

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

COLUMBIA COUNTY

and

COLUMBIA COUNTY EMPLOYEES UNION, LOCAL 995 AFSCME, AFL-CIO

Case 229

No. 62687

MA-12398

(Deich Discipline)

Appearances:

Ms. Ann Deich, personally, and **Mr. David White**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, on behalf of Ann Deich and Local 995.

Mr. Jonathan Swain, Attorney at Law, Lindner & Marsack, S. C., 411 East Wisconsin Avenue, Milwaukee, WI 53202, on behalf of the County.

ARBITRATION AWARD

The County and the Union are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested and the County agreed that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Ann Deich, who is referred to below as Deich or Grievant. The Commission appointed Paul Gordon, Commissioner, to serve as the Arbitrator. Hearing on the matter was held on August 3, 2004 at the County Highway Shops in Wyocena, Wisconsin. 1/ A transcript was prepared. The Union made oral arguments and summations at the hearing. A briefing schedule was established. The County filed a brief and argument on October 12, 2004. The Union did not file a brief or further arguments and the record was closed on October 26, 2004.

1/ The hearing was a joint hearing with another grievance arbitration between the parties, Case 228, No. 62686, MA-12397, involving another employee besides Grievant herein. Both Grievants were involved in the facts and circumstances in both cases.

ISSUES

The parties stipulated to the following issues to be decided:

Did the County have just cause for issuing a three (3) day suspension to Grievant for the incident which occurred on May 21, 2003?

If not, what is the appropriate remedy? May the remedy include both the discipline imposed and the order for counseling and the attendant costs?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHTS

3.01 The management of the Highway Department and direction of the working forces is vested exclusively in the Employer, including, but not limited to, the right to hire, suspend, or demote, discipline or discharge for just cause, to transfer or lay off because of lack of work or other legitimate reasons, to subcontract for economic reasons, to determine any type, kind and quality of service to be rendered to the citizenry, to determine the location, operation and type of the physical structures, facilities, or equipment of the Highway Department, to plan and schedule service and work, to plan and schedule any training programs, to create, promulgate and enforce reasonable work rules, to determine what constitutes good and efficient County service and all other functions of management and direction not expressly limited by the terms of this agreement. The Union expressly recognizes the prerogative of the Employer to operate and manage its affairs in all respects with its responsibilities.

BACKGROUND AND FACTS

The County had in effect at all material times herein the following personnel policy which states in pertinent part.

Sec. 7.02 Sexual Harassment

Harassment, Discrimination, and Retaliation

Statement of Policy

Federal and state law prohibits employment discrimination on the basis of race, color, religion or political beliefs, creed, sex, age, disability, national origin or sexual preference. Among these prohibitions is the harassment of fellow employees. Columbia County is committed to maintaining a place of employment and a work environment that is free from discrimination and any

form of harassment whatsoever. Harassment is unlawful and is conduct that exposes both Columbia County and individuals engaging in harassment to significant liability under the law. Employees at all times should treat other employees respectfully, with dignity and in a manner so as not to offend the sensibilities of a co-worker. Accordingly, Columbia County is committed to vigorously enforcing this Harassment, Discrimination and Retaliation policy at all levels within the Columbia County.

No employee should be subjected to behavior that is personally offensive, which lowers morale or interferes with productivity in the workplace. Each employee has a duty to help maintain a workplace free from harassment. This duty involves refraining from any insulting, degrading, demeaning, or exploitative behavior toward other employees, including sexual harassment.

...

Examples of conduct that would be considered harassment or regarded as retaliation are set forth in the Statement of Prohibited Conduct below. These examples are provided to illustrate the kind of conduct prohibited by this Policy and the list is not exhaustive.

...

Statement of Prohibited Conduct

Columbia County considers the following conduct to represent the kind of acts that violate this Harassment Policy:

Physical Contact of a Degrading, Demeaning or Sexual Nature. This includes:

Any punching, hitting. Slapping, rape, battery, molestation or attempts to commit any such assaults; and
Intentional physical conduct that is offensive or sexual in nature, such as touching, pinching, patting, grabbing, brushing against another employee's body, or poking another employee's body.

...

Other Acts

The above lists do **not contain all** acts prohibited under this Policy. . . .

...

Schedule of Penalties for Misconduct

. . .

The following schedule of penalties applies to all violations of Columbia County's Harassment policy. Where progressive discipline is provided for, each instance of conduct violating the Policy moves the offending employee through the steps of disciplinary action. In other words, it is not necessary for an employee to repeat the same precise conduct in order for more severe discipline to be imposed.

A written record of each action taken pursuant to the Policy will be placed in the offending employee's personnel file. The record will reflect the conduct (or alleged conduct) and the discipline imposed.

Assault

Any employee's first proven offense of assault or threat of assault, including assault of a sexual nature, will result in dismissal.

Other Acts of Harassment by Co-Workers

Acts of harassment, other than assault, will result in non-disciplinary oral counseling for an alleged first offense. A written warning, suspension, or discharge will be imposed for the first proven offense, depending upon the nature or severity of the misconduct. Suspension or discharge will be imposed for the second proven offense, depending on the nature and severity of the misconduct.

. . .

Grievant has been employed in the Columbia County Highway Department for approximately seventeen (17) years and two (2) months as of the time of the hearing. Her job title is paver operator. As of May 20, 2003 she owned a 2002 Dodge Dakota Sport pickup truck. She took the vehicle to work that day at the County shops and parked it in the parking lot next to a grassy area. This was not in a designated parking spot. There were designated parking spots in a different part of the parking lot. She parked two (2) feet from the grassy area. There are telephone poles in that grassy area. When she parked the pickup she left the keys in the ignition and the windows down. She was having a moisture problem on the floorboards, and it was getting a musty smell so she was trying to get it aired out. She left the keys in it so if it rained, somebody could put the windows up. She testified at the hearing to the effect that she would not have a problem with someone moving the pickup, with permission, if they let her know it needed to be moved and they could move it back, or let her know it was moved so that she did not worry where it was when she came in.

Sometime later that day another County Highway Department employee, Gary Paske, was mowing grass in the grassy area near Grievant's pickup. The mower he was using is 61 inches wide. His method of mowing was to blow the grass away from where he has to cut and avoid blowing grass into an area that yet needs to be cut. He also avoids blowing grass into obstructions, such as the telephone poles, so that grass does not get deflected back and hit him in the face. When he approached the pickup truck there was not enough room to cut the grassy area in that manner without blowing grass or possibly debris at the pickup. Without asking permission from Grievant or his supervisor, Paske moved the pickup between 10 to 25 feet, changing its direction. The vehicle was not damaged and he completed his mowing without blowing any grass or debris into or onto the pickup. He did not see or speak to Grievant that day after moving her pickup.

When Grievant returned to the parking lot she did not immediately see her pickup truck. She became unhappy and got a sick feeling in her stomach that her vehicle was gone. At some point in the past she had had a vehicle stolen. She swung around the parking lot in the county vehicle she was in, then walked towards the parking lot and saw her pickup about a minute later. She was upset that someone moved her vehicle without her permission and did not tell her. She felt that whoever moved it did not have a reason to move it. She felt that was against the law, and that the pickup would not be covered by insurance if it were damaged. She was upset enough to go into the office where there were four (4) supervisors and ask them why her vehicle was moved without someone asking her. Two said there should not be any reason people should be moving her vehicle without her permission, without her knowing about it. One said he did not know who did it. The other did not say anything. There were other people in the office at that time. She did not determine that day who had moved the pickup. Grievant did know, generally, that some people's vehicles were sometimes moved in or out of a shed around equipment. She then walked through the tractor shop where County employee Steve Leverich was working. She made a statement, not directed at Leverich, about "we're going to have a big argument tomorrow".

Grievant and Paske have had difficulty with each other in the past. At one point Grievant had been Paske's supervisor. Grievant has expressed dissatisfaction with Paske being hired by the County and Paske has complained to his superiors about how he was treated by Grievant. Paske sometimes tried to avoid Grievant's presence.

The following morning, May 21, 2003, Grievant entered the county shops shelter shed where County employees Tom Jones, Robert Wanat and Tom Killoran were. She asked them if they knew who moved her pickup. Jones and Wanat describe her as mad, Jones particularly from her facial expression. He indicated to her that Paske might have moved it. Grievant then went through a small passage way and into the welding shop. Paske and another County employee were in the welding shop, and the other employee soon left.

Grievant then approached the part of the shop where Paske was putting away tools and asked Paske if he had moved her truck. He said "yes, I did". "I had to cut grass". Paske

started walking toward Grievant and she told him he didn't have a right to be in her truck and he didn't need to move it. They continued to say things about moving the pickup. At this point the testimony of Grievant and Paske differs on who did what. They were very close to each other and speaking. Grievant thought Paske's stomach touched her. Paske denied that. He could feel the spit from her voice on his face. If there was contact it was slight and it is not clear who would be responsible for that. Grievant admits that she was "hollering by that time". Jones, Wanat and Leverich were in adjacent rooms and have consistent testimony of what they heard. Grievant was screaming and yelling at Paske in a very loud, argumentative voice. Their testimony is consistent with Paske's. Grievant was using profanities, including the F word, son of a bitch, damn, and others. She was pointing her finger at him and saying things like: stay out of my F truck; I don't want you around me; I hate you; I just don't think you have a right to do what you have done. Paske turned to leave and was walking towards the tractor room, being careful as he stepped around some equipment due to a knee condition he has. Grievant followed him and stayed very close to him, yelling at him the entire time. Paske turned around, and Grievant was then in front of him. Leverich, who was in the next room and looking through a door window, saw Grievant between the door and Paske, yelling at Paske about her truck, with Paske backing away from Grievant saying "what did I do? What did I do?" Leverich did not see any physical contact between the two during the approximately 30 seconds he observed them. (He heard them longer than that). Grievant contends that Paske pushed her into a welding screen or rack and Paske denies that. The episode lasted about two (2) minutes, with Grievant yelling, screaming, and swearing at Paske for most of that time. Although Grievant describes Paske as "snotty", he did not yell, shout, scream or act confrontational towards Grievant. Jones and Wanat had started to enter the welding shop from the passageway when they heard Grievant yelling and using profanities. They did not hear Paske say anything. After about 20 to 30 seconds they returned to the shelter shed and could still hear Grievant yelling at Paske. They described Grievant's voice as very loud; the loudest ever heard in terms of her voice; very, very loud; never heard a female holler like that; the worst he had ever heard; Wanat was actually scared by Grievant by the way she was "so dang ticked off at Gary" that he didn't want to be around. They waited several minutes for this to stop before entering the welding shop. Leverich described what he heard, from the other direction, in terms of quite loud; not yelling but very loud; screaming; probably not heard anyone scream louder at someone. When Grievant left the welding shop she walked through the tractor shop and Leverich heard her say "There, I feel better now". Jones observed Paske after the incident and he looked "a little shaken up". The incident caused Paske to feel nauseous.

Grievant then went to her supervisor and complained that Paske had pushed her into a welding screen. She was not hurt. She contended, and still does, that she had tried to talk to Paske nicely and that he was hollering at her. The County then investigated the incident. Marc Playman interviewed the witnesses and prepared a report. Assistant Highway Commissioner Theo Boge reviewed the report and recommended to Kurt Dey, the Highway

and Transportation Commissioner, that discipline be imposed. The County was aware of her prior discipline and work record. The County then issued letters of discipline to Grievant and Paske. 2/

2/ The Paske discipline was later revised in part and the County proceeded on that discipline only for the events of May 20, 2003, as referenced in footnote 1, herein.

By letter of June 16, 2003, Grievant was issued a letter of discipline which states in pertinent part:

From the investigation performed by the counties [sic] Risk Manager, Marc Playman, on May 28, 2003, it has been determined that Annie Deich was in violation of Section 7.02 of the Personnel Manual (harassment, discrimination, & retaliation statement of policy) on May 21, 2003. Discipline for these actions will be as follows:

Ann Deich will:

1. Receive a written warning for the violation of Section 7.02 of the personnel Manual.
2. Receive a 3-day suspension without pay.
3. Seek counseling through Employee Assistance Program at the Paquette Center located at 2901 Hunters Trail Portage, Wisconsin 63901. Phone #608-742-5518. Annie must show proof of Compliance in the program along with a doctor's slip showing she was present for each session.

Any future violations under this policy will result in further disciplinary action and may result in discharge.

Grievant was also issued a progressive discipline form which included a **SECOND WRITTEN WARNING or SUSPENSION** which states in pertinent part:

Date of

Incident 05/21/03 **Summary** Ann Deich did not treat a co-worker with respect and dignity in a manner offending their sensibilities and disrupted several co-workers in the process creating a hostile environment, which will not be

tolerated. Ann will receive a 3 day suspension without pay to start June 17, 2003 and end June 19, 2003. She is to return to work on June 20, 2003. See Attached (letter of June 16, 2003).

Grievant has had prior disciplines as a County employee. On December 19, 2002 she was suspended for one (1) day for an incident occurring on 12/11/02 when she demonstrated conduct unbecoming an employee of Columbia County while on duty by showing abusive behavior/language towards an on duty representative of the Town of Pacific. There are prior disciplinary matters which are remote enough in time and different in nature as to have no bearing on the instant case.

Columbia County was the Respondent in an action brought by a former employee, Birkett, before the Wisconsin Department of Workforce Development wherein the County and Boge were found to have discriminated on the basis of sex. In that decision there is a finding of fact that Boge made the statement "I don't know why we hired a woman; we have enough problems with the one we have now". The decision finds that Deich is the other woman working in the field. Boge denies having made the statement.

Other matters appear as contained in the Discussion.

THE PARTIES' POSITIONS

Union

To summarize, the Union argues that Deich is the victim of sexual discrimination because she was disciplined on the recommendation of Theo Bog. He has committed other acts of discrimination based upon sex in a different case decided against him on that point. He doesn't know why the County hired another woman when they already had one (Grievant). He's recommended discipline for Grievant before and has an issue with her. This caused him to feel Grievant lied during the investigations and that Paske's version of the interaction was thus correct. Grievant was truthful during the investigation. She has a relatively loud voice and Paske's is not very loud. Therefore her voice figured more prominently with the witnesses. She disputes being profane. The witnesses, especially in the Marc Playman report, could not recall the specifics on profanities, so the County has not met its burden of proof on that. Boge had no evidence as to how the conversation with Paske started. So the County has not sustained its burden of proof on how this started and what happened. Paske has a close personal zone of operation and the evidence doesn't sustain who bumped into whom. The Playman report is basically he said, she said, and does not exonerate Paske from moving the pickup. Paske got the far lighter discipline and this is disparate treatment.

Not all the witnesses heard Grievant's negative comment about Paske having a job with the County, but it was a commonly held view. To paint Grievant with that broad brush lacks just cause. There may have been a terrible interaction between the two, but Paske has had conflicts with other people whom he has offended and have sworn at him. He reports some of these to his superiors. With 38 years of experience in a meat cutters union his sensibilities should not be so offended as to justify a three (3) day suspension for Grievant. The other matters are trivial. Employees often don't get along with each other. There is no just cause to discipline Grievant.

County

To summarize, neither Boge nor the County discriminated against Grievant. The evidence demonstrates she engaged in highly offensive, insulting, degrading demeaning behavior, and seeks to place the blame on Paske. Grievant has a history of this kind of conduct. She confronted the Town of Pacific representative and was found in violation of Section 7.02 for a one day suspension. Progressive discipline suggests a greater penalty for the May, 2003 conduct.

It is not true, as Grievant claims, that Paske was the aggressor. She approached him and immediately became loud. Paske was afraid of injuring his knees, making it unlikely he would bump or push her. Paske's 38 years as a meat cutters union official gave him an understanding of the consequences of a physical confrontation.

The witnesses support Paske's version and discredit Grievant's. Whether profanities were used or not, her conduct was abusive, intimidating, degrading and demeaning towards a fellow employee.

Grievant's response to Paske's moving her vehicle was out of proportion to what occurred and was an irrational response. The response was somewhat premeditated and motivated by her extreme dislike of Paske. Playman, Boge and Dey reasonably credited Paske's version of the story and progressive discipline needed to occur. This is a repeat violation of the anti-harassment policy. A three day suspension calls attention to the continued seriousness of these outbursts and gives her another opportunity to correct her behavior. This is furthered through County EAP anger management.

DISCUSSION

Because this is a discipline matter the County has the burden of proof. The contract requires that there be just cause for discipline. The issue is did the County have just cause for issuing a three day suspension to Ann Deich for the incident which occurred on May 21, 2003? If not, what is the appropriate remedy?

The contract and the Personnel Policies of record do not define just cause, and the parties have not stipulated to a definition of just cause. The policies and procedures manual sets out in chapter 7 a non-exhaustive list of misconduct and a schedule of penalties. It is appropriate to use the just cause definition which has been applied in prior, recent, discipline grievance arbitrations between the parties. See, COLUMBIA COUNTY (HIGHWAY DEPARTMENT), CASE 233, NO. 63355, MA-12560 (MCLAUGHLIN, 10/7/04). Two elements define just cause. The first is that the employer must establish conduct by the Grievant in which it has a disciplinary interest. The second is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest. This is essentially the same analysis used by Arbitrator Burns in her Award upholding the County's one day suspension of Grievant for a violation of Section. 7.02 in the Town of Pacific incident. COLUMBIA COUNTY (HIGHWAY DEPARTMENT), CASE 226, No. 62301 MA-12230 (BURNS, 7/15/04).

On May 20, 2003 Gary Paske moved Grievant's pickup truck in the county shops parking lot without her permission or the permission of his supervisor in order to mow grass in an area near where Greivant's vehicle was parked with the keys in the ignition. Grievant was upset that her vehicle was moved, but it is not clear that she knew that Paske had moved it until the following morning. Grievant and Paske have not been on good terms since Paske was hired by the County. Commissioner Dey knew that Paske sometimes avoided Grievant when going about his work activities. As reflected in the findings of fact, above, on May 21, 3003 Grievant sought out the person who had moved her vehicle, and upon finding it was Paske, as he himself admitted to her, she engaged in conduct that was insulting, degrading and demeaning in the way she yelled, screamed, hollered and swore at Paske. This was intimidating to Paske and it also intimidated and disrupted the work activities of several other employees who heard the incident. She did not treat Paske with respect and dignity and offended his sensibilities and those of three other coworkers. She did so unreasonably and without a valid reason. There is no credible evidence that Paske bumped or brushed Grievant with his stomach or that he pushed her into the welding curtain.

Grievant could have gone to her superiors and complained about Paske moving her vehicle without getting into a confrontation with Paske. When he admitted he moved it she could have gone to her superiors immediately. Grievant also could have spoken to Paske in a respectful manner. She could have respectfully told him that his conduct upset her, why it did, and informed him not to enter her vehicle without permission. But she did not do either of these things. She may have started the conversation with Paske that way. But it immediately turned into a one sided berating of Paske. She made comments the day before that there was going to be an argument. She was mad when she first saw Jones and Wanat in the morning. She had a longstanding dislike for Paske. And she commented about feeling better after the confrontation. She was the aggressor in the confrontation and any argument that Paske was aggressive or bumped or pushed her are not persuasive. Paske sometimes tried to avoid Grievant due to their prior strained relationship, and does have a knee condition for which he exercises caution in his movements. Between Grievant's version of events and Paskes's version of events, Paske's is the more credible. It is consistent with the testimony of Jones

Wanat, and Leverich. Those witnesses testified with clarity and consistency with each other. They have nothing to gain or lose in this matter. There was no demonstrated bias or hostility shown by any witness towards Grievant, or favoritism towards Paske.

The evidence is compelling that Grievant engaged in the conduct referred to in the letter of discipline as more fully set out above, and the County has sustained its burden on those fact matters. There is no evidence that Grievant is the victim of discrimination based on sex. Her discipline was based on her conduct and Section 7.02. Grievant has not established a course of conduct of sex discrimination against her. Her prior discipline was based on the facts of that discipline and Section 7.02. The statements attributable to Boge in the Department of Workforce Development Decision do not establish discrimination in this case and do not have any bearing on the discipline decision here.

A just cause determination requires the employer to have an interest in the conduct at issue. The contract gives the County the right to create, promulgate and enforce reasonable work rules and Section 7.02 contains such rules. The County certainly has an interest in the working environment and interpersonal relationships among the employees. Section 7.02 recognizes and reflects this. Although the Section is captioned "*Sexual Harassment*", the content of the Section clearly includes conduct beyond sexual harassment. As a statement of overall policy, Section 7.02 states in pertinent part:

Employees at all times should treat other employees respectfully, with dignity and in a manner so as not to offend the sensibilities of a co-worker. . .

No employee should be subjected to behavior that is personally offensive, which lowers moral of interferes with the productivity in the workplace. Each employee has a duty to help maintain a workplace free from harassment. This duty involves refraining from any insulting, degrading, demeaning or exploitative behavior toward other employees, including sexual harassment.

There is a statement of prohibited conduct which is non-exhaustive but lists many types of conduct. Although the specific conduct of Grievant is not contained in the list, her conduct fits squarely into the general policy statement and violated that policy. Grievant's confrontation with Paske offended Paske's sensibilities and those of the witnesses. That is evidenced by their reactions and characterization of Grievant's conduct as well as their avoiding the work area where Grievant was confronting Paske. That is an interference with the productivity in the workplace. The County has established a disciplinary interest in the conduct.

Grievant argues that Paske has been sworn at by others and that his 38 years of union experience somehow means he was not or should not have been offended. But that does not mean that Grievant's conduct was not a violation on Section 7.02. The suggestion that

Grievant's conduct is in any way normative or that any employee should have to be subjected to that is not reasonable and not persuasive. Certainly there are occasional sharp exchanges or arguments that occur between employees. These often do not rise to the level of Grievant's conduct. Her conduct was described by some witnesses as the worst they had heard. And even lesser intense incidents of employee arguments sometimes result in discipline, as was testified to by some of the witnesses. Whether other employees share a similar view of Paske's employment status does not give Grievant, or anyone, the right to violate Section 7.02.

Even if Paske has violated a work rule or policy by moving Grievant's vehicle, that would not give her the right to violate the policies herself. The policies are in place for her protection as well. She could have invoked the discipline process against Paske by complaining to her supervisors about moving the vehicle. To be sure she did so, but only after she violated the policy and complained about being pushed into the welding curtain.

The County has also established that the discipline imposed reasonably reflected its disciplinary interest. This is the second violation of Section 7.02 within a year and the type of conduct if each violation is similar. The first violation resulted in a one (1) day suspension which was upheld through grievance arbitration. Section 7.02 contains a progressive discipline provision which the County has followed here. A three (3) day suspension should impress upon Grievant the serious nature of her actions and their ramifications. It is also reasonable and appropriate to require her to attend the County EAP anger management sessions to help her in the workplace and correct conduct which has twice resulted in discipline. She admitted she was upset about her vehicle being moved. She said the day before there was going to be an argument. She appeared mad just before the confrontation. After the confrontation she said she felt better. She did not manage her anger well. This was in a work setting. The counseling sessions give her an opportunity to conduct herself in the workplace without intimidating, insulting degrading or demeaning others, and to avoid further incidents of discipline being imposed on her.

Accordingly, based upon the evidence and arguments in this case, I issue the following

AWARD

The grievance is denied. The County had just cause for issuing a three day suspension to Ann Deich for the incident which occurred on May 21, 2003. No remedy is made in that all elements of the discipline are reasonably related to the County's disciplinary interest.

Dated at Madison, Wisconsin, this 11th day of January. 2005.

Paul Gordon /s/

Paul Gordon, Arbitrator