

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

VILLAGE OF KIMBERLY

and

**KIMBERLY MUNICIPAL EMPLOYEES UNION LOCAL 130-D,
DISTRICT COUNCIL 40 AFSCME, AFL-CIO**

Case 20
No. 63556
MA-12627

Appearances:

Mark DeLorme, Staff Representative, Wisconsin Council 40, 2010 Memorial Drive, #206, Green Bay, Wisconsin 54303, appearing on behalf of the Union.

James R. Macy, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the Employer.

ARBITRATION AWARD

The Village of Kimberly, hereafter Village or Employer, and Kimberly Municipal Employees Union Local 130-D, District Council 40, AFSCME, AFL-CIO, hereafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Village, requested the Wisconsin Employment Relations Commission to appoint a Commissioner or member of the Commission staff to hear and decide the instant grievance. Commissioner Susan J.M. Bauman was so appointed on April 22, 2004. A hearing was held on July 14, 2004, in Kimberly, Wisconsin. The hearing was transcribed. The record was closed on October 4, 2004 upon receipt of all post-hearing written arguments.

ISSUES

The parties were unable to stipulate to an issue or issues for resolution in this case. However, they agreed that the Arbitrator could frame the issues based upon the relevant evidence and argument, as well as the parties' suggested issues. The Village suggested the following issue for determination:

Did the Village violate Article XVIII of the collective bargaining agreement when it provided its discipline letter of March 22, 2004 to the Grievant?

The Union suggested the following statement of the issue:

Did the employer have just cause to suspend the Grievant? If not, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case, the undersigned adopts the Union's statement of the issue.

RELEVANT CONTRACT PROVISIONS

PREAMBLE

The intention of this mutual Agreement is to maintain the existing harmonious relationship between the Employer and the Union: to promote cooperation and understanding between them, to promote the morale and well being, safety and security of the employees; to effect the best interests of the employer; to promote the economic operation and to provide for the proper care of the equipment relative to the Park Department, the Street Department, sewer and water main upkeep and sanitary collection.

ARTICLE II - MANAGEMENT RIGHTS

Section 1. The management of the work, the direction of the working forces, the direction of the job obligations and qualifications for work, the right to hire, promote and transfer, suspend, discharge, discipline for just cause, the right to lay off employees, the right to establish work rules, . . . shall continue to vest in the Employer, exclusively, subject only to amendment by the Employer from time to time.

Section 2. The exercise of management rights as outlined in Section 1 shall be done in accordance with the specific terms of this Agreement and shall not be interpreted so as to deny the employee's right to use the grievance procedure.

ARTICLE XII - INCIDENTAL RELEASE PROVISIONS

Section 1. A fifteen (15) minute daily rest period, without loss of compensation, shall be allowed each employee as soon after 9:00 a.m. as is deemed practicable under the circumstances and after every uninterrupted three (3) hour periods of work thereafter.

ARTICLE XVIII – DISCIPLINARY PROCEDURE

The following disciplinary procedure is intended as a legitimate management device to inform employees of work habits, etc., which are not consistent with the aims of the employer's public function, and thereby to correct those deficiencies.

Section 1. Any employee may be demoted, suspended, discharged or otherwise disciplined for just cause. Except as noted below, the sequence of disciplinary action shall be oral reprimands, written reprimands, suspension, demotion and discharge, i.e., an employee shall first be reprimanded orally, then reprimanded in writing, etc. A written reprimand sustained in the grievance procedure or not contested shall be considered a valid warning. A written reprimand must be provided to employee and the Union. No valid warning shall be considered effective for longer than a twelve (12) month period.

Section 2. The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension of [sic] discharge. Theft of personal or public property is hereby defined as cause for immediate discharge. Gross negligence or willful dereliction of duty are hereby defined to be immediate cause for suspension.

. . .

Section 5. Suspensions shall not be for less than two (2) days, but for serious offense or repeated violations may be more severe. No suspension shall exceed thirty (30) calendar days.

RELEVANT PERSONNEL POLICY

SEC. 5.3. USE OF VILLAGE TELEPHONES

- (a) Employees shall observe the rules of telephone courtesy in receiving or placing calls.
- (b) Employees are permitted to use Village telephones for personal reasons, but are to limit such use to instances of necessity. This is a privilege and not a right and may be withdrawn by the Village Board if abused through excessive use or if telephoning causes interference with work duties.

. . .

