

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
TEAMSTERS, CHAUFFEURS AND HELPERS UNION LOCAL 43

and

TOWN OF BURLINGTON

Case 14
No. 63067
MA-12491

(Laura Peek Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Nathan D. Eisenberg**, 1555 North RiverCenter Drive, Suite 202, Milwaukee, Wisconsin 53212, on behalf of the Union.

Long & Halsey Associates, Inc., by **Attorney Victor J. Long**, 8330 Corporate Drive, Racine, Wisconsin 53406, on behalf of the Township.

ARBITRATION AWARD

Teamsters, Chauffeurs and Helpers Union Local 43 (herein the Union) and the Town of Burlington (herein the Town) have, at all times pertinent hereto, been parties to a collective bargaining agreement covering the period January 1, 2001, to December 31, 2001, and continuing from year to year, which provides for binding arbitration of certain disputes between the parties. On December 9, 2003, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding the suspension of bargaining unit member Laura Peek (herein the Grievant). The parties selected the undersigned to arbitrate the issue from a panel of staff members provided by the Commission. A hearing was held on June 15, 2004, and the proceedings were not transcribed. The parties filed their briefs on July 26, 2004, whereupon the record was closed.

ISSUES

The Union would frame the issues as follows:

Was the Grievant, Laura Peek, disciplined for just cause?

If not, what is the appropriate remedy?

The Town would frame the issues as follows:

Did the Town violate the Collective Bargaining Agreement by suspending Laura Peek for three days without pay with just cause?

If so, what is the remedy?

Having reviewed the record and the parties' submissions, the Arbitrator adopts the issues as framed by the Union.

PERTINENT CONTRACT LANGUAGE

**ARTICLE IV
MANAGEMENT RIGHTS**

Except as otherwise provided herein, the management of the operations and the direction of the working forces, including the right to hire and the right to suspend, discipline or discharge for just cause, the right to transfer, promote or relieve employees from duty because of lack of work or other legitimate reasons, the right to establish and make effective reasonable rules of conduct and the assignment of employees to a job, is vested in the Town, together with all other functions of management, with the understanding that such rights of management will not be used for the purpose of discrimination against any employee.

. . .

**ARTICLE XX
DISCIPLINE AND DISCHARGE**

Any employee may be dismissed or otherwise disciplined for just cause. Any disciplinary action taken by the Town may be reviewed by use of the grievance procedure.

Written reprimands (not suspensions) will be removed from an employee's personnel file one year from the date of the written reprimand, if there are no additional reprimands for a similar infraction.

BACKGROUND

Laura Peek is a Dispatcher for the Town of Burlington Police Department, which maintains its headquarters at one end of the Town Hall building. The Town's administrative offices are located at the other end of the building. Peek is under the direct supervision of the Chief of Police, but also is directed by the Town Administrator for certain administrative duties. On January 29, 2003, Peek received a written reprimand from the Town Board for a variety of acts committed during late 2002 and early 2003 (Employer Ex. 3). Peek did not grieve this reprimand.

Subsequent to receiving the written reprimand, Peek was involved in a number of incidents later in 2003, wherein her behavior was deemed by her superiors to be inappropriate. As a result, on September 12, 2003, Peek received a letter from the Town suspending her for three days for various misconduct. The text of the suspension letter is as follows:

. . .

A variety of complaints with respect to your employment with the town have again come to my attention. It appears as if rather than choosing to comply with the terms of my January 29, 2003 correspondence, that you have chosen to circumvent the town's requests wherever possible.

I will attempt to summarize the various complaints in chronological order. This is not a comprehensive list, but simply touches on the various concerns, and continuing problems that we seem to be having.

March 20, 2003 - You slammed a door because Diane Baumeister did not have Philor Vicki Peterson's work number. It is not the administrator's job to supply you with phone numbers. It is not appropriate for you to slam doors no matter how upset you may be.

March 20, 2003 - You requested of Ms. Baumeister the owner of certain property. When the administrator did not have this information, you questioned why the town did not. You were instructed that Linda Vos would have this information. You then shouted down the hallway to the person who was requesting the information, then abruptly left. Again, it is not the administrator's job to supply you with this information. Your behavior was inappropriate.

- April 2, 2003 - You demanded that the town's cleaning people do a better job. When Mr. Baumeister informed you that it was being addressed, you made a comment to the effect that the town would talk about it in closed session "like you did about me." Again, the administrator does not answer to you, and your behavior was inappropriate.
- April 15, 2003 - You questioned Ms. Baumeister about the procedure for enforcement of an ordinance in the presence of a resident who had just made a complaint, instead of following up on the complaint with the police department. It is not your position to interrogate the administrator, and it not the administrator's job to issue instructions about enforcement of ordinances. As dispatcher, you should realize the enforcement is generally handled by the police department or the building inspector.
- April 17, 2003 - You questioned Diane Baumeister extensively about availability of health insurance. When Ms. Baumeister informed you that she did not wish to discuss it anymore, you became defensive, began lecturing her that it was discrimination, and advised Ms. Baumeister that she "had better wake up and help herself." You suggested that Diane was collaborating with the town to discriminate against you. Your tone was condescending, intimidating, and harassing. It is entirely inappropriate for your [sic] to "interrogate" the town administrator. You are entitled to obtain documents with a legitimate Open Records request, but as the interpretation of these documents, that is up to you. Ms. Baumeister does not answer to you in any way, fashion or form. As a consequence of this behavior, Ms. Baumeister felt is [sic] necessary to issue a memorandum to Chief Mehring on April 21, 2003 requesting that you not be allowed on the north end of the building during working hours, without a specific need based upon town work.
- May 9, 2003 - Supervisor Joan Boehm questioned you during work hours as to the whereabouts of Lieutenant Sevick. Ms. Boehm indicates that your response was sarcastic, that you did not have the courtesy to stop what you were doing, but continued flipping through papers on your desk with your back to Ms. Boehm. Ms. Boehm indicated that she did not appreciate you talking to her like that, to which you replied you didn't appreciate Joan Boehm "lying about her." Your general demeanor was rude and inappropriate.

- May 23, 2003 - You mad rude comments to town clerk Heidi Streiff with respect to sorting the mail. Ms. Streiff is concerned that she cannot talk to you with either being ignored or having snide remarks made.
- July 24, 2003 - You again confronted Diane Baumeister about documentation of an incident which occurred on July 10, 2003. Ms. Baumeister instructed you that certain notes were made, but that there was no "report." You demanded that Diane Baumeister further document an incident which took place on or about July 10, 2003. The administrator is not required to "document" any particular incident, and certainly not at your demand. You certainly have no authority to instruct the town administrator to perform any particular function, including preparation of "incident reports."

The front office personnel indicate that you continue to appear for non-work related matters during working hours, despite the fact that you have been instructed not to come to that end of the building. You have stated to them you are on your break, but we are also aware that you taking extensive "smoking" breaks, which would put you well beyond 15 minutes. Additionally, Chief Mehring reports that you continue to show up late on a regular basis. Further, your breaks are still work hours, and this does not give you the right to violate the specific instructions to stay away from that end of the building. You are using work hours for personal use, which is generally designed to harass, disrupt and intimidate the front office personnel. The request that you not come to that end of the building holds true for all work hours, including any breaks you take during the day.

There are other reports of numerous incidents of inappropriate demands, accusations, stomping and slamming doors, rude and inappropriate commentary and tones of voice, and other disruptive behavior.

Your behavior continues to be inappropriate, and your attitude is poor. There is a great deal of concern at every level in the town not only as to how if [sic] affects the operation of the town itself, but how it appears to the residents with whom you come face to face. While you may be dissatisfied with your employer, this does not give you the right to act in this manner during working hours.

Please take this notice that your [sic] are hereby administratively suspended for three days, without pay, effective September 23 through September 25, 2003.

Be advised you have the right to discuss this matter with your union representative, and you may feel free to have him contact my office.

If you have any questions or concerns, please feel free to contact me by telephone or e-mail.

. . .

On September 26, 2003, Peek filed a grievance challenging the discipline. The matter proceeded through the contractual steps without resolution, resulting in this arbitration. Additional facts will be referenced, as necessary, in the discussion section of this award.

POSITIONS OF THE PARTIES

The Town

Between March 20, 2003, and the time of the suspension letter, Peek engaged in numerous acts of misconduct or otherwise inappropriate behavior. At various times, she was rude and/or insubordinate to her superiors. At other times, she was rude to members of the public. On one occasion, Town Treasurer Debra Weiss wrote to the Town Board about her concerns in regard to an incident between Peek, herself and Town Administrator Diane Baumeister regarding dog licensing regulations (Employer Ex. 4). Later, Baumeister also wrote the Board and the Chief of Police regarding a separate incident and requested that Peek be barred from coming to the administrative wing of the Town Hall unless necessary (Employer Ex. 1). As a result, Peek was instructed by the Chief that she was not to go to the administrative wing for non-business related reasons (Employer Ex. 2). The Chief also testified that Peek was late to work on 35 occasions during the period between January and August, 2003.

Any contention that Peek had insufficient notice of the foregoing problems is without merit. The Chief's April 23, 2003 memo ordering Peek not to go the administrative wing makes it clear that there were problems with her behavior. Further, the January 29 reprimand makes reference to numerous instances of misconduct similar in nature to those resulting in the suspension, including tardiness, rude behavior and problems with the administrative personnel. The similarity in the incidents recorded in the reprimand and the suspension letter are inescapable, such that Peek cannot have failed to be aware of the behaviors that needed correction and what she needed to do to improve. She did not heed the warnings or amend her behavior and the discipline rendered was appropriate. The grievance should be denied.

The Union

The Union observes that in a discipline case the burden of proof is on the employer to prove just cause for the issuance of discipline, which includes both proving that the employee committed the acts alleged and that the discipline imposed was appropriate to the offense. In this case, the Town cannot show that the discipline was appropriate, so the grievance should be sustained.

Arbitrators have long acknowledged the “seven tests” approach for determining when just cause exists, which include a requirement of due process. These tests require that the employee be forewarned of the possible disciplinary consequences of his or her conduct and also that the discipline be timely. Many arbitrators will overturn discipline, even where otherwise warranted, where these criteria haven’t been met. Here, the Town provided no notice of misconduct contemporaneously with the Grievant’s actions. The suspension letter, issued September 12, 2003, referred to eight separate incidents going back to March 20. In none of the instances was the Grievant given any warning at the time the incident occurred, or at any other time prior to the suspension. Further, there was no documentary evidence to back up Chief Mehring’s claims that the Grievant took too many breaks or was habitually tardy and the Chief admitted that he hadn’t even calculated the Grievant’s attendance prior to preparation for the hearing.

There is no justification for disciplining Ms. Peek for six months of infractions based on one summary letter of suspension. Essentially, the Town built up a case against the Grievant over a period of months, never giving her notice of wrongdoing or a chance to correct her behavior, and then only issued discipline after it had sat on the information for months. This gave Ms. Peek no opportunity to defend herself. Further, there is no way to tell from the letter which offenses carried greater weight in the Town’s decision-making and many of the complaints are trivial.

It should also be noted that none of the various incidents catalogued in the suspension letter would, in and of itself, justify discipline. None of the complaints relate to job performance, but merely state that she was rude or sarcastic when dealing with other people. The Town cannot legislate politeness. Also, many of the complaints deal with legitimate work-related questions raised by the Grievant. She cannot be disciplined for asking legitimate questions. She also raised other legitimate issues regarding health insurance and building security. To allow discipline for this would chill the rights of bargaining unit members to raise legitimate issues in the workplace. There are no allegations that the Grievant was insubordinate, that her conduct hindered the operations of the Town, or that her own work performance was unsatisfactory. The individual incidents are all minor, petty events which do not qualify for discipline. Neither does the Town’s effort to store them up and lump them together in order to make a sufficient case. The grievance should be sustained.

DISCUSSION

The incidents and behaviors that resulted in Laura Peek's suspension are adequately set forth in the suspension letter, entered in the record as Joint Exhibit 2 and quoted above. At the hearing, the Town offered testimony corroborating the various allegations from Police Chief Michael Mehring, Town Administrator Diane Baumeister, Town Treasurer Debra Weiss, Town Clerk Heidi Streiff and Town Supervisor Joan Boehm. The Union offered no rebuttal testimony, so the evidence presented by the Town regarding the Grievant's alleged misconduct stands uncontroverted.

Indeed, in its brief, the Union does not seriously dispute the truth of the Town's allegations, although it does raise objections to the fact that, although the Town listed habitual tardiness as one basis for the discipline, it never informed the Grievant of the times and dates she was late prior to the hearing. Instead, the Union maintains that the Town did not have just cause for the discipline on two primary grounds. First, the Union contends that the Grievant was denied due process by the Town's handling of the discipline procedure – specifically in that the Town stored up a series of incidents over a number of months and issued the discipline based on the cumulative wrongdoing. In so doing, it failed to notify the Grievant in a timely fashion of her misbehavior and thus deprived her of an opportunity to correct her conduct. Furthermore, the discipline is too remote in time from the misconduct. Second, the Union contends that discipline should not have been issued for a course of conduct where no individual incident was sufficiently onerous to warrant discipline.

The first question, therefore, is whether the Grievant received due process in the issuance of discipline. Certainly, there is an obligation on the employer to give the employee timely notice of wrongdoing to allow him or her to correct his or her behavior. PINE LAWN MEMORIAL PARK, CASE 4, No. 63147, A-6098 (MAWHINNEY, 5/10/04); BROWN COUNTY (SHELTER CARE), CASE 663, NO. 61313, MA-11890 (NIELSEN, 8/18/03) Having said that, there are a number of troubling aspects to the manner in which the Town proceeded against the Grievant. In the first place, the Town apparently documented the Grievant's wrongful behavior, but never confronted her at the time of the incidents. The testimony of both Chief Mehring and Administrator Baumeister indicated that the Grievant was never told that her behavior was inappropriate at the time the events took place. The exception is the letter from Mehring to Peek on April 23, 2003, following an April 17 confrontation with Baumeister, wherein he instructed her that she should not go to the administration side of the Town Hall building except on official business (Employer Ex. 2). The Town asserts that this memo put Peek on notice that her behavior was inappropriate. The wording of the notice, however, while referring to the confrontation with Baumeister, does not indicate that it is a reprimand, nor does it assess fault for the incident, but could be construed as only a work directive designed to forestall future problems. Thus, standing alone, it is difficult to conclude that the suspension, without any forewarning, comported with the requisite level of due process.

Set against this is the fact that the Grievant had received a written reprimand on January 29, 2003, less than nine months prior to the suspension (Employer Ex. 3). The reprimand is significant in two respects. First, it also was based on a series of incidents taking place between November, 2002, and January, 2003, rather than a single act. Secondly, the types of conduct for which the reprimand was issued are remarkably similar to the matters raised in the suspension letter. The itemized behaviors include giving unsolicited legal advice, throwing temper tantrums, leaving the workplace without permission, loitering in the administrative area without legitimate reason and tardiness. Inasmuch as the Grievant did not grieve the reprimand, the veracity of the allegations may be taken as acknowledged. The concluding paragraphs of the reprimand state, in pertinent part:

. . .

These actions on your part are unacceptable. First the board expects that you will behave in a professional manner with the public, with board members and with Chief Mehring from this point forward. During working hours, outbursts will not be tolerated. Foul language will not be tolerated. Further, as you are a representative of the township, we would expect that your behavior during non-working hours, but at the town hall, also accord with general tenets of professionalism.

Second, the town expects that you act within the scope of your duties as dispatcher. Giving legal and flooring advice, and spending inordinate amounts of time in the front office during working hours is unacceptable. This is beyond the scope of your duties. . . .

. . .

Third, it is expected that you will report to work in a timely fashion, and leave work at the appropriate time. Further, you should not be leaving the office and your duties without appropriate permission, or a compelling reason within the scope of your duties.

. . .

In the wake of this reprimand, it is difficult to imagine that the Grievant could have been unaware that rude behavior, emotional outbursts, unwanted loitering in the administrative area and habitual tardiness were unacceptable and would not be tolerated. Further, having been disciplined once for this type of conduct, it should have come as no surprise to her that a continuation of the behavior would result in further discipline. Notwithstanding that the Grievant was not immediately confronted about each incident, therefore, I do not find that such was a violation of due process. 1/

1/ I note also that the Grievant chose to stand mute at the hearing rather than to challenge the allegations made by the Town. That tactic, along with the thrust of the Union's argument, reveals that her defense does not rest on denying the conduct. This undercuts one of the primary due process concerns, which is that remoteness in time deprives the employee the opportunity to effectively defend against the charges. There is nothing in the record to indicate that the Grievant denies the allegations as set forth in the suspension letter.

The second question challenges the Town's approach of basing discipline on a cumulative list of misbehaviors, rather than one incident. As the Union states in its brief:

“Where the individual reasons provided by the Town fail to show just cause, so too must the effort to lump all the different incidents together in order to manufacture a basis for discipline.”

Union brief at 12.

The Union cites no authority in support of this proposition, but, whatever the merits of the argument generally, I do not accept the underlying premise. That is, I find that there are allegations within the suspension letter which, in and of themselves, are sufficient to support discipline. At the hearing, the Chief testified that his investigation determined that the Grievant was tardy at least 35 times in the eight months leading up to her suspension. There can be no question that an employer has a right to discipline an employee who is habitually tardy without excuse. Likewise, an employer has a right to expect an employee in the Grievant's position to behave politely and professionally toward the public, her co-workers and her superiors. Nevertheless, there were no fewer than eight documented incidents of rude and/or inappropriate behavior leading up to the suspension despite the fact that the Grievant had recently been reprimanded for just such behavior. In my opinion, either of these offenses, regardless of the number of incidents, would be sufficient to justify further discipline.

Clearly, the reprimand did not impress upon the Grievant the seriousness of her behavior or the need to amend it. Within a scheme of progressive discipline, the next logical disciplinary step after a reprimand is a suspension. I am mindful, however, that the level of discipline imposed was most likely influenced by the number of offenses cited in the suspension letter. That is to say, had the Grievant been immediately confronted for the first violation, a one-day suspension would probably have been all that would have been imposed or warranted. To that extent, I believe it does an injustice to the Grievant to impose an increased level of discipline for multiple incidents of misconduct when the employer had the power to interdict the behavior after the first occurrence. Thus, for the reasons set forth, and based upon the record as a whole, I hereby enter the following

AWARD

The Grievant, Laura Peek, was disciplined for just cause, but the level of discipline is mitigated by the employer's handling of the disciplinary process. Therefore, the three-day suspension is reduced to one-day and the Town is ordered to compensate Ms. Peek accordingly.

Dated at Fond du Lac, Wisconsin this 10th day of February, 2005.

John R. Emery /s/

John R. Emery, Arbitrator