BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 67, AFSCME, AFL-CIO

and

THE CITY OF RACINE

Case 577
No. 58277
MA-10903

(Markus Dyess Suspension)

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appeared on behalf of the Union.

Mr. Guadalupe G. Villarreal, Assistant City Attorney, City of Racine, 730 Washington Avenue, Room 201, Racine, Wisconsin 53403, appeared on behalf of the City.

ARBITRATION AWARD

On December 7, 1999, Local 67, AFSCME, AFL-CIO filed a request with the Wisconsin Employment Relations Commission seeking to have an arbitrator appointed to hear and decide a dispute pending between it and the City of Racine, Wisconsin. On March 20, 2000, the Union and the City requested the Commission appoint William C. Houlihan, a member of its staff, to hear and decide the captioned matter. The matter was set for hearing and postponed several times. Ultimately, the matter was heard on May 31, 2001, in Racine, Wisconsin. A transcript of the proceedings was made and distributed on June 13, 2001. Briefs and a reply brief were submitted and exchanged by October 18, 2001.

This Award addresses a 30-day suspension involving employee Markus Dyess.

BACKGROUND AND FACTS

Markus Dyess, the grievant, has been employed by the City of Racine, as a truck driver in the solid waste operation, since September of 1995. As of the date of the events giving rise to this proceeding, Mr. Dyess had accumulated a lengthy disciplinary record. There are 13 disciplinary incidents listed in Mr. Dyess' file in the four-year period between his date of hire and August, 1999. Notably, Mr. Dyess has two oral reprimands, two written reprimands, and a one-day suspension for "failure to notify of absence from work". Additionally, Mr. Dyess served a two-day, 5½ hour suspension in January of 1997 for insubordination. That suspension was grieved and arbitrated. In sustaining the suspension, the arbitrator found Dyess to have behaved in an insubordinate fashion, found that he had challenged a supervisor's authority, that he was angry, and that he was prone to not listen. Mr. Dyess also served a five-day suspension in May of 1999 for insubordination. That suspension was grieved and arbitrated. In sustaining the five-day suspension, the arbitrator noted that the grievant had on three separate instances refused a directive to go home on an overtime day.

On August 4, 1999, the grievant arrived late for work. The next day, August 5, 1999, the grievant arrived at work approximately 50 to 55 minutes late. Joe Golden, the Superintendent of Streets, determined to issue Dyess a three-day suspension for "failure to notify of absence from work". The City has a work rule requiring employees who will be late to work to notify their supervision in advance. Dyess had failed to do so. Golden directed Jeff Fidler, who is the General Supervisor for the Department of Public Works, to issue the discipline. At the conclusion of the workday on August 5, Fidler called Dyess into a conference room where he had arranged to have Union steward John Tate present. Fidler handed Dyess the following disciplinary letter:

. . .

> ON WEDNESDAY AUGUST 4, 1999 YOU CALLED THE STREET MAINTENANCE FIELD OFFICE AT APPROXIMATELY 7:28AM TO NOTIFY SUPERVISION THAT YOU HAD OVERSLEPT BECAUSE YOUR ALARM CLOCK DID NOT GO OFF. THE FOLLOWING DAY THURSDAY AUGUST 5, 1999 YOU WERE NOT PRESENT FOR THE START OF YOUR SCHEDULED 7:00AM WORK SHIFT. AT APPROXIMATELY 7:58AM YOU REPORTED FOR WORK AND TOLD YOUR IMMEDIATE SUPERVISOR THAT YOUR ALARM CLOCK HAD BEEN SET FOR THE WRONG TIME.
>
> BOTH OF THE ABOVE INCIDENTS ARE VIOLATIONS OF WORK RULES "A. TIME CARDS, SEC. 3" AND "B. NOTIFICATION OF ABSENCE, SEC. 1."

> I HAVE DISCUSSED THIS SITUATION WITH THE PERSONNEL DIRECTOR AND WE ARE IN AGREEMENT THAT YOU ARE TO RECEIVE A 3 DAY SUSPENSION WITHOUT PAY BEGINNING ON FRIDAY AUGUST 6, 1999 AND CONTINUING FOR MONDAY AUGUST 9, 1999 AND TUESDAY AUGUST 10, 1999.
>
> PLEASE BE ADVISED THAT YOU HAVE DEVELOPED A VERY POOR WORK RECORD WHICH INCLUDES NUMEROUS REPRIMANDS AND SUSPENSIONS. I STRONGLY SUGGEST THAT WHILE YOU ARE SERVING THIS SUSPENSION YOU EXAMINE YOUR COMMITMENT TO REMAIN AN EMPLOYEE WITH THE CITY OF RACINE AND UPON YOUR RETURN TO WORK YOU TAKE WHATEVER STEPS ARE NECESSARY TO IMPROVE YOUR WORK RECORD. FAILURE TO DO SO WILL RESULT IN THE APPROPRIATE DISCIPLINARY ACTION.

The form is dated 8-5-99 and signed by Joe Golden. During the course of the meeting, Dyess took issue with some of the representations in the disciplinary memo. Fidler advised Dyess that he had not written the memo and was in no position to modify its terms. According to Fidler, Dyess became angry and wanted to discuss the memo and have it rescinded. Dyess persisted, and Fidler continued to remark that he was in no position to change anything. According to Fidler, Dyess interrupted him to tell him that he (Fidler) had a bad attitude and needed to change his attitude. Fidler advised Dyess that he had his recourse, and ended the meeting.

The meeting ended, and the three men exited the conference room. Once in the common office area, Dyess went to another supervisor, Bill Folstrom, and attempted to engage Folstrom on the reprimand. Folstrom testified that he did not understand what Dyess was attempting to talk to him about. Folstrom had no part in the discipline, though he was aware of it. According to Folstrom, Tate urged Dyess to leave, and Dyess responded that he would not leave, and that he did not care if they threw him out. Folstrom described Dyess' attitude as defiant. According to Folstrom, Tate again urged Dyess to leave, and the two started to walk out.

Dyess then walked toward Fidler's desk and in response to Fidler indicating that Dyess would be entitled to a meeting, Dyess told Fidler that he had a bad attitude, and needed to change his attitude. His demeanor was confrontational and intimidating. Dyess pointed his finger at Fidler and told him "Don't look at me that way." Ultimately, John Tate persuaded Dyess to leave the office.

The supervisors believed Dyess behavior to be unacceptable in the workplace. They brought the matter to James Kozina, the City's Human Resource Director. In response to the supervisor's description of Dyess' behavior on August 5, Kozina issued Dyess the following letter:

August 9, 1999

Mr. Markus Dyess

. . .

Dear Mr. Dyess:

This letter is intended to officially notify you that you are being placed on a 30-calendar day suspension without pay effective Friday, August 6, 1999 through September 4, 1999 (your latest 3-day suspension for absenteeism and tardiness is included in the 30-day suspension).

This suspension is based on the totality of the work record you have compiled with the City of Racine which includes numerous disciplinary notices, including suspensions, for tardiness, failure to notify of absences, insubordination, vehicular accidents and work performance.

In addition to and coupled with these work rule violations, you have exhibited a blatant hostility toward and lack of respect for supervision and your fellow employees. You have created a disruptive, intimidating and hostile work environment; such behavior can no longer be tolerated.

This suspension is intended as a "last chance" opportunity for you to reassess your employment status with the City of Racine. You will be expected to comply with the following standards:

1.) Good attendance and punctuality.
2.) Compliance with all supervisors' instructions and/or directives
3.) Civility and common courtesy with fellow employees and supervisors
4.) Adherence to all departmental and City work rules.

You should understand that any sub-performance in the above areas or other work rule violations will result in your termination from City employment.

You will be expected to return to work on Tuesday, September 7, 1999 and any questions concerning this letter may be directed to the undersigned.

Respectfully,

James C. Kozina /s/
James C. Kozina
Personnel Director

Although the letter was prompted by Dyess' behavior of August 5, there is no specific reference to that behavior.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate the collective bargaining agreement when it disciplined the grievant with a 30-day suspension on August 9, 1999? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE II
Management and Union Recognition

. . .

E. Management Rights. The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

1. To direct all operations of City government;

2. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge and take other disciplinary action against employees for just cause.

. . .

POSITIONS OF THE PARTIES

It is the Employer's contention that the grievant's actions and tirade on August 5, 1999 was unprovoked, uncalled for and was insubordinate in nature. The Employer contends that the evidence is undisputed that the grievant failed to call in on two consecutive days, August 4 and 5, 1999. By failing to address the merits of the 3-day suspension, the Employer contends that the Union and grievant have conceded the work rule infraction of notification of absence, which demonstrates that the grievant had no real issue with the 3-day suspension, and thus the grievant's actions and outburst on August 5, 1999 were without any merit or justification. Similarly, it cannot be argued that somehow the grievant was confused about the work rule requirement to call in, since he had been disciplined on five separate occasions for the same infraction, including a one-day suspension. The Employer contends that the grievant's actions on August 5, 1999 are exactly the same type of behavior for which he was disciplined with a two-day, 5.5 hour suspension and another five-day suspension for insubordination.

It is the position of the Union that the Employer bears the responsibility for writing a vague notice of discipline. The disciplinary process followed in this case is most noteworthy for what it failed to convey. The 30-day suspension contains no fresh charge of insubordination. Neither Kozina nor Golden ever met with the grievant or his representative before invoking discipline. Due process was not followed. The Employer did not conduct a fair investigation because it never afforded the grievant an opportunity to be heard prior to determining discipline.

The Union contends that the actual reasons cited in the notice of discipline were historic in nature and cumulative. The three-work day suspension was incorporated as a part of the 30-calendar day suspension. Whereas there were no new or additional incidents cited, the ultimate discipline constituted double jeopardy. By not meeting with the grievant, the Employer not only failed its obligation to conduct a fair investigation, afford the grievant an opportunity to be heard and to confront his accusers, but also failed to follow the concept of corrective discipline.

The Union cites authority for the proposition that discipline must stand or fall upon the reasons stated in the notice of discipline. The Union cites further authority for the proposition that employees are entitled to a precise statement of charges when facing discipline. Surprise and lack of adequate notice about the basis for disciplinary action generally prejudice the Union and the employee in investigating the charges and preparing a defense. Notices that do not describe the type, scope, or nature of the alleged misconduct are also considered to be flawed.

The Union contends that due process requires a fair investigation. One component of that is that the employee be given an opportunity to tell his version of the incident. The Union cites authority for the proposition that this opportunity must occur prior to the administration of discipline. Hearing the employee's side of the story may clear up misunderstandings and even exonerate the employee. Requiring an employer to take this step before imposing discipline can give cooler heads an opportunity to slow down impulses and arbitrary decisions. In this case, prior to the arbitration hearing, the grievant was never allowed to tell his side of the story. At no time prior to arbitration was the grievant or his Union afforded an opportunity to confront those who had accused him of wrongdoing.

DISCUSSION

There is no dispute in this proceeding as to the propriety of the three-day suspension imposed for the grievant's failure to provide notification of his absence.

The testimony of Fidler and Folstrom as to the events of August 5 stands unrebutted. The behavior described was inappropriate to the workplace, confrontational and threatening. Dyess refused to listen, as Fidler attempted to explain that he had no authority to modify the text of the discipline. He challenged his supervisors openly and in the workplace. Mr. Dyess is fortunate that Mr. Tate was able to diffuse the situation. No supervisor ever directed Dyess to leave. Thus, his failure to leave was not, in and of itself, insubordination. However, his behavior bore strong parallels to that for which he has been disciplined in the past.

30 calendar days is a long suspension. The record suggests that the Employer has imposed such discipline in the past in the context of "last chance" warnings. In light of Mr. Dyess' dismal disciplinary history, I would be inclined to defer to the Employer and sustain even this lengthy suspension. However, I do believe the disciplinary process was flawed.

The Union contends that the 30-day suspension letter is vague. The Union is accurate in noting that the letter contains no fresh charge of insubordination. The August 5 incident precipitated the 30-day suspension, but is not mentioned in the disciplinary letter. The absence of any reference to the event is troublesome. The Employer contends that the intent of the

letter was to put Dyess on notice that his entire performance was unacceptable. It is in that context that the Union's second claim, that there was no meeting with Mr. Dyess prior to the imposition of discipline, must be considered.

The Union accurately points out that there was no meeting afforded Mr. Dyess prior to the imposition of the 30-day suspension. I agree with the Union's contention that minimum notions of due process demand that the grievant be confronted with the allegation, and afforded an opportunity to respond. Here, the incident of August 5 prompted the letter. Dyess was entitled to confront the charges relative to his behavior of August 5, and either admit, deny or explain what occurred. This is particularly true given the gravity of the discipline imposed, a 30-day suspension. The letter accompanying the suspension describes this as a "last chance" warning. The Employer put Dyess on notice that the totality of his work performance was lacking. He was directed to modify his behavior in numerous and sweeping areas. His failure to do so would lead to his termination. I believe Mr. Dyess was entitled to have the Employer's expectations articulated, clarified and reviewed. That was not done.

The Union contends that the imposition of a 30-calendar day suspension on top of a 3-work day suspension constitutes double jeopardy, in the absence of noted intervening behavior. I disagree. The 3-day suspension was in response to Mr. Dyess' failure to call in advance of his absences. The 30-day suspension was prompted by his insubordinate behavior of August 5 and the totality of his work record. The disciplines were served concurrently.

I am reducing the 30-calendar-day suspension to a 5-day work suspension. 5 work days was the suspension imposed for insubordination in January, 1999. Due to the significant procedural flaws in the imposition of the discipline, I am unwilling to allow the City to "progress" beyond the 5-day disciplinary standard previously issued. If it was the City's intent to put the grievant on a last chance notice of his termination, the City had an obligation to confront the grievant with the totality of his unacceptable behavior, allow the grievant to respond, and to explain the performance expectations required of Mr. Dyess to continue as a City employee.

I am unwilling to void the discipline entirely. Mr. Dyess' behavior was entirely inappropriate to the workplace and the same type of behavior previously exhibited. Mr. Dyess did not dispute supervisory accounts of the events of August 5. Mr. Tate, who was not called to testify, observed what transpired. Mr. Tate's presence eliminated the potential for surprise to the Union.

Under the totality of circumstances, it would send a terrible message to workers and to line supervisors for Mr. Dyess' August 5 conduct to escape discipline. The 5-day work suspension shall be served in addition to the 3-day work suspension for absenteeism.

AWARD

The grievance is sustained.

REMEDY

The Employer is directed to reduce the 30-calendar day suspension to a 5-work day suspension. The Employer is further directed to refund to Mr. Dyess the monies he lost in excess of 5 work days (and the additional 3 work days for tardiness), and to modify his personnel file to reflect this Award.

Dated at Madison, Wisconsin this 5th day of November, 2001.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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