BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS, CHAUFFEURS AND HELPERS
LOCAL UNION NO. 43

and

CITY OF LAKE GENEVA

Case 32
No. 45889
MA-6795

Grievance of Ronald Zink and
Robert Heling dated
6-12-91

Appearances:

Mr. John J. Brennan, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North River Center Drive, Suite 202, Milwaukee, WI 53212, appearing on behalf of the Union.

Mr. Robert W. Mulcahy, with Mr. John J. Prentice on the brief, Michael, Best & Friedrich, 100 East Wisconsin Avenue, Milwaukee, WI 53202-4108, appearing on behalf of the City.

ARBITRATION AWARD

The parties requested the Wisconsin Employment Relations Commission to designate an arbitrator to hear and decide a dispute concerning the above-noted grievance under the grievance arbitration procedures contained in the parties' 1990-91 Office Employees unit Agreement (herein Agreement). The undersigned Arbitrator was so designated by the Commission.

The parties presented their evidence and arguments to the Arbitrator at a hearing at Lake Geneva City Hall on September 26, 1991. A transcript was made of the proceedings and distributed. Both parties reserved the right to sum up their positions by submitting a written post-hearing brief for simultaneous exchange through the Arbitrator. As of November 29, 1991, the Arbitrator had received each party's post-hearing brief. On that date the Arbitrator completed the mail exchange of briefs and advised both Counsel that under the briefing arrangements mutually agreed upon at the hearing, the case was then fully submitted and ready for award issuance.

On December 9, 1991, the City wrote the Arbitrator (with a copy to Union Counsel) requesting "an opportunity to file a brief in response to the Union's brief" and requesting that the Arbitrator "Please advise as to the appropriateness of this request at your earliest convenience." The Arbitrator replied by letter to both Counsel on December 11, stating that he would welcome

reply briefs from the City or from both parties, but because the briefing arrangements agreed-upon at the hearing did not provide for an opportunity to submit a reply

brief, the Arbitrator would consider reply briefs only upon mutual agreement of the parties. The Arbitrator suggested that Counsel for the City seek mutual agreement on the subject with Counsel for the Union. By letter dated December 27, 1991, the City advised the Arbitrator that the parties had agreed as follows regarding the City's request to submit a reply brief in the matter:

> Mr. Brennan will pose no objection to your consideration of the arguments we raised in the Grabbert grievance, Case 31, No. 45792 MA-6754, with respect to the contractual authority of the City of Lake Geneva to impose any discipline less than discharge (other than a warning notice) for the enumerated offenses in Article 26 of the Collective Bargaining Agreement (See Brief of the Grievants at 7).
>
> Despite the fact that the Grievants did not raise this issue during their opening arguments, they will not permit the City of Lake Geneva to reply formally to their argument. However, the principles outlined in the relevant portions of the brief of the City of Lake Geneva in the Grabbert grievance is extended by reference in this letter to the brief of the City of Lake Geneva in the above matter. Therefore, the arguments raised on pages 8-12 of the City of Lake Geneva's brief in the Grabbert grievance (Case 31 No. 45792 MA-6754) should be applied to respond to the identical arguments raised in the Grievant's brief in Case 32 No. 45889 MA-6795. Please be advised that this extension has been approbated by counsel for the Grievants.

By letter dated December 30, 1991, the Arbitrator acknowledged receipt of that letter and advised the parties that the City's written arguments in this matter will be deemed extended as described above and that, as so modified, the case was again fully submitted and ready for award issuance as of that date, December 30, 1991.

Consistent with the foregoing, the Arbitrator has considered the City's arguments noted above as presented in the Grabbert case. The Grabbert case involved the same parties, Counsel, Arbitrator, and hearing date as the instant case. In that case the parties fully grievance processed, tried and briefed the issue of whether agreement language materially the same as that in the instant Agreement prohibited suspensions for listed offenses in the absence of a written warning notice in effect. By receiving and considering herein the City's arguments as advanced in that case, the Arbitrator is satisfied that any prejudice to the City due to surprise at that issue being considered herein has been obviated.

ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Did the City violate the Agreement by its ten-day suspensions of the Grievants or either of them?

2. If so, what shall the remedy be?

BACKGROUND

Grievants Zink and Heling are full-time non-probationary employes of the City working in its Streets Department, with about 14 and 12 years of City service, respectively. Primary among their duties during the warm weather months is removal and chipping of citizens' yard trimmings.

It is undisputed that sometime in late May or early June of 1991 the Grievants removed a pile of brush at the property of Bruno O'Reilly and that in connection with that removal the Grievants were offered and, after initially objecting, accepted ten dollars from one Alvin "Stub" West, which they split between themselves. West is Zink's father-in-law and had owned the property involved before selling it to O'Reilly in 1965. West is also the former head of the City's Streets Department, having retired in July of 1980. He is engaged in an unincorporated yard care business providing services on several properties within the City limits. West pays other individuals to assist him with some of the yard care services he provides, and Grievant Zink does such work for West from time to time.

