BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1366, AFSCME, AFL-CIO

and

CITY OF FOND DU LAC

Case 139
No. 56684
MA-10377

Appearances:

Mr. James Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. William G. Bracken, Coordinator of Collective Bargaining Services, Godfrey & Kahn, S.C., appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a 1998-99 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear the grievance of Michael Detert. A hearing was held on October 20, 1998, in Fond du Lac, Wisconsin, at which time the parties were given the opportunity to present their arguments and evidence. The parties completed filing briefs by December 16, 1998.

ISSUE

The issue to be decided is:

Did the City have proper cause to give the Grievant, Michael Detert, a three-day suspension for an incident that occurred on May 9, 1998? If not, what is the appropriate remedy?

BACKGROUND

The Grievant, Michael Detert, has worked for the City for 18 years, with 17 years in the Parks Division. His job description is that of a Caretaker II. This grievance is about a three-day suspension he received for an incident that occurred on May 9, 1998, when he had volunteered for overtime on a Saturday to paint one of the City's two pools. Employees paint one pool every other year. It is a major project and must be done when weather conditions allow. The Grievant has participated in this project several times in the past.

There are two foremen in the Parks Division. One is Timothy Klima, who has been with the City for 18 years and a foreman for the last three years. He was a bargaining unit member before becoming the foreman and was the Union president for three years. Klima has known Detert for many years, as they started working for the City about the same time. The other foreman is James Rosenthal. Klima handles the trees, grass, shrubs, flowers, or the green end of the parks, and Rosenthal handles the construction projects, such as playground installations. Both of them supervise Detert, depending on the particular work assignment.

The City has a safety committee made up of five bargaining unit members and four management members. The committee establishes safety policies, issues a safety manual and oversees the safety program in the City. Part of the safety manual includes the following policy regarding foot protection:

> The wearing of sandals or canvas sneakers (tennis shoes) in City work areas is prohibited. Wear sturdy comfortable work shoes/boots.
>
> Foot protection is a sound investment for any employee – not only for work activities, but for many off-the-job tasks as well. Following are some of the activities in which safety shoes should be worn:
>
> 1. Engineering Office personnel while on the job site of any public service construction or maintenance project.
>
> 2. All Street Maintenance Division personnel while on the job site of street maintenance, storm drain maintenance, curb and gutter construction or other public service maintenance projects.
>
> 3. Park Department personnel while on the job site of any park construction project, or during ground maintenance activities involving use of mowers, trimmers, and other power equipment.
>
> 4. Refuse Collection Division personnel working collection routes or in the disposal area.

5. Sewage Treatment Plant maintenance personnel and plant operators when assisting in teardown of machinery.

6. All Construction Division personnel while on the job site of construction and maintenance of sewers.

7. All Electric Division personnel while on the job site of installation and maintenance of street lighting facilities.

8. All Electric Division personnel while on the job site of installation and maintenance of traffic control facilities.

9. All Water Department personnel while on the job site for construction and maintenance of water transmission facilities.

10. All other personnel working near construction equipment.

11. All personnel performing repair shop tasks.

The Grievant received a copy of the safety handbook in November of 1993 and signed an acknowledgement of its receipt.

The Grievant was previously warned about failing to wear work boots. Klima gave him a verbal warning on Friday, September 23, 1997, when the Grievant came to work wearing a casual loafer type of shoe. Klima told the Grievant that he was expected to be wearing a sturdy work boot when he came back to work the following Monday. The Grievant asked him to put the warning in writing, and Klima wrote it up. This warning was not grieved or taken up to the safety committee for review.