SEC. 5.8. MISCONDUCT – UNACCEPTABLE PERFORMANCE

(b) Violation of Village Rules of Conduct. . . .

(14) The employee has been abusive in his attitude and language or has been abusive in his conduct to fellow employees or the public.

. . .

(23) The employee has demonstrated conduct unbecoming an employee of the Village.

. . .

(25) The employee has used the Village telephone for personal use in violation of Section 5.4 [sic] of this manual.

. . .

RELEVANT BACKGROUND AND FACTS

Grievant Jon Merckx, hereafter Grievant or Merckx, has been employed by the Village of Kimberly as a general laborer for the past six years. From 1986 to 2003, he also served as the assistant football coach for the Kimberly Area School District. Merckx has seven brothers, one of whom, Jamie, was the head football coach for the Kimberly Area School District until November 17, 2003. At that time, Jamie Merckx and the Grievant as well as other members of the football staff were notified that they would be replaced.

Along with the District Athletic Director, Mike Rietveld, Principal of Kimberly High School, made the decision to replace the coaching staff. Mel Lightner, Superintendent of the Kimberly Area School District, approved the decision. On November 19, Rietveld received a voice-mail message on his work phone:

Yeah, Mike. Remember when you were a DECA teacher and you had that little beer party? Well, I'm going to take care of that matter now, okay? You be ready, because we're coming to get you now. Beer party. DECA teacher. You get what I'm talking about. Have a good day.

Subsequent to this, Rietveld received numerous hang up phone calls at home and numerous drive-bys his house which is located on a dead end court. The additional traffic, cars lingering, phone calls with hang ups and the November 19 threatening call affected Rietveld and his wife's comfort in their home and their ability to sleep, as well as their over all well-being. They sought medical attention and filed a complaint with the police. The police worked with the telephone company to trace and trap the phone calls.

Although the phone traces did not determine who was making the hang-up calls, the police were able to determine that Greg Merckx, another of Grievant's brothers, had placed the November 19 threatening call. Greg Merckx was scheduled to appear in court on March 10, 2004, on a non-traffic ordinance violation of "Unlawful Phone Use."

The choir director at Kimberly High School, G-T, was terminated by the Kimberly Area School District on July 30, 2003, allegedly for allowing the consumption of alcohol during a musical theater trip she led. G-T appealed her termination to arbitration, and the matter was scheduled for hearing on March 17, 2004. G-T's representative alleged that Rietveld had allowed teens to drink alcohol on a trip that Rietveld had chaperoned. Grievant's sister-in-law 1/ was subpoenaed to testify at the arbitration hearing, apparently because she was on the trip with Rietveld when the alleged drinking took place.

1/ This individual is married to yet another of Grievant's brothers.

Early in March 2004, during his morning break, Grievant placed a call to the *Post Crescent*, using a Village phone. He asked to speak to an investigative reporter, and was connected to Amy Pelishek. According to Grievant, he told her that he heard a tip that there was going to be an arbitration hearing regarding a teacher being fired, and that she was alleging something about an administrator. The reporter was the first to mention G-T by name, and also asked if the administrator in question was Rietveld. Grievant acknowledged that the hearing concerned G-T and Rietveld. The reporter also asked where Grievant had gotten the information. Grievant acknowledged that a relative of his had been subpoenaed to testify. Grievant did not identify himself as the caller. The call lasted about ten minutes.

On March 4, 2004, Dr. Lightner received a call from Susan Draves, a reporter for the *Post Crescent*. According to Dr. Lightner, Ms. Draves advised that the paper had received an anonymous phone call indicating that the Kimberly Area School District was going to hold a hearing regarding inappropriate conduct engaged in by Mr. Rietveld. This was upsetting to Lightner, in light of the other harassing phone calls and events that had been occurring to Rietveld since the non-renewal of Jamie Merckx as the football coach. Lightner attempted to contact the assistant editor, Amy Pelishek, and the executive editor, Andrew Opman, to obtain additional information regarding the call.

Through unidentified sources, Lightner heard that the call to the *Post Crescent* had been made by the Grievant, using the phone in the Village shop where he worked. Lightner contacted Rick Hermus, Village Administrator, by the following letter dated March 9, 2004:

From information that I have received, I believe that an anonymous call was placed from a Village of Kimberly phone to the Post Crescent on either Monday, March 1, 2004 or Tuesday, March 2, 2004. The phone call was made

to Amy Peleshek [sic] who is a news editor for the Post Crescent. The call was regarding an upcoming hearing and the caller relayed information to Ms. Peleshek [sic] about alleged improper conduct on the behalf of Kimberly High School Principal, Mike Rietveld, when he was a teacher in the district. My concern is that an anonymous call from a Village phone to the press is an extremely inappropriate use of Village resources. Also, there has been a pattern of behavior directed to Principal Rietveld that is both harassing and intimidating in nature. I would appreciate it if you would keep me apprised of any developments as a result of the information I have conveyed.

Lightner also heard that Grievant was bragging about making the call to the newspaper and said words to the effect "Lightner and Rietveld are going down."

Upon receipt of this information, Hermus met with the Grievant to let him know that an investigation was being conducted. Grievant requested a meeting as soon as possible, and it was set up for that afternoon, March 10, 2004, at 1:00 p.m. Hermus told Grievant that he considered the call to be a part of a known pattern of harassment and intimidation being directed at Rietveld. Grievant readily admitted to making the call, but did not think it was harassing or slanderous. Grievant did, however, apologize for making the call.

The Village contends that the Grievant boasted about his call to the *Post Crescent* and told fellow employees about the call, including negative comments about both Lightner and Rietveld. Co-employee Dave Schuh testified that the Grievant made the comment that he had

. . . called The Post-Crescent regarding Mel Lightner, and said something to the effect of a misappropriation, misuse of funds, you know, he had heard that from someone else, so . . .

Co-employee Mike Riesterer recalled that

. . . after the phone call he came into the lunchroom telling us that there are allegation of Mel or something with another teacher, and that was about it.

Both of these statements were interpreted in a negative manner by the listening co-employees.

Hermus was of the opinion that Grievant's actions failed to demonstrate acceptable behavior of a Village employee and violated the Village personnel policy as to use of the Village's telephones. Hermus, based on information received from Lightner, also believed that Grievant bragged about the call to fellow employees. By letter dated March 22, 2004, Hermus advised Grievant that he was being suspended without pay for a period of five (5) working days. In pertinent part, the letter of suspension states as follows:

We have concluded our investigation into the issue of you admitting to making a harassing phone call about a school district official with whom you have a personal issue, to another individual, using a Village of Kimberly telephone, during working hours.

During our meeting of March 10, 2004, you readily admitted to making this phone call. You concurred on the place from which you made the call, and that it was during the normal workday. You also agreed on the subject matter. This phone call to other individuals was to raise suspicion about a school district official, and infer inaccurate information so as to cause him undue stress and harassment.

It was noted to you that this phone call was a part of a larger matter involving the school district official, and a pattern of harassment being directed at him. There are other issues related to this pattern of harassment that have been investigated, and are still being investigated, by the Kimberly Area School District.

The Village of Kimberly has also worked with you in the past regarding poor judgment, which almost caused you to lose your Commercial Drivers License (CDL), and possibly your position. As you will recall, the village gave you another chance under that circumstance despite your poor judgment. Unfortunately, you have again engaged in extremely bad judgment. We consider this pattern of behavior serious, and feel appropriate action is necessary.

Based on this information, you are hereby being suspended without pay for a period of five (5) working days. Street Commissioner Vanden Boogaard will work with you to schedule this suspension within the next 30 days.

It is disappointing that you do not seem to grasp the serious nature that such issues can have on an individual. However, we feel strongly that such behavior must be addressed swiftly and directly, as we address annually in our harassment training. Please note that any further such activity will lead to further discipline up to and including termination of your employment.

At the time of the hearing in this matter, Grievant had not yet served the five (5) day suspension.

Additional facts are included in the discussion below.

POSITIONS OF THE PARTIES

The Village

The Village takes the position that the Grievant engaged in a pattern of malicious and intentional harassment of the high school principal in violation of the Village policies prohibiting harassment and prohibiting the use of the Village phone. The Village contends that the grievance should be denied.

The Union

The Union takes the position that the Grievant exercised his freedom of speech by making a brief telephone call to the newspaper and that the Grievant had a reasonable belief that the information he was giving to the newspaper was correct. Further, the Union contends that the use of the Village telephone for making personal, non-emergency calls, is common practice in the shop and, therefore, no discipline is appropriate.

DISCUSSION

The parties to this dispute are essentially in agreement that the just cause standard to be applied in this matter consists in a two-pronged analysis. First, the undersigned must address the question of whether the Grievant is guilty of the misconduct alleged. Second, if so, the arbitrator must determine whether the penalty is appropriate under the circumstances.

The Village argues that if the arbitrator finds that the complained of conduct has occurred, and that the conduct merits disciplinary action, that the arbitrator should not substitute her personal judgment for that of management in establishing the degree of discipline. While in general the undersigned agrees that it is primarily the function of management to determine the proper penalty, it is also the role of the arbitrator to determine whether the discipline is appropriate to the misconduct proven. That is, where the Employer interprets the misconduct in a manner in excess of that which it proves, the level of discipline to be imposed may be reduced by the arbitrator so as to better fit the proven behavior of the employee.

The Village contends that the Grievant's actions in making what it considers to be a harassing phone call utilizing the Village telephone was part and parcel of a pattern of harassment perpetrated by the Grievant's family against officials of a sister governmental unit, the Kimberly Area School District. The Village also contends that Grievant's action in making this telephone call, and bragging about it to fellow employees, is another example of Grievant's bad judgment and failure to consider the implications of his actions that are unbecoming an employee of the Village.

However, in light of the contents of the Village's letter of discipline, there are only two aspects to the Grievant's actions of early March 2004 that are the subject of discipline: (1) the improper use of the Village telephone and (2) the content of the telephone call. Each will be analyzed separately.

Use of the Village Telephone

It is uncontested that the phone call giving rise to the discipline at issue was made during the workday, at the workplace, using the Village telephone. The record is unclear as to how much of the suspension is attributable to the alleged violation of the Personnel policies

regarding the usage of the Village telephone, and how much is attributable to the content and possible ramifications of the telephone call that was made. It is also unclear, on this record, whether the Village would have disciplined the Grievant had the call been made from another, non-Village owned, telephone.

Although Rick Hermus, the Village Administrator, testified adamantly that the Personnel Policy limiting the use of the Village telephone to instances of necessity was vigorously enforced throughout the Village, the testimony of the Grievant, and employees Van Oss, Schuch and Riesterer contradicts this assertion. It is clear that, unbeknownst to Hermus, Village phones, at least in the shop, are used to respond to newspaper ads, to place newspaper ads and to order food, among other non-necessity uses. In fact, Van Oss testified that the lunchroom phone has a few restaurants on speed dial, allowing for quick ordering of food. While food is arguably a necessity, it can be planned for ahead of time. Cell phones are readily available these days, making use of the Village phone to order food less than a necessity.

In addition to actual use of the telephone, the length of the call involved is of issue. Grievant acknowledged that the call was approximately 10 minutes in length. Van Oss testified that his understanding of allowed telephone usage was that no long distance calls were to be made, and that calls were to be "quick," "not lengthy." According to Van Oss, ten minutes might be getting close to lengthy, but that for sure 15 minutes is lengthy.

Inasmuch as the supervisor of these employees, Street Commissioner Vanden Boogaard, did not testify as to his knowledge or understanding of the use of the telephone by employees of the Department of Public Works, I cannot find that Grievant's use of the telephone, in and of itself, warrants imposition of discipline. That is not to say that his usage of the telephone did not violate the Personnel Policy, but rather that the practice within this particular Village department appears to be such that personal use of the phone for the period of time in question was not extraordinary. The undersigned is persuaded that the use of the Village phone in this department for the time period in question was a regularly occurring event and that the department management had to be aware of it and condoned it. Consequently, discipline for the use of the Village phone, in and of itself, is not sustainable.

The Content of the Call

In looking at the call itself, the Village contends that it was part of a pattern of harassment and in any event constituted "conduct unbecoming an employee of the Village."

The Grievant does not deny that he made the phone call, but he contends that he was merely exercising his constitutional right of freedom of speech when he phoned his anonymous tip to the *Post Crescent*. He contends that he wanted the newspaper to investigate the upcoming arbitration hearing involving terminated teacher G-T, particularly with respect to allegations that were being made by G-T's representative that Principal Rietveld had once been

part of a student outing at which alcohol was consumed. Grievant further contends that he did not mention the names of the individuals to the reporter, but that he confirmed the names when the reporter offered them.

The Village learned about the call from the Kimberly Area School District (KASD), a partner unit of government with which it has a good working relationship that it would like to maintain. Mel Lightner, KASD Superintendent, believed that Grievant's call was part of a harassing pattern of behavior, perpetrated by the Merckx family, in retaliation for the termination of Jamie Merckx's position as football coach, and Grievant's termination as assistant football coach. In fact, Lightner brought the matter to the attention of the Village as he was very concerned about the impact of harassing behavior to which Rietveld had been subjected since the decision to replace the football coaching staff became public. Lightner was of the opinion that the call to the newspaper was part and parcel of a pattern of this behavior that was disturbing and upsetting to Rietveld and his family, as well as to Lightner and the KASD.

Hermus' notes from the investigatory hearing reveal that the Grievant admitted to making the call, but "he did not think it was harassing or slanderous." The notes indicate that the Grievant admitted making the call prior to Hermus' characterization of its content, and that he was consistent in his testimony at hearing and the investigation that he had heard something and wanted to pass it on to the newspaper. He felt that it should be known. Hermus' notes indicate that the Grievant apologized for his "indiscretion", and that he did not mean to raise a fuss with the issue. These notes do not differ significantly from Grievant's testimony at hearing.

Given all of the foregoing, I conclude that the Village has failed to establish that the Grievant was part of a pattern of harassing behavior, or that he was even aware of any of the other actions, of his brother Greg or otherwise. Therefore, I conclude that to the extent the five day suspension rests on the charge of harassment, it cannot be sustained. 2/

2/ Although not cited in the letter of discipline, there was a great deal of testimony regarding remarks the Grievant allegedly made to co-workers after he had placed the call to the Post Crescent. It appears that these alleged comments played a role in the extent of discipline that the Village imposed on the Grievant. As they are not referenced in the letter of discipline, and much of the testimony regarding these remarks was hearsay, the undersigned will not consider them in deciding this grievance. The Village also contends that the comments that the Grievant made after the telephone call created a hostile and threatening environment for his co-employees. As indicated above, the comments to Grievant's co-employees are not referenced in the letter of discipline. Thus, I cannot find that the behavior created a hostile, intimidating or offensive work environment in the Village.

I also reject the Village's claim that the call violated the Personnel Policy's prohibition against creating a hostile work environment for Rietveld. Because Rietveld is not an employee

of the Village and because the Personnel Policy cannot reasonably be interpreted as applying to non-Village work environments, the Village's argument in this regard is not persuasive.

As to the question of whether the Grievant's action constituted "conduct unbecoming an employee of the Village", I conclude that it is. In reaching this conclusion, I agree with the Village that it has an interest in maintaining a good working relationship with the School District. The Village of Kimberly is a big part of the School District that includes several other villages and towns, or parts thereof. The KASD prides itself on having a good relationship with the boards and administrators of these municipalities. The Village and KASD partner through the sharing of facilities, parks, projects. KASD is the fastest growing school district in the State of Wisconsin. As the major part of the KASD, the Village has an interest in ensuring a good relationship and the ability to share information and facilities. The Village has an interest in ensuring that its employees do not conduct themselves in such a way as to harm either the Village or the School District.

The collective bargaining agreement between the Union and the Village provides that gross negligence or willful dereliction of duty constitute immediate cause for suspension. The Village has failed to demonstrate that the actions of the Grievant constitute gross negligence or willful dereliction of duty or that the Grievant engaged in conduct that would otherwise warrant a five day suspension under a just cause standard. However, the Village has established that the Grievant did engage in "conduct unbecoming an employee of the Village." In the context of the Grievant's overall work record 3/, I conclude that a written reprimand is the appropriate discipline. 4/

3/ Grievant's record of employment contains only one prior cause for disciplinary action: an unrelated verbal reprimand issued on June 6, 2003 for being tardy on May 29 and June 5, 2003. Though the Village solicited testimony regarding allegedly improper behavior on the Grievant's part while an employee of KASD, that is not relevant to Grievant's employment relationship with the Village. The letter of suspension references a driving issue. As no discipline was issued in connection with that, it cannot be considered for purposes of progressive discipline.

4/ Although perhaps lacking in common sense, the behavior of the Grievant consisted of one action: making a phone call using a workplace phone. This can, in no way, be compared to the malicious actions described in QUAKER OATS Co., 116 LA 211 (2001), where an employee maliciously ordered numerous magazine subscriptions for supervisors and their families, resulting in harassment and financial obligations. There, the employee professed to be someone else when completing the order forms and initially denied the activity when confronted. Here, the employee told the truth during the call to the newspaper and readily admitted making the call when asked about it.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not have just cause to suspend the Grievant but did have just cause to issue a written reprimand.
2. The Grievant shall be made whole for any wages and benefits he lost and this award shall be placed in his personnel file and serve as the written reprimand.

Dated at Madison, Wisconsin, this 3rd day of December, 2004.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator