BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF NEW RICHMOND DEPARTMENT OF PUBLIC WORKS

and

TEAMSTERS GENERAL UNION, LOCAL NO. 662

Case 22
No. 67032
MA-13718

Appearances:

Pamela M. Macal, Weld, Riley, Prenn & Ricci, 3624 Oakwood Hills Pkwy., P.O. Box 1030, Eau Claire, Wisconsin 54702-1030 appearing on behalf of City of New Richmond Department of Public Works.

Timothy C. Hall, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212 appearing on behalf of Teamsters General Union Local 662.

ARBITRATION AWARD

The City of New Richmond Department of Public Works, hereinafter Employer, City or Department, and the Teamsters General Union Local 662, hereinafter Union, are parties to a collective bargaining agreement covering the period January 1, 2007 through December 31, 2009 that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to provide a panel of seven WERC Commissioners or staff members from which they could jointly select an arbitrator to hear and resolve a dispute between them regarding the instant grievance. Commissioner Susan J.M. Bauman was so selected. A hearing was held on December 13, 2008 in New Richmond, Wisconsin. The hearing was transcribed by Mark A. Perner, and a transcript was filed on January 4, 2008. The record was closed on March 10, 2008, upon receipt of all post-hearing written argument from the parties.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties stipulated that the issue to be decided is:

> Did the Employer have just cause pursuant to Article 10 of the Collective Bargaining Agreement to terminate the grievant? If not, what is the remedy?

FACTS

The Grievant, P.G., was employed by the City of New Richmond as a street maintenance laborer in the Department of Public Works for approximately a year and a half when he was terminated, effective May 8, 2007. Until that time, he had a clean disciplinary record. The events giving rise to P.G.'s termination occurred on May 7, 2007.

A water main beneath South Knowles Avenue in the City of New Richmond had broken during the winter of 2007. The city shut the water line until spring, when the Department was scheduled to repair it. As South Knowles Avenue is a main thoroughfare, and a four-lane state highway, the City called upon St. Croix County to establish appropriate detour markings and signage, including hazard cones, barricades with a flashing arrow, and a black and white fifteen mile per hour speed limit sign attached to a barricade. This segment of road is usually posted at thirty-five miles per hour, but neither the City nor the County covered the signage regarding the usual speed limit.

Work on the project began approximately one week prior to the events giving rise to this grievance and, based upon the record herein, were uneventful. May 7 was, however, different. That day, the streets department was going to be pouring curb and gutter on the street, as well as drilling holes into the cement for reinforcing rebar. P.G. was scheduled to begin work at 7:30 a.m. P.G.'s father, M.G., a long-time employee of the Department was assigned to the location with P.G. that morning.

P.G. and M.G. had a conversation about the conditions at the work site and decided to call the police for assistance, as they felt the working conditions were unsafe in that traffic was moving too fast near where they were working. Prior to the police responding to the call, P.G. and M.G. used the stop/slow sign to slow traffic while the other performed work in the closed traffic lane.

Officer Thomas Wulf responded to the call around 8:15 a.m. He assisted the construction crew for about half an hour at that time and again from about 10:20 a.m. to noon. Wulf initially clocked motorists on his laser speed detection device and then he made some traffic stops on vehicles he felt were going too fast, as well as for other reasons. Traffic was moving at a rate of 20 to 40 miles per hour through the construction zone. Wulf also used a slow/stop traffic sign for a short time in an attempt to slow the traffic. He did this by standing in the closed lane and showing the "slow" side to traffic, and when cars looked like they were not slowing down enough, he would attempt to make eye contact and point at the sign. P.G. was in the vicinity when Office Wulf was utilizing the slow/stop sign, but Wulf does not know if P.G. observed how the sign was used. Wulf soon returned to his squad car, as he felt this was a better way to slow traffic.

The cement truck, street shop foreman Gary Crosby and the rest of the crew arrived at the work site at approximately 9:00 a.m. The crew poured cement while P.G. and M.G. took turns with the stop/slow sign. At no time did Crosby, or anyone else, direct P.G. or M.G. to slow traffic using the stop/slow sign except when traffic had to be stopped to allow the cement truck to enter or exit the construction site. Crosby was aware that the sign was being used and did not direct either P.G. or his father to cease the use of the sign.

At some time during the early morning Anne Mehls, the mother-in-law of street employee Dennis Raddatz traveled through the construction site. She describes what happened to her as follows:

> Well, I'll start at the beginning. I came down 6th Street going west and the light was red. I stopped, waited until it turned green, took a left heading south. And as I pulled into the left-hand lane, I noticed up ahead there was some work being done in the street. There was a car ahead of me, there were cars coming behind me. And as I got closer to the workers, the median comes in and it narrows there, and they were working here. It was very close quarters, I admit that. And just suddenly this flag came into my antenna twice. There was a fellow standing right to my right of my windshield, hit the -- hit the antenna, and it whapped the windshield twice. And it stunned me. And as I went further, he went back, this other fellow came at me like this, and I know he was yelling something, but I couldn't hear him.

