



TOWN OF CHAPEL HILL
Human Resource Development

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MEMORANDUM

To: Roger Stancil, Town Manager

From: Members of the Personnel Appeals Committee
Patrice Howell, Member Hugh "Skip" Proctor III, Member
Eugene Farrar, Member Rex Mercer, Chair
Asila Calhoun, Member

Date: February 27, 2013

Subject: Step IV Appeal Hearing of Kevin L. Thompson

We are writing to present our unanimous recommendations in the matter of the Step IV appeal of Kevin L. Thompson. Mr. Thompson is appealing the decision by the Chapel Hill Deputy Town Manager to uphold the following action:

Issue under Review

You are appealing the decision of Ray "Butch" Kisiah, Director of Parks and Recreation, to terminate your employment with the Chapel Hill Parks and Recreation Department.

Grounds for Appeal

In your grievance you stated: "The Town used the pretext that he had violated the Town's policies when he picked up a fallen tree branch at the State Employee's Credit Union, at the request of the bank manager and hauled it off in a Town Truck. The real reasons were racial and retaliatory animus that had piled up against Mr. Thompson because he had joined the Union, filed grievances and been targeted by the anti-union, right-wing outside consultant - Capital Associated Industries that was hired by the Town to stop any growth of employee associations. Mr. Thompson, along with two other fired employees, Mr. Bigelow and Mr. Clark were the main targets of this action." (Attachment 1)

Requested Remedy

Reinstatement and transfer from Robert Minick's authority and a full investigation of the anti-union and anti-grievance attitudes in the Town.

Hearing of Appeal

The Personnel Appeals Committee was convened to hear these issues on February 12, 2013 at 6:00 pm in the Human Resources Training Room. At the employee's request, this was an open hearing. In addition to the Committee Members listed above, present at the hearing were: Ralph Karpinos, representing the Committee; Kevin L. Thompson, the appellant; Allan McSurley, Attorney, Ray "Butch" Kisiah, Director, Parks and Recreation; Tiffanie Sneed, Town Senior Legal Advisor representing Mr. Kisiah; Terry Battle, Landscape Supervisor - witness, Robert Minick, Landscape Superintendent - witness,; and Frances Russell, Director, Human Resource Development. Rex Mercer served as Committee Chair.

As is required by Town policy for a hearing that is an appeal of a Step III grievance decision regarding discipline, the Town presented its information first.

Mr. Mercer opened the meeting with introduction of the Committee members and staff. He gave an overview of the process for the hearing, the committee's purpose, and reviewed the meeting agenda.

SUMMARY OF WITNESSES RESPONSES

Department's Statement

Tiffany Sneed Opening Statement

This is not about racial pretexts, this is not about the sanitation workers, this about Mr. Thompson's refusal to modify his behavior; to take the coaching and counseling that his department tried to provide. After several coaching and counseling sessions, after several suspensions, after two final written warnings he still would not modify his behavior. He still used Town equipment, Town personnel and on Town time to go pick up the limb on private property while under the guise of doing personal business. We only found out about it because he was so late in getting to his reporting site that his co-worker complained about it. But for that fact we would not have known. Unfortunately, this is not the first time Mr. Thompson has been disciplined. As I stated, they engaged in numerous acts of progressive discipline with this employee; more so, when you hear the evidence tonight, your will probably think that it was more than what is warranted. Mr. Thompson gave us no choice. We are here because of him and no other reason.

Witness

Terry Battle Summary Responses to Ms. Sneed's Questions

During my supervision of Mr. Thompson I did have issues with his work performance. Mr. Thompson has a few issues dealing with tardiness, being at his assigned place when he should be, difficulty getting along with co-workers, using profanity in his general language, using profanity in meetings, speaking despairingly about people of other races. There was a meeting where we were discussing an upcoming seminar. There were requirements for attending the seminar. Mr. Thompson disagreed with the requirements. He spoke loudly, using profanity during the meetings, so much so that afterwards his co-workers came to me and said that they felt very uneasy about his reactions during that meeting. I also recall hearing his general use of profanity that shocked me more than others because he was pretty negative about white people and used profanity in his comments. I don't use profanity at all so I do not want to use the word. I don't feel comfortable writing it down, but I am willing to do that (he wrote the words white bastard on a sheet of paper). These comments were directed at the white members of middle management, people on the same level as me, and the other supervisors, particularly Mr. Minick.

