievant.³² Therefore, the Employer has failed to sustain its burden of proof for the reasons set forth herein.

In view of the foregoing, I conclude, and the Arbitration Panel concurs, that the grievance be sustained and that the appropriate remedy is reinstatement to his former position without loss of seniority or any other right or benefit he previously enjoyed. Since

³² The matter could have been resolved had Officer Zawacki driven directly up to the Grievant while he was allegedly pouring gasoline into his vehicle.

the Grievant has continued to receive his wages since his termination pursuant to the Veterans Preference Act, there is no back pay involved.

AWARD

IT IS HEREBY ORDERED that Steve Smith be unconditionally reinstated to his former position.

IT IS FURTHER ORDERED that the Steve Smith be made whole for any loss of economic benefits, seniority; or any other benefits or rights or privileges suffered as a result of the Employer's action.

IT IS FURTHER ORDERED that the Employer expunge the October 14, 2005 termination letter issued to Steve Smith and any reference to his termination contained in his personnel file, consistent with my Decision herein.

. The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

Dated: July 8, 2006

In Eagan, Minnesota

Richard R. Anderson, Neutral Arbitrator