BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS UNION, LOCAL 662

and

CITY OF PRESCOTT

Case 20
No. 60112
MA-11519

(Jerry Killian Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jill M. Hartley**, appearing on behalf of the Union.

Olson & Wertheimer, S.C., by **Attorney Robert A. Wertheimer**, appearing on behalf of the City of Prescott.

ARBITRATION AWARD

At all times pertinent hereto, General Teamsters Union, Local 662 (herein the Union) and the City of Prescott (herein the City) were parties to a collective bargaining agreement covering the period from January 1, 1999, through December 31, 2001, and providing for binding arbitration of certain disputes between the parties. On July 6, 2001, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over discipline issued to bargaining unit member Jerry Killian (herein the Grievant), and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on September 19, 2001. The proceedings were not transcribed. The Union filed a brief on October 24, 2001, and the City filed a brief on October 29, 2001, whereupon the record was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties stipulated to the following framing of the issues:

Was there just cause for the suspension and probation of the Grievant?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 2

MANAGEMENT RIGHTS

Section 1. The Employer retains the right to operate and manage its affairs in its sole discretion. The rights, power, and authority which the Employer has not modified by the Agreement, are retained solely by the Employer.

Without limiting the foregoing, the Employer expressly retains the right to direct the working forces; to plan, direct, and control all of the operations and services of the Employer; to determine such methods, means, organization, and number of personnel by which such operations and services of the Employer are to be conducted; to assign and transfer employees; to schedule working hours and to assign overtime; to hire, promote, demote, suspend, discipline, discharge or other just cause; to change or eliminate existing methods, equipment, or facilities; and to make and enforce reasonable rules and regulations. However, the exercise of any of the above rights shall not conflict with any of the expressed written provisions of the Agreement.

ARTICLE 11

DISCIPLINE AND DISCHARGE

Section 1. Disciplinary Action. It is the Employer's responsibility to offer and provide reasonable training and supervision, and to establish reasonable work rules.

Disciplinary action may only be imposed on an employee for failing to fulfill his/her responsibilities as an employee. Any disciplinary action, or measure imposed upon an employee may be appealed through the regular Grievance Procedure.

If the Employer has sufficient reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before others or the public.

Section, 2. Just Cause Notification. Employees shall not be disciplined or discharged without cause. If the Employer feels there is just cause for suspension or discharge, the employee and his/her steward shall be notified in writing within twenty-four (24) hours following the discharge or suspension, that the employee has been discharged or suspended and the reasons therefore.

Section 3. Procedure. The normal procedure for discipline and/or discharge shall include only the following:

(A) ORAL REPRIMAND
(B) WRITTEN WARNING
(C) SUSPENSION
(D) DISCHARGE

The number of written warnings and the length of suspension shall be determined by the Employer in accordance with the gravity of the violations, misconduct, or dereliction involved; taking into consideration that such steps are intended as corrective measures.

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OTHER RELEVANT LANGUAGE

DISCIPLINE AND WORK RULES

POLICY

To ensure orderly operations and provide the best possible work- environment, the City of Prescott expects employees to follow rules of conduct that will protect the interests and safety of all employees and of the City of Prescott.

CAUSES FOR DISCHARGE

It is not possible to list all the forms of behavior that are considered unacceptable in the workplace. The following are examples of infractions of rules of conduct that, in most circumstances, will result in termination of employment for the first offense:

. . .

c. Stealing or attempting to steal property from any individual on City premises, or stealing or attempting to steal property from the City, or the inappropriate removal or possession of City property.

. . .

g. Insubordination to supervisor, refusal to perform supervisor's assignments, or directing abusive or threatening language at any City supervisor, City employee or City representative.

. . .

n. Reckless endangerment of self or another employee.

. . .

r. Unsafe operation of equipment in a negligent manner or destruction of City material or property or the property of fellow employees.

. . .

