BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 67, AFSCME, AFL-CIO	
and	Case 325 No. 42170 MA-5592
CITY OF RACINE	

Appearances:
Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Mr. Guadalupe G. Villareal, Assistant City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

Local 67, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Racine, 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 over a suspension. The undersigned was so designated. Hearing was held in Racine, Wisconsin on November 16, 1989. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on February 12, 1990.

BACKGROUND

The grievant has been employed by the City for approximately nine years, first as a seasonal employe, and since June 11, 1987, as a full-time truck driver in the Solid Waste Division of the Department of Public Works. On March 8, 1989, the grievant and another employe had an altercation in the Employer's lunch room just prior to the normal starting time of 7:00 a.m. The grievant had arrived at work first at approximately 6:40 a.m. The other employe arrived at work a short time later and upon his entry into the lunch room, the grievant made an obscene remark to the employe. This remark apparently was very common in the work environment and constituted normal shop talk. The employe testified that he was not offended by this remark and that it played no part in the subsequent altercation. After the employe entered the lunch room, he sat down in a chair. The grievant claimed that he had been sitting in that particular chair as his jacket was on it and he told the employe to give him his chair. The employe in turn directed a profane remark at the grievant. The grievant then grabbed a bag of donuts the employe had brought to work, whereupon the employe in turn grabbed the grievant's radio. The grievant then sought to retrieve his radio and in doing so pushed past the chair the employe was sitting in which squeezed the employe between the chair and the table and eventually the chair came out from under the employe. The employe grabbed another chair and swung it at the grievant hitting him a glancing blow. The grievant grabbed the employe in a bear hug and they fell through the tables to the floor with the grievant on top. The employe cut his lip somewhere during this scuffle. Someone said that it was not worth losing your job and the grievant and the employe broke it up. The employe then went to his supervisor and told him he should keep the grievant away from him. The Employer then investigated what had occurred and on March 13, 1989 suspended the grievant for a period of three days. The notice of suspension stated as follows:

> ON WEDNESDAY MARCH 8, 1989 YOU WERE INVOLVED IN A FIGHT WITH ANOTHER EMPLOYEE WHILE ON CITY PROPERTY. AFTER INVESTIGATING THIS INCIDENT WITH OTHER EMPLOYEES THAT WITNESSED THE FIGHT, WE HAVE DETERMINED THE FOLLOWING FACTS. THAT YOU VERBALLY ASSUALTED (sic) THE OTHER EMPLOYEE WITH YOUR TAUNTS AND SARCASTIC REMARKS. THIS IS WHAT LEAD (sic) TO THE START OF THE FIGHT, TO YOUR CREDIT YOU DID NOT THROW ANY PUNCHES, FOR THIS REASON I AM GIVING YOU A THREE(3) DAY SUSPENSION. THE SUSPENSION IS FOR VIOLATING THE FOLLOWING WORK RULE SECTION R PERSONAL ACTIONS PARAGRAPH B) THREATENING, INTIMIDATING, INTERFERING WITH OR ABUSING (PHYSICALLY OR VERBALLY) OTHERS.
>
> THE THREE(3) DAY SUSPENSION WILL BE FOR THE FOLLOWING DAYS, WEDS. MARCH 8 TUES. MARCH 14, AND WEDS. MARCH 15, 1989.
>
> I ALSO WANT TO INFORM YOU THAT THIS TYPE OF TAUNTING AND VERBAL ABUSE IS NOT WANTED IN THIS DEPARTMENT, AND WILL NOT BE ACCEPTED. ANY FURTHER VIOLATING OF THIS WORK RULE WILL RESULT IN THE NEXT STEP OF PROGRESSIVE DISCIPLINE.

The grievant filed a grievance over the three-day suspension. The parties stipulated that the grievance is timely and properly before the Arbitrator.

ISSUE

The parties were unable to agree on a statement of the issue.

The Union states the issue as follows:

> Did the City violate the contract when it suspended Charles Besler without pay for three (3) days? If so, what is the appropriate remedy?

The City states the issue as follows:

> Did the City have just cause to impose a three-day suspension on Charles Besler?

The undersigned frames the issue as follows:

> Did the City have just cause to suspend the grievant for three days?

If not, what remedy is appropriate?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 11

Management and Union Recognition

. . .

E. Management Rights. The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

. . .

2. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge and take other disciplinary actions against employees, for just cause.

CITY'S POSITION

The City contends that it reasonably imposed the three-day suspension on the grievant for just cause. It submits that the evidence established that on March 8, 1989, the grievant got into an altercation, both verbal and physical, with another employe and each should be reprimanded for his individual part in the altercation. The City acknowledges that the other employe engaged in more egregious action which deserved a greater penalty, but the grievant was the instigator of the fight by his obscene remarks or physical action. The City claims that it properly investigated the incident by interviewing all the employes and determining that a fight had occurred as well as an exchange of verbal obscenities.

The City denies that it has ignored similar fights in the past and that it is somehow obligated to do so in the present or future. It points out that employes hardly ever admit to being involved in a fight and the City imposed discipline whenever it could substantiate that a fight occurred. It maintains that the action taken against the grievant is consistent with the specific language of the work rules and the gravity of the offense. The City requests that the grievance be denied.

UNION'S POSITION

The Union contends that the City violated the parties' agreement when it suspended the grievant. It submits that the grievant should not have been disciplined at all. It points out that the City acknowledged that the grievant did not "throw any punches" and the discipline was based solely on the grievant's comments and not on his participation in the confrontation. The Union asserts that the City has adopted a tolerant approach to fights between employes and only once has an employe been disciplined and that was a written reprimand for threatening to hit a fellow employe with a metal bar. It argues

that the incident on March 8, 1989 was a momentary confrontation between two friends which occurred before the start of the work shift and did not disrupt the City's operation or its ability to assign work nor did it cause employe morale to suffer.

The Union takes the position that the grievant's obscene comments do not warrant discipline. It points out the testimony of several witnesses that employes commonly use profanity and make obscene comments to each other. It notes that the comments were not threatening and did not provoke a fight. It points to the grievant's unblemished work record and the lack of any basis to discipline him. It argues that the other employe provoked and was responsible for the incident and the discipline imposed is disparate. It submits that even if some discipline were warranted, the suspension was inconsistent with the intent of discipline as set forth in the contract which is to elicit corrective action. It insists that the suspension was punitive and requests that the discipline be rescinded and the grievant be made whole.

DISCUSSION

Although the Union argued that the City tolerates fighting in the work place, the undersigned does not find that this is the case nor would the City be bound by its past leniency. The work rules clearly prohibit physically abusing others and discipline may range from an oral reprimand to immediate discharge, depending on the severity of the infraction. Thus, this argument is rejected.

The March 13, 1989 letter of suspension to the grievant states in part that the grievant "verbally assualted (sic) the other employe with your taunts and sarcastic remarks. This is what lead (sic) to the start of the fight." A review of the evidence fails to support this conclusion. The evidence established that obscene remarks were commonplace in the work areas and were a daily occurrence. The other employe testified that the profanity and kidding happens and is not unusual and that it did not offend him and he did not take it personally. In essence, the remarks were not a factor in the altercation. His testimony with respect to the altercation was that the grievant grabbed his bag of donuts, at which point, he in turn grabbed the grievant's radio. The grievant then used his weight to push on the employe's chair squeezing the employe between the chair and the table. This is what caused the employe to strike the grievant with a chair as he felt intimidated by the grievant, who is a much bigger man than the employe. The employe felt that the grievant was bullying him. Thus, this testimony establishes that the verbal remarks did not provoke the fight.

The altercation was a result of the struggle over the donuts and radio, respectively, and the overreaction of the other employe due, in part, to the grievant's greater size. The grievant was partly responsible for this conduct and had he been suspended for his part in this altercation on that basis, the suspension may very well have been warranted. It is also noted that the other employe was determined to be the aggressor and the grievant simply defended himself. The letter of suspension and the differences in penalties established that the grievant acted to protect himself and did not retaliate, thus any disparate treatment is justified.

Arbitrators have generally held that the commonplace hard language of the shop is not acceptable provocation. 1/ While verbal provocation may be and often is a reason for physical violence, in a civilized society it cannot be accepted as a justification. 2/ So even if the grievant's language was a reason for the fight, it cannot be accepted as a provocation. As long as the words contain no threat of physical aggression, which reasonably appears may be instantly acted upon, such may not be met with a physical response. 3/ The evidence fails to establish that the words used by the grievant contained any threat of physical aggression that would produce a physical response. The obscenities were so commonplace in the work environment that the grievant would have had no reason to suspect that these words would in any event be the cause of a physical confrontation. Thus, it must be concluded that the grievant's taunts and sarcastic remarks did not lead to or provoke the altercation. Therefore, the basis for the suspension set forth in the March 13, 1989 letter of suspension does not withstand scrutiny and is not supported by the evidence.

The undersigned concludes that the City did not have just cause to suspend the grievant for the reasons set forth in the letter of suspension dated March 13, 1989. The verbal conduct on the part of the grievant did not lead to the fight nor can it be considered as provocation. Therefore, the letter must be set aside and removed from the grievant's file.

Although there was not just cause for the suspension based on the reasons

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1/ Cavalier Corp., 75 LA 258 (Haemmel, 1980).

2/ General Electric Co., 73 LA 1248 (King, 1979).

3/ Id.

set forth in the letter of suspension, the grievant did play a part in the altercation by grabbing the employe's bag of donuts and pushing on his chair. It is noted in the record that the grievant was sent home to cool off on the date of the incident, March 8, 1989. This was not disciplinary but rather an appropriate response to the result of the altercation. Inasmuch as the grievant was not totally blameless in the altercation such that his being sent home to cool off was his own fault, the undersigned finds that the day off on March 8, 1989 was the grievant's responsibility and not the City's attempt to discipline him.

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 did not have just cause to suspend the grievant pursuant to the letter of suspension dated March 13, 1989. The City is directed to remove the letter from the grievant's file and to pay him for his suspension on March 14 and 15, 1989. The grievant's absence on March 8, 1989 will be treated as an absence without pay.

Dated at Honolulu, Hawaii this 9th day of April, 1990.

By_____
Lionel L. Crowley, Arbitrator