The Grievants were suspended without pay beginning at about 8:30 AM on Friday, June 7, 1991, after being confronted earlier that morning by the City's Mayor Spyro Condos at his restaurant. According to Mayor Condos and City Street Superintendent Robert McLernon, McLernon informed the Mayor for the first time that morning that he had reason to believe the Grievants had accepted ten dollars for removing the brush pile at the O'Reilly property, at which point the Mayor directed McLernon to have the Grievants come to the restaurant immediately. After some brief hesitancy or denial on one or both of their parts, both Grievants admitted that they had accepted and split between them West's dollars in connection with their removal of the O'Reilly brush pile. At that point, the Mayor angrily told both employes that taking money from citizens for doing their City jobs was not acceptable conduct and that they were being suspended and should punch out and give a statement for documentation purposes to the City Clerk, Colleen Alexander, back at City Hall. It is undisputed that the question of when the money was taken in relation to the removal of the brush pile did not come up in the Mayor's conversation with the Grievants, and that McLernon did not question either of the Grievants about the incident before reporting and turning the matter over to the Mayor on the early morning of June 7. In the presence of their Union steward, Robert Bullis, Alexander took brief statements from the Grievants confirming that they had accepted and split ten dollars from West for removing the O'Reilly brush pile.

After meeting with the Grievants, the Mayor immediately contacted the police department and an investigation of the matter was undertaken. A report of the police investigator's interviews with Alexander, McLernon, Mayor Condos, West, Bruno O'Reilly, the Grievants, and Bullis was issued on June 10. The Mayor had also directed on June 7 that McLernon give his own statement to Alexander. McLernon's statement, which was turned over to the police, read as follows:

> FROM: STREET SUPERINTENDENT ROBERT MCLERNON
>
> On or about May 30, 1991; Stub West came into the Clerk's office and inquired why the brush on O'Reilly's lot in Geneva Bay Estates had not been picked up as it is the City and Bob Heling told him that he could not pick it up because it was outside the City. Just at that time Street Superintendent came into the Clerk's Office and Stub started to tell him the whole story and also told Street Superintendent that I gave them a ten dollar bill to do it. Street Superintendent told Stub you cannot do that as it is against the code of ethics and not to do that any more. He then said, "not even a six pack"? and at that time the Clerk came back in and both chimed together and said "no", Stub, "no way", that is against the code of ethics.
>
> On June 7, 1991 at 9:20 A. M. Stub came into the Business Administrator's office doorway where City Clerk, Business Administrator and Street Superintendent were in the B.A's office. Stub West admitted that he gave them $10. for doing such a good job.

Walworth County District Attorney Phillip A. Koss addressed himself to the situation by letter dated June 11, 1991, to City Police Chief Richard Newberry. That letter read as follows:

> You have requested my opinion as to whether our office will issue criminal charges against the above two individuals. Specifically, as requested, whether or not they have committed the crime of misconduct in public office.
>
> It is my understanding that Mr. Zink and Mr. Heling are employed by the City of Lake Geneva as street department laborers. From reading the reports, it appears that they accepted a $10.00 tip after they destroyed some brush from a homeowner's property.

> While this technically may be a violation of Sec. 946.12(5), it does not appear as though the workers solicited the money. When deciding whether to issue charges, I also looked to the amount involved. It appears to be a rather small amount. Given the nature of the offense and the small amount of money, I do not believe that felony charges would be appropriate.
>
> While certainly I do not condone the workers' behaviors and while disciplinary measures may be appropriate, I am not going to issue a criminal complaint.
>
> Thank you for your attention in this matter.

The following memorandum signed by Mayor Condos and City Business Administrator Gordon E. Ellis and dated June 7, 1991, was forwarded to the Grievants with copies to Union representatives, City Labor Relations Counsel Robert Mulcahy and the Personnel Committee. It reads as follows:

> You are hereby notified that under Article 21, "Discharge or Suspension" of an immediate suspension and possible discharge, under Article 21.01(a), no warning notice needs to be given in this situation.
>
> A hearing before the Personnel Committee will determine final action. You have the right to be represented at this meeting. The City has a duty to investigate the facts of this situation. I believe under Chapter 1.07(3) of the Municipal Code, Standards of Conduct, additional charges may be filed.
>
> A Personnel meeting has been scheduled for Wednesday, June 12, 1991 at 6: P.M. You are to be present.

The Personnel Committee met as scheduled, with a stenographic reporter present. Attorney Mulcahy described the situation to the Committee and referred to various Ethics Code provisions including Secs. 1.07(3)(b)3. and 11, quoted below. Mulcahy informed the Committee that the Mayor had determined that suspensions without pay of 30 days would be the appropriate disciplinary penalty, and he presented sworn testimony from McLernon, Alexander and Mayor Condos. Sworn testimony was also given by Bullis as were statements of viewpoint by various Committee members and by Union President and Business Representative Charles Schwanke. Schwanke pointed out, among other things, that neither Grievant had received a written warning notice within the preceding nine months. Mulcahy responded by stating the view that the Agreement did not require progressive discipline in the circumstances. West was not present at

the meeting, and neither Grievant was called upon to testify by the City or the Union. The Personnel Committee then went into closed session, after which it was announced that the Mayor and the Personnel Committee unanimously agreed that the discipline to be imposed on each Grievant in the circumstances would be 10-day suspensions without pay. While the suspensions were in effect during ten full workdays, they were also in effect during two intervening weekends, making them perhaps more accurately characterized as two week suspensions.

The grievance giving rise to this proceeding was filed on June 12, 1991. In it the Grievants assert that the City violated Articles "2 & 21" and complain in detail as follows:

> We feel we were discriminated against and suspended from our jobs without just cause. There was NO act of dishonesty or theft.
>
> As a settlement of this grievance we request to be immediately reinstated and made whole for all lost wages and fringe benefits without loss of seniority.

On June 18, 1991, McLernon entered a written response of "Grievance Denied" on the grievance form, but with the further statement, "Referred by me to the Business Administrator for his review and response." On June 25, 1991, Business Administrator Ellis wrote Schwanke agreeing with Schwanke's June 20 letter suggestion that the matter be treated as ripe for arbitration.

The matter was then submitted to arbitration as noted above.

At the arbitration hearing, the City presented various exhibits including the transcript of the open portion of the Personnel Committee meeting, the police investigator's report, McLernon's written statement, and the testimony of Alexander, McLernon and Mayor Condos. The Union presented the testimony of West, the Grievants and Bullis.

PORTIONS OF THE AGREEMENT

> ARTICLE 2. MANAGEMENT RIGHTS
>
> 2.01 The Employer possesses the sole right to operate the Department and all management rights to repose in it with the understanding that such rights of management will not be used for the purpose of discrimination against any employee or contrary to this Agreement. These rights include, but are not limited to, the following: . . .
>
> B. To establish reasonable work rules and schedules of

work;

. . .

E. To suspend, demote, discharge and take other disciplinary action against employees for just cause.

. . .

H. To take whatever action is necessary to comply with State or Federal Law.

. . .

ARTICLE 5. GRIEVANCE AND ARBITRATION

5.01 Grievance steps: . . .

5.02 A decision of an arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpreting the labor contract. The arbitrator shall not modify, add to, or delete from the expressed terms of the agreement. . . .

. . .

ARTICLE 21. DISCHARGE OR SUSPENSION

21.01 The Employer shall not discharge nor suspend any full-time employee, except probationary employees, without cause but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against the employee to the employee in writing and a copy of the same to the local union and job steward except that no warning notice need be given to an employee before his [sic] is discharged for the following causes:

(a) Dishonesty or theft;
(b) Being under the influence of intoxicants or drugs;
(c) Recklessness resulting in serious accident while on duty;
(d) Carrying unauthorized passengers in city vehicles;
(e) Willfully damaging city property;
(f) Fighting or assaulting other persons while on duty;
(g) Insubordination.

21.02 The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of said warning notice. Discharge must be by proper written notice to the employee and the local union affected.

. . .

ARTICLE 23. CONDITIONS OF AGREEMENT

23.01 This Agreement may not be amended except by mutual consent of the parties in writing.

23.02 This Agreement constitutes the entire agreement between the parties and no verbal statement shall supersede any of its provisions.

. . .

ARTICLE 25. REPEAL OF PRIOR AGREEMENTS

All prior Ordinances and parts of Ordinances, resolutions or parts of resolutions, agreements or parts of agreements, inconsistent with the provisions hereof, are hereby repealed as of January 1, 1990.

. . .

PORTIONS OF THE CITY'S CODE OF ETHICS

1.07 CODE OF ETHICS . . .

(3) STANDARDS OF CONDUCT. (a) There are certain provisions of the Wisconsin Statutes which should, while not set forth herein, be considered an integral part of any code of ethics. (b) Accordingly, the provisions of the following sections of the Wisconsin Statutes shall apply to public officers and public employes, whenever applicable:

1. Bribery of Public Officers and Employees. a. No person shall, with intent to influence the conduct of any public officer or public employee in relation to any matter which by law is pending or might come before him in his capacity as such officer or employee or with intent to induce him to do or omit to do any act in violation of his lawful duty, transfer or promise to him or on his behalf any property or personal advantage which he is not authorized to receive.

b. No public officer or public employee shall directly or indirectly accept or offer to accept any property or any personal

advantage, which he is not authorized to receive, pursuant to an understanding that he will act in a certain manner in relation to any matter which by law is pending or might come before him in his capacity as such officer or employee or that he will do or omit to do any act in violation of his lawful duty.

. . .

3. Misconduct in Public Office. No public officer or public employee shall: . . . e. Under color of his office or employment, intentionally solicit or accept for the performance of any service or duty anything of value which he knows is greater or less than is fixed by law.

. . .

11. Gifts and Gratuities. a. No public officer, elected official or employee shall accept any valuable gift, whether in the form of service, loan, thing or promise from any person, firm or corporation which, to his knowledge, is interested, directly or indirectly, in any manner whatsoever in business dealings with the City that may tend to influence him in the discharge of his duties or grant in the discharge of his duties any improper favor, service or thing of value.

b. Gifts received under unusual circumstances should be denied or returned immediately or in the most expeditious manner possible.

c. Acceptance of gifts or gratuities shall not be interpreted to mean those social, education, informative, or public relations events open to many or all public officers or employees that are not intended to influence them in their official duties.

(4) DISTRIBUTION OF CODE OF ETHICS. (a) The City Clerk shall cause a copy of this section to be distributed to every public officer and employee of the City within 30 days after enactment of this Section. Each public officer and employee elected, appointed or engaged thereafter shall be furnished a copy before entering upon the duties of his office or employment.

(b) Each public officer, the President of the City Council, the chairman of each board, commission or agency and the head of

> each department shall, between May 1 and May 31 of each year, review the provisions of this section himself and with his fellow Council, board, commission and agency members or subordinates as the case may be and certify to the City Clerk by June 15 that such annual review had been undertaken. A copy of this section shall be continuously posted on each department bulletin board wherever situated.

