

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 LOCAL 71, AFSCME, AFL-CIO : Case 160
 : No. 45834
 and : MA-6772
 :
 CITY OF KENOSHA :
 :

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40,
 appearing on behalf of the Union.
Mr. Charles Grapentine, Personnel Director, City of Kenosha,
 appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear and resolve the grievance of Therese Moeller. A hearing was held on September 30, 1991, in Kenosha, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments, and the record was closed at the end of the hearing.

ISSUE:

The parties stipulated that the following issue is to be decided by the Arbitrator:

Did the City violate the collective bargaining agreement by disciplining Ms. Moeller with a two-day suspension on January 15 and 16, 1991, for insubordination? If so, what is the remedy?

CONTRACT LANGUAGE:

ARTICLE II - MANAGEMENT'S RIGHTS

. . . .

2.04 The City reserve the right to discipline or discharge employees who have completed their initial probationary period pursuant to Section 4.02 for just cause.

. . . .

2.06 The Union recognizes the right of the City to establish reasonable work rules. The Union recognizes the rights of the City to establish and enforce reasonable standards relating to employees' personal appearance. Any dispute with respect to reasonableness may be submitted to the grievance procedure.

BACKGROUND:

This grievance is over a two-day suspension given to Grievant Therese (Reesie) Moeller, a secretary in the Police Department for 11 and a half years.

The City considers the appearance of employees working in the Police Department to be important, because employees serve the public and interact with the public. In the City's Work Rules (for non-represented employees, Local 71 employees, and Building Inspectors Association) the rule reading wearing apparel and personal appearance states: "Hard-soled, oxford, or work-type shoes." In the City's Safety Rules (for all City employees), Rule 7.08 states:

Work Shoes - Approved work shoes shall be interpreted to mean hard-soled, oxford or work type shoes. To meet these guidelines, a shoe must be designed for use in the working environment in which it is being worn. Hard-sole is interpreted to mean a sole that is made from hard leather, composite or other man-made materials that are resistant to puncture and absorption of oil and other substances. In case of dispute, the Department Head shall be the final deciding authority.

Around the middle of December of 1990 1/ Moeller wore a pair of flat shoes with a defect that caused an irritation or a swollen spot on the back of her right heel. When she worked on December 17th, she wore high heels which aggravated the irritation on her heel, and she took the shoes off and worked in her bare feet during the afternoon. No one apparently noticed. According to Moeller, when she worked the next day, December 18th, she wore a pair of mid cut white tennis shoes with bright pink shoe laces. Assistant Chief of Police Robert Carney mentioned that the shoes were not appropriate. Moeller noted that Carney has often made remarks about what she has worn, such as a jumpsuit, and she considered Carney's remark about her shoes to be small talk or light conversation.

Moeller had a vacation day on December 19th, and when she came to work on December 20th, she wore flat brown shoes and brought the tennis shoes with her. She put the tennis shoes on because the flat shoes hurt her feet. Her immediate supervisor, Captain Robert Young, saw the tennis shoes and called her into his office and told her to change her shoes. Moeller protested, telling him that these were the only shoes she could wear with her foot problem. Young recalled this conversation as a vocal argument lasting about five minutes. Moeller went back to her desk and complied with Young's order, putting her brown flats back on, but she could not put her heel in the right shoe due to the irritation. She called a doctor's office and asked if she could come in during her break around 11:15 a.m. Moeller left the building and went to the doctor's office during her break, and got a doctor's slip stating that she had an irritation on her foot, and that until the pain subsided, she must wear tennis shoes. No one in the doctor's office actually examined her, and the office nurse apparently stamped a signature on the doctor's slip.

Moeller returned to the office sometime between 11:30 and 11:40 a.m., and Young saw her walk through the squad room with the tennis shoes on. He called her into his office and ordered her to take the tennis shoes off. She presented him with the doctor's slip, but he refused to accept it because she did not have such a doctor's slip at 9:00 a.m. According to Young, a heated argument ensued, during which Young gave Moeller an ultimatum that she obey his order or he would need to recommend disciplinary action. Moeller asked him if she could go home sick, and he replied that was up to her.

Moeller decided to use three hours of sick leave on December 20th after

1/ All dates refer to 1990 unless otherwise stated.

the second discussion with Young, as she did not want to be written up and she felt she could not wear her brown flats. She went to Chief Joseph Trotta's office with the doctor's excuse, and left it with the Chief's secretary with a message that she was going home sick.

Carney thought that he had seen Moeller wearing the tennis shoes during the week of December 10th, and on December 26th, sent the following memo to Young:

The week of December 10, 1990, I informed Secretary II Therese E. Moeller, Detective Bureau, that in my opinion, her high top tennis shoes with bright pink laces were inappropriate for office attire at the Kenosha Police Department.

Carney testified that when he saw Moeller wearing the shoes, he had a one-on-one talk with her, and he expected her to change the shoes or not wear them again. He considered this to be his usual method of an oral warning, because in his experience, if he brought matters to employees' attention without being heavy handed, his goals would be reached nine out of ten times. Carney did not order her to take the shoes off or threaten her with discipline.

Young recommended that Moeller be disciplined for insubordination on the basis that she had refused to obey his orders and undermined his authority. Young noted that some detectives in the squad room heard the argument between himself and Moeller, and one of them got a kick out of it. Young had not previously seen Moeller working in bare feet and did not see her wear the tennis shoes earlier in the week. Young's recommendation for disciplinary action was sent to Chief Trotta on January 2, 1991, in the following memo:

At approx 0900 hrs., 12-20-90, I noticed that Ms. Moeller was wearing a pair of white high-topped tennis shoes with bright fluorescent orange shoe laces. I called Ms. Moeller into my office and informed her that her shoes were unacceptable as work attire. A short time earlier, I had noticed Ms. Moeller wearing a pair of brown leather flat shoes. I therefore ordered Ms. Moeller to change into the shoes she was wearing earlier.

Ms. Moeller immediately took issue with this order and began to argue with me. She stated her feet hurt, therefore, it was necessary to wear these tennis shoes. She further stated her feet were sore because she was breaking in a new pair of shoes. I responded to the effect "it is still unacceptable to wear tennis shoes with bright fluorescent orange shoes laces". I then reiterated my order to remove the shoes. A short time later, I observed Ms. Moeller standing near her desk and she was wearing brown leather flat shoes.

At 11:40 A.M., I observed Ms. Moeller walking around in the Detective Squad Room. She was again wearing the white tennis shoes with the fluorescent orange shoe laces. I immediately called her into my office and informed her that in my opinion she was guilty of insubordination. I informed Ms. Moeller to go to her desk and change her shoes. She once again began to contest and attempted to present me with some sort of Doctors slip. At this point, I refused to accept her

doctors slip, as I was sure she did not possess such a slip earlier in the A.M. In any event, a doctor's slip could not have addressed a matter of insubordination.

Ms. Moeller then stated she would have to go home sick. I replied that the choice was hers, as I do not have authority to prevent employees from declaring sickness nor utilizing sick benefits.

At this point, Ms. Moeller was visibly upset and left my office. Moments later, I observed Ms. Moeller put on her coat and leave the building, without saying a word. Ms. Moeller did not fill out a sick leave form prior to leaving nor did she tell me she was leaving. I did assume that she was taking sick leave, but I could only assume.

Sometime after 1300 hrs., Chief Trotta presented a Doctor's Slip to me that concerned Ms. Moeller's foot irritation. (Slip attached.) Chief Trotta instructed me to contact the doctor's office and ascertain how and when Ms. Moeller obtained this slip, as it was clear she did not have this slip during our encounter at 0900 hrs.

I contacted the office nurse at Dr. Ranieri's Office, 3734 - 7th Avenue, Kenosha. The office nurse (name unknown), informed me that between 11:00 - 11:30 P.M., Ms. Moeller appeared at the office complaining that she was breaking in a new pair of shoes and her feet hurt. Without the doctor examining Ms. Moeller, the nurse wrote out the attached slip and affixed the doctor's stamped signature. I questioned the rationale of such a practice with the office nurse, but failed to get any rational explanation.

Based upon the aforementioned circumstances, I recommend disciplinary action, based upon a clear case of insubordination.

On January 9, 1991, Trotta notified Moeller that she was suspended without pay for two days, January 15 and 16, 1991. Trotta's memo contained information about prior disciplinary actions, which noted that she was suspended for one day without pay on November 20, 1990. Two other disciplinary actions date back to 1981 and 1982. Due to the fact that the suspension was served in January, Moeller did not qualify for a quarterly attendance bonus of \$75.00.

Kathleen Seidel, a civilian employee of the Police Department, works in parking control and wears low cut black tennis shoes for work, The shoes and laces match her black trousers. Seidel was once asked to change shoes when she was wearing open sandals, and although she had permission from her supervisor, a commander told her the sandals were inappropriate, and Seidel went home and changed her shoes. She testified that others who work as civilians, like Moeller, have worn tennis shoes, and she is not aware that anyone has been told not to wear them. While she has seen other civilian employees wearing shoes which are not color coordinated with their uniforms, she has not seen them wear high top tennis shoes with fancy shoe laces. The tennis shoes worn by Moeller were not high tops but mid cuts, but a tab in the back of the shoes gives them the appearance of being high tops.

Young testified that if Moeller asked to go home to change her shoes, her request would have been granted, but that matter never came up on December 20th.

THE PARTIES' POSITIONS:

The City asserts that this is a clear situation where the Grievant was ordered to do something and did not comply. This is not an issue of the appropriateness of the shoes, but that Moeller was insubordinate in not following Young's order to not wear them. Carney had previously told Moeller that the shoes were not appropriate, and on whatever date Carney spoke to Moeller, it was before December 20th. In spite of Carney's statement, Moeller wore the shoes again. After Young told her not to wear them on December 20th, she wore them between 11:30 and 11:40 a.m., contrary to Young's order. She waited until he saw her and confronted her before giving him the doctor's slip.

The City points out that the accepted rule is to work now and grieve later, and that Moeller's behavior is contrary to the proper employer-employee relationship. Seidel resolved a similar matter over shoes in the appropriate method. The City also notes that this is not the first time that Moeller has disregarded orders with supervisors, as the record shows that she was disciplined only one month before this incident for insubordination. The City asserts that it cannot have employees not obeying supervisors' orders, and asks that the discipline be sustained.

The Union asserts that two criteria are important -- one, the employee must know the clear instructions of management, and two, the employee must know what discipline would be involved. The Union notes that prior to December 20th, Moeller was not ordered to remove the shoes or threatened with discipline, even though a supervisor had seen the shoes. To avoid discipline on the 20th, she felt she had no alternative other than to leave work ill, thereby complying with the order given.

The Union contends that there is no just cause for discipline, and rejects older incidents in the personnel record as being stale. The Grievant was not being insubordinate on December 20th but made a reasonable effort to explain her foot problem. Management did not challenge the use of sick leave, and the Grievant lost three hours of sick leave, two days for the suspension, plus a \$75 attendance bonus due to the fact that the discipline was invoked three weeks after the fact.

DISCUSSION:

Insubordination has been defined as a refusal to obey some order which a superior is entitled to give and have obeyed, and a willful disregard of express or implied directions of the employer. 2/

Young was entitled to give Moeller an order regarding appropriate office wear and expected it to be obeyed. However, the record falls short of demonstrating that Moeller refused to obey his order in a manner that justifies a two-day suspension. In fact, Moeller attempted to comply with his order, first by changing from the tennis shoes back into her flats, and then by attempting to demonstrate to him through a doctor's slip that her problem was severe enough to allow an exception to the general rule regarding shoes. When Young saw Moeller wearing the tennis shoes at about 11:40 a.m. on the day in

2/ Napoleon Board of Education, 74 LA 303, 306 (Roumell, Jr., 1980).

question, she was just coming back from a break where she had obtained the doctor's excuse. Moeller did not exhibit a willful disregard of Young's directions, and when faced with no alternatives but to wear shoes which were causing her pain, she attempted to comply by taking sick leave, rather than be in defiance of Young's order.

The City argues that the general rule is that one should work now and grieve later. This case is not about an order to work. Moeller was not refusing any order to work. The order was about what shoes to wear while working. Moeller was willing to continue to work; she was unwilling to work in pain. Her attempts to explain her dilemma were falling on deaf ears. Moeller made attempts to comply with the order given her. Even if those attempts were half-hearted, there is no evidence of insubordination that would warrant a two-day suspension.

The City believes that Moeller should have resolved the matter as Seidel did when she went home and changed shoes after being told that sandals were inappropriate. While Young stated that he would have granted a request by Moeller to go home to change shoes, he did not offer her that opportunity. The City feels it was incumbent upon Moeller to resolve the matter in a satisfactory method. However, it is equally incumbent upon the supervisor handing out the discipline to offer the alternative. At least two alternatives might have resolved the matter easily -- Young could have given Moeller the option to go home and change shoes, or allowed her to continue wearing the tennis shoes for the rest of the day and show some leniency for her foot problem. While Young warned Moeller that he would recommend disciplinary action, he did not warn her that the consequences would be fairly severe. Even if discipline were warranted, which I find is not the case, a two-day suspension is hardly in line with the nature of the offense.

While the City has a legitimate concern about employees obeying supervisors' orders, particularly in a police department, it must also recognize that civilian employees in police departments do not always give blind adherence to orders from ranking officers as do police officers with paramilitary training. There was no emergency or police situation here -- only a matter of what a secretary was wearing in the office. This employee had been employed over 11 years in the Department, and there is no evidence that her attire has been a matter of concern in the past.

While these two adults could both have been a bit more reasonable and avoided a suspension, a grievance and an arbitration case, the Arbitrator finds that under all the circumstances, there was no just cause for discipline. Accordingly, the grievance is sustained and the relief noted below is ordered.

AWARD

The grievance is sustained.

The City is ordered to immediately remove the two-day suspension from the Grievant's personnel record and to restore to the Grievant any loss of wages and benefits associated with the suspension.

Dated at Madison, Wisconsin this 4th day of December, 1991.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

