BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 414, KENOSHA FIREFIGHTERS, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS

and

CITY OF KENOSHA (FIRE DEPARTMENT)

Case 164
No. 46017
MA-6846

Appearances:

Mr. John B. Kiel, Executive Board Member, Local 414, IAFF, appearing on behalf

Davis & Kuelthau, S.C., by Mr. Roger E. Walsh, and Mr. Lon D. Moeller, appear

ARBITRATION AWARD

The Employer and Union above are parties to a 1989-91 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the discipline grievance of Lieutenant Richard Bosanko.

The undersigned was appointed and held a hearing on November 4, 1991 in Kenosha, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on February 6, 1992.

ISSUES:

The Union proposes the following:

1. Did the Fire Chief have just cause to discipline Lieutenant Bosanko in regard to Bosanko's participation in the Operation Desert Storm parade held on May 19, 1991?

The Employer frames the issue as follows:

1. Did the City violate the contract by issuing a written warning to Richard Bosanko on May 29, 1991?

In either case, the corollary issue is:

2. If the City violated the Agreement, what remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS:

. . .

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:

. . .

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

. . .

ARTICLE 16 - GRIEVANCE PROCEDURE

. . .

16.05 Step 4. If any party is dissatisfied with either the Mayor's or his/her designate's disposition or the disposition of the Board of Police and Fire Commissioners at Step 3, said party may invoke final and binding arbitration of the grievance or dispute by serving written notice of intention to do so within fifteen (15) days following receipt of the written decision of either the Mayor or his/her designate, or the Board of Police and Fire Commissioners. The arbitrator shall then be selected by a joint written request to the Chairman of the Wisconsin Employment Relations Commission to appoint a member of his staff as arbitrator. After the arbitrator is appointed, the parties shall agree on a hearing date as soon as is mutually convenient. 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 . . . .

FACTS:

The facts are largely undisputed. Like many other cities and towns throughout the United States, the City of Kenosha held a parade in honor of the troops who had served in Operation Desert Storm. The Mayor requested that the Fire Department take part in the parade, the Department's chief Richard Thomas agreed, and Thomas requested volunteers from among the firefighters. Thomas and John Celebre, President of Local 414, discussed the matter on two occasions about a month prior to the parade, and Celebre offered to encourage off-duty firefighters to participate. He himself also offered to participate, and subsequently sent a memo to Local 414 members suggesting their participation. It was also made known to employes generally that the Department's two newest pieces of equipment and their associated crews would be featured in the parade in an on-duty status.

On the morning of the parade, Chief Thomas discovered upon his arrival at the parade site about 10:30 a.m. that only four off-duty volunteers were available, including himself and Celebre. This, Thomas testified, was far short of the number required to staff a "honor guard", as he had been requested to do by the Mayor. Thomas testified that he then solicited more volunteers from among officers on-duty on that day, which netted two more participants. He then ordered Assistant Chief Jim Sundstrom to issue an order, to the crews of the two rigs which were scheduled to be in the parade on-duty, that all members of those crews except the driver were to march or walk in the parade rather than ride in the rig.

All the members of the crews did so, except for the drivers and Lieutenant Richard Bosanko. Celebre, however, on being informed of the order to walk/march, objected to any employe being ordered to walk/march, and told Thomas he himself would not march with the Department. Celebre then covered his uniform and participated in the march along with the "firefighters' auxiliary" unit elsewhere in the parade. The crews of the two units assigned to the parade marched immediately behind those units, and there is no dispute that had either unit been dispatched for firefighting duty from the parade, the firefighters' absence from the rigs would have added no more than a few seconds to the dispatch time. There is also no dispute that while the Department has frequently provided units to participate in parades before, no employes were ever ordered to march in a parade before. Employes did, however, leave their rigs to perform demonstrations of equipment during a parade.

When Sundstrom issued the order to on-duty firefighters to march in the parade, he delivered that order directly to only two officers, Captain Hines [officer in charge of the Med unit] and Lieutenant Bosanko [officer in charge of Engine 4]. There is no dispute that Bosanko understood that all employes except the driver were ordered to march in the parade, but Bosanko remained in his rig throughout the parade.

Bosanko testified that the reason he excepted himself from this order was that he felt it to be inconsistent with a prior order he had received, to the effect that all employes in the parade were to be attired in the Department's new uniforms. Bosanko testified, without contradiction, that when he received his new uniform some five weeks before the parade, virtually every piece did not fit. By the time of the parade, Bosanko had received a number of items of clothing that were better suited to him, but still lacked the new uniform trousers. Bosanko testified that on the day of the parade he showed up for work wearing an old and battered pair of dark blue uniform trousers, which conspicuously lacked the "sharp" appearance that had been required in Sundstrom's prior phone calls and memo concerning the appearance of employes expected to take part in the parade. Bosanko testified that he tried to borrow new trousers from two other firefighters, but that because of size differences

neither would have resulted in a visual improvement. Bosanko stated that this did not appear to be a major problem at first, because the trousers would not be visible when he was seated in the back of the rig.

There is no dispute that when Sundstrom told Bosanko all employes were to march, Bosanko did not reply that he himself would be unwise to march since it could hardly improve the Department's reputation for smartness of appearance. Bosanko testified that the trouser problem did not occur to him until after the conversation. But he admitted that in the half-hour to one hour after that conversation till the start of the parade he did not bother to check which of the two supposedly conflicting orders management wanted obeyed. Chief Thomas testified that he saw Bosanko sitting in the cab of the truck only at the last minute as he was putting the employes into formation, and did not go up to him to ask why he was not marching. Thomas testified that the parade was pulling out at that moment.

After the parade, Sundstrom asked Bosanko why he had not marched, and Bosanko told Sundstrom that he felt the order did not apply to him because his trousers looked too shabby. Sundstrom advised Bosanko to tell Thomas this, and the following morning Bosanko did so voluntarily. But after a subsequent investigatory meeting Thomas determined that Bosanko had been insubordinate, and issued him a written warning. The written warning provided that:

> I have reviewed the incident that occurred on May 19, 1991 in which you and the firefighters on your Engine Company were ordered to march in the parade honoring the troops from Operation Desert Storm. Your failure to comply with this order and march with the other members from your Engine Company constitutes insubordination. If you had a problem with this 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.

The Union introduced several documents to demonstrate that the Department has issued varying uniform guidelines from time to time, but that in the parade situation the Department took the appearance of the employes who were to participate very seriously. The City did not quarrel with this evidence, and it is clear that appearance was a concern for Thomas and Sundstrom.

THE EMPLOYER'S POSITION:

The Employer first argues that the contract contains no specific disciplinary standard for written warnings. The City argues that while "just cause" is listed as the standard for suspension, demotion or discharge, the absence of any standard for a written warning indicates that it would be beyond the authority of an arbitrator to read a just cause standard as applying to the lesser discipline involved in a written warning. The City suggests instead that a "arbitrary and capricious" standard should apply, while averring that it can meet either test on the facts here.

The Employer points to Bosanko's admission that he was told to march in the parade as indicating that his subsequent failure to do so was a clear act of insubordination, a serious offense. The City notes that the grievant admitted that he did not tell either Thomas or Sundstrom that he was not wearing the appropriate pants until after the parade, and contends that at the

very least the grievant had an obligation to notify management if he felt he had received two contradictory instructions. The City argues that leniency is not a gift for an arbitrator to bestow, and that an employer's judgment as to an appropriate penalty should be upheld unless it constituted an abuse of discretion. In this instance, the City argues, there was no abuse of discretion because Bosanko blatantly ignored a direction from management, failing even to notify management that he had a problem with the order.

The Employer requests that the grievance be denied.

THE UNION'S POSITION:

The Union first argues that an employe cannot be insubordinate if the order involved could not properly be given, citing similar arguments to those advanced separately in case 163. (These will not be reprinted here, in view of my conclusion in the Award in that case, issued separately today.) With respect specifically to the grievant herein, the Union contends that Bosanko did not willfully or intentionally disregard the order to march, and cannot be reasonably be considered insubordinate, because he received two contradictory instructions. The Union argues that based on management's repeated emphasis on the importance of looking good for the parade, the grievant could properly conclude that through no fault of his own he was unable to look good outside the cab of the truck, and should stay in the cab. The Union notes that the grievant's return of clothing and his failure to receive the proper articles of clothing in exchange on a timely basis were facts available to management, since these exchanges occurred through the Department.

The Union further argues that Thomas saw the grievant sitting in the cab of the truck as the parade was starting, but did not go up to him to ask why. The Union contends that for this reason, management failed to inform itself as to the fact that the grievant felt he had been given contradictory instructions, and also failed to make clear to the grievant which of these instructions was more important to management. Thus, the Union argues, the grievant was given confusing, ambiguous and unclear directives which were subject to varying interpretations, all tests which have been previously used in arbitration to determine whether or not insubordination has occurred. With respect to Bosanko's failure to inform management that he did not have the right trousers to march, the Union argues that this was not the subject for which he was disciplined, and therefore the City cannot now argue that he was insubordinate because of neglect in informing management of the situation. Finally, the Union argues that a "just cause" standard should be applied to this discipline, because the disciplinary warning and Thomas' testimony indicate that in future the City could discharge the grievant for some related offense, which would have the effect of obviating the just cause standard then because of reliance on the present incident as a basis for future discipline.

The Union requests that the discipline be overturned.

DISCUSSION:

The initial issue is what standard should be applied to a review of this discipline. I conclude that I can do no more than to apply the letter of the contract as it stands. The Union was fairly on notice at the outset of the hearing that the City contended that a just cause standard did not apply to written warnings, but made no effort to prove by past practice or history of collective bargaining that the language should be read as including warnings in that standard. While the language does not specifically say that warnings are excluded, it leaves that as the primary impression of the clause as a whole, because several common varieties of discipline are included under the just cause standard and written warnings are a somewhat conspicuous omission. Thus,

on this record, I conclude that the standard the City must meet is that the discipline it imposed was neither arbitrary, nor capricious, nor discriminatory, as many arbitrators have concluded in situations where no explicit contract language specified a standard for review of discipline, and as the City concedes here.

I find that the discipline given to the grievant for the incident in question was neither arbitrary, nor capricious, nor discriminatory on this record. The Union makes a good point in arguing that the grievant had been given contradictory instructions; and it is true that there is nothing in the record to indicate that the grievant had any control over what trousers were available to him on the morning of the parade, particularly since he had reasonably expected that his trousers would be hidden from view up till shortly before the parade began. I note, however, that there was some resentment among the employes generally as to this last minute order to march, as discussed in the parallel case 163. For the grievant to assume, in the face of an explicit order that all employes march, that he was implicitly excluded from that order -without checking - made him responsible for the consequences. While it is credible that he might feel he had been given two contradictory instructions, in such an instance, unless there is some reason why the employe cannot check back, some duty attaches to the employe to try to straighten out which instruction management believes more important. In this instance, the grievant had time to check, but did not, and guessed wrong.

There is no evidence that the grievant deliberately triggered this situation, or that he intended to "thumb his nose" at management. Therefore, it is difficult to believe that management would be upheld in any discipline more serious than a written warning for this minor incident. Indeed, the City might fail the "just cause" standard, if that applied to the present incident. But, as noted above, there is nothing in this record to overcome the facial implication of the language itself that it does not so apply. Clearly, the discipline was issued only after an investigation, it was related to conduct which the grievant did engage in, and there is no evidence of discrimination here. Thus, the discipline involved meets the test that it not be arbitrary, capricious, or discriminatory.

The Union's argument that "just cause" should be found to apply because of the fact that the City threatened a higher level of discipline for any repeated offense is best answered by noting that where the City has not subjected itself to a "just cause" standard of review, it cannot automatically expect an arbitrator, should there be a subsequent case, to give the prior discipline the same probative weight that it might have had the City been subject to the more rigorous level of review. Beyond that, the "future instances" notation in the disciplinary warning is speculative, and is not the immediate concern of this proceeding.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the City did not violate the collective bargaining agreement by the written warning given to Lieutenant Richard Bosanko.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 8th day of April, 1992.

By ____

Christopher Honeyman, Arbitrator