I had heard of other activity involving Mr. Thompson. His co-workers would come to me and report unethical behaviors by him; instances like being with the town equipment out of our jurisdiction in other counties and other cities and using Town equipment for his personal business, which is like a trucking and tree cutting business. When this stuff would come to me, I would say that we need to document and act on this, but they would not come forward and put their name on a piece of paper. They told me they were afraid that he might do something to them or retaliate against themselves, their property or their family.

I learned about this most current incident when my crew leader came to me and said Mr. Thompson was missing from the work site for about an hour. The next morning, the other crew members came to me and said that they heard in general conversation from the person that was working with Mr. Thompson, that they were at the State Employees Credit Union (SECU) doing some work, do some tree branch removal. When they told me I said that is not good, he should not be doing that. I went and spoke to Mr. Minick and we decided that more fact finding had to be done. I went to the credit union and spoke to the Senior Vice President there. I asked him if any work been contracted for debris removal. He said yes and he had contact a known associated of his, Mr. Thompson who had done work for him in the past. Mr. Thompson came that on that Monday right after lunch. He was there for a short while and he removed the limb and

the manager said that he had not billed him as yet. I went to my office and wrote up what I had found out. At the end of that day, the contract worker (Eddie Nabors) that was working with Mr. Thompson came by my office and said he was getting ready to leave. I asked him what happened yesterday after lunch. He said that he and Mr. Thompson had gone to the credit union after lunch. As soon as they got there they got out and started cutting up the tree, clearing up the area. They may have talked to the bank manager after they got started or even after they finished. I wrote that up and the next day went to talk to Mr. Minick and told him what I had found out. Based on that information we decided that we need to have a pre-disciplinary conference to give Mr. Thompson the opportunity to explain what we had been told to us.

Mr. Thompson's account of what had occurred is that he had gone to the bank to some bank business, after receiving permission from his crew leader, while there he saw the bank manager and the bank manager asked him to remove this tree limb while he was there. He said that he removed the tree limb and left. He did not deny removing the tree with the Town equipment. He did not deny using Town personnel to remove the equipment.

During the conference, questions arose as to why Mr. Thompson would have a chain saw on his truck. I found out that he had gotten the chain saw from another work group that morning and immediate after lunch he went to the credit union. There was no reason for him to have the chain saw. I spoke to his Crew Leader and no work using the chain saw was proposed for that day, that week or even the previous week. Mr. Thompson would not have been needed the chain saw for after-hours or call back work for the Town. The after-hours crew has a vehicle set up with the chain saws and whatever equipment they would need. He would not have used the equipment from our setting, so there was no reason for him to have that chain saw.

Mr. Battle's Responses to Mr. McSurley's Questions

I don't know the Town's specific policy when citizens ask for help. I do know that we are not supposed to go on private property to assist private citizens. The Town's position is that you don't go on private property to do anything for citizens or for businesses. We do a lot of litter debris cleanup after things like Halloween or game celebrations for UNC. We are always given specific directions that we do not go on private property to clean it up. We get what's in the street or on the right-of-way but we don't go on private property is the owners or the business owner's responsibility. I did not say before "there was not a defined policy"; I think I said I don't know the specific policy.

I think the first time I saw the letter from Mr. Wellborn, the Senior Vice President of the SECU was in the pre-disciplinary conference. I was not aware that this came over to the Town Manager. Mr. Thompson gave the letter to us at the pre-disciplinary conference. The information in the letter from Mr. Wellborn is not what Mr. Wellborn told me when I spoke to him. It really doesn't matter what he told me or what he says, Mr. Thompson admitted in the pre-disciplinary conference that he went to the credit, that he used Town equipment, he used personal there on private property after he has been instructed not to do so by our superintendent on numerous occasions. Mr. Thompson went on private property, used Town equipment and he shouldn't have done that. We are firing Mr. Thompson for using Town equipment and personnel on private property after being instructed not to do so. I said that he has been instructed by our Superintendent on numerous occasions not to go on private property to do anything for citizens or businesses.

