BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between APPLETON MUNICIPAL EMPLOYEES' UNION, LOCAL 73, AFSCME, AFL-CIO and CITY OF APPLETON (WASTE WATER DIVISION)	Case 284 No. 42083 MA-5562

Appearances:

Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40, appearing on behalf of the Union.
Mr. Greg J. Carman, City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

Appleton Municipal Employees' Union, Local 73, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Appleton (Waste Water Division), hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance involving a suspension. The undersigned was so designated. Hearing was held in Appleton, Wisconsin on July 11, 1989. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on August 31, 1989.

BACKGROUND

On February 6, 1989, at around 9:15 a.m., Peter Wachs, Superintendent of Waste Water Division, entered the breakroom where seven employes were on break. Wachs told the employes that they were in violation of the breaktime by exceeding the 15 minutes allowed for breaks and they could consider this an oral warning. The grievant was one of the seven employes present in the breakroom and is also the Chief Steward. The grievant approached Wachs and told him he could consider this a first step grievance. What transpired next is somewhat in dispute. Wachs testified that the grievant was upset and stated to him that Wachs was causing morale problems and was a goddamn asshole. The grievant repeated that Wachs was a goddamn asshole twice more. Steve Hetzel, the manager of maintenance, testified that he was present and that the grievant stated to Wachs, "Let's face it. You're a goddamn asshole." The grievant couldn't recall exactly what he said but stated that if Wachs was indicating that everyone had overstayed the 15 minute break that he was a goddamn liar and was creating morale problems and if he continued, he would look like a goddamn asshole.

Wachs then contacted David Bill, the Director of Personnel, and told him what had occurred and Bill told Wachs to send the grievant home for the day. Wachs called the grievant in and told him he was being sent home for the rest of the day for the statements. The grievant indicated that he did not recall the statement but apologized and then went home as directed. The verbal warnings issued to all seven employes were later rescinded but the grievant was not paid for the approximately five hours he was sent home and the lost time was considered a suspension for the statements he made to Wachs.

ISSUE

The parties were unable to agree on a statement of the issue. The Union frames the issue as follows:

> Did the City have proper cause to suspend the grievant on February 6, 1989? If not, what is the appropriate remedy?

The City states the issue as follows:

> Did the City have just cause pursuant to Article VIII of the parties' collective bargaining agreement to suspend the grievant on February 6, 1989? If not, what is the appropriate remedy?

The undersigned adopts the issue as stated by the Union.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE VIII - SUSPENSION, DEMOTION AND DISCHARGE

Disciplinary action pursuant to this Article shall be initiated no later than five (5) working days following the Employer's knowledge of the infraction, unless otherwise mutually agreed. Such discipline shall be carried out as soon thereafter as practicable.

SUSPENSION: Suspension is defined as the temporary removal without pay of an employee from his designated position.

SUSPENSION FOR CAUSE: The Employer may for disciplinary reasons, suspend an employee. Any employee who is suspended, except probationary and temporary employees, shall be given written notice of the reasons for the action, and copy of such notice shall be made a part of the employee's personal history record, and a copy shall be sent to the Union. No suspension for cause shall exceed thirty (30) calendar days.

UNION'S POSITION

The Union contends that the City did not have proper or just cause to suspend the grievant. The Union submits that even if the statements would ordinarily constitute proper cause for discipline, discipline is not proper in this matter because the grievant was acting in the protected role of steward discussing a grievance when the statements were made. The Union also asserts that the City lacked proper cause for the suspension because David Bill never investigated the matter prior to suspending the grievant, thereby violating the due process rights of the grievant. The Union further claims that the punishment did not fit the crime in that the alleged offense was minor and the grievant had a clean record, so only a reprimand would be appropriate even if the grievant was guilty as charged.

The Union asserts that the facts show that the grievant was acting as a steward when he argued with Wachs. It notes that no bargaining unit employes heard the conversation. It points out that the grievant was the only steward in the Waste Water Division and had stated this was the first step in the grievance procedure. Wachs, according to the Union, knew quite well that the grievant was acting as a steward when he made the remarks. The Union submits that the use of profane language when discussing a grievance is protected activity as the parties are acting as equals in such discussions. It argues that the failure to sustain the grievance will have a disastrous effect on the Union if its advocate will be within an eyelash from discharge for standing up to management. It recognizes the concern of the City that the Union cannot be given carte blanche to openly defy management under the quise of protected activity but asks that the "rule of reason" be applied to find that the suspension was unjustified and was based on protected Union activity. It asks that the suspension be rescinded and the grievant be made whole and all references to the discipline be removed from his record.

CITY'S POSITION

The City maintains that this case is not about protected activity by a Union steward. It submits that nothing in the record corroborates the grievant's assertion that he was acting as a union steward and he did not confer with union members involved in the dispute before making the statements. The City argues that even if he were acting as a steward, nothing in the law allows a personal attack under the aura of protected activities. It insists that the Union's argument that any discipline will have a chilling effect on the per-formance of a union steward's duties, when carried to the extreme, would mean that a union representative could never be disciplined no matter how grievous the cause.

The City contends that the grievant's comments to Wachs constituted insubordination. According to the City, the repeated use of abusive and profane language used in an insulting manner to a superior constituted sufficient cause to justify the grievant's suspension.

DISCUSSION

The first issue to be determined is whether the grievant directed abusive and profane language towards Wachs, his superior. Based on the testimony of

Wachs, Hetzel and the grievant, the undersigned finds that the grievant did call Wachs "a goddamn asshole." Thus, the evidence presented establishes that the grievant did direct abusive and insulting language at his superior. The Union has raised due process issues with respect to the investigation before the sus-pension. The undersigned finds that the grievant was sent home the day of the incident not necessarily because of the imposition of a penalty at that time but to remove him from work until he cooled off and Mr. Bill did not decide the suspension or determine the appropriate discipline but merely advised Wachs as to what Wachs should do at that time. Only later was it decided that the time off was sufficient and that became the discipline. Under the circumstances, the evidence was apparent to Wachs because he was there and the comments were directed toward him so no investigation was required and Wachs did the actual disciplining. 1/ The mere fact that Wachs consulted with Bill did not change anything such that Bill had to reinvestigate everything. Thus, the due process arguments are not persuasive.

The Union's strongest argument is that the grievant was acting as a steward and his language was protected. The City claims that the grievant was reacting to discipline and not acting as a steward. The grievant did say that Wachs could consider it the first step of the grievance procedure which supports the Union's position that this was part of the grievance procedure. Assuming arguendo that the grievant was acting as a steward, arbitrators have held that stewards acting in their official capacity enjoy a special immunity from discipline and stand as equals with supervision so the use of profanity and shouting as well as insulting conduct is protected activity. 2/ However, there are limits on how far an employe can go even when engaged in protected activity. The National Labor Relations Board, the Courts and the Commission have held that by opprobrious conduct, a steward engaged in protected activity can lose the protection of the statute. 3/ The factors considered in determining whether the steward is protected or not include the place of the discussion, the subject matter discussed, the nature of the employe's outburst and whether the outburst was provoked by an employer's unfair labor practice. 4/

With respect to the place of discussion, the use of insulting language is condoned when it occurs during a formal grievance meeting or during contract negotiations which are conducted away from the plant where only management and union officials are present. Here, the discussion took place in the breakroom or in the hallway and these circumstances can be easily distinguished from a private grievance meeting. The nature of the discussion was the verbal warning given by Wachs to employes including the grievant. A steward prosecuting his own grievance or one that arises from his own conduct or mis-conduct in the work place must be particularly careful about his activity 5/ A union official cannot write his own rules but must comply with the restrictions on handling grievances. He is not free to say whatever he wants to management regardless of the pertinence, truth or civility of his remarks. 6/ Additionally, the nature of the steward's statements cannot be intended to be personally abusive toward the supervisor. 7/ Here, the remarks were directed at and were personally abusive toward Wachs. Finally, there was no evidence that the City had engaged in any unfair labor practices or prohibited practices which might have provoked the grievant. The undersigned finds that under the circumstances presented here, even assuming that the grievant was acting as a steward in a grievance meeting, he overstepped the line of protected activity in directing the insulting comments towards Wachs. 8/ Thus, the grievant was subject to discipline for the remarks directed to Wachs on February 6, 1989.

1/ Ex - 2.

2/ Southern Indiana Gas & Electric Co., 85 LA 716 (Nathan, 1985); Owens-Illinois, Inc., 73 LA 663 (Witney, 1979).

3/ City of Kenosha, Dec. No. 25226-B (WERC, 2/89); Atlantic Steel Co., 102 LRRM 1247 (1978).

4/ Atlantic Steel Co., 102 LRRM 1247 (1978).

5/ Calmar, Inc., 51 LA 766 (Turkus, 1968).

6/ Wen Products, Inc., 73 LA 1028 (Kossoff, 1979) at 1036.

7/ Id., at 1035.

8/ See Kraemer & Sons, Inc., 81 LA 821 (Rezler, 1983).

With respect to the penalty of a suspension for the rest of the day on February 6, 1989, the Union asserts that the penalty is too severe. Arbitrators have upheld discharges or long suspensions for such conduct 9/. The undersigned cannot conclude that the suspension was too severe. Given the nature of the offense, a suspension of less than one day does not violate the just cause standard.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The City had proper cause to suspend the grievant on February 6, 1989, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 13th day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ______________________________
Lionel L. Crowley, Arbitrator

9/ Calmar, Inc., 51 LA 766 (Turkus, 1968); Kraemer & Sons, Inc., 81 LA 821 (Rezler, 1983); Atlantic Steel Co., 102 LRRM 1247 (1978); Hyatt On Union Square, 111 LRRM 1684 (1982).

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