Ms. Mehls identified the person who was holding the sign as P.G. She also stated that she thought he had hit her car deliberately. She acknowledged that she did not see P.G. or the sign until the sign hit the antenna. Ms. Mehls was traveling at the same speed as the car in front of her, and she contends that if she was going too fast, all the other cars were as well. Mehls did not report the situation to the City, but she was contacted by two City staffers later in the day who asked if she was all right.

The crew took a break at the shop around 9:00 a.m. According to co-worker Dennis Raddatz, P.G. came up to him and boasted that he had hit Mehls' car with the stop/slow sign and scratched it.

Sometime after the crew returned to the work site, the truck ran out of cement. Gary Crosby, the foreman, sent P.G. and M.G. to get more cement and sent the remainder of the crew back to the shop for lunch. Crosby was still at the work site when P.G. and his father returned with the cement. P.G. handed shovels of cement to Crosby and M.G. to finish the curb. During this time, there was nobody attempting to control the speed of traffic. At some point, P.G. felt that it was unsafe with the busy, fast moving lunch time traffic passing by and, without instruction to do so, picked up the stop/slow sign and began flagging traffic. Again, Crosby did not direct P.G. to return to work and cease attempting to slow traffic.

A van driven by Deanna Kaufman passed the work site and, according to the police report filed as a result of Ms. Kaufman's complaint to the New Richmond police department later in the day,

> . . . [Kaufman] was southbound on South Knowles Avenue at approximately 1245 and 1300 hours on today's date. She stated that she approached the construction area where the New Richmond Street Department was repairing the roadway in front of the Bosch/Doboy plant. She slowed to approximately 20 mph. Deanna stated that she looked down to check her speed as she saw a sign

> for the 15 mph area. Deanna stated that as she looked up the flag man was holding the sign out into the roadway horizontal with the roadway. Deanna stated that he did not pull the sign back in and the sign struck her van. Deanna stated that the sign caused damage to her vehicle.

As part of her investigation into the incident, the police officer went to the work site and also interviewed P.G.:

> I responded to the worksite and they stated that they were aware of the situation and that the male subject who was flagman at the time of incident was P . . . G. . . . They stated that P was up at the street department at this time. I responded to that location and met with P. P stated that the cars were traveling at excessive speeds through that area and he was concerned for his safety as well as the other workers. I advised P of other ways of handling this situation rather than striking vehicles with the sign such as obtaining license plates to allow our department to make contact with the drivers of the vehicles. I advised P that Deanna was requesting compensation. I then spoke with P's immediate supervisor, Gary Crosby. Gary stated that Deanna should contact the city offices during regular business hours and the incident could be turned over to their insurance. At this time, it was determined that the incident is a civil matter rather than criminal.

According to Crosby, he was finishing cement and heard a noise. He looked up and saw P.G. "standing there with the paddle, and I seen the sign go over the car, and turned around, and we were looking at one another, and I immediately started hollering at him." Crosby sent P.G. back to the shop, telling him that he didn't want to see him back on the job the rest of the day. Crosby then had a conversation with M.G. in which he said that if it were up to him, he'd fire P.G. right then.

Just prior to 4 p.m. that day, Crosby spoke with John Berends, then streets superintendent, and told him about the incident with the Kaufman vehicle.[1] Crosby recommended to Berends that P.G. be terminated as he had never seen anybody do anything like that before, i.e., deliberately going after a car with a sign. Crosby later learned about the Mehls incident from Raddatz and another employee, Tom Meir.

According to Berends, he went to the shop just before quitting time and found P.G. there. P.G. told him "Yes, I did. Yes, I did. Yes, I did. I hit it." Upon further inquiry, P.G. acknowledged that he hit a vehicle with a control sign, that he "kind of" did it on purpose because cars were going too fast. P.G. advised Berends that Crosby had sent him to the shop to sweep the floor. Berends then waited for Crosby to talk with him. Prior to Crosby's arrival, Raddatz and Meir arrived and advised Berends that P.G. had hit a car (Mehls') in the morning as well.

[1] Crosby was not aware of the incident with the Mehls vehicle at that time.

When Crosby arrived, he told Berends that he wanted P.G. fired. Berends said we'll have to think about it tonight and talk in the morning, and that he wanted to talk with Raddatz as well. The following morning, Berends asked Crosby if he had changed his mind and Crosby said no, that he still thought P.G. should be fired. Crosby also advised Berends that he had learned of the Mehls' car incident since last speaking with him.

Berends then had a conversation with P.G. Berends described the conversation as follows:

> And I called him out and I asked him you know, if he did it on purpose. And, "Well, no, but it happened." And I said, "What about Anne Mehls' car that you hit?" And he says, "The other car." I said, "First," I said, "the other car." He says, "Well, no. No." He says . . .
>
> I says, "You, Tom and Dennis - - Dennis told me that you got Anne Mehls' car too." "Oh." I said that there was – What upset me the worst is that he tried to lie about it. I says, "As far as I'm concerned, you are terminated." And he left.