Mr. Battle's Responses to the Committee's Questions

I am Mr. Thompson's immediate supervisor. He also has a Crew Leader Sam Rhone. Mr. Wellborn's statement to me was that he had called a known associate to come and remove the limb. It happened to be Mr. Thompson. He did not say when he had called him.

The next week unbidden by me Mr. Nabors came by my office said that I need to tell you something. He said that he was in the truck going down the road with Mr. Thompson when he called the bank manager

and he heard his name and told him to tell anyone that calls about the day in question that while he was at the bank the manager asked him to pick up the limb on the property. When he told me that, I opened up my notes and put it in there.

The bank manager pointed to where the limb was and it was outside of his window. After I finished speaking with him I went outside to see if I could see anything and I could also see the shavings from where the tree was cut up. I don't know how far it was from the bus stop. I could describe it from the street. There is a sidewalk and then a 3 foot rock wall. After the rock wall there is ivy and there is cut grass. The shavings were found in the grass area right on the edge of the ivy on the credit union property. That is not on Town property it is definitely credit union property

Witness

Robert Minick's responses to Ms. Sneed's Questions

I am Mr. Battle's supervisor. I am in the supervisory chain of command for Mr. Thompson. I am familiar with previous disciplinary issues with Mr. Thompson. He has been on progressive discipline he has had two final written warnings and a three day suspension. After the most recent final written warning he was informed that any performance issues in the future would result in immediate termination of his employment. When this occurrence happened at the SECU where he removed a limb that had fallen off a tree, with the Town chain saw, town truck with a Town employee while he was on Town time, we resulted in a recommendation that we terminated his employment.

The Parks and Recreation practice is that we don't remove anything from somebody's personal property. We do remove litter downtown after special events like NCAA and Halloween celebrations we have and the employees are always instructed that they should remove any litter that is right on the right-of-way right up to the personal property. The same holds true with any tree work that we do vegetation control. We only remove vegetation and trees that are on Town right-of-way or Town property as opposed to being on private property. Like the tree removal, that's one of the things we always check out first if the tree is on if there is a dangerous tree of a whether it's on right-of-way or if it's on private property. If it comes off of private property onto the right-of-way, if a tree falls on to the right-of-way, then we will cut that tree back to the right-of-way line and move it back from the street.

The reason we don't go onto private property is due to liabilities issues. We are only instructed to go on Town property. If we go on private property to do any work there is an added risk of liability there that would be absorbed by the Town.

Before Halloween, NCAA we have meetings before we go out to do what we are going to do and remind them that they should only be removing litter and debris that's on the right-of-way as opposed to going on private. I am always in contact with the tree crew and the people who do vegetation cut-back and they are well aware that they should only be working on Town right-of-way and Town property.

Mr. Thompson works on the call-back crew and does work on the weekends but not during normal working hours where a crew is called back into work for a fallen tree, other than the normal working hours. He was aware of the practices that I have been talking about.

The first was progressive discipline it involved workplace harassment. The second one was a three day suspension was for not attending the education part of the training part of an equipment show that he attended. The most recent final written warning he had was for striking a pedestrian in a crosswalk on East Franklin Street when he was driving a company vehicle. In that most recent final written warning he was informed that any problems with his performance would result in his immediate termination from his job.

I found out about this most recent when Terry Battle came to me about an incident that took place at the credit union. He had spoken to the crew leader the day before and was told that Mr. Thompson was late reporting to the work site after lunch break. Mr. Battle talked to other members of the crew that next morning about the incident after they had been talking about it. That's when Mr. Battle came to me and we both decided that it warranted more investigation and I instructed Terry to go speak with the bank manager at the SECU to find out what actually transpired. The bank manager informed him that Mr. Thompson had been at the bank that afternoon after lunch and that he did remove the branch and that he took it away in a Town vehicle.

Lee Thompson in his pre-disciplinary conference admittedly said that he went to the location he used a Town vehicle and Town equipment chain saw and cut the limb up and took it away. The chronically from what Terry was original told changed to this, but the bottom line is that Lee Thompson admittedly did the work for the SECU and he was on town time and admittedly used the Town vehicle to haul it away with the Town vehicle.

