IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	OPINION AND AWARD
	)	
AMERICAN FEDERATION OF STATE,	)	
COUNTY AND MUNICIPAL EMPLOYEES)	)	
LOCAL 2064	)	
	)	
"AFSCME 2064" OR "THE UNION"	)	
	)	
AND	)	
	)	
BENTON COUNTY	)	
	)	TARA BREKKE
"COUNTY" OR "THE EMPLOYER"	)	GRIEVANCE

HEARING:

November 1st and 2nd, 2012
Corvallis, Oregon

HEARING CLOSED:

December 31, 2012

ARBITRATOR:

Timothy D.W. Williams
830 NE Cesar E Chavez Blvd
Portland, OR 97232

REPRESENTING THE EMPLOYER:

Diana Moffett, Attorney
Jen Hansen, H.R. Analyst

REPRESENTING THE UNION:

Jennifer Chapman, Attorney
Rick Henson, AFSCME Representative
Tara Brekke, Grievant

APPEARING AS WITNESSES FOR THE EMPLOYER:

John Haroldson, Benton County District Attorney
Jenifer Hansen, H.R. Analyst
Rene Hammill, Office Administrator
John Chilcote, District Attorney Investigator
C. Bonnie Anderson, Child Victim Paralegal
Lynne Wiritemon, Coordinator Crime Victim Advocate
Christopher Stringer, Chief Deputy District Attorney

APPEARING AS WITNESSES FOR THE UNION:

David Amesbury, Deputy District Attorney
John Mason, Former Deputy District Attorney
Tara Brekke, Grievant
Julie Rondeau, Paralegal
Sue Peck, Victim Services

EXHIBITS

Joint

1. Collective Bargaining Agreement, 2009 - 2013

Employer

1. Collective Bargaining Agreement, 2009-2013
2. Notes from Second Fact Finding meeting, 1/18/12
3. Predetermination Meeting letter, 1/27/12
4. Letter from Brekke to Haroldson, 2/5/12
5. Transcript from predetermination meeting, 2/5/12.
6. Dismissal letter, 3/2/12.
7. Union Grievance, 3/14/12.
8. County e-mail agreeing to move to Step 3, 3/19/12.
9. Step 3 response from Brekke, 5/17/12.
10. County step 3 response, 5/18/12.
11. Corvallis Gazette Times article, 3/15/11.
12. Certificate of Study, Rodolfo Campos Priego
13. Goggle map – 120 NW 4th Ave, Corvallis, OR.
14. Photo of former location for Fedex box
15. Email & attachments, Brekke to Haroldson, 12/09/11.
16. Email – Haroldson to Brekke, 12/29/11.
17. [excluded]
18. Brekke Employment Record re: policy manual.
19. Benton County DS's Office Vision Statement.
20. Performance Assessment for Tara Brekke, 12/07/06.
21. Personnel Policy Page 100 (Use of Electronic Equipment)
22. Benton County Personnel Policy manual.
23. Memo about J. Mason, 7/2/09.
24. Memo J. Mason, 3/18/09.

Union

1. Collective Bargaining Agreement, 2009-2013.
2. Grievance – steps 2, 3 & 4.
3. Fedex receipt.

4. Certificate of Study.
5. "Brave" Awards (2006)
6. Performance Evaluation (December 2006).
7. E-mail, 4/2010
8. E-mail, 8/2010
9. E-mail, 11/2010
10. E-mail, 1/21/2011
11. E-mail, 2/24/2011
12. E-mail, 3/25/2011
13. E-mail, 3/29/2011
14. E-mail, 4/19/2011
15. E-mail, 7/13/2011
16. E-mail, 8/16/2011
17. E-mail, 10/26/2011
18. E-mail re: Fedex, 12/9/11
19. E-mail re: Fedex, 12/12/11
20. Personnel action form RE: OFLA/FMLA
21. E-mail re: Fedex, 12/28/11 9:16 a.m.
22. E-mail re: Fedex, 12/28/11 9:23 a.m.
23. E-mail re: Fedex, 12/28/11 9:50 a.m.
24. E-mail re: Fedex, 12/28/11 10"07 a.m.
25. E-mail re: Fedex, 12/28/11 2:59 p.m.
26. E-mail re: Fedex, 12/28/11 3:06 p.m.
27. E-mail re: Fedex, 12/28/11 3:12 p.m.
28. E-mail re: Fedex, 12/28/11 3:37 p.m.
29. E-mail re: Fedex, 12/29/11 8:23 a.m.
30. E-mail re: Fedex, 12/28/11 3:24 p.m.
31. E-mail re: Fedex, 12/30/11 10:16 a.m.
32. [excluded]
33. [excluded]
34. Beggs Tire Invoice
35. Letter from Dr. Schmitt, Corvallis Clinic
36. Transcript of Unemployment Hearing

BACKGROUND

Benton County, (hereafter "County" or "the Employer") and the AFSCME Local 2064 (hereafter "ASFSCME Local 2064" or "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy Williams in Corvallis, Oregon on November 1st and 2nd, 2012. The Parties stipulated that the grievance was timely and properly before the Arbitrator to be

decided on the merits of the case. At the hearing the Parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents, and make arguments in support of their positions. The Arbitrator made an audio recording of the hearing in a digital format as a part of his notes.

At the start of the hearing the Parties provided the Arbitrator with a joint stipulation which reads:

Jointly Stipulated to Issue Statement

Did Benton County have just cause to terminate Tara Brekke? If not, what is the proper remedy?

Stipulation:

1. *The Parties agree that the Arbitrator will not provide the Parties with a copy of the recording of the hearing.*[1]

2. *The Parties stipulate that the grievance is timely and properly before the Arbitrator.*

3. *The Union moves to exclude witnesses. The County has no objection.*

4. *The Parties agree that the Arbitrator can retain jurisdiction over the scope and implementation of any remedy awarded.*

5. *The Parties stipulate that the Arbitrator will hold the record open for 10 days following receipt of the Closing Briefs to allow the Parties to make any objections to the Briefs on the following two grounds:*
   a. *That the Party argued facts that were clearly not in evidence and*
   b. *That the Party requested an award that was outside the scope of the remedy sought in the grievance or allowed for in the CBA.*

[1] Regrettably, audio files were inadvertently sent to both Parties.

At the close of the hearing, the Parties were offered an opportunity to give closing oral arguments or to provide arguments in the form of post-hearing briefs. Both parties chose to provide written arguments which were timely received by the Arbitrator. Thus the award, in this case, is based on the written evidence, the testimony provided during the hearing and the Parties' arguments.

SUMMARY OF THE FACTS

The grievance in this case is between the American Federation of State, County and Municipal Employees, Local 2064, Council 75 (AFSCME), on behalf of Grievant Tara Brekke-Bratsouleas (Brekke), and Benton County (the County). The Parties are bound by a collective bargaining agreement (CBA), effective 2009 through 2013, under which the present grievance arose. The following is a brief summary of the events that led up to the filing of the grievance. It is based on both documentary and testimonial evidence presented during the hearing.

The Grievant, Tara Brekke, worked for the Benton County District Attorney's Office for nearly seven years as a paralegal. She received one performance evaluation during her tenure, which described her as meeting and exceeding expectations. In 2011, Brekke was assigned as the paralegal for three or four Deputy District Attorneys at the County. She

worked on a large volume of cases, including cases involving juvenile and dependency matters.

On November 29th, 2011, Benton County District Attorney John Haroldson asked Brekke to mail a time-sensitive FedEx parcel (E-3). Brekke assured Haroldson that she would mail it the following day since it was too late for the parcel to go out that evening from a drop box. She had a brief conversation with another paralegal, Julie Rondeau, about how to mail the tube since it was uncommon to send parcels via FedEx, and it was a unique size and shape to attempt to put into a drop box. Then, according to her statements, Brekke decided to mail the package on her way home from work that evening.

After work, the Grievant had planned to meet her children and parents at her childrens' karate class. Brekke stated on record that when she was about to leave, she noticed a dash light on in her car and panicked. She called her ex-husband to come try to help her with the issue, and he took her and the children to karate class. Brekke claims that at the karate class she requested that her parents mail the parcel for her (E-5).

On December 5, 2011, Haroldson learned that the parcel never arrived at its destination. On December 9, 2011, Haroldson spoke with and e-mailed Brekke about the parcel (E-3, p.2). Haroldson asked Brekke for the tracking number for the

missing parcel, and then sent another email saying she could disregard it, because Brekke had already emailed him a scanned copy of the sender-portion of the receipt that one must fill out when preparing to FedEx a parcel. (E-5) She did not mention that her parents had mailed the parcel rather than her.

Haroldson contacted FedEx and learned that the parcel had never entered their system. At this point, Brekke was out of the office on FMLA leave (E-5).

When Brekke returned to the office from her leave on the morning of December 27, 2011, Haroldson came to Brekke's desk and asked about the parcel, telling her that it had been lost and he was trying to find it. Mr. Haroldson's version[2] of the conversation that ensued is found in Employer's exhibit #3 and the following is a summary of that recollection. Haroldson asked Brekke about the exact physical location where she had dropped the package off. She gestured out the window and said, "across the street and around the corner at the drop box." Then she said she'd go to the drop box and determine the drop box number in order to help track the missing package. When she walked to the box that afternoon, Brekke discovered that it was no longer at that location.

Brekke emailed Haroldson about it the next morning, December 28th, 2011. She said that the parcel was mailed from

[2] Brekke disputes some of Haroldson's characterization of the facts. Her position will be discussed as part of the analysis section of this arbitration decision.

the 2011 Airport Road FedEx location. Haroldson, intending to inquire about the package in person at that FedEx location, asked Brekke whether the parcel was dropped off at the desk, or put into a drop box outside of the building. Brekke stated that it was put in the drop box. Haroldson asked if the drop box was freestanding or attached to the building. At this point, Brekke stated that she had given the parcel to her parents to mail.

The next day, December 29, 2001, Brekke confirmed with Haroldson that she'd talked to her parents and they'd told her the parcel was taken to the Airport Road location. At this point, Haroldson sent Brekke an email, scheduling an "opportunity to explain your conduct concerning the missing parcel… You have the right to have an AFSCME union steward with you at this meeting…" Brekke acknowledged receipt of the email at 3:24 that day (U-30). That night at approximately 8:21 pm, Haroldson received a call from Brekke on his personal cell phone. She stated that she'd visited her parents' home on December 29, 2011, and had found the parcel there. She gave it back to Haroldson on December 30, 2011 (E-3).

On January 4th, 2011, Brekke, Haroldson, Benton County Human Resources Analyst Jennifer Hansen and AFSCME Union Steward Harry Stafford met for the first of two fact-finding meetings. (E-3) At this meeting, Brekke stated that she was confused about Haroldson's initial question regarding where she'd dropped off

the parcel when Brekke returned to work from leave in late December.

On January 6th, 2012, the County reviewed Brekke's emails about the FedEx Parcel after providing her the County's "Use of electronic equipment" policy. The County discovered an email between Brekke and Stafford in which Brekke stated that the package contained a certificate and some newspapers, and another email that said Brekke knew the certificate had Spanish writing on it (E-3, attachments E and G).

On January 18th, 2012, Hansen asked Brekke at the second fact-finding meeting whether she knew what the parcel contained, and whether she'd opened it. She denied knowledge of the contents and denied having opened it. When confronted about the emails found during the review, Brekke then acknowledged that she had opened the parcel. She continued to deny knowledge of the parcel's contents.

As a result of these meetings, the County arranged for a pre-determination meeting on February 6th, 2012, at which Brekke had the opportunity to respond to the allegations outlined in her pre-determination letter and had AFSCME Business Representative Rick Henson present. Brekke submitted a written statement as her response (E-4).

At the predetermination meeting, the County concluded that Brekke was untruthful about the following matters:

a. Her statement about dropping the parcel off "across the street and around the corner,"

b. Her statement to Haroldson which led him to believe that she was the person who dropped the parcel off at Airport Road when in reality, it was her parents who supposedly dropped it off,

c. Her statement that she "didn't know" the parcel's contents.

These findings ultimately led John Haroldson and The County to terminate Brekke's employment on March 5, 2012.

Brekke grieved under CBA Articles 3 and 20.1. The Union argued that the County failed to comply with just cause by failing to provide a fair and unbiased investigation to the Grievant, failing to use progressive discipline, imposing an extreme level of discipline, and not proving by clear and convincing evidence, that Brekke was untruthful.

The Parties were unable to settle the matter, and submitted the case to arbitration. The parties selected Arbitrator Timothy Williams, and a hearing was held on November 1 and 2, 2012 at the Sunset Building in Corvallis, Oregon. At the end of that hearing, the parties agreed to submit post-hearing briefs by December 6, 2012, and that date was then extended to December 20, 2012. The briefs were timely received by the Arbitrator and this document constitutes the Arbitrator's final decision on the matter.

STATEMENT OF THE ISSUE

As noted above, the Parties agreed on the following statement of issue:

1. Did Benton County have just cause to terminate Tara Brekke?

2. If not, what is the proper remedy

APPLICABLE CONTRACT LANGUAGE

COLLECTIVE BARGAINING AGREEMENT, Effective 2009-2013

ARTICLE 3. MANAGEMENT RIGHTS

Except as otherwise expressly limited by the terms of this agreement, the County retains all of the customary, usual and exclusive rights, decision-making prerogatives, functions and authorities connected with or in any way incident to its responsibility to manage the affairs of the County or any part thereof. Without limitation, but by way of illustration, the exclusive prerogatives, functions and rights of the County shall include the following:

* * * * *

I. To discipline, suspend, demote or discharge an employee so long as such action follows the tenets of just cause; and probationary employees at the pleasure of the appointing authority pursuant to Section 20.1.

ARTICLE 20. EMPLOYEE DISCIPLINE

Section 20.1 Progressive and Corrective Discipline. The County agrees with the tenets of progressive and corrective discipline, when appropriate. Progressive discipline will normally start with an oral reprimand. An oral reprimand is defined as a corrective action, which will result in a written record to the employee's Personnel file. The County shall neither discipline nor discharge post-probationary employees without just cause. Pursuant to this Section, just cause means, but is not limited to:

"… a cause reasonably related to the employee's ability to perform required work. The term includes any willful violation of reasonable work rules, regulations or written policies…" (ORS 236.350(3)

ARTICLE 22. GRIEVANCVE PROCEDURE

D. Grievance at Step 4

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3. The decision of the arbitrator shall be final and binding on the parties, however the arbitrator shall not have authority to alter, modify, amend, vacate or change any terms or conditions of this agreement, and his/her remedy must follow the tenets of being within the four corners of this agreement. This provision is not intended to prevent either party from any administrative or statutory relief they may otherwise have to appeal an arbitrator's award. The decision of the arbitrator shall be issued within thirty (30 days) of the conclusion of the arbitration hearing.

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6. If arbitration is utilized, the cost of the Arbitrator shall be shared equally by the Parties. Each Party shall bear the cost of presentation of their own case.

POSITION OF THE COUNTY

The County contends that the Arbitrator should deny the Union's grievance because the County had just cause to terminate the Grievant's employment. The County believes that Tara Brekke was repeatedly untruthful to her employer about a work-related incident. Neither the County nor Brekke believes that the incident itself was serious enough to warrant termination; rather, when Brekke was given numerous opportunities to take ownership of her mistake, she lied to and misled her employer.

The County argues that these kinds of behaviors, in any office, are equivalent to insubordination, and it is particularly true in the case of a paralegal in a district attorney's office. Such paralegals are in a position of trust, having direct access to private information about members of the

public. The work of a paralegal directly affects the integrity of service and reputation of the District Attorney's office. They necessarily must be held to high standards of honesty and integrity.

The County maintains that it had just cause to terminate Brekke's employment because it proved on several occasions that Brekke lied to her employer. Brekke was provided a full and fair investigation by the County, where she failed to provide rational and clear explanations for her actions.

Under the "just cause" statue in ORS 263.350 (3), the County must prove that the employee violated a written rule, regulation or policy. The County indeed proved that Brekke violated one of the County's Core Values by being dishonest. In the policy manual published on the County website, the County cites integrity, honesty and honor as central or core values (E-19).

Brekke also signed the Personnel Manual, in which Rule 18 spells out that the County will subject employees to disciplinary action for any "action that reflects discredit upon County service, or is a direct hindrance to the effective performance of County functions." (E-22) Another cause for discipline in this Manual is "Willfully giving false information or withholding information with intent to deceive." (E-22, p.

67) The County terminated the Grievant for violating these written rules, as per the statute.

To be clear, the County argues that Brekke first lied when she stated to Haroldson that she dropped the package off at the FedEx location near the office when he asked her about it on December 27, 2011. Her next lie was that she didn't open the parcel, and didn't know what was in it, which was proven untrue by a discovered email she had sent to her union steward prior to being asked this question. In that email, she provided evidence that she had seen a certificate with Spanish words in the package, contradicting her claim that she had "no idea" what was in the parcel.

There are several other inconsistent accounts by Brekke about the events of November 29, 2011, which further erode her credibility and demonstrate her willingness to change her stories, even under oath. In one account, she claimed that her vehicle was still at the office when she left karate class, and in another, she claimed that her ex-husband had the car removed during the class.

Brekke testified that she brought her purse into the class in case her car would be gone by the time it was over, but she could not explain why she would have left the parcel in the vehicle, knowing it needed to be mailed, if she thought her ex-husband would take the car during class.

To bolster her version of events regarding her car problems, she submitted an invoice for vehicle parts. These only add confusion to Brekke's story. The invoice, for instance, shows that someone ordered parts for Brekke's vehicle fourteen days before the service light supposedly went on in her car. She testified under oath that the first time she'd learned about her car troubles was when she got into her car after work on the evening of November 27, 2011.

Finally, though Brekke could have called several witnesses to confirm her recollection of events, including her parents or ex-husband, or the mechanic who wrote on the parts invoice and was supposedly a family friend, Brekke did not call any witnesses during the hearing, and the County views this fact as conspicuous.

Regarding the Union's contention that the County did not use due process in its discipline of the Grievant, the County argues that in this case, the CBA specifically allows the County to summarily discharge an employee for cause. The CBA allows elasticity when it says that progressive discipline will be used "when appropriate." The County chose that language to ensure its right to terminate an employee when that employee's actions damage his or her relationship to the County such that the County cannot continue the working relationship.

The County argues that Brekke had adequate notice that her actions could result in termination, including that she knew Benton County's "Vision Statement," had signed her Personnel Handbook, and as was demonstrated through the questioning of witnesses at the hearing.

Brekke had adequate opportunity to present her side of the case before being discharged, making the County's investigation of the matter a full and fair one. She had that opportunity at two separate fact-finding meetings, and had union representation at both meetings. After consideration of the outcome of these and meetings and the predetermination meeting, the County determined that Brekke violated Benton County Employee Policy 18.2, which states, in part, that the County may discipline employees for willfully falsifying information or withholding information with intent to deceive.

The County believes that the penalty was reasonably related to the event because, as previously stated, honesty and integrity are critical values at the District Attorney's Office. Employees who have lost the trust of the District Attorney cannot gain that trust back through progressive discipline, and therefore, argues the County, Brekke's termination was warranted. In addition, the County believes that some breaches of trust are so severe that even a history of satisfactory or even excellent service cannot repair the relationship.

The Union argued on behalf of Brekke that her inconsistencies regarding the parcel owed to an overwhelming workload and the stress of her mother having an illness. The County wishes to remind the Arbitrator that Haroldson approached Brekke's desk before she had even started her day's work, and therefore had her full attention. And despite her mother's unfortunate illness, the District Attorney's office must still have been able to hold Brekke to its standard of truthfulness and honesty. Having an ailing family member does not negate these values and duties.

The County found Brekke's repeated lies to be intolerable, particularly for a paralegal in the District Attorney's Office, and the County terminated Brekke for the critical loss of trust that occurred as a result. This decision was reached after a full and fair investigation. In conclusion, the County requests that the Arbitrator deny this grievance, as the facts presented amount to just cause for discipline.

POSITION OF THE UNION

The Union contends that the Arbitrator should sustain the grievance and make Ms. Brekke whole in all ways because Tara Brekke's termination was unwarranted, inappropriate, and in violation of the parties' collective bargaining agreement. The absolute maximum penalty that Benton County should have imposed

was a reprimand, based on her excellent work history, the confusing circumstances, and Brekke's immediate attempts to rectify the situation once she realized that there was a problem.

The Union believes it is important to discuss the context in which the instant dispute arose. Though Brekke was an outstanding paralegal, her immediate supervisor Renee Hammill, and D.A. John Haroldson, had problems with Ms. Brekke unrelated to her work performance prior to the dispute. For instance, in April 2010, Haroldson sent an email that said he was "already smiling" after learning that Brekke would be staying home sick. (U-10). Then in February 2011, Renee Hammill commented that "Tara's poison is spreading." (U-11) This comment was associated with an email string in which another employee was asking about comp time. The comments from Haroldson and Hammill stand in contrast to the written compliments they gave Brekke during the same time frame regarding her work performance. (U-9, 10, 12, 13, 15)

In addition, Haroldson learned about the problem with the package no later than December 9 or 10, and did not contact Brekke about it until she returned from leave. The Union argues that the purpose of Haroldson withholding information from Brekke was to keep the conversation going so that he would have a written record of her statements. (U-27) Indeed, some of

these statements were the ones he later used to justify his decision to terminate her. In addition, reviewing and relying on the emails between Brekke and her union steward hardly help the County's claim that it did everything it could to ensure that the investigation was "fair and impartial."

There is no dispute that Brekke made a mistake by giving her parents the package to mail on her behalf. The County made it clear that this was not the reason she was terminated, and that giving the package to her parents was understandable given the circumstances of that day. What Brekke and the Union will not accept is that Brekke was terminated for willfully giving false information or withholding it with intent to deceive. The evidence simply does not support the County's claim that Brekke lied or intentionally withheld information.

There is a lack of evidence that Brekke knew or had been told that the package had not arrived at the time she made several statements at issue. Based on the emails she received from Haroldson on December 9, it would have been reasonable for her to assume that Haroldson had checked and located the tracking information. She heard nothing further from him until December 28. When they discussed the matter on the 28th, Brekke had no reason to think that the package had not been mailed, or that who mailed the package would be relevant.

When Haroldson questioned Brekke about which FedEx box the package had been mailed from, Brekke had not thought about the package in weeks, was unclear or confused about Haroldson's questions. As soon as she wrapped her mind around the fact that the package was missing and there was a problem, she immediately told Haroldson about giving the parents the package to mail on her behalf. Brekke also had no reason to believe that the package had not been mailed until almost a month after the events with her car problems and the karate class transpired.

The Union's conclusion that Brekke told the truth and attempted to correct her mistakes right away is congruent with what witnesses testified about her behavior. Witnesses said that it was not in Brekke's character to lie or to deny making a mistake when it happened. Even Haroldson testified that it was not like Brekke to lie.

The Union also believes it is critical to discuss the quality of the Employer's investigation, which the Union argues was tainted and biased from the beginning. Haroldson served as victim of the incident, as the primary witness, as an investigator and fact-finder, and as the ultimate decision-maker. Before the January 18 fact finding meeting, the County typed up questions *and* answers. (E-2, Jennifer Hanson testimony) The final notes only appear to reflect part of what was said during the meeting.

The County violated article 20 of the CBA because it did not comply with the tenets of progressive and corrective discipline. If it had, the County would have begun its process with an oral reprimand to Brekke. The County, in this case, failed to show that progressive or corrective discipline would not have worked or been effective with Brekke. She had performed at a high level for nearly seven years, and had an unblemished personnel file. Some of the County's witnesses testified that even after everything in this case had happened, they still trust Brekke. The events that led to her termination were unique and unlikely to occur again, and they were also events unrelated to the performance of her day-to-day duties.

Any mistaken statements or misunderstandings that took place on Brekke's part were understandable given the number of emails and conversations that were taking place in rapid succession, given the other work she was trying to get done, and given the fact that she had just recently returned from work after a long absence. There is no reason to believe that the only viable option the County had for discipline was to terminate Brekke's employment. More mild forms of discipline could have and should have been used. John Haroldson himself acknowledged that he originally believed that just a written reprimand would be the appropriate sanction until he discovered

on January 18 that Brekke had written a comment about "wishing for new management" in an email to her union steward. (U-37)

For these reasons above, the Union respectfully requests that the Arbitrator enter an award that finds that the County violated Article 20 of the CBA by discharging Tara Brekke; that orders the County to reinstate Brekke with full back pay and benefits; and that orders the County to reimburse Brekke for all benefits she would have received if not for the improper termination, including but not limited to restoration of retirement benefits, health insurance premiums or uncovered health expenses, vacation and sick leave accruals; orders the County to remove any and all mention of the discharge from Brekke's personnel and working files; and orders any further relief that the Arbitrator deems just and appropriate.

ANALYSIS

The Arbitrator's authority to resolve a grievance is derived from the Parties' collective bargaining agreement (CBA) and the issue that is presented to him. The pertinent contract provision is found in Article 3 and this provision, in part, grants the Employer the right:

> To discipline, suspend, demote or discharge an employee so long as such action follows the tenets of just cause…

The Parties agreed that the issue in this case is whether the Employer's discharge of the Grievant, Tara Brekke, was for

just causes. The Employer asserts that its actions were consistent with the requirements of the labor agreement including the just cause standard while the Union argues that the termination of the Grievant violated the just cause provision.

The Arbitrator notes that in a grievance arbitration proceeding, the employer is generally assigned the burden of proof in any matter involving the discipline or discharge of an employee. In all other matters the union is assigned the burden of proof. As the instant grievance does involve a matter of discharge, the burden lies with the Employer.

Also, this Arbitrator has regularly determined in prior decisions that where discipline or discharge relates to questionable circumstances that would place a permanent stain on the Grievant's record (such as sexual harassment or theft), the applicable standard of proof is "clear and convincing." The instant case does involve such circumstances as it questions the Grievant's integrity. Therefore, the Arbitrator determines that the appropriate standard of proof is clear and convincing.

The Arbitrator carefully reviewed the audio recording of the hearing, the documents presented into evidence and each Party's brief. After thoughtful consideration he concludes that the Employer has provided clear and convincing evidence to support the charges against the Grievant and sufficient to

establish that the just cause requirement of the CBA has been met. As a result of this conclusion, the Arbitrator finds for the Employer and denies the grievance.

The Arbitrator emphasizes that, while he carefully reviewed all of the points raised by the Parties in their briefs, he has chosen to focus the remaining analysis on the arguments and evidence that he found weighed most heavily on the final decision. The fact that a contention or point is not discussed does not mean that it was not considered. It does mean that it was not determined to be a major factor in arriving at the conclusion that the grievance should be denied. The reasoning and the primary factors that led to this conclusion are laid out in the following multipoint analysis.

First, ultimately the discharge arose out of events that originated with a request by District Attorney Haroldson that the Grievant FedEx a package. For reasons that are not totally clear, the Grievant claims that she gave the package to her parents to drop the package off. She maintains that they failed to do so and the package remained in their possession. What is known for sure is that the package never entered the FedEx shipping system.

The decision to terminate the Grievant's employment was made by Benton County District Attorney John Haroldson and H.R. Analyst Jenifer Hansen. Mr. Haroldson made it clear that the

Grievant was not discharged as a result of mishandling the FedEx shipment. The unfortunate error with regard to completing the shipping process would have at most resulted in a minor form of discipline. Rather, the discharge was based on the County's conclusion that the Grievant had engaged in a series of dishonest acts related to the failed shipment.

The Union, focusing on the fact that the Grievant fully acknowledges her mistake in handing the package off to her parents, contends that she was not dishonest and that at most she deserved only a minor form of discipline for her inappropriate handling of the package (U Br 13).

Thus there are two general areas of agreement between the Parties. First they agree that only a very minor form of discipline is warranted by the fact that the Grievant did not ensure that the package was actually given over to FedEx. Second, while they disagree as to whether or not the Grievant was dishonest, they agree that any case for discharge is centered on the question of dishonesty. The remainder of this analysis focuses exclusively on that question.

Second, the Arbitrator's experience tells him that honesty is often times the central issue in an employee discharge case particularly when it is a public sector case. This is true because the question of honesty and the issue of public trust are often closely intertwined – the Arbitrator notes the

passionate testimony of Mr. Haroldson on this issue. A phrase the Arbitrator has heard in police cases, for example, is "if you lie you die," meaning of course that dishonesty will bring about the immediate termination of employment.

The Arbitrator further notes that there are two primary reasons to discharge an employee. The first is a matter of misconduct while the second is a matter of unacceptable performance. Matters of misconduct almost always involve the violation of a work rule or policy such as a safety or a personal conduct rule. When an employee is accused of misconduct, he or she can acknowledge the wrongful action or deny it. Denial raises questions of honesty, is the employee being truthful when he or she denies the misconduct? If the denial is not believed, then the Employer may take disciplinary action against the employee both on the account of the misconduct and on the account of the dishonesty. All too often the result is that a higher level of discipline is imposed then would have occurred had the employee owned up to the misconduct. On the other hand, if the employee was honest yet still not believed, the discipline imposed is doubly unjust both because he or she is not guilty of the accusation and because his or her character has been wrongfully attacked.

Most important, the act of dishonesty is often times viewed as more significant than the misconduct. For example, assume

that the County has a public works department that maintains County roads. Also assume that there is a work rule requiring the wearing of safety vests at any time that an employee is working on a road project. A motorist calls in a complaint that while driving through a road project he almost hit a worker who was hard to see and not wearing a safety vest. The County confronts the employee with this accusation and he maintains that at all times he was wearing his vest. Smart phones being what they are, the County now shows the employee a picture the motorist took and sent to document his complaint.

In this example, what was the bigger concern to the County: misconduct or the dishonesty? Usually, the bigger concern is the dishonesty because problems honestly confronted can be resolved. Most important, the act of dishonesty eats away at the quality of the relationship between the employee and the employer. The Arbitrator will go one step further, in some situations the act of dishonesty so destroys the relationship that there is no reasonable basis upon which employment can continue.

In the instant case, this final point is the center of the Employer's case to terminate the Grievant's employment. From the County's perspective, the Grievant has belligerently maintained her dishonesty such that the act of dishonesty and the maintenance of that act have damaged her relationship with

the Employer to the extent that there is no reasonable basis to continue her employment. Moreover, the County contends that it had just cause to discharge the Grievant because the CBA specifically granted the Employer the right of summary discharge for particularly egregious cases. The County writes:

> The CBA contemplates that not all cases warrant progressive discipline: the CBA states progressive discipline will be used "when appropriate." The County chose that language to reserve the right to terminate any employee when the employee's actions so severely damages his or her relationship with the County, that the County cannot continue the working relationship. Repeated dishonesty is one of those occasions. (E Br 11)

Third, the primary factual question for the Arbitrator to answer, therefore, is whether or not the Grievant was dishonest. The letter of discharge specifically states that, "Throughout this investigation you have shown a pattern of deception and have failed to be forthright and truthful in your responses about this parcel and its delivery" (E 6, P 9). In its brief the County focuses its arguments on two acts of dishonesty:

- Brekke first lied when she stated she dropped the parcel off at the FedEx location near the office. (E Br 6)
- Brekke lied about opening the parcel (E Br 9)

Turning to what the County has labeled the Grievant's first lie, the Grievant is accused of first stating that the package had been dropped off across the street and around the corner from the office and then changing her story to a drop off at the FedEx office on Airport Road. She denies ever having stated

that the package was dropped off at the FedEx box close to the office. The Arbitrator finds the best summation of this charge at page 4 of County exhibit 3:

> You claimed to not recall the exact details of the initial conversation, and added that I had been the one who initially made the inquiry about drop boxes and drop box numbers. I pointed out that my recollection was very clear, and reminded you that I only ask you to identify the physical drop off location so the parcel could be tracked down. I pointed out that it was you who offered (after stating you had dropped off the parcel at the Fed Ex drop off box around the corner) to go out to the Fed Ex drop off box around the corner to get the box number. You said that you did not recall being asked where the parcel was delivered. You claimed you only recalled me asking you to get the box number for the Fed Ex drop off box where the parcel was dropped off. I pointed out that I had no basis to know where the parcel was dropped off (eg. Benton County Mail Services, Fed. Ex. counter service, Fed. Ex. drop box) so I would have no basis to initiate an inquiry by you for a drop box number. To this you have no response.

The Arbitrator emphasizes that the critical point of dishonesty focuses on the allegation that the Grievant first stated that the package was dropped off across the street and around the corner and then changed her statement to the package was dropped off at the FedEx office on Airport Road. Mr. Haroldson in his testimony emphatically testified that she in fact did make the first statement (across the street and around the corner) and the Grievant denies that she did.

Overall, the Arbitrator finds clear and convincing evidence that the Grievant did make the statement that she now denies and that her denial is not a matter of bad memory but rather deliberate and willful. The evidence and reasoning behind this

conclusion parallels that found on pages 6 through 9 of the County's brief. The Arbitrator finds no reason to repeat or summarize that material but will emphasize two important considerations.

The Parties are in agreement that there once was a FedEx box across the street and around the corner. The evidence also indicates that the Grievant had previously used that box (Attachment G, E 3). The Grievant does not deny that she walked to the box but now claims that she did so to find a telephone number. It seems to the Arbitrator that the Grievant has created a dilemma for herself where she either has to admit her dishonesty or provide an absurd explanation. She acknowledges that she went to a box that no longer exists. But if it did not exist, how could she have placed the package in it? Thus the Grievant concocted the story of going for a telephone number. The Arbitrator is simply unwilling to believe that an experienced paralegal would choose to walk to a box to get a phone number that was easily obtainable by a 15 second trip to the internet; a fact that Office Administrator Hammill testified to when she needed to call FedEx. On the other hand, it would make sense to go see if the box had a specific box number on it if you wanted to identify that specific box.

The other consideration by the Arbitrator that he wishes to emphasize is the absence of evidence as to the instructions

given by the Grievant to her parents when she handed over the package. Was the package handed over with specific instructions as to where the parents were to take it? The Arbitrator's review of the record indicates only that the Grievant takes the position that her parents accepted the package and agreed to submit it to FedEx. One thought is that she could have simply asked them to get the package to FedEx and left it up to them to figure out where to take it. Also, she could have given them very specific instructions as to where she wanted it taken. Of course, the County is not totally convinced that her parents were ever involved (E Br 11).

The vagueness of these facts increases the likelihood that the Grievant did first indicate that the package had been deposited across the street and around the corner. She may not have known, assuming that she did give the package to her parents, where they were going to take it and across the street and around the corner was a very plausible answer based on her past experience.

As previously stated, the Arbitrator finds the evidence clear and convincing that in spite of her denials, the Grievant did first assert that the package was deposited across the street and around the corner and then later changed her story to the FedEx Airport Road facility. The Arbitrator emphasizes that of the two charges of dishonesty this is the more significant

and, having concluded that it is proven by way of the evidence on the record, he sees no reason to proceed to the second charge. Rather, he will next proceed to take a deeper look at the seriousness of this proven charge.

Fourth, the Arbitrator takes particular note of the statement found in the Union's brief that "there is absolutely no reason to believe that the County's only viable option was to terminate Brekke" (U Br 13). The County, of course, disagrees with this assertion and takes the position that the Grievant's continuing denial of her dishonesty, the fact that she kept changing her story and the fact that she acted in a manner that Mr. Haroldson called disdainful during the investigation, all worked together to make rebuilding a reasonable workplace relationship impossible. Thus, argues the County, it was not required to use progressive discipline in determining the appropriate penalty for her actions.

Responding to the Parties positions with regard to whether the just cause standard required the County to assign discipline less than discharge, the Arbitrator refers back to his earlier discussion of the significance of dishonesty in eroding workplace relationships. Ultimately he concurs with the County and concludes that there was not a reasonable basis upon which to reestablish a workable workplace relationship. While much could be written on this point, the Arbitrator's focus will be

on Employer exhibit 9 which is a letter from the Grievant to the Step Three Grievance Committee.

There is a concept in argumentation theory called argumentum ad hominem which references arguments that focus on attacking the person as opposed to the issue. The above document is full of such argument:

- Mr. Haroldson's regal like behavior (page 3)
- clearly indicate his personal disdain for me and his ruthless attempt to destroy my reputation and character (page 4)
- Mr. Haroldson's actions continue to verify his deliberate attempt to discredit my character and furthermore allow the office to become a volatile and hostile work place (page 4)
- the overt retaliatory acts of Mr. Haroldson (page 6)
- act maliciously with the intent of knowingly, willingly and intentionally engaging in a manner to defame my character, publicly humiliate me, and accuse me of being dishonest or deceptive without just cause (page 6)

It is hard if not impossible to read this document and draw the conclusion that there is a possible way to restore a reasonable workplace relationship. As the Arbitrator reviewed the document he was almost immediately struck with the thought that Shakespeare said it best in Hamlet, "the lady doth protest too much, methinks."[3] In verifying the accuracy of the quote, the Arbitrator came across an applicable reviewers comment: "When we smugly declare that 'the lady doth protest too much,' we almost always mean that the lady *objects* so much as to lose

[3] Often misquoted as "methinks the lady doth protest too much."

credibility." What is particularly troubling to the Arbitrator is that the document contains no sense that even if every single thing the Grievant has stated were true, which the Arbitrator has concluded otherwise, it is still a story with difficult to believe realities. An engine warning light is on and it gets fixed by changing the tires? The parents have a memory of doing something they absolutely did not do? One walks to a FedEx box a couple of blocks away to get a phone number that is easily obtainable on the internet? While the old statement "truth is stranger than fiction" can certainly be correct, the Grievant seems to have no sense of how difficult it is to believe her story. It is simply all a problem of a ruthless, malicious boss.

Obviously the document in question was created after the discharge and played no role in the actual decision to terminate her employment. It is used here, however, to illustrate that the incidences in question had created a rift between the Grievant and her Employer of a magnitude that it could not be reasonably healed. Progressive discipline is used only when there is a reasonable basis upon which to believe that there is some likelihood of successfully re-aligning the parties. Since in the instant case that is not a possible conclusion, the Employer is permitted under the just cause requirement to move to summary discharge.

Fifth, the Union notes that the Grievant was entitled to appropriate due process under the just cause standard and that the investigation was significantly flawed with inadequate due process. The Arbitrator acknowledges that the Union raises some legitimate concerns particularly from the perspective that Mr. Haroldson served multiple roles which conflicted with each other. He was the key witness, the investigator and the ultimate adjudicator of the facts. That hardly seems fair to the Grievant and one has to wonder, contends the Union, whether the outcome would have been different had the roles been divvied up amongst different individuals. To be the witness and to be the weigher of fact is inherently conflictive and inappropriate.

After some very careful deliberation, the Arbitrator arrives at the conclusion that while the due process was not ideal it was sufficient to meet the just cause standard found in the CBA. In this Arbitrator's view, the most significant element of due process is the opportunity for the accused to be able to fully present his or her own version of what happened. The evidence on the record indicates that the Grievant received two fact-finding hearings at which she had Union representation with an extended opportunity to present her case. Additionally, she had a pre-determination meeting also with Union representation. Clearly, she had a full and complete opportunity to present her side of the story.

Also, the Grievant was able to use the grievance procedure to challenge any or all of the County's conclusions. It seems to the Arbitrator that the best evidence of a due process failure is to uncover facts that should have been found during the investigation. During this lengthy process, the Union is unable to point to any significant failure by the County with regard to obtaining pertinent information prior to making the ultimate decision to discharge the Grievant.

Additionally, the Arbitrator notes that as the elected official Mr. Haroldson had the final say with regard to discharging or not discharging the Grievant. That role comes with his position. He was a witness because of his direct involvement. Obviously, it is not an assigned role and could not be given to someone else. Thus, at least part of the due process concerns is simply built into the system and cannot be avoided.

In sum, the Grievant was given multiple opportunities to fully present her point of view during the investigative process. The fact that ultimately she and the Union disagree with the outcome is not in and of itself a measure of due process failure. The Arbitrator finds that the quality of investigation and the amount of due process given was sufficient to meet the just cause standard.

To summarize, the County has a reasonable rule that prohibits employees from "willfully giving false information or withholding information with intent to deceive" (E 22, P 67). The Arbitrator has concluded that the Grievant violated this rule in her responses to the investigation concerning the inappropriate handling of a FedEx parcel. The Arbitrator has further concluded that her "disdainful" and at times belligerent defense of her dishonesty has fully eroded the normal bonds of trust necessary in an employment relationship. As a result of the proven charges and the effects of her dishonesty, the Arbitrator concludes that the Employer did have just cause to terminate her employment. Thus the grievance is denied.

CONCLUSION

The issue before the Arbitrator is whether Benton County terminated the Grievant's employment for just cause as required by the CBA. The Arbitrator has concluded that the charge of dishonesty is proven by clear and convincing evidence. The Arbitrator has further concluded that the nature of the dishonesty and its impact on the grievance employment relationship was sufficiently corrosive as to destroy the necessary bond of trust and respect needed to maintain employment. The Arbitrator further found that the Grievant was given sufficient due process as to meet the standards required by the just cause requirement. As a result of these

conclusions, the Arbitrator determines that the Employer did have just cause to discharge the Grievant. As a result the grievance is denied.

An award is entered consistent with these findings and conclusions.

IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	AWARD
	)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 2064, COUNCIL 75	)	
	)	
"AFSCME" OR "THE UNION LOCAL 2064	)	
	)	
AND	)	
	)	
BENTON COUNTY	)	
	)	TARA BREKKE
"COUNTY" OR "THE EMPLOYER"	)	GRIEVANCE

After careful consideration of all arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1 Benton County did have just cause to terminate Tara Brekke.

2 The grievance is denied.

3 Article 22, D6 of the Collective Bargaining Agreement states "the cost of the Arbitrator shall be shared equally by the Parties." The Arbitrator's fees will be so assigned.

Respectfully submitted on this, the 25th day of January, 2013

Timothy D.W. Williams
Arbitrator