BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL #414, KENOSHA FIRE FIGHTERS, I.A.F.F.

and

CITY OF KENOSHA

Case 188
No. 58173
MA-10862

Appearances:

Mr. Timothy E. Hawks, Attorney at Law, Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, appearing on behalf of the Union.

Mr. Roger E. Walsh, Attorney at Law, Davis & Kuelthau, appearing on behalf of the City.

ARBITRATION AWARD

The Union and Employer named above are parties to a 1998-2000 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 a dispute involving Michael Hopkins. The undersigned was appointed and held a hearing on January 18, 2000, in Kenosha, Wisconsin, at which time the parties were given an opportunity to give their evidence and arguments. The parties completed filing briefs by March 21, 2000.

ISSUE

The issue to be decided is:

> Did the City violate the collective bargaining agreement when it failed to remove references to a verbal or written reprimand from the files relating to Michael Hopkins? If so, what is the appropriate remedy?

BACKGROUND

Section 2.01(e) of the labor contract states in part:

> References to verbal and written discipline more than three years old shall be expunged from all records and files of an employee and shall not be used in the determination of subsequent discipline.

The City agrees that if the documents called Joint Exhibit #4 were found to constitute verbal or written discipline, they should be expunged from the records. The parties stipulated that during a hearing in 1998 before the Police and Fire Commission (PFC), no exhibit relating to discipline was introduced.

The documents in question are two pages. The second page contains handwritten notes from April 30, 1985. The first page is a May 9, 1985 letter to Garb's Gift Shop in Kenosha, marked attention to Ms. Doris Rover, from the former Fire Chief, Gerald Poltrock. The letter states:

> Dear Doris:
>
> Thank you for brining to my attention the matter of the apparent conduct of Firefighter Michael Hopkins during a routine Fire Department inspection of your premises on April 30, 1985.
>
> I have discussed this matter with Firefighter Hopkins in plain English, and I am confident he understands proper conduct expected by the public, as well as the Fire Department, during his performance of official duties.
>
> Please accept my apology for any inconvenience your enterprise may have been caused. I hope we can resume mutually positive relationships which have existed for many years.

On July 7, 1999, the City filed a response to a complaint that Hopkins had filed with the Equal Rights Division of the State's Department of Workforce Development (ERD CASE NO. 199901380). In the City's position statement, on page 2, the City stated:

> In accordance with the collective bargaining agreement and statute, Mr. Hopkins has been disciplined by the city. First, he was counseled regarding inappropriate behavior in May 1985 for improper comments made to a citizen during a fire inspection. (Exhibit 6). In addition, the Board of Police and Fire Commissioners issued a five day suspension on August 3, 1998. (Exhibit 7). It is this suspension which forms the basis of the complainant's complaint. However, the record clearly shows that the city's action was a legitimate, non-discriminatory exercise of its right to discipline for "just cause."

Later in the City's position statement, on page 13, the same incident is noted with the following statement:

> Also, it is interesting that the complainant cites this situation as evidence of discrimination. He engaged in similar conduct in 1985 and was simply counseled. He wasn't made to apologize. In fact, the Chief apologized for him. (Exhibit 6).

Chief Richard Thomas (who retired at the end of 1999) testified that the Department has a file for each fire fighter. The file has five folders. One contains personnel change forms, dealing with pay changes. One is called "Personal" and includes applications for hire, promotion, physical information, etc. One folder is on sickness, tracking time off and all days off. Another is on education, recording seminars, certifications or degrees. The fifth one is for commendations and disciplines.

When Thomas reviewed Hopkins' record before filing charges against him with the Police and Fire Commission during 1998, he did not review the entire personnel file but reviewed the folder that contains commendations and disciplines. He did not find the letter at issue in that folder. The letter was in the folder labeled "Personal." In preparing the position statement for the ERD complaint, an attorney for the City asked the Department for Hopkins' personnel file. Thomas assumed that his secretary probably took out all the material from all the folders, without sick leave, and made a copy of everything and sent it to the attorney. There was no notice to the attorney writing the position statement that the May 9, 1985 letter was not a disciplinary notice and was not in the discipline folder, Thomas speculated.

During the 1998 discipline matter of Hopkins before the Police and Fire Commission, Thomas testified that Hopkins had a good record with the Department over the years and made no reference to any prior discipline. Prior to the ERD complaint, Thomas was not aware of any prior discipline of Hopkins.

Union Vice-President Alan Horgen testified that he reviewed promotional procedures in the Department during 1998 and 1999 when several bargaining unit members questioned how the Chief weighed his evaluation and how he arrived at a point standard. Horgen met with the Chief and two assistant chiefs, and he was told that they looked at everything in a person's personnel file when arriving at the Chief's evaluation. That would include commendations and the letter at issue in this dispute.

THE PARTIES' POSITONS

The Union

The Union asserts that Joint Exhibit 4 clearly establishes that the City intended to discipline Hopkins in 1985. The letter alludes to a verbal reprimand, and as such, contains a

reference to verbal or written discipline within the meaning of Section 2.01(e) of the bargaining agreement. Chief Poltrock stated in the letter that as a result of his discussion with Hopkins about the incident "in plain English," he was confident he understood the proper conduct expected by the public and the Department. From the tone of the letter, it is apparent that Hopkins was confronted and reprimanded for his behavior.

The City's statement before the ERD that Hopkins was counseled regarding inappropriate behavior for improper comments made to a citizen during a fire inspection show that the City considered the counseling to be a verbal or written reprimand. The City called it the first discipline that he had received and equated counseling with discipline. The City now wants to claim that the contents of Joint Exhibit 4 do not contain a reference to discipline. The City cannot have it both ways, the Union asserts. Either the action taken against Hopkins in 1985 was intended as discipline or it was not, and the City must abide by the consequences of its prior representation.

The Union submits that the failure to introduce evidence of the 1985 discipline before the Police and Fire Commission in 1998 does not mean that the City did not intend to discipline Hopkins in 1985. Chief Thomas was not aware Joint Exhibit 4 because he reviewed the file folder containing disciplines and commendations, not the entire file. More importantly, the evidence may not have been presented before the Police and Fire Commission because to do so may have violated Section 2.01(e) of the collective bargaining agreement. Joint Exhibit 4 should now be expunged from the file, regardless of which folder contains it. The collective bargaining agreement does not differentiate between the types of files in a folder, but provides for the expungement of "all records and files of an employee" related to discipline.

In SACRAMENTO AIR LOGISTICS CENTER, 93 LA 470 (HOH, 1989), a letter to a grievant listing the number of times he was injured on the job was not put in his personnel file but was in a file available to supervisors. The employer in that case called the letter counseling to make the grievant more aware of safety considerations. However, Arbitrator Hoh found the letter to be discipline because it could be used both as a partial basis for later disciplinary action and as an impediment to any subsequent promotional opportunities. In this case, a record of counseling in an employee file poses a threat because it can be considered in decisions affecting disciplinary action and promotional opportunities. Local 414 Vice-President Horgen testified that the City looks at everything in an employee's personnel file in making promotional decisions. Because the City considered all of the folders in an employee's file in making promotional or disciplinary decisions, the retention of Joint Exhibit 4 in Hopkins' file violates the collective bargaining agreement. While the City asserted at hearing that its reference to prior discipline in the ERD proceeding was an error, the error has an obvious remedy – it must be purged from the file.

The City

The City asserts that the documents in Joint Exhibit 4 are not discipline by themselves. Nothing refers to any discussion between Chief Poltrock and Hopkins, but merely notes that the Chief indicated he used "plain English" to emphasize to Hopkins the type of conduct expected by the public in performing his duties. The letter does not indicate that Hopkins was given any type of discipline. At most, it could be interpreted that he was "counseled" by Poltrock, and counseling is not considered a form of discipline.

Chief Thomas did not consider the items in Joint Exhibit 4 to be discipline. When filing charges of improper conduct against Hopkins in 1998, Thomas reviewed his personnel file looking for any prior disciplines but found none. The items in Joint Exhibit 4 were not found in Hopkins' folder for commendations and disciplines. Thomas told the Police and Fire Commission that Hopkins had a good record with the Department and made no statement that the record included any prior discipline. The Police and Fire Commission further noted that Hopkins has no previous disciplinary problems when it reduced the proposed discipline in 1998. The parties further stipulated that no exhibits relating to any prior discipline of Hopkins were offered or received in evidence before the Police and Fire Commission hearing in 1998. Hopkins himself agreed with that stipulation. His emphatic reply at the arbitration hearing indicates that he believes he was never disciplined before the 1998 charges. The first time Thomas became aware of the items in Joint Exhibit 4 was after Hopkins complained about them in the City's 1999 Position Statement in response to his ERC complaint.

The City states that its reference to items in Joint Exhibit 4 as "discipline" was in error. The Attorney who prepared the City's Position Statement requested a copy of Hopkins' personnel file, and the Chief told one of his secretaries to copy the file. The secretary copied documents out of each of the five folders without indicating which folder where they came from, and the Attorney did not know that there was a separate folder for "commendations and disciplines" or that the items in Joint Exhibit 4 were in the folder called "personal." However, the City's Position Statement specifically refers to the action taken in response to the phone complaint as Hopkins being counseled.

The City submits that the general consensus among arbitrators is that counseling is not discipline. In OZAUKEE COUNTY, (CASE NO. A/P M-87-266, 1987), Arbitrator Malamud looked at three factors to differentiate between discipline and counseling. First, did the language in the document refer to a warning or more severe discipline for a recurrence of the conduct? Second, if the discipline was documented in writing, was a copy given to the grievant? Third, if the warning was verbal, was the grievant specifically told that the meeting was disciplinary in nature? In the instant case, there is no evidence that Hopkins was notified that a verbal warning was administered or that he was given a copy of the items in Joint Exhibit 4.

The City has reviewed the SACRAMENTO AIR LOGISTICS CENTER case cited by the Union at hearing and believes that the Union misconstrues that decision. The City argues that

the SACRAMENTO case supports the City's position. The parties in that case stipulated that records of counseling can be mentioned in subsequent disciplinary actions but cannot be used to increase the level of discipline. Moreover, the contract provided that counseling sessions were grievable or arbitrable. The Arbitrator had ruled in previous cases involving the those parties that counselings must have a reasonable basis similar to the just cause standard, and the issue, therefore, was whether there was just cause for the counseling. The SACRAMENTO case is a clear recognition of the common understanding in labor relations matters that counseling is not discipline.

The Union's Reply

In reply, the Union states that the 1985 letter of apology by Chief Poltrock was not an instance of counseling. It is not credible for the City to assert that Hopkins was let off the hook with an informal counseling session. The fact that the City formally apologized to the owner of Garb's Gift Shop indicates that the City believed his behavior was inappropriate to the extent it warranted a written apology. The Union notes that in USDA FOREST SERVICE, 91 LA 694 (CORBETT, 1988), the Arbitrator decided it was inappropriate to retain copies of cautionary letters in the employee's official development folder and ordered them removed. Had Joint Exhibit 4 not been in Hopkins' file, the mistake the City made in copying his entire folder and using it as an exhibit in the Position Statement would not have happened. Because of the error, the remedy is simple – it must be removed from Hopkins' file.

The Union objects to the City's reliance on the OZAUKEE COUNTY case because the three factors to evaluate whether an employer's action was discipline were met in this case. The first factor was whether the document contains a threat of more severe discipline for a recurrence of the conduct. The terminology in Poltrock's letter of apology confirms that he confronted Hopkins and issued a reprimand. He told Hopkins in no uncertain terms what constituted appropriate conduct and indicated that his actions did not conform to that standard. As a result, Poltrock was confident that Hopkins possessed a clear understanding of what was expected of him. What else could be inferred but that if he repeated this conduct, he would be disciplined again? The Union states that it is reasonable to infer that it was the Chief's position that if Hopkins did not conform in the future to the standard of conduct he outlined to him in plain English, there would be adverse consequences regarding his job.

The second factor Arbitrator Malamud considered was whether the action taken was documented in writing and a copy given to the grievant. Because Joint Exhibit 4 was not identified as an exhibit at the Police and Fire Commission hearing, Hopkins did not have an opportunity to answer the question of whether he received a copy of it in the past. The issue did not arise until the City listed it as an example of discipline in its Position Statement with the ERD. As to the third factor, whether the grievant was told that the meeting was disciplinary in nature, nobody knows if Poltrock told Hopkins that the meeting was disciplinary in nature.

The Union asserts that one of the findings of Arbitrator Malamud in OZAUKEE COUNTY support the Union's position that Joint Exhibit 4 refers to discipline, not counseling. In that case, a letter from the police chief to the grievant after a citizen complained about the grievant's alleged cocky demeanor in a traffic stop, in similar circumstances to this case, was found to be disciplinary. The letter stated that "You are judged and respected by your character which has to be established with your peers, employer, the judicial process, and all the citizens you come in contact with. You are off to a bad start." The letter also warned the grievant that he would be suspended if he continued to treat people poorly. Arbitrator Malamud found the language and threat of severe disciplinary action for a recurrence of such conduct to constitute a written warning. While Joint Exhibit 4 does not contain an explicit threat to Hopkins, the letter was not directed at him, but it did refer to a verbal warning that may have been given to him regarding the appropriate standard of conduct.

The Union takes issue with the City's analysis of the SACRAMENTO case. The point is that Arbitrator Hoh ordered the removal of a record of counseling due to the risk that its presence in an employee file posed. Because Arbitrator Hoh did not believe that a reasonable basis existed for the letter of counseling, he ordered its removal from the employee's file. The same order is appropriate here.

In conclusion, the Union submits that the grievance must be sustained because Joint Exhibit 4 clearly contains a reference to discipline, and the City acknowledged as much in its Position Statement. Even if it were an error for the City to do so, the remedy is to purge it from the file.

The City's Reply

The City states it is compelled to counter many unwarranted assumptions and erroneous conclusions of the Union's initial brief. The first erroneous assumption is where the Union claims that Joint Exhibit 4's contents "allude to a verbal reprimand." Then the Union referred to it as a verbal "or written" reprimand with the intention to discipline Hopkins. The Union also stated that it was apparent that Hopkins was confronted and reprimanded for his behavior by the Chief's choice of words. The City finds all that to be pure speculation. While the Union appears to base its claim of discipline on the use of the phrase "in plain English," the word "plain" has a number of meanings that do not denote discipline. There never was any discipline imposed, and at best, all that was involved was counseling.

The City also takes issue with cases cited by the Union. The issue in USDA FOREST SERVICE was over where copies of informal cautionary/warning letters were to be placed. The Arbitrator ruled that while the employee could keep copies of the informal cautionary/warning letters, it just could not place them in the employee's "Department Folder."

The City asserts that comments of Arbitrators Sugerman, Daly and Jacobowski in three cases, along with Arbitrator Malamud previously noted, support the City's position. In NORTH

CENTRAL BOARD OF EDUCATION, 104 LA 399 (SUGERMAN, 1994), the Arbitrator found nothing in the record to show that an employer had put an employee on notice that she was being given a verbal warning and found that there needs to be some written evidence of such. In INDEPENDENT SCHOOL DISTRICT NO. 701, 108 LA 577 (DALY, 1977), the Arbitrator found that a written evaluation counseling an employee of perceived problems did not constitute discipline. And in VA MEDICAL AND REGIONAL OFFICE CENTER, 112 LA 984 (JACOBOWSKI, 1999), the Arbitrator found an admonishment for being disrespectful and vociferous was not prior discipline.

The City believes that the sole reason for this grievance is that the Union is concerned about factors reviewed during promotions. However, the labor contract states that only references to verbal and written discipline more than three years old are to be expunged from an employee's files and cannot be used in the determination of subsequent discipline. It does not state that references to non-disciplinary counseling are to be expunged, and those matters can remain in an employee's file. There is also no reference in Section 2.01(e) to the use of documents in a file for promotional decisions. If the parties wish to have non-disciplinary counseling references over three years old expunged from an employee's files, they will have to take it up at the bargaining table.

The City points out that the burden of proof in this case is on the Union to show by clear and convincing evidence that the City violated the specific contract provision. The Union must prove that the items in Joint Exhibit 4 are references to verbal and written discipline as those terms are used in Section 2.01(e) of the contract.

In conclusion, the City argues that the items in Joint Exhibit 4 are not verbal or written discipline, it did not consider them as discipline back in 1985, it did not use them in determining subsequent discipline in 1998, it does not consider them as discipline now, and it understands that it cannot use them in determining subsequent discipline in the future.

DISCUSSION

The labor contract calls for references to verbal and written discipline more than three years old to be expunged from all records and files of an employee. The letter in Joint Exhibit 4, while not addressed to Hopkins, contains a reference to a potential verbal discipline and is more than three years old. The only question is whether Hopkins was actually given a verbal reprimand in 1985.

There is no solid evidence one way or the other that determines what the 1985 incident would have been, whether a mere counseling and direction or a sharp rebuke and a verbal reprimand. There is an assumption that it is the latter, by the use of the words "plain English." The term "plain English" carries a connotation with it that implies a "dressing down," a harsh statement to someone, a verbal reprimand. If there were any doubt about the term having such a connotation, it was confirmed by the City itself when an attorney preparing

a response to the ERC complaint considered the letter to be discipline in one instance, although later softening the blow by calling it counseling. While the City says now that it was an error, the harm is done.

The Union is correct – there was a simple mistake that has a simple remedy. The City should remove the documents in Joint Exhibit 4, because they contain a reference to a verbal reprimand and were considered to be such by the City many years later. This is exactly what the contract seeks to prevent – the misuse of old disciplinary actions.

AWARD

The grievance is sustained.

The City is ordered to remove the documents of Joint Exhibit 4 from all records and files of Michael Hopkins.

Dated at Elkhorn, Wisconsin this 25th day of April, 2000.

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

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