During the investigation, I spoke with Eddie Nabors who was riding with Lee that day and Sam Rhone who is Mr. Thompson's crew leader. I did document the interview. I conducted the interview with John Newark, Facilities Superintendent for the Town. Mr. Newark sat in the conference with me. Mr. Nabors told us that upon arrival at the credit union, as soon as they pulled into the corner of the parking lot he was instructed by Mr. Thompson to begin to help cut up a tree limb that was on the ground, place it in the back of the truck and clean the area up after they were done with the work. During this period the bank manager came outside. Mr. Nabors indicated that the reason that they went to the credit union after lunch was the Mr. Thompson went to do a side job. He reviewed the written statement and both he and John Newark signed it.

At the pre-disciplinary conference we explained to Mr. Thompson the reason why were there and explained to him that this was his opportunity to give his side of what happened. He admitted that he had been there on that day and with Eddie Nabors and they had he cut the limb up with the Town chain saw and placed it in a truck that belonged to the Town while they were on Town time. Mr. Thompson did not dispute any of the allegations.

After the conference I wanted to speak to his crew leader, Sam Rhone and we wanted to find out more about how Lee Thompson got the chain saw that day. We found out that he had gotten the chain saw from another crew. They got the chain saw right before lunch that day. There was no tree work for them to do previous to that and none was scheduled the following day. After the pre-disciplinary conference, Terry Battle and I felt that the recommendation that we give to Mr. Kisiah would be to terminate Mr. Thompson's employment. This was because he had gone through two final written warns and a three day suspension. He was well aware that if he had any performance issues after that most recent final written warning it would result in his termination and he went to the credit union and admittedly used the Town chain saw, the Town truck had a Town contractor employee with him and removed material from there. We just felt that with the progressive discipline and evidence from that day, that his employment should be terminated.

I have seen the document in which Mr. Thompson has made some very serious accusations and the racism that exist in the department and has stated that this is an attempt to control him and keep him quiet about some of the issues in the department and that is really why he was terminated. That is not the case. We try to operate our department through respect and observe the Town goals. Some of the employees in the Landscape division helped to create created the value of RESPECT and we try to uphold those values. We try to work as a group. I see no evidence of racism in our group or anywhere in the Parks and Recreation Department. The reason for his termination is what I stated earlier. He went through a progression of discipline. He was well aware of the fact that if he had any negative impact on his performance with his job that his employment would be terminated. He went to the SECU which is

private property and used Town vehicle and Town equipment to remove a limb there and that is why he was terminated.

Mr. Minick's Responses to Mr. McSurley's Questions

When Mr. Thompson asked Sam Rhone it was after the lunch period. He asked to go to the credit union on his way to the job site. Mr. Rhone assumed that he was there to do banking business. I have seen the receipt from his banking business. He did that in addition to cutting the tree limb and hauling it off.

We use labor agency people because we have some open positions. Whether or not they need a job, we deal with the Westaff and not the people. To my knowledge Mr. Nabors has not applied for a job with the Town. We have not hired anybody. The Senior Vice President said that he had talked to Lee and Lee had removed the limb, cut it up and removed it while he was there. The VP did not state to me that this was a paid job. During the pre-disciplinary conference Lee stated that he had done work SECU before and he had been paid for it. The bank manager also stated that he has done work for SECU and he had been paid for it. The SECU manger stated to Terry Battle that he hadn't been a billed yet. It led me to believe that he had not been paid yet. Mr. Thompson did do this on company time and that is one of the reasons we terminated him. Based on what the bank manager said and what Lee said in his pre-disciplinary conference yes I believed that he was going to be paid for that. We fired him because he removed the limb from the property with a Town chain saw. I do not believe I have changed my reason for firing Mr. Thompson between now and the hearing with Ms. Miller.

In my view a practice is what we do our work under. In my estimation, a policy does not have to always be a written policy. If you have a practice that is the normal practice of that division then that practice is actually the policy.

Mr. Minick's Responses to the Committee's Questions

This was actually behind the building, so it should have put it away from the street. It was quite a distance from the right-away. I can't tell you what caused all of the animosity in the 9 years of Mr. Thompson's employment. I can only tell you that we went through progressive discipline in the past. We went through the process guided by human resources. He was well aware of the fact that if he had any negative impact on his performance with his job that his employment would be terminated. As a supervisor we go through training for human resource issues policy issues, disciplinary issues and how to handle situations. We try to adhere to what we get in our training. Those are the policies and procedures that we used. We just had a new group of policies that were updated just recently for the Town.

I did not contact the Vice President regarding the letter that was submitted to us by Mr. Thompson at the pre-disciplinary hearing.

The scores on the evaluation are weighted. On the left hand column it shows the weight of each score. The supervisor rates employee in each of the categories on the evaluations. This evaluation from 8/18 is a meets expectations not exceeds expectations. Some of the categories he did score 4's in and some of the areas he received a rating of 3's and 2's. These are different aspects of the employee's job and that is how the final overall evaluation is done which is meets expectations.

The Employee Assistance Program is in effect and it has been. Any employee can go to the program to deal with any type of a situation, a personal situation, an illness a private situation, something that deals with work. Also within the last year and a half, we have started an Ombuds program which is available to employees to go and talk in confidence to the Ombuds about anything they want to talk to the Ombuds person about. We have to outlets for employees to receive help as far as personal or financial.

It is probably not uncommon to issue multiple final written warnings in a person's tenure, but it happens. That is one reason why I had stated in the most recent final written warning that if any additional

performance issues came up that Mr. Thompson's employment would be terminated immediately. We had gone overboard trying to work things out with him and it had really gone too long.

None of the previous disciplinary actions involved using Town equipment to do outside the Town. The most final written warning was when Mr. Thompson hit the pedestrian while driving a Town vehicle. That was substantiated.

In his notice Mr. Thompson received a final notice. Mr. Thompson's action did warrant Unsatisfactory Job Performance. There is no time limit on disciplinary actions.

The limb in question is on the opposite side of the credit union building from Pittsboro Street. It was a corner parking lot. It was not near the right-of-way. It was under a large oak tree. The bank manager told me where it was. I don't think there are any cameras. I think we asked him that when we were there. I thought that too but for some reason on that back side of the building they don't. The limb was on the banks property based on what the bank manager was.

Mr. Nabors worked for us about two months before this occurred. Mr. Nabors is no longer employed by the Town so he cannot be here.

I have never had notice of any other employee going on Town property to cut limbs or doing any other kind of work. I am very specific with the tree crew or any other crew that we only work on the Town right-of-way; they do not go on private property.

Department Head

Ray "Butch" Kisiah Summary Statement

The final written warning that I presented to him was based on his hostility in the workplace that was based on an investigation that was done in our department and the Public Works department. The second final written warning that he received came from Mr. Minick.

On the December final written warning Mr. Minick recommended termination based on the incident where Mr. Thompson hit the pedestrian in the crosswalk. I got the recommendation from Mr. Minick and I wanted to give Kevin another chance. So I didn't fire him. I gave him 5 days suspension and a final written warning. I did it because in our office we have an open door policy. Kevin would come in and talk to me about things that were going on in the yard. He has had issue in the past and I knew that Terry and Mr. Minick had been working with him on some of the issues you have heard about. Kevin would come in the office and we would talk about a lot of different things. He would tell me about his family and about his son. When you fire somebody, it's a big deal. It affects the family. From our side of the table you have made an investment in that employee and you want them to succeed. I just couldn't do it. Kevin was in the office and I told him the same thing. I had written that termination letter twice and I tore it up twice. I look back at it now and I go, I don't know if I made a mistake or not, but I am going to give somebody every opportunity to straighten out and do what they are supposed to do and do it the right way and that's what I did. It feels like it has come back and bit me in the "but," but I wouldn't change that decision. That is why he didn't get terminated when he hit the pedestrian. In the end it's my job to make that recommendation to the Manager. This time after Mr. Minick and Mr. Battle did their investigation, I wanted to make sure that we dotted all of the "I's" and crossed all of the "T's" and make sure we have all of the information we needed to have. I think they did a very good job in checking out what happened. Whether it's a policy or a practice I'm not sure myself. I started in 2007, and I know since I have been here it's been in practice and I know that I have been in meetings with the Landscape crew where it has been discussed that you don't go on private property. It sets the Town up for too many issues. There is no question that that is what Lee did. He used Town equipment and a Town truck and he had a Town contract employee with him and they did work for the SECU. He knew better. Kevin has

had an issue of good performance and bad performance and I felt at that point we had done everything we could think of. Everything that Mr. Battle and Mr. Minick could think of to try to get him to not only improve his performance and stay consistent with that performance. I felt that my only choice was to agree with that recommendation. It is a difficult decision; it's not something that you every want to do. By doing that you are basically saying let's start over, and that means that investment in time and effort in getting a good employee and all of the things that you do to have a person come and be a good employee for you, you are losing that to and that's not what you want to do but there are times when you have to make that decision.

Mr. Kisiah's Summary Response to Mr. McSurley's Questions

The May 2010 written warning that I gave was based on a report from Capitol Associated Industries (CAI). I think CAI was brought into the Town by HR. I never met anyone from CAI. I got the parts of the report that dealt with the behaviors of Mr. Thompson and that what I acted. I did not see any other report. I believe the report came from the HR Director at that time who was Valerie Meicher. I am not sure how many people from my department were investigated. I don't know who the union members are. I believe that were three people that were talked about in the results of the report. I do not know if Lee is a member of the union. I don't get a copy of the sheet they sign to pay union dues. I have no sense at all who the person was that wrote the May 2010 report. I did not speak to anyone from CAI. I wrote my recommendation based on the CAI report

Mr. Kisiah's Summary Response to the Committee

I think the question is whether the tree was on Town property. That is Mr. Thompson's testimony. I don't want to put words in Mr. Battle's mouth, but if it were not on Town property we would not be here today. This is the first I have heard that the tree limb might have been on Town property.

I am not aware of any other employee being terminated for doing work on private property. I agree with what Mr. Minick and Mr. Battle put on the performance evaluations.

Ms. Sneed's Closing Statement

I want to make sure; I hope you understand that this is not just about using Town equipment and Town personal on private property. How do we know that? The bank manager told the two Town employees exactly where on the SECU property where that limb was located and where it was cut. Mr. Battle told you that he went out himself and saw the shaving from the chain saw from where it was cut. It was not until this hearing that we all of a sudden hear that it may be a bus stop; it may be in the right-of way. Why, because it is convenient. But in the pre-disciplinary conference that was not what was said. What was said was yes I did it. I was out there and I was doing bank business- which is fine. No one is disputing the fact that a check was cashed and deposited. No one is disputing the fact that he got had talked to Mr. Rhone about going to the credit union. Mr. Thompson does not dispute the fact that he cut the limb.

If this was the first thing that Mr. Thompson had ever done we would not be in this room. But it was not the first thing he had done. It was not the second or third thing he had done. What you have before you is an exemplary example of progressive discipline -of coaching, of counseling, of suspensions and two final written warnings. Mr. Minick would have terminated him when he hit the pedestrian, but Mr. Kisiah couldn't do it. He told Mr. Thompson he was giving him another shot. This final written warning is not something that occurred 10 or 20 years ago. I know Mr. Minick said that it would be indefinitely, but it would have to go through HR, Ralph or myself. We wouldn't hold this over his head for the next 9 or 10 years. But this just happened 2 years ago. He was just told. You also have to remember what Mr. Battle testified to. While this was the first time we had notice of someone on private property cutting down limbs, it was not the first time that anyone had told Mr. Battle that Mr. Thompson was doing this. Unfortunately this was the first time he was able to verify and act upon it. When he found out he went and talked to the manager and he talked to Mr. Nabors twice. Mr. Nabors told him that when we got to

the property we immediately got out of the car and started cutting down limbs. Whether you believe that that happened immediately or sometimes afterwards it was cut with the Town equipment. Whether you believe why Mr. Thompson had the chain saw on the truck or not, it doesn't matter. He had the chain saw, it wasn't his; it was the Town. If you look at Mr. Nabors statements when he was asked why he was out there he said to do a side job. The manager says yes, I asked him, maybe I didn't call him, but I did ask him to do it. Mr. Thompson said I did it. None of that is in dispute.

So what choice does Mr. Kisiah have at that point? He's told him and Mr. Thompson had basically called his bluff. Termination was the only option. We tried to modify the behavior of our employees we try to correct it - Mr. Kisiah talked about the investment that we make in our employees and it was not rewarded in this case. Hopefully after we shift through all of the allegation and the pretext we can get to the crux of the issue. The crux is pursuant to the Town Ordinance under Unsatisfactory Job Performance this is improper use of Town equipment. They hear at basketball games, they hear it at Halloween. They hear it at safety meetings. Whether they do it all around Town, and we don't know about it we can't speak to. But what we can speak to is that Mr. Thompson did do, he did get caught, he admitted to doing it and this was his last shot.

APPELANTS STATEMENT

Allen McSurley's Opening Statement Summary

This case must be viewed through a historical context of the Town. I will be giving you a link so you can get it on-line to Dr. John Chapman's Ph.D. dissertation on the history of racism in this Town and the University. I am going to make it one of the exhibits I will put in. There is no way you can understand this case without understanding the history of racism in the university and the Town. The Town was a subsidiary of the University for many years and then it set up its own section and adopted the personnel policies of the university. Dr. Chapman's Ph.D. dissertation explains how that happened.

Ten years ago the Parks and Recreation Landscape Department that my client used to work for was run by a person named Fred Battle. When Mr. Battle was here there were all kinds of activities and organization within both the Landscape Department and the Public Works Department. The former Town Manager, Cal Horton established a meet and confer with about 35 or 40 black men who would meet on a regular basis with the HR Director, the head of Public Works and sometimes with the Town Manager. There were never any grievances all the little problems that evolved with the workers were dealt with just like that. If the people were messing with each other on the job, Mr. Battle dealt with it like that. Unfortunately Mr. Battle retired and Mr. Horton retired. Since then we have had very poor management throughout both department in terms of ordinary human relations, black and white, black on black and sometimes black on white. What we also have is the Town not knowing how to deal with it and they bring in a group from Raleigh called CAI. My client and two other men from sanitation department tried to form a union, they were targeted immediately. This outside group that was brought in went around and asked people questions about things that those people had done and compiled a large dossier on all of those people. That case is over at the court of appeals and as soon as we win that we will come back and have a trial over at Orange County about that case. Three minutes of something that Lee Thompson did over at SECU which is what he is being fired for. If you believe that I have a bridge I want to sell to you.

Mr. Thompson's Response to Mr. McSurley's Questions

The limb was 15 feet long and it was between the sidewalk of the bus stop and the right-of-way of the credit union. Part of it wasn't on private property. No I never tried to cover up the fact that I cut up the limb. I did not make any money from cutting the limb. I did not have a deal with the bank manager to make any money off of it. I did not lean on him to change his story from the story he told Terry Battle. My wife is Caucasian. My two boys look like President Obama. I have never made any comments to anybody that I would consider racist.

I did not make a phone call to the bank manager instructing him what to say. I don't know why anyone would think I did.

Mr. Thompsons Response to the Committee's Questions

The reason I had the chain saw in my truck that week is because I was going on call. I get all of my chain saw equipment together and put it on my truck. If I get called in after hours I have to have the use of my chain saw. That's why I was trying retrieved my chain saw back. I retrieved it then along with my chaps, hard hat and everything else. If they call me after hours like at 2:30 in the morning I have to go do what they say. I was doing work for the Town of Chapel Hill.

The whole Town of Chapel Hill goes on private property all of the time. If a resident asks them to do anything, they are supposed to do it and that's what I did. It's a common courtesy.

Mr. McSurley's Closing Statement

First of all I felt like I have been in two different hearings. The hearing that we had before Flo Miller, where all three of these men talked over and over again about this was a paid job that was set up before everything. They changed their story between then and now. We heard that from all of the witnesses and now we hear from the lawyer. So they set it up differently this time and said he was there and cut up the limb and just doing that he has already confessed to what they are saying is a big enough violation to fire him.

If you look at the last page number 39 in your attachment 13 you will see that Ms. Russell and Ms. Florentine Miller who fired him and then had a hearing to see if she acted correctly in firing him (which is an interesting policy of the Town that that I think the Committee should look at) Flo sign off on this on 9/25. If you read this, you will see that the recommendation that comes from Mr. Kisiah made a big deal that this was a paid job. He was going to double bill the town. He was going to get paid for working that day and he was going get 100 bucks or whatever from doing this thing. That's what the hearing before was all about? When they realized that it didn't come out so good, when they were confronted with the fact that he was in the bank and the bank director said that he did not talk to him before, he saw him in the bank and it was a spontaneous act and he says hey, can you do that. Then they have to turn the thing around and make it what he has already told everybody. We never said anything different. He goes drove up with this guy. He goes in to deposit his check. He sees the guy and the guy says can you pick up that limb and saw it up and Lee said sure I' do that.

It does make a different what the Town's policy is not practice. Lee says people do it all of the time. I asked what the difference between policy and practice. Of course there is a major difference. Do people know what they are supposed to do and what they are not supposed to do? Those are Town policies. If this is such a big deal we ought to put it in writing? The fact is as I mention in my opening, is that two people fired for not picking up stuff on the street. They actually went back and picked it up and they got in trouble because the women asked them to pick it up and Joe Biden was going to be there that day. What kind of message are we sending to our people? Our Town employees have to guess is this on Town property or is it off to one side by the bus stop. So I ask you to read carefully what Ms. Miller and Ms. Russell thought they were signing off on, which is totally different than what we heard tonight. I just want to congratulate you all for being so observant about the two written warnings – one in May which was generated by CAI and a second written warning in December of 2010 and then we have 2011, a whole year goes by and Lee improves considerably and he gets the highest rating he can in two of the areas he of the things he got the written warning and we have 8 more month he is doing everything well. In the state if you have a written warning it dissolves itself, and I think in the Town it dissolves itself too at a certain point.

If you say that the Town personnel policies which it says at the beginning of them are designed to help people get better, Lee was probably on the best upswing he has ever been on when he goes over and the

guy asks him to pick up that tree limb and he says sure. For that they fired him and we don't think that is just cause.

Our Findings

After thoughtful and careful consideration and deliberation, the Personnel Appeals Committee unanimously recommends that Mr. Kevin Lee Thompson be reinstated as an employee of the Town of Chapel Hill, reversing the termination decision communicated to Mr. Thompson in the October 1, 2012 memorandum from Ray L. Kisiah, Jr., Director of Parks and Recreation. We further recommend that a lesser form of disciplinary action be taken to address the July 30, 2012 incident. In reaching our decision, we considered the following:

- The Town has no defined or written policy specifically addressing Town personnel performing work on private property. This was confirmed through our questioning in the hearing and by the testimony of Mr. Terry Battle at the December 4, 2012 Step III Grievance Appeal hearing. (The December 18, 2012 memorandum from Ms. Florentine Miller, Deputy Town Manager, to Mr. Thompson notes, "Mr. McSurely then asked was there a policy that addressed when, what, where and how items like debris were removed from private property. Mr. Battle said there was no defined policy and it just depended on the circumstances.")
- Twenty-one months elapsed between the incident that resulted in Mr. Thompson's December 10, 2010 Final Written Warning, which was the second Final Written Warning he had received during his tenure with the Town, and the incident that resulted in his termination. There were no documented incidents that resulted in disciplinary action during that time.
- The Town's Human Resources Policies and Procedures manual (Section 5, policy #3) states that a Final Written Warning "...spells out specific steps the employee must take to avoid termination, often including a time limit for improvement...." The Final Written Warning communicated to Mr. Thompson on December 10, 2010 stated that "...any future violations of Town Policies and Procedures..." would result in termination. In the committee's opinion, the warning did not include specific steps needed for improvement and, given the lack of specificity, should have included a time limit or expiration date if performance was improved or maintained.
- Mr. Thompson's August 18, 2011 Performance Appraisal Report, the only evaluation conducted after the December 10, 2010 Final Written Warning, indicated he had improved his performance over the prior rating period. His ratings improved in three areas: "Ability to work with supervisor and co-workers" (from 0 to 3), "Attendance" (from 0 to 4), and "Punctuality" (from 3 to 4). One rating, "Quality and thoroughness of work", decreased (from 3 to 2). All ratings were "2" (Meets expectations) or higher.

Respectfully submitted on behalf of the Committee,



Rex K. Mercer, Chair