

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF GREEN BAY

and

GENERAL TEAMSTERS UNION LOCAL 662

Case 462

No. 68305

MA-14188

(VanderSteen Discipline Grievance)

Appearances:

Chris M. Toner, Attorney, Ruder Ware, 500 First Street, Suite 8000, P.O. Box 800, Wausau, WI 54402, appeared on behalf of the City of Green Bay.

Sara J. Geenen, Attorney, Previant, Goldberg, Uelmen, Gratz, Miller & Bruggeman, S.C., 1555 N. RiverCenter Drive, Suite 202, Milwaukee, WI 53212, appeared on behalf of General Teamsters Union Local 662 and Don VanderSteen.

ARBITRATION AWARD

The City of Green Bay, herein the City, and the General Teamsters Union Local 662, herein the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Union filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by the Union concerning the discipline of one of its members, Don VanderSteen, herein VanderSteen or Grievant. The Commission designated Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held on the matter on December 2, 2008 in Green Bay, Wisconsin. A transcript was prepared. A briefing schedule was set. The briefing schedule was expanded at the parties' request to discuss settlement of the case. The parties did not settle the case and filed written briefs, and the record was closed on March 6, 2009.

ISSUES

The parties stipulated to the following issues to be decided:

Was the Grievant, Don VanderSteen, disciplined with just cause?
If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 MANAGEMENT RIGHTS

(A) The City retains all rights, powers or authority that it had prior to this contract as modified by this contract subject to any challenge by the Union.

(B) The City shall have the right at all time during the existence of this contract, and subject to provisions herein, to conduct its affairs according to its best judgment and the orders of competent authority, including the power of establishing policy to hire all employees, to dismiss and discipline for just cause, to lay off subject to provisions in the contract, and to determine the methods, means and personnel by which City operations are to be conducted.

(C) The City agrees it will not use these rights to interfere with the employee's rights established by law or by this agreement.

...

ARTICLE 12 DISCHARGE

(A) The Employer shall not discharge or suspend any employee without just cause, and shall give at least one (1) warning notice against such employee to the employee in writing and a copy of the same to the Union affected, except that no warning need be given to an employee before he/she is discharged due to dishonesty, being under the influence of intoxicating beverages while on duty, drug addiction, or other flagrant violations. The warning notice provided herein shall not remain in effect for a period of more than nine (9) months from date of said warning. Discharge or suspension shall be in writing with a copy to the Union and to the employee affected.

(B) Any employee desiring an investigation of his/her discharge, suspension or warning notice must file his/her protest with the Union and the Employer within ten (10) days, exclusive of Sundays and holidays of the date the employee received such discharge, suspension or warning notice. The protest must be filed in writing.

(C) The discharge, suspension or warning notice shall then be discussed by the Employer and the Union as to the merits of the case. Failure to agree shall be cause for the issue to be submitted to arbitration as provided for in Article 11, Grievance and Arbitration of this Agreement.

(D) Should it be found that the employee has been unjustly discharged or suspended, he/she shall be reinstated and be compensated for all time lost except as otherwise determined by agreement between the Employer and the Union or by direction of the impartial arbitrator.

BACKGROUND AND FACTS

Grievant is a Housing and Zoning Inspector working in the Planning/Inspection Division of the City, and is a member of the bargaining unit represented by the Union. As an Inspector he has the duty to enforce the City Building Code, and has the rights provided to inspectors under that Code. By letter of August 13, 2008 he was given a three day unpaid disciplinary suspension by the City for violation of Chapter 14 of a City policy which prohibits: intimidating, interfering with or using abusive language toward others. The discipline was also for violation of the City Harassment and Discrimination in the Workplace Policy which states, "The City of Green Bay considers harassment and discrimination of others to be forms of serious employee misconduct". Grievant has been an Inspector for the City for at least 15 years. He speaks both English and Spanish and sometimes helps Spanish speaking people communicate in the Inspections Department office. There is no record of Grievant having been disciplined prior to the events involved in this case or that he had any written warning notices from the City for discipline within nine (9) months of the events in this case.

The City Building Code contains the following sections among others:

. . .

15.05 (b) Right to Inspect. The Building Inspector Superintendent or any Inspector of the Division of Building Inspection may, as a condition of the granting of a building permit, enter any premises for which such permit was issued at any reasonable time during the course of the work and until final inspection and approval thereof has been given to inspect such premises for compliance with all statutory and ordinance regulations concerning the construction, repair, uses and location of such building.

. . .

(c) Evidence of Permit. With every permit issued, the Building Inspection Superintendent or an authorized agent shall issue to the applicant an appropriate card properly filled out evidencing issuance of the permit. The permit holder shall place such card in a conspicuous place on the site of such authorized work, the card to be unobstructed from the public view and available for inspectors to mark.

. . .

The City has also adopted a number of policies and procedures which are provided to its employees. They contain, among others, one titled: Harassment & Discrimination in the Workplace. It states in pertinent part:

I. PURPOSE

The purpose of this policy is to maintain a healthy work environment in which all individuals are treated with respect and dignity and to provide procedures for reporting, investigating and resolving complaints of harassment and discrimination. Federal and state law provides for the

protection of classes of persons discriminated against based on race, sex, religion, age (over 40), disability, marital status, and national origin. Not protected by federal law but also protected by this policy are persons discriminated against based upon their sexual orientation. Harassment on the basis of any of the aforementioned is illegal under Section 111.31-111.39, Wisconsin Statutes.