POSITION OF THE EMPLOYER

In its brief as originally filed in this matter, the City argues as follows. The ten-day suspensions imposed in this case were justified by Grievants' dishonesty and did not violate the Agreement.

The only reasonable reading of the evidence as a whole is that West gave the Grievants the ten dollars before they performed the work. Alexander and McLernon testified consistently about the timing and contents of West's discussions with them. In contrast, the testimony of the Grievants and West contain too many inconsistencies to list. If West gave the money to the Grievants as a tip, he would have had no reason to go to the Clerk's office, and (as the discussion was described by Alexander and McLernon) to simultaneously remind McLernon that the pile needed to be picked up, explain to McLernon why the pick up was properly to be done by City personnel, and discuss whether the employes are prohibited from accepting $10 or even a six pack of beer from citizens for doing work that is a part of their jobs with the City.

So viewed, the facts establish a clear violation of Ethics Code Secs. 107(3)(b)1.a. and b. and 107(3)(b)11. relating to bribery of public employes and gifts and gratuities. Grievants' jobs include making decisions whether to alert McLernon that a brush pile may be large enough for the City to arrange a special pick up rather than to pick it up as a part of their normal rounds. West acts as groundskeeper for a number of City residents. He was effectively coordinating the pickup of brush from O'Reilly's property when he paid the Grievants the money in this case, and was reimbursed by O'Reilly for the payment made to Grievants. Because West therefore could have been billed for a special pick up had one been required for what Grievant Heling described as a pile that might have warranted a special pick up, Because West had "business dealings" with the City within the meaning of Ethics Code Sec. 107(3)(b)11. West's payment to Grievants before they did the pick up was intended not only to get the pile picked up but also to avoid a judgment by Grievants that could have led to West being billed for a special pick up.

Whether or not the Personnel Committee heard a claim that the employes accepted the money before or only after doing the work is irrelevant since the meeting of that Committee was merely informational and since that Committee is not identified in the Agreement as an official step in the grievance procedure.

The evidence shows that the Code of Ethics was distributed to each Street employe and posted at all relevant times on a Department bulletin board. Even if that had not been the case, the Code of Ethics was published in the newspaper when initially enacted, and everyone can fairly be presumed to know the requirements of state law. Ignorance of the law is no excuse. In any event, the employes knew and acted as if they knew that what they did was wrong.

Even if the money was not paid to Grievants before the work was performed, they accepted money for performing tasks they were being paid by the City to provide and they neither returned the money to West nor turned it in to the City. Such conduct is violative of the Ethics Code, of a parallel provision of Sec. 946.12(5), Wis. Stats., of the rules of the Department, and of the public trust generally. The District Attorney's opinion, based on much less evidence than was presented at the arbitration, viewed the money only as a post-performance tip and still found Grievants to have technically violated state law but decided not to prosecute because of the small amount of money involved.

Moreover, the evidence shows that in the very limited circumstances in which employes are permitted to receive cash from citizens -- such as when they sell collected scrap metal -- they are required to turn in those monies to the City and are given a receipt for same. Grievants' failure to turn in the money they received from West therefore violated Street Department rules in those regards, as well.

Grievants' accepting the money from West was "dishonesty" within the meaning of Sec. 21.01, whether they accepted it before or after performing the work. They told West they were not allowed to take the money he offered. They initially denied taking it when confronted by the Mayor. Clearly, they knew taking the money was wrong, yet they took it anyway, did not return it to West, and did not turn it in to the City. This lack of probity is clearly "dishonesty" within the Websters 3rd New International Dictionary (1986) definition characterizing it as a lack of truth, probity or trustworthiness or by an inclination to mislead, lie, cheat or defraud. Accordingly, the prior warning notice requirement in Sec. 21.01 is not applicable in this case.

The Union's evidence does not establish concrete, reliable examples of disparate treatment. There is a recognized difference between accepting cash and accepting food items of nominal value. The Union has identified no prior instance of acceptance of an inducement to perform a particular City job task.

For all of those reasons, the grievance should be denied and the suspensions upheld.

In the additional arguments the City has been permitted to advance from its Grabbert case brief, the City argues further that any interpretion of Sec. 21.01 that would permit discharges but not suspensions in cases of offenses listed in that Section must be rejected because such an interpretation would produce a harsh, absurd or nonsensical result which the parties could not have intended. Such an interpretation would require the City either to have discharged Grievants or to

have limited its disciplinary response for dishonesty or other listed offense to issuance of a warning notice. Such a result would be absurd or nonsensical at best. If the conduct is serious enough that the parties have agreed that the City could impose discharge without issuance of a prior written warning, and since discharge has been characterized as the capital punishment of labor law, it is only reasonable and logical that the City should also be permitted to impose a lesser penalty without issuance of a prior written warning, as well. Thus, in Halstead Industries, 90 LA 387 (1987, Stephens) the arbitrator concluded, under language similar to Sec. 21.01, that the employer in that case was not precluded from imposing suspensions without a prior written warning for those listed offenses as to which agreement language expressly provided that the employer need not have issued a prior written warning in order to impose the penalty of discharge. There as here the parties established two separate penalty schemes: one for the listed offenses as to which no progressive discipline is required; and the other for all other offenses as to which at least one warning notice prior to suspension or discharge is required. In such a dichotomous arrangement, the City has the right to suspend as well as discharge for a listed offense, such that there has been no procedural violation of the prior notice language in Sec. 21.01 in this case.

For all of those reasons, the grievance should be denied in all respects.

POSITION OF THE UNION

The Grievants were suspended for an alleged violation of the City Ethics Code for accepting money from a citizen of the City for duties performed in the normal course of their employment. Given the factual circumstances and the relevant history of the City, no discipline was warranted in the circumstances.

The credible evidence establishes that on May 31, 1991, the Grievants were directed by McLernon and did in fact remove and chip a pile of brush at the street edge of the O'Reilly property. The Grievants were aware the pile had been there for some time but were unsure whether the O'Reilly was entitled to have the City remove it because of the location of the property in relation to the City limits. Earlier that same day, West, the former Street Superintendent and Zink's father-in-law informed the Grievants that the pile was waiting and was eligible for City removal, but they did not remove it until McLernon confirmed that it was appropriate for them to do so. As they finished clearing the brush pile, West approached them and offered a ten dollar bill which West described as "a tip for doing a good job." At first the Grievants rejected the offer, but eventually Zink took the money and split it between himself and Heling.

McLernon told the Mayor on June 7 that two of his employes had taken ten dollars for clearing the brush at the O'Reilly's residence. McLernon's testimony that West told him that he had paid the Grievants $10 before the brush was removed is not credible. McLernon's testimony was unreliable generally and especially as to dates and it was inconsistent in various respects with his prior written statement and with his testimony to the Personnel Committee. It is not credible

that McLernon, with that claimed knowledge as of May 31, would have directed the employes to clear the brush pile without first raising the payment issue with them and would have waited until June 7 before bringing the matter to the Mayor's attention. The Grievants and West all clearly testified that the money was paid only after the work had been performed, not before.

When the Mayor confronted the Grievants at his restaurant on the morning of June 7, Zink admitted receiving the ten dollars and splitting it with Heling. Heling either denied it at first or was silent, but eventually admitted receiving five dollars from Zink. The Mayor, without asking when the money actually changed hands, became upset, said taking the money was not at all acceptable, and suspended the employes without pay. A police investigation was requested. The Personnel Committee met, heard from Management's witnesses and from the Union, and it was announced following a closed session meeting of the Committee that the suspensions would be reduced from 30 to 10 days each.

Imposition of suspensions in this case violated Sec. 21.01 of the Agreement. Neither grievant had a written warning notice in effect. The conduct involved was neither dishonesty nor theft. Accordingly, the most severe penalty permissible under Sec. 21.01 would have been a written warning notice.

Articles 23 and 25 of the Agreement prohibit discipline beyond that which is outlined in Art. 21. The Code of Ethics was never bargained with the Union and is not a part of the Agreement. The Arbitrator is without jursidiction to consider anything but that which has been bargained into the Agreement.

In any event, for a violation of the Code to be a basis for disciplinary action, the City must have given the employes fair notice of what it says and what it means. The City has failed to do that even to the extent explicitly called for in the Code itself. McLernon admitted that he had not read the entire document. He says he handed some out and laid the rest on a table and posted it on a bulletin board. The evidence shows, however, that the Grievants and many other Street employes were unaware of the Code, its existence, terms or application, making discipline for violation of the Code contrary to fundamental fair notice requirements under a cause standard.

It is also not clear that accepting a tip for a job well done violates the Ethics Code at all. The meaning and applicability of Ethics Code Sec. 1.07(3)(b)11.a. to a tip is dubious at best, especially without an explanation being given to the employes. West has not been shown to have been "interested directly or indirectly, in any manner whatsoever in business dealings with the City." The ten dollars involved could not have influenced the Grievants in the discharge of their duties since their duties were complete. Neither Grievant granted any "improper favor, service or thing of value."

The City's discipline of the Grievants for accepting a gratuity is patently unfair and violative of the contractual cause standard in light of the practice in the City of allowing acceptance

gifts and gratuities to employes for a job well done. The evidence shows that both before and after passage of the Code of Ethics, holiday and even non-holiday gifts from citizens are donated from time to time by grateful citizens for services performed on their property. It also appears that alcoholic beverages have been received from time to time, as well. After enjoying such gratuities and seeing notes showing from whom they came, the employes have occasion to work on properties of those citizens. Such conduct is not different in kind from that for which Grievants have been punished in this case.

For those reasons, the City did not have the cause for imposing suspensions or, indeed, for imposing any discipline in the circumstances of the case. The Arbitrator should therefore order the suspensions rescinded and the Grievants made whole for all lost wages and fringe benefits without loss of seniority.

DISCUSSION

The grievance in this matter alleges violations of Agreement Arts. 2 and 21.

Agreement Secs. 2.01 Management Rights expressly recognizes the City's rights "B. To establish reasonable work rules . . . [and] E. To suspend, demote, discharge and take other disciplinary action against employees for just cause." Section 2.01 further provides that "such rights will not be used for the purpose of discrimination against any employee or contrary to this Agreement."

Section 21.01, is titled "DISCHARGE OR SUSPENSION." It provides that both discharges and suspensions of full-time non-probationary employes are subject to a general cause standard. As this Arbitrator interprets it, in addition to the requirements of a cause standard, Sec. 21.01 superimposes the additional procedural requirement -- whether or not such would otherwise be required in the circumstances of the case under a general cause standard -- that a prior written "warning notice of the complaint against the employee" have been given to the employe, Union and steward within the preceding 9 months. It makes that notice requirement applicable "in respect to discharge or suspension . . . except that no warning notice need be given to an employe before his [sic] is discharged for the following causes: . . ." including "(a) Dishonesty or theft;. . . ."

The circumstances of this case call initially for an interpretation of Section 21.01 to determine the scope of the above-quoted "except . . ." clause. The City's position in this matter, as stated beginning in its June 7 suspension and meeting memo, has consistently been that that clause permits the City to impose suspensions as well as discharges for the listed offenses without a Sec. 21.01 warning notice being in effect. As the Arbitrator interprets it, however, that clause means just what it says. It excepts from the warning notice requirement only situations in which the employe "is discharged" for one or more of the listed causes.

The Arbitrator has carefully reviewed and considered the facts and reasoning set forth in the Halstead Industries award, cited by the City. The agreement in the Halstead case expressly provided that "Failure or refusal to comply with the [employer's plant] rules shall be cause for the disciplinary action specified in the rules subject to provisions of Section 4 of this Article relating to Warning Notices." Section 4 provided as follows:

> After an employee's probationary period has been completed, the Employer may discharge an employee only for just cause and/or violation of the Plant Rules. After completion of the probationary period, all employes must be given at least one (1) warning notice of the Employer's complaint against the employee, in writing, excepting that no warning notice need be given to an employee before discharge if cause of such discharge is [various listed offenses]. Discharge or suspension must be by proper written notice sent to the employee's last known address and a copy of said discharge or suspension shall be mailed to the Union. Warning notices shall have no force or effect after six (6) months from the date thereof for purposes of discharge or suspension.

Halstead Industries, 90 LA at 388-9. Arbitrator Elvis C. Stephens interpreted that language to mean:

> For probationary employees, the employer can discharge at will. Once the employee has served the probationary period, the employer must have just cause, or show a violation of the plant rules to discharge an employee. However, prior to discharge a warning notice must be given employees, except for certain named types of offenses. Where warning notices must be given prior to discharge, they must be not more than six months old to support the discharge. Also, where such warning notices are part of the three step progressive discipline as shown in the penalty part of the Plant Rules) they must be no more than six months old to support the next step of suspension. For those offenses which list the penalty as "Warning to Discharge," no such notice is required for a penalty less than discharge, e.g., a warning or a suspension.

90 LA at 390 [emphasis added].

The City's assertion that Sec. 21.01 should be interpreted the same as is stated in the last sentence above is without merit, due to material differences in the agreement language in the two cases. As expressly noted by Arbitrator Stephens, "The first part of Section 4 states that the employer "may discharge" an employee for just cause or violation of plant rules. It does not refer

to suspension." 90 LA at 398. In contrast, in the first parts of Sec. 21.01, both the general reference to a cause standard and the prior warning requirement itself are addressed expressly to both discharges and suspensions. It could fairly be reasoned that the Halstead parties intended their Sec. 4 language to superimpose a warning notice requirement onto the penalties specified in the plant rules only in cases of discharge for an offense listed in Sec. 4, such that suspensions for violations of plant rules permitting penalties of "warning to discharge" were not subject to the warning notice requirement. However, it cannot be similarly reasoned in this case that the parties intended their Sec. 21.01 language to permit suspensions for the offenses listed in Sec. 21.01 without a prior warning notice being in effect. For here the parties chose language in Sec. 21.01 that clearly applied portions of that Section including the prior notice requirement to both discharges and suspensions. It is only in the "except . . ." clause defining exceptions to the prior-warning-notice-in-effect requirement for suspensions and discharges that the parties have limited the language they used only to situations "before [the employe] is discharged" for the listed causes. The parties' earlier references to both "discharge" and "suspension" clearly, unequivocally and persuasively show that the subsequent reference to "discharged" alone in the "except . . ." clause was intended to make the "except . . . " language applicable only to discharges for the listed offenses and not to suspensions. To read the language as the City proposes would be to add the words "or suspended" to exception clause. That would be an exercise of authority in excess of the Arbitrator's expressly limited Agreement interpretation role as set forth in Agreement Sec. 5.02.

It is entirely appropriate to bind the parties to the clear and unambiguous meaning conveyed by the language they have agreed upon. Moreover, the Arbitrator is not persuaded that the parties' scheme as interpreted above is so absurd or nonsensical as to negate any possibility that the parties could have intended such an arrangement. As interpreted above, the warning notice language prohibits suspensions absent the requisite written warning notice in effect, while protecting the City's right to discharge for very serious offenses without having to meet the written warning notice requirement. In all cases of discharge and suspension of full-time non-probationary employes, however, the Section subjects the City's actions to arbitral review under the general cause standard, as well. Proof that an employe's misconduct falls within one of the listed offenses, alone, will not suffice to establish that the imposition of a discharge met the requirements of the cause standard. Other conventional cause standard considerations, such as whether the penalty of discharge was proportionate to the offense committed would also be relevant. Proof that the offense for which the employe was discharged was one of those listed in Sec. 21.01 merely relieves the City of what would otherwise be a requirement that a prior warning notice be in effect. The City must also meet the remaining requirements of the cause standard generally. In that context, the Arbitrator does not find the interpretation given herein to Sec. 21.01 to be absurd or nonsensical. If the City considers the arrangement clearly described in the language it has agreed upon to be harsh or unreasonable, its relief must come at the bargaining table, and not by an addition of language to the Agreement by the Arbitrator.

It is undisputed that neither of the Grievants had a written warning notice in effect within

the meaning of Sec. 21.01 at the time of the occurrence in question here. The instant suspensions therefore violated Sec. 21.01 because that Section, as interpreted above, prohibits suspensions even for dishonesty and the other listed offenses, where a prior warning notice is not in effect within the meaning of that Section.

Accordingly, the most severe disciplinary action the City could have taken in this case would have been issuance of a written warning notice. The Union, however, asserts that the Agreement would not permit discipline of any kind to be imposed on the Grievants in the circumstances. The Arbitrator does not agree. Rather, it is the Arbitrator's opinion, for the reasons noted below, that the City had just cause in this case for the issuance of a written warning notice on June 7, 1991.

The "just cause" standard made applicable to disciplinary actions including written warning notices by Agreement Sec. 2.01.E., incorporates a variety of well-recognized principles of fundamental fairness in dealing with alleged employe misconduct. Among those principles are requirements that employes have reason to know the nature of their employer's standards for employe conduct and that the employer administer discipline in an even-handed, non-discriminatory manner. The Union asserts that the City's actions herein are fatally flawed in both respects.

The Arbitrator is not persuaded that the Grievants violated any established Street department rule by failing to turn in the money received from West to the City. No written Street Department rules on that subject or any other were shown to exist. While the evidence shows that there are some established City practices whereby employes turn in monies received from the sale of scrap metal objects found in the course of their work for the City, there are no established practices for turning in to the City cash received in the form of gifts or gratuities from citizens. If anything, the Ethics Code in Section 107(3)(b)11.b. suggests that monies received in unusual circumstances be returned as expeditiously as possible to the donor rather than to the City Clerk.

The Arbitrator also agrees with the Union that the City cannot, consistent with the Agreement, rely on its Code of Ethics as a basis for imposing any disciplinary action on the employes for their conduct in late May or early June of 1991. Neither Art. 23 nor Art. 25 precludes the City, during the term of the Agreement, from exercising its Art. 2.01.B. right to establish and enforce reasonable work rules in the form of Ordinances or in other forms, without negotiation or agreement with the Union on the specifics of the rules established, so long as the rules are not contrary to any terms of the Agreement. The fact that the Ethics Code pre-existed the Agreement and is not included in the Agreement does not preclude the City from enforcing it with respect to bargaining unit employes. However, to be consistent with the Agreement just cause requirement, the City must have given the employes fair notice of the contents and intended meaning of the standards of conduct contained in the Ethics Code.

In this case, it is undisputed that as of the time of the alleged Ethics Code violation at

issue, the City had failed to provide the Grievants with the notice of its contents required by the Code itself. In Ethics Code Sec. 1.07(4), the drafters appear to have wisely recognized that for the Code to have its intended effect on employe conduct, it must not only be "distributed to every . . . employe . . . " and "continuously posted on each department bulletin board wherever situated," but also "the head of each department shall, between May 1 and May 31 of each year, review the provisions of this sections himself and with his . . . subordinates . . . and certify to the City Clerk by June 15 that such annual review had been undertaken." Whether the Grievants received a copy of the Code before the instant suspensions were initiated is open to question given the absence of any system for acknowledging or recording such receipt and the facts that McLernon was issued the precise number of copies he needed for his employe complement and that he thinks he placed at least some of those on a table for pick up by unidentified employes who may have been absent when the Code copies were initially available for distribution. Even more significantly, however, McLernon acknowledged that he had neither read the full Code document himself nor reviewed it with his subordinates at any time from its promulgation in December of 1989 through the initiation of the instant suspensions on June 7 of 1991. While the Code included a certification procedure regarding annual reviews, that system also proved insufficient to cause McLernon to do what the Code drafters called for in an effort to assure that the Code becomes and remains well-known and reasonably well-understood by all City employes. In the face of the claims by Grievants and others that they were unaware of the Code's requirements, the City's failures to follow its own well-devised distribution and periodic review requirements preclude the City from relying on the existence of the Code as a basis for disciplinary action against the Grievants for conduct in late May or June of 1991.

Nevertheless, as the City points out, the Ethics Code in various material respects incorporates pre-existing state laws establishing standards of public employe conduct. As the District Attorney noted, acceptance of a ten dollar cash tip for performing the duties of one's public employment "technically may be a violation of Sec. 946.12(5)," which defines it as a Class E felony when a public employe "Under color of his office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which he knows is greater or less than is fixed by law."

While the Arbitrator is not prepared to charge Grievants with constructive knowledge of every nuance of all such statutes, the Arbitrator is persuaded that the Grievants knew that it was wrong for them to accept cash for performing their City job duties. Their reluctance to accept the money from West and their brief initial delay and/or reluctance to admit having done so when confronted by the Mayor both suggest that the Grievants knew it was wrong to accept the money from West as they did. Neither of the Grievants claimed to have been acting in accord with what West says was his advice to subordinates as Street Superintendent, to wit, "if you do a good job and you find a kind, generous person in the City that wants to give you a six pack of beer or a couple bucks, take it." Notably, Zink never worked as a subordinate of West's; and Heling told West he was "not allowed to take this" and acknowledged in his testimony that he knew it was wrong to take money from a citizen for performing the duties of his City job. The fact that the

City did not put the Grievants on notice that the acceptance of
cash for the performance of their City duties was not acceptable under the Ethics Code does not relieve the Grievants of disciplinary responsibility for having done so where, as here, they knew that the conduct was wrong.

There remains, however, the Union's contention that the City has historically permitted employes to accept gifts and gratuities in various forms from citizens in the past, both before and after enactment of the Code of Ethics, without ever disciplining anyone before the Grievants. In that regard, the Arbitrator finds persuasive the City's contention that there is a difference between accepting cash as opposed to accepting coffee, rolls, holiday foods or other consumables. The evidence does not establish a pattern of cash gratuities in any amount being paid or accepted by City employes, and the Grievant's abovenoted responses to West's offer of the money and to the Mayor's confrontation of them about it suggests that they did not perceive it to be common or accepted conduct on their part to accept cash for doing their City jobs. For those reasons, the Arbitrator does not find the evidence concerning disparate treatment to be sufficient to preclude the issuance of a written warning to the Grievants in early June of 1991.

The Arbitrator also concludes, however, that the conduct for which the written warning notice could properly cite the Grievants must be limited to their acceptance of ten dollars cash after their removal of the O'Reilly brush pile as a part of their City job duties. As the Union pointed out at the arbitration hearing, neither the Personnel Committee transcript nor any other City communication with the Grievants specifically cited them for taking the money before the brush pile was removed. Indeed, there was never a clear statement of the precise basis on which the suspension in this case was being imposed. Instead, the City has (correctly) stressed throughout the processing of this case that the acceptance of the money would have been improper employe conduct whether it was taken before or after the brush pile was removed.

While the circumstances as they were reported to the Mayor and to the Personnel Committee could well have given rise to speculation or suspicion on the part of the Mayor and Personnel Committee that the Grievants had accepted the money before removing the brush pile, the City has not sustained its burden of proof to that effect in this arbitration. The City's case for a pre-removal payment rests on McLernon's recollection that West told him that he had given Grievants ten dollars before the work was performed. Alexander was not present for that portion of the conversation such that she only heard and joined in the portion of the conversation in which McLernon told West that the Ethics Code does not permit giving gratuities in the form of cash or even a six pack. For his part, West claims he gave Grievants' the money only after the brush pile was removed. It is possible, therefore, that West told McLernon what he intended to do rather than what he had already done. West's attitudes as reflected in his testimony suggest to the Arbitrator that he would have been quite capable if not outright inclined to follow his own perceptions of what ought to be permissible in the Street Department rather than conforming his conduct to what McLernon and Alexander told him were the requirements of the Ethics Code. McLernon's memory of the events and time sequences as reflected in his written statement, his

statements to the police investigator, to the Personnel Committee and in his arbitration testimony do not engender the Arbitrator's confidence sufficiently to support the more serious charge that the payment was a pre-removal inducement rather than a post-removal gratuity. If West had told McLernon that he had paid Grievants the money prior to removal of the brush pile, that would mean both that McLernon waited several days before reporting the matter to the Mayor and that in the interim he directed the Grievants to remove the O'Reilly's brush pile without saying anything to them about what West had told him. McLernon offered no persuasive explanation for his claimed conduct in either respect. All things considered, therefore, the proof establishes only the admitted acceptance of a post-removal gratuity.

By way of remedy in this case, the Arbitrator has ordered the suspensions removed from each Grievant's record and that each Grievant be made whole for any wages (including overtime), fringe benefits and seniority lost by the Grievants by reason of their suspensions. The Arbitrator has also provided that the suspensions shall be reduced to an identically-dated written warning notice citing each Grievant for accepting five dollars each after removing the O'Reilly brush pile during work hours as a part of their City job.

The outcome in this case is not intended and should not be understood either as a condonation of the Grievants' acceptance of a cash gratuity for doing their City job duties or as a criticism of the Mayor or Personnel Committee for pursuing the declared purposes of the Code of Ethics as regards honesty and integrity in City government. As earlier noted, the City has a right under the Agreement to promulgate reasonable work rules and to apply them by means of disciplinary actions against employes. However, in promulgating and enforcing its rules for employe conduct, the City must adhere to the various procedural and substantive requirements of the Agreement, including the warning notice requirement in Art. 21.01 and the basic principles underlying the just cause standard provided therein. Because the Arbitrator has concluded that the City did not do so in this case, the disciplinary penalty imposed has been ordered reduced.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the ISSUES noted above that:

> 1. The City violated the Agreement by its ten-day suspensions of each of the Grievants. Section 21.01 prohibited the City from suspending either Grievant, even for one or more of the causes listed in Sec. 21.01 a.-g., because there was no prior written warning notice in effect within the meaning of that Section. The City nevertheless had just cause in the circumstances to issue a written warning notice citing the Grievants for accepting five dollars each from Stub West after removing the O'Reilly brush pile during work hours as a part of their City jobs.

2. By way of remedy, each of the suspensions is hereby reduced to a written warning notice which shall be deemed to have been issued to each of the Grievants and to the Union, and the Union steward on June 7, 1991, and each of which shall be deemed to cite each of the Grievants for misconduct noted in 1, above, and which shall further be deemed to warn the Grievants that "No further violations will be tolerated. A future incident may result in further discipline up to and including discharge." The City shall immediately remove the subject suspensions from Grievants' records and remove the suspension-related documents from their files and shall insert a copy of this award in place of that/those document(s) in each Grievant's file. The City shall also immediately make the Grievants whole for any wages (including overtime), fringe benefits and seniority that they lost by reason of the suspensions imposed in this case.

Dated at Shorewood, Wisconsin
this 12th day of March, 1992 by Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator