

BEFORE THE CIVIL SERVICE COMMISSION
FOR THE CITY OF SEATTLE

BRUCE A. PHELPS,
Appellant
V.
CITY LIGHT,
City of Seattle

Respondent

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION
CSC No. 08-02-002

BACKGROUND

1
2 While investigating an incident involving Bruce Phelps and a co-worker in
3 February, 2008, Seattle City Light (SCL) became aware of two other matters of
4 concern for further investigation: (1) a screen shot from Mr. Phelps' work computer
5 which contained inappropriate material of a sexual nature; and, (2) allegations that Mr.
6 Phelps improperly used a forklift to move a City Light vehicle. Mr. Phelps was placed
7 on paid administrative leave.

8 Following an investigation of those matters, Mr. Phelps was terminated from his
9 employment with SCL on September 17, 2008 by SCL Superintendent, Jorge Carrasco.

10 Mr. Phelps filed a timely appeal with the Seattle Civil Service Commission on
11 October 1, 2008.

12 During the Pre-Hearing Conference, SCL objected to Mr. Phelps' Hostile Work
13 Environment claim and allegations of Retaliation. Mr. Phelps withdrew the Hostile
14 Work Environment claim and clarified that his appeal is based on selective enforcement
15 of policy. Mr. Phelps represented himself and SCL was represented by Branda
16 Andrade, Employee Relations Manager at the appeal hearing on December 2, 3 and 4,
17 2008.

18 Based on evidence submitted by and on behalf of the parties, the applicable rules,
19 regulations, policies and laws; and, having considered the parties' Post-Hearing
20 Memoranda and Brief, the Hearing Officer enters the following Findings, Conclusions
21 and Decision.

1 **ISSUE PRESENTED**

2 Was there Justifiable Cause to terminate Mr. Phelps?

3 **FINDINGS OF FACT**

4 **The Computer Issue**

- 5
- 6 1. In November 2007, two SCL coworkers observed explicit and inappropriate
7 material of sexual nature on the screen of Mr. Phelps computer. (McClintock
8 Testimony, Ponath Testimony, SCL Exhibit 10).
- 9 2. It is unclear whether Mr. Phelps' supervisors or managers discussed this with
10 him. Mr. Carrasco testified that Dave Smith, a supervisor or manager in Energy
11 Delivery Support Services or Business Planning, warned Mr. Phelps about his
12 inappropriate computer use. (Carrasco Testimony). Mr. Phelps testified that Mr.
13 Smith encouraged him to keep his nose to the grindstone because he was still
14 under a microscope, but did not warn him about inappropriate computer use or
15 refer to the image viewed on his computer screen by coworkers. (Phelps
16 Testimony). Mr. Smith was not called as a witness to testify, and neither party
17 offered an Affidavit from him at the hearing.
- 18 3. In March, 2008, the SCL computer assigned to Mr. Phelps was confiscated and
19 delivered to the Department of Information Technology ("DoIT") for a
20 forensics examination. (Andrade Testimony, SCL Exhibit 67, SCL Exhibit 72)
- 21 4. In April, 2008, David Matthews, Deputy Chief Information Security Officer,
22 with DoIT prepared a Final Investigation Report related to the investigatory
23 review of Internet activity on the computer assigned to Mr. Phelps. (Matthews
24 Testimony, SCL Exhibit 11, SCL Exhibit 72).
- 25 5. A computer forensics Investigation Report, dated April 16, 2008, contained an
26 analysis of the Internet History files and hard drive from Mr. Phelps' SCL
27 computer. Based on the analysis, DoIT concluded that the computer had been
28 used outside the bounds of the City's acceptable use rules, by several users. A
29 search of Internet history and temporary files showed several instances of
30 pornography and other prohibited websites under the Documents and Settings
31 folder for user Phelps. Many websites were visited that are un-related to City

1 business, including some which would be considered dangerous or
2 questionable. (Matthews Testimony, Andrade Testimony).

3 6. On April 30, 2008, Roger Serra, SCL Director of Security and Emergency
4 Preparedness, issued a memorandum discussing the evidence obtained in the
5 computer forensics examination. (SCL Exhibit 9).

6 7. On May 12, 2008, Mr. Serra and Ms. Andrade met with Mr. Phelps and his
7 Union Representative, Matt Hanson. They shared evidence from the computer
8 forensics examination and provided a redacted copy of Mr. Serra's
9 memorandum, including attachments (Andrade Testimony, SCL Exhibits 65,
10 67).

11 8. After reviewing the memorandum and copies of images obtained from his
12 computer, Mr. Phelps acknowledged that he did visit the websites described in
13 the memorandum and that he did view the images obtained from his computer
14 while at work. (Andrade Testimony, Phelps Testimony, SCL Exhibit 67).

15 9. Following the meeting on May 12, 2008, Ms. Andrade conducted further
16 analysis to determine how much time Mr. Phelps spent accessing the Internet
17 for non-work related purposes and the time frames in which he did so; and,
18 discovered that the report from DoIT contained duplicate entries of some of the
19 internet use shown in Mr. Phelps' internet history. (Andrade Testimony, SCL
20 Exhibit 67).

21 10. The computer forensics Investigation Report and spreadsheets were revised and
22 reissued by DoIT, on June 2, 2008, to reflect accurate information about Mr.
23 Phelps' internet use, (Andrade Testimony, SCL Exhibit 67, and SCL Exhibit
24 72).

25 11. On June 23, 2008, Ms. Andrade presented DoIT's revised findings about his
26 internet use to Mr. Phelps (Andrade Testimony, SCL Exhibit 67).

27 12. The Internet history, temporary files, cache and cookies associated with Mr.
28 Phelps' user ID from October 12, 2007 through February 28, 2008 showed that:

- 29 • Mr. Phelps accessed the Craigslist website for men to men postings,
30 personal ads, casual encounters, missed connections, and erotic services,

1 on 27 of the 36 days available (the majority of which occurred between
2 December 2007 and February 2008);

- 3 • Some of the websites contained male homosexual pornographic and/or
4 sexually explicit images and content;
- 5 • Sixty-three images and 49 postings were of a pornographic nature and/or
6 were sexually explicit;
- 7 • Nine of the Craigslist postings were solicitations for prostitution, three
8 of which were self-evident from the title of the posting;
- 9 • Mr. Phelps used the Internet extensively for other non-work related
10 purposes, including searches for: recreational vehicles, boats, tools,
11 materials, real estate, firearms and other general items for sale;
- 12 • The average amount of time spent by Mr. Phelps accessing the Internet
13 for non-work related purposes was approximately 36 minutes per day,
14 with a range of between 5 and 94 minutes per day;
- 15 • The average amount of time Mr. Phelps spent accessing pornographic or
16 sexually explicit material on the Internet, was approximately 8 minutes
17 per day, with a range of between one minute and 18 minutes per day;
18 and that,
- 19 • Much of the time that Mr. Phelps accessed the Internet for non-work
20 related purposes was during his work hours, and not on his established
21 break or lunch times. (Matthews Testimony, Andrade Testimony, and
22 SCL Exhibits 11, 12, 67 and 72).

23 13. Mr. Phelps admits that he used the Internet as described in the Report;
24 repeatedly viewed the sexually explicit postings and images from Craigslist on
25 his work computer, on Company time; and that, his conduct was inappropriate
26 for the workplace (Phelps Testimony, SCL Exhibit 10, 13 – 62, 65).

27 14. Mr. Phelps denies that the sexually explicit images that he viewed are
28 pornographic because: (a) Management's characterization of what he was
29 viewing on the Internet as pornography was, by definition, inaccurate because
30 he only viewed the postings and images on Craigslist, which has a policy
31 forbidding the posting of pornography; and because, (b) SCL does not have

1 specific guidelines for what is “pornographic” and, because the term “graphic in
2 nature” used in Personnel Rule 17.9, is too vague, ambiguous and subject to
3 personal opinion. (Phelps Testimony)

4 15. The sexually explicit postings and images viewed on Mr. Phelps computer are
5 offensive to other City employees. (Ponath Testimony, Dailey Testimony,
6 Matthews Testimony, Andrade Testimony, Taylor Testimony, Carrasco
7 Testimony and SCL Exhibits 27, 31-34, 37, 40, 59-60, and 67).

8 16. Mr. Phelps explained that he became complacent when management did not
9 discipline his co-workers for their misconduct (Phelps Testimony).

10 17. Five years ago, information about Mr. Phelps’ past became public and created
11 challenges for him at home and at work, which increased his depression,
12 contributed to a relapse, after 27 years, and awakened a pattern of addictive
13 behavior related to his fascination with the male anatomy. (Phelps Testimony).

14 18. Mr. Phelps explained that he viewed sexually explicit postings and images as
15 research and rehabilitation prescribed by his Therapist. (Phelps Testimony).
16 However, he offered no evidence from the Therapist to support this explanation.

17 19. Mr. Phelps speculates that if he had been notified by management that his
18 computer and Internet use was inappropriate and given an opportunity, he
19 would have corrected his behavior; and that most of the forensic evidence
20 relied on by SCL, to support the termination decision, would not exist. (Phelps
21 Testimony).

22 20. During the investigative meetings and the Loudermill meetings, Mr. Phelps did
23 not acknowledge that his extensive use of computers and the Internet for non-
24 City purposes and viewing pornographic and sexually explicit material was
25 inappropriate workplace behavior. However, during the appeal hearings, Mr.
26 Phelps did acknowledge that his conduct was inappropriate in the workplace.
27 (Phelps Testimony, Andrade Testimony).

28 21. Mr. Phelps’ use of his work computer, on City time, to access and view sexually
29 explicit websites and pornography was excessive and violated City of Seattle
30 policies and guidelines governing the use of City Digital Equipment and City
31 time. (See: SCL Exhibit 1 (SMC 4.16.070(2)(b)); SCL Exhibit 2 (Seattle City

1 Light Workplace Expectations – Financial Responsibility, Accountability and
2 Integrity sections); SCL Exhibit 5 Guidelines for Employee Use of City
3 Equipment & Facilities); SCL Exhibit 6 (Information Systems Security Policy,
4 POL 17, Acceptable Use of City Digital Equipment, Internet Access, Electronic
5 Communications and Other Applications); SCL Exhibit 7 (Information Systems
6 Security Policy, GUI 17A, Prohibited Uses of City-owned Digital Equipment),
7 and SCL Exhibit 8 (Information Systems Security Policy GUI17D, Guidance on
8 De-Minimus Use of City Digital Equipment; Andrade Testimony, Carrasco
9 Testimony, SCL Exhibit 69 and, SCL Exhibit 70).

10 22. Mr. Phelps engaged in misconduct that meets the definition of a major
11 disciplinary offense under Personnel Rule 1.3.4(A), for which progressive
12 discipline is not required, in the absence of mitigating circumstances. (SCL
13 Exhibits 1, 2, 4, 5, 6, 7, 8, 11, 12, 13-62, 63, 67, 69, 70, 71 and 72; Ziemianek
14 Testimony, Dailey Testimony, Taylor Testimony, Andrade Testimony and
15 Carrasco Testimony).

16 23. Mr. Phelps' apparent confusion about the City's definition of pornography,
17 complacency, increased depression, relapse to addictive behavior patterns, and
18 possible need for therapeutic research and rehabilitation (by extensively and
19 excessively viewing sexually explicit postings and images on the Internet) are
20 not mitigating circumstances, within the meaning of Personnel Rule 1.3.4(A).

21 24. Any findings of fact deemed to be conclusions of law are adopted as such.
22

23 **The Fork Lift Issue**

24 1. In February, 2008, Mr. Phelps used an SCL forklift to tow an operational SCL
25 van that was blocking a vendor from leaving the SCL South Service Center.
26 (Phelps Testimony).

27 2. Prior to moving the van with a forklift, Mr. Phelps knew that management
28 consent was required. He stated that he could not request consent because his
29 supervisor was at lunch. (Phelps Testimony).

- 1 3. Mr. Phelps is a trained and experienced forklift operator. He placed the forks
2 under the Class 3 hitch on the van, lifted the rear axle of the van so that the rear
3 wheels were approximately three inches above the ground, wrapped a safety
4 line around the trailer hitch and the back of the forks, and pulled the van
5 diagonally a distance of approximately 15 – 20 feet. The van was a rear-wheel
6 drive vehicle and the front axle steering mechanism was locked during the tow.
7 (Phelps Testimony, Ziemianek Testimony, SCL Exhibit 73 and Phelps Exhibit
8 6).
- 9 4. The appropriate action would have been to notify MTD, which has keys to all
10 City vehicles or to have the van towed, in a conventional and appropriate
11 manner. The MTD offices are located in Building B of the SCL South Service
12 Center, where Mr. Phelps worked and on the premises where the van was
13 towed. (Dailey Testimony, Tawney Testimony).
- 14 5. Mr. Phelps made no effort to locate the driver of the van before towing it and
15 failed notify the driver of the reason why it was necessary to move the vehicle.
16 (SCL Exhibit 69, Phelps Testimony).
- 17 6. It would have also been appropriate to have informed his Supervisor about his
18 decision and actions; and, to have informed the driver about how the vehicle was
19 moved in case problems occurred while it was being driven. (SCL Exhibit 2)
- 20 7. Mr. Phelps attempted to justify his decision to tow the SCL van with a forklift,
21 without prior consent, based on: (a) SCL Workplace Expectations related co
22 customer service, because he was responding to an urgent request for assistance
23 from the Vendor; and (b) confidence his own knowledge, experience that
24 precautions were taken to prevent damage to the van and to others. (Phelps
25 Testimony, SCL Exhibit 3, and SCL Exhibit 69).
- 26 8. On May 22, 2008, Mr. Ziemianek and Ms. Andrade held an investigatory
27 meeting with Mr. Phelps to discuss the forklift incident. This was the second
28 investigatory meeting with Mr. Phelps related to the issues of concern
29 discovered in February, 2008. (Andrade Testimony; Ziemianek Testimony;
30 SCL: Exhibits 66 and 69).

- 1 9. Forklift operators must follow the operations manual for forklifts and all
2 applicable rules and regulations. (Tawney Testimony, Ziemianek Testimony,
3 SCL Exhibit 68).
- 4 10. Washington Administrative Code, Chapter 296-863, governs the safe operation
5 of forklifts and other Powered Industrial Trucks ("PIT"). PIT operators are
6 required to: adhere to the manufacturer's instructions and keep the forklift under
7 control at all times. (WAC 296.863.40010); and to make sure that loads are
8 stable, safe and within the rated load capacity of the PIT. (WAC 296-863-
9 40015).
- 10 11. City Light policy for Forklift (Lift Truck) Operations outlines responsibilities,
11 operation procedures, and training requirements. Appendix A outlines operation
12 requirements, which includes a provision that: "...only stable or safely arranged
13 loads shall be handled. Caution shall be exercised when handling off-center
14 loads which cannot be centered. Only loads within the rated capacity of truck
15 shall be handled." (DPP 500 P II-505, SCL Exhibit 68, Tawney Testimony).
- 16 12. A considerable amount of testimony was entered into the record about the
17 stability of the load, the rated capacity of the forklift, vertical lifting verses
18 horizontal towing of loads and the absence of specific manufacturer's
19 instructions about using the forklift to tow or move another operational vehicle.
- 20 13. Some witnesses testified that Mr. Phelps' use of a forklift to tow the SCL van
21 was unsafe and created a risk of property damage to the undercarriage, gas tank,
22 steering mechanism and other parts of the vehicle that may have made the van
23 inoperable or unsafe to drive. (Dailey Testimony, Ziemianek Testimony, and
24 Tawney Testimony).
- 25 14. Despite the risk, there is no evidence that either the SCL van or the forklift were
26 damaged; or, that Mr. Phelps or anyone else were injured during or as a result of
27 Mr. Phelps actions.
- 28 15. Several other experienced forklift operators, testified that Mr. Phelps towed the
29 van safely; and, that SCL forklift operators have, in fact, safely moved vehicles
30 and other equipment and materials not intended to be moved by forklift.

1 (McClintock Testimony, Charlesworth Testimony, Hansen Testimony and
2 Phelps Testimony).

3 16. The use of an SCL forklift to move a vehicle was done without at least one SCL
4 manager's knowledge and approval. (Dailey Testimony).

5 17. Mr. Phelps' supervisor, Ms. Dailey and Director, Mr. Ziemianek, did not learn
6 that other employees have used forklifts to move vehicles until the issue arose
7 with Mr. Phelps. (Dailey Testimony and Ziemianek).

8 18. The vehicles moved by SCL forklift operators were disabled, rather than
9 operational like the van moved by Mr. Phelps. (McClintock Testimony, Hanson
10 Testimony, Charlesworth Testimony).

11 19. Mr. Phelps admitted that he would not have towed a privately owned vehicle
12 with the forklift due to the risk of litigation by the vehicle's owner. (Phelps
13 Testimony).

14 20. Mr. Phelps knew or should have known that it was also risky to move a publicly
15 owned vehicle without the owner's prior approval which, in this case, could
16 have only been provided by an SCL supervisor or manager.

17 21. Mr. Phelps engaged in an unauthorized use of the forklift, because: (a) SCL did
18 not provide the forklift for the purpose of towing other operable vehicles; and
19 (b) Mr. Phelps did not provide prior notice of his plans to a Supervisor and,
20 therefore, denied SCL management the crucial opportunity to evaluate risks of
21 damage to persons or property, and make an informed decision about whether to
22 tow its own vehicle with a forklift. (Dailey Testimony, Ziemianek Testimony,
23 Tawney Testimony, Andrade Testimony and Carrasco Testimony).

24 22. Mr. Phelps violated applicable safety rules, regulations and policies, which is a
25 major disciplinary offense under the Personnel Rules, for which progressive
26 discipline is not required, without mitigating circumstances. (Dailey Testimony,
27 Ziemianek Testimony, Tawney Testimony, Carrasco Testimony and SCL
28 Exhibits 3, 70, 71 and 73).

29 23. Mitigating circumstances do exist in this situation because Mr. Phelps used his
30 extensive training and experience to safely move the SCL van while assisting a
31 vendor; and, because there is evidence that other SCL forklift operators have

1 also, safely moved vehicles, materials and equipment not intended to be moved
2 by a forklift, without being disciplined.

3 24. Any findings of fact deemed to be conclusions of law are adopted as such.

4 **BURDEN OF PROOF**

5 1. Seattle City Light has the burden of proving, by a preponderance of the
6 evidence, that Mr. Phelps was terminated from his employment for a Justifiable
7 Cause (Civil Service Rule 5.31).

8 2. Seattle City Light based its termination decision on three Major Disciplinary
9 Offenses included in Personnel Rule 1.3.4(A):

- 10 • 6. Use of City time, equipment or facilities for private gain or other non-
11 City purpose;
12
13 • 13. Endangering the safety of, or causing injury to, the person or property of
14 another through negligence or intentional failure to follow policies or
15 procedures; and
16
17 • 15. A knowing or intentional violation of the City Code of Ethics or other
18 ordinance, the Personnel Rules, or the employing unit's adopted policies,
19 procedures and workplace expectations.

20
21 3. Personnel Rule 1.3.4 (B) states that in determining the level of discipline to
22 impose, Seattle City Light shall consider factors that it deems relevant to the
23 employee and his or her offense, including but not necessarily limited to:

- 24 • The employee's employment history, including any previously imposed
25 disciplinary actions;
26 • The extent of injury, damage or disruption caused by the employee's
27 offense;
28 • The employee's intent; and,
29 • Whether the offense constituted a breach of fiduciary responsibility or of a
30 public trust.

31
32 4. Personnel Rule 1.3.4 (C) includes a five part standard for Justifiable Cause.

33 SCL must prove that:

- 34 • Mr. Phelps was informed of or reasonably should have known the
35 consequences of his conduct;
36 • The rules, policies or procedures that Mr. Phelps violated are reasonably
37 related to safe and efficient operations at SCL;

- 1 • A fair and objective investigation produced evidence that Mr. Phelps
- 2 violated the rules, policies or procedures;
- 3 • The rules, policies or procedures, and penalties for their violation, are
- 4 applied consistently; and,
- 5 • The discharge of Mr. Phelps is reasonably related to the seriousness of his
- 6 conduct and previous disciplinary history.
- 7

8 CONCLUSIONS

9 **A. Mr. Phelps was informed of or reasonably should have known the**

10 **consequences of his conduct.**

11

12 Mr. Phelps was employed at SCL for 18 years, with no disciplinary actions
13 prior to February 2008. He admits that he knows the difference between right
14 and wrong and was one of the top three students in a prep class for supervision
15 and management, in which he became familiar with City of Seattle Personnel
16 Rule 1.3.

17 Mr. Phelps acknowledged that spending extensive amount of time using a
18 City computer, for non-City purposes, to access the Internet and view sexually
19 explicit, pornographic and other websites was inappropriate. He knew that
20 management approval was required before moving the SCL vehicle with a
21 forklift, but chose to do so without management approval.

22 Seattle City Light has proven, by a preponderance of the evidence, that Mr.
23 Phelps knew or reasonably should have known that disciplinary action, up to
24 and including termination, could be a consequence of his conduct.

25

26 **B. The rules, policies and procedures that Mr. Phelps violated are reasonably**

27 **related to safe and efficient operations at Seattle City Light.**

28

29 The safe and efficient operation of Seattle City Light depends, in part, on
30 adherence to its published Workplace Expectations.

31 SCL Workplace Expectations require all employees to: use equipment and
32 property safely, properly and wisely; avoid misuse of SCL property; report to
33 work...willing and able to work a full shift; try to resolve issues before they
34 become problems; accept safety as a personal responsibility; understand and
35 comply with applicable government and department safety regulations; read,

1 become familiar with, and comply with the City's Code of Ethics and policies
2 regarding ethical standards; avoid unethical behavior; ask a supervisor for
3 information or clarification regarding ethical standards, if you are unsure how to
4 act ethically in a specific situation; refrain from using City equipment or other
5 resources for personal use; and, refrain from engaging in or condoning behavior
6 that "insults, demeans, ...embarrasses, ...or is disrespectful to another employee
7 (SCL Workplace Expectations, at pp. 3, 7,8,13 and 14).

8 Seattle City Light's safe and efficient operations also depend on adherence,
9 by all employees, to rules policies, guidelines and procedures that:

- 10 ○ Prohibit use of City property for a non-City purpose (SMC 4.16.020(2) (b);
- 11 ○ Limit personal use of the Internet to only moderate amounts of time (Ethics
12 and Elections Commission Guideline for Employee Use of City Equipment,
13 Internet Use Policy #5.2);
- 14 ○ Prohibit use of City owned digital equipment and Internet access for illegal
15 uses as defined by City policy, ethics rules and City, State and Federal laws
16 (Department of Information Technology ("DoIT") – POL17, GUI17A);
- 17 ○ Permit minimal use of City owned digital equipment and Internet access
18 (DoIT - POL17, GUI17D); and,
- 19 ○ Relate to safe operation of forklifts (WAC 296-863-40015; DPP 500 P II-
20 505).

21 Seattle City Light has proven by a preponderance of the evidence that Mr.
22 Phelps violated those rules, policies, and procedures; and, that they are reasonably
23 related to its safe and efficient operations. Even if the rules, policies and procedures did
24 not exist, public employees have constructive notice that extensive personal use of City
25 computers for non-City business, during working hours, to access the Internet for the
26 purpose of viewing sexually explicit and pornographic images and postings, far exceeds
27 the limits of acceptable behavior in the workplace.

