BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 796-B, AFSCME, AFL-CIO

and

CITY OF OSHKOSH

Case 360
No. 66654
MA-13593

Appearances:

Mary Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

William Bracken, Labor Relations Coordinator, Davis & Kuelthau, appearing on behalf of the City.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2004-2006 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve the grievance of Laurin Hoffman. A hearing was held on May 8, 2007, in Oshkosh, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on July 23, 2007.

ISSUES

The City raises an issue of timeliness and asks whether the grievance should be dismissed since the Union notified the City of its intent to arbitrate the grievance on May 1, 2006, and did not file a petition with the WERC until January 23, 2007.

If the Arbitrator finds the grievance to be arbitrable, the issue is whether the City violated the collective bargaining agreement when it issued a written reprimand to the Grievant, and if so, what is the appropriate remedy.

BACKGROUND

This case is about snow and ice removal at the Oshkosh Senior Center. The Grievant, Laurin Hoffman, has been employed by the City since February 10, 1997. He is a Building Maintenance/Custodian II at the Center, working between 6:30 a.m. and 2:30 p.m., Monday through Friday. He is grieving a written reprimand issued on March 31, 2006 for not clearing ice off a patio on March 3, 2006.

Judy Brewer has been the supervisor of the Center for the last four and a half years, and she is the Grievant's immediate supervisor. There are two separate buildings at the Center, one called the annex and the other called the main facility. The Grievant maintains both buildings. There are 12 exits and entrances at the main facility, including emergency exits, and there are 3 exits and entrances at the annex. The Center is used by about 300 people on a daily basis, with more people for special events. Some of them use wheelchairs or walkers.

One of the Grievant's duties is to keep the sidewalks, walkways, entrances and exits free of snow and ice as needed. Between December 18, 2003 and March 3, 2006, there were several memos and meetings over snow and ice removal. Brewer stated that there had been a pattern of not shoveling. The Grievant was given an oral warning for not clearing the sidewalk of snow on February 3, 2006. The warning was issued on March 9, 2006. The instant grievance – issued March 31, 2006 – was for not clearing the patio of ice on March 3, 2006. Between February 3rd and March 3rd, the Grievant was told on February 6th and 17th that he did not shovel snow as needed.

The patio is off the main building, with two sets of double doors between the great room and the patio. It is considered an emergency exit, but there are no sidewalks going to it. It is not an entrance, and the patio doors are locked from the outside but open from the inside. When it snows, the shoveled snow is piled up on the perimeter of the patio, creating one big snow bank around it. According to Brewer, people sometimes use the patio to have a cigarette, but the Grievant had never seen anyone use it in five years.

On March 3, 2006, there was ice on the patio from the previous night's precipitation. Sometime after 10:00 a.m., Brewer told the Grievant that the patio needed to be cleared. The Grievant put salt on the patio but it had not melted by 11:00 a.m. when Brewer took pictures of it. She expected the patio to be clear of snow and ice in case it was needed for an emergency exit. Brewer admitted that the sidewalks are more important than the patio, and they were cleared. The salt on the patio had turned the ice into slush by 4:00 or 4:30 p.m. The Grievant said he got a directive from Brewer to salt the patio and he did so. The patio was still not clear by the following Monday.

The Grievant is the only person that cleans and maintains the Center, although there had been more personnel to do the work in the past. If it snows on a weekend or in the evenings when the Grievant is not at work, the Grievant is not called for overtime. The snow could stay on the patio from Friday night to Monday. If the Grievant were out for sick leave or vacation, management would have to find alternative staff or volunteers. Employees in the Forestry Department may help out at the Center for snow removal, but the Grievant usually has the work done by the time they get there. They have told the Grievant that they don't have time to work on the patio.

The Grievant's understanding of snow removal is that the walkways and entryways have to be done first, and the patio comes at the end because it is not an accessible door. The Grievant described the shoveling duties as a juggling act. If it is snowing and blowing during the day, he stays at it throughout the day to keep the walkways accessible and the entries from the wheelchair ramp, bus stop and parking lots open. After a snowstorm is finished, he clears the patio. When there is a lot of ice, he uses salt, then scrapes what has melted, salts some more, scrapes some more, etc.

The Grievant stated that one of the problems is that everything seems to be a priority. Snow shoveling is a priority but so are cleaning bathrooms. The Grievant admitted that he was confused about which priority he was to meet. Brewer agreed that he was pulled in many directions at work.

Bobbie Luft is a Clerk Typist II in the Parking Utility who previously worked at the Senior Center. She worked with the Grievant for three years. She testified that Brewer told her that Sue Kreibich, the Director of the Senior Center, wanted to get rid of the Grievant because she did not particularly care for him and it would be cheaper to have Title 5 employees. Luft talked to Kreibich about that comment later and was told that she had misunderstood Brewer's comments. Kreibich denied saying anything like that and testified that Title 5 workers are not reliable or permanent. Kreibich did not recall Luft coming to her about Brewer's comments. Brewer did not recall making the comment to Luft.

