

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 67, AFSCME, AFL-CIO

and

CITY OF RACINE

Case 519
No. 55248
MA-9945

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Guadalupe G. Villarreal, Deputy City Attorney, City of Racine, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a 1995-1997 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the grievance of Markus Dyess regarding a two day, five and one-half hour suspension for insubordination. The undersigned was appointed and held a hearing in Racine, Wisconsin on April 1, 1998, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by August 17, 1998.

ISSUE

The parties ask:

Did the Employer violate the collective bargaining agreement when it imposed a two day, five and one-half hour suspension on the Grievant on January 27, 1997? If so, what is the appropriate remedy?

BACKGROUND

The Grievant is Markus Dyess, an employee of the City who works in the solid waste division of the Department of Public Works collecting garbage.

On January 24, 1997, public health nurses gave a presentation regarding hepatitis B to City employees in the Department of Public Works. The nurses met with employees in the lunchroom of the DPW, showed a video regarding the disease, and talked about the vaccine that they would give to employees. They asked employees if they had the vaccine before, whether they have had a hepatitis panel, or know that they have hepatitis B, in which case those people would not need the vaccine. At the end of the program, the nurses were going to give the vaccine to employees unless they signed a statement to decline it.

Dyess asked several questions because he works with garbage and had been stuck by a needle in the past. He told the nurses that he had previously had the vaccine. Debora Williams from the Nursing Department recalled that Dyess asked, "Is this being given to everyone, and is it for free?" When the nurses responded yes, Dyess said he wanted the vaccine. However, the nurses told him that he could not get it because he had already had it. They repeatedly told him that he could not get the shot, and he kept on repeating that if it was available to everyone and if it was free, he wanted the shot. Dyess felt that he was not getting answers to his questions. The nurses told him to get his records from his doctor, and come to City Hall to the lab to get a hepatitis profile to find out if he was immune. Dyess did not recall being told by the nurses that he could be checked at a later date.

Other employees were starting to get restless as Dyess continued to assert that he wanted the vaccine. They said they wanted the questions to stop so they could get on with the shots and go back to work or get to lunch. They objected to hearing the same questions and answers involving Dyess over and over.

The Superintendent of Public Works, Joseph Golden, felt that Dyess' continued questions and demands to have the shot were becoming disruptive, particularly as other employees started to tell him to be quiet, and he sensed that the nurses were getting a little unnerved. Golden asked Dyess to come into his office. They went into a conference room right next to the lunchroom, while the nurses started to give the shots to employees.

Golden tried to tell Dyess in the conference room that no one was trying to "rip him off" and that he could go over to City Hall at the end of the session to get the blood work that the nurses had offered him. Dyess continued to demand that he should get the shots, that the blood panel was not an option. Golden was gesturing with his hands as he talked, and Dyess told him, "Don't you ever point your finger in my face again." Golden testified that he never pointed his finger in Dyess' face. Golden told Dyess to go back across the street to the DPW garage and that Golden would have him reassigned by a supervisor. Dyess left the conference room.

Dyess testified that when he went into the conference room with Golden, Golden closed the door and said, "What the fuck are you trying to do, embarrass that nurse out there?" Dyess stated that when Golden put his finger in his face, he calmly said, "Do you want to get your finger out of my face?" Dyess stated that Golden then told him to "get the hell out" of his office and report across the street to his immediate supervisors. Golden testified that he did not swear at Dyess.

When Dyess went out into the lunch room, he spotted Leonard Hand, another employee. Dyess thought that Hand was a Union representative and he wanted a witness for what he was about to do next – to tell Golden again, in front of others, not to put his finger in his face and to not swear at him.

Golden assumed that Dyess had left the building and Golden intended to help with the hepatitis program in the lunchroom. As Golden entered the lunchroom, Dyess came right up to him and said, "Don't ever get your hands in my face again, do you hear me?" Dyess stated that he also told Golden not to swear at him. Dyess walked out of the building. Golden felt that Dyess had now challenged his authority in front of other employees and he needed to do something about it. Golden started to follow Dyess and called him and asked him to return to the office. Golden called three or four times to him and said, "Markus, I want to talk to you, come on back." Dyess continued to walk away.

Dyess knew that someone was following him because he heard someone "stomping" or making loud foot noises behind him. Dyess said he looked over his shoulder and assumed it was Golden, but that nothing was said to him, so he left and went across the street. He was outside when he heard someone (he assumed it was Golden) yell, "Markus, get back here." Dyess kept walking, because he said, he did not know who was yelling at him. Dyess stated that he then heard Golden yell, "Markus, if you want your job, you better get your ass back here." Dyess went to report to his immediate supervisor and did not return as ordered by Golden.

Dyess testified that he went to find a supervisor because things were out of control, that he felt Golden was talking to him in a condescending manner, and that perhaps a supervisor could calm things down. Dyess testified that he returned to Golden's office area a couple of minutes later but the door was locked. Jeffrey Fidler, the general maintenance supervisor, came to the door and told Dyess to go around to the front office and meet with Golden. Dyess told Fidler he wanted a Union representative, and Fidler said they had already called Rick Koke, who was a Union steward at the time. When Dyess and Koke met with Golden, Golden told Dyess that he was indefinitely suspended until further notice and to punch out. There were five and a half hours left in the day when Dyess was suspended for that day. It was eventually determined that Dyess would be suspended for another two days, for a total of two days, five and a half hours.

When Dyess and Koke met with Golden, Golden said he told Dyess that he would not accept that type of behavior – refusing to acknowledge Golden calling him back and the incident in the lunchroom when Dyess told Golden not to point his finger in his face. When Dyess made that remark in the conference room, Golden accepted it and thought it was the end of the matter, but when Dyess repeated it loudly in front of others, Golden saw no need for him to do that.

Golden and Dyess met with the City's Affirmative Action Officer, William Dyess, who is also the father of Markus Dyess, the Grievant here. Golden explained to the Grievant that he has a tendency to talk with his hands, and if the Grievant construed those gestures as pointing his finger in his face, he did not mean to offend him. The Grievant felt that Golden apologized to him in this meeting, and he apologized to Golden. The Grievant feels as if he is being singled out or picked on because of his relationship to William Dyess.

James Kozina, the City's Personnel Director, and Golden considered Dyess' history with the City in determining the amount of discipline. Dyess started as a seasonal employee. The City usually considers its seasonal employees for full-time employment, and there is a six-month period where seasonal employees are evaluated before a decision is made to make them full-time permanent employees.

Golden had some concerns about Dyess becoming a permanent employee because he had shown some trouble with authority. However, Golden felt that Dyess had made some improvement in that area and that it was a minor thing at that time, but worth noting in the evaluation. His progress report shows that he was being recommended as a permanent hire, and the remarks, prepared by Golden, stated:

“Employee has had some problem with tardiness in the past. This has improved. Although I am recommending this employee for regular full-time employment I am somewhat concerned with his ability to take instruction and follow directions. I do not however, believe this is a serious problem that would prevent his full-time employment.”

Golden relied on supervisors comments when making that evaluation. When Golden gave Dyess this evaluation, Dyess told Golden: “Who do you think you are to evaluate me? You don't even know me, and you don't have any qualifications to evaluate me.” Dyess signed the progress report with a protest, and noted:

“I Markus protest (“concerned with his ability to take instruction and follow directions”) I never didn't listen to my directions given by my supervisor while working for the City.”

Dyess felt that Golden had no contact with him and no reason to write down anything about his ability to follow directions and instructions. Golden promptly ended that meeting and told Kozina that they should extend his probationary period another 30 days to see if there was any change in his attitude. Dyess' probationary period was extended.

On May 10, 1996, Dyess was given an oral reprimand for insubordination during the meeting on April 30, 1996, when Golden wanted to discuss Dyess' six month progress report. During the May 10th meeting, Golden felt that Dyess' attitude was much better and the 30 day extension was not necessary.

Dyess received a one day suspension on January 16, 1996, for an accident while operating a snow plow, but it was later reduced to a written reprimand on June 16, 1996, and then further reduced to an oral reprimand on January 17, 1997.

Dyess also received a written reprimand on January 21, 1997, for calling in sick without sufficient notice. He had earlier been given an oral reprimand for the same thing.

Dyess eventually had a blood panel done that showed that he was immune to hepatitis B and that he did not need the vaccine.

THE PARTIES' POSITIONS

The City

The City asserts that the Grievant's behavior at the nurses' presentation was disruptive to the nurses and other DPW employees present in the lunchroom, and that behavior caused Golden to ask the Grievant to go into his office/conference room. Golden wanted to give the Grievant his options one more time and bring the presentation and vaccinations to an orderly end. Golden also wanted to get the Grievant back to his work area to be reassigned for the rest of the day.

It is uncontradicted that the Grievant did not go back to his supervisor to be reassigned as requested by Golden. There was no purpose in the Grievant's action in yelling and getting in Golden's face after the short discussion in Golden's office.

The City submits that the Grievant's actions were insubordinate in two ways. First, he failed and/or refused to carry out Golden's two requests – to return to his work area to be reassigned, and to stop and come back. Secondly, his act of getting in a supervisor's face is an insubordinate act in itself. It is the essence of his unwillingness to accept authority by the outright display to other employees of his unwillingness to be bound by authority. His disruptive behavior with the nurses was similar and shows that he thinks he does not have to follow the rules and can be as ornery and obstinate as he wants to be without any consequences. Other employees saw that his repetitive questions were only delaying the hepatitis presentation.

The Grievant's explanation that he was merely responding to Golden's actions in the office/conference room is not credible. If Golden wanted to humiliate him, he would have done it in front of everyone, as the Grievant did. The Union's own witness, Hand, described the Grievant's actions as a confrontation between Golden and the Grievant and noted that Golden did not say anything.

The City concludes that the suspension was consistent with the Employer's progressive discipline and the Grievant's disciplinary history. The Grievant's behavior was disruptive to the nurses' presentation, and his inappropriate behavior was followed by the insubordinate actions of getting in the superintendent's face, yelling at him in front of other employees, and refusing Golden's request to come back.

The Union

The Union submits that Dyess' concerns about the severity of hepatitis B were justified and his questions were not answered. The stories split when Golden and Dyess went to the office and had a private conversation. Dyess testified that Golden demanded, "What the fuck are you trying to do?" Dyess also testified that Golden was flailing his hands and cursing at him and eventually told him ". . . to get the hell out of my office and report to your supervisor across the street." Golden denies it all.

Dyess was embarrassed and upset by the incident. When Golden followed him out, he approached Golden and told him not to point his finger in his face and not to swear at him. At that time, Golden decided to discipline him, even before Dyess left the building. Dyess followed Golden's order and went to seek his supervisor for a work assignment. Dyess returned when he couldn't find a supervisor and pounded on the door about two minutes later.

The Union asserts that the City did not have just cause to suspend Dyess for insubordination, and even if discipline is in order, the punishment does not fit the crime. City Exhibit #6 is a mediated settlement regarding a past vehicular accident. There is no similarity between the January 27th incident and a vehicular accident.

Golden testified that oral reprimands are the first step of discipline under the City's progressive discipline policy, and written reprimands are second. Progressive discipline was absent when Dyess received a suspension of more than two days.

The Union objects to the City's Exhibit of an evaluation form signed by Dyess under protest, since his objection to the evaluation was not noted by the City and not revealed until the Union introduced an exhibit that reflects the entire document. Further, the exhibit is worth nothing because it was the evaluation of a seasonal employee hoping for a full-time position who understood that it was in his best interest to say his peace and move on.

The Union argues that a two and a half day suspension for questionably divergent recollections and without convincing proof is stiff. The suspension where a work record is void of similar warnings is even stiffer. While two wrongs don't make a right, two wrongs don't make a right and a two and a half day suspension. At most, Dyess should receive a reprimand and be made whole for the time lost.

DISCUSSION

The record contains sufficient proof that Dyess was insubordinate to Golden. The fact that Dyess and Golden do not agree on what happened in the office is irrelevant to the disposition of this case, because the discipline imposed was not for Dyess' conduct in Golden's office. In fact, Golden was willing to allow Dyess' insubordinate acts in his sole presence to pass without further ado. However, it was Dyess who escalated the matter by approaching Golden later in the lunchroom in front of several employees, got close to Golden and told him to never put his hands

in

his face again and to not swear at him. Also, Dyess refused Golden's direction to return to the office after Golden asked him to come back several times. Few managers or supervisors would let such conduct go unchallenged.

The City has shown that it had just cause to discipline Dyess for his insubordination, and the only real question in this case is whether the discipline is reasonable or whether it is excessive. Certainly, a two and a half day suspension is a steep penalty. However, disciplinary measures imposed by management should not be reduced by an arbitrator unless the disciplinary measure is clearly excessive, unreasonable, arbitrary, capricious, or management has abused its discretion.

I find that the discipline imposed was reasonable under all of the circumstances of this case. First, the Grievant has been insubordinate less than one year before this incident, and he almost did not get a full-time position with the City because of his attitude with Golden while he was being evaluated for a permanent position. He told Golden, "Who do you think you are to evaluate me?" Dyess needs to realize just who Golden is, and hopefully, he has figured it out by now that Joe Golden is the Superintendent of Public Works – the person with the authority to hire, evaluate, supervise and discipline. Golden holds a high level of authority in the Department, and if Dyess continues to challenge Golden's authority, how will he ever accept any orders from lower level supervisors?

The penalty is appropriate in light of what it takes to get the Grievant's attention. If he is to have a long and successful career in the Department, he cannot possibly treat Golden in this manner and expect to stay in this Department. Also, it is apparent that Dyess never listens. He did not listen to the nurses when they explained that he did not need the shot. He did not listen or even hear the nurses tell him that he could come to City Hall and have his blood tested to see if he was immune to hepatitis B. He did not listen to Golden in the conference room and reacted angrily to Golden. He did not listen to Golden when Golden asked him to return as he crossed the street.

So it takes more than the usual discipline to get his attention.

Accordingly, I find that the City had just cause to suspend the Grievant for his conduct on January 27, 1997, particularly his two insubordinate actions of challenging Golden's authority in front of other employees and refusing to obey Golden's orders to return to his office.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin this 7th day of October, 1998.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator

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