BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
LOCAL 20, AFSCME, AFL-CIO	:	Case 99 No. 49606 MA-8004
and	:	
CITY OF BROOKFIELD	:	

Appearances:

Mr. Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Roger E. Walsh, Attorney at Law, Davis & Kuelthau, S.C., appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a 1990-92 collective bargaining agreement which calls for final and binding arbitration of certain disputes. The Union requested, with the City's concurrence, that the Wisconsin Employment Relations Commission appoint an arbitrator to hear the grievance of Lance Kaun. The undersigned was appointed and held hearings in Brookfield, Wisconsin, on October 14 and October 27, 1993, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by January 10, 1994.

ISSUE:

The parties ask the Arbitrator:

> Was the Grievant, Lance S. Kaun, discharged for proper cause? If not, what is the appropriate remedy?

BACKGROUND:

The Grievant, Lance Kaun, worked for the City of Brookfield Highway Department from March 10 or 11, 1992, until July 1, 1993, when he was discharged by the City in the following letter:

> You are hereby discharged from your employment effective immediately with the City of Brookfield for your dishonesty and untruthfulness. You falsified your employment application form by answering "No" to the question, "Have you ever been convicted of a crime other than a traffic, game law or other

> minor violation?" In fact, you had been convicted of a crime other than traffic, game law or other minor violation on at least two prior occasions, one in 1979, and one in 1984.
>
> You are asked to immediately return the work clothes, keys, tools, etc., furnished by the City to me.

The letter was signed by Larry Majeskie, Superintendent of the Highway Department, and dated July 1, 1993. Kaun had successfully completed his probationary period when he was discharged. The parties stipulated that his work performance was adequate.

Kaun applied for a job in the Highway Department on November 1, 1991. He took the application form home and had his wife print the information on it, because her handwriting is neater than his. One of the questions on the application form states:

> HAVE YOU EVER BEEN CONVICTED OF A CRIME OTHER THAN TRAFFIC, GAME LAW OR OTHER MINOR VIOLATIONS?

The box below the question is marked "NO." Kaun has had two misdemeanor convictions in his past. He discussed the question with both his wife and his father before answering the above question, since he preferred not to disclose his misdemeanor convictions unless necessary. His wife and his father agreed with his interpretation of the question -- that misdemeanors are minor violations, which would not need to be listed under the question as phrased on the application. Kaun asked his father about the matter, because his father is more knowledgeable about business matters. Kaun's father runs an insurance business in his home and maintains some law books as part of his business. At one point, Kaun's father looked up "misdemeanor" in Black's Law Dictionary and noted that a synonym is "petty offense," but Kaun's father did not show Kaun the dictionary definition until after he was discharged. Kaun was satisfied with his father's initial explanation. Kaun testified that he was not trying to be dishonest when he checked the box "no," but he felt he had never been convicted of anything other than minor violations -- his misdemeanors.

Kaun did not get a job immediately with the City but was placed on an eligibility list. He was interviewed for a job on February 12, 1992, and at that time, he signed a form authorizing the release of information to the City, including records of any criminal violations, although criminal convictions are a matter of public record. He was offered a job on February 17, 1992, pending a physical, and he passed his physical exam including a drug screen.

While it is routine for the City to ask the Police Department to check criminal records on those job applicants being considered for employment, the City did not do so for Kaun when he was hired.

It was not until more than a year later that the City did so when Kaun applied for another position with the City. Kaun applied for the position of maintenance specialist in the Inspection Services Department sometime between June 4 and June 11, 1993. He was the only employee to sign the posting for that position. The Director of that department, Dean Marquardt, asked to see Kaun's personnel file to see whether he had experience for the position. At that time, the Director of Human Resources, James Toby, noticed that the criminal activity background check form had not been submitted to the Police Department and sent the form over to the Police Department. The Police Department check showed that Kaun had been convicted of two misdemeanors.

Kaun's first misdemeanor conviction was for obstructing an officer on October 16, 1979. Kaun was 18 years old at that time, and he was ordered to pay costs of $9.00 and placed on probation for one year. Sentence was withheld, and it was ordered that Kaun could request an expungement hearing following completion of probation. He did not ask for an expungement hearing.

Kaun's second misdemeanor conviction was for possession of cocaine on June 9, 1982. The judgment of conviction was not entered until January 9, 1985, at which time it was ordered that Kaun pay restitution of $175.00, be placed on probation for two years, and be evaluated for abuse of drugs or alcohol. Kaun recalls that initially, he was supposed to see a probation officer every month, but it became stretched out to every three months and then every six months.

When Toby learned of Kaun's misdemeanors, he got certified copies of them and discussed the matter with the Mayor, the attorney for the City, and Highway Superintendent Larry Majeskie. Toby had a meeting with Kaun on June 30, 1993, which included Majeskie, Union representative Dick Paul, and Toby's secretary, Judy Sigerud. Toby asked Kaun if he had been convicted of any crime, and Kaun said that he had been convicted of possession of cocaine and obstructing an officer. Kaun volunteered that information when asked. Toby asked him if he had been charged with a felony for selling cocaine to an undercover sheriff, and Kaun said that the charge had been reduced to a misdemeanor, apparently through plea bargaining. When Toby told Kaun that he had falsified his application, Kaun said that was not true because his convictions were both misdemeanors and he considered them to be minor offenses. Toby felt that Kaun had been honest regarding his convictions, except that he had hedged about the length of the probation period. Toby told Kaun to come back the following day. He then discussed the matter with Majeskie and the two of them agreed that falsification of the job application was an offense for which Kaun should be discharged.

On July 1, 1993, Kaun met with Toby, and those present at that meeting included Kaun's wife and his attorney, Union representatives Dick Paul and Ray Putchinski, as well as Majeskie and Toby's secretary. Toby wanted some more information, and

asked Kaun if he filled out the application himself. Kaun stated that his wife filled it out at home because she had better penmanship than he did. Kaun was asked if he asked anyone at City Hall about the question regarding minor violations, and he stated no, that he talked to his father and his wife about it. Toby asked Kaun if his father was an attorney, and Kaun said no but that his father had a law library. Kaun gave Toby a copy of the portion of Black's Law Dictionary defining misdemeanor, the portion his father had used. Paul said something to the effect of taking Kaun's work record into consideration, and Toby replied that his work record was less than exemplary. Nothing Kaun said changed Toby and Majeskie's decision to terminate Kaun, and he was given his notice of discharge on July 1, 1993.

Toby testified that there was no reason to terminate Kaun other than Kaun's response to the question on the job application. Toby was aware that Kaun was a short-term employee who had worked for the City a little over a year. Toby was also aware that there were no other disciplinary actions in Kaun's file, and Toby was the main decision maker on the discharge.

Kaun had been working for the Waukesha County Highway Department when he was hired by the City of Brookfield, and after his discharge from Brookfield, he was called by Waukesha County to see if he wanted his job back. He was employed at the County when the hearing in this matter took place.

Kaun filled out an employment application form for Waukesha County in June of 1989. The County form asks: "Have you ever been convicted of a felony," to which he answered "no." During the same period of time, Kaun applied at Elm Grove. He reapplied to Elm Grove after he was discharged from Brookfield, and the current Elm Grove application form asks: "Have you ever been convicted of a crime, excluding misdemeanors and summary offenses, in the past ten years which has not been annulled or expunged or sealed by a court?" Kaun does not recall if the application form asked the same question when he first applied at Elm Grove in 1989.

Toby has been the City's Director of Human Resources for three and a half years and has been involved in personnel relations for 25 years. In his experience, he is not aware of ever having to explain how to fill out an application form. Kaun did not ask anyone in the City for an explanation regarding what constitutes a minor violation.

Kaun has little or no knowledge of what constitutes a misdemeanor or a felony. Kaun's experience with the criminal justice system was limited to those two occasions when he was 18 and 21 years old. During his working experience involving both private sector and public sector employers, his past record was

never an issue, to his knowledge.

Kaun believes he was discharged because he had some incidents involving his supervisor, Majeskie. He testified that two weeks before he was discharged, he called Union Chief Steward Ray Putchinski and told him that he was concerned that Majeskie was out to get him fired.

During the winter of 1992-93, employees had plowed snow until around 2:00 a.m. one night and were too tired to keep it up. They returned later that morning, possibly around 4:00 a.m., and Majeskie met with the crew in the lunch room and said, "If you fuckers would have done this right last night, we wouldn't be here this morning." Later that morning, Kaun was out plowing snow when Majeskie appeared on the scene. Kaun got out of the truck and walked over to him. He poked Majeskie in the shoulder and said, "I don't appreciate being called a fucker."

Richard Pfeiffer testified that sometime before this snow plowing incident, Kaun had asked Majeskie during a department meeting about a rumor he heard, that Majeskie was not going to hire any more workers from the County. (Both Kaun and Pfeiffer worked at the County Highway Department before coming to the City). Majeskie stated that they were too much set in their ways.

The municipal dump is in back of the Highway Department, and the public may bring items such as tractors, lawn mowers, mulch and leaves, lumber, and larger materials that cannot be picked up with garbage. Kaun used to go into the dump before his morning shift and take things out, such as a lawn mower and lumber. Other employees also removed items from the dump. Majeskie started locking the gates to prevent employees using it before their starting shifts. Kaun questioned Majeskie about it, and Majeskie said that it was not fair to the taxpayers. Kaun replied that he did not think it was fair that Majeskie would have employees use a city wrecker to pick up a garden tractor on city time and haul it into the garage and torch the wheels off for his own personal use. Kaun testified that Majeskie got mad, said that it never happened, and Kaun replied that half of the highway shop saw it.

Kaun took the matter up with William Muth, the Director of Public Works. He took the Union Vice-President, Eugene Reuter, in with him for this meeting. They discussed access to the dump, and Kaun told Muth that it was a shame that employees could not go into the dump and salvage things anymore. According to Kaun, Muth said employees could take out anything they could use, the more the better, since the City eventually has to pay to haul it away. Muth was concerned that employees working for the Highway Department but not living in the City would bring brush and other matters into the dump, as some had done in the past. Muth also

told Kaun and Reuter that he would prefer that employees go in the dump between 3:30 and 4:00 p.m., rather than the morning, so nobody could get in early and dump brush off. Muth also told them that they could not use city equipment for loading chips onto their personal trailers.

Reuter did not like the rules established by Muth, since employees -- both residents and non-residents -- had used the dump for years, bringing things in and taking things out. But Muth was determined that everyone was to be treated the same -- just as any other resident, with no special privileges to employees. Kaun testified that it was shortly after that meeting with Muth that Majeskie had some friends bring a trailer to the dump, and that he told two employees during working hours to load up the trailer with chips. The Union then filed a grievance.

Richard Pfeiffer was the Union steward who filed the grievance, which stated: "Union member was instructed by Larry Majeskie to load trailer with chips with city equipment on city time. (Outside of dump hours) Which is in direct violation of established rules set forth by Bill Muth and Larry Majeskie." Pfeiffer testified that the majority of Union members wanted it filed, so Pfeiffer presented the grievance to Majeskie, along with Dick Paul and Eugene Reuter. They discussed it and worked out an agreement which Majeskie posted the next day, on June 11, 1993.

Majeskie's memo said that employees may pick up compost, wood chips, lumber, etc., on Mondays, Wednesdays and Fridays after 3:15 p.m., and a loader may be used. The memo also stated that grass clippings, leaves and brush could be dropped off on Mondays, Wednesdays and Fridays after 3:15 p.m., and large amounts of brush or debris were not acceptable unless approved by the department head. Essentially, this memo re-established the past practice, something favored by Reuter and others.

Muth apparently was not pleased with that arrangement and called Reuter into his office the following Monday, where Muth told Reuter that the deal they made with Majeskie was off. Muth told Reuter he was changing the rules, and he also met with Majeskie and let him know that he was not pleased with Majeskie's memo that restored the past practice. On June 23, 1993, Muth issued a memo regarding the use of the dump. That directive stated that the City could not accept any material from properties located outside of the City, and employees who live in the City could use the dump only when the site is open to the public. However, the City would be happy to see materials leave the dump, and employees could pick up materials on Mondays, Wednesdays and Fridays between 3:30 and 4:00 p.m.

