BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between KENOSHA FIREFIGHTERS, LOCAL 414, INTERNATIONAL ASSOCIATION of FIREFIGHTERS, AFL-CIO and CITY OF KENOSHA	Case 157 No. 44968 MA-6469 (Reprimand of John Celebre)

Appearances:

Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-6613, by Mr. Roger E. Walsh, Attorney at Law, appearing on behalf of the City of Kenosha.

Lawton & Cates, S.C., 214 West Mifflin Street, Madison, WI 53703-2594, by Mr. Richard V. Graylow, Attorney at Law, appearing on behalf of Local 414, IAFF.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Kenosha Firefighters, Local 414, International Association of Firefighters, AFL-CIO (hereinafter referred to as the Union) and the City of Kenosha (hereinafter referred to as the City) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning a written reprimand issued to Union President John Celebre. The undersigned was so designated. A hearing was held on April 12, 1991 in Kenosha, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. No stenographic record was made of the proceeding. The parties submitted post-hearing briefs and reply briefs, the last of which were received on June 12, 1991, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the contract language and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties were unable to stipulate to the issue in this matter. The City proposes the issue as:

"Did the City violate the collective bargaining agreement by issuing the October 24, 1990 disciplinary warning letter to the grievant, John Celebre? If so, what is the appropriate remedy under the contract?"

The Union proposes:

"1. Did the Employer violate Section 4.01 of the collective bargaining agreement when the Chief issued his memo of August 31, 1990? and

2. Did the Employer have just cause for issuing the letter of reprimand to Celebre? and

3. If there is any breach of the agreement, what relief, if any, is appropriate?"

The undersigned believes that the issues can be fairly stated as follows:

"1. Is the grievance timely as it relates to the validity of Assistant Chief Thomas's August 31, 1990 memo regulating the content and size of bulletin boards? and

2. Did the City violate the collective bargaining agreement by issuing the October 24, 1990 disciplinary warning letter to the grievant, John Celebre? and

3. If the City violated the collective bargaining agreement by issuing the October 24, 1990 disciplinary warning letter to the grievant, John Celebre, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 1 - RECOGNITION

1.01 The City recognizes and acknowledges that Local 414, I.A.F.F. is the authorized representative and sole bargaining agent for Fire Fighters of the City of Kenosha, excluding the Assistant Chiefs, the Chief of the Kenosha Fire Department, Training Coordinator, and the Apparatus and Equipment Supervisor.

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ARTICLE 2 - MANAGEMENT RIGHTS

2.01 The management of the City of Kenosha Fire Department and the direction of the employees in the bargaining unit, except as otherwise specifically provided in this agreement, shall be vested exclusively in the City, and shall include, but not be

limited to the following:

a) To determine its general business practices and policies and to utilize personnel, methods and means in the most appropriate and efficient manner possible.

b) To manage and direct the employees in the bargaining unit.

c) To determine the methods, means and personnel by which and location where the operations of the City are to be conducted.

d) To hire, promote and transfer and lay off employees and to make promotions to supervisory positions.

e) To suspend, demote or discharge employees for just cause.

f) To schedule overtime work as required in the manner most advantageous to the City and consistent with the requirements of the Fire Department and the public interest.

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ARTICLE 4 - MAINTENANCE OF STANDARDS

4.01 The City agrees that all conditions of employment in the unit of bargaining covered by this agreement relating to wages, hours of work, overtime, and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this agreement. As to any item not covered by this agreement, references may be made by either party to past procedure, department policy, City Ordinances or Resolutions, and State Statutes as guidelines to settle a particular dispute.

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ARTICLE 16 - GRIEVANCE PROCEDURE

16.01 Any violation of this Agreement or any supplement thereto shall be deemed subject to the grievance procedure as follows:

16.02 Step 1. Within ten (10) days of the occurerence of the grievance, the employee or employees and the Union shall present a statement of the same in writing to his/her Assistant Chief. No sooner than three (3) days nor later than five (5) days said officer will make his answer thereto in writing and provide copies to the grievant or grievants, the Union and the Chief.
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16.04 Step 4. *** The arbitrator shall have jurisdiction to rule on the arbitrability of the dispute, to issue subpoenas, to define the questions involved, to make rulings on procedure and evidence according to the equities of the situation, and to render a decision on the merits which will be final and binding on the parties. The authority of the arbitrator shall be limited to the above and he/she shall have no authority to add to, detract from, or amend the agreement. The costs and expenses, if any, of such arbitrations shall be shared equally by the City and the Union, except that each party shall pay its witnesses and attorney's expenses.
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16.06 The purpose of the time limits in the foregoing paragraphs is to provide a procedure for dispute settlement which will be prompt and expeditious. However, where extenuating circumstances prevail, any of the said time limits may be modified or extended by written mutual agreement of the parties.
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FACTUAL BACKGROUND

The City is a municipal corporation providing general governmental services to the people of Kenosha in southeastern Wisconsin. Among the services provided is fire suppression through a fire department. The Union is the exclusive bargaining representative for non-supervisory employees of the Kenosha Fire Department. The grievant, John Celebre, is the President of the Union.

The City operates six fire stations. At each of the six stations there is a departmental buletin board, on which are posted official departmental notices and communications. Additionally, at stations 1, 2 and 5, the Union maintains a bulletin board for the posting of Union notices and other materials of interest to firefighters. At stations 3, 4 and 6 the Union uses the department's bulletin boards for these purposes. The Union bulletin boards at stations 1 and 5 measure 24" by 36". At stations 2, the Union bulletin board measures 25" by 37" because of an oversized frame.

At a meeting of the non-represented staff in the summer of 1990, concerns were raised about the posting of allegedly obscene and offensive materials on both departmental and Union bulletin boards. In response to these concerns, Assitant Chief Richard Thomas issued a memo on August 31, 1990 addressing the content and size of bulletin boards in the fire stations:

TO: All Stations
Fire Administrative Staff

FROM: Assistant Chief Richard Thomas

SUBJECT: Posting of Material on Bulletin Board

From this date forward, only official Kenosha Fire Department communications or related City of Kenosha communications will be posted on the Fire Department bulletin board.

Local 414 Union bulletin boards will be limited to a maximum size of 24" x 36".

At no time will the posting of obscene or offensive materials by allowed on any bulletin board.

Thomas did not consult with any Union official prior to the issuance of his August 31st memo.

On September 5th, the grievant posted a memo in response to Thomas' announced restrictions on bulletin boards. The memo was produced on Union stationery and was posted on Union bulletin boards. A copy was also sent to Thomas:

TO: All Union Members
A/C Thomas

FROM: John Celebre

SUBJECT: Union Bulletin Board

Recently A/C Thomas wrote a memo concerning bulletin boards in the fire stations. His memo spoke to both the Department boards and those of the Union. **Members of Local #414 will ignore those portions of A/C Thomas' memo that deal with Union bulletin boards**. Until further notice, the following guidelines will perform to the Union boards.

The size of Union bulletin boards will be determined by the needs of the Union and the space available.

Union bulletin boards will be placed in each station in areas conspicuous to all Union employees and equally conspicuous as Fire Department boards.

No person, except members of the executive board, will remove items from Union bulletin boards until they have remained posted for at least 12 days. After this period of time, items may be removed if space on the board is at a premium.

Any Union member may post anything he/she wishes on Union bulletin

> boards provided it does not cover official Union communications and is not obscene. If there is a question of obscenity, the Union President will decide if materials should remain posted.
>
> Satirical commentary and/or cartoons will continue to be allowed on Union bulletin boards.
>
> If you see anyone other than a Union member tampering with or removing items from a Union bulletin board, please let me know so that appropriate action can be taken.