BACKGROUND

The Grievant has been an employee of the City of Prescott Department of Public Works for over 31 years. In March, 2001, he underwent surgery to repair a torn rotator cuff in his left shoulder and was off work for a period of time thereafter. In April, 2001, pursuant to an inquiry from the City, the Grievant's doctor certified him able to return to work subject to light duty restrictions. On April 23, 2001, the Grievant met with the City's Personnel Committee to discuss his return to work. The Grievant requested that he be allowed to remain off work and use accrued sick time while undergoing physical therapy. The Committee refused the request and ordered the Grievant back to work on light duty. There was discussion at the time about what duties the Grievant could perform and he indicated that he could drive City vehicles that had an automatic transmission, which included the pickup truck and end loader. As a result of the meeting, the Grievant was told he could perform duties that did not require use of his left arm, but could not engage in strenuous activities, including operating heavy equipment. The Grievant returned to work on April 24 and performed a variety of tasks, including repairing City equipment and removing construction stakes.

On May 11, 2001, the Grievant was assigned to monitor the City's compost site, which is a collecting point for brush, leaves and other compostable materials. While there, he asked the Public Works Director, Jeff Kittleson, if he should burn the brush and Kittleson indicated

he should. At 10:00 a.m. on that day, the Grievant left the compost site for a physical therapy appointment, which he was entitled to do. After his appointment, the Grievant went to the City garage, picked up the end loader and drove it to the compost site in order to pile the brush for burning, which was normal procedure for this task. At approximately 11:30 a.m., the Grievant was returning the end loader to the City garage when he was seen by the City Administrator, Lloyd Mathes, who followed him to the garage and accosted him there. Mathes inquired whether the Grievant had been released from his restrictions. The Grievant responded "not per se" and Mathes subsequently learned from Kittleson that the Grievant had not received permission to use the end loader.

As a result of the Grievant's unauthorized use of the end loader, Mathes and Kittleson suspended him and brought charges against him before the City Personnel Committee seeking further disciplinary action. Specifically, the Grievant was charged with numerous violations of City work rules, including:

1. Failure to obey a direct legal order by leaving the workplace.
2. Inappropriate removal of City property.
3. Refusal to perform the supervisor's assignment, i.e. leaving the compost site unattended.
4. Reckless endangerment of himself and the public.
5. Unsafe operation of City equipment in a negligent manner.
6. Insubordination by failing to obey the directives of the Director of Public Works, the Personnel Committee and the City Administrator.

On May 15, 2001, the Personnel Committee conducted a disciplinary hearing to consider the charges against the Grievant. As a result, the Grievant was given a 30-day suspension without pay and was placed on probation for a year, during which time any further disciplinary action would result in termination. A grievance was filed disputing the suspension and probation and the matter proceeded to arbitration. Additional facts will be referenced, as necessary, in the discussion section of this award.

POSITIONS OF THE PARTIES

The Union

Under arbitral precedent, the City is required to prove that the Grievant committed the acts charged and that the penalties it imposed were justified. The City has failed to meet its burden. The contract does not allow for probation as a form of discipline and the Grievant was not guilty of the work rule violations charged by the City.

The Grievant did not violate orders by operating the end loader and, therefore, this act cannot constitute insubordination. The evidence is not clear that the Personnel Committee informed the Grievant that he was forbidden to drive the end loader. Insubordination involves

willful defiance of authority. Because of the seriousness of the charge, the City is required to prove that the Grievant was given orders by his superiors, which he refused to obey. Further, that the orders were clear and were understood, that they were reasonably related to the Grievant's job, and that he was informed of the possible and probable consequences of violating them. None of the elements were proven.

The evidence is not clear that the Grievant was ordered not to drive the end loader. The City claims the Personnel Committee ordered the Grievant to not operate heavy equipment, but the Grievant recalls being asked if he was able to operate the end loader and answering in the affirmative. He believed, therefore, he was permitted to use it. The Grievant's testimony was credible and is entitled to belief absent conclusive evidence to the contrary. The Personnel Committee minutes from the April 23 meeting reference a restriction from operating heavy equipment, but make no mention of the end loader, although both the Grievant and the City Administrator remembered it being discussed. Thus, the evidence is inconclusive as to whether the end loader was included in the proscription. This is buttressed by the fact that the Public Works Director testified that the Grievant was permitted to do whatever he felt were within his limitations. This is an equivocal order and since the Grievant believed he could operate the loader, which had an automatic transmission, he rightfully believed he had permission to use it. Assuming such an order was given, the Grievant was also never informed of the consequences of violating the order. There was no mention of potential suspension, or probation, in any conversation about the Grievant's restrictions and they cannot stand.

The City also failed to prove the other allegations against the Grievant. He did not violate a direct legal order when he left the compost site because he had permission to leave for a physical therapy appointment and also was permitted to leave for lunch and scheduled breaks. Further, Kittleson admitted that the Grievant was not required to be at the compost site at all times. This also undercuts the charge of leaving the compost site unattended. The charge of inappropriate removal of City property also stems from the Grievant's use of the loader. Kittleson testified that the loader was normally used for piling brush for burning and since the Grievant believed he was authorized to use the loader his action in using it for this purpose was reasonable. The charges of reckless endangerment and negligence are also specious. Mathes testified that he did not observe the Grievant driving recklessly or violating traffic regulations. The charge stems from the Grievant's physical restrictions, but the City did not prove that the Grievant violated his restrictions by operating the loader or that the restrictions prevented the Grievant from operating it safely. At the hearing, the Grievant demonstrated that he could get in and out of the loader and operate its controls with only the use of his right arm. The City never asked the Grievant's doctor whether he could operate the loader and Union Exhibit #1 established that the doctor believed he could, thus he did not violate his restrictions

The Grievant was not guilty of insubordination. At most he was mistaken about the scope of the Personnel Committee's restrictions on his operation of City equipment. His belief that the proscription from operating heavy equipment did not include the end loader, was in

good faith and was reasonable under the circumstances. The penalties imposed by the City far outweighed the severity of the Grievant's error. They must be lifted and the Grievant must be made whole.

The City

The facts are not in dispute. The Grievant was under light duty restrictions and was not to use his left arm per instructions from his doctor. He was, therefore, placed on light duty by the Personnel Committee and directly ordered to not operate heavy equipment. There is no dispute that the end loader is heavy equipment or that the Grievant operated it without seeking permission from his superiors.

By using the loader in direct violation of the lawful order of the Personnel Committee, the Grievant was insubordinate. By not obtaining prior approval, the Grievant violated the rule against inappropriate removal of City property. Further, despite the fact that it has an automatic transmission, there is no way that the Grievant could have operated it in a way that was safe to both himself and others. First, he could only use one arm in climbing in and out of the vehicle, which violated clearly posted safety provisions. He also could not steer and operate the turning signals at the same time, since the signal switch is on the right hand side of the steering column. To operate the switch, he would have to steer with his left hand, which would violate his physical restrictions. Otherwise, he would have to not steer altogether, which would be clearly reckless and unsafe to the public. In either event, the Grievant took an unacceptable safety risk in operating the end loader, which clearly warrants the discipline imposed by the City. The grievance should be denied.

DISCUSSION

On April 23, 2001, the City Personnel Committee ordered the Grievant back to work following shoulder surgery on light duty restrictions. On May 11, 2001, the Grievant was observed driving an end loader, allegedly in violation of his work restrictions. On May 15, 2001, the Personnel Committee suspended the Grievant for 30 days as a result of the May 11 incident, which it found constituted six separate violations of the City work rules, any one of which warranted termination. The City Council ratified the Personnel Committee's action on June 11, 2001. I will address each of the violations as they are set forth in the Cause of Action brought against the Grievant by the City (City Exhibit #5).

Failure to obey a direct legal order by leaving the workplace.

This charge stems from the Grievant's act of leaving the City compost site on the morning of May 11. The evidence is undisputed that the Grievant left the compost site for a 10:00 a.m. physical therapy appointment. City Administrator Mathes and Public Works

Director Kittleson admitted that a medical appointment is a legitimate reason for leaving the worksite. The charge arose from Mathes' assumption that the Grievant had left the worksite to get the end loader. Inasmuch as the Grievant had an approved reason for leaving the worksite, his doing so was not a work rule violation and the City did not have just cause to discipline him for that reason.

Inappropriate removal of City property.

This charge is based upon the Grievant's unauthorized use of the end loader. The wording of the work rule in question here is instructive:

> c. Stealing or attempting to steal property from any individual on City premises, or stealing or attempting to steal property of the City, or the inappropriate removal or possession of City property.

By linking "inappropriate removal" with theft and attempted theft, it is clear that the City intended by this rule to prohibit the taking of City property for personal use. By adding "inappropriate removal or possession" the City is thus able to address situations where an employee is in wrongful possession of City property, but there is insufficient proof to establish that it was stolen rather than "borrowed." This is made even clearer by the fact that the City has a separate group of minor work rules, violation of which result in lesser discipline, including the following:

> 1. Unauthorized possession or use of any City property, equipment or materials.

This lesser infraction is clearly intended to address the situation where an employee improperly uses City property, but not with intent to convert it to his own purposes or possession. It is undisputed that the Grievant's use of the end loader was for City business, not his own and, but for his work restrictions, would have been authorized. This conduct falls, if anywhere, within the scope of the lesser rule and, therefore, I find that the City did not have just cause to discipline the Grievant under the more stringent rule. It is also clear from the testimony of Kittleson that under normal circumstances the Grievant would not have needed permission to use the end loader for the task described and has not been required to obtain permission in the past for this purpose. As will be discussed later in this award, however, the City did not clearly advise the Grievant of the need for additional authorization and, therefore, I find his use of the loader under the circumstances was not a violation of the less serious rule either.

Refusal to perform the supervisor's assignment, i.e. leaving the compost site unattended.

This charge is a corollary to the first charge, in that it is based on the Grievant's leaving of the worksite, in this case leaving the compost site unattended. As has been previously established, the Grievant did have permission to leave the compost site for his

medical appointment. Further, both Mathes and Kittleson testified that employees are permitted to leave the compost site unattended, if necessary, while on breaks or attending to other business. Indeed, typically the end loader is used in the process of burning brush, which would require an employee to leave the worksite in order to get it from the City garage and later leave to return it. Furthermore, Kittleson did not testify that he ordered the Grievant to not leave the worksite, as the charge implies. I find, therefore, that the City did not meet its burden as to this charge and did not have just cause to discipline the Grievant thereunder.

Reckless endangerment of himself and the public.

This charge is based upon the City's contention that under his restrictions the Grievant could not safely operate the end loader. What's more recklessness implies something beyond mere negligence, as where a person does not use proper care, but rather behavior that suggests utter disregard for the safety of one's self or others. This charge cannot be based upon any observed conduct of the Grievant's behavior. The only person who saw the Grievant driving the loader was City Administrator Mathes, who testified that he did not observe the Grievant violating traffic regulations or otherwise driving dangerously. He stated that the charge arose from the assumption that for the Grievant to drive the loader at all with his restriction was, per se, reckless.

The record shows that at the April 23 Personnel Committee meeting, the Grievant was asked, point blank, whether he could safely operate the end loader with his restrictions. He stated that, inasmuch as the loader had an automatic transmission and the bucket controls were operated with the right hand, he felt he could do so. He testified that nothing more was said about the end loader at the meeting and he assumed that, since he was permitted to use the pickup truck, which had an automatic transmission, he was authorized to use the loader as well. The Personnel Committee meeting minutes (City Exhibit #1) reflect that the Grievant was authorized to perform a variety of tasks, but was not to operate heavy equipment. Although the loader is not specifically mentioned, Mathes testified that it was understood that the loader was considered heavy equipment. Mathes also testified, however, that the Grievant was not provided with either a written copy of his work restrictions or a copy of the meeting minutes.

I am persuaded that on May 11, the Grievant believed, in good faith, that he could safely operate the end loader, since he clearly believed this to be the case on April 23. I am also persuaded that the Grievant's belief was not unwarranted, inasmuch as he described the process of driving the loader to his doctor, who stated that such was within his capabilities under the doctor's written work restrictions (Union Exhibit #1, City Exhibits #2 and #12). 1/ Furthermore, the Grievant demonstrated at the hearing that it is possible to enter and operate the end loader with just the use of one's right arm. Also, despite the posted notice regarding the proper method of entering and exiting the end loader, Kittleson, who is the Grievant's direct supervisor, testified that there is no requirement in this regard and he would not discipline an employee for using only one arm to enter or drive the loader.

1/ Union Exhibit #1 was prepared on June 1, 2001, subsequent to the discipline, and was not available to the Personnel Committee when it met on May 15 to consider the charges against the Grievant. Nevertheless, it was available to the City Council when it met on June 11 to ratify the Personnel Committee's action and is, therefore, relevant to this proceeding.

Inasmuch as there is no evidence that the Grievant's conduct while driving the loader was reckless or dangerous, and inasmuch as the objective evidence provided by the Grievant's doctor supports the view that he was capable of operating the end loader safely with just his right arm, and without undue danger of harm to himself or others, I find that the City did not have just cause to discipline the Grievant under this charge.

Unsafe operation of City equipment in a negligent manner.

This charge is predicated on the same basis as that for reckless endangerment, that the use of the end loader by the Grievant was, in itself, negligent because of his restrictions. Again, Mathes did not observe any negligent or unsafe driving, so the charge must proceed from the City's assumption that the restrictions placed on the Grievant at the April 23 meeting created a standard of care and his conduct in violation of those restrictions violated that standard. This assumption is incorrect. Negligence arises when a person acts unreasonably under the circumstances with which he is presented, and an objective, or "reasonable person," standard is applied to make that determination. Negligence also typically becomes an issue when an injury has occurred and an attempt is made to assign fault for the loss. There was no injury here, so there is no need for such an analysis. Whether driving the loader was, in itself negligent, depends on whether the Grievant's assumption that he could do so safely was reasonable. The only expert evidence offered on the point was the opinion of the Grievant's doctor, whose report supported the Grievant's action. The only opinion evidence offered by the City came from Public Works Director Kittleson, who stated that it is possible to operate the loader with one hand. On this basis, I cannot find that the City had just cause to discipline the Grievant under this charge.

Insubordination by failing to obey the directives of the Director of Public Works, the Personnel Committee and the City Administrator.

In actuality, this charge is subsumed within the other five. The bottom line is that the City contends that the Grievant was told by the Personnel Committee and the Administrator on April 23 that he was not to operate heavy equipment and in doing so he willfully disobeyed his superiors. The record reveals problems with this assertion, however. First, it is unclear exactly what the scope of the Personnel Committee's directive to the Grievant was. He came away from the April 23 meeting believing that he was authorized to operate the end loader, but not other heavy equipment which required the use of both arms. The City believed he was precluded from operating any heavy equipment. This miscommunication was compounded by

the fact that the Grievant was not provided with a written copy of his work restrictions or the Committee's meeting minutes, which would have clarified the issue. 2/ At best, it is clear that there was no meeting of the minds on April 23 as to what the Grievant could or could not do. Insubordination, however, implies willful defiance, which this record does not support. In sum, the most that can be said is that the Grievant misunderstood the Personnel Committee's directive, which is not enough to establish a charge of insubordination.

2/ The City points out that the purpose of the April 23 meeting was to consider the Grievant's request that he not be required to return to work immediately in that he was not sufficiently recovered from his surgery. The City argues that this request is inconsistent with the Grievant's assertion that he was physically able to operate the end loader. The City does not deny, however, that the Grievant did make such an assertion at the meeting. Further, it is a measure of the Grievant's credibility that, under those circumstances, if he felt he could not operate the loader he would have said so and if he were told not to he would have remembered it.

There is also no evidence that the Grievant disobeyed the Public Works Director. Kittleson testified that he told the Grievant to work at the compost site on May 11 and to burn the brush there, which the Grievant did. Kittleson was aware that employees typically use the end loader to pile the brush as part of the burning process, but did not tell the Grievant he should not use it. In effect, he told the Grievant to burn the brush if the Grievant thought he could do so without harm to himself and never discussed his restrictions with him at all. Under the circumstances, the Grievant could reasonably have believed that using the loader was a necessary part of the task he was given to do. In fact, had he not burned the brush as instructed he could have been open to discipline, as well. On the whole, therefore, I cannot find that the Grievant's behavior in this incident was insubordinate and, therefore, find that the City did not have just cause to discipline him on this basis. The grievance is sustained.

For the reasons set forth herein, and based upon the record as a whole, I hereby enter the following

AWARD

The City did not have just cause to suspend the Grievant and place him on probation. Therefore, the City shall make the Grievant whole by paying him backpay for all time lost due to the suspension, as well as any other benefits affected by the suspension, shall lift the probation, and shall expunge the incident from the Grievant's work record.

Dated at Eau Claire, Wisconsin this 30th day of January, 2002.

John R. Emery /s/
John R. Emery, Arbitrator

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