Berends testified that he told P.G. that he was terminated for damaging private property and lying to him about the second (Mehls') car. The termination was grieved in a timely manner and proceeded through the steps of the grievance procedure.

Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE 10

DISCHARGE

Section 1. A. No employee covered by this Agreement shall be suspended or discharged except for just cause.

B. The Employer shall give the employee involved, and the appropriate Union Representative, at least seven (7) days notice prior to the effective date of any suspension or discharge. Such notice shall contain a full explanation of the reason for the action, and shall be in writing with a copy to the Union.

C. Nothing in the foregoing shall prevent the Employer from immediately removing the employee, for just cause, from the premises or job assignment pending final disposition of the case.

D. The question of whether "just cause" exists for the suspension or discharge shall be subject to the Grievance and Arbitration procedures provided herein.

POSITIONS OF THE PARTIES

It is the position of the Employer that it had just cause to terminate P.G. because of two serious safety incidents in the same day involving the Grievant. The City contends that to establish just cause, it must establish the existence of the grievant's misconduct and that discharge was the appropriate measure of discipline.

There is no dispute that two incidents with the stop/slow sign occurred in the same day, both involving the Grievant. The City describes these incidents as extreme and potentially lethal in that it is not difficult to envision a driver losing control of a vehicle "under attack" from a city employee wielding a seven-foot sign.

According to the Employer, P.G.'s description of how he was balancing the sign off his foot does not square with the vehicle damage that occurred. The scratch near the taillight of the Mehls vehicle and the damage to the front lower portion of the Kaufmann van near the headlight area are consistent with the sign being held out into the roadway, horizontal with the roadway and not pulled back at the approach of a vehicle. The City contends that the various descriptions of the events given by the Grievant at the unemployment compensation hearing, to a newspaper, and at the arbitration hearing are inconsistent with one another, and that there was no need for a flagman at the time of either incident.

The City argues that an employee has a duty to use care and caution in the exercise of his job duties and that the Grievant did not do so on two distinct occasions on May 7. The fact that P.G.'s actions did not result in an emergency or harm to others does not absolve him of liability in that the potential for real harm existed when he acted as he did, and his actions did cause physical harm to vehicles and trauma to the drivers. P.G. had received emergency training from the Fire Department where he works as a volunteer, including instruction on stopping and redirecting traffic. It is incredible to believe that he was clueless as to how to utilize a stop/slow sign so that it would not strike vehicles. P.G. clearly was negligent in failing to exercise the appropriate degree of care required in traffic control.

In addition to acting in such a negligent, perhaps intentional, manner, the Grievant accepted no responsibility for his actions and, from the perspective of Superintendent Berends, lied when he only mentioned one of the two incidents in his discussion on May 8 immediately preceding his discharge. Further, the Grievant failed to change his manner of handling the stop/slow sign after having hit the first car, demonstrating that he took no responsibility for the damage to the vehicles.

The City takes strong objection to introduction of testimony from the Union regarding settlement discussions that took place between the Employer and the Union. The Employer consulted with various employees as well as the reports of damage to two vehicles and a police report in making its determination to terminate P.G. It undertook a complete investigation and made a reasoned determination that discharge was the appropriate level of discipline, given the circumstances. There was just cause to terminate the Grievant and the grievance should be denied and dismissed.

The Union contends that the City cannot show just cause for P.G.'s discharge for a number of reasons. These include that John Berends issued the termination under the false impression that Gary Crosby had seen the Grievant intentionally hit a vehicle with a sign, something Crosby had orally claimed to Berends after the event took place and in his written statement but which he acknowledged at hearing was not the case. The Union argues that the City failed to undertake any sort of investigation with witness interviews and immediate written statements, but rather issued a hasty and excessive termination on the morning following the incident.

The Union argues that at the May 9 grievance meeting, Administrator Dennis Horner admitted the termination was excessive by offering to reduce the discipline so long as the Union could obtain the consent of the entire bargaining unit.[2]

The Union contends that the Employer's burden of proof is to establish guilt by clear and convincing evidence in light of the fact that discharge is "economic capital punishment." The Union argues that the City has failed to prove by clear and convincing evidence that P.G. intentionally struck the vehicles with the stop/slow sign. Crosby's conclusion that the act was intentional was with no basis in fact since he observed the situation after the vehicle made contact with the sign. The City has offered no evidence to suggest that P.G. intended to make contact with either car. Based on this, it is the position of the Union that no discipline is warranted under the facts of this case. Discharge was excessive and unwarranted under the circumstances – it is vastly disproportionate to the offense. The Employer terminated P.G. for errors committed while attempting to preserve the safety of a work crew.

Finally, the Union argues that the discharge was tainted by a complete lack of any investigation. P.G. was denied due process, something that is inherent to a just cause analysis. The Employer should conduct an impartial investigation, not just look for facts that substantiate the allegations of wrongdoing and ignoring everything else. Here, the Employer proceeded under the assumption that Crosby was an eyewitness to the entire incident and that P.G. deliberately struck the vehicles. Though the Employer gave the Grievant a perfunctory opportunity to deny wrongdoing, it was illusory. Additionally, the City failed to interview even a single witness to provide support for its early conclusion until well after the termination. This statement is supported by the testimony of Dennis Horner who acknowledged that the City never conducted any kind of investigation into the incident.

The Union requests that the grievance be sustained and that a make-whole remedy be ordered, including reinstatement with back pay and back benefits.

[2] It is these settlement discussions that the City objects to being included in the record herein.

DISCUSSION

At issue herein is the question of whether the City of New Richmond had just cause to terminate P.G. as the result of two incidents that occurred on May 7, 2007. The City contends that the Grievant's actions in hitting two automobiles with a stop/slow sign were intentional acts with the potential of endangering the public and co-workers, and which did physical harm to the two struck vehicles. The Union, on the other hand, contends that the City does not have just cause to terminate the Grievant, that his acts were not intentional, and that the City failed to provide P.G. with the due process that he is entitled under such circumstances in that the City failed to investigate the events properly and relied totally on one report in making its decision to terminate.

The grievance was processed through the grievance procedure, and the termination was upheld by the City Council. The arbitration process allows for an impartial, unbiased review of the facts of the case. The undersigned will make her determination of whether the Employer had just cause to terminate the Grievant based on the evidence presented at hearing, without regard to the nature of any settlement discussions that might have been had between the City and the Union.

The collective bargaining agreement between the parties neither defines just cause nor specifically provides for the use of progressive discipline which would require a lesser degree of discipline for a first offense, and a greater degree of discipline for each successive act of misconduct. The collective bargaining agreement is also silent with regard to the nature of discipline that may be applied, mentioning only suspension of unspecified duration and termination.

Absent a definition of just cause in the labor agreement, the undersigned adopts a two prong analysis which requires the Employer to establish the existence of conduct by the Grievant in which it has a disciplinary interest and it must then establish that the discipline imposed for the conduct reflects its disciplinary interest. However, as a threshold matter, it is axiomatic that due process is an element of just cause.[3] Due process requires that the employee be given an adequate opportunity to present his or her side of the case before being discharged by the employer. "If the employee has not been given such an opportunity, arbitrators will often refuse to sustain the discharge or discipline assessed against the employee."[4] Industrial due process also requires management to conduct a reasonable inquiry or investigation before assessing punishment.[5] Accordingly, the analysis below will consider not only the events of May 7 for which the Grievant was terminated, but also the actions of the Employer following those events as regards the investigation and decision to terminate P.G.

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[3] See, generally, Brand, ed., DISCIPLINE AND DISCHARGE IN ARBITRATION, 1998, pp. 35 – 45.

[4] Elkouri & Elkouri, HOW ARBITRATION WORKS (6th Ed.), p. 967.

[5] Id., p. 969.

The requirements of Article 10 of the collective bargaining agreement

Although not argued by the Union, it is important to note that, in addition to the just cause requirement of Section 1A of the Article 10, Section 1B requires that the Employer provide the employee and the Union representative at least seven (7) days notice prior to the effective date of any suspension or discharge. In addition, "[s]uch notice shall contain a full explanation of the reason for the action, and shall be in writing with a copy to the Union." The collective bargaining agreement does not prevent the Employer from immediately removing the employee, for just cause, from the job site pending final disposition of the case. Whether the Grievant was paid for the seven days subsequent to May 8 was not presented as an issue in this matter and, therefore, is not before the undersigned. The failure of the Employer, however, to present a written explanation for the reasons for P.G.'s discharge is more troubling. In its opening statement at the hearing, the Employer referenced only the two instances of the stop/slow sign hitting vehicles. During the hearing, Superintendent Berends contended that the termination was for these actions as well as for lying about them. In its post-hearing brief, however, the Employer does not argue that, in part, the termination was based on the failure of the Grievant to acknowledge that there were two incidents of the sign hitting a car, although reference is made to dishonesty in the Employer's reply brief. Accordingly, it is only the events of May 7 in which the stop/slow sign under the control of the Grievant impacted vehicles that will be considered as the basis for the disciplinary action taken by the Employer.

The events of May 7, 2003

There are two distinct events that occurred on May 7: the incident with the Mehls vehicle and the incident with the Kaufman vehicle. It is unclear whether the Employer would have terminated P.G. had only one incident taken place, but it does argue that "once may not be enough for discharge, but twice is too many and more than enough."