On October 9th, Thomas contacted the grievant by telephone to schedule a meeting so that they could discuss the grievant's memo. Thomas attempted to schedule the meeting on either October 12th or 15th, both days on which Thomas was on duty but the grievant was not. The grievant indicated that he considered the matter to be fire department business and that he would not meet on his day off unless he received overtime pay under the contract. Thomas insisted that the meeting go forward on the 12th, since his understanding of the past practice was for Union officers to attend to Union business without overtime pay on off-duty days. Celebre sent Thomas a memo on the 9th, summarizing their telephone conversation, and reiterating his position that he would not meet on an off-duty day unless he was paid overtime. Two days later, Thomas responded in a memo:

> In response to your memorandum to me of October 9, 1990 relating to our telephone conversation that day trying to schedule a meeting, my purpose in requesting this meeting with you was to get your rationale for writing the letter to the Union members telling them to ignore my memo as it related to Union Bulletin Boards. Since your letter appears to constitute insubordinate conduct on your part, I wanted to hear your side of the issue before I decide whether and to what extent disciplinary action should be taken against you.
>
> ***[The] meeting scheduled for Friday, October 12, 1990 at 10:00 a.m. in my office, will stand as scheduled. If you desire to give me your input regarding this disciplinary issue, I expect that you will attend this meeting. As I mentioned to you yesterday, since this meeting involves potential discipline, you can have a Union representative present at the meeting if you wish. If you do not attend the meeting, I will make the decision on whether and to what extent disciplinary action should be taken against you on the basis of my own review of the matter.

The meeting was ultimately held on October 17th. At the meeting, the grievant presented a written response to the Chief:

> In your memo of October 11th you state your reason for requesting a meeting with me was to get my rationale for writing my memo to both you and members of

> Local 414 regarding Union bulletin boards. While I choose not to meet with you on this matter while I am not on duty, I would be happy to share my rationale for writing the memo in question.
>
> In your memo of August 31, 1990, you attempted to place management control on the size and content of Union bulletin boards. In doing so you exceeded your authority as an Assistant Chief of the Department. As President of the Union, it was my duty to inform both you and our membership of the Union's position on the subject and to clarify the guidelines by which we intend to operate our buletin boards.

One week later, Thomas sent a letter of reprimand to Celebre:

> Dear Mr. Celebre:
>
> I have reviewed your memo of September 5, 1990 in response to my order of August 31, 1990 concerning posting of materials on bulletin boards. In this memo, you directed bargaining unit personnel to ignore my order. In fact, you highlighted in bold type that "Members of Local #414 will ignore those portions of A/C Thomas' memo that deal with union bulletin boards." This constitutes insubordination. If you had a problem with my order, appropriate steps could have been taken by you to address this issue.
>
> Therefore, this letter is a written disciplinary warning. You are hereby advised that similar future instances will subject you to further disciplinary action, up to and including termination.

A grievance was filed on October 29th, asserting that "A/C Thomas attempted to reprimand grievant for maintaining the Union's rights to communicate to its members through the uncensored use of bulletin boards." As relief, the grievant sought "removal of all references to this matter from the grievant's personnel file and the recinding (sic) of the Fire Department policy regarding Union bulletin board." In processing the grievance, a dispute arose between the City and the Union over whether the grievance related only to the discipline imposed on Celebre or, as contended by the Union, it also represented a timely challenge to Thomas' bulletin board policy. The matter was not resolved in the lower steps of the grievance procedure and was referred to arbitration. Additional facts, as necessary, will be set forth below.

THE POSITIONS OF THE PARTIES

The Position of the City

The City takes the position that the grievance as it relates to the substance of the bulletin

board policy is untimely and is not therefore procedurally arbitrable. The memo announcing the policy was posted and implemented on August 31, 1990. The grievance in this matter was not filed until October 24th, some 59 days later. Since the contract clearly provides for submission of a written grievance within ten days of the occurrence of the grievance, and since there was no mutual agreement to extend this deadline,Celebre's grievance cannot be considered a timely challenge to the substance of the Chief's policy.

On the merits of the discipline, the City notes that §2.01(e) of the contract establishes a "just cause" standard for suspension, demotion or discharge. The contract does not specify such a standard for written warnings. Thus the discipline in this case must be sustained unless it is found to have been arbitrary or capricious. However, the City characterizes the grievant's misconduct as serious enough to rise to the level of just cause.

The City cites the familiar principle of "obey now, grieve later", and contends that the grievant should appropriately have filed a grievance against the bulletin board policy if he believed it violated the collective bargaining agreement. By instead resorting to self-help, and urging other employees to ignore a supervisor's direction, the grievant is obviously guilty of insubordination.

While the City acknowledges that protests of management policies by Union officials are generally considered protected concerted activity, there are exceptions. The City cites WERC decisions, NLRB decisions and arbitration awards all of which note that a union official may lose his protected status by engaging in flagrant or egregious acts of insubordination while challenging management. Indeed, some of the cases suggest that there is a special obligation on union officials to follow the grievance procedure because of their familiarity with it. The grievant in this case was thoroughly familiar with the grievance procedure, yet chose to ignore it. Instead he urged disobedience of Thomas's legitimate order. For all of the foregoing reasons, the City urges that the discipline be sustained.

The Position of the Union

The Union takes the position that the grievant was properly engaged in protected activity -- protesting an illegal policy -- and committed no act of insubordination. Thus the discipline should be reversed.

The collective bargaining agreement provides, at §4.01, "that all conditions of employment in the unit of bargaining covered by this agreement relating to wages, hours of work, overtime, and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this agreement." It is undisputed that the Union had the unfettered right to maintain and make use of its bulletin boards at the time of the signing of the agreement. Thus, Thomas could not have legitimately abridged this right as he purported to do in his August 31st memo. The grievance challenging this attempt is, according to the Union, timely since the parties were continuing to discuss the matter up to the point at which discipline was imposed on

Celebre. Thus, the Union did not have certain knowledge that the policy would remain in effect until Thomas's October 24th memo. The instant grievance was filed five days later, well within the contract's guidelines.

On the substance of this discipline, the Union asserts that insubordination requires an "intentional, willful violation of a lawful, direct order." To the extent that Thomas's Augst 31st memo can be read as an order, it is not a lawful order. It is not lawful because it directly contavenes §4.01 of the contract.

Not only does the August 31st memo not constitute a lawful order, the Union argues that it does not constitute an order at all. It is merely a generic policy statemenet. To the extent that it contains anything that might be considered an "order", it is that no "obscene or offensive materials be allowed on any bulletin board." The grievant neither posted such materials nor directed that such materials be posted. Indeed, his memo directed Union members not to post obscene materials and thus was in complete accordance with Thomas's memo.

For all of the foregoing reasons, the Union urges that the grievance be sustained and appropriate relief be granted.

Reply Brief of the City

The City takes exception to several arguments raised by the Union, contending that they are not justified by the record evidence. Specifically, the City contends that there is no evidence concerning the usage or customs related to the Union's use of bulletin boards. Thus, it is impossible for the Union to argue that Thomas's order changed any existing conditions related to bulletin boards. Furthermore, the record evidence will not support the Union's contention that there were ongoing discussions between the Union and the City over the merits of Thomas's memo during the period between its posting and the filing of this grievance. The only correspondence or discussions between the parties during this period of time related to whether or not Celebre would be paid for time spent in meetings to justify his September 5th memo and in attempts to schedule such meetings. The only Union response to the substance of the Chief's memo was Celebre's order to Union members to ignore the Chief's order. It is that act of insubordination which is the sole focus of this case.

The Reply Brief of the Union

The Union objects to several "glaring omissions" in the City's brief. The City fails to recognize the protected status of Union bulletin board, and thus the protected nature of the grievant's efforts to protect those boards. Union bulletin boards are a mandatory topic of bargaining and past practices on mandatory topics are protected by §4.01 of the contract. As Union President, Celebre had the right to protect the use of Union bulletin boards.

The City also fails to correctly understand the law of insubordination. It ignores the illegal nature of Thomas's attempt to unilaterally change protected working conditions, and thus the invalidity of his memo. Had Thomas truly believed that there was abuse of the Union's right to maintain a bulletin board, he should have filed a grievance against the Union. Instead he bypassed proper procedures and engaged in self-help by issuing an invalid policy.

The Union again asserts that there was no disobedience of Thomas's proposed policy. Celebre's memo is, in virtually every respect, consistent with Thomas's memo. Moreover, nothing in the memo can be interpreted as interfering in any way with the orderly, safe, and efficent operation of the department. To the extent that Thomas's authority was challenged by Celebre's memo, it was his non-existent authority to interfere with Union bulletin boards. The Union notes that not one firefighter, including Celebre, took any action before or after Celebre's memo to violate Thomas's policy.

The Union rejects the City's claim that the grievant was in any way egregiously or flagrantly insubordinate to Chief Thomas. His memo was simply a clear statement of his position as Union President, and as such was privileged. The case and examples cited by the employer all involve misconduct which is well beyond anything that the grievant can be said to have done.

Finally, the Union notes that many cases hold that the time for filing a grievance must be measured from the point at which pre-grievance discussions collapse. The rigid "date of occurrence" standard urged by the City would clog the grievance procedure with unnecessary grievances. Therefore the arbitrator should find the grievance timely as it relates to the substance of the Thomas memo.

DISCUSSION

At the hearing in this matter, the undersigned reserved a ruling on the procedural arbitrability of the grievance as it related to the validity of Thomas's attempt to regulate Union bulletin boards, directing the parties to submit evidence only on the arbitrability issue and on the discipline of Celebre. Thus, procedural arbitrability is addressed separately and first in this opinion.

Timeliness of the Grievance as it Relates to the Substance of Thomas's Memo

The contract establishes timelines for the submission of grievances:

> 16.02 Step 1. Within ten (10) days of the occurrence of the grievance, the employee or employees and the Union shall present a statement of the same in writing to his/her Assistant Chief…

The grievance, in the remedy portion, asks that Thomas's memo be rescinded. Thus, on its face,

it raises the issue of whether Thomas had the authority to regulate Union bulletin boards. The grievance was, however, filed 59 days after the issuance of Thomas's memo. While the Union contends that the City's position on the Thomas memo was unclear until the discipline was imposed on Celebre, the record does not support such an inference. The City does not appear to have waivered at any time or to have given any indication that it was considering modification of the policy. Its silence in the face of Celebre's challenge might have misled the Union, but only until October 9th, when the silence was broken and the Chief made it clear that he intended to discipline Celebre. Thereafter there was no discussion other than the imposition of discipline and the processing of the grievance.

The Union argues against a stringent "date of occurrence" standard for measuring whether a grievance is timely, since this will lead to the filing of grievances which might otherwise be worked out informally between the parties. This is a reasonable policy goal, and the arbitrator endorses it. The contract, however, does not. It is the clear language of the contract which imposes this standard and the arbitrator has no discretion to modify or ignore the contract language. If the language generates a surplus of grievances, the answer is for the parties to negotiate a change in the language.

Notwithstanding the determination that the grievance was filed more than 10 days after the issuance of the memo, and that the 10 day limit was not extended by discussions between the parties, the undersigned concludes that the instant grievance does represent a timely challenge to the bulletin board policy. This is because the policy, if it is a violation of the contract, is continuing in nature. The promulgation of the policy is a grievable event, but it is not the only grievable event flowing from the policy. Unlike a discrete and complete act, such as the imposition of discipline, the bulletin board policy is in effect and, to the extent that it does constrain the union and its members, constrains the unit anew each day. Although there is unquestionably a point at which the right to challenge the policy will expire, either because the Union implicitly acquiesces in its existence or because the delay triggers the doctrine of laches, that point cannot be said to have been reached after only seven weeks.

On the basis of the above stated conclusion that the grievance over the substance of the policy is procedurally arbitrable, the undersigned directs that the hearing be reconvened to take evidence and hear arguments on that topic.

Discipline Against Celebre

Applicable Standard

The City urges that the grievance must be denied if it can be shown that the discipline was neither arbitrary nor capricious, since the contract calls for "just cause" only in cases of suspensions, demotions and discharges. It is not necessary to resolve the question of whether reprimands are covered by the "just cause" provision. The grievant's alleged insubordination

springs from a memo signed by him as Union President, directed to Union members, in protest of the City's effort to regulate Union bulletin boards. This, on its face and as both parties concede, is concerted activity. Since the grievant was disciplined for actions taken in his capacity as Union President, his activity is presumptively protected from retaliation even if it would call for discipline were he involved solely in his capacity as an employee. This protection does not extend to conduct which is particularly egregious or flagrant, 1/ but in order to get beyond that threshold, the grievant's acts must by definition exceed those which would ordinarily be considered "just cause" for discipline. Thus, whether the normal standard for reprimands is "arbitrary or capricious" or "just cause" is not relevant under the circumstances of this case.

Capacity as a Union Officer vs. Capacity as an Employee

The City asserts that the grievant had an obligation to "obey now, grieve later", and that resort to self-help is particularly inappropriate for a Union officer. The undersigned agrees that the principle of "obey now, grieve later" is fundamental in labor relations. As noted by the eminent arbitrator Whitley P. McCoy, however, the principle is just that -- a principle, rather than a hard and fast rule:

> When an employee is told by a supervisor to do something, his duty, perhaps after preserving his rights by a protest, is to do it. He then has the right to file a grievance and have the propriety of the order tested. No plant could operate if the employees were free to obey or disobey orders according to their own notions of their contract rights.
> ***
> Certain exceptions to this principle are equally well recongnized. No employee is bound to obey an order which would involve an unreasonable hazard to life or limb; no employee is bound to obey an order which would humiliate him or which has no reasonable relation to his job duties -- such as to shine a foreman's shoes or to withdraw a grievance. Arbitration decisions have established these and other exceptions.

1/ City of Kenosha (Fire Dept.), Dec. No. 25226-B (WERC 2/89), holding that a grievance containing statements which constituted purely personal insults could lead to discipline; See also Trans-City Terminal Warehouse, 94 LA 1075 (Volz, 1990) holding that obscenity and personal insults directed towards a supervisor while protesting managerial decisions may remove a Union president from the protection of the NLRA; See also Hamburg Industries, 271 NLRB No. 108 (1984); Caterpillar Tractor Co., 242 NLRB 523 (1979); Traverse City Osteopathic Hospital, 260 NLRB 1061 (1982); Union Carbide Corp., 171 NLRB 1651 (1968).

This case presents the question whether the facts here involved bring it within the scope of the general principle or the scope of the exceptions. In considering this question, it is important to bear in mind the reasons for the general principle; the necessity for the efficient, orderly, uninterrupted operation of production; elimination of unseemly argument on the plant floor; and the practical necessity, for reasons of efficient operations, of maintaining the proper authority and dignity of those entrusted with supervisory duties. *Since these are the reasons for the general principle, absence of such reason in a particular case (such as in the shoeshine case), or the existence of an overriding right or interest in the employee (such as to life or health), may form the basis for a legitimate exception. A*

weighing of the conflicting interests may be necessary on a given state of facts…" Sheller Mfg. Corp., 34 LA 689 (McCoy, 1960) at 689. (emphasis added) 2/

The discipline here flows from the Union President's written rejection of the City's attempt to regulate the Union in the conduct of its affairs, specifically the Union's right to judge whether materials posted on the Union bulletin board were "offensive", and to determine the size of those boards. The portions of the Assistant Chief's memo directed to the content and size of departmental boards and banning obscene materials on all boards were not challenged by the grievant. No portion of the policy was actually violated by the grievant, or by any other member of the bargaining unit acting in response to the grievant's memo. It is the largely symbolic statement of defiance that resulted in this reprimand.

In the undersigned's view, this is a case where the "weighing of conflicting interests" referred to by Arbitrator McCoy comes into play. Since the Union controls access to its bulletin

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2/ Arbitrator Harry Shulman, as umpire for Ford Motor Co. and the UAW also wrote strongly in support of the principle, upholding discipline against a union committeeman who had directed employees not perform work in other classifications:

"..[An] industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for the exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And someone must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and that responsibility must be accompanied by authority. It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision…" (Ford Motor Co., 3 LA 779 (Shulman, 1944) at page 781).

In his next reported decision involving the same two parties, however, Arbitrator Shulman refused to uphold discipline against glaziers who refused to perform painting work as ordered:

"Nothing in Opinion A-116 [3 LA 779] justifies the disciplinary action in this case. That opinion dealt primarily with production employees. It may be applied to the skilled classifications in situations where there is reasonable dispute as to whether the work assignment does or does not fall within the employee's classification. The duty of obedience to orders may well be extended to such instances of reasonable dispute. But it cannot be extended to assignments of work in admittedly different trade groups constituting different seniority groups. The company does not have the same right of transferring or loaning skilled tradesmen from one classification to another that it has with respect to employees in production classifications…." (Ford Motor Co., 3 LA 782 (Shulman, 1946) at page 783).

Thus Arbitrator Shulman recognized a balancing of interests on the issue of whether "obey now, grieve later" was applicable, even where the order directly involved production, and struck the balance in favor of the bargaining unit's integrity as a craft unit.

boards, the Assistant's Chief's policy represents an order to the Union as an entity. It does not involve the suppression of fires, the delivery of emergency services, the disposition of departmental forces, the administrative flow of departmental business or any other core function of the Fire Department. The legitimate interest of management lies in regulating the display of "offensive" material on its property, albeit on spaces under the control of the Union. 3/ While a valid interest, it is not nearly so compelling as the interest in maintaining production that underlies the "obey now, grieve later" standard.

On the Union's side, the interest in promptly and clearly stating the Union's position against the Assistant Chief's unilateral directive is fairly evident. I agree that no employee, including Celebre in his capacity as an employee, would be entitled to rely on Celebre's statement of defiance as a defense if disciplined for violating the policy. That is a different thing than saying that Celebre, in his official capacity as the President of the Union, can be disciplined for speaking out on the Union's behalf when the City attempts to regulate what are at least arguably the internal affairs of the Union. The distinct roles, responsibilities and liabilities of Union officers who are also employees has been discussed by numerous arbitrators. Arbitrator McCoy spoke to the difficult distinctions in cases involving direct conflict between the rights of the Company and the rights of the Union in their institutional roles:

> If production is to be had, the plant cannot be turned into a debating society. And a special duty in this respect lies upon Union Stewards, committeemen and officers. They above all, should set an example for obedience to orders and strict adherence to the contract for redress rather than resort to self-help…
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> ***
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> But while adhering to the rule, I do not feel inclined to extend it to unlawful orders issued by the Company to the Union. *There is a clear distinction between the case of a supervisor telling an employee to go back to his job, and a supervisor telling the Union to stop investigating a grievance. The Company and the Union have met on equal terms and adopted a Contract recognizing each*

3/ The discussion of who controls access to and the content of Union bulletin boards is intended to be general in nature, and is not intended to indicate any conclusion with respect to the ultimate validity of the Assistant Chief's policy.

other's rights. Each has its dignity to uphold. International Harvester Co., 16 LA 307, (McCoy, 1951) at pages 310-311. (emphasis supplied) 4/

While International Harvester is an old case and the phrase "each has its dignity to uphold" sounds somewhat dated, it is a fairly apt description of the Union's interests in this case. It may well be that the City has the right to regulate the content and size of bulletin boards maintained on its property, but the manner in which the Assistant Chief exercised this right -- through a memo and without any prior consultation or warning -- should reasonably have been expected to prompt a strong response by the Union. Acting in defense of its standing as an equal voice in matters of collective bargaining is a fundamental interest of the Union.

The balancing of interests in this case precludes discipline against Celebre for engaging in self-help, even though he should have grieved the policy instead of posting a notice stating that it would be ignored. Granting the rather provocative nature of Thomas's notice, Celebre's conduct was still inappropriate. If not plainly insubordinate, it was at the very least impertinent. It does

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4/ The duality of the Union officer's position has been frequently discussed, as has the attendant distinction between insubordination as an employee and vigorous, even inappropriate, advocacy as a Union representative:

"An employee of the Company who at the same time is a Union officer serves in two capacities. Each carries with it its own duties and responsibilities, but they are separate and distinct. The fact that he is a Union officer does not excuse him from the faithful performance of the obligation he owes to the Company as its employee and if he fails in that respect he is subject to discipline as every other employee is. On the other hand, if he misconducts himself only in the performance of his functions as a Union officer it would be decidedly unfair to punish him in his status of employee. Furthermore, it would emperil the administration of Union affairs if its officers were subject to such a liability." (American Airlines, Inc., 31 LA 144 (Gray, 1958));

"…Failure to obey such orders would ordinarily constitute insubordination. Had M ___ ignored a direct order regarding his work responsibilities, he would be subject to disciplinary action. The Union does not deny this. Here, however, the order related not to M___'s duties as an employee but rather to his duties as a Union officer. The meeting involved Union business. It was called for the purpose of transmitting certain information to the Committee and presumably discussing it as well." International Salt Co., 39 LA 238 (Mittenthal, 1962) at page 240. To the same effect, see also Heil Packing Co., 30 LA 143 (Klamon, 1958). The stronger minority view is exemplified by North American Aviation, Inc. 17 LA 199 (Komaroff, 1951) at page 204.

not, however, rise to the level of "flagrant or egregious" misconduct. 5/ The dispute here was over the rights of the City as an entity and the rights of the Union as an entity, rather than the right of Thomas or any other supervisor to direct the work force. The notice was not worded in terms that might have been regarded as insulting to Thomas or as questioning his authority to direct the work force, as distinct from his right to direct the Union. 6/ Further, following the issuance of the memo by Celebre, there was no action taken by any employee, including Celebre, to actually violate the Assistant Chief's policy. Having weighed all of these factors, the undersigned concludes that the reprimand should be expunged from the grievant's personnel file.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

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5/ Traverse City Osteopathic Hospital, supra.

6/ In this regard, the undersigned notes that he has read and considered the many cases cited by the City for the proposition that Union officials may be disciplined for conduct related to their official duties. Those cases are distinguishable from this case in that they involve either (1) discipline for work performance; (2) discipline for interfering with production; (3) use of insulting, humiliating or obscene methods to press grievances, or (4) the pursuit of individual interests or vendettas under the guise of grievance processing. None of these elements are present in this case.

AWARD

1. The grievance is timely as it relates to the validity of Assistant Chief Thomas's August 31, 1990 memo regulating the content and size of bulletin boards. The undersigned will retain jurisdiction and the arbitration hearing will be reconvened to take evidence relating to that issue;

2. The City violated the collective bargaining agreement by issuing the October 24, 1990 disciplinary warning letter to the grievant, John Celebre.

3. The appropriate remedy is to remove the disciplinary warning letter and any reference to the discipline from the grievant's personnel file.

Signed this 25th day of October, 1991 at Racine, Wisconsin:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator