BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF SHEBOYGAN

and

**SHEBOYGAN CITY HALL EMPLOYEES,
LOCAL 1564, AFSCME, AFL-CIO**

Case 102
No. 58208
MA-10881

Appearances:

Davis & Kuelthau, S.C., Attorneys at Law, by **Ms. Mary S. Gerbig**, P.O. Box 1534, Green Bay, Wisconsin 54305-1534, appearing on behalf of the City of Sheboygan.

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of Sheboygan City Hall Employees, Local 1564, AFSCME, AFL-CIO.

ARBITRATION AWARD

The City of Sheboygan, hereinafter referred to as the City, and Sheboygan City Hall Employees, Local 1564, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the discipline and discharge of an employee. Hearing on the matter was held in Sheboygan, Wisconsin on May 31st, June 1st, 6th, 7th, 28th, 29th, and July 12th, 2000. A stenographic transcript of the proceedings was prepared and received by the arbitrator by September 13th, 2000. Post hearing arguments and reply briefs were received by the undersigned by January 12th, 2001. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUES

During the course of the hearing the parties agreed upon the following issues:

1. Did the City have just cause to discipline the grievant with an eleven (11) day suspension on February 4th, 1999 for actions committed on January 4 and 5, 1999?

2. If not, what is the appropriate remedy?

3. Did the City have just cause to discipline the grievant on June 15th, 1999 for actions committed on April 6th, 1999?.

4. If not, what is the appropriate remedy?

5. Did the City have just cause to issue a warning letter to the grievant on June 29, 1999?

6. If not, what is the appropriate remedy.

7. Did the City have just cause to discharge the grievant on July 2, 1999 for actions committed on June 30th, 1999?

8. If not, what is the appropriate remedy.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE IV

MANAGEMENT RIGHTS

Except to the extent expressly abridged by specific provisions of this Agreement, the City reserves and retains solely and exclusively all of its Common Law, statutory law, and inherent rights to manage its own affairs.

The Union recognizes the City's right to manage its affairs and direct its work force. Furthermore, the City has all the customary and usual rights, powers, functions, and authority of management, including but not limited to the right to decide the number and location of its facilities, work and services to be performed, amount of supervision necessary, methods, means, and number of personnel needed, the amount and quality of work, and the right to change existing methods, utilize temporary and part-time employees, or purchase the services of others.

It is further recognized that the responsibilities of the management of the City for the selection and direction of its work force including the right to hire, suspend, or discharge for cause, assign, promote, or transfer, to determine the amount of overtime to be worked, to relieve employees from duty because of lack of work or other reasons is vested exclusively in the City. The Union recognizes the exclusive right of the City to establish reasonable rules and regulations.

It is understood by the parties that every incidental duty connected with a job is not always described in the job description. Nevertheless, it is intended that the employees shall perform all duties of their job.

The Union pledges cooperation in accomplishing the above.

. . .

ARTICLE XII
OVERTIME

. . .

Section 2. Compensatory Time – Plus Hours. The first sixty (60) hours (converted to a dollar amount) of overtime worked in each calendar year shall be accumulated as plus hours unless the employee notifies the Payroll Department in writing by November 1 that he/she does not elect to accumulate said plus hours for the succeeding year. The employee may request said sixty (60) hours off in accordance with the following provisions:

(a) All requests for plus hours usage must be approved by the employee's supervisor and must be made forty-eight (48) hours in advance of the day wanted off. No plus hour usage will be granted during any period when in the judgment of the employee's supervisor, the employee's services are needed.

(b) Said accumulated plus hours not used shall be paid out on the first pay day in November of each year. Compensatory time for the following year shall start accumulating immediately after the November payout.

PERTINENT CIVIL SERVICE RULES

SECTION XIX. STANDARDS OF CONDUCT

A. Purpose.

1. Probationary employes are employes at will and are not subject to progressive discipline. As such, they may be terminated without cause at the discretiion of the appointing authority and without recourse to the Civil Service Commission.

2. The rules and regulations set forth herein are established to inform employes who have successfully completed their probation period.of the City's standards of conduct, to promote safe employe work practices and to improve the public service. The City's philosophy is that discipline should be corrective insofar as possible, not punitive. Discipline, when necessary, is intended to benefit the employe and the City.

B. Procedures.

Discipline should be administered by the employe's supervisor when it becomes necessary. Depending on the seriousness, magnitude, or repetition of rule violations, an employe may be subject to any of the following types of discipline. Disciplinary procedures and hearings will comply with applicable labor agreements or Civil Service Rules.

Employe Counseling/Verbal Warning. The supervisor talks to an employe following a minor offense in an effort to eliminate possible misunderstandings and to explain what constitutes proper conduct.

Written Warning. The employe is issued a written notice of disciplinary action following misconduct.

Suspension. Disciplinary time off without pay.

Final Written Warning. The employe is issued a final notice of predischarge disciplinary action which may include suspension following serious misconduct or accumulation of minor offenses.

Discharge. The employe is terminated as a result of serious misconduct or after a Final Written Warning has been given.

Grounds for Discipline.

Violations of City rules and regulations shall be deemed grounds for disciplinary action. Examples of just causes for dismissal, suspension and warnings are grouped below although discipline may be administered for other just causes.

GROUP I RULES.

The following example is an illustration of progressive discipline for Group I offenses; however progressive discipline may be changed depending on the seriousness or repetition of rule violations:

* Employe counseling/verbal warning.

* Written warning

* Written warning and suspension

* Final written warning

* Discipline up to and including discharge.

1. Violation of safety rules and/or procedures or failure to report an accident or failure to report any serious violation of rules or laws.

2. Unexcused Absence.

3. Tardiness or failure to begin work at designated time.

4. Inefficient or careless performance of duties, failure to maintain reasonable job standards or perform required duties.

5. Failure to observe work schedules including starting, quitting, and break times.

6. Leaving the assigned work area without authority while on duty or loitering.

7. Interfering with another employe's work performance.

8. Reckless or careless use of equipment or damage to City and/or private property.

9. Engaging in personal work or outside business activities on City time, or unauthorized use of City property or privileged information for personal work or outside business activities.

10. Offensive conduct or language toward the public, City officials, or other City employes during working hours and official City meetings.

11. Gambling or unauthorized soliciting of any kind for any purpose during work hours or on City work premises.

12. Soliciting or receiving anything of value from any person for services rendered or in the hopes or expectation of receiving a favor or special treatment in the course of City employment.

13. Unauthorized posting of any material or removal or altering of any official material on City work premises.

14. Failure to report for overtime work without a valid reason after being scheduled to work according to the overtime policy.

15. Breach of statutory confidential materials: example, divulging confidential matters to an unauthorized person.

16. Harassment on the basis of sex, national origin, color, age, handicap, religion, or sexual preference.

II. GROUP II RULES

An employe will be subject to discipline up to and including discharge for the following Group II offenses; specific warnings need not precede discharge.

1. Consumption of alcoholic beverages or being under the influence of intoxicants on City work premises.

2. Use, possession, or sale of illegal controlled substances or illegal drugs during work hours or on City premises or in City vehicles.