The Mehls vehicle

Anne Mehls entered into the construction area of South Knowles Avenue relatively early on the morning of May 7, but sometime after P.G. and M.G. had already requested police assistance due to the speed of traffic in the area. Ms. Mehls acknowledges that she may have been exceeding the speed limit, but asserts that she was traveling at the same speed as other vehicles in front of her and behind her. She further acknowledges that she never saw P.G. holding the stop/slow sign until the antenna on her car made contact with the sign. The interaction of the sign and her vehicle was upsetting to her, causing her to pull over for a few minutes before continuing on with her activities for the day. She did not report the incident to the City, but was contacted by representatives of the City later in the day. At that time, she reported that she was unhurt and that there appeared to be a scratch near the taillight of her vehicle.

In his statement to the Unemployment Compensation division, P.G. described this incident:

> When the cement truck driver was putting the chutes on the front of the truck he was out next to the barrels by traffic and there was a lady in a maroon van that you could see she didn't even apply the brakes when she came in to the work zone. She was coming in fast so I had the sign on the edge of my foot leaning out to get her attention and it caught the radio antennae on the van because she was that close to me and I was worried about the safety of the cement truck driver because I did not have a radio or anything to warn of anything.

Co-worker Dennis Raddatz (and Mehls' son-in-law) wrote a statement regarding this incident months after it took place:

> The day before P[ ] got fired, at right around break time (9:00 AM), he was bragging to me about hitting my mother-in-law's vehicle with his sign and scratching it. When I asked him why he did that, he laughed and joked to me that "she was going too fast."

At hearing, Raddatz also testified that P.G. talked about hitting and scratching Mehls' vehicle. However, Mehls' testimony demonstrates that the scratch near the taillight was not discovered until later in the day when City officials called Mehls and her husband noticed the scratch. It is likely that Raddatz prepared for the hearing by reviewing his written statement. Unfortunately, the statement was not written at the time of the events in question, but weeks later. I do not credit Raddatz' testimony that P.G. mentioned the scratch to him on the morning of May 7 and, in fact, do not find credible the fact that the scratch was caused by P.G.'s actions.

The Employer's contention is that P.G. held the stop/slow sign in such a manner that it would hit a passing vehicle. P.G. does not deny that when he was holding the sign, it hit the antenna on Mehls' vehicle. There is no testimony, of either Mehls or P.G. or any other witness, that the sign hit the rear of Mehls' vehicle. All references to the scratch were hearsay to the effect that Ms. Mehls' husband noticed the scratch later in the day. Even if the hearsay testimony to the effect that he had recently washed and polished the car and the scratch was not there at the time is true, nothing in this record establishes that the scratch was caused by P.G.'s behavior.

Although there is credible testimony that P.G. should have known how to utilize the stop/slow sign based on his training as a volunteer firefighter, the record also establishes that the City failed to properly instruct P.G. or other members of the street department crew on the proper utilization of the stop/slow sign. Officer Wulf's testimony supports the Union's contention that vehicles, including Mehls', were going too fast in the work zone and that the crew did not have proper safety attire while working on the construction site on South Knowles Avenue.

Although the Employer argues that P.G.'s action in hitting Mehls' vehicle was intentional, the record does not support such a conclusion. The fact that Mehls acknowledged that she did not even see P.G. or the stop/slow sign until contact was made with the antenna on her van is persuasive in finding that she was inattentive to the conditions at the site. P.G., however, should also have been more careful and moved the sign back towards himself once he saw that Mehls was not slowing down and was on a path to hit the sign.

With respect to the Mehls' vehicle, I find that P.G.'s actions demonstrated a failure to utilize proper care and caution in the exercise of his job and that he was negligent in the performance of his duties. I do not find that he intentionally struck or caused damage to the vehicle.

The Kaufman vehicle

Deanna Rae Kaufman reported to the New Richmond Police Department around 1:35 p.m. on May 7 that she had been traveling southbound on South Knowles Avenue sometime between 12:45 p.m. and 1:00 p.m. that afternoon. Kaufman reported that she had slowed to about 20 mph and that "as she looked up the flag man was holding the sign out into the roadway horizontal with the roadway." She further reported that he did not pull the sign back as she approached and that the sign struck her van and caused damage to her vehicle.

The incident first came to the attention of Superintendent John Berends when Foreman Gary Crosby reported it to him. Crosby's testimony at hearing, and his statement written sometime after the event were similar to the information he provided to Berends on May 7. His written statement regarding this event reads as follows:

> We were working on South Knowles Avenue by Bosch doing concrete work; there were traffic control signs and cones directing traffic to one lane. During times when we were near the traffic lane we had a man with a sign that had "STOP" on one side and "SLOW" on the other. We were doing curb work which is 12' from the traffic lane, which at the time didn't need a man with the "STOP/SLOW" sign. I observed P G pick up the sign and go stand out by the traffic lane. A few minutes later I saw him stick the sign out in front of a car hitting the front hood wiper area and windshield. I immediately called him away from the area and confronted him with words and then sent him back to the shop. . . .

Crosby reported the incident to Berends whose non-contemporaneous written statement and testimony were similar:

> On May 7th about 3:30 I entered the shop and P.G. was saying "I did it, I did it...I hit the car". I then said "What are you talking about" and he replied "I hit the car with the sign on the construction project today and Gary sent me to the shop to sweep floor and to stay in the shop". So I said continue with what you are doing and that I need to talk to Gary.

Gary then came into the shop about 3:55 p.m. I asked him what happened and he told me that P[ ] deliberately took the sign and slammed it on the car and slid it all the way over the top of the car. Gary also said the [sic] he sent him to the shop and didn't want to see him the rest of the day. Gary also stated that he would like to see him fired because he deliberately did it and the bad reputation it put on the city workers.

In his unemployment compensation statement, P.G. describes this incident:

When Gary Crosby and M.G. started troweling the cement I went and picked up the traffic sign that was there because we did not have anyone to flag traffic because it was only the three of us down there while we were working down there and we did not pull our pickup back around to the other side of the hole and park it in a fend off position for our safety, so that is why I decided to take the sign and go back up and try and slow traffic because there were two of our men working on the street on a state hwy.

That is when a tan van came through at about 35 miles per hour and you could see she never touched her brake lights to slow down when she came in to the work zone area. Traffic was probably confused because the speed limit on the highway was not covered up and we had a 15 mph sign drilled into a barricade stuck out by the traffic when it switched to one lane and there wasn't any orange construction signs with speed limits posted on them or men working. All we had was an orange sign that showed a lane merge and then a flashing sign halfway down in the work zone with a yellow arrow flashing on which way to go.

So I had no radio to tell anybody that there was anyone coming or to look out so I started waving the sign as soon as she got in to the work zone to get her attention and she did not even see me or the sign and I could not even pick the sign up fast enough as I just froze and she caught the sign off the corner of her van and hit the radio antennae and she didn't even slow down and just kept driving right through.

Then Gary Crosby heard the sign hit and started swearing at me saying "get the hell of the street, what the hell are you doing you up there and I should have your ass fired and go to the shop and clean, I don't even want you down here the rest of the day to work".

. . .

When John Berends came to the shop that afternoon I told him I caught a car with the sign and that they didn't even slow down or stop or anything and that they had just hit the sign and kept driving and he just kind of smiled and laughed and said "yeah, the cars don't slow down and it is pretty bad working down there". . . .

Crosby acknowledged during cross examination at the hearing that he did not see how P.G. was holding the stop/slow sign and that he became aware of the situation upon hearing the contact between the sign and the van driven by Kaufman. There is no question that Kaufman's vehicle suffered damage as a result of the impact, though the cost of repairing the damage, and the amount of the claim Kaufman filed with the City, if any, is not part of the record herein. Crosby contends that P.G. intentionally hit the van. Berends statement continues (referring to the following morning):

> . . . I also wanted to talk with P again so I called him aside and asked him if he hit the car on purpose and he said "somewhat."

This statement, if actually made by P.G., would support the Employer's contention that P.G. acted deliberately in hitting Kaufman's van. However, because Berends' statement was not made contemporaneously with the conversation, but was written on July 9, 2007, two months after the events in question, the undersigned cannot credit it as an accurate reflection of the conversation between P.G. and Berends. Rather, the statement conforms too much to the City's version of the event. P.G.'s testimony regarding his conversation with Berends on the morning of May 8 is to the effect that although Berends asked P.G. if he intended to hit the vehicle, Berends cut off P.G.'s attempt to say "no" and terminated the Grievant on the spot.

As with the Mehls vehicle, there is nothing on this record to support the Employer's contention that P.G. intentionally struck the Kaufman vehicle. While there is dispute as to the speed at which Kaufman was driving through the construction zone, there is no dispute that she made no attempt to avoid the stop/slow sign if, as claimed by her and the City, it was sticking out into the roadway. Although it is questionable that P.G. was holding the stop/slow sign in accordance with Department of Transportation guidelines or with appropriate care and caution, and it is established that he made contact with the Kaufman vehicle, there is nothing in the record that supports a finding that P.G. deliberately struck the van.

The Investigation

The undisputed evidence shows that Gary Crosby thought that P.G.'s actions on May 7 with respect to the Kaufman vehicle were sufficient reason to terminate P.G.'s employment with the City. Crosby conveyed this to Berends at about 3:55 p.m. that day. At that time, Berends already had had a preliminary conversation with P.G. in which the Grievant acknowledged that a car had been hit by a stop/slow sign that P.G. was holding. At the time of Berends's conversation with Crosby, neither man was aware, with certainty, that two vehicles had been hit by stop/slow signs held by P.G. during the course of the day.

By Berends' own admission, he wanted to wait until the next day to see if Crosby still felt the same way; that is, if Crosby still wanted P.G. terminated as a result of the contact with Kaufman's vehicle. By the morning of May 8, both Crosby and Berends were aware that P.G. had also hit the Mehls' van. Crosby advised Berends that he still wanted P.G. fired. Berends waited until the other streets employees had left the shop and then spoke with P.G.

Without affording P.G. his right to have a union representative present during an interview that Berends knew would result in disciplinary action being taken, Berends asked P.G. if he had hit the car on purpose. According to Berends' hearing testimony, P.G. said "Well, no, but it happened." Berends then asked about the Mehls' van. Berends' testimony on this point is quite unclear, but it appears that he believed P.G. was denying having hit the Mehls' car. Berends completed the interview by stating that as far as he was concerned, P.G.'s employment was terminated.

Although the City argues that it conducted a full investigation, it did not do so:

> It is undisputed that the Grievant the Street Superintendent Berends had **two** meetings, one on the day of the incidents and a second meeting the following day, at which time the Grievant's employment was terminated. It is also not disputed that prior to the termination, the City contacted the driver involved in the first incident (TR. 48, 16-21) and that the City was aware of the Police Report on the second incident. (ER EX. 8) Further, there is no dispute that Foreman Crosby discussed the incidents with the Superintendent prior to discharge. Street Superintendent Berends obtained information from a variety of sources prior to reaching the decision to terminate the Grievant.
>
> One of the remarkable features of this grievance is that there is no evidence the Grievant protested at the prospect of discharge. The Grievant had two opportunities to discuss the incidents with Street Superintendent Berends prior to being discharged. In his own words, the Grievant states he only mentioned one of the sign incidents to Superintendent Berends, "…I told him I caught *a car* with the sign…" (ER. EX. 13, emphasis added). The Grievant selectively reported only one part of the day's events when he was given an opportunity to tell his side of the story. Moreover, the Grievant waited nine days after discharge to file his grievance. (JT. EX. 2).

(Employer Reply Brief, pp. 2-3) Anne Mehls was, indeed, contacted by City representatives. Her testimony is clear that "…I got home and I found out that two of the City people had called to see if I was all right." While such action on the part of unnamed City representatives is certainly desirable when hearing that a citizen was involved in an incident with a city employee, Ms. Mehls was not asked what had happened – she was asked whether she was all right. In fact, Ms. Mehls' testimony indicates that City representatives called when she was not home and she may not even have talked with them!

Although City representatives were aware of the second incident (the Kaufman car) inasmuch as Crosby was present when it occurred and he told Berends about it, the record does not establish that the police report was completed and reviewed by Berends or others prior to making the decision to terminate the Grievant, and advising him of that fact, though Crosby was aware that a police officer was investigating the incident during the afternoon of May 7.

The two meetings referenced by the Employer consisted of one late in the afternoon of May 7 when P.G. acknowledged to Berends that he had hit a vehicle. Berends had no knowledge of the situation during this encounter with P.G. and was not in a position to ask appropriate questions. Further, P.G.'s testimony indicates that during that meeting Berends acknowledged that traffic moved too fast in the construction zone. Berends' testimony is to the effect that P.G. responded to an inquiry as to whether he hit the car on purpose with "Well, kind of. They were going too fast." The second meeting between Berends and P.G. was, according to the testimony of both parties, even shorter in that Berends apparently cut off P.G.'s explanation and told him that he was terminated.

In order to provide the Grievant the due process that is required by the just cause standard, P.G. had the right to provide a full and complete account of the events of the day before a decision on discipline was made. That did not occur in this case. Crosby was angered by P.G.'s behavior and, on the spot, decided that P.G. should be terminated. That is what he told Berends on the afternoon of May 7. Berends' response was that they should "sleep on it". The proper reaction would have been to advise that he would be talking with all the people present and affected and then make a reasoned, rationale decision as to what had taken place. Significantly, M.G. was present on site when both of the incidents took place. Nobody from the City ever obtained a statement from him!

The City raises an interesting point in stating that P.G. did not protest his termination, and that he did not file his grievance until nine days after the termination. In light of the failure of the Employer to avail the Grievant of his *Weingarten* rights, and the fact that Crosby is the Union steward, the Grievant's behavior is understandable. The fact that P.G. references "*a car"* in his written statement, rather than readily acknowledging that two cars were hit on May 7 is not really relevant – the Employer has not contended that P.G. was terminated for his lack of candor during the conversation with Berends.

Conclusion

This is a classic case of rush to judgment. Crosby was angered when he realized that P.G. had hit a van with the stop/slow sign. This is understandable in that such behavior does not demonstrate the type of public image and performance that the Department wishes to convey to the public. Crosby thought P.G. had struck the van intentionally. The manner in which Crosby reported this to Berends and, in fact, the manner in which he initially testified to the event would indicate that he saw the whole incident and could say, unequivocally, that P.G. hit the van on purpose. On cross examination, however, he acknowledged that he had not seen what P.G. was doing prior to the Kaufman van and the stop/slow sign making contact. Had Berends asked the proper questions of Crosby, and had Berends undertaken a proper investigation, including an investigatory interview of P.G. in the presence of a union representative, other than Crosby, Berends could have made his own determination of what had taken place and what the appropriate level of discipline should be. Unfortunately, Berends did not do so. Berends followed the wishes of Crosby, the foreman who is also a member of the bargaining unit, and summarily dismissed P.G.

It appears that the first time a thorough airing of all the facts occurred was at the arbitration hearing. That hearing did not establish that P.G. acted intentionally in striking either the Mehls or the Kaufman van. It did establish that P.G. was negligent in the performance of his self-assigned duty as flagman. It did establish that even though P.G. and other streets department employees had not been instructed in the proper use of the stop/slow sign prior to May 7, P.G. certainly had a rudimentary knowledge of proper traffic control measures through his training as a volunteer fire fighter. Common sense should have taught P.G. that the stop/slow sign should never be placed, in any part, in the actual lane of traffic. After having struck the Mehls vehicle with the sign, he certainly should have modified the manner in which he used the sign and avoided making contact with the Kaufman vehicle. Had he utilized common sense, P.G. would not be in the predicament that he is today.

I find that the Employer did have just cause to discipline P.G. I find, however, that the discipline imposed, discharge, is too severe under the facts of this case. To be clear, had the record supported a finding that P.G. deliberately hit the vehicles with the stop/slow sign, discharge would be appropriate. As indicated, however, the record establishes that Crosby did not actually witness either event, and that the City failed to properly investigate the situation so as to be able to prove P.G. intended to hit the vehicles in question.

The Employer cites cases to support its argument that many arbitrators will not set aside an employer's decision regarding the appropriate disciplinary action unless the action is found to be arbitrary, capricious, discriminatory, or excessively severe.[6] There is, of course, a line of cases that run the other way.[7] In the case at bar, although the undersigned has found that the Grievant did not exercise the proper degree of care and caution in his use of the stop/slow sign, there is no finding that the actions of the Grievant were deliberate in making contact with two vehicles. Indeed, though contact with the vehicles was not deliberate, the improper use of the stop/slow sign could have had serious consequences, and it is clear that the Grievant did not adjust his behavior based upon the first incident in the morning. Accordingly, the Union's argument that no discipline is appropriate is rejected, as is the ultimate consequence of termination.

Although the damage to the vehicles in question was minimal, and although nobody was hurt as a result of the Grievant's behavior, the City is absolutely correct that the behavior, deliberate or not, could result in serious damage to people and property. Accordingly, significant discipline, short of termination is appropriate. I find that a 30 day suspension without pay is appropriate under these circumstances. The length of this suspension takes into account the potential liability the City could incur as a result of the Grievant's actions.

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[6] The City incorrectly ascribed the decision in ELEVA-STRUM SCHOOL DISTRICT, WERC Case 18, No. 55096, MA-9898 (1998) to the instant arbitrator. In fact, it was Arbitrator Sharon Gallagher who stated that "arbitrators generally will not second guess the employer's decision in this area."

[7] See, generally, Elkouri & Elkouri, HOW ARBITRATION WORKS (6th Ed.), pp. 958-962.

The Employer also argues that the crew members, other than P.G.'s father, do not trust P.G. and do not want to work with him. This fact is evidenced by the letter to the Union, signed by all bargaining unit members other than P.G. and M.G., requesting that the instant grievance not be pursued. However, the record does not demonstrate any basis for this distrust, other than the incidents of May 7. There must be more on the record, in addition to the events of May 7, before this arbitrator can find that there is a reasonable basis to terminate P.G. The Union attempted to demonstrate that members of the bargaining unit were "against" P.G., in part because he was able to live further outside the City limits than other employees.

While there are clearly undercurrents in this record to suggest that the members of the bargaining unit, other than M.G., dislike and/or distrust P.G., there is nothing in the record, other than the events of May 7, which demonstrate that P.G. has acted in other than an acceptable fashion while employed by the City of New Richmond. P.G.'s personnel record does not show any prior disciplinary actions, and nobody testifying at hearing, the foreman, the supervisor, and co-workers, indicated a basis for such alleged lack of trust. The fact that co-workers may not like P.G. cannot form the basis of assessing greater discipline than I have found to be warranted under the facts herein.

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

AWARD[8]

The Employer did not have just cause, pursuant to Article 10 of the Collective Bargaining Agreement to terminate the Grievant. The Employer did, however, have just cause to discipline him by the imposition of a 30 day unpaid suspension.

The Grievant shall be reinstated to his prior position. His personnel file shall be modified to remove all references to a termination and to reflect a suspension of 30 days without pay. He shall be made whole for earnings and benefits lost as a result of his termination, less the 30 day unpaid suspension and any interim earnings.

Dated at Madison, Wisconsin, this 8th day of April, 2008.

Susan J.M. Bauman /s/
Susan J.M. Bauman, Arbitrator

[8] The undersigned will retain jurisdiction over this matter for a period of 60 days following issuance of this award for the purpose of resolving issues of remedy.

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