

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**LOCAL 1287-A ROTHSCHILD VILLAGE EMPLOYEES**

and

**VILLAGE OF ROTHSCHILD**

Case 19  
No. 65778  
MA-13323

(Zemke Grievance)

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**Appearances:**

**Mr. John Spiegelhoff**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1457 Somerset Drive, Stevens Point, Wisconsin 54481, appearing on behalf of Local 1287-A.

**Mr. Neil Tourney**, President, Village of Rothschild, 310 Edgar Avenue, Rothschild, Wisconsin 54474, appearing on behalf of Memorial Medical Center.

**ARBITRATION AWARD**

AFSCME Local 1287-A, hereinafter "Union," and Village of Rothschild, hereinafter "Village," mutually requested that the Wisconsin Employment Relations Commission assign an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot was assigned the dispute. The hearing was held before the undersigned on June 12, 2006 in Rothschild, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on September 4, 2006, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

**ISSUES**

The parties stipulated that there were no procedural issues. The Union framed the substantive issues as:

Did the Village of Rothschild violate the collective bargaining agreement when it issued a written disciplinary notice on February 16, 2006 to Mr. Rex Zemke? If so, what is the appropriate remedy?

The Village declined to frame the issue leaving it to the arbitrator to determine, although in addition to discussing the discipline issued, it argued in its brief that the Union was without authority to challenge the Village enacted work rules.

After considering the arguments of the parties and the evidence, I accept the Union's framing of the issue.

**RELEVANT CONTRACT LANGUAGE**

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**ARTICLE 3 - MANAGEMENT RIGHTS**

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Section 1. The management of the business of the Village and the determination and direction of the working force including the right to play, direct and control Village functions; to schedule and assign work to employees; to determine the means, methods, processes, materials, and schedules; to maintain the efficiency of employees; to establish and require employees to observe Village rules and regulations; to hire, lay-off, or relieve employees from duties; to maintain order, suspend, demote, discipline, and discharge employees for just cause, are the rights solely of the Village, its Board of Trustees, and President.

Section 2. The foregoing enumeration of management rights of the Village shall not be deemed to exclude other rights not specifically set forth and, therefore, retains all rights not otherwise specifically provided in this Agreement.

Section 3. The Village agrees there shall be no infringement of any employees' rights provided in this Agreement and will adhere to the provision of this Agreement.

Section 4. The Union has the right to appeal through the grievance procedure for any or all of the foregoing.

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Section 6. The Village has the right to establish reasonable work rules. The Village will notify the Union, through its authorized representatives, of any proposed rules at least two weeks prior to the time the new rules will become effective. At any meeting held to consider such rules, the Union through its authorized representatives, will be allowed to make its position

known on the proposed rules or changes. The Village, however, reserves the right to establish work rules for day-to-day operations.

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#### ARTICLE 6 – GRIEVANCE PROCEDURE

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Section 3. If the matter remains unsettled, it shall be submitted to arbitration. Either party may request the Wisconsin Employment Relations Commission to appoint an arbitrator who shall be a member of the Commission staff. The arbitrator appointed shall set a meeting date to hear the dispute and his/her finding and decision shall be submitted in writing to the parties and it shall be final and binding upon the parties. The costs of the arbitrator, if any, shall be divided equally between the Union and the Employer.

Section 4. The Union shall have the right to have present, the aggrieved employee and any other Union representatives at all meetings for the purpose of resolving said grievance. Grievances shall be presented for adjustment without fear of penalty to the employee aggrieved. No employee shall be caused to suffer loss in pay during regular working hours, on account of carrying out the provisions of this grievance procedure.

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#### BACKGROUND AND FACTS

The Grievant, Rex Zemke, is a nine-year employee of the Village in the capacity of Truck Driver/Laborer/Forester/Groundskeeper. His supervisor is George Peterson.

The Grievant is a certified arborist and has held such certification since before 1995. Although it is not a job requirement for the Grievant to hold this certification, between ten and 20 percent of his job duties relate to arborist functions. In order to maintain his certification, he must complete hours of continuing education annually. The Grievant has utilized attendance at a forestry conference at the Village's expense to maintain his license for the last 9 years. Prior to 2000, the Grievant presented his requests to attend the conference directly to the Village Board for approval at the direction of then DPW Administrator Jim Hahn. When Peterson became the administrator in 2000, the approval process changed and the Grievant was expected to submit his request to Peterson. From 2000 to 2004, Peterson approved the Grievant's request. In 2005, Peterson denied the Grievant's request. As a result of the denial, the Grievant appealed to the Village Board. The issue was placed on a Village Board agenda and the Board approved Zemke's 2005 attendance.

The Grievant submitted a request to Peterson to attend a Forestry Conference in Green Bay, Wisconsin during the Spring of 2006. Peterson denied the request.

During January 2005 and prior to a Village Personnel Committee meeting, the Grievant initiated a telephone call to Personnel Committee Chair Arlene Paulson regarding the denial of his request to attend the Forestry Conference. The Grievant told Paulson that he believed he was being harassed by his supervisor Peterson and Village President Neil Tourney as it related to the denial of his conference attendance request and that he was considering hiring an attorney. Paulson understood the intent of Zemke's telephone call was to solicit her support toward his attendance at the conference. Zemke did not use profanity, words of disrespect or voluble voice when speaking to Paulson. In addition to Paulson, the Grievant telephoned the other two members of the Personnel Committee and spoke with them. No evidence was submitted indicating he used profanity or was disrespectful when speaking with either of them.

The Village Personnel Committee voted to deny Zemke's appeal of his supervisor's denial to attend the conference. The Grievant requested that his denied conference attendance be placed on the next scheduled Village Board meeting agenda. Members of the Village Board initiated contact with the Grievant to discuss his conference attendance request. The Grievant's request was granted, the issue was placed on the agenda and the Board voted, 4-2 to approve the Grievant's conference attendance.

On February 16, 2006 the Grievant was issued the following memorandum:

To: Rez Zemke – Personnel File

From: Neil C. Tourney, President  
Arlene Paulson, Chairman of Personnel  
George O. Peterson, Administrator of Public Works

Subject: Written Reprimand

Rex Zemke received a written reprimand for a repeat violation of the conduct provision of the departments general work rules contained in Policy Memo #1, dated March 10, 2004. This reprimand follows the counseling session between Rex Zemke and Village President Neal C. Tourney.

The specific violations include item 11 of the conduct provision, which states, "Employees shall not "seek out" one or more elected officials in order to persuade them to vote in a given fashion or to influence department operations", and item 3 of the insubordination provision, which states "Employees shall not threaten, intimidate, coerce or harass another employee or supervisor at any time."

Attendance at seminars is a decision made by the respective department heads. It is not a decision that involves the entire Village Board because they are not current as to how the Village will derive benefit from attendance at a seminar, nor are they current with the employee's job performance. The Boards input is concurrence with the department heads decision by approving or denying the payment of expenses.

Mr. Zemke's calling of several Village Board members to obtain their approval to attend a seminar is not acceptable and is a violation of the above referenced policies. The extent to which the conversations went, and the comments made by Rex Zemke were interpreted as threats.

As stated in the policy memo, disciplinary action can be expected to violation of the rules. This memo is being placed in his Personnel file to document to the fact that Rex Zemke received a written warning. He also was advised that future violations of the policy code would result in progressively more serious levels of discipline, up to, and including, termination.

### **DISCUSSION**

The Grievant was disciplined for violating two sections of the Village Work Rules. The Union challenges the existence of the Work Rules and asserts that just cause was lacking. Thus, the preliminary question is whether the Village Work Rules were in effect when the Grievant was disciplined.

The parties' collective bargaining agreement in Article 3, Section 6 provides that:

The Village has the right to establish reasonable work rules. The Village will notify the Union, through its authorized representatives, of any proposed rules at least two weeks prior to the time the new rules will become effective. At any meeting held to consider such rules, the Union through its authorized representatives, will be allowed to make its position known on the proposed rules or changes. The Village, however, reserves the right to establish work rules for day-to-day operations.

The Village distributed Work Rules in July 2003 and informed the employees that they were "in effect" without first providing them to the Union for comment. After the Union pointed out that the two week notice period had not been fulfilled, the Village withdrew the Work Rules. No Union employee submitted any comments to the then distributed Work Rules. In January 2004, Peterson re-distributed Work Rules to the employees in his department, including the Grievant. In February 2004 he reviewed the Work Rules with the employees in meeting.

While management generally retains the right to implement work rules, it is not always the case, as it is here, that the Union has the contractual right to notice and a response period. Having said that, the language of this section does not state nor require that the Union acquiesce to the work rules before they become effective. Rather, the language only requires the Village to provide the Union with two-weeks notice and an opportunity to comment. Accepting the Union witness' testimony that that January 2004 distributed document contained the notation "DRAFT", that is exactly what the Village was required to distribute. The language of Section 6 provides that a proposed or draft document must be distributed and thereafter, if a meeting is held, employees are entitled to voice their position. Once that two week time period had expired, the Rules were in effect. The Village complied with the language of Section 6. Given this, I conclude that the Village fulfilled its Article 3, Section 6 obligations and the Work Rules, as distributed, were in effect at the time of the Grievant's discipline.

The Union points out that the employees did not sign the Work Rules. Usually, employees are asked to sign a document indicating that they have received the employer's work rules. This occurs to alleviate any questions when an employee is subject to discipline as to whether the employee knew or should have known that his or her behavior was inconsistent with the employer's expectation. The Village did not produce a document indicating that the Grievant had received the Work Rules, but the record establishes that the Peterson reviewed the Rules during an employee meeting and the Grievant testified that he had received the Rules.

Having concluded that the Work Rules were in effect and that the Grievant was aware of the Work Rules, I move to the discipline. The Grievant received a written warning for violating two Work Rules. The first Work Rule that the Grievant was found to have violated is located in a section entitled, Conduct, and expects that employees will not "'Seek Out' one or more elected officials in order to persuade them to vote in a given fashion or to influence department operations."

This Work Rule appears to deny employees the right to offer their opinion directly to a Village Board members on voting or department operations issues. I decline to address the constitutionality of this rule. Rather, accepting that the Rule is enforceable on its face, the discipline imposed is not sustainable.

The Grievant was disciplined for contacting Board members regarding his supervisor's denial of his conference attendance and his desire to appeal. The Village appears to base the discipline on the Grievant's self-initiated discussions with Village Board members regarding his conference attendance concluding that he was "seeking out" the board members. The problem with this part of the discipline is the Village was willing and gave tacit approval to the Grievant's method of appealing his supervisor's decision to deny him attendance at the conference.

The Village Work Rules were in effect when the Grievant requested attendance for the 2005 conference. The record is void of what process the Grievant followed after his supervisor's initial denial, but the issue was ultimately addressed by the full board and the Grievant was not disciplined for his appeal pursuits. The Grievant is the only likely individual that would have pursued appeal to the full board and he would have had to do so by making contact with at least one board member to request inclusion on the agenda. The Grievant's behavior in 2006 is sufficiently similar to his behavior in 2005. It was reasonable for him to have concluded that it was acceptable, condoned and above reproach for him to solicit support from individual Village Board members given that they were scheduled to vote on whether he would attend the conference.

The Grievant was very persistent with Personnel Committee members and Board members, making telephone calls and engaging in face-to-face discussions regarding the merits of his conference attendance. It is possible that the Grievant began to annoy board members on an issue that although it was important to him, it was not important in the grander scheme of Village business. If this was the case, then it was incumbent on the Village to inform the Grievant of the parameters to acceptable behavior.<sup>1</sup>

The Village argues to this Arbitrator the merits of the Grievant's attendance pointing out that the percentage of time that the Grievant performs work associated with the arborist certification is limited. While this may be true, it is not relevant in determining whether the discipline was proper. The fact of the matter is the Grievant has attended this conference for nine years. The process for gaining approval has also changed over that time period, but prior to and after the intervening first step of submitting the request to his supervisor, the Village afforded the Grievant the option to include his request on a Village Board agenda.

Moving to the second basis for discipline, Work Rule three in the Insubordination section states that "[e]mployees shall not threaten, intimidate, coerce or harass another employee or supervisor at any time." The Village maintains that the Grievant harassed, intimidated and threatened Village Board Member Arlene Paulson during his telephone conversation with her prior to the Personnel Committee meeting and likely after the Personnel Committee meeting, but before the Village Board meeting. Paulson also testified that that she believed the Grievant threatened and/or harassed board members and that she perceived it to be a threat when Zemke told her that he was considering hiring an attorney.

The record establishes that the Grievant did not use profanity or raise his voice during his conversation with Paulson or other members of the Village board. There is no evidence or assertion by the Village that the Grievant directed any inappropriate, threatening, intimidating, coercive or harassing statements to Peterson or Tourney. Assuming *arguendo* that I accept that Paulson and the other board members are supervisors within the meaning of the Work

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<sup>1</sup> This contradicts Paulson's testimony on cross-examination that the Grievant had "every right to call Board members."

Rule, the evidence fails to show that the Grievant engaged in threatening or harassing behavior.

There is no question that Paulson viewed the Grievant's statement that he was considering pursuing legal action as a result of Peterson and Tourney's behavior as a threat. She testified so. And, while it may be a threat, it is also a right to which the Grievant is entitled. I am unwilling to allow an employer to discipline an employee for informing his employer that he intended to exercise his legally protected rights, even if such an exercise was inconsistent with the interests of his employer.

**AWARD**

1. Yes, the Village of Rothschild violated the collective bargaining agreement when it issued a written disciplinary notice on February 16, 2006 to Mr. Rex Zemke.

2. The appropriate remedy is to expunge the Grievant's personnel file of the written reprimand issued on February 16, 2006.

Dated at Rhinelander, Wisconsin, this 30th day of November, 2006.

Lauri A. Millot /s/

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Lauri A. Millot, Arbitrator