3. Unauthorized possession or use of a weapon or explosives during work hours or on City work premises or in City vehicles.

4. Falsification of records, including timecards, or making false claims for personal gain, including misuse of paid sick leave, or falsifying testimony.

5. Theft or unauthorized possession of property belonging to the City or to another employe or the commission of any other crime while on duty.

6. Absence from work for three consecutive workdays without notifying the department unless it was impossible for the employe to do so.

7. Instigating or participating in any walkout, slowdown, strike or refusal to return to work at the scheduled time, or other concerted curtailment or restriction of production or interference with City work in or about the City's work stations.

8. Deliberate misconduct including horseplay or fighting which results in injury to any person or damage to equipment or property or sleeping on duty.

9. Insubordination or failure to follow any lawful order, directive, regulation, or law.

10. Threatening, intimidating, coercing or harassing employes, supervision, or the public during working hours and official City meeting.

D. Removal of Disciplinary Warnings. The clearing and removal of disciplinary records shall be as follows and consistent with the terms of any labor agreement.

1. Documented verbal warnings and written warnings not involving a suspension except Final Written Warnings shall be removed from the file and destroyed after two years of a clean record.

E. Demotion.

The City may use demotion when disciplinary action would not prove appropriate and/or effective in enabling an employe to perform satisfactorily in his/her position. Demotion may be made upon the recommendation of the Department Head and approval of the Personnel Director consistent with any labor agreements.

F. General Information.

1. Sexual Harassment Complaint Procedure.

Victims of sexual harassment may file an informal or formal complaint pursuant to Resolution No. 461-84-85. For further information, contact the Personnel Department.

2. Outside Employment.

Outside employment shall not conflict with the interest of the City. Employes of the City may not engage in outside job activities while on duty nor may City property be used for any but approved City functions.

3. Reporting Absences.

When you are unable to come to work as scheduled, it is essential that you promptly report your absence to your immediate supervisor prior to the start of your shift or schedule. Report the reason for your absence and keep your supervisor advised if absences must continue.

4. Address and Phone Numbers.

All employes must immediately report any change of address and/or phone number to the Personnel Department and their immediate supervisor.

5. Supervisor's Role.

All supervisors should refer to the City's Supervisor Manual for Personnel Management before administering discipline. All actions which may result in discharge must be authorized by the Personnel Director and/or City Attorney. Supervisors are responsible for maintaining standards of conduct among their employes so that the work force remains effective and efficient. Most employes know that there are basic standards of conduct in every organization and they expect the supervisor to enforce them.

6. Distribution of Rules.

A copy of this section shall be given to each employe and shall be posted for thirty days by each department head in such a manner as it will bring to the attention of all his/her employes.

BACKGROUND

The City has employed Eilene Ribbens Rhode, hereinafter referred to as the grievant, as a Public Works Inspector in the City's Department of Public Works, hereinafter referred to as the Department, for approximately nine years. After she was hired, and on various occasions thereafter, the grievant has approached the City with concerns that she believed she was underpaid in comparison with other City employees. During December 1998 the grievant engaged the Union President Mike Keppel and Union Vice-President Tom Horness in a loud verbal argument about seeking her a pay raise in the current collective bargaining negotiations. The grievant's immediate supervisor, Ryan Sazama, intervened informing the employees they should not talk in that manner in the office and that Union business should be kept out of the office. Sazama specifically informed the grievant she should not shout, scream or disrupt the office in the manner that she was conducting herself.

During the latter part of December, 1998, the grievant took vacation and her first day back was January 4th, 1999. On that day she made comments to Horness about a puppy mill in the Sheboygan area. The grievant is an animal rights activist. On various occasions on January 4th and 5th, 1999 co-workers observed the grievant engage in various activities concerning the puppy mill. Co-workers observed a letter on her word processor and overheard her make phone calls to the media and a State of Wisconsin legislator. The grievant also left for several hours on January 5th, 1999, and was observed at the Sheboygan County Sheriff's Department. Sazama was informed of the matter and he raised it with City Engineer Thomas Holton. They brought the matter to the attention of Director of Human Resources and Labor Relations John Becker. Becker, Sazama and Holton investigated the matter including interviewing several employees. Becker also had City Police Officer Robert Wojs investigate how much time the grievant spent at the County Sheriff's Department on January 5th, 1999 on her puppy mill complaint. Wojs concluded his report on January 20th, 1999 and thereafter it was submitted to Becker. Wojs concluded the grievant spent over two hours at the Sheriff's Department. On February 3rd, 1999 Becker, Sazama and Holton met with the grievant to obtain her version of her work production on January 4th and 5th, 1999. The grievant acknowledged she had spent some time on her puppy mill complaint although she did not agree it was a significant amount of time. She informed them she had worked over her lunch hour in December, her last work day prior to leaving on vacation, and kept an informal compensatory time and she used this time when she went to the Sheriff's department. The grievant also stated she had left the office to check some north side sidewalk crossings as part of a resurfacing program.

Becker, Sazama and Holton concluded that the grievant falsified her time cards, and, because there had been a snow storm of over a foot of snow on January 2 and 3, 1999, they concluded the grievant could not of possibly been able to check sidewalk crossings on January 5th, 1999. They then determined to issue the grievant an immediate suspension of eleven (11) days. The grievant was given the following letter of suspension and work rules to govern her activities upon her return to work:

Re: Suspension and remedial Action

Dear Ms. Ribbens-Rohde:

This letter is in reference to the activities you reported on your time cards and your actual activities on January 4, 1999, and January 5, 1999, and your personal use of City work time and equipment including the telephone. You reported specific projects that you were working on in the field and in the office on the above dates when, in fact, you were at other locations other than reported, conducting personal business. Specifically, you were at the Sheboygan County Sheriff's Office and the County Court House conducting personal business for a period of two (2) hours on January 5, 1999, during a time you reported that you were working on City projects. Additionally, you were witnessed, for a great deal of the time that you report working in the office, making personal telephone calls and writing personal letters regarding some concerns that you had about an alleged puppy mill.

I discussed the above dates with you and the City's belief that you were conducting personal business on City time. You denied having taken any personal time that could not be accounted for by your self-authorized time-shifting from occasions in which you claim to have worked more time than you reported. I also discussed with you the personal long-distance phone calls that you made at, not only at the expense of the City, but at times that you should have been working. You claimed not to know that phone calls to Plymouth, WI were long distance, and that calling neighbors was just like calling home which you believed to be ok.

Your conduct, as noted above, violates various City of Sheboygan rules and policies, including, but not limited to: the City of Sheboygan Civil Service Rules, Section XIX, Standards of Conduct, Subsections C(I)(4), C(I)(5), C(I)(6), C(I)(9), and C(II)(4).

Considering the seriousness of your conduct in using City time for personal business, falsifying records to conceal that use of personal time, and having submitted time cards for payment that indicate eight hours of compensable time worked, for which you were paid, and having had an opportunity to be heard, it is my decision that based on all of the evidence gathered, **you are hereby suspended without pay for a period of eleven (11) work days effective February 5, 1999.** You are to immediately turn in your Cellular Telephone, your radio, and your keys to the premises. During the term of your suspension you are not to be on City premises, and are to have no contact with any City employee outside of the Human Resources office.

Upon your return from your period of suspension you will be required to abide by the following corrective actions:

1. Your duties shall be confined to the office (non-field) until further notice.

2. Once deemed eligible to handle field assignments, and until further notice, said assignments shall, at all times, be conducted in the presence of another employee of the department as assigned by supervision.

3. You are to conform to all City of Sheboygan and Department of Public Works office rules and policies.

4. Breaks must be authorized in advance by supervision and shall not exceed one in any four hour period.

5. You are to conduct no personal business on City time.

6. Personal use of the telephone shall be kept to a de minimis level.

7. In accordance with City policy, there is to be no further personal long distance calls made that are not reimbursed to the City on a monthly basis.

8. Comply with any further corrective action delineated upon your return from your suspension.

Your progress in attaining reliability and trustworthiness will be reviewed on a monthly basis until such time as confidence in you is restored in those aspects.

It is necessary to take the above remedial measures in an attempt to help you address your deficiencies in honesty, reliability and trustworthiness, and become a reliable City employee. Your cooperation is necessary and expected in achieving these goals.

Upon her return to work the grievant filed the instant grievance. The City initially took the stance the grievance was untimely and refused to process the matter. The Union filed a Prohibited Practice Complaint with the Wisconsin Employment Relations Commission. Thereafter the mattered was voluntarily resolved and the matter was processed to arbitration. The City did not raise a timeliness issue at the hearing.

The grievant also upon her return to work took issue with the work rules the City placed upon her. On several occasions the grievant had discussions and arguments with Sazama about their fairness and continuation. The grievant continued to complain about the unreasonableness of the imposed work rules up until her termination on July 2, 1999.

On June 6th, 1999, the grievant received a three (3) day disciplinary suspension for allegedly giving the "finger" to Human Resources Director Becker on April 6, 1999. Becker and the grievant both park in the same parking lot, Becker in space 1 and the grievant in space 14. The parking lot is a north/south rectangular shape with an exit to the west at the middle of the rectangle. At the conclusion of the work day both Becker and the grievant got in their vehicle's and approached the exit lane at the same time. Two vehicles were ahead of them and Becker motioned with his hand for the grievant to proceed ahead of him. Becker alleged the grievant responded by giving him the "finger". Plumbing Inspector Larry Hilbelink was sitting in his vehicle and observed the incident. On April 12th, 1999 Becker sent the following to City Attorney Steve McLean:

To: Stephen G. McLean, City Attorney

From: John C. Becker, Director of Human Resources

Subject: Harassing and hostile behavior of Eilene Ribbens-Rohde

Date: April 12, 1999

On Tuesday, April 6, 1999 at approximately 5:03 p.m., I was exiting the employee parking lot in which my parking is assigned. Two cars were cued-up to enter traffic onto ninth street in front of my auto. Eilene Ribbens-Rohde and I were in equal position to be the third car in the cue. I politely gestured for Ribbens-Rohde to proceed ahead of me. The gesture was made with my left hand, palm turned up, all fingers and thumb together, with a slight horizontal motion from left to right indicating that she could proceed. Almost immediately Ribbens-Rohde raised her right hand, arm fully extended, and made an obscene gesture, extending her middle finger vertically with her other fingers curled back. The action of this gesture is commonly known as "giving someone the bird," "the finger," "flipping me off," etc. This action on the part of Ribbens-Rohde was witnessed by Larry Hilbelink, Plumbing Inspector, and possibly other employees who were exiting the parking lot at that time.

I have no doubt in my mind that Ribbens-Rohde knew it was me to whom she was gesturing. Recently I have had many dealings with Ribbens-Rohde regarding disciplinary matters. This behavior violates, in my opinion, the City's Civil Service Rules – Standards of Conduct. The City's Policy on Sexual Harassment and other forms of Harassment, and the sixth (6th) minimum qualification on the Public Works Inspector Job description which requires the "Ability to create and maintain effective public and employe relationships."

> Prior to this specific incident, Ribbens-Rohde has glared at me on several occasions. She has also made sarcastic comments and has refused to respond to common cordialities such as saying "hello" when I have seen her, as I do with all employees. Similar outward hostility has been displayed to her superiors as well as her co-workers. This may possibly amount to retaliation against those people who have reported or assisted in the investigation of her misconduct.

Thereafter McLean asked Hilbelink for a statement and on April 15th, 1999 Hilbelink gave the following written statement:

> On April 6, 1999, at 5:05 p.m., I was leaving the parking lot south of DPW. I had backed into my parking space so my truck was facing west. As Eilene Rohde drove past the front of my truck she made an obscene gesture at John Becker who was waiting in his car to leave the parking lot.

On May 28th, 1999, McLean sent the following to Risk Administration Officer Mike Hotz:

> Dear Mr. Hotz:
>
> Shortly after providing me with the enclosed attached memo, dated April 12, 1999, Mr. Becker asked that I investigate the incident, which I did on April 14 and 15, 1999.
>
> After investigating the matter, I made the following findings:
>
> 1. That on Tuesday, April 6, 1999, at approximately 5:03 p.m., Director of Human Resources John C. Becker was exiting the employee parking lot behind the Public Works/Engineering office in his private auto.
>
> 2. That two cars were queued-up to enter traffic onto Ninth Street in front of Mr. Becker's auto. That Eilene Ribbens Rohde was in her private auto and in equal position with Mr. Becker's vehicle to be the third car in line.
>
> 3. That Mr. Becker politely gestured to Ms. Ribbens Rohde to proceed ahead of him.
>
> 4. That almost immediately, Ms. Ribbens Rohde raised her right hand, arm fully extended, and made an obscene gesture, extending her middle finger vertically with her other fingers curled back, commonly referred to as "giving the finger."

5. This gesture by Ms. Ribbens Rohde was also clearly and directly observed by Mr. Larry Hilbelink, City Plumbing Inspector, who was also in the process of exiting the parking lot at the time. Mr. Hilbelink has no doubt as to the nature of the gesture having been "the finger."

6. That Ms. Ribbens Rohde's statement to this investigator that she merely flashed the "peace sign," being an upright "V" with the index and middle fingers extended, with the back of her hand facing outward away from her is not credible in light of the clear independent observation by both Mr. Becker and Mr. Hilbelink.

7. That Item I.10. of the Group I Civil Service Rules lists:

> "Offensive conduct or language toward the public, City officials or other City employees during working hours and official City meetings."

8. That the listed Civil Service Rules are provided as examples of just causes for discipline, although discipline may be administered for other just causes.

9. That the obscene gesture occurred on the City employee parking lot at the immediate conclusion of the work day, was directed at Mr. Becker, and was obviously business related as Mr. Becker, as Director of Human Resources, had had many recent dealings with Ms. Ribbens Rohde regarding disciplinary matters.

10. That the City's Code of Ethics, Section 2-261, et. Seq., Sheboygan Municipal Code, Code provides in relevant part that the conduct of public employees in both their official and private affairs should be above reproach so as to foster respect for all government.

Determination:

That Ms. Ribbens-Rohde violated the Group I Civil Service Standards of Conduct and the City's Ethics Code in making a blatantly obscene gesture toward a City department head on City premises as employees were exiting at the end of the work day and that Ms. Ribbens Rohde denied making this gesture in order to avoid the consequences of her wrongful conduct.

McLean did not seek to find any other employees who may have observed the incident. During direct examination McLean acknowledged there is no specific work rule governing off duty conduct that the grievant may have violated. On June 15th, 1999 Turner sent the following suspension letter to the grievant:

Dear Ms. Rohde:

The City of Sheboygan has conducted a formal investigation regarding your conduct on Tuesday, April 6, 1999, directed toward former Director of Human Resources John C. Becker. In the course of the investigation, witnesses were interviewed. You were also afforded an opportunity to present a statement to the investigator regarding your position with respect to the alleged conduct.

The investigation discloses that on April 6, 1999, at approximately 5:03 p.m. while waiting to exit the City's parking lot in your automobile, you made an obscene gesture toward Mr. Becker, commonly described as "giving the finger."

Your crude, offensive, and highly unprofessional conduct contravened Item I.10. of the Group I Civil Service Rules, as well as Section 2-261 of the City Code of Ethics. This is unacceptable on the part of any employee of the municipal government of the City of Sheboygan. The seriousness of your misconduct was exacerbated through being directed toward a City official who exercises management authority over you.

For your conduct on April 6, 1999, you are hereby suspended without compensation for three days. The suspension will occur on June 16, 17, 18, 1999.

You are further advised and warned that any future conduct of an identical or related character will result in further and more severe disciplinary action, to include discharge from your employment. Govern your actions accordingly.

As noted above, commencing with her return to work from her eleven (11) day suspension the grievant challenged the reasonableness of the City's imposed work rules. On June 10th, 1999 during a discussion with Sazama, the grievant informed him that she was no longer going to tell a supervisor when she was going to take a break because no one was ever in the office to tell. Thereafter the grievant received the following written warning:

Dear Ms. Ribbens-Rohde:

According to the letter sent to you on February 4, 1999, from the Human Resources Office, you were required to abide by a set of corrective actions (copy of letter is attached).

Specifically, item #4 in the letter states: "Breaks must be authorized in advance by supervision and shall not exceed one in any four-hour period." No one has told you anything to the contrary. On June 10, 1999, at 3:41 p.m., you told your

> supervisor Ryan Sazama, that you were not going to tell your supervisors when you were taking a break because no one was ever in the office to ask to take a break. This is unacceptable. You must continue to have your breaks authorized by supervision in advance. When none of your four supervisors, i.e., Ryan Sazama, Tom Holtan, David Biebel, or Lloyd Turner is in the office, you shall tell the engineering secretary that you are taking a break.
>
> For your conduct, you are hereby formally warned. You are further advised and warned that any future conduct of this nature or related character will result in further and more severe disciplinary action, up to and including discharge from your employment. Govern your actions accordingly.

There is no evidence that after June 10th, 1999 that the grievant took a break without seeking permission first.

On June 30th, 1999 the grievant, at approximately 8:00 a.m., confronted Sazama about the warning letter and the unreasonableness of the work rules. The grievant became loud and disruptive. Sazama told the grievant she should return to her office and they would discuss the matter there. Sazama testified at the hearing that in the grievant's office she continued to be loud and disruptive, to the point Sazama thought, she was attempting to provoke him into hitting her. Sazama informed the grievant she was to follow the work rules until further notice. He turned to leave and as he was walking out of the grievant's office, the grievant, speaking in a low tone to herself muttered, … "You're such an asshole." Realizing that Sazama had heard her comment the grievant went to his office and apologized. Thereafter the grievant received the following termination letter:

> Dear Ms. Ribbens-Rohde:
>
> On June 30, 1999, at approximately 8:15 a.m. you appeared at the office of your immediate supervisor, Assistant City Engineer, Ryan Sazama, to present a complaint regarding a formal disciplinary warning from the undersigned, which you received regarding a previous work directive. You raised your voice in a confrontational manner, disrupting the work environment of other employees present. Because of this, Mr. Sazama asked that you accompany him to your office. You did this and then resumed your comments in the same loud, confrontational manner, challenging a series of work directives, previously issued to you. As you made these comments, you stood only inches away from Mr. Sazama. After listening, Mr. Sazama advised you that the matters which you raised had been reviewed with you at length on prior occasions, and that he did not wish to discuss the matter further. You were instructed to continue to comply with the directives. Mr. Sazama then turned and walked out of your office. As he did this, you stated: "You are such an asshole."

> Approximately fifteen minutes later, you again appeared at the office of Mr. Sazama and stated that you wished to apologize. You then resumed discussing your complaint, using the same loud and confrontational approach, further disrupting the department. Mr. Sazama again listened. He then stated that he had heard enough and repeatedly directed you to go back to work. You then complied.
>
> You have been previously disciplined for insubordinate conduct, as well as disrespectful conduct directed toward a management official of the City. You were clearly advised that conduct of this type is unacceptable on the part of any employee of the City. You nonetheless repeated this conduct, demonstrating to the City that you have learned little, if anything, through prior progressive disciplinary action. It is also evident that you place little value upon your employment with the City.
>
> For your conduct on June 30, 1999, viewed in light of your disciplinary record as a whole, you are hereby discharged from employment, effective immediately.

Thereafter the matters were processed to arbitration and per the parties' agreement consolidated into the one case before the undersigned.

City's Position

The City contends it had just cause to suspend the grievant for misuse of city work time and falsification of time cards on January 4th and 5th, 1999. The City points out that the January misconduct was preceded by the grievant's disruptive behavior concerning pay discussions with Keppel and Horness. The City further points out that on or about January 3rd, 1999 and on other occasions the grievant discussed with Sazama the possibility of getting a pay raise. The City asserts the grievant used sixteen (16) hours of work time on January 4th and 5th, 1999 to deal with her puppy mill complaint. The City argues that when the matter was brought to management's attention they investigated the matter. The City points out that Horness advised the grievant she was under investigation and not to falsify her time cards for work performed on January 4th and 5th, 1999. The City asserts the record demonstrates the grievant spent the majority of her time over the two (2) days on personal matters. The City points out even the grievant acknowledged she spent an hour and a half on January 5th, 1999 on personal business and the City stresses her time card does not reflect this time. The City contends it spent a significant amount of time investigating the matter and on February 3rd, 1999 met with the grievant and gave her an opportunity to explain her actions. The City points out she acknowledged making personal phone calls, printing out letters, faxing materials and going to the Sheriff's Department. The City acknowledges employees spend a minor amount of time on personal business. However, the City argues the time spent by the grievant was a significant part of her total workday.

The City contends the grievant violated City Civil Service Rules and Department Office

Policy/Procedures. The City points out any compensatory time claimed by the grievant was not documented nor was it approved by supervision. The City concludes that based upon the investigation the misconduct merited an eleven (11) day suspension.

The City also contends not only did the grievant spend hours of her time writing personal letters, making personal phone calls, and lobbing employees on a personal matter, the grievant abandoned her job and undertook a personal crusade. The City asserts the grievant can not make any argument to justify her actions. The City argues the grievant's contention she used compensatory time is not acceptable as it fails to comply with the usage requirements of the collective bargaining agreement. The City asserts the grievant attempted to deceive her supervisors as to her whereabouts. The City contends her actions violated the City's Civil Service Rules, that falsification of time cards is a form of theft, and that her actions destroyed any trust the City could place in her. The City also contends the work rules placed upon her were reasonable and that the majority of these rules are to be followed by all employees.

The City also points out that Becker met with the grievant's bargaining representative Helen Isferding and promptly relaxed the work restriction concerning being on the City's premises and having contact with other employees. The City points out that Horness also informed the grievant about the relaxing of the directive.

The City concludes it had just cause to discipline the grievant for eleven (11) days for her conduct on January 4th and 5th, 1999.

The City also contends it had just cause to suspend the grievant for three (3) workdays for displaying an obscene gesture to a City management official on April 6th, 1999. The City argues the grievant's attitude in the workplace was poor from December 1998 to June of 1999. The City points out she had a confrontation with Holtan when she returned to work from her eleven (11) day suspension about the configuration of her office. The City asserts the grievant threatened other employees with attorneys and would frequently say, "My attorney is going to love this." The City argues that the grievant knew on April 6th, 1999 that Becker was a management official. That when Becker waived for her to proceed first she responded by raising her right hand into plain view and extended the middle finger up with the back of her hand facing him. The City points out this was observed by Plumbing Inspector Larry Hilbelink. Hilbelink immediately pulled his vehicle up to Becker and asked Becker, "Did I just see what I think I saw?" The City points out that Hilbelink did not have any reason to lie. The City asserts McLean did a timely and thorough investigation into the grievant's conduct. The City contends that McLean's reasonably concluded that the grievant's statement was not credible that she flashed the peace sign not the finger. The City also contends its Civil Service Work Rules and arbitral precedent were applicable to the incident. The City concludes it had just cause to give the grievant a three (3) day suspension.

The City also asserts it had just cause to issue the June 29th, 1999 written warning to the grievant. The City points out Horness testified he did not believe the grievant was accurately reporting her breaks. The City also argues that the grievant failed to demonstrate she was trustworthy and that it reviewed her compliance with the February 4th, 1999 work rules on more than a once a month basis. The City points out that Horness told Sazama a member of the Union was violating the contract's break provision. Thereafter, Sazama verbally warned the grievant about taking too many breaks and he informed her if no supervisor was in the office she was to tell the office secretary she was taking her break. The City points out that on June 10th, 1999 the grievant informed Sazama she would no longer adhere to the work rule to verbally inform her supervisor of an intent to take a break. The City concludes this is a refusal to comply with a work directive. The City argues the grievant should have worked and grieved the rule. The City concludes the warning letter was reasonable in light of the grievant's insubordinate conduct.

The City contends it had just cause to terminate the grievant based upon her conduct in directing profanity towards her supervisor on June 30th, 1999 and in light of her entire disciplinary record. The City points out that the grievant confronted Sazama in his office in an hour-long tirade about her warning letter. Concerned that the grievant was disrupting other employees Sazama calmly asked the grievant to discuss the matter privately in her office. The City avers that the grievant angrily stepped forward to Sazama at one point so that their faces were only inches apart. Sazama quickly backed away and directed the grievant to comply with the work rules. At this point he turned to leave the grievant's office and as he was going through the doorway he heard the grievant say… "You're such an asshole." Although the grievant went to Sazma's office and immediately apologized, the City asserts her actions were abusive towards her supervisor. The grievant was complaining to her supervisor about a formal work directive. The City concludes that in light of the grievant's disciplinary record involving theft of time, falsification of time cards, an obscene gesture toward a manager, refusal to comply with work directives, and a general pattern of confrontational disruptive behavior, the City had just cause to terminate the grievant's employment. The City also asserts there are no facts to support any assertion of Union animus or retribution for filing a sexual harassment complaint or any other complaint.

Union's Position

The Union stresses that the grievant has been discipline free since 1993. The Union argues that there was an undercurrent of matters that preceded the events leading to disciplining the grievant. In the Fall of 1998 she commenced seeking a pay raise because she believed she was underpaid. The Union asserts that as a result of the requests the City sabotaged her relationship with fellow employees to bolster hostile testimony from them. The Union argues that during the grievant's eleven (11) day suspension the Department had their first staff meeting in six (6) to eight (8) months and informed employees the grievant was keeping track of employees conduct. Becker sent the following letter to the grievant:

During your due process hearing on February 3, 1999, you made allegations that the matters for which you were investigated were also matters some

or all of your co-workers were involved in. You indicated that you were keeping records at your home with regard to misconduct on the part of your co-workers.

YOU ARE HEREBY ORDERED: to provide a copy of any notes or other proof that substantiates your claims that your co-workers are behaving in violation of City rules or policies with respect to conducting personal business on City time, or any other misconduct, to the Director of Human Resources and Labor Relations not later than Monday, February 22, 1999, or withdraw the allegations if they were false. Failure to provide your notes and other substantiating materials on or before the above date shall subject you to disciplinary action up to and including discharge. You are further ordered to cease and desist making notations or keeping records of employees behaviors on City time.

The Union contends these actions tainted fellow employees to negatively view the grievant's past and future actions. When the grievant returned to work she found her work area had been rearranged, no one greeted her and no one spoke to her. The Union points out it had to file a prohibited practice complaint because the City would not let the grievant file a grievance. After her eleven (11) day suspension the grievant in effect worked in a fish bowl doing grunt work. The Union argues this all began because the grievant asked for a pay raise.

The Union also argues that poor supervision led to a dysfunctional Department. The Union points out Sazama would turn on his heels and just walk away form the grievant. Sazama never discussed the grievant's loudness with her nor did he ever put anything about being loud in the grievant's personnel file. Sazama was the grievant's supervisor for three years but didn't know if she was assertive and did not know all the job duties the grievant was responsible for. The Union points out that Sazama never disciplined the grievant for yelling or screaming. The Union also points out Holton gets a record of phone calls monthly but during this matter questioned the grievant about phone calls that occurred over five (5) years ago. The Union points out that the day the grievant asked that Turner be investigated for harassment was right before the finger incident and that she asked that Becker recuse himself from the investigation, which Becker did not do.

The Union acknowledges that upon the grievant's return to the work on January 4th and 5th, 1999 the grievant engaged in personal business. The Grievant made some personal phone calls, printed out two letters she had typed at home and brought to work to print because her printed had broken, and she stopped at the Sheriff's office. The Union points out that it was not until later in the week that she learned she may be in some trouble. The Union points out that doing personal business at the office was tolerated, yet the grievant was the only employee

punished. The Union points out the City acknowledged it was not enforcing the number of breaks employees took; yet the grievant was the only employee punished. The Union points out the City allowed employees to use office equipment for personal use, yet the grievant was the only one punished.