After the incident regarding the dump, Kaun was reassigned from mason work to tractor mowing.

Another incident involving Kaun and Majeskie occurred shortly before his discharge. Kaun testified that he was taking a mower into the dump to dump off a pail of trash when a mechanic came back to the dump with a wrecker and cut him off. The mechanic asked him what he was doing with a tractor back there, that he was not supposed to have it in the dump. Kaun jumped off the tractor and told the mechanic, "I thought you were my friend," and poked him in the shoulder. According to Kaun, the mechanic went to Majeskie's office and told Majeskie that Kaun hit him. Kaun also headed to the office, and found Majeskie just pulling out, so he pulled the tractor in front of him and said that he was sick of being harassed. Majeskie told him to get in his office, and Kaun got a Union representative, Dick Paul, to join them.

Kaun testified that he told Majeskie at this meeting that he felt like he was being harassed, that he thought Majeskie was out to get him. Majeskie told him that was nonsense, that he could not believe rumors. They shook hands, and Kaun went back out on the mower. He testified that about an hour later, Majeskie pulled up next to him and said, "Remember, I'm watching you," and drove off.

When Kaun was discharged, the Union filed a grievance -- actually two of them -- and the parties agreed to skip the steps of the grievance process and go directly to arbitration. Ray Putchinski, the Chief Steward, filed the initial grievance on July 9, 1993. Under the statement -- "(The contention - what did management do wrong?)(Article or Section of contract which was violated if any)" -- Putchinski wrote, "Article I, Management Rights, 1.01, There also may be a violation of Mr. Kaun's rights, because of his reportings of the City of Brookfield's Ethic Code Violations." Putchinski testified that he put this statement down because Kaun felt he was being discharged for questioning the City's ethics code whereby employees could not use machinery to load materials from the dump but other people had that favor. Putchinski also stated in the grievance that Kaun was discharged "under the pretense of dishonesty by falsifying his employment application," and asked that Kaun be made whole and "free of any further harassment."

Union President Dick Paul changed the grievance four days later, withdrawing the initial grievance and substituting another that simply said that Kaun was discharged, that Article 1, Section 1.01 was violated, and asked that Kaun be reinstated and made whole. Paul testified that he changed the wording of the grievance because his training in filing Union grievances has taught him that they are to be short and sweet. Paul stated that when he took the first grievance from Toby, he told Toby that he wanted to do some housekeeping, but he did not tell Toby that the Union would not pursue the issue of ethics. Toby testified that Paul came to him either with or without the new grievance and said

that the Union was not going to get into the ethics code violations and that they would be submitting a new grievance.

THE PARTIES' POSITIONS:

The City:

The City asserts that falsification of an employment application form constitutes proper cause for discharge. In this case, there was a statement at the end of the job application which made it clear to applicants that any false or misleading statements and/or omissions on the application form were grounds for termination. Falsification of criminal record information has been held by the Wisconsin Court of Appeals to constitute "misconduct" barring unemployment compensation benefits. The City notes that whether or not the falsification involved has any relationship to the job is not considered by either arbitrators or courts.

Arbitrators have found just and proper cause for a discharge even when the falsification is discovered years later, and in this case, the City discovered the falsification 19 months after Kaun filled out the job application and 15 months after he started working for the City.

The City contends that Kaun knowingly, deliberately and intentionally falsified his job application. It points out that he was not hurried or pressured, that he took the form home and had his wife fill it out for him. He asked both his wife and his father how to answer that question of whether he had been convicted of a crime and told them of his two misdemeanors. He wanted his job application to be perfect and look better, and a "no" answer would cause the City to look more favorably on his application. He admitted he made a conscious effort to check "no" to the pivotal question, and that he discussed the answer to this question at length with his wife and father. The City states that Kaun was well aware of his convictions, and that he worried about disclosing them and made a deliberate and conscious effort not to disclose his prior misdemeanor convictions on his job application. Therefore, he knowingly and intentionally falsified his application form.

The City argues that conviction of a misdemeanor is a serious matter and clearly not a minor violation. A crime is conduct prohibited by state law and punishable by fine or imprisonment or both. The difference between a felony and misdemeanor is that a crime punishable by imprisonment in the state prisons is a felony, every other crime is a misdemeanor. In 1980, Kaun was convicted of obstructing an officer, a Class A misdemeanor, the highest class of misdemeanor, and he could have been fined $10,000 and imprisoned for nine months. In 1985, Kaun was convicted of

possession of a controlled substance, cocaine, a Class C misdemeanor, and he could have been fined $500 and imprisoned for 30 days.

Both those convictions involve crimes which were serious matters, and they were not convictions of a "Traffic, game law or other minor violations." Minor means comparatively unimportant, not serious, petty. Petty implies contemptible insignificance and littleness, inferiority and small worth. While Kaun claimed he felt his two misdemeanors were minor violations, he has a warped and self-serving understanding of the definition of a minor violation. Kaun stated that he did not consider a fine of $10,000 or imprisonment for nine months for obstructing an officer a serious matter, or the theft of a car, or breaking into a house and taking stereo equipment and televisions, or robbing a 7-Eleven store at gunpoint, etc.

Although Kaun was concerned enough to ask his wife and father how to answer the critical question, he never asked anyone from the City how to answer that question. The application forms for other employers are not relevant, as the Waukesha County form only asks for information about felonies and the Elm Grove form specifically excludes misdemeanors. The Brookfield form asks for information on all crimes.

The City also argues that there is no basis for the Union's claim that the City waived its right to make a police background check where it was not made within one year of the authorization form signed by Kaun. The delay in obtaining the background check should not be material to this case, as it was an oversight. Also, there is no basis for the Union's claim that Kaun was discharged for reasons other than falsification of his job application form.

The Union:

The Union asserts that Kaun did not intentionally falsify his employment application when he answered "no" to the question at issue here. Kaun has had jobs of a similar nature with six other employers before coming to the City, and has made various job applications. This is the first time in his experience where misdemeanor and felony convictions were not differentiated. No other employer has shown any interest in misdemeanor convictions, and the Elm Grove application specifically excludes misdemeanors. The Grievant testified that he thought a misdemeanor was a minor violation, and that is why he checked the box "no."

The Union contends that Kaun's response on the employment application and his testimony at hearing was truthful. It notes that arbitrators have found that it is not uncommon for applicants to answer questions carelessly or loosely, and where the employer has not been damaged, particularly after a period of satisfactory

service by the employee, the circumstances fail to justify a discharge.

The Union cites definitions of misdemeanor, petty offense and felony from Black's Law Dictionary, 5th Edition. It notes that Toby conceded that Kaun volunteered the convictions when asked, and the City has not challenged any other representation made by Kaun. He is as qualified as he stated he was, and he truthfully reported everything the Employer needed to know in hiring him.

The City asked a question of opinion rather than a question of fact, according to the Union. What crime is minor or major? Kaun's conclusions do not automatically constitute falsification. It was the City's responsibility to interview the applicant or make the question specific to avoid misunderstanding. Moreover, the existence of misunderstanding or lack of mutual understanding of a question on the application does not mean that the applicant acted willfully or deliberately to deceive the Employer or that the matter involved a question material to the job. The Union states that authorities note that an intent to defraud must be shown, and the present consensus of arbitrators is that after some reasonable period of time, falsification does not act as an automatic cause for discharge.

The Union contends that assuming for purposes of argument that Kaun falsified his job application, discharge is not automatic. Hill and Sinicropi write that ten factors are taken into account, such as the nature of the fact falsified, the number of items concealed, whether disclosure would have precluded hiring, overall job performance, etc. Arbitrators are generally not inflexible but consider the circumstances.

The Union argues that conviction of a misdemeanor, obstructing an officer, as an 18-year-old, is not material to the laborer position in the Highway Department. Neither is the 11-year-old conviction for possession of cocaine. The City is not harmed or at risk by Kaun's continued employment. Kaun answered the job application truthfully and in accordance with his understanding of a misdemeanor as opposed to a felony. The question permitted the applicant leeway and discretion in answering what crimes are minor convictions. Kaun has accepted punishment, corrected himself, and should not be punished again. The City showed little concern at the time of hire regarding the criminal record. While the City does not admit to it, the record supports the Union's contention that Majeskie had strong motivation to terminate Kaun, because of a dispute involving the City dump.

The City's Reply:

The City replies that even if there were some temporary deterioration in the relationship between Kaun and Majeskie, that had nothing to do with the decision to discharge Kaun. The City

received information of the convictions by June 16, 1993, and Muth had not reversed Majeskie's memo regarding the use of the dump at that time.

The City further notes that the fact that other employers' application forms either excluded misdemeanors or asked only about felonies should have put Kaun on notice that Brookfield was seeking broader information on prior crime convictions. Kaun deliberately and intentionally answered "no" when he knew he had been convicted of two misdemeanors, an intentional and deliberate falsification of material facts.

The City finds cases cited by the Union distinguishable from the instant case. Cases also indicate that employees should have inquired further about information sought by employers and what facts need disclosure, and in most of the cases cited by the Union, no backpay was awarded although the discharge was reversed. Moreover, the City did not act in an arbitrary, capricious or discriminatory manner.

The Union's Reply:

The Union replies that the City apparently discharged Kaun because he was charged with a felony, even though he in fact paid fines of $9.00 and $175.00, which are petty compared to amounts of fines under traffic and game law violations. The Union states that the City is more impressed with the potential for more severe punishment than what the courts determined at the time. The Union believes the City is making so much out of this case because it wanted to discharge him for other reasons, and it seized its window of opportunity and orchestrated the discharge.

The Union states that the City excuses its role as a break down in the system or an oversight. However, Kaun was no longer an at-will employee. When Kaun applied at the City, he had a good job and was not desperate for employment. There is no reason to believe that he had to falsify an application to get a job. The Union maintains that the City discharged Kaun because of his outspoken demand for fairness.

The Union also objected to the City's submission of Exhibit A attached to its reply brief, as the Arbitrator had previously ruled that unemployment compensation decisions would not be considered in the grievance arbitration proceeding.

DISCUSSION:

Section 1.01 of the parties' labor contract gives management the right to discharge for proper cause. It is the City's burden to show that it had proper cause to discharge Kaun. The City's stated reason for the discharge is that Kaun falsified his job application. Thus, it is the City's burden to show that Kaun indeed falsified his job application. If the City were able to sustain this burden, falsification of a job application may be considered as proper cause for discharge. It is often a difficult burden for an employer to prove dishonesty, and so it should be, given the consequences -- destroying one's reputation for honesty as well as depriving one of a job.

The City asked job applicants:

> HAVE YOU EVER BEEN CONVICTED OF A CRIME OTHER THAN TRAFFIC, GAME LAW OR OTHER MINOR VIOLATIONS?

Kaun determined, after discussions with his wife and his father, that his prior convictions of misdemeanors could be considered to be "minor violations." Accordingly, he answered "no" to the question.

The City could have specified that it wanted applicants to disclose both misdemeanors and felonies. It was reasonable for Kaun to conclude that by the phrase "other minor violations," the City did not want some information disclosed, and it was further reasonable for him to conclude the misdemeanors could be considered minor violations. His father advised him that Black's Law Dictionary called misdemeanors "petty offenses." Kaun's interpretation is the reasonable understanding of a lay person's definition of the division of crime.

The City centers on the word "crime" as the trigger to disclose the information withheld here, while the Grievant centered on the words "minor violation" in determining not to disclose his prior misdemeanors. While the word "crime" encompasses both misdemeanors and felonies, the modifying part of this question limits the disclosure necessary. A job applicant need not be an expert in English or criminal law to fill out an application in a reasonably truthful manner, where some discretion is allowed by the question.

The City argues about the seriousness of Kaun's misdemeanors. Are job applicants supposed to distinguish between serious and minor violations of the law, where the law itself makes a distinction between felonies and misdemeanors? Does the City want serious misdemeanors disclosed but not minor misdemeanors? And what would those be? While the Grievant has a shocking lack of understanding of what conduct the law deems serious enough to be considered a felony, one only hopes that it is his own forgiving

nature based on his troubled youth, rather than the desensitization of a generation to crime (Hello, Violent America). At any rate, it is not clear what the City means by "other minor violations."

The City did not follow its own internal procedures for checking on job applicants. Why should the Grievant be made to pay the price now for the City's failure to make a police run of his records a year after he has worked for the City, has performed satisfactorily, and has a reasonable expectation of continued employment? Once the City discovered the information, and Kaun gave a reasonable explanation, why would the City not consider it sufficient and simply correct the record? The Union raises the suspicion that the City had

other reasons to discharge Kaun, and it may be so, but it is unnecessary to even reach that issue, where the City cannot prove dishonesty in the first place. There is no evidence on the record that Kaun has been dishonest in his dealings with the City in any respect, and there is no contention that his failure to disclose the prior misdemeanor convictions has harmed the City in any manner.

The City would have it that three people (Kaun, his wife, his father) conspired to hide from the City information which was readily available to the City in the first place, with or without any signed authorizations for release of information. That seems less likely than the likelihood that the three of them tried to make a rational interpretation of the City's application form question in determining whether or not disclosure of misdemeanors was necessary under that particular question.

Kaun was not likely to have intended to defraud the City, since he knew that a mere police run on a computer would have produced his record regarding former misdemeanors. Kaun readily volunteered the information regarding the misdemeanors when Toby met with him and asked him whether he had been convicted of any crime. Toby's question was not limited in its scope -- he asked Kaun directly if he had ever been convicted of <u>any</u> crime. Toby made no exclusions, as did the City's application form.

Both parties have made some mistakes. The Grievant could have inquired further of the City how to answer the question, knowing that the question left some discretion. The fact that he did not do so does not mean that he lied. The City should have checked the record before hiring, rather than after the employee performed satisfactorily for more than one year. There is no harm to the City in retaining the Grievant, while there is great harm to the Grievant in having been discharged for dishonesty.

Moreover, the City cannot have it both ways -- it cannot tell applicants in one instance that it does not want them to list minor violations of the law, but then be the sole party to determine what indeed is a "minor violation." There is nothing on the record that shows what the City considers to be a minor violation which needs no disclosure. 1/

1/ The Arbitrator notes that the commission reviewing the unemployment benefits award determined that the City's intent in excluding "minor violations" from the question meant to exclude "other minor violations" similar to traffic and game law violations. I disagree. This interpretation of the sentence substantially changes the meaning of it. The City could have said, other similar violations. At any rate, what are violations similar to traffic and game law violations? As noted before, it is not necessary to dissect a sentence in great detail or be an expert in English in order to answer it in a reasonably truthful manner.

Accordingly, based on the above discussion and on the record as a whole, I conclude that the City did not have proper cause to discharge Lance Kaun, and the normal and usual remedy of reinstatement with back pay will be ordered. 2/

AWARD

The grievance is sustained.

The City is ordered to immediately reinstate Lance Kaun to his former position or substantially equivalent position and to make him whole by paying him a sum of money, including all benefits, that he otherwise would have earned from the time of his termination to the present, less any amount of money he has earned elsewhere.

2/ The Union has asked for an unusual remedy by asking the Arbitrator to reinstate the Grievant of his job posting rights to the maintenance specialist position. This is the position Kaun posted for and triggered the review of his personnel file. He had not obtained the position when he was discharged. The normal and usual remedy of reinstatement to his former or equivalent position makes him whole in a manner sufficient to be an appropriate remedy.

For the benefit of the Grievant's future with the City, the Arbitrator wishes to note that she and many arbitrators hold to the notion that employees and employers are to keep their hands off each other, particularly in the heat of the moment. The record shows that on two occasions, Kaun poked a supervisor and another employee. Although the City chose not to discipline him, such conduct in the future may result in sustainable disciplinary action.

The Arbitrator will retain jurisdiction over this matter until May 31, 1994, solely for the purpose of resolving any disputes over the scope and the application of the remedy ordered.

Signed this 6th day of April, 1994, at Elkhorn, Wisconsin.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator