

UNITED STATES OF AMERICA
FEDERAL MEDIATION AND CONCILIATION SERVICE

JEROME H. WOLFSON, ARBITRATOR

IN THE MATTER OF ARBITRATION
BETWEEN:

RE: FMCS #03-03377-3

AFSCME FLORIDA COUNCIL 79
LOCAL 1718

ISSUE: MICHAEL PELL
DISCHARGE

and

CITY OF VENICE, FLORIDA

AWARD AND OPINION

Robert C. Anderson, Esquire for the City of Venice. Venice, Florida

Michael Temple, Field Representative. AFSCME Florida Council 79, Local 1718. Tampa. Florida

This arbitration came on to be heard before the undersigned, with proper notice and in accordance with the grievance procedure of the employment agreement existing between the City of Venice and AFSCME Florida Council 79. Local 1718 covering the period of October 1, 1999 through September 30, 2002. A hearing commenced in a timely fashion at the office of the City Attorney, Bob Anderson. located at 1314 East Venice Avenue, Suite E, Venice, Florida. The hearing was held on Friday, July 25, 2003 commencing at 8:30 a.m.

The parties stipulated to various exhibits which were properly marked. Objections were noted as concerns the evidence submitted and to certain testimony. Argument was had as concerns each objectionable item. The aforementioned marked exhibits were appropriately accepted into evidence. The parties agreed and stipulated that jurisdiction was proper over both the parties and the subject matter along with notice,

that the grievance procedure has been properly followed by both parties, and the undersigned was sitting properly as the Arbitrator in this cause.

Witnesses who testified included Lawrence A. Heath, Director of Public Works, Robert Hirter, Maintenance Supervisor for the Department of Public Works, Rollie Reynolds, Director of Personnel, Dan McGoogan, Deputy Chief of Police in charge of the patrol division, Michael John Treanor, Detective/Sergeant of the Police Department, Dennis Rodriguez, President of the local 1718 and Bill Rodefer, Union Steward. Also testifying were James E. Williamson, a heavy equipment operator for the Department of Public Works, Kip McCord, a maintenance employee, Michael Pell, the grievant herein and Ronald Eplin, the foreman of Parks/Maintenance and the Airport.

The Employer herein offered the position that the grievant was properly terminated from his employment as a public works electrical maintenance technician assigned to the sign shop. During the year 2001 a civilian complaint was brought to the attention of the police and his department that the grievant wrongfully had placed signs on his own premises that were the property of the City of Venice. Formal grievance steps as included in the union contract were appropriately followed with discharge being the penalty awarded under Article VI and VII of the contract existing between the bargaining unit herein and the City of Venice. The Employer relied on the personnel rules and regulations adopted by Ordinance No. 962-82 revised 1982 of the City of Venice whereby the punishment for a first offense of "theft or removal from City locations without proper authorization, any City property or property of any employee is discharge." The City further offered the position that there was just cause to discharge the grievant herein and that said penalty was not excessive.

The grievant offered the position that management was aware of the signs on his property and that prior to the offense being reported other employees including management personnel were in possession of similar signs that were the property of the City of Venice. The grievant contended that there was an offer of amnesty to other individuals with similar signs and/or other city property which was not offered to him and that by the employer herein discharging him he was the subject of disparate treatment. The employer [*sic – should probably be ‘grievant’*] also brought forward the argument that the grievant utilized scrap or discarded material which was permissible and that he is seeking reinstatement and to be made whole.

FINDINGS OF FACT AND CONCLUSION

The findings of fact made in this cause are based upon the consideration of all the testimony and evidentiary [*sic*] exhibits along with my observations as concerns the demeanor and credibility of all witnesses who have appeared before me. Any and all evidential conflicts have been weighed and resolved by me. Based upon the foregoing I make the following findings of fact:

1. The arbitrator has jurisdiction of the parties and the subject matter.
2. The evidence submitted is accepted and included in the record.
3. The stipulations entered into between the parties are accepted.
4. The petitioner has properly processed his appeal/grievance entitling him to this hearing and has submitted argument as concerns this cause along with all evidence and documentation he sought fit to submit. The employer, the City of Venice has offered its case and has argued for upholding the termination of the grievant. The parties offered

argument at the inception of this cause, during the cause, and at the conclusion. They agreed not to submit written memorandums or briefs.

5. Michael Pell is a 46 year old male. At the time of his termination he had been employed by the City of Venice, public works department, for over twelve years. On June 28, 2001 he was questioned by police personnel as a result of a civilian complaint that he wrongfully maintained signs on his premises that were the property of the City of Venice. There was also concern at that time that he was maintaining a gun range. By his own admission the signs were made in the public works sign shop by utilizing precut blanks and lettering that was the property of the City of Venice. There was no finding that he maintained a gun range on his property.

After being questioned by both detective Michael Treanor and now deputy chief Dan McGoogan it was decided that criminal charges would not be pursued and that whatever remedy the City was seeking would be from the department of public works, his employer. At a certain point the grievant was accompanied to his home by another employee, retrieved the city property and returned it to a maintenance area of the employer herein. He did not return to gainful employment with the employer after that date.

During the ensuing weeks the contractual grievance procedure was followed with the disciplinary/discharge becoming effective August 7, 2001. The basis for the discharge was the written offense and violation as included within Ordinance #962-82 revised 1982 of the City of Venice. Same notes that discharge is proper for a first offense of

28 Theft or removal from City locations
without proper authorization, any

City property or property of any
employee

On July 11, 2001 a special meeting was called whereby all remaining employees of the public works department were required to attend. They were advised by Ronald Eplin, foreman, that if they returned any city property within their possession including signs they would not receive any form of discipline. They were given a window period during which they could return city property which they were not entitled to have possession of and not be penalized. They were advised that no questions would be asked. Shortly thereafter many signs and poles were returned to the city premises by numerous individuals. In so determining the undersigned accepts the testimony of Bill Rodefer and James Williamson. Harry Holder, a maintenance supervisor returned two picnic tables made of wood and steel. In so determining the undersigned accepts the testimony of Kip McCord.

6. During the entire period of time, which was more than twelve years, that the grievant was employed by the City of Venice, individual employees made for themselves or had co-employees make for them signs which they removed from city property and utilized for their own personal use. Individuals who made such signs and removed them from city property well prior to June 28, 2001 were Al Conrad, Mike McGill, Ken Barrett, Ron Eplin, and the grievant herein. In so finding the undersigned accepts the testimony of Kip McCord. A retired/deceased employee Ray Markey regularly made signs for himself and for others. Signs were displayed on private property by Floyd Hall, Ray Markey and Dan Van Aker. In so finding the undersigned accepts the testimony of Bill Rodefer. The employees relied on that practice as it continued. It did not occur by happenstance. As such it became a portion of the agreement between the parties which

could not be changed in a unilateral fashion. The grievant herein along with the other members of the work force relied on said practice of sign making for personal use to the extent that the manner in which they relied on it was reasonable. See Lithonia Lighting, 89 LA 781, 1987 and Fruehauf Trailer Co., 29 LA 372, 1957. The behavior of the employees and the employer as concerns the aforementioned practice showed a definite assent of the parties and their minds. See Elkouri & Elkouri, How Arbitration Works, Fifth Edition, Page 651-654, 1997. There was no warning prior to 6/28/01 that the established sign making practice for personal use would or could result in any form of discipline, especially discharge or that the discharge penalty included in Ordinance #96282 revised 1982 of the City of Venice (personnel rules and regulations) would be enforced. The Employer did not provide the grievant herein nor any other employee forewarning or foreknowledge of the possible or probable disciplinary consequences of such conduct. There was an absence of actual communication of penalties or that dismissal was possible. The employer did not proceed in a manner so as to overcome its prior lax enforcement. See Grief Bros. Cooperage Corn., 42 LA 555, 1964 for the importance and necessity of explicit warnings. Just as management chose not to forewarn its employees that sign making for personal use was a violation worthy of discipline, members of the workforce came to expect that they were not committing a violation of the personnel rules and regulations that would result in discipline. There were no specific published work rules nor forewarning that the established personal sign making practice would be considered as theft or improper removal of city property that could result in discharge under the appropriate city ordinance which includes the personnel rules. Prior instances of other individuals being disciplined for violation(s) as

concerns sign making for personal use was not presented by either party. In Stevens Shipping & Terminal Co., 70 LA 1066, 1978, Arbitrator Malcom J. Hall stated ... it might be somewhat unfair to now "get tough" on this grievant without some forewarning. Said doctrine applies to the instant cause. It has also been well stated that:

It is a basic arbitration principle that non-enforcement or lax enforcement of a company rule will neutralize its enforceability, unless there is advance warning that the rule will be enforced in the future. That principle is plainly applicable here. Lockheed Corp., 75 LA 1085, 1980.

7. All members of the immediate work force employed by the public works department were allowed a "window" for returning any and all property that was owned by the City of Venice. They were advised that they would not be the subject of discipline, especially discharge. Said window period was related to them at a special meeting of July 11, 2001. No other member of the work force was disciplined. The grievant herein is being treated in a manner more severe and harsh than his co-employees for the exact same actions. For the reasons stated herein no employee should have been the subject of the discipline prior to the special meeting that took place on July 11, 2001. See Inter-Pack Corp., 76 LA 1236, 1986 which includes that:

The same violation by one employee committed relatively close in time to that of another employee should not result in two kinds of justice under the collective bargaining agreement... Thus, grievant should not suffer punishment any greater than that imposed upon any other employee under similar circumstances, rather, the issuance of unusual punishment must be justified by special circumstances or may be found to be discriminatory. (Mobil Oil Corp., 75 LA 143 (1980).

Also see Grief Bros. Cooperage Corp., 42 LA 555, 1964.

8. For an individual to be discharged from his employment for theft it must be shown that she/he intended to deprive the employer of its property. There must be a requisite intent to steal, and clear showing that the act of the employee was dishonest in nature. San Diego Transit Corporation and Amalgamated Transit Union, Local 1209, 1980. 74 Lab. Arb. (BNA) 714. Offenses that are proven to be theft are clearly those that fall within the parameters of discharge from ones employment. In the instant cause there has been no showing that the grievant herein intended to steal. Michael Pell was not one of the high ranking members of the work force within his department. Sign making for personal use was regularly engaged in by other members of that department who had more seniority and occupied higher positions. The grievant herein did not intend to take or carry away property of the City of Venice with the intent of converting it to his own use and deprive the city of its own property. The signs that he made and the removal of them from the city premises was done without any intent or idea of depriving his employer of an item that may have had value. His actions were not thievery and did not include bath faith [sic]. Said actions were similar and consistent with the behavior of other members of the work force including those occupying higher positions than his. His actions were merely patterned after the regularly followed behavior that was allowed in his shop. The grievant herein has been charged with wrongful removal of property from the premises of the employer in an improper manner that resulted in theft. I find that he did not violate rules or regulations as promulgated by the employer herein for the reasons stated herein. He is not guilty of the offense(s) that he is charged with. Discharge/termination is an improper disciplinary measure given to or awarded the grievant herein. No form of discipline is appropriate.

9. The practice of employees making signs from new (and discarded) materials owned by the city and removing those signs for their own personal use evolved so that both the employer and the employees relied on that practice without regard for the personnel rules and regulations. The lax enforcement of the rules and the failure to forewarn or provide foreknowledge to the employee herein of the possible or probable disciplinary consequences are elements so basic to this cause that the undersigned is unable to conclude that there exist just cause for discipline for the reasons stated in Grief Bros. infra.

WHEREFORE, IN ACCORDANCE WITH THE BINDING ARBITRATION CLAUSE AS INCLUDED IN ARTICLE VI, STEP IV OF THE CONTRACT EXISTING BETWEEN THE AFSCME FLORIDA COUNCIL 79 LOCAL 1718 AND THE CITY OF VENICE, FLORIDA.

IT IS THE ORDER OF THE UNDERSIGNED THAT:

A. The Grievant herein has been charged with theft or removal from City locations without proper authorization, City property or property of any employee. I find that he did not violate rules or regulations as promulgated by the Employer herein; especially the specific one with which he has been charged resulting in discharge. He is not guilty of the offense that he is charged with. Discharge/termination is an improper disciplinary measure given to or awarded the Grievant herein. No form of discipline is appropriate.

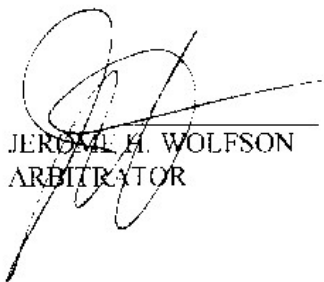
B. The disciplinary action taken against the petitioner of a dismissal/termination from his employment effective July 29, 2001 is hereby reversed. The actions taken against him under the personnel Rules and Regulations relating to removal/theft of City property as contained in city Ordinance No.962-82 of the City of Venice together with any and all other regulations, statutes, orders, policies, procedures and rules which were

utilized are specifically reversed for the reasons stated above. The petitioner/employee should not have been dismissed from his employment. He is hereby reinstated to the position he held for the City of Venice on June 28, 2001. The petitioner should be made whole as concerns any and all salaries, emoluments and benefits losses.

C. The City of Venice and AFSCME Florida Council 79, Local 1718 shall share equally in the expenses and fees of the Arbitrator in the instant arbitration under Article VI. Step IV of the contract between them. Therefore, the costs and the attorney fees of the arbitrator shall be shared equally between them. This cause arose as a result of the behavior of both management and the workforce.

D. No finding(s) of fact, decision or order as concerns discarded property is being made. There is neither sufficient testimony nor evidence for the undersigned to consider and offer findings of fact or a ruling on said specific issue.

DONE AND ORDERED on this 21st day of August, 2003. in Miami. Dade
County, Florida.



JEROME H. WOLFSON
ARBITRATOR

This downloaded version of the Pell arbitration order is slightly altered from the original legal document.

Two obvious typographical errors that appear in the hard copy are notated as such in this electronic copy with the standard notation of "sic" contained in brackets. A third error in which the word 'employer' is apparently used by mistake instead of 'grievant' is also notated. Other than the three inserted notations indicating typographical errors, no wording has been added, removed or changed.

The font used in this online version is not the same font that is used in the original printed document. This causes some minor layout changes in the online version (Wolfson's signature at the end of the document is moved to the left a bit, e.g.). Exact pagination from the original hard copy is retained in this electronic version.

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