Klima's notes show his version of the events of May 9, 1998, and are worth repeating here:

> After going through the extra board I had 5 employees assigned to work overtime to paint due to good weather conditions on this Saturday. 2 employees came in at 7:00 a.m. to vacuum the bottom of the pool and mix paint and three were to come in ready to work at 9:00 a.m. I arrived at the pool at 9:10 a.m. to find that Mike B. and Gary M. had the paint all mixed and the pool cleaned and ready to paint. At 9:15 a.m. Bruce B. arrived and at 9:17 a.m. Bev K. and Mike D. arrived. As Mike D. walked on to the pool deck I observed that he was wearing tennis shoes. I said "Mike what are you doing in tennis shoes." He replied "I'm not going to get paint all over my work shoes." I then said "You know you can't work in tennis shoes." He replied "Fine I'll go home." As he walked past me toward the pump house he stated to me "You are not my mother and you don't tell me what to do!" I replied as I walked behind him into the pump house "Your right I'm not your mother I'm your supervisor, and I will tell

you what to wear." As Mike D. walked in front of me in the pump house I heard him reply "Fuck you." I then gave Mike D. a ride in 315 back to LSP during which not a word was said.

Klima had no idea whether the Grievant's shoes were in the truck, his locker, the shop or his home. Klima testified that he told the Grievant to get his work boots, and he would have allowed him to go him and get them and return to the job. The Grievant did not come back to work on Saturday at all. Klima did not tell him to take the rest of the day off. The Grievant asked for pay for the time he spent working on Saturday (about 30 minutes) but was not paid for any time on that Saturday. The other employees who stayed and worked that day were also paid for the time spent getting to and from the job site, as well as their time on the job itself.

Bev Kindschuh was working on the pool project and told Klima that he gave Detert a way out of this, that he could have gotten his shoes. Klima testified that she seemed surprised that he would leave the job site.

The Grievant noted that when Dick Davies was the foreman, the Grievant wore tennis shoes and shorts to paint the pool. At times, employees were allowed to take their shirts off while painting the pools. Davies retired in 1992. Klima was not aware that employees wore tennis shoes in the past to paint the pools. Employees have been asked to wear shorts and tennis shoes when working on the docks.

The Grievant testified that Klima objected to his sweat pants as well as his tennis shoes, but that Klima did not tell him that he wanted him to return to work. The conversation between them had been loud and heated. The Grievant told Klima that they had problems with the marring of the soles on the surface of the pools, that the work boots made black scuff marks, which had to be cleaned off. The Grievant stated he was angry when he told Klima that he was not his mother. The Grievant said Klima told him to go home, and that there was no option to get his work boots and return to work that day.

The following Monday, Klima met with his supervisor, the Superintendent of Parks, John Kiefer, and Rosenthal, the other foreman. Rosenthal told Klima about another incident on May 4, 1998, which ended with a verbal warning being given to the Grievant for work performance.

Rosenthal has been a foreman in the parks for more than five years. On May 4, 1998, the parks employees were installing a playground system at Lakeside Park. There were several six by six timbers, eight feet long, inside a snow fence, which was four feet high. Rosenthal instructed Detert to open up the fence and pull the timbers out of that area so employees could start working on them. The employees had to take half-inch rods or stakes out of the timbers. Detert walked inside the fenced area and started picking up the timbers and throwing them out over the top of the snow fence with the rods still intact. Rosenthal told

Detert he wanted the timbers to be pulled out. Rosenthal was concerned that Detert could hook himself with one of the rods in the timbers, or that they could fall backwards or hit something. The timbers weighed about 75 pounds.

Rosenthal walked up to Detert and told him that it was not the proper procedure because he could hurt himself. Detert replied that Rosenthal was not his supervisor, that he was his own person and he was going to do it his way whether or not Rosenthal liked it. Rosenthal told Detert that he was his supervisor. Detert finished getting the timbers out of the fenced area by handing them over the fence to another employee, Jim Zahn, but did not open the fence as Rosenthal had asked. Detert then walked off toward the park office which was about 300 feet away and returned to the job site about 15 or 20 minutes later.

Detert testified that Rosenthal never told him to open the fence and drag the timbers out. Detert stated that employees had never dragged the timbers out before.

The warning given to Detert regarding the timbers was a verbal warning. Rosenthal wrote it on May 5 but did not give it to Detert until May 8, 1998. It states:

> This is a verbal warning in ref. to May 4 disagreement between you & myself. Mike, I am able to & will inform you on what, where & how I want things to be done on any job that I am supervising. I also have the right to allow you to use your own judgment on the jobs we do. First the method you used to move the timber out of the fence area was improper and could have injured yourself or someone else. The second thing is yes you are your own person but when you are here & working you will follow proper working procedures. Also the number of times you walk off the job sites for unknown reasons will stop. On Friday I had to talk to you about the lunch 7:30 "break" you were on and this is not the first we noticed you abusing the break time or dead time during work. You will also take responsibility on the job site and not tell employees that I am not going to because . . . The warning is in ref to your job performance. The next time may be time off do to progressive system.

Rosenthal had been concerned with Detert taking unusual breaks, sometimes 15 minutes per hour without saying where he was going. He told Detert a few days earlier that he should not be eating at 7:30 a.m., that the breaks are at 9:00 a.m. and noon. Detert had been given a verbal warning on October 24, 1997, and a written warning on November 7, 1997, by Rosenthal. He did not grieve either the verbal or written warning about his breaks. He has a condition called Raynaud's syndrome, which is a disorder of the circulatory system that affects blood circulation to fingers and toes. The Grievant went to a doctor in November of 1997 because his hands were going numb and turning white. His doctor has told him to minimize his exposure to the cold during the winter and wear comfortable mittens when outdoors. The Grievant gave the doctor's letter regarding his condition and treatment to the City.

When Klima and Rosenthal and Kiefer met on Monday, May 11, 1998, the prior disciplinary measure was fresh in Rosenthal's mind since it had all happened within a few days. The management team agreed that the Grievant's conduct showed a hostile approach to supervision and that he felt he did not need to follow instructions. Klima was concerned about safety violations, insubordination and work performance. He noted that the crew painting the pool did not accomplish as much as they wanted to because they were short one person.

The disciplinary notice given to the Grievant also referred him to the Employee Assistance Program for work conflict and anger management. The notice stated that the referral to EAP was mandatory, and the Grievant complied with this aspect of the notice.

The Human Resources Director for the City, Ben Mercer, reviewed the Grievant's record and noted that he has a fairly lengthy history of disciplinary actions. In the spring 1996, the Grievant was given a verbal warning for a late arrival to work on April 16, 1996, and two written warnings for being late on April 18th and 24th, 1996. When he showed up late on May 3, 1996 – the fourth time in three weeks – he was given a one-day suspension.

Mercer noted that the Grievant was given a three-day suspension later that spring, when he called in sick on May 29, 1996. The City considered this late notice to be the fifth time he had notified the City after his normal starting time that he was late. This suspension was grieved and the parties entered into a non-precedential settlement of the grievance, which reduced the penalty to a one-day suspension. On July 22, 1997, the Grievant was given a written warning for using a City vehicle for his own personal use.

Mercer testified that the Grievant's insubordination was the primary issue that the City wanted to address in the May 1998 pool incident. There was also the safety issue, the prior warning about improper shoes, as well as the issue of the Grievant leaving a job and not coming back to work.

THE PARTIES' POSITIONS

The City

The City states that it gave the Grievant a three-day suspension for violating a safety rule, insubordination for refusing to follow work directives, engaging in self-help by walking off the job, and poor work performance by not completing his assigned task. The City asserts that the combination of these factors and the seriousness of the Grievant's behavior show that the suspension was warranted. Management may use its discretion to impose discipline ranging from a verbal reprimand to discharge, depending on the seriousness of the offense.

The Grievant received a copy of the work rule that prohibits the wearing of sandals or canvas sneakers or tennis shoes. The City notes that he had been warned before about the proper foot attire. The City further points out that the Grievant admitted being insubordinate

to Klima and saying that he wasn't his mother. That was clearly an example of insubordination with the Grievant questioning the supervisor's authority. His statement – you don't tell me what to do – is a perfect example of an employee overtly refusing to take direction from a supervisor, reflecting an attitude of defiance and insolence. The Grievant's behavior undermines the supervisor's authority, and his conduct cannot be condoned.

There is little doubt that the Grievant's work performance was deficient where he failed to perform the task assigned. Finally, he engaged in self-help by walking off the job. While the Grievant testified that Klima told him to go home, his testimony is not credible. Kindschuh overheard the conversation and she told Klima that he had given Detert an out, that he could have gotten his shoes. Klima never ordered the Grievant off the work site. The Grievant left his fellow workers with more work to do, and the City did not accomplish its goal of painting the pool in a timely fashion.

The City cites arbitrators who have held that insubordination is a serious offense. It also submits that other employees knew of the work boot rule and complied with it, and that the City has applied the rule in an evenhanded manner.

The totality of the Grievant's employment history supports the decision to suspend the Grievant for three days, the City argues. Detert has a lengthy history of disciplinary actions, including five instances of reporting late to work, using a City truck for personal use, improper foot attire and extending break time improperly. The Grievant was issued a verbal warning just a few days before this suspension. The events show a pattern of insubordination by the Grievant. He defied Rosenthal's order regarding the timbers and stated that Rosenthal was not his supervisor. Then less than a week later, he told Klima that he was not his mother. The common theme is the reluctance to follow supervisors' directions. The close proximity of insubordinate behavior on May 4th to the insubordinate behavior of May 9th warrants time off. Rosenthal warned Detert that he could be subjected to more severe discipline.

The City submits that the arbitrator should not substitute her judgment for the City's if she does not agree with management in its disciplinary decision. It is the function of management to decide what disciplinary action will be taken. Unless the discipline is discriminatory, unfair or arbitrary and capricious, the arbitrator should not substitute her personal judgment.

The Union

The Union points out that under Article XXXI, written reprimands are not considered valid for future disciplinary action 12 months after they are given, and verbal reprimands are used by supervisors in accordance with each department's own practice. However, verbal reprimands do not become part of an employee's personnel file and are an informal step given before the City issues more formal discipline, such as written warnings or suspensions.

The Union finds the three-day suspension given to Detert to be unusual in that Rosenthal's verbal warning immediately preceded the suspension, without any subsequent written warning. Detert got a three-day suspension for an alleged second incident of insubordination within one week of the first incident which resulted in only a verbal warning. The written warning that supposedly gave notice of harsher discipline in the future was given six months earlier for alleged violations of totally different City policies.

The Union is concerned that the normal disciplinary process function in a way that is understandable by all employees by virtue of its being predictable. Employees should know the normal and reasonable consequences of receiving any warning and what further penalties could occur if a reprimand were given to them for the same reason. There is no way the discipline Detert received can be considered progressive, and at the most, he should have been given a written warning.

The Union points out that Rosenthal's warning was a verbal warning, and the events involved in that incident are not the subject of this arbitration and Detert cannot receive any additional penalty for that incident. Klima was not aware of the prior verbal warning during the pool incident but was filled in by Rosenthal later. Klima later determined that the pool incident in conjunction with what occurred the previous week justified a three-day suspension for the pool incident. All three Park Department supervisors decided that Detert should be suspended for a variety of reasons, and called it a progressive disciplinary action even though it went from a verbal warning to a suspension without an intervening written reprimand.

Regarding the pool incident, the Union notes that both parties agree that Detert indicated that he would go home after being told he could not work in tennis shoes. There is no testimony that Detert was told to return to the pool after getting the proper shoes, or that he was expected back at a certain time. Klima had the chance to tell him what the City expected when he drove him back to the shop. If Klima wanted Detert to come back to work, he should have said so, in the same clear way he told him he couldn't work in his tennis shoes.

There is an additional issue – that of the pay for the time that Detert punched in until the time he punched out. This time would have been at least a half hour of time for all other employees, but the City did not pay him because they did not consider him to be working. However, all of the other employees were considered to be working from the time that they punched the time clock at the start of the assignment until they punched out after returning when the day was done. The Union asserts that he should have been paid for that half hour. The Union also believed that the record shows that he was sent home by management, rather than returning by his own choice.

The Union also submits that both parties should share the blame, that Klima started the argument between him and Detert by reacting angrily to Detert's shoes. Klima began yelling, and to put the entire blame on Detert is unfair. The Union agrees that Detert needs to control how he reacts to his supervisors and their instructions, and that he will have to learn to listen

and follow instructions. However, the outcome of this case should not ignore procedural issues mentioned earlier or fail to recognize that both Detert and Klima participated in the confrontation.

In Reply

The City disagrees that there is any procedural question, and it included all of the prior disciplinary actions taken so that the arbitrator could review the cumulative work history of the Grievant. The City states that there is not lock-step system that requires it to move in a certain way in the disciplinary process, and the Union admits that progressive discipline normally includes a series of warnings from verbal through termination. The timing of the Grievant's infraction and his work history warrant a stronger form of discipline than the written reprimand the Union suggests. The cumulative record is a valid factor in considering a more severe form of discipline. Moreover, Detert was placed on notice that the next time he was insubordinate, he would receive time off, and he was insubordinate less than one week later.

The City further disagrees that Detert was sent home. He told Klima that he would go home after Klima told him he couldn't wear tennis shoes to work. The City also disagrees that Detert was not allowed to work. It was Detert's decision not to come back to work. Klima told him to get his shoes, and he would not have done so if he had not expected him to come back to work. Moreover, there is no proof that Klima reacted angrily or that Klima yelled, as the Union claimed. The City asks – if the verbal warning did not have the desired effect of improving Detert's behavior in less than one week, does the Union really believe that a written warning will have some positive impact? The suspension is the Grievant's wake-up call to work with supervisors, not against them.

The Union replies that it does not see the lack of work shoes as supporting insubordination by itself. Also, the issue of Detert leaving work and not returning is not insubordinate since there is no evidence that Klima told Detert to return to the pool. The City did not prove that it gave him clear instructions to return to work, and therefore he cannot be considered insubordinate on this issue. The record also shows that the exchange between them at the pool was heated on both sides.

The Union also notes that the City spends a lot of time defining the concept of just cause and narrowing it from the seven classic tests to a rather brief two-question test. But the City made no mention of the procedural due process arguments, leaving it to do whatever it feels is appropriate. And while the City urges the arbitrator to not substitute her own judgment, it requires an open mind to determine which party has the most credible position.

DISCUSSION

Under Article XXVII, the City may discipline or discharge employees for proper cause. Article XXXI states that written reprimands or warnings are not to be considered valid for further disciplinary action 12 months after they are given. Whatever is outside of the

one-year period is outside of it for this proceeding. If the parties agreed that they could not consider written warnings after a year passed, then those warnings cannot be considered in this proceeding either.

Therefore, the written warnings in April of 1996 cannot be part of the picture, but everything else is either a suspension or within the 12-month period.

The Union makes a good point that Klima could have been clear about his expectations and could have told Detert that he expected him to come back to work once he got his shoes. However, the failure to clearly delineate those expectations is not fatal to the City's disciplinary action for insubordination, because the insubordinate act had already occurred.

I disagree that the record shows that the Grievant was sent home – it appears that he made that choice on his own. While the evidence is somewhat sketchy in this matter, and Klima and Detert do not agree on this very point, Kindschuh was present during the testimony and no one sought to have her dispute Klima's testimony in this regard.

There is little dispute between the parties that some discipline was warranted. The Union acknowledges that the Grievant has to learn to listen to his supervisors and respond to them in an appropriate manner. The Grievant had been on a track of defying them openly.

Once it has been determined that there is just or proper cause for discipline, arbitrators should hesitate to second-guess the degree of discipline imposed. An arbitrator should not substitute his or her judgment for that of management unless the penalty is excessive, unreasonable, arbitrary, capricious, or management has abused its discretion.

The real dispute in this case is whether the penalty was excessive. It is somewhat unusual for an employer to jump from a verbal reprimand to a three-day suspension over a similar offense. However, the fact that the Grievant was insubordinate less than a week after he had been warned shows that he was not heeding the lesson of the prior warning, and that it was going to take more drastic action to get his attention. Also of particular note is the fact that the Grievant was previously warned about not wearing the proper shoes, in September of 1997. That warning – less than a year before this incident – should have been fresh in his memory. Finally, the Grievant was piling up a number of warnings and suspensions. It is proper to look at the whole record, except with the exceptions noted above for contractual reasons.

One cannot say that discipline was clearly excessive under all the circumstances. The issue of the one-half hour of overtime does not weigh heavily in this matter. While the Arbitrator believes that the City should have paid the Grievant for time going to and from work if it pays other employees for such time, the amount of time involved is too small to make much difference in the outcome here.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin this 23rd day of December, 1998.

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

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