28 This element of the Justifiable Cause has been proven by SCL.

1 **C. A fair and objective investigation produced evidence that Mr. Phelps'**
2 **conduct violated the rules, policies or procedures.**
3

4 Seattle City Light became aware of the two matters for which Mr. Phelps was
5 terminated while investigating another incident involving Mr. Phelps and a coworker
6 in February 2008. One result of the underlying investigation was that Mr. Phelps did
7 not violate some of the rules, policies and procedures related to the investigation.

8 Ms. Andrade appropriately began an investigation of the computer matter in
9 March 2008, confiscated Mr. Phelps' computer and requested the Department of
10 Information Technology ("DoIT") to perform a computer forensics examination.

11 David Mathews, Deputy Chief Information Security Officer, performed the
12 examination and on April 16, 2008, prepared a Final Investigation Report related to
13 the investigatory review of Internet activity on Mr. Phelps' computer.

14 On April 30, 2008, Mr. Serra, SCL Director of Security and Emergency
15 Preparedness, issued a memorandum discussing the evidence obtained during the
16 forensics examination.

17 On May 12, 2008, Mr. Serra and Ms. Andrade met with Mr. Phelps and his Union
18 Representative, Matt Hanson, to advise him of the investigation surrounding the
19 inappropriate use of company computers to access CraigsList and other websites on
20 company time.

21 Mr. Phelps was told why the investigation was performed and was presented with
22 a redacted copy with attachments of Mr. Serra's report to Human Resources Officer
23 Jean West summarizing the results of the investigation.

24 Following the meeting on May 12, 2008, Ms. Andrade noticed duplicate entries
25 of internet use by Mr. Phelps. She notified DoIT, which, on June 2, 2008, revised the
26 Report and spreadsheets to reflect accurate information about Mr. Phelps' Internet use.

27 On June 23, 2008, Ms. Andrade published a memorandum to Mr. Phelps
28 explaining the analysis performed by DoIT and presented the findings.

29 On August 6, 2008, Matt Lundgren prepared a memorandum for Berle Hardie
30 about Forklift Information and SCL policy, which described the applicable WAC and
31 SCL policy regarding use of forklifts.

1 On August 4, 2008, Ms. Ziemianek prepared a memorandum to Mr. Phelps to
2 notify him of the reasons that a recommendation would be made to terminate his
3 employment for inappropriate use of the company computer and inappropriate use of
4 the forklift. Mr. Heimgartner also prepared a memorandum to Mr. Phelps on August 4,
5 2008, providing notice to Mr. Phelps of his opportunity to respond to the proposed
6 disciplinary action. Based on the reasons stated in Mr. Ziemianek's memorandum, Mr.
7 Heimgartner explained that the proposed disciplinary action is consistent with
8 Personnel Rule 1.3.4 regarding major disciplinary offenses; and why Mr. Phelps'
9 extensive use of the Internet for non-City purposes, viewing sexually explicit and
10 pornographic material violated rules, regulations and policies identified and explained
11 in the memorandum.

12 Mr. Heimgartner also notified Mr. Phelps of his Loudermill right to respond in
13 writing or in person to Superintendent Carrasco and his Weingarten right to have a
14 representative present, if he elects to meet with Mr. Carrasco.

15 Mr. Phelps elected to meet with Mr. Carrasco and two meetings were held on
16 August 8, 2008 and on September 5, 2008. Mr. Phelps' Union Representative, Gregory
17 Slaughter, attended both meetings. Mr. Carrasco listened to the comments raised by Mr.
18 Phelps and carefully reviewed the other information and documents made available to
19 him, including Mr. Phelps' Internet records, the Investigation Report authored by Ms.
20 Andrade and the memorandum from Matt Lundgren regarding forklift safety analysis.

21 In a letter dated September 17, 2008, Mr. Carrasco responded to the comments
22 raised by Mr. Phelps in both meetings, including assertions by Mr. Phelps that:

- 23 o The disciplinary recommendation by Mr. Ziemianek was in retaliation for a
24 complaint regarding forklift safety, filed by Mr. Phelps with the State of
25 Washington, Department of Labor and Industries, in June, 2006.
- 26
- 27 o After a co-worker reported to management that in October, 2007, she had seen
28 Mr. Phelps viewing Internet sites that were similar to the ones identified in the
29 computer forensics examination, management did not say anything to him about
30 the matter, so he assumed that his activity was acceptable to management;
- 31
- 32 o Management's characterization of what he was viewing on the Internet as
33 pornography was, by definition, inaccurate because he only viewed the postings
34 and images on Craigslist, which has a policy forbidding the posting of
35 pornography;

- 1
2 ○ The same co-worker that saw him viewing inappropriate material on the
3 Internet engaged in retaliation and harassment when she reported that he had
4 come onto the pole yard while on administrative leave, in violation of an
5 express direction by management not to contact any SCL employee, except Mr.
6 Smith and Mr. Ziemianek;
7
8 ○ SCL selectively enforced the policy with respect to Internet use because other
9 unidentified employees misused the Internet and spent significant amounts of
10 time on the Internet on work time, without being disciplined;
11
12 ○ Safety rules and policies were not violated when he moved an SCL van with a
13 forklift because of the safe manner in which he performed the tow and because
14 vans can be moved with forklifts in a stable fashion.
15
16 ○ Towing the van with a forklift was safe because of his background as an
17 instructor on forklift operations and because of his experience moving
18 equipment with a forklift.
19

20 Based on his investigation of Mr. Phelps assertions and other facts related to the
21 employment termination recommendation, Mr. Carrasco found that Mr. Phelps
22 violated City rules and policies related to computer use; and, that his actions in
23 moving the SCL van with a forklift created a safety risk for himself and others,
24 created a risk of property damage to the City Light vehicle, and violated safety rules
25 and regulations.

26 A preponderance of the evidence supports a conclusion that a fair and objective
27 investigation resulted in evidence that Mr. Phelps violated the rules, policies or
28 procedures. This element of the Justifiable Cause standard has been met.

29
30 **D. The rules, policies and procedures and penalties for their violation have**
31 **been applied consistently.**
32

33 SCL states that there are no recent disciplinary decisions that directly compare
34 to the facts and circumstances of the termination of Bruce Phelps.

35 Patsy Taylor, Labor Relations Coordinator and Employment Supervisor,
36 performed the comparable analysis. Ms. Taylor testified that none of the other
37 incidents of misconduct selected as comparables presented the same elements of
38 Internet misuse and another major disciplinary offense. Also, except for one

1 disciplinary action, none of the other comparables involved a pattern of long-term
2 misuse of a computer. The majority of comparables involved a single incident or
3 short-term use of the Internet to view sexually explicit material, so they warranted a
4 lower level of discipline. (Taylor Testimony)

5 It is unclear whether any of the comparable cases involved a forensic
6 examination of the employee's computer. The use of a forensic examination in this
7 case revealed extensive computer misuse and abuse of Internet use rules and
8 policies by Mr. Phelps including, the discovery of many sexually explicit and
9 pornographic images and postings; and solicitations for prostitution. (Andrade
10 Testimony, Taylor Testimony, SCL Exhibits 10, and 13-63).

11 All of the disciplinary comparables occurred between 1993 and 2000, prior to
12 the tenure of Superintendent Carrasco, who "takes disciplinary matters very
13 seriously." (Taylor Testimony, SCL Brief)

14 During his meeting with Mr. Carrasco, Mr. Phelps claims that SCL selectively
15 enforced the Internet use policy because other unidentified employees misuse the
16 Internet and spend significant amounts of time on the Internet during work time.
17 However, Mr. Phelps did not know if the employees were viewing sexually explicit
18 and pornographic images and postings; and did not disclose their names so that an
19 investigation could be done.

20 According to Ms. Andrade, SCL is now investigating two co-workers of Mr.
21 Phelps, whose computer ID was associated with questionable Internet searches
22 identified during the computer forensic examination. (Andrade Testimony)

23 Based on the nature and extent of Mr. Phelps' admissions, and the
24 investigations conducted prior to the termination of his employment, I conclude that
25 the rules, policies and procedures and penalties for their violation have been applied
26 appropriately and, as consistently as possible, in connection with the computer and
27 Internet investigations.

28 The misuse of a City forklift created a risk of danger to Mr. Phelps and others,
29 and created a risk of damage to the City van, and, therefore is also a serious offense
30 as defined by City Personnel Rule 1.3.4(13) – "Endangering the safety of, or

1 causing injury to, the person or property of another through negligence or
2 intentional failure to follow policies and procedures.”

3 However, unlike the computer misuse and the Internet misuse violations, I
4 conclude that Mr. Phelps’ conduct is mitigated because Mr. Phelps used his
5 extensive training and experience to safely move the SCL van while assisting a
6 vendor; and, because there is evidence that other SCL forklift operators have also,
7 safely moved vehicles, materials and equipment not intended to be moved by a
8 forklift, without being disciplined.

9 This does not excuse Mr. Phelps for failing to get the approval of a manager or
10 supervisor or for failing to exhaust other options before using the forklift to move
11 the SCL van.

12 However, if this infraction was not combined with the computer and Internet
13 misuse infractions, termination may not be the appropriate discipline. Mr. Phelps is
14 an 18 year veteran whose supervisors find no fault with his work, and who had no
15 prior disciplinary infractions before February 2008, when the forklift incident
16 occurred. (Phelps Testimony, Dailey Testimony).

17 Unfortunately for Mr. Phelps, the forklift misuse must be considered along
18 with the two other Major Disciplinary Offenses, for which there are no mitigating
19 circumstances.

20 A preponderance of the evidence supports a conclusion that, in this unique
21 situation, the rules, policies and procedures and penalties for their violation have
22 been applied consistently. This element of the Justifiable Cause standard is met.

23
24 **E. Mr. Phelps’ discharge is reasonably related to the seriousness of his**
25 **conduct and his previous disciplinary history.**
26

27 City Personnel Rule 1.3.4 defines and provides a nonexclusive list of Major
28 Disciplinary Offenses where a verbal warning or written reprimand will not be
29 appropriate, in the absence of mitigating circumstances.

- 30
31 1. Personnel Rule 1.3.4.A (6) states that “Use of City time, equipment or
32 facilities for private gain or other non-City purpose” is a major disciplinary
33 offense.
34

- 1 2. Personnel Rule 1.3.4.A (13) states that “Endangering the safety of, or
2 causing injury to, the person or property of another through negligence or
3 intentional failure to follow policies or procedures;
4
5 3. Personnel Rule 1.3.4.A(15) states that “A knowing or intentional violation
6 of the City Code of Ethics or other ordinances, the Personnel Rules, or the
7 employing unit’s adopted policies, procedures and workplace expectations
8 is a major disciplinary offense.
9

10 The decision to discharge Mr. Phelps was reasonably related to the
11 seriousness of his misconduct. Mr. Phelps admitted to: viewing a considerable
12 amount of pornographic material on many occasions; surfing the Internet for
13 non-work related purposes; and, failing to secure management approval before
14 using a forklift to move an operable SCL vehicle.

15 By leaving an offensive, sexually explicit posting on his computer screen
16 where it was viewed by co-workers, Mr. Phelps significantly increased the risk
17 of creating or increasing a hostile work environment for some of his co-
18 workers.

19 The computer forensic examination confirmed that he spent an
20 extraordinary amount of City-time, using City equipment for non-City purposes;
21 and that he knowingly violated the City Code of Ethics and other ordinances,
22 the Personnel Rules, and SCL policies, procedures and workplace expectations
23 by viewing sexually explicit and pornographic postings and images as more
24 fully described in the DoIt Final Investigation Report.

25 Mr. Phelps created a risk of damage to an SCL van by using a forklift to tow
26 it without supervisory approval and thereby, endangered SCL property through
27 his negligent failure to follow policies or procedures. The circumstances of this
28 transgression, do not, however, mitigate the termination of his employment for
29 computer misuse and Internet misuse.

30 While it is true that the purpose of discipline is to correct and rehabilitate
31 employees, it is also true that a verbal warning or a written reprimand is
32 inappropriate when an employee commits a major disciplinary offense.

33 As a matter of law, the City’s Personnel Rules, PR 1.3.4(A) expressly
34 identify “major disciplinary offenses” for which a verbal warning or written

1 reprimand are not appropriate in the absence of mitigating circumstances.
2 Because the rule expressly permits suspension or termination without need for
3 first issuing a verbal warning or written reprimand, there is no basis to read
4 additional "progressive-discipline" requirements into the rule. Any form of
5 discipline may be taken, with just cause, and SCL retains the discretion to
6 discipline an employee without prior, lesser discipline. See *Drobny v. Boeing*
7 *Co.*, 80 Wash.App. 97, 907 P.2nd 299 (1995) (because employer retained
8 discretion to dismiss an employee without prior discipline, the progressive
9 discipline policy was not an enforceable promise).

10 The disciplinary discharge of Bruce Phelps was reasonably related to the
11 seriousness of his conduct. Because Mr. Phelps committed three major
12 disciplinary offenses, two of which were not mitigated, Supervisor Carrasco had
13 legal discretion to terminate Mr. Phelps' employment without prior discipline or
14 consideration of his previous disciplinary history. This element of the
15 Justifiable Cause standard is met.

16 Any conclusions of law deemed to be findings of fact are adopted as such.

17 DECISION

18 For the reasons set forth above, the undersigned Hearing Officer finds that a
19 Justifiable Cause exists to support Seattle City Light's disciplinary termination of
20 Bruce Phelps. This appeal is denied and Mr. Phelps' termination is upheld.
21

22 Dated: January 28, 2009

23
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25
26
27 CHRISTOPHER MATHIEWS
28 Christopher E. Mathews, Hearing Officer
29

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31
32

The decision of the Hearing Officer in this case is subject to review by the Civil Service Commission. Parties may also request that the Commission review the decision by filing a petition for review of the Hearing Examiner's decision, and asking the Commission to consider specific issues. To be timely, the petition for review must be filed with the Civil Service Commission no later than ten (10) days following the date of issuance of this decision, as provided in Civil Service Commission Rules.