THE PARTIES' POSITIONS

The City

The City argues that the grievance should be dismissed as untimely because the Union did not appeal it to arbitration until nine months after it notified the City of its intention to do so. There was no explanation as to why a nine month delay was warranted, and the delay was unreasonable. Also, the City notes that there is no just cause standard except for discharges, and the Arbitrator should use an arbitrary and capricious standard for this reprimand.

The Grievant was reprimanded for his repeated failure to keep the entrances, walkways and exits free of snow and ice. A review of City Exhibits #3 and #4 show that the Grievant was negligent in meeting the City's standards. He was repeatedly reminded since December 18, 2003, about this issue, and the Grievant was told of the City's priorities in this regard. In February 4, 2004, the Grievant was told by Brewer that the patio doors are emergency exits and must be shoveled whenever it snows. While the Grievant questioned whether the patio is an emergency exit, it is not up to him to decide what is or is not an emergency exit that needs to be shoveled. The Grievant admitted that there was ice on the patio on March 3, 2006, and claimed that he had put ice melt on it. However, it was not cleared to a sufficient degree that made it safe for people to exit the building in the event of an emergency.

The City has run out of patience with the Grievant. Brewer wants him to do his job without being reminded all the time to do so. The Grievant said he was confused about priorities but that he is not confused about the priority on snow shoveling since he was written up. The City was not arbitrary and capricious in issuing the Grievant a written reprimand, and it contends it could meet the just cause standard if one existed in the contract.

The Union

While the City claimed that the grievance is not timely, the grievance procedure does not state a time limit for filing a petition with the WERC for grievance arbitration. The Union was trying to resolve the matter. Also, the Union argues that the City may not circumvent the just cause standard, and the City did not have just cause to discipline the Grievant.

The Grievant was not negligent – there just is not enough time to keep up with all of the requirements of the job. There used to be more employees to do the work, but due to budget cuts, manpower had to be reduced. Brewer admitted that the Grievant has a large responsibility and is pulled in many directions. On the day in question, the Grievant did salt the patio. He was not told to clear it immediately. Brewer told him about the patio after 10:00 a.m. and took pictures by 11:00 a.m. If the matter was so urgent, why not demand that the Grievant stop what he was doing and tend to it immediately? The Union questions how the patio can be such a priority Monday through Friday and not so important on weekends when the Grievant is not working.

The Grievant is aware of the need for safety and does the best he can with the amount of work that needs to be done. The patio is one small area out of a total of 15 entrances and exits between the two buildings that the Grievant clears on a regular basis. The Employer's assertion that he was negligent is nothing more than an attempt to get rid of him, as Luft's testimony noted.

In Reply, the City

The Union's claim that there were more employees working at the Center in the past does not excuse the Grievant from completing his assigned tasks. Shoveling was always his primary job responsibility. While the Union is critical of the time that Brewer took pictures of the patio, there was enough time from 6:30 a.m. to 11:00 a.m. to remove ice from the patio, and the Grievant failed to do so.

It is true that the grievance procedure does not place a specific time limit on when the Union must appeal the grievance to the WERC. There must be a reasonable period of time in which the Union must file its appeal, and nine months is too long for the Union to sit on the grievance and not proceed to file it with the WERC. The City also contends that the just cause standard cannot be implied in a labor contract.

The City had valid reasons to issue a written reprimand. This is not an isolated incident. While the Grievant salted the patio, it is not enough. The City is not out to get the Grievant and has bent over backwards to work with him to impress upon him the necessity of having the walkways, entrances and exits free of snow and ice.

In Reply, the Union

The Union objects to the City's claim that the Union has a disregard for processing the grievance to arbitration. The City was not disadvantaged in any way. The Union has a right to complete an investigation and attempt to resolve the matter short of arbitration.

The Union admits that the Grievant may not have completed his work in the timeliest fashion but he did the best he could. Luft noted that the Grievant's name always comes up, because "he is darned if he does and he's darned if he don't...." and that if he's doing one part of his job, it should have been the other part. The Union disputes the Employer's statement that the patio is often used as a smoking area and notes there are no ashtrays by the doors, unlike the main entrances which have at least one ashtray per door.

DISCUSSION

The first issue to be determined is whether the grievance is timely because the Union did not file for arbitration with the WERC until January 24, 2007. The City Manager denied the grievance on April 24, 2006, and the Union advised the City on May 1, 2006 that it intended to process the grievance to arbitration. The collective bargaining agreement states in Article XXI, Section 1, Step 4:

> If the Union does not consider the grievance to be resolved, it may request that the grievance be submitted to arbitration. The Union shall give written notice of its request for arbitration within ten (10) days after the receipt of the City Manager's statement. Upon receipt of such notice, the Union and the Employer shall endeavor to select an impartial arbitrator by mutual agreement.. . .

There is no time frame stated in the contract for the Union to file a petition with the WERC for grievance arbitration. The only time frame in Step 4 is that within 10 days after receiving the City Manager's statement, the Union must give written notice of its request for arbitration. It met that time frame.

The Union's action in waiting approximately eight to nine months to file an appeal to arbitration is an unusually long period of time. While the Union states that it was still investigating the case and attempting to settle it, the better procedure would be for the Union to file its appeal and then continue its investigation and settlement attempts. The Arbitrator recognizes that filing costs are then involved, but at some point, the delay becomes unreasonable.

In this case, the Arbitrator finds that it is best to proceed to a decision on the merits. The City does not have any monetary liability running in this case and is not harmed by the delay. The parties have not negotiated a time limit for filing for arbitration, although they may wish to do so in the future now that this has become an issue. And while the Arbitrator is dismissing the City's first issue regarding timeliness, the Union should be aware that another arbitrator in a future case may impose a reasonable time standard and find that delays of this nature are unreasonable.

In Article V, the Employer may discharge any employee for good cause. There is nothing about lesser disciplinary actions, such as reprimands and suspensions. The Arbitrator agrees with the City that the parties could have easily included other disciplinary actions but did not do so. By excluding those other disciplinary actions and applying a good cause standard on discharges only, the City is correct that an arbitrary and capricious standard should be applied. However, the City does not meet that lesser standard anyway.

It may be admirable that Brewer does not want to micro-manage the Grievant's work. However, if the Grievant uses his own judgment and it turns out not to Brewer's liking, then he could be disciplined. Or if he doesn't do something by the time Brewer thinks it should have been done, he could be disciplined. So it becomes arbitrary. Brewer must be clearer in her directions and expectations. If she wants the Grievant to stay outside all day long and shovel snow and scrape ice, she needs to tell him that. If she wants all the ice off the patio or any other place scraped off instead of using salt to help melt it off, she needs to tell him that. If she wants it done now and not later when he's finished doing inside work, she needs to tell him that. If she wants sidewalks and entrances done first and the patio done immediately after that but before he does inside work, she needs to tell him that. But she has to realize that he will not be able to do everything. If bathroom cleaning is a priority as well as snow removal, the Grievant can do only one task at a time.

The Employer may set the priority on tasks, but everything cannot be a priority and get done first. It certainly appears that the Grievant is pulled in too many directions, and the Employer's disciplinary action is arbitrary because it does not spell out its expectations clearly.

Brewer admitted that clearing the sidewalks is more important than the patio. The sidewalks were cleared on March 3, 2006. Then it became the patio that was important in Brewer's mind. She told the Grievant about the patio sometime after 10:00 a.m. He salted it shortly after that, and Brewer took pictures of it by 11:00 a.m., showing that it was not clear of ice. The pictures show that the salt had started to make pits in the ice. Brewer could have been more specific and told the Grievant to scrape the ice off the patio right away. The Grievant was trying to do it in an efficient manner, which is to let salt do some of the work before trying to scrape ice off a surface. The fact that the patio had lesser importance, and the fact that Brewer jumped on this patio/emergency exit and gathered evidence that it was not clear within one hour of pointing it out to the Grievant shows the arbitrariness of this case. Certainly the City may designate the patio as an emergency exit, but the parties know that in a real emergency, senior citizens could be stuck out on a patio that goes nowhere with a snow bank surrounding it. And as far as people using it to smoke, the Grievant knew where people smoked and it was not on the patio but by the front entrance.

The Employer is within its rights to determine emergency exits and what tasks are to be completed when. However, in this case, it has left an employee with discretion on when and how to complete his tasks, and then when the employee's judgment conflicts with the supervisor's judgment on when to complete tasks, the Employer subjects the employee to discipline. This looks arbitrary because no matter what the employee is doing, he could be doing the wrong task. As Luft noted, he was darned if he did and darned if he didn't. It appears Brewer was looking for something that the Grievant did wrong. He had cleared the entrances and exits. He followed her direction to work on the patio. He said she told him to salt it and he did. The difference was that he salted it instead of scraping it. If she wanted it cleared by having him stay out there and scrape it until it was perfect, she should have told him to do that but she gave no such direction. The patio had not been a big priority in their past discussions but it became one on March 3, 2006. As previously noted, the Employer may determine what needs to be done first, but it needs to communicate that clearly to the employee before disciplining him.

AWARD

The grievance is granted.

The City violated the collective bargaining agreement when it issued a written reprimand to the Grievant for the incident of March 3, 2006, and it is ordered to remove this reprimand from the Grievant's personnel file.

Dated at Elkhorn, Wisconsin this 25th day of September, 2007.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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