The Union also asserts Becker did not do a fair investigation. The Union argues Becker did not compare the grievant's phone usage with other employees. The Union points out Becker never investigated to see if the grievant did extra work on December 18th, 1998. The Union points out it took a month to investigate the matter without approaching the grievant. The Union argues it is very difficult to remember what one did one (1) month ago. The Union also asserts the grievant was not given sufficient time to prepare a response to the City's allegations.

The Union again points out the grievant had not been disciplined since 1993. The Union asserts the grievant at most is guilty of carelessness for not filing her time card out properly. The Union also asserts the grievant had a degree of flexibility in meeting with contractors and all she did was exercise that flexibility. The Union also points out the City had no idea of how long the grievant may have worked on the letters and thus failed to meet its burden of proof except for the two hours the grievant was at the Sheriff's office.

The Union also points out other smokers took more than two (2) breaks and none were penalized or required to seek approval prior to taking breaks. The Union avers that the penalty imposed by the City was not corrective but punitive and demeaning. The Union also argues the rules imposed upon the grievant were penalties that went on for months with no measurable criteria for review.

The Union also points out the grievant was not disciplined for the 'finger' incident until two (2) months after the incident. The Union points out McLean received Becker's statement on April 12th, 1999 and Hilbelink's on April 15th, 1999. McLean made a determination on the matter on May 28th, 1999. The Union argues both Becker and Hilbelink give conflicting testimony as to the position of the vehicles and how they viewed the grievant's hand. The Union argues the City bases the discipline on a rule governing on duty behavior and the incident was off duty. The Union also argues a timely thorough investigation was not done pointing out the City waited weeks until it talked to the grievant.

The Union contends the City did not have just cause to issue the grievant a written reprimand on June 29th, 1999. The Union avers that the grievant continuously attempted to talk to Sazama about her breaks but she would only get in response that she had been observed taking more than one break in the morning and receive another copy of the February 4th, 1999 work rules. The Union asserts the preauthorization of breaks only applied to the grievant and was unreasonable work rule. The Union also asserts the City never investigated to see if the grievant was taking unauthorized breaks.

The Union acknowledges that the grievant and Sazama had just completed a meeting whereat he informed her that she was to do as the City told her what to do until she was told otherwise and she was to get back to her plumbing permits. At this point Sazama turned around, opened the door and as Sazama was walking out the doorway she muttered under her breath, "You're such an asshole." The Union points out that the statement the grievant made was made in

frustration and that the grievant immediately apologized for it. Further, the Union points out the letter of discharge makes no reference to yelling and screaming. The Union also points out that the grievant was telling Sazama she was going to file a grievance over the written reprimand and that raised and loud voices are not unusual when grievances are filed. The Union also points out that managers and other employees have used profane words in the office and no one has ever been disciplined for it. The Union concludes that discipline is not warranted because the remark was not directed toward the supervisor.

City's Reply Brief

The City asserts it took a reasonable amount of time to investigate the grievant's conduct on January 4th and 5th, 1999. The City also asserts that the grievant's creation of and use of compensatory time was contrary to the collective bargaining agreement. The City also asserts the office work assigned to the grievant were all tasks which were a part of her normal work functions and important to the entire Department. The City also asserts that the grievant continued to take more than her allotted breaks after her February suspension. The City argues this demonstrated her trustworthiness had not improved. The City contends the only reason the grievant was disciplined was because of her own misconduct and that each of these misconducts was seriously sufficient to warrant an immediate discharge. The City also asserts it did not intentionally turn co-workers against the grievant. The City contends it was the grievant's negative behavior and complaints that caused other employees to avoid her. The City also asserts Becker never harassed the grievant. The City avers it did not make the grievant work in a fish bowl but that it did expect her to work in a professional manner in accord with office rules and policies. The City also asserts it was not the grievant's request for a wage increase that caused problems, but rather, the grievant's misconduct. The City also asserts that contrary to the claim of poor supervision the grievant was given the benefit of the doubt throughout this matter and provided with progressive discipline and corrective measures.

The City also argues that the grievant was not a subject of poor management but rather that the grievant was a poor employee who chose to be aggressive and defiant. The City also asserts that the grievant's pattern of behavior belies any argument that she was a model employee unfairly portrayed by the City. The City points out the grievant had the opportunity to work now and grieve later but chose to disrupt the work environment. The City points out that the grievant's creation of comp time highlights the fact she had multiple inaccurate timecards and that she did not receive authorization to use compensatory time. The City also contends that the grievant did give Becker "the finger" and that Hilbelink observed this event. The City argues the discrepancies in their testimony are the result of the different angle they viewed the event, but does not discredit the fact they both saw the obscene gesture.

The City also contends the June 29th, 1999 warning letter was warranted based upon the grievant's refusal to inform supervisors when she was going to be taken a break. The City argues the grievant had a history of disrespectful comments and gestures to employees and managers. The City further argues her disruption of the office on June 30th, 1999 and insubordinate conduct

demonstrated her contempt for her supervisor and complete disregard for the work environment. The City concludes the grievant fully earned and merited her discharge from employment.

Union's Reply Brief

The Union stresses that the grievant did not direct profanity towards Sazama. The Union points out even Sazama acknowledged his back was to the grievant and the comment was in a muffled voice (Tr. p. 300). The Union also points out the City took an unfair amount of time to investigate "the finger" incident. The Union also points out no one monitored the grievant's total actions over January 4th and 5th, 1999 and the City did not prove the grievant used sixteen (16) hours of City time to do personal business. Nor did the City prove she did not make up the time on the days in question. The Union also points out there is no evidence the City took any action to demonstrate the grievant was being disruptive after December of 1998. The Union points out she was not reprimanded for any outburst. The Union points out this is not a case of violence, threats of violence, failure to obey a work related order or repeated acts of insubordination. Finally, the Union points out the grievant was never confronted with any allegations that she was taking more than her contractual breaks. When she was directed to go back to work she did.

DISCUSSION

The record demonstrates that prior to January 4th and 5th, 1999 the grievant had an acceptable work record with no disciplinary acts for several years. The record also demonstrates that on January 5th, 1999 the grievant left her workplace for at least two (2) hours to conduct personal business. The grievant's defense that she had accumulated undocumented compensatory time, as the City points out, does not alter the fact she left her work place without permission. The collective bargaining agreement and the Department's work rules do not give the grievant the authority to create or use compensatory time without the approval of her supervisor. Thus when the City became aware that the grievant left the work place to conduct personal business without permission the City had just cause to discipline the grievant. Therefore the City had just cause to direct the grievant to cease accumulating and using undocumented compensatory time and had cause to discipline the grievant. However, as noted above, the grievant had a clean work record and there is no evidence in the record that the grievant had left her work place without permission in the past.

The directive the City issued concerning the grievant's breaks is clearly unreasonable. The record demonstrates that when the City commenced a "no smoking" policy, Department managers choose not to enforce a strict break policy allowing employees to go outside to smoke more that twice a day. Thus, when the grievant acknowledged she had been taking up to as many as eight (8) smoke breaks a day, the breaks she had taken were in clear view of managers who chose to

ignore her actions as well as the actions of any other employee who smoked. Thus, for the City to single her out as a violator of contractual work breaks is disparate treatment. The City would have some basis for singling out the grievant if the entire Department had been put on notice that breaks would be strictly enforced and the grievant continued to take more than the contractual breaks. However, given the City's laxness in enforcing breaks it's decision to require the grievant, and only the grievant, to seek approval prior to taking a break is clearly unreasonable. The undersigned also notes here that given the fact that there are times when there is no management in the building, to require the grievant to receive management approval prior to her taking her contractual break violates the terms of the parties agreement. The grievant is entitled to one (1) ten (10) minute break every four (4) hours. For the City to place into being a rule that could have the effect of preventing the grievant from taking a contractual break because no supervisor was present is clearly unreasonable.

The undersigned further notes that the record demonstrates Sazama was informed by employees that the grievant was not limiting herself to her contractual breaks after the issuance of the February suspension. However, Sazama chose to ignore such information because he failed to discipline the grievant for failing to comply with the directive. The City offered no rational reason why, if Sazama believed the grievant was not complying with the written directive concerning her breaks, he did not discipline her for it. When a supervisor contends there was misconduct by an employee and the supervisor does not promptly correct the action or chooses to ignore the misconduct, the employer can not then claim that whatever the employee did is demonstrative of the employee's failure to comply with written directives. The City has correctly pointed out that if an employee believes a rule to be unreasonable the employee grieves the rule but still follows it. Herein, if the City believed the grievant was not complying with the rule concerning the grievant's breaks, the City chose to ignore such actions if they occurred. Having chosen to ignore such misconduct the City can not claim the grievant's actions were a continuing example of the grievant's untrustworthiness.

The record also demonstrates the City asserts the grievant could not have done a check of walkway crossings on January 4th or 5th, 1999 because there had been a major snowstorm prior to those dates. However, there is no evidence that would demonstrate the grievant did not go to those crossings, only supposition by the City. Supposition does not meet the City's burden of demonstrating the grievant did not do as she said. While the record demonstrates the grievant spent at least two (2) hours at the Sheriff's Office there is no evidence that she did not go to the crossing worksite. Had the City immediately confronted the grievant with questions about what she was doing on January 4th and 5th, 1999 and the grievant informed the City that she checked crossways the City could have gone to the worksite and determined whether she could in fact

have been able to check the wear on the crossings. However, the City waited until February to obtain the grievant's version of what she did on the days in question. To conclude one month after the fact that the grievant could not have done what she claimed because of a snow storm prior to her work dates is insufficient to meet the City's burden of demonstrating the grievant falsified her timecard and did not do as she claimed. The undersigned concludes the City has no direct

evidence she did not check the crossways. Having no direct evidence that the grievant did not check sidewalk crossings on the days in question the undersigned finds the City directive to confine her to office work was unreasonable, particularly as the Union pointed out, there is no ending date to the confinement.

The record demonstrates that the City has allowed employees to do some personal work on City time. The record also demonstrates that when the City became aware that employees were exceeding practical limits on personal business it discussed the matter with the employee to correct their actions. Herein the record demonstrates that Sazama was aware on January 4th and 5th, 1999 of employees' concerns that the grievant was doing too much personal work (TR p.49). There is no evidence in the record as to why Sazama did not immediately confront the grievant about doing personal business on City time. While the grievant's questionable conduct is compounded by the fact she left the office to do personal business without seeking approval first, nevertheless, the City has not demonstrated why it chose to treat the grievant's actions differently then other employees who did personal business on City time. There is no record that employees after being confronted by management that they were doing too much personal business on City time that they received a written warning for doing personal business on city time. At most they were at first talked to. There is no evidence the City has ever had to discipline an employee for failing to stop doing personal work on City time. The City offered no reason as to why Sazama ignored the complaints of employees on January 4th and 5th, 1999, why he failed to confront the grievant immediately and why he took the matter up with his supervisor rather than direct the grievant to cease what he believed to be too much personal business. The grievant was not hiding her activities. Anyone passing by could see her letter on her computer monitor, overhear her conversations or see her fax a letter. It is clear to the undersigned after watching the grievant during the several days of hearing and her testimony that she can be direct, overbearing and intimidating. It is also clear that she is a zealous animal rights activist. However, there is no evidence that had Sazama immediately informed and directed the grievant on January 4th, 1999, or to at least on January 5th, 1999, to cease doing her personal business on City time that she would have refused to comply with such a directive. Had the grievant continued to do personal business concerning the puppy mill on the City time the City would have had cause to discipline the grievant. However, the record demonstrates the City has knowingly allowed other employees to conduct personal business on City time. The record also demonstrates Sazama knowingly allowed the grievant to continue doing personal business on the City time after employees informed him of her activities. The undersigned therefore concludes the City did not have just cause to discipline the grievant for making personal calls, sending personal faxes and writing letters on January 4th and 5th, 1999.

The record demonstrates that Isferding contacted Becker about the work restrictions concerning prohibiting the grievant being on City premises or contacting other City employees. Becker acknowledged that he informed Isferding the grievant could talk to her Union steward and use public facilities. These restrictions imposed by Becker on their face would seem to violate not only the grievant's contractual rights but some constitutional rights as well. Becker never directly informed the grievant in writing about the revisions. Thus even though Isferding and Horness

contacted the grievant separately and told her that portion of the written directive had been relaxed she chose to comply with the directive as written. The record also demonstrates that Becker never corrected the matter in writing.

The undersigned notes here that Becker in his letter of reprimand informed the grievant her performance would be reviewed on a monthly basis. It is not unusual for an employer to increase the evaluations of an employee to help them improve their performance. However, the undersigned also finds there is nothing in the record that would demonstrate the City on a monthly basis reviewed the grievant's performance. The only evidence in the record that the City ever reviewed the grievant's performance are Sazama's negative responses to the grievant's requests that the work rules be lifted. The undersigned notes here that Becker imposed the work rules. He acknowledged they could not be lifted without his input (Tr. p.84-85). There is no evidence Becker ever met even once with Holtan, Turner or Sazama to review the grievant's work performance and that such a review was transmitted to the grievant.

Therefore, based upon the above and foregoing and the testimony, arguments and evidence presented the undersigned finds the City had just cause to discipline the grievant for leaving her workplace without authorization to go to the Sheriff's Department and for creating and using compensatory time without management approval. The Union has pointed out this is the grievant's first disciplinary offence since 1993. However, leaving work without permission to conduct personal business, as pointed out by the City, is a serious offense. Creating and using compensatory time without the approval of the City is a serious offense. Particularly when an employee has as much flexibility over their workload as the grievant does. The undersigned therefore concludes a disciplinary suspension is warranted. However, given the grievant's work history and the City's failure to demonstrate that the grievant did not drive to the sidewalk crossings or to take any action to curb the grievant's performing of personal business on January 4th and 5th, 1999, the undersigned reduces the grievant's suspension to a three (3) day suspension. The undersigned directs the City to make the grievant whole for the loss of pay and any benefits for the other eight (8) days she was suspended. If the City has suspicions the grievant is not performing her duties in the field nothing herein is meant to prevent the City from monitoring her field activities.

The City has also alleged it had just cause to discipline the grievant for allegedly giving a manager the "finger" as she left the City's parking lot on April 6th, 1999. In its brief the City cited two cases, MEAD PACKAGING COMPANY, 74 LA 881 (1980) and HOUSTON GRINDING & MANUFACTURING CO., 106 LA 875 (1996), neither of which are on point. Both dealt with on

duty performance and insubordination. While the grievant was in a City parking lot, it was after work hours and there was no insubordination involved. There is also no evidence that the City has any rules governing the off duty actions of employees in situations such as the instant matter. However, the City can expect a certain amount of respect and decorum from employees in their actions with management officials when employees are off duty. Herein, the grievant's actions were observed by Becker and Hilbilink. However, Becker and Hilbilink gave conflicting

testimony as to what they saw and the positions of the vehicles that Becker and the grievant were driving. Further, Hilbilink testified the grievant could have had a cigarette lighter in her hand (June 1st, Tr. p. 17). At the Unemployment compensation hearing Hilbilink testified she gave "the finger" out the window (Em. Ex. 27). While the City has attempted to give credence to what Becker and Hilbilink think they saw by providing the undersigned with a video reenacting the incident, this does not overturn the discrepancies in their testimony. Further, there is no evidence that McLean ever attempted to find out if the grievant did give the "peace sign" to other employees. There is no evidence that McLean investigated by asking either Becker or Hilbilink whether the grievant may have been lighting a cigarette at the time or whether she had a cigarette and/or cigarette lighter in her hand when she flashed a response to Becker. Hilbilink testified that other than the testimony he gave at the unemployment compensation hearing, he never had a conversation with McLean (Tr. June 1st, p.15).

Even if the City can demonstrate the grievant did in fact give Becker "the finger", the question is whether such off duty conduct of the type alleged to have been performed by the grievant is grounds for discipline the City imposed. To be so the City would have had to at least demonstrate that somehow the grievant's alleged action of disrespect impacted on the way the City or the grievant perform their functions. Herein there has been no such showing with the City relying for the most part on a work rule that governs on duty conduct.

Becker was insulted and Becker believed the grievant should be disciplined for an act of flagrant disrespect. However, the undersigned cannot ignore the discrepancies in Becker's and Hilbilink's testimony concerning the position of the vehicles, whether the grievant was in the act of turning or not, and how the grievant presented her arm. Further, the fact the grievant was a smoker and that one of the first things she could have been doing is lighting a cigarette lend credence to her defense that she may have been in the act of lighting and smoking a cigarette.

Finally, McLean's failure to timely investigate the grievant's defense that she was waving a peace sign, with no rational reason in the record why it took until May 28th, 1999 for McLean to complete his investigation in the matter and the fact this was off duty conduct the undersigned concludes the City did not have just cause to suspend the grievant for three days.

Based upon the above and foregoing, and the testimony, evidence and arguments presented by the City the undersigned concludes the City did not have just cause to discipline the grievant for allegedly giving a manager the "finger" on April 6th, 1999. The City is directed to make the grievant whole and to cleanse her work record.

The undersigned would note here that contrary to the City's assertions, that fact the grievant was aggressive in trying to have what she believed to be unreasonable rules overturned does not lead to the conclusion the grievant was a poor employee. Nor is the fact that the grievant complained about the rules on a regular basis demonstrative that she was insubordinate. There is no evidence that when Sazama directed her to go back to work that she failed to do so. There is evidence that the grievant informed Sazama she was no longer going to comply with the City's

directive that she obtain supervisory approval prior to taking her breaks. Even though there is no evidence the grievant followed through on her statement, her threat not to do so is grounds for discipline. As the City has noted, work and grieve later is the standard procedure. The undersigned finds the City's letter of warning that such conduct is not tolerable is warranted and clearly placed the grievant on notice she was to comply with the work rule or face discipline.

The record also demonstrates that the morning after receipt of the warning letter the grievant confronted Sazama about the matter. The discussion became heated and Sazama directed the grievant to go to her office where they could complete the discussion in private. The record demonstrates they did go to her office where Sazama informed the grievant she was to comply with the work rules. As Sazama was leaving her office the grievant made a profane statement about him, muffled and to his back.

At the hearing Sazama asserted that although swearing in the office occurred on occasion, it was not prevalent (Tr. p. 73). This assertion was contradicted by the Union and the City attempted to resurrect this defense by claiming if such language occurred it had never been directed at a supervisor. Herein the record demonstrates the statement was made in a muffled voice and to Sazama's back as he was leaving the grievant's office. Sazama further testified he directed the grievant to go to the grievant's office so that their discussion could be more private (Tr. p. 73). That another employee, Horness, overheard any comments made by the grievant is cause for concern. However, as the City cited in FREIGHTLINER CORP., 95 LA 302 (1990), mere cursing in and of itself is not sufficient basis for discipline and the grievant was not refusing to follow a directive. The manner, spirit and exact language used, the extent to which profanity is used and/or tolerated all come into the decision. Herein the grievant had continued to express her feelings about the unreasonableness of the City's work rules. In five months of arguing this was the first profane word the grievant had uttered. As in FREIGHTLINER CORP., the grievant was frustrated and being asked to do something she found unreasonable. The statement was also made in private and there was no intent on belittling Sazama in front of other employees. Horness testified the comment was muffled and said to Sazama's back (Tr. p. 300).

Based upon the above and foregoing the undersigned concludes the grievant's actions do not rise to a dischargable offense. It is evident profanity does occur in the office on occasion. While the grievant used a profane term in describing her supervisor, the comment was not directed towards him nor is there any evidence it was an attempt to belittle him in front of other workers. The fact the grievant continued to argue about the unreasonableness of the break rule also does not rise to a dischargable offense. From the date of its issuance to the date of her

termination the City never disciplined the grievant for alleged infractions of the rule, even though some employees reported they thought she had been violating the break policy. Therefore, based upon the above and foregoing and the testimony, evidence and arguments presented the City is directed to reinstate the grievant to her former position and to make her whole for any lost wages and/or benefits.

AWARD

1. The City did not have just cause to discipline the grievant with an eleven (11) day suspension on February 4th, 1999 for actions committed on January 4 and 5, 1999?

2. The City did have cause to discipline the grievant with a three (3) day suspension and is directed to make her whole for the other eight (8) days. The City is also directed to cease the unreasonable work rules of confining the grievant to office work and requiring her to seek supervisory approval prior to taking her contractual breads.

3. The City did not have just cause to discipline the grievant on June 15th, 1999 for actions committed on April 6th, 1999. The City is directed to make the grievant whole for any lost wages and/or benefits and to cleanse her work record.

4. The City had just cause to issue a warning letter to the grievant on June 29th, 1999.

5. The City did not have just cause to discharge the grievant on July 2, 1999 for actions committed on June 30th, 1999. The City is directed to reinstate the grievant to her former position, make her whole for any lost wages and/or benefits, and to cleanse her record.

The undersigned will retain jurisdiction of the instant matter for ninety (90) days pending implementation of this Award.

Dated at Madison, Wisconsin this 6th day of April, 2001.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

EJB/gjc
6210.doc