

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 2804, AFSCME, AFL-CIO

and

CITY OF RACINE

Case 576

No. 58265

MA-10901

Appearances:

Mr. Michael J. Wilson, Representative at Large, 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.

WRITTEN CONFIRMATION OF BENCH DECISION

The Union and the City named above are parties to a 1998-2000 collective bargaining agreement that provides final and binding arbitration of certain disputes. The parties jointly requested that the Commission appoint Arbitrator Karen J. Mawhinney to hear and resolve the grievance of Dennis Thompson, who was terminated on November 3, 1999, for fighting with another employee on October 21, 1999. Hearings in the matter were held on February 25, April 13 and 14, 2000. At the conclusion of the hearings, the parties argued their case and the Arbitrator issued a bench decision, denying the grievance. This document is a confirmation of that bench decision.

The evidence was undisputed that the Grievant was a good employee who worked for the City's Water/Wastewater Utility full-time for more than 12 years. He was well liked by his co-workers and management and considered to be a good worker. His prior disciplinary actions included only a reprimand and a four-hour suspension. Neither of those was relied upon by the Arbitrator in reaching a decision on the termination.

The evidence was also undisputed that employees Wayne Brown and Robert Rollins and the Grievant had not been getting along for some period of time. Brown and Rollins had made racial slurs and personal insults to the Grievant. The Grievant had complained to management about this conduct and felt that nothing had been resolved. In July of 1998, management from

the Utility, City Personnel Director James Kozina, Deputy City Attorney Wally Villarreal, City Affirmative Action Officer Bill Dyess, the Grievant, employees Brown and Rollins, and Union representatives all met at City Hall to discuss the ongoing problems between employees. Kozina stated bluntly that if the problems were not resolved, heads were going to roll. Utilities' General Manager Thomas White warned them that if they could not figure it out, they were going to lose their jobs.

In the early part of 1999, the Grievant and Brown were told to stay away from each other, and that the Grievant should not be in the same working area as Brown. The evidence is mixed on whether or not the Grievant was in the belt press room at the same time as Brown on October 20, 1999. Brown had complained to management that the Grievant was in the belt press room on that date, and the Grievant testified that he was not there.

In the meeting on October 21, 1999, those attending were the Grievant, Wayne Brown, Maintenance Supervisor James Jordan, Superintendent of the Wastewater Treatment Plant Joseph Mandala, Union Vice-President Steven Blegen and Union Steward James Thompsett. The meeting was called to deal with the problems between Brown and the Grievant, although the Grievant may not have been told the purpose of the meeting. The Grievant was angry when he realized that Brown had complained about him, and he left the meeting, despite Mandala's order to remain in the meeting. The Grievant walked out but returned within a couple of minutes and proceeded to go over to Brown. The Grievant recalled hearing Brown say something like, "Now why don't you write him up?" Others testified that Brown had not said anything. When the Grievant approached Brown, the Grievant either pulled Brown out of his chair or Brown rose up to meet him. At any rate, the Grievant grabbed Brown and took him down on the floor. Mandala ran over to grab the Grievant, but was thrown aside by the Grievant's force. Blegen and Thompsett also tried to pull the Grievant off Brown without success. Operations Supervisor Rick Pace and employee Roger Flannery heard the commotion and came in and were finally successful in pulling the Grievant off Brown. The testimony varies as to the amount of kicking, punching or physical actions actually done by the Grievant, but no one denies that the Grievant attacked Brown and Brown did not fight back.

In a bench decision, the Arbitrator addressed the Union's argument that there was not a complete and fair investigation of the matter. The purpose of an investigation is to ascertain that what is being alleged actually happened, and in this case, there is no dispute about the fight. Six people were present when it started, two more came into the room. The Grievant was interviewed by Kozina and given an opportunity to be heard. The investigation was sufficient for the facts of this case.

The Union argued that the City has turned a blind eye in other similar cases, and notes that there was an incident of two employees fighting in 1998. One employee, Chris Harris, was off duty but went to the Utility to pick up a rent check from another employee, Robert Rollins. Harris reported to the Police Department that Rollins kicked and punched him in a stairwell inside the plant. Harris testified that he told his supervisor, Rick Pace, about it within a day or two, but Pace did nothing about it until several weeks later. The matter did not come to the attention of Mandala or Kozina until a couple of months after the incident, and

Kozina concluded that he could not prove anything, when it would be one employee's word against another's and Harris did not want the matter to go any further. In another incident of employees fighting at the Utility, an employee was discharged (although later reinstated by the undersigned under very different facts from the present case). The Arbitrator concluded that there was no disparate treatment of the Grievant.

The Arbitrator also addressed the issue of provocation, and found that there was no justification for the Grievant's actions on October 21, 1999, given the lack of physical provocation and no proximity of verbal provocation to the fight or attack itself. Physical provocation may mitigate the penalty but not excuse the fight. Any verbal provocation would have to be so close in time to the assault that a reasonable person would not withstand such verbal abuse without reacting in some fashion. In this case, Brown did not throw the first punch or physically do anything to the Grievant. There is evidence that Brown had made racial slurs and personally insulted the Grievant on various occasions, and that the Grievant had complained about such conduct.

The Arbitrator made it clear in her bench decision that the Utility should take careful note – employees should not have to be subjected to racial slurs and verbal harassment. However, the verbal provocation was too remote in time to play a mitigating factor here. The Grievant testified that Rollins had taunted him the morning of October 21, 1999, calling him “white man's nigger,” but Brown had not said anything to him. The most that Brown may have said during the October 21st meeting was, “Now why don't you write him up?” This is insufficient to justify the violence or mitigate the discipline.

The Arbitrator took into account that the Grievant was a good employee. He was reliable, dependable and well liked by most of management and the work force.

The Arbitrator also considered whether the penalty of termination was too severe or excessive under all the facts and circumstances of this case, and found that it was not. There were prior warnings to all employees involved, going back to July of 1998. Violence in the workplace is a major concern of the Employer, and it has a major work rule stating that fighting will normally subject one to discharge on the first offense. The Union argued for progressive discipline, but it is not necessary in all cases, including such a major offense as a violent attack on another employee without sufficient provocation, justification or some mitigating factor. It was the Grievant's violent attack on another employee that gave the City just cause for the discharge. Accordingly, the grievance was denied.

Dated at Elkhorn, Wisconsin this 21st day of April, 2000.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator