BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF HORICON PUBLIC WORKS, LOCAL 1323H, AFSCME, AFL-CIO, WISCONSIN COUNCIL 40

and

THE CITY OF HORICON

Case #38
No. 68590
MA-14280

(Tammy Hintz Termination)

Appearances:

Laurence Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, appearing on behalf of Local 1323H.

Alan M. Levy, Attorney at Law, Lindner & Marsack, S.C., 411 East Wisconsin Avenue, Milwaukee, WI 53202, appearing on behalf of the City of Horicon.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, the City of Horicon (hereinafter referred to as either the City or the Employer) and AFSCME, Local 1323H (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as the arbitrator of a dispute concerning the termination of Tammy Hintz. The undersigned was so designated. A hearing was held on January 29, 2009 at the City's offices, at which time the parties submitted such exhibits, testimony, other evidence and arguments as was relevant to the dispute. No stenographic record was made. The parties submitted the case on oral arguments at the end of the hearing, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the contract language, and the record as a whole, the Arbitrator makes the following Arbitration Award.

ISSUES

The parties agreed that the following issues should be answered herein:

1. Did the City of Horicon have just cause to terminate the Grievant, Tammy Hintz?

2. If not, what is the appropriate remedy?

BACKGROUND

The facts of this case are reasonably straightforward. The City provides general municipal services to the people of Horicon, Wisconsin. The Union is the exclusive bargaining representative for the City's DPW employees, including those in the classification of Class I – Trench & Mason. The Grievant, Tammy Hintz, was until the date of her discharge in November, 2007, classified as a Trench & Mason Laborer in the City's Department of Public Works.

The Grievant suffered a job related back injury in 2006, and a re-injury at the end of May, 2007. She was released to return to work by her chiropractor on June 1st: "This is to certify that Tammy Hintz has recovered sufficiently to return to normal duty on Monday, June 4, 2007." Her physician, Dr. Christopher Witke, followed up with a letter on June 18, 2007:

> *I am writing on behalf of my patient Tammy Hintz and her thoracic back injury that originated 5-2-06 with re-injury 5-29-07. I have cared fro Tammy to some degree this entire time. She has made an excellent recovery and is very motivated to go back to work and to do her job. She says she loves her job, and I do believe that. She went through an extensive work hardening program and was able to go back to her work and do a full-time job; however, I do not believe that she is in fact 100% and never at risk for injury again. I do anticipate that she will have flare-ups as she continues to do a very physical job. The frequency of these flare-ups is indeterminable. She also, when she does flare of the back, suffers from an increasing amount of headaches which I do think are related to the back injury.*

The Grievant returned to work, but suffered a re-injury due to operating a weed eater for a couple of days, that caused some lost time in July.

Richard Karr, the doctor for the City's workers compensation carrier performed a physical exam on the Grievant on June 11, 2007. In late July, the carrier sent a report through to the Grievant and the City, stating Dr. Karr's findings. The doctor concluded that she had reached a plateau in healing, with a 3% permanent partial disability. He released her to return to full-time work with restrictions reflecting her permanent disability:

- Maximum 25 pounds lifting restriction
- Maximum repetitive lifting/carrying restriction of 10 pounds
- No prolonged or repetitive work with her arms positioned above shoulder level
- No work requiring prolonged neck/upper thoracic flexion

The carrier awarded a payment of $7560 for the permanent disability.

The City returned the Grievant to work on July 20th, modifying her duties to fit within the restrictions called for by Dr. Karr. At the time she returned, she told Steve Bogenschneider, the Supervisor of the Department, that she did not agree with Dr. Karr's evaluation, and that she would be interested in getting another medical evaluation. He told her that another evaluation would be expensive, and she responded that she would pay the cost if necessary. However, neither of them ever pursued getting another medical opinion.

As the summer season came to a close in October, Bogenschneider was instructed to perform an analysis of her restrictions relative to her regular duties. He concluded that she would not be able to perform approximately 55% of her normal duties within the restrictions placed on her by Dr. Karr. On October 24th, a meeting was held with Bogenschneider, Mayor James Grigg, the Grievant and representatives of the Union. Bogenschneider explained that the seasonal work she had been assigned was coming to an end, and that the Department needed to determine whether she could return to her normal job. He presented his analysis of the Grievant's normal duties and the percentage of her time they normally took per year, and which of them she could not perform, showing that a majority of the normal work time in her classification each year was spent performing jobs outside of her restrictions. The Grievant did not dispute Bogenschneider's analysis, but said that she felt she was fully capable of performing many of her duties, notwithstanding Dr. Kerr's report. She said that she would like to get another opinion, and might contact the workers' compensation carrier to see if that was possible. The Mayor told her that they had to rely on the opinions they actually had, and that if she injured while performing work outside of her restrictions, the City would be liable.

On November 8, the Mayor sent the Grievant a letter, terminating her employment because she could not safely perform the duties of her position. The instant grievance was filed, challenging the discharge as not being for just cause. The City denied the grievance, conceding that there was no question of misconduct or discipline, but contending that just cause would include inability to work safely.

In December, the City Council adopted a 2008 budget that eliminated a position in the Department of Public Works. The elimination of a position had been under consideration for some time. Following adoption of the budget, the City sent a letter to the President of the Local, advising him that the Grievant's position would not be posted or filled.

The grievance was not resolved in the lower stages of the grievance procedure and was referred to arbitration. At the hearing, City Clerk-Treasurer David Pasewald testified that he directed Bogenschneider to prepare the analysis of the Grievant's capabilities. He agreed that the City had had other employees go out with workers compensation injuries in the past, and that none of those employees had been fired, but he noted that none of them had any permanent disability, and all of them came back without restrictions. Pasewald agreed that the City had previously arbitrated a case with the Grievant over her entitlement to supplementary benefits for prior workers compensation absences, and that it had been an expensive process.

Steve Bogenschneider said the Grievant could not do the majority of her job, and that this was untenable because it was a small department and he felt they could not create a permanent light duty position for her without transferring work to other employee, at the expense of having their work neglected. He noted that neither the Grievant nor the Union ever challenged the accuracy of his analysis, or the conclusion he drew from it, and that no one ever presented any medical information to the Department to challenge Dr. Karr's restrictions. Asked about the elimination of the Grievant's job in the 2008 budget, Bogenschneider said that the Grievant was the least senior Trench and Mason Laborer. There was a less senior employee in the classification of Heavy Equipment Operator and a couple of less senior employees in the Wastewater Operator classification, but that the Grievant was qualified to operate heavy equipment, and wasn't licensed as a Wastewater Operator. He acknowledged that the City had, in the past, hired persons as Wastewater Operators without licenses, and that it would have been possible for the Grievant to be hired into that job. He did not know whether there were any unlicensed operators at the time of the budget was adopted.

The Grievant testified that she had been fine since her last flare-up in July of 2007, and has had no need to consult a physician since she was examined by Dr. Karr in June of that year. She agreed that she had not worked since her termination and that her pain and migraines had been related to back problems caused at work. However, she said she had kept active after her termination, and had been able to lift heavy items with no problem at all. She said she wanted another medical opinion, but she agreed that she had never obtained one and that the only medical information in the City's possession were the letters from her doctor and her chiropractor, and the insurance company report of Dr. Karr's conclusions.

ARGUMENTS OF THE PARTIES

The City argues that its termination decision was non-disciplinary but nonetheless was made for just cause. Termination is not simply a punishment for misconduct. It can also reflect the fact that an employee, even through no fault of her own, cannot perform the work of the position. The Grievant suffered an injury and then a re-injury, resulting in a permanent partial disability. The only medical evidence in the record demonstrates that she is subject to permanent restrictions, restrictions which prevent her from performing more than half of her duties. Contrary to her testimony, she accepted that report, and the cash payment that accompanied it. Moreover, her own doctor's report said this injury was likely to recur on an unpredictable basis. No one has challenged Supervisor Bogenschneider's analysis of her duties relative to her restrictions, and there is no medical evidence that the restrictions are inaccurate. This is a small department, and while it is possible to accommodate someone with temporary restrictions, it is not possible to create a permanent light duty assignment for the Grievant. Placing the Grievant on a layoff would accomplish nothing, since she is the least senior employee in her classification, and she is not qualified for any other bargaining unit job held by a less senior worker.

The Union argues that the termination is not supported by just cause. The evidence indicates that the Grievant was still healing after she returned to work in July, and that she has continued to improve since that time. While the City claims that the insurance company doctor's report was unchallenged, that ignores the apparent disagreement between her doctor, who released her without restrictions, and the insurer's doctor. Moreover, the City actively resisted her efforts to secure a neutral third opinion. The medical information is hardly clear-cut or conclusive. Nor is the City's "analysis" of her duties particularly reliable. Supervisor Bogenschneider applied a layman's understanding of the restrictions and the duties, and came up with an estimate. While it may have been made in good faith, it is still just an estimate and it cannot be proof under a just cause standard that she is incapable of doing her job. The City bears the burden of proof. It relies on a medical report that states she had a miniscule 3% permanent disability to conclude that she is wholly incapable of performing her duties. There simply is no persuasive basis for that conclusion.

Had the Grievant not been terminated, she would have been able to post into a Wastewater Operator's position when her job was eliminated. She had the seniority to claim that job, and persons have been hired in the past with no licensure. Thus the arbitrator should sustain the grievance, and order her reinstated the Wastewater Operator position, with full back pay as a Trench Mason Laborer up to the point at which that job was eliminated, and as a Wastewater Operator from that point on.

DISCUSSION

Generally speaking, an employer has the ability to disqualify an employee who is not physically able to perform the duties of his or her position. That disqualification may take the form of a layoff, a leave, a demotion, a transfer, or a termination, depending upon the language of the contract and the practices of the parties. The contract here does not make any specific provision for how such circumstances are to be addressed, and there is no evidence of a practice, as the issue has not arisen in the past. The contract does provide that the City may terminate employees for just cause. The City terminated the Grievant, citing as just cause her inability to safely perform the majority of her duties. The Union disputes the accuracy of that assessment, the permanence of her disability, and the extent of her disability.

DPW Supervisor Steve Bogenschneider compared the Grievant's restrictions with the duties of her position, and the percentage of work time devoted to those duties. His conclusion was that she could not perform duties that would normally occupy slightly over 55% of her work time. Prior to arbitration, neither the Grievant nor the Union challenged the accuracy of his analysis. At arbitration, the Union characterized it as a layman's understanding of the job and her limitations. On the contrary, Bogenschneider was the supervisor of this work, and had performed the job himself during his career. The record demonstrates that he was in fact very familiar with the Grievant's job duties. As for the restrictions, they are not exotic, and would not require specialized medical training to understand. In short, I find that Bogenschneider had a sound basis for his analysis.

The Union asserts that the Grievant's discharge was, at the very least, premature, in that there was no evidence that she would not have been able to return to her position in time. I find that proposition incorrect. The medical evidence in the record showed a permanent disability, with permanent restrictions. Contrary to the Union's argument, there is no conflict between the report of the insurance company's doctor and the release issued by the Grievant's personal physician. The insurer's doctor said the disability was permanent, and provided a list of restrictions. Her personal physician said she was not 100% and that he anticipated flare-ups on an indeterminate basis as a result of performing her job. Both physicians, then, predicted ongoing problems related to performing her job duties. One provided a list of ways in which those problems might be avoided, while the other did not, but there is no inconsistency between the two opinions.[1]

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[1] For this reason, among others, I find nothing improper in Bogenschneider's skepticism of the Grievant's idea of securing another medical opinion. The two opinions on hand did not conflict, and the City was under no obligation to seek out additional opinions in order to create a conflict. Moreover, the fact is that no third opinion was ever secured. The Grievant certainly had the right to obtain such an opinion, and had it completely contradicted the opinions of Drs. Kerr and Witke, there might have been a factual dispute to be resolved. On this record, it is purely speculative that another medical opinion might have been more favorable to the Grievant than the two that were actually rendered.

Nor is there an inconsistency in the doctor's finding of permanence and the Grievant's report that, as of the hearing, she felt fit and well and had suffered no back problems despite maintaining an active lifestyle which included lifting and carrying her child, and performing manual labor around the house. There was no finding that she would suffer chronic back pain. The finding was that she would be fine so long as she avoided certain activities. To say that someone can occasionally lift weight without injury is not the same thing as saying that someone can safely work a job requiring lifting and movements that place strain on the back as a matter of routine. It bears remembering that the re-injury in the summer of 2007 was not triggered by lifting heavy weights, but by the repetitive movements of operating a leaf blower.

While the insurance carrier characterized the Grievant as having a 3% permanent disability, which the Union describes as "miniscule", it is the restrictions on the Grievant's activities, not the percentage of disability, that are important here. It may be that a 25 pound lifting restriction is minor as a percentage of the entire scope of life's activities, but if one's job routinely requires lifting more than that, it can be disabling as far as that job is concerned.

I conclude that the record evidence suffices to demonstrate that the Grievant cannot safely perform a majority of the normal duties of her job, and that the City had a reasonable basis for concluding that this inability was not a temporary or short term condition. While the term "just cause" normally conjures up notions of misconduct and punishment, it can also apply to accurate, good faith determinations that an individual, without fault, is not capable and will not again become capable of performing the job for which he or she was hired. The resulting termination is not disciplinary, but it is nonetheless imposed for just cause.[2]

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The Employer had just cause to terminate the Grievant, Tammy Hintz.

2. The grievance is denied.

Dated at Racine, Wisconsin, this 17th day of March, 2009.

Dan Nielsen /s/
Daniel Nielsen, Arbitrator

[2] This is not to suggest that termination is the only appropriate response. As previously noted, a disqualification from work because of physical limitations may take many forms, depending upon the circumstances of the case, the language of the agreement and the practices of the parties.

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