

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
CITY OF SOUTH MILWAUKEE, (WATER DEPARTMENT)

and

MILWAUKEE DISTRICT COUNCIL 48, LOCAL 883, AFSCME, AFL-CIO

Case 115
No. 66799
MA-13641

Appearances:

Mr. Joseph G. Murphy, Esq., Murphy & Leonard, LLP, 2013 Fourteenth Avenue, P.O. Box 308, South Milwaukee, Wisconsin 53172-0308, on behalf of the City.

Mr. Gene A. Holt, Esq., Law Offices of Mark A. Sweet, LLC, 705 East Silver Spring Drive, Milwaukee, Wisconsin 53217, on behalf of the Union.

ARBITRATION AWARD

According to the terms of Article VII of the 2004-2006 labor agreement between the City of South Milwaukee (City) and Milwaukee District Council 48, Local 883, AFSCME, AFL-CIO (Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and resolve a dispute between them concerning the discharge of John Socha. The Commission designated Staff Arbitrator Sharon A. Gallagher to hear and resolve the dispute. Hearing was held on May 21, 2007. No stenographic transcript of the proceedings was made. The Arbitrator received the parties' post hearing briefs by June 27, 2007, whereupon the record herein was closed.

STIPULATED ISSUES

The parties agreed that the Undersigned should decide the following issues herein:

- 1) Did the Employer have just cause to discharge the Grievant?
- 2) If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE IV

SECTION 1 – MANAGEMENT FUNCTIONS

Except as expressly limited in this Agreement, all management functions are reserved to the Municipality. Disputes over the application of this provision shall be submitted under ARTICLE VII, SECTION 4 (Step III of Grievance Procedure) of this Agreement.

. . .

ARTICLE VII

. . .

SECTION 7 – DISCIPLINARY ACTION FOR MISCONDUCT OR INCOMPETENCE

- A. Just Cause. Any employee who is reduced in status, suspended, removed or discharged for misconduct or for incompetence may, within twenty (20) working days after receipt of such action, file a grievance as to the just cause of the discharge, suspension, reduction in status or discipline imposed on him/her. No such action shall be taken without just cause.
- B. Discipline. Disciplinary action may be initiated at any one of the following five (5) steps depending on severity but shall, thereafter, follow the listed progression:
 - 1. Verbal warning
 - 2. Written warning
 - 3. One (1) day suspension
 - 4. Three (3) days' suspension
 - 5. Prolonged suspension or discharge
- C. Immediate Removal. In those instances where the misconduct complained of is immediate and the safety or well-being of the particular employee, other employees or citizens is involved, or when the misconduct is so serious as to be criminal, the Department Head of the particular employee shall have the power to relieve the particular employee of his/her duties and to remove him/her from the job. When an employee is required to leave the job because of immediate misconduct, the Department Head shall promptly advise the Union of the alleged misconduct and the disciplinary action imposed.

...

ARTICLE XXXIV

RESTRICTED RESIDENCY

Employees covered by this Agreement shall be required to reside within the following geographic boundaries of Milwaukee County:

North Boundary – East and West Expressway, South Boundary – County Line Road, West Boundary – 124th Street.

CITY EXHIBIT 1

...

RESIDENCY REQUIREMENTS (Read the following carefully. Sign and date one of the following statements)

A. FOR APPLICANTS LIVING WITHIN THE CITY LIMITS:

I understand, as one of the conditions of my employment with the City of South Milwaukee, I shall maintain my residence within the specified area during my employment with the City. Furthermore, I understand I am to keep my supervisor informed and shall advise, in writing, of all changes of residence address. I further understand if I should move outside the specified area, my position will be vacated and I will be deemed to have resigned employment with the City.

Date

Signature

B. FOR APPLICANTS LIVING OUTSIDE THE CITY LIMITS:

I understand, as one of the conditions of my employment with the City of South Milwaukee, I must establish residence within the specified area within one year from date of appointment. I further understand if I move outside of the specified area, my position will be vacated and I will be deemed to have resigned employment with the City.

Date

Signature

AUTHORIZATION AND ACKNOWLEDGMENT FOR EMPLOYMENT
(Read the following carefully before signing)

I certify the answers given by me in this application are true and correct without omissions of any kind. I understand any misleading or incorrect statements may render this application void. If I am employed and it is subsequently discovered that any answer given by me is incomplete, misleading or incorrect, I may be terminated. I agree the City of South Milwaukee shall not be held liable in any respect if my employment is terminated because of false, incomplete or misleading statements, answers or omissions made by me in this application.

I also authorize pertinent companies, schools, agencies, municipalities or persons to give to the City of South Milwaukee any information requested regarding my employment, character, experience and qualifications and/or suitability for employment with the City of South Milwaukee including a check of my fingerprints and police record for the purpose of considering my suitability for hire. I hereby forever release, discharge and covenant not to sue any person or organization for any result of providing, obtaining or acting upon such information. I understand such information is sought with confidentiality and will not be released to me in any form whatsoever.

In addition, a copy of this authorization is as valid as the original and should be recognized as such.

I further understand I may be asked to undergo a physical examination, including substance abuse screening, prior to appointment to a position with the City of South Milwaukee. Refusal to participate will result in the withdrawal of any offer of employment.

Date

Signature

The Union presented evidence to show that Socha filled out and signed a different (also undated) application form which read in relevant part as follows:

UNION EXHIBIT 1

...

**CAREFULLY READ THIS APPLICATION, YOUR ANSWERS,
and THE CERTIFICATION AND AGREEMENT BELOW,
BEFORE SIGNING THIS APPLICATION.**

APPLICANT'S CERTIFICATION AND AGREEMENT

I certify that answers given herein are true and complete to the best of my knowledge. I understand and agree that any misstatements or omission of material fact subjects me to disqualification or dismissal.

I authorize the City of South Milwaukee to make such investigations and inquiries of my personal employment, financial and other related matters as may be necessary at arriving at an employment decision. I hereby release employers, schools or persons from all liability in responding to inquiries in connection with my application. A copy of this authorization shall be as effective as the original.

I authorize the City of South Milwaukee to make such investigation of my medical history, as may be necessary only after I have received a conditional job offer by the City of South Milwaukee.

I further understand that in the event of employment by the City of South Milwaukee, my classification as a permanent employee depends upon my successfully performing work assigned me during a probationary period, where applicable.

I also understand that covered employees are compensated for overtime work in accordance with the Fair Labor Standards Act. Applicants should discuss overtime pay practices with the appointing authority prior to accepting employment with the City of South Milwaukee.

SIGNATURE OF APPLICANT

DATE

...

FACTS:

The Grievant, John Socha, applied for a position at the City's Water Utility in July, 2006. Although the City no longer has a personnel file on Socha,¹ it presented testimonial evidence that Socha must have completed an (undated) application form City Exhibit 1 (quoted above). The Union presented Socha's testimony that he filled out and signed Union Exhibit 1 (quoted above), also an undated application form.

On August 7, 2006 John Socha began employment at the South Milwaukee Water Utility as a Relief Operator. When he filled out his application, Socha listed his in-laws address in Oak Creek, Wisconsin, as his residence. From 2002 to 2005 Socha lived in Franklin, Wisconsin in a house which he built. Socha and his wife sold that house in January, 2005 and in February or March, 2005 Socha bought land in Rochester, Wisconsin at 29326 River View Parkway where he and his wife began to build a house.

In November, 2005, Socha received an occupation permit for the house in Rochester but between January, 2005 and November, 2005 Socha, his wife and their 2 year old daughter lived with Lester and Mary Ellen Scholz (Socha's in-laws) at 3478 East Elm Street in Oak Creek. Socha offered to pay monthly rent to his father-in-law but Mr. Scholz declined. Socha and his family lived with his in-laws and Socha slept in Oak Creek the majority of the time after November, 2005 and spent only the weekends in Rochester, when he worked to complete its construction. Because Socha's wife was employed by the Oak Creek police department on third shift, she sometimes slept at the Rochester house and sometimes stayed at her parents' Oak Creek house depending on whether she was working overtime or was held over for overtime.

Mostly because of child care issues for his daughter and because he and his family needed more family time together, Socha and his wife put the Rochester house up for sale in August, 2006 by signing a "Residential Listing Contract" on August 31, 2006 with Realty Executives Integrity (Union Exh. 9). The Rochester house sold sometime between Thanksgiving and early December, 2006 and the sale of that property closed on February 4, 2007. Between Christmas, 2006 and January 1, 2007, Socha put an offer on a lot in Oak Creek, Wisconsin and signed a contract to build a house on that lot on January 5, 2007.²

The parties hotly contested whether Socha and Chief Operator/Leadman Jim Proescel had certain conversations (5 or more) in which, according to Proescel herein, Socha admitted

1 I have found infra that the evidence herein is insufficient to prove that Socha stole his personnel file. However, to assure the record herein is complete, I have quoted both of the portions of the two application forms proffered by the parties that refer to residency and truthful completion.

2 All of the facts surrounding Socha's real estate purchases and sales and his construction projects stood essentially uncontested by the City and I have therefore credited Socha on these points.

that he had lied on his employment application about where he lived. Socha specifically denied ever making any such statements to Proescel and asserted that Proescel must have lied about them. Proescel's written statement submitted to the City (U. Exh. 4) contained no specific description of these five conversations.

Proescel was a very reluctant witness herein whose position is in the bargaining unit. However, it was undisputed that as Leadman, the Utility expects Proescel to observe and report all unit employee misconduct to Fischer. Although Proescel confirmed that he knew of this expectation, he admitted herein that he did not recall telling Fischer about any of the five or more conversations he had with Socha in which Socha (allegedly) admitted that he lied about his residence on his employment application.

In early December, 2006, Fischer decided to make new employee ID cards for all Water Department employees. As Socha was not at work that day, Fischer went to the filing cabinet in his office to look for Socha's height, weight and eye color in his personnel file for Socha's new ID. Fischer could not find Socha's file in the filing cabinet and Fischer thought he had mislaid it so he looked around his office for the file but could not find it. Fischer just let it go and he did not ask his Office Manager, Jane Niggemann, to look for the file.

It was not until sometime in mid-December, 2006 that Proescel volunteered to Fischer that he did not think Socha was as handy as he (Socha) had said he was. At this time, Fischer told Proescel that Socha's personnel file was missing and he asked Proescel where Socha's file was. Proescel then told Fischer he did not know but that Socha had admitted to him (Proescel) he had lied on his employment application. At this time, Proescel admitted he did not tell Fischer about another conversation he had with Socha in early December, 2006 (the context of which Proescel could not recall except to say they were telling stories) wherein Socha said "no application no evidence."³

Fischer then decided to investigate Socha's residency by going on-line. Public records for Racine County showed that in 2006, Socha owned a parcel of land in Burlington/Rochester, Wisconsin (City Exh. 2).⁴ Records kept at City Hall showed that Socha had used his Burlington/Rochester address for a City paycheck direct deposit form (City Exh. 5), but for his tax/withholding form, Socha listed his Oak Creek address (City Exh. 6); and Socha's driver's license (on file at City Hall) showed he resided at Franklin, Wisconsin (City Exh. 7). 2005-2006, Tax records (which the City obtained on January 19, 2007 after Socha was fired) showed that Lester and Mary Scholz (Socha's in-laws) owned the home in Oak Creek that Socha had listed on his employment application.

3 Proescel stated that he only told Fischer about Socha's "no application, no evidence comment" after Fischer terminated Socha on January 10, 2007.

4 Jane Niggemann actually found City Exh. 2. Fischer did not find in on-line.

Thereafter, Fischer contacted the City Police Department about his concern that Socha may have stolen his own personnel file. On December 18, 2006, a City Police Investigator dusted Fischer's office for fingerprints and that same day, the Investigator issued the following narrative report:

Doug Fischer reports he believes an employee stole a personnel record. He requested the file cabinet be processed for prints. Scene processed by Inv. Walker. Recovered fingerprints compared to employee fingerprint card obtained from Brookfield PD. Unable to determine fingerprint origin. Employee fingerprints would not have been evidence of theft, only presence in the office.

After receiving this report, Fischer decided to see if his office door could be removed, even when locked, by taking the hinges off the door. Fischer stated he was able to remove the locked door and get into his office in 20 seconds. It is undisputed that Socha's work schedule was such that he was periodically alone at the Utility working. However, the City proffered no evidence that showed that Socha had ever been observed entering or leaving Fischer's office alone or that he had ever been observed touching the filing cabinet where the personnel files were stored or that Socha had ever attempted to remove Fischer's office door by its hinges. Fischer admitted that Socha's fingerprints were not found on the door or door frame to Fischer's office or anywhere in his office and that Socha did not have a key to Fischer's office. At no time during his investigation and at no time prior to the January 10th termination meeting did Fischer question Socha regarding his residency or the fact that Socha's personnel file had apparently gone missing.

On January 9, 2007⁵ Fischer brought the results of his investigation of Socha's conduct to the Utility Commission. No minutes of this meeting were kept. The Commission decided to terminate Socha according to Fischer, because he stole his personnel file and falsified his employment application.

On January 10, 2007 Fischer met with Socha and his Union representative and told Socha he was discharged because he had lied on his employment application⁶. Fischer then asked Socha if he had lied on his application and Socha responded, "Yes and no." Socha stated that he stayed at the Oak Creek address because his in-laws were taking care of his daughter and that this was more convenient for child care. Fischer then took Socha's Utility

5 City Exhibits 3 and 4 were dated January 30, 2007 (bowling tournament documents). In my view, it is highly unlikely that these documents as well as City Exhibits 8 and 9 (dated January 19, 2007) were put before the Utility Commission on January 9th when it decided to terminate Socha.

6 Fischer did not accuse Socha of stealing his own personnel file or state that this was part of the reason why the Commission had decided to discharge Socha.

key, let him clear out his personal effects and a City Police Officer escorted Socha out of the building. It is undisputed that Socha was surprised and unhappy at the January 10th meeting⁷. Also on January 10th, Fischer issued a letter of termination to Socha which simply stated he was terminated without stating any reasons therefor. On January 18, 2007, Fischer sent another termination letter to Socha, which read as follows:

This letter is to inform you that you were terminated on January 10, 2007 because you provided false information on your application for employment at the South Milwaukee Water Utility and for removing your employment file from my office.

Socha stated herein that during his City employment he told Proescel he had a house in Rochester but that the house was up for sale because of family issues and that he (Socha) was looking for land in Oak Creek on which to build another home. Socha stated that at no time did he tell Proescel that he had lied on his employment application and he never said “no application, no evidence” to Proescel. Socha stated he never discussed his application or his personnel file with Proescel.

It is undisputed that Socha’s job performance was never formally evaluated or criticized and that he was never disciplined by the City prior to his termination. Within one or two weeks of his hire, Socha was operating the plant alone. Socha stated he has never gone into Fischer’s office unless Fischer was there and he denied he had any knowledge of or anything to do with the disappearance of his personnel file. Socha stated that he believed Proescel lied herein; that he was aware that employee J. Meyer’s brother-in-law and Proescel’s brother-in-law had unsuccessfully applied for Socha’s job.

Proescel stated herein that he thought it was odd that Socha would admit to him that he lied on his employment application. Proescel also stated that Socha told him he was building a house in Rochester, that he was buying a new truck, a motorcycle and a lot in Oak Creek near Fischer’s home. Just before Socha was terminated, Proescel stated that he had a conversation with Socha in which he (Proescel) told Socha he needed to live in the residency area to which Socha responded, he was looking at property in Oak Creek and that he would be moving. Proescel admitted that he never told Fischer about this conversation.⁸ Finally, Proescel stated that he could not recall anything else Socha told him during the conversation in December, 2006, wherein Proescel asserted Socha made the “no application....” comment.

7 It is undisputed that Fischer never showed Socha any of the documentary evidence he had.

8 Proescel stated he wrote his hand-written statement (U. Exh. 4) after Socha was terminated so Fischer did not then know of the “no application, no evidence” comment and the Utility Commission did not have this statement when it made the termination decision.

Fischer stated herein that the Utility had never had an applicant/employee who had multiple addresses before Socha's case; and that the City had no procedure/policy to deal with that situation. Fischer stated that had he known Socha had multiple addresses, he would have reminded him that employees need to move into or reside in the contractual residency area within one year of hire/appointment, and that the purpose of the City's residency requirement is not that the employee must establish City area residency at the time of hire, but within one year of hire. Furthermore, in Fischer's opinion the contract does not stop new employees from moving around so long as they are within the residency area within one year. On this point, Socha stated herein he was aware of the City's residency policy and confirmed he understood it as Fischer explained it.

The Union timely filed the instant grievance on January 11, 2007 and it was properly processed through the contractual steps. At Step 5 the Utility Commission met with Socha and his Union representatives. At the hearing, for the first time, Socha was accused of/asked whether he stole his own personnel file and whether he had in fact worked for the City of Milwaukee Water Authority.⁹ Thereafter, the grievance remained unresolved and it was brought on for Arbitration.

POSITIONS OF THE PARTIES

City:

The City asserted that the appropriate just cause standard to be applied here is whether the Grievant committed misconduct in which the City had a disciplinary interest and whether the discipline the City imposed was reasonable given its disciplinary interest in the misconduct proven. Here, the City argued that the evidence showed that the Grievant misrepresented or misled the Utility concerning his residence by listing the Oak Creek address on his employment application and that the Grievant removed his employment application from Fischer's office to conceal his misrepresentation. In this regard, the City noted that the application form signed by the Grievant (City Exh. 1) contained a certification of the truth and accuracy of all information thereon and states that any incomplete, misleading or incorrect answer may result in the employed applicant's termination. Therefore, the termination punishment clearly suited the Grievant's crime of dishonesty and he was forewarned thereon.

Contrary to the Union's assertions herein, the City urged that a "beyond a reasonable doubt" evidentiary standard should not be used in this case. The lesser standard, clear and convincing preponderance of the evidence should apply in this case. Based upon the record evidence, the City urged the Arbitrator to uphold the discharge. Specifically, the City pointed to the following record facts in support of its position:

⁹ There is no question that prior to his employment at the South Milwaukee Water Utility, Socha was employed by the City of Milwaukee Water Utility (U. Exh. 5).

1. The application the Grievant signed contained a residency certification/notice and although at the time Socha listed his in-laws' Oak Creek address as his residence, he owned a home in Rochester where he received his bills and maintained half of his furniture and had an occupancy permit to reside.
2. Socha's bowling record showed he lived in Rochester, Wisconsin.
3. Socha's address on his driver's license showed a residence in Franklin, Wisconsin.
4. A direct deposit sample check Socha filed with the City listed his Rochester address.
5. At his exit interview Socha, admitted "yes and no" that he lied about his address on his employment application and his explanation merely confirmed the fact that he knew he had lied.

The City asserted that Socha admitted he read his employment application and knew that misleading or misrepresenting facts thereon could be grounds for termination. Here, Socha deliberately misrepresented his address on his application.

Beyond this, the City urged that the record facts showed that Socha stole his own personnel file so that his lie on his application would not be supported by any evidence. The City admitted that Socha's housing was "irrelevant" because "where he lived only became an issue because Socha lied and believed he had lied" (ER Br. P. 7). The City asserted that Socha also admitted he lied on his application in conversations with Leadman Proescel and that he also virtually admitted he had stolen his application when he told Proescel, "no application, no evidence."

The City urged that Socha's termination was fully supported by his lie on his application alone. But even if the Arbitrator were to find otherwise, when Socha's removal of his personnel file from Fischer's office is added to his other offense, just cause for his termination is fully supported.

The City further contended that Proescel had no reason to lie about his conversations with Socha and that unless these conversations occurred as Proescel asserted, Proescel had no way of knowing that Socha lived in Rochester or that he had lied on his employment application. Therefore, Proescel, who had no axe to grind herein, must be credited over Socha as no evidence was proffered to show Proescel had a reason to fabricate his testimony. The fact that Proescel did not know that Socha's personnel file was missing when Socha said, "no application, no evidence" and it was not until he talked to Fischer that he realized the significance of that comment also supported Proescel's reliability as a witness.

Finally, the City noted that Socha and Proescel got along at work; that Proescel had recommended Socha be retained at the end of his probationary period.

In the City's view, its substantial interest in keeping its water supply safe and the seriousness of Socha's proven misconduct in lying on his application and stealing his personnel file supported his discharge and it argued further as follows:

If termination is not the response for falsifying information on a job application, then all applicants are invited to risk limited discipline knowing that they will nevertheless get the job. Mr. Socha is not an employee with 5 or 10 years experience on the job; not an employee who, despite a misrepresentation on an application, has demonstrated for years that he is trustworthy. He is an employee who deliberately misrepresented a material fact on his application and then went into his supervisor's office when no one was around and removed the evidence of his misrepresentation. Mr. Socha cannot be trusted to perform the job he was hired to do; yet the job requires the city to trust the employee doing this job enough to place the health and welfare of all its citizens directly in this employee's hands. In these circumstances, termination is appropriate (ER Brief, p. 12).

Union:

The Union asserted that the City failed to meet its burden of proof that Socha lied on his employment application and then stole his own personnel file to cover up his lie, as alleged in the termination letter. Regarding the issue of Socha's residency, the Union urged that during his first 12 months of employment, Socha's residency was irrelevant and immaterial as he had one full year to establish his residency within the contractual residency area. In this regard, the Union noted that Superintendent Fischer stated that employees have 12 months to establish residency within the boundaries stated in the contract; that he (Fischer) stated he would not terminate an employee even if the employee 1) lived outside the boundaries for most of the 12 months, so long as the employee moved into the proper area before the 12 months expired, or 2) listed an address within the boundaries but then moved out so long as the employee had moved back inside the boundaries before the 12 months expired. Given Fischer's testimony, Socha's residency was a non-issue until 12 months after his hire (August 7, 2007).

In addition, the City failed to prove its assertion that Socha lied about his residency on his application, as the record showed that Socha spent the majority of his time at the Oak Creek address and as the City's assertion that Socha lied on his application would require it to prove intentional or knowing falsification, the evidence fell short of this as well. In regard to the latter point, the Union noted that Socha had lived at the Oak Creek address while employed by the City of Milwaukee and the City of South Milwaukee despite having received an occupancy permit in November, 2005 to live at the Rochester house; that Socha and his wife put the Rochester house up for sale in August, 2006 and it sold prior to the end of 2006; and then Socha bought a lot in Oak Creek during Socha's employment with South Milwaukee with the intention to build a house thereon. Fischer was unaware of these facts as he never asked Socha about his residency/living arrangements until his termination interview on January 10, 2007.

In regard to the City's allegation that Socha stole his own personnel file, the Union argued that the City should be held to a higher burden of proof – beyond a reasonable doubt – on this theft claim. Here, the Union pointed out that the City's claim, if proven, would involve criminal behavior, moral turpitude/social stigma and the City discharged Socha based in part on its allegation that he stole his personnel file, making the application of a beyond a reasonable doubt standard appropriate.

However, under any standard of proof the Union asserted that the record is “devoid of any evidence that Socha actually removed a personnel file” from the Water Utility (U. Br.p.9). First, the Union contended Socha had no motive to take the file as he had 12 months to establish residency. Second, Socha's fingerprints were not found anywhere in Fischer's office. Third, Office Manager Niggemann stated she gave Socha's application (and no file was with it) form back to Fischer in August, 2006 and that she never saw it again.

Finally, the Union urged that Proescel's testimony should be discredited due to his interest in the outcome of this case and his demonstrated unreliability as a witness. In this regard, the Union noted that Proescel's brother-in-law had applied for the job Socha took; that although Proescel recommended Socha be retained upon completing his probationary period and his admission that he rarely worked with Socha, Proescel stated herein he told Fischer, without prompting, that Socha was not as handy as he claimed; that Proescel's written statement (made after Socha's termination) contained no references to the five conversations which Proescel stated herein he had with Socha in which Socha allegedly admitted lying on his application; and that Proescel never told Fischer about these five conversations (despite his Leadman status).

Furthermore, the evidence herein showed Socha was competent: he ran the plant alone within a few weeks of his hire; he successfully passed his probation; and no disciplinary actions were taken against Socha prior to his termination. In these circumstances, Socha must be credited over Proescel and the grievance should be sustained and Socha reinstated and made whole.

DISCUSSION

The Union has asserted that the highest standard of proof – beyond a reasonable doubt - should be applied in this case because a major allegation against Socha involves the City's assertion that Socha stole his own personnel file from Fischer's office. Although I am sensitive to the seriousness of this allegation against Socha, I do not believe that the “beyond a reasonable doubt” standard would be appropriate here. In this regard, I note that although the allegation of stealing involves moral turpitude and that Socha's was discharged therefor, no criminal charge could have been brought against Socha even if his fingerprints had been found in Fischer's office. Therefore, a lesser standard of clear and convincing evidence should be used in this case.

Based upon all of the evidence proffered on the point, I find that the City failed to demonstrate that Socha stole his own personnel file from Fischer's office, as alleged. Indeed, in my view, all of the evidence on this point was circumstantial at best and mere conjecture at worst. In this regard, I note that no witness herein stated that they saw Socha enter Fischer's office at any time and Socha's fingerprints were not found anywhere in Fischer's office. No evidence was presented to show that Socha ever attempted to remove Fischer's office door or that he ever saw or touched his own personnel file or that he even knew where such files were kept. Indeed, the evidence also failed to show that Fischer had any consistent practices regarding what documents should be kept in the Utility's personnel files and how those files should be treated, used and stored.¹⁰ The fact that City Hall Administration kept a separate file on Socha which contained important tax information as well as his direct deposit authorization tended to show that the City chose not to rely on the value/security of the Utility's files.

Indeed, with no eyewitness testimony and no documentary evidence or other evidence from the police investigation, there was no reasonable basis on which to conclude that Socha's personnel file had been stolen. Rather, the evidence herein, including the Department's lack of consistent practices/protocols regarding its files, could just as easily support a conclusion that Socha's file and his application were mislaid and are still somewhere in Fischer's office.

Having found the evidence entirely insufficient to prove Socha "removed his personnel file" from the Utility, the next question arises whether the City proved by clear and convincing evidence that Socha lied on his employment application. As an initial matter, I note that the contract requires unit employees, like Socha, to be residents of the area stated in Article XXIV, but the contract does not state a time frame within which the employee must reside in the contractual area. It is undisputed that the City has allowed employees one year after their hire/appointment to demonstrate they reside in the Article XXIV area.

In this case, Socha was sent his appointment letter on July 20, 2006 (City Exh. 11). Therefore, pursuant to the labor agreement as well as the City's undisputed policy setting one year from hire/appointment as the time frame for employees to reside within the contractual area, it is clear that Socha was never given the one year period, to July 19, 2007, to make sure he lived in the residence area. In these circumstances, the City violated its own policy (and the labor agreement) by discharging Socha prior to July 19, 2007.

The next question that must be answered is whether Socha lied on his employment application and if so, whether such a lie should result in his immediate discharge. On this point, I note that lying on an employment application can be the basis for immediate discharge but only if the lie concerns a relevant and material fact. In this case, as observed above, Socha's residence would not become relevant or material until July 20, 2007 under the City's own practice and policy. Therefore, I need not decide which application form Socha signed, as even assuming, *arguendo*, that Socha signed City Exhibit 1 and that he lied on that form about his residence, the City could not discharge him for that non-material "lie" until July 20, 2007 came and he then resided outside the residency area.

¹⁰ It is undisputed that Fischer did not lock the filing cabinet where he kept Utility personnel files.

However, concerning Socha's living arrangements, in my view, the evidence was sufficient to prove that Socha lived at the Oak Creek address during all times material hereto. In this regard, I note that Socha spent a majority of his time living at the Oak Creek address, he had some furniture there, his baby daughter lived there, he received some of his mail there, and he put his Rochester house up for sale within one month of his start date at the City. The fact that he went to Rochester on the weekends to complete construction of that house does not detract from his residence in Oak Creek. Significantly, the labor agreement requires employees to reside in the contractual area; it does not require them to own or rent the premises they reside in.

The City has argued that Socha admitted that he lied on his employment application in the termination interview and during five conversations Leadman Proescel stated herein he had with Socha. However, in my view the record evidence fails to show that Socha admitted he lied. First, in regard to the alleged conversations with Proescel, I note that Proescel admitted herein that he saw and noted Socha's Oak Creek address on his application when Proescel briefly saw Socha's application at Socha's interview for the Utility position, and that Socha also told him (Proescel) that he owned a house in Rochester. Thus, the City's argument that Proescel's credibility herein was supported by the fact that Proescel did not know where Socha was living or about the Rochester house must fail. Furthermore, it is significant that Proescel's written statement (U. Exh. 4) failed to describe, in any way, the five conversations Proescel stated herein he had with Socha. In addition, Proescel (although the Leadman in charge who is expected to report employee misconduct to Fischer) admitted herein that he failed to tell Fischer at all about these five conversations and that he failed to tell Fischer, until after Socha was discharged, about Socha's alleged "no application, no evidence" comment because he did not recall it until then. Also, Proescel admitted herein that Socha told him prior to his discharge, that he (Socha) was buying a lot in Oak Creek and he would be moving, but Proescel never told Fischer about this conversation. This evidence shows Proescel's conduct concerning these matters was at least illogical and careless and contrary to principles of normal human interaction. This evidence therefore tended to undercut Proescel's credibility and it tended to support the Union's case and Socha testimony.

The next question to be addressed is whether Socha's "yes and no" response to Fischer's question whether he lied on his application at his termination meeting constituted an admission that Socha lied on his application¹¹. In my view, when put in context, Socha's "yes and no" response did not constitute such an admission. Rather, Socha's "yes and no" response, when analyzed along with his explanation that he lived the majority of his time in Oak Creek in order to facilitate child care for his young daughter, could not be reasonably construed as an admission that he had lied.

¹¹ On this point, I find it significant that Fischer never attempted to confront or question Socha regarding his residency prior to the Utility's decision to terminate Socha on January 9, 2007 which essentially denied Socha due process herein. Had Fischer sought Socha's side of the story before January 9th perhaps the Utility would have reached a different conclusion. Also, Socha's answer to Fischer's question made on January 10th had no impact on the City's decision to discharge Socha.

Based upon the above analysis as well as the lack of due process given to Socha who was, in my opinion, a credible witness whose testimony was supported by the documentary evidence as well as other witnesses' testimony, I issue the following

AWARD¹²

The City did not have just cause to discharge John Socha. The City shall therefore immediately reinstate Socha to his former position and make him whole by paying him backpay and benefits from January 10, 2007 forward.

Dated in Oshkosh, Wisconsin, this 21st day of August, 2007.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

12 I shall retain jurisdiction of the remedy only for 60 days from the date of this Award should the parties have difficulty determining the remedy herein.