II. POLICY

It is the policy of the City of Green Bay that all employees have the right to work in an environment free of all forms of harassment. The City of Green Bay will not tolerate, condone, or allow harassment by any employee or other non-employees who conduct business with the City. The City of Green Bay considers harassment and discrimination of others to be forms of serious employee misconduct. Therefore, the City shall take direct and immediate action to prevent such behavior, and to remedy all reported instances of harassment and discrimination. A violation of this City policy will result in discipline up to and including termination, with repeated violations, even if “minor”, resulting in greater levels of discipline as appropriate.

A. Prohibited Activity (Sexual Harassment and Harassment)

1. Harassment is any verbal, written, visual or physical act that creates a hostile, intimidating or offensive work environment or interferes with an individual’s job performance.
2. No employee shall either explicitly or implicitly ridicule, mock, deride, or belittle any person.
3. Employees shall not make offensive or derogatory comments to any person, either directly or indirectly, based on race, color, sex, religion, age, disability, sexual orientation, marital status, or national origin. Such harassment is a prohibited form of discrimination under state and federal employment law and/or is also considered misconduct subject to disciplinary action by the City of Green Bay.
4. Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:
 - a. Submission to such conduct is made either explicitly or implicitly a term of condition of employment.
 - b. Submission to or rejection of such conduct by an employee is used as the basis for employment decisions affecting the employee.
 - c. Such conduct has the purpose or effect of unreasonably interfering with an employee’s work performance or creates an intimidating, hostile, or offensive working environment.

5. Individuals covered under this policy include all employees and elected officials. Any unwelcome conduct that originates from a non-employee or elected official (Examples: customers, citizens, temporary employees, volunteers, contractors, etc.) will be investigated in accordance with this policy.
6. This policy covers any incident that occurs as an extension of the workplace (i.e. City sponsored event). (See definition). All conduct, whether before, during, or after the event, will be considered under this policy.

B. Supervisory Responsibilities

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C. Employee Responsibilities

1. Each employee, included elected officials and supervisors of the City, is responsible for assisting in the prevention of harassment by the following acts:
 - a. Refraining from participating in, or encouragement of actions that could be perceived as harassment;
 - b. Reporting acts of harassment to a supervisor; and
 - c. Encouraging any employee who confides that he or she is being harassed or discriminated against to report these acts to a supervisor.
2. Employees are expected to cooperate fully in any investigation, whether or not they are directly involved in the incident.

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Grievant signed a receipt for that policy, reviewed it and attended training on it on October 26, 2007.

City Building Inspectors occasionally request City Police Officers to accompany them during inspections if they feel there is a concern for or threat to their safety, usually based on prior experience at a particular location or with people who have been angry during previous contacts. Occasionally the Police Department requests a Building Inspector to accompany them when going to a location which might have Building Code or other City Code ramifications. Grievant has asked for Police to accompany him not infrequently, perhaps up to twice a week.

On July 23, 2008 at approximately 4:00 p.m. Grievant was driving on Dousman Street in Green Bay on his way to an inspection when he passed a residence where he noticed some roofing work being done. He could not see a building permit displayed as required by the City Building Code, and he stopped his car to look further. There was a temporary sign in the front of the residence in the City right of way with the name and phone number of the roofing contractor. He first noticed two men working on the roofing job. They appeared to be Hispanic. He was not familiar with the contractor or the members of the work crew. Nothing in the record indicates he had any prior contact with the owner of the residence. Grievant noticed a van on the property without any name or identification on it except to have Pennsylvania license plates. From his car Grievant then made a call to the City Police Department to request an Officer respond to that location. He then called his Supervisor, Sheryl Renier-Wigg, to request overtime in the event he could not finish this matter and his pending appointment before his normal ending work time of 4:30 p.m. She approved the overtime during that phone call. Several minutes after this call, Officer Richard Belanger arrived in a marked police squad car, parked it a few houses away from the particular residence and in a no parking zone, and put on the smaller of two flashing light bars equipped on the squad car. Grievant then approached the squad car and contacted the Officer.

The parties disagree as to the facts on two matters immediately following Grievant's initial observation of roofing work being done without a building permit being displayed. The first dispute is whether Grievant left his car and made contact with one or more of the work crew before making his two telephone calls and before coming into contact with Officer Belanger at the scene. The other fact issue is whether Grievant said to the work crew upon first contacting them, "Do any of you speak English", or if he said "Do any of you Hispanics speak English". There is no dispute that there were three members of the work crew and they were Hispanic.

As to the first fact issue, at the hearing Grievant testified that he had stayed in his car the whole time. He wasn't concerned about his safety while in his car. He believed that he would be unsafe if he walked in without an officer because these were not local people - didn't appear to be. They did not seem to be from the Green Bay area and he did not know who these people were. And he did not get out of the car until Officer Belanger arrived. He then got out of the car and talked to Belanger for a few minutes. Grievant also testified at the hearing that he does not recall if he approached the house prior to Officer Belanger arriving. He also testified:

Well, I got out of my car, and I believe I walked over to the officer, and I said, you know, There's not a permit posted. We've got an out-of-state plate, you know, and we've got to know who these, you know, people are here, and that's what the reason why us being there was.

Other evidence at the hearing included a print out of the Police Dispatch log for the incident, which also appeared on the computer screen in the squad car. It shows that at 4:02 p.m. the Dispatcher typed into the system the following:

UNLICENSED ROOFERS FROM PENNSYLVANIA DOING A JOB THERE, 2 M/H. HARD TO COMMUNICATE WITH, COMP WILL BE ISSUING CITATIONS. COMP IS WAITING IN CITY BLUE DODGE NEON

In this entry the 2 M/H refers to identifying the roofers as two Males/Hispanics, and COMP refers to Grievant. This is a usual type of police identification of persons with whom an Officer might have contact. The log also has an entry where Officer Belanger was dispatched at 4:04 p.m., and one where he arrived on scene at 4:09 p.m. Grievant testified, as to the first entry, that he may have said it may be hard to communicate; They only do a little typing on these things; This isn't the whole affair on here, and that's what Officer Belanger stated; It's - you know, its a little information. At the hearing Reiner-Wigg testified that when she received Grievant's call requesting overtime authorization, he stated to her that he believed he had a fly-by-night operation, there are Pennsylvania plates here, and that he had a police officer coming. Officer Belanger testified at the hearing that when Grievant first made contact with him at the scene that he [Grievant] told him he was checking on a license at the house and he [Grievant] couldn't communicate with them, they were Hispanic, he didn't get a whole lot of cooperation, wasn't able to communicate with them and he wasn't able to see a permit.

There is no dispute that Grievant and the Officer then went onto the property. The Officer motioned the crew down from the roof and identified the work crew while Grievant sought information from the crew and the owner of the residence about a building permit for the roofing work. The work crew members were all identified as being from Costa Rica and were legally in the country. Grievant later stated to his supervisors, and reiterated at the hearing, that part of the reason he had called for a police officer was to make sure that these workers were not taking work from legalized workers. He explained at the hearing that he understood that there was a City Ordinance in Chapter 6 of the Code, which is under his purview, regarding contractors must hire legalized citizens. Grievant has never enforced that, does not anticipate enforcing it, and thinks the ordinance is written wrong. Chapter 6 of the City Code was not introduced as evidence, and Grievant's supervisor testified that it is not his duty to enforce or determine if the workers are legalized citizens. He also testified that he has had one or two fly-by-night operations in his 15 years as an Inspector.

When it appears that a building permit is not posted or that there may be no permit, normally Grievant will just stop and ask the crew if they have a permit. Sometimes it is in their vehicle and just needs to be visibly posted. Oftentimes it is an unlicensed crew and he will normally just say to get the permit within the next couple days and they will not be charged a double-fee. Or, if an unlicensed crew, the owner has to sign a waiver stating that if the roofers make mistakes and it leaks that's the owner's problem. Sometimes Inspectors simply call the Inspections Office initially to see if there is a permit issued, or go to the owner and ask if there is a permit.

As to the second fact issue, while the Officer was identifying the work crew, Grievant tried to get some information about the status of the building permit. Grievant did not get any information from the work crew as to the building permit or anything else. Grievant testified that he did ask the work crew "Do any of you speak English?", because they were not responsive to him in either English or Spanish. They did not verbally communicate with him, but at least one indicated in some fashion that the owner of the residence may have the permit,

and went to the back of the house to get him. At the hearing Grievant testified, as to using the word “Hispanic” at this point, that he didn’t recall, it may have slipped, he doubts it because he speaks Spanish he would just say “Do any of you speak English”.

There is no dispute that at one point one of the work crew handed a cell phone to Grievant who tried to talk to a woman on the call who had, as Grievant described it, a bit of an accent. But, street noise from Dousman Street prevented clear communication before the call ended. After about five or six minutes, the owner of the residence came to the front and spoke with Grievant. The owner told Grievant who the contractor was and that the contractor had taken care of getting the permit. Grievant told the owner that there was no permit posted on the house. Grievant told the owner they were going to check this thing out, to make sure everything is okay, that you don’t want a fly-by-night operation coming in here, pay money, and then all of a sudden you end up with leaks, and to give him a little time to check to see if everything is okay. The owner then went in the house to look for his paperwork on the project and also called the roofing contractor, Shannon Eifort. Neighbors and passersby began looking and watching what was going on. In the meantime Grievant did call back to the Inspections Office to see if there had been a permit issued, and was then told that a permit had been issued and the contractor was licensed. He then told the owner that everything was fine and that everything was taken care of. Grievant also observed that the work was being done properly. The owner, who testified at the hearing, felt the roofing work was fine and did not have any problems with the work or how the roofing crew had conducted themselves. The owner did become concerned about people wondering what was going on and the work having been stopped during that time.

It is undisputed that at the scene Grievant tried to make contact with the contractor and left a short voicemail message on the phone: “This is Don, City of Green Bay Inspection. You’ve got some Hispanics . . .”, before the call was disconnected. A very short time after that Grievant spoke via a cell phone with Shannon Eifort, the contractor. Grievant stated in that conversation that it was necessary to post the permit in a visible place. Eifort had responded by indicating that he had had the permit posted. Grievant and a worker had looked about the outside of the residence, including behind some bushes, and could not find the permit.

Grievant and Officer Belanger then left the residence. The incident took approximately 30 minutes. According to the testimony of the residence owner, Eifort arrived shortly thereafter and found the building permit outside in some bushes.

The following day Eifort called the City Planning Director and Department Head, Patrick Strong, who happened to be in a meeting then with Renier-Wigg. The call was put on speaker phone. Eifort appeared pretty upset, stated he had an inspector out on the site that showed up, a police department vehicle was there, an officer was there and the inspector was addressing his employees as Hispanics. Among other things, Eifort said that one of his workers told him that it was said, Do any of you Hispanics speak English? He also complained about Grievant saying on the phone call that “you have a bunch of Hispanics working here”.

Eifort complained that his wife, who is a Hispanic woman, was distraught over the phone call she had received. He explained that he felt bad because the owner of the property was embarrassed and not sure if Eifert was a good contractor because the inspector kind of indicated to the owner he was a fly-by-night contractor. Eifort asked that the owner of the residence be contacted to straighten that out. Eifort insisted that he did have a permit on site, which must have blown off, and that he had his contracting sign with his company name and phone number so the Inspector could have just called him and asked about the permit rather than disrupt the crew and the work. Eifort felt his work crew had been racially profiled. He said he still had a recording of the telephone call where the Inspector had said you've got some Hispanics, which he brought to Renier-Wigg later that day.

Strong and Renier-Wigg then investigated the matter, which included an interview of Grievant. At one point before a meeting between management and Grievant, when Grievant was told of the meeting he said, at least once in a loud voice, in the Inspections office area with at least one customer and another employee present: "What is this, the fucking inquisition?" He was incensed that what was a routine situation turned into a volcano so to speak. Other employees have been disciplined for similar outbursts, some have not.

During the investigative meeting Grievant was confronted with Eifort's complaint that Grievant had made the comment about, Do any of you Hispanics speak English. Grievant's response was that he didn't understand the problem with that. When the subject of his having mentioned in the phone message to the contractor that you've got some Hispanics, Grievant initially said he did not believe he left a voice mail message. Management then told him they had the tape of the message, and then he recalled using someone else's phone and having someone taking the phone away and flipping it closed in the middle of the message.

At the conclusion of the investigation, Strong gave Grievant a three day unpaid suspension which is reflected in a letter of discipline dated August 13, 2008 that stated:

This letter is in reference to your work performance, specifically your recent inappropriate behavior while at a property at 1084 Dousman on July 23, 2008, and profanity that you used in the Inspection office on July 24, 2008.

On July 24, 2008, Shannon Eifort of Home Pro Roofing Company reported to me that he had significant concerns regarding your behavior on his job site at 1084 Dousman. He said that after you arrived at the home you took notice of the ethnicity of his crew and made the comment, "Do any of you Hispanics speak English?" According to Mr. Eifort there are a few on his crew that are able to speak English. Mr. Eifort asserts that you told the owner of the home that the crew was not licensed and didn't obtain a permit before you confirmed whether that was true. As it turns out, the crew was licensed and the company had obtained a permit.

In addition, Mr. Eifort informed me that you left a partial voicemail message for his office "...you have some Hispanics here..." then the call was disconnected. He felt that your comments about the "Hispanics" were discriminatory and you

were racially profiling. You also called the police, which escalated the situation even more so. The owner of the company informed the Mayor and me that he was prepared to go to the media with his complaint.

On July 25, 2008, we met with you, your union representatives and Human Resources to provide you with an opportunity to respond to the complaints. You said that the reason you stopped at the property was because you saw the crew working on the roof, and you did not see a posted permit. You were asked why you called the police, and you responded that you called because there were a lot of people to "ID". In addition, you said that none of the crew spoke English and you were not comfortable. However, you also stated during our meeting that you did not feel threatened by the crew in anyway. Department protocol is that an Inspector can call the police to assist if the Inspector believes there is a threat to his/her safety. In this case, there was no indication that the workers would have posed a threat to your safety.

You stated during this meeting that you asked one of the guys on the crew where the permit was located, and you were told the owner had it. You asked this crew member to get the owner. You said that 10 minutes later a "Costa Rican guy" gave you a cell phone and the phone number to call. You called, but said that the individual who answered at that number was a Hispanic lady whom you could not understand. All of this time a Patrol Officer was at the scene.

You said at this point, you felt this was a "fly by night" operation because the crew could not speak English; there was not a permit posted and there were Pennsylvania plates on the vehicle at the site. When you finally were able to speak with the homeowner, you said that you told him that you were going to find out what was going on and to make sure that they were licensed. You denied telling the homeowner that the crew was not licensed.

You said that you then called Donna in the Inspections office. She gave you Mr. Eiforts phone number, and told you that his firm was licensed, and he had a permit to do the work. You said that you then called Mr. Eifort and asked him where the permit was located. He told you it was on the porch, but it was not there.

During your meeting on July 25, 2008, you admitted that you referred to the crew as Hispanics, but that you meant that they did not speak English. I explained to you during the meeting that by referring to the crew as "Hispanics" at the job site your were singling them out by race, which was perceived by the crew and the owner of the company as discriminatory. A more appropriate way to ask the question would have been, "do any of you speak English?"

You initially denied leaving a voicemail for the owner of the business. However, after you were informed that the owner gave me a copy of the voicemail message you left, you then admitted that you did. You stated that you left a partial message for the owner of the company stating that he “had Hispanics here.” You could not recall why you got cut off or what you were going to say after that. You further explained that another reason you requested that an officer be at the home was that you wanted to make sure that “these guys weren’t taking work from legalized workers.” You were informed that it is not your job to verify whether crew members are “legalized” workers.

You were also informed during this meeting that I had received information that on July 24, 2008, you were overheard making loud, profane statements in the Inspection office repeatedly saying, “fucking inquisition”, referring to the meeting your supervisor had just set up with you. You were also told that there was a member of the public at the front desk within earshot of you making those remarks. You admitted that you made these statements, and you apologized.

Your behavior at the property and in the Inspection Office on July 24, 2008 is of considerable concern. You made inappropriate assumptions that the contractor and crew performing the roofing work was a “fly by night operation” before verifying whether they were a licensed contractor. Your rationale for that assumption was because the crew was “Hispanic”, there were out-of-state plates on the vehicle, and the permit was not visibly posted. Based upon your comments at the property and your actions, the owner of the roofing company felt that your behavior was discriminatory and placed his company in a bad light.

In addition, I am even more concerned that your behaviors were motivated based upon the race of the crew because during our meeting on July 28, 2008 you made the statements that a “Costa Rican” gave you a cell phone, and you needed to make sure that “these guys were not taking work away from legalized workers.” These statements are discriminatory. You again made assumptions that because of the ethnicity of the crew, they were “illegals.” As we discussed during the meeting, you should have investigated your concerns regarding the permit and whether the contractor and crew were licensed by making a call to the Inspection office for verification. That could have been done from your vehicle.

Once you learned that a permit had been issued, but was not posted, you could have then addressed that issue with the homeowner. Instead, you escalated a relatively simple matter into a situation that frightened and embarrassed the homeowner and presented discriminatory undertones. Your actions on that day placed the City and the Inspection office in an unfavorable light, and potentially exposed the City to liability.

Regarding your use of profanity in the Inspection office, you made these comments where members of the public could hear you and staff heard it as well. Your comments were also directed toward your supervisor, which is disrespectful. This is unacceptable behavior, and it will not be tolerated.

Your recent behavior is in violation of City of Green Bay Policy and Procedure, specifically, Chapter 14, Discipline and Discharge:

- Intimidating, interfering with or using abusive language toward others.

Your behavior is also in violation of the City's Harassment and Discrimination in the Workplace Policy which states, "The City of Green Bay considers harassment and discrimination of others to be forms of serious employee misconduct."

As a result of the seriousness of your actions, this letter serves as notice that you will serve a (3) day suspension without pay. The suspension will be served starting September 3, 2008. Future inappropriate behavior or violation of City/department policy or procedure will result in further discipline up to and including termination.

In addition, because of the nature of your inappropriate behaviors, you are directed to participate in the Employee Assistance Program for sensitivity training. You are required to comply with any and all of their directives. This is a condition of continued employment and failure to comply with this directive will subject you to further discipline, up to and including discharge.

You are required to contact the Employee Resource Center by (2 days from date of meeting) to schedule your first appointment, and you must sign all of the necessary releases required by the Employee Resource Center so that they can keep us apprised of your compliance.

I trust that you will correct your behavior and that a situation like this will not occur again.

After Grievant received this letter he filed a grievance over the discipline.

The grievance contends that the disciplinary action was taken without just cause. It requested that Grievant be made whole for all lost wages and benefits, and to have the disciplinary letter removed from his file. The grievance was denied by the City, which led to this arbitration.

Further facts appear as are in the Discussion.

POSITIONS OF THE PARTIES

City

In summary, the City argues it established the two elements that define just cause. Grievant violated the anti-harassment policy. Among other things, the policy considers harassment and discrimination of others to be forms of serious employee misconduct, and employees are to refrain from participation in, or encouragement of actions that would be perceived as harassment. Inherent in that policy is the idea that individuals are treated with respect by City employees. Grievant had training in the policy. Any type of racial remark to the public is inappropriate.

The City argues that Grievant's actions in their entirety rise to the level of racial discrimination and/or harassment. The idea that Grievant, who speaks Spanish, was unable to communicate with Spanish speaking individuals is suspicious. He called police dispatch to have an Officer check the worker's identification, which Renier-Wigg testified is not normal operating procedure. Grievant did not contact the police because he was concerned for his safety, but instead to ensure the workers were not taking work from legalized workers. He made numerous racially insensitive remarks. He did not deny to his superiors saying "Do any of you Hispanics speak English." He admitted it may have slipped. He referred to the workers as being Hispanic when discussing with Officer Belanger. He left a voice mail message indicating Hispanics at the job site. He told the residence owner he believed the contractor was lying about his business and told him it was good he had not paid any money. He did so without confirming the truth and having no knowledge of the contractor's business. The only basis was the nationality of the workers. All these actions show Grievant violated the policy. Discipline is warranted.

The City also argues that the level of discipline is reasonable. The anti-harassment policy indicates discrimination is one of the most serious forms of misconduct. Grievant's actions require a three day suspension without pay. When dealing with the public, any employee must be sensitive to the way his or her conduct is perceived. Grievant made a number of assumptions which caused unwarranted escalation of the matter. Instead of calling the office to confirm whether there was a permit, he assumed the job was conducted by a fly-by-night company. With only one or two of those in 15 years, his assumption was based not on the work, but purely on ethnicity of the workers and that no permit was posted. He called for overtime, but did not ask for permit and licensing information first. He knew nothing about the roofing company but made disparaging remarks to the residence owner. He admitted it is routine to give contractors a chance to obtain a permit before he cites them. In this case his admitted motive was to ensure work was going to legalized workers. He called for police back up but had no articulable reason for doing so other than to obtain identification of what he believed to be illegal workers. This is not his job and shows discriminatory motive. While not knowing what his thought process was, his conduct left both the property owner and the business owner frustrated and angry.

The City argues that this is not a termination case and the purpose of progressive discipline is to notify employees that their performance or conduct is inappropriate and to allow them to modify their behavior. Reducing the suspension sends a terrible message that it is alright to refer to people by their ethnicity, to swear in public, and make disparaging remarks' about a legitimate business with no factual support. Grievant did not understand his actions to be inappropriate and believed the City was making a mountain out of a mole hill. Absent serious corrective action his behavior will continue to be perceived as discriminatory by the public and may result in poor publicity of the City, a lawsuit, or both.

In reply to the Union arguments, the City argues that the Union repeatedly misstates the facts. Contrary to the Union arguments, the Grievant did talk to the workers before the officer arrived; Grievant left before the residence owner could get the paperwork from his house; he didn't tell the residence owner considering confusion over the licensure; the residence owner was upset with Grievant pulling workers off the job, calling the police and delaying the job; the City did corroborate Grievant's use of the word "Hispanic"; that Grievant's "fucking inquisition" statement was made before he was questioned by the City: that Grievant's comments were offensive and derogatory and intended to harass based on ethnicity, and; the Union argument that the City did not interview everyone is unpersuasive when Grievant admitted sufficient facts to warrant discipline.

The City further argues that Grievant's actions violate City policy. Under both Federal and state law adverse action, based, even in part, on protected classifications gives rise to a violation of law. Ethnic identifiers are indicators of the speaker's motive in making decisions. In this case use of the word "Hispanic" in the context used by Grievant questions his motives for stopping and investigating. He called for backup without feeling his safety was in jeopardy or needing a witness, and to make sure the workers were not taking work from legalized workers. Coupled with comments about the workers being Hispanic, this shows discriminatory motive. And his comments to the residence owner about the contractor were with no evidence other than the ethnicity of the workers, a Pennsylvania license plate, and the misplaced permit.

The City argues that Grievant does not exercise unfettered discretion. The City has management rights under the contract. The City has a policy that outlines the manner in which all of its employees are expected to exercise their discretion. The City provided training. Grievant's actions go outside those boundaries. Describing people by their race is some evidence that Grievant's actions were motivated by the ethnicity of the workers. Ethnicity must have no place in the exercise of discretion. "Hispanic" is not inherently derogatory, but the manner by which a person uses those phrases had a profoundly different impact on the person with whom the speaker is referring. It is like putting up a sign, "Irish need not apply". Grievant used the most aggressive tactics and techniques he had in order to investigate the matter. It is not his job to protect the rights of legalized workers. He does not understand his actions were inappropriate. The residence owner and business owner were upset. The City carefully metered out discipline in order to notify Grievant that his actions were inappropriate and to give him an opportunity to correct his behavior.

Union

In summary, the Union argues that the City violated the bargaining agreement when it suspended Grievant. Grievant referred to the contractors as Hispanic. They were, in fact, of Hispanic origin. Their ethnicity, however, played no role in stopping and inspection the work being performed. There was no posted permit, a violation of the Building Code. Grievant acted within his authority. His referring to the crew as “Hispanic” to their boss in a voicemail, while less than ideal, is not tantamount to the very serious offense of discrimination or harassment. He did not use a derogatory term, and the City never spoke to any individual who was present at the residence during the inspection.

The Union argues that the City bears the burden of proving both elements of just cause to suspend Grievant. This alleged misconduct carries the stigma of general social disapproval and should be clearly and convincingly established by the evidence, citing arbitral authority. The City cannot meet its burden of proof. Its investigation was deficient in that it never interviewed the actual witnesses and it cannot prove a violation of the policy or other allegations.

The Union argues the City cannot meet its burden because the use of the word “Hispanic” is neither racial discrimination nor harassment and does not violate any City policy. The allegations of discriminatory overtones are ridiculous. The single use of the word “Hispanic” is not racial discrimination and is not harassment. Grievant did not act with an improper motive. He conducted the inspection the same as any other; his actions were not discriminatory. Grievant has never been accused or suspected of harboring improper race-based motivations. He speaks Spanish and assists the City and its Spanish-speaking (Hispanic) citizens. The City claims, in hindsight, that because the supervisors would have handled things differently, Grievant was acting with an improper motive. If the City is going to accuse Grievant of an offense tantamount to racism it has an obligation to convincingly prove that race motivated Grievant’s actions. There is nothing wrong with requesting police assistance or in conducting the investigation in the manner Grievant did. While it may not be politically correct to use an ethnic-identifier in the label-free world the City of Green Bay envisions, the City policy is unrealistic, contrary to its own policies and procedures, and furthermore, the use of the term “Hispanic” is not derogatory, discriminatory or harassing. The request for police assistance was not unusual or out of the ordinary, and not in any way motivated by race. “Hispanic” is a legitimate word used by Green Bay Police and Inspectors. It was lobbied for by the Hispanic population and is used by the United States Census Bureau and other government divisions to identify people. This identifier is not harassment or racial profiling. The City uses them regularly. The City has not told employees that the use of such identifiers falls under its Harassment policy. Having the crew members ID’d is not evidence of discrimination. It was Officer Belanger who identified the crew independently and based on his own standard as a police officer. Grievant never requested and was not involved in the identification process. And even if he had requested identification, there is no procedure which prescribes the manner by which he does his job. If he had issued a citation to the

workers he would need to know who they were. Renier-Wigg's assumptions are unfounded and baseless given her lack of field experience. Grievant's actions were appropriate. There are no written guidelines inspectors must follow. They have discretion. Grievant completely informed his supervisor as to suspicions of a fly-by-night operation and that he'd asked for police assistance. His assessment was not based on race. It was based on no posted permit, his unfamiliarity with the crew, an unmarked van with Pennsylvania license plates –suggesting an unlicensed, and therefore illegal, contractor. He was not told to cancel the police request. None of the facts suggest even a shred of improper or race-based motivation. Police assistance is commonly requested and is left to the Inspector's discretion. Supervisors are not usually informed when police assistance is requested. The request was Grievant's right. He can't be disciplined for it because there are no hard-and-fast rules or manuals for requesting police assistance.

The Union also argues that Grievant did not violate the City's Harassment policy. The policy does not prohibit employees from identifying individuals by ethnicity or race. Subsection IV.E applies to race, but refers explicitly to conduct between employees, which is not at issue in this matter. The policy is also confusing when invoking the Wisconsin Fair Employment Act. Even if the prohibited activity applied to situations involving City employees and the public, Grievant engaged in no such activity. Citing the policy language, the only proof the City has that Grievant asked the crew "Do any of you Hispanics speak English?" is an allegation by someone who was not present during the investigation or when the alleged comment was made. Eifort claims to have heard this from his employees, whose English speaking skills have not been established. Grievant's use of "Hispanic" during the phone call was not degrading, offensive or derogatory, but described his crew. It does not violate the policy. He did not ridicule, mock, deride, or belittle any person and he did not make or engage in verbal harassment which created a hostile, intimidating or offensive work environment. He made a single comment- something he would have done if he had issued a citation to any one of those individuals.

The Union further argues that there was no harassment and nothing that created a hostile work environment. Citing legal authority, there was no course of conduct against the crew treating them differently than anyone else. Grievant did not explicitly or implicitly ridicule, mock, deride or belittle any person, even if he did ask "Do any of you Hispanics speak English?" He was asking to determine what language he needed to use. He was not using the term to hurt or harm or use at their expense. It does not rise to the level of an ethnic slur, citing arbitral authority. It does not rise to a violation of the policy. Grievant did not use derogatory or offensive language. The policy does not define this. Common dictionary definitions are not met here. Not all annoying, irritating or grating statements are grounds for discipline. Some objective standard is needed and a valid ethnic identifier is not objectively offensive. It is unclear whether the workers were offended or even knew of the voicemail. Grievant did not know the City considered the term derogatory or offensive, and asked the supervisors for an explanation in view of the "Hispanic Arts Council" and other use of the word "Hispanic". He then used Costa Rican to try and comply with Strong's absurdly strict interpretation. The City has lofty goals, but that does not mean references such as these and "those women", "some guys" or "those Protestants" are discriminatory.

The Union further argues that Grievant did not intimidate, interfere with or use abusive language toward others. He conducted his examination as any other. The City had no evidence to the contrary or that he intimidated, interfered or used abusive language. The City failed to prove Grievant used the word “Hispanic” one-on-one to crew members, or if he did use it that it was abusive. And when Grievant swore while a resident was within earshot at the Clerk’s desk, it is unclear if the resident heard anything. Grievant was upset at the allegations, but apologized. The City did not present witnesses about that. He did not intimidate another person or use abusive language toward or directed at another individual.

The Union argues that the City cannot prove just cause to discipline Grievant for swearing. He did swear. The use of inappropriate language in the clerk’s office is not sufficient grounds for a three-day suspension. Other employees who use similar colorful language have not been disciplined. Disciplining Grievant would be disparate treatment.

The Union also argues that Grievant’s Due Process rights were violated. Due process includes clear advance communication of what constitutes a violation, the reason for management’s actions, timely employer action, fair investigation, appropriate management review, evenhandedness, and an opportunity for the employee and union to be heard, citing arbitral authorities. The City’s investigation was insufficient and it is unreasonably interpreting and applying a policy never communicated to its employees. Grievant did not have knowledge that use of the term was considered a violation of the policy. Strong never warned against this. It can’t be inferred because “Hispanic” is not a derogatory term and numerous organizations self-identify with it. The Policy does not identify it. City employees have citation books that identify by race, as does the City Police Department. Eifort referred to his wife as a “Hispanic” woman – which begs the question of where, when and how do you draw the line between appropriate and inappropriate use. And the City failed to seek out relevant information after Eifort’s call. This call was the basis for discipline and Eifort did not witness a significant portion of the allegations against Grievant. Eifort’s hearsay statements are not corroborated by actual witnesses. This violates just cause as does the refusal to talk to Officer Belanger who was present at the inspection and believed it was routine. This violated due process.

The Union argues a three-day suspension is too severe under the circumstances. Even if it were proved that he has a single use with Eifort or used “Hispanics” in a conversation with the workers, Grievant was not motivated by an improper motive. He has never done anything to raise the specter of discrimination or harassment based on national origin. The opposite is true, as he has helped people of other ethnic origins at the Clerk’s desk. A three-day suspension and accusations that Grievant acted with a discriminatory motive is too severe under the circumstances.

The Union, like the City, included Article 12 (A) in its relevant contract language in its brief.

In reply to the City’s arguments the Union contends that this case is not about racial discrimination or harassment as Grievant never acted outside the confines of written or verbal policy. It is at worst allegations of racial insensitivity - some unclear and undefined violation of an unannounced code retroactively imposed. City concerns are outweighed by the fact

Grievant did nothing wrong. The City's goal of branding him a racist violates just cause. He can't be disciplined for violating a rule he didn't know existed. Eifort was not a witness to anything at the scene. He got a single voicemail containing "Hispanic" one time. There is no proof of violation of policy or any context to the voicemail suggesting discipline is appropriate. Racial insensitivity, as argued by the City, is much different than discrimination or harassment. Grievant did not use derogatory language and expressed confusion as to why it was improper to refer to ethnic origin. He didn't knowingly violate a policy or have notice of such an extreme and counter-intuitive policy interpretation. Even if this were a violation, just cause prohibits assessing a three-day suspension for a first minor violation of an unclear policy. And the City has not disciplined others for swearing in the workplace. Some do swear and are not punished. Swearing does not rise to the level of abusive language and can't trump up charges Grievant is a racist. Grievant's comments to the residence owner about Home Pro's credentials were made out of an over-abundance of caution. He truly believed it was a fly-by-night operation. Grievant broke no rules in speaking to the crew first. Race had nothing to do with it. He stopped because no permit was posted. There was an unfamiliar crew and an unmarked out of state vehicle. The supervisors' criticisms are speculative and are not a basis for improper motive. There is no evidence inspections are done differently. If the residence owner had been bilked for substandard roofing, the City would not be complaining. Use of "Hispanic" in a voicemail does not imply racial motivation for stopping or otherwise imply discrimination or harassment. As to "Do any of you Hispanics speak English?", there is no violation because none of the employees complained. Eifort is not Hispanic and can't be personally discriminated against as none of the comments were directed at him or made on account of his race. Grievant did not violate the policy. Alleged racial insensitivity is not discrimination or harassment, but is wading into muddy waters.

DISCUSSION

This is a discipline case where it is alleged that the Grievant, a City Building Inspector, violated City policies prohibiting employees from discrimination or harassment based on race or national origin, among other things, and prohibiting employees from intimidating, interfering with or using abusive language toward others. Two incidents are involved. The first concerns Grievant's inspection of a residential roofing job. The second concerns him swearing, in the Inspections office, when told of an investigation into the roofing inspection matter.

The parties' collective bargaining agreement contains provisions referencing just cause for discipline. In part, under Article 2(B) of the Management Rights clause:

- (B) The City shall have the right at all time during the existence of this contract, and subject to provisions herein ... to dismiss and discipline for just cause

And, in part, under Article 12(A) of the Discharge clause:

- (A) The Employer shall not discharge or suspend any employee without just cause, and shall give at least one (1) warning notice against such employee to the employee in writing and a copy of the same to the Union

affected, except that no warning need be given to an employee before he/she is discharged due to dishonesty, being under the influence of intoxicating beverages while on duty, drug addiction, or other flagrant violations. The warning notice provided herein shall not remain in effect for a period of more than nine (9) months from date of said warning. Discharge or suspension shall be in writing with a copy to the Union and to the employee affected.

The agreement provides, in the above Article, some procedural limitations or requirements in some discipline cases, but overall it does not define just cause. The parties did not stipulate to a definition of just cause. Both parties argue a similar two part standard. Generally, just cause involves proof of wrongdoing and, assuming guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, whether the punishment assessed by management should be upheld or modified. See, *Elkouri & Elkouri, How Arbitration Works*, 6th Ed., p. 948. In essence, two elements define just cause. The first is that the employer must establish conduct by the Grievant in which it had a disciplinary interest. The second is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest. See, e.g., *MILWAUKEE COUNTY, MA-13866* (Gordon, Nov. 2008). That is the definition of just cause that will be used here subject to the provisions in Article 12, in its entirety, of the parties' agreement.

As to whether or not Grievant's actions at the roofing inspection violated the City policy on harassment and discrimination in the workplace, there are two factual matters which need to be resolved. The first, as noted in the Background and Facts portion of this Award, is whether Grievant left his car and made contact with one or more of the work crew before making his two telephone calls and before coming into contact with Officer Belanger at the scene. The Union and Grievant argue that he did not. The City argues that he did. Whether he did or not has some bearing on the question of what he said to the work crew at the scene, and the overall fact pattern.

When asked by his attorney if he got out of the car and spoke with the workers prior to Officer Belanger arriving, Grievant testified that he did not believe that he did, he waited in his vehicle until Officer Belanger got there. He also testified, when asked by his attorney if he approached the house before Officer Belanger arrived: "I don't recall." The Police Dispatch log, an exhibit introduced by the Union, contains notations entered by the Dispatcher based on the call from Grievant. It states in part: "UNLICENSED ROOFERS FROM PENNSYLVANIA DOING A JOB THERE, 2 M/H. HARD TO COMMUNICATE WITH, COMP WILL BE ISSUING CITATIONS." This indicates that he had already contacted the crew or there would be no reason to say anything about "hard to communicate with" if he had not already had contact. This is regardless of whether there is some language barrier or mere uncooperativeness stemming somehow from the lack of a posted permit. Grievant contends that this is only a summary of what he told the Dispatcher, and that he "may" have said it "may" be hard to communicate. In addition to what the log says on its face and Grievant's lack of certainty is the testimony of Officer Belanger. He testified without qualification that when Grievant first

approached him at the squad car Grievant told him that he (Grievant) couldn't communicate with them, they were Hispanic, he didn't get a whole lot of cooperation, and wasn't able to communicate with them. These are all past tense statements. They all indicate Grievant had already left his car and had contact with the crew. They are consistent with the past tense implication in the log phrase "hard to communicate with." And, other than note an out of state license plate and that he was unfamiliar with the crew and the contractor, whose business name was on the sign in the City right of way, Grievant has not identified any reason to have any concerns for his safety other than the people did not appear to be local, from the Green Bay area. Nothing in the record indicates he told the Police Officer he feared for his safety. If, as he suspected, the roofers were a fly-by-night operation, he still has not indicated anything that threatened, or potentially threatened, his safety.¹ In short, the undersigned is not persuaded that he was afraid to get out of his car and approach the work crew before a police officer was there. All of the above persuades the undersigned that Grievant did leave his car and approach the work crew, had some difficulty in getting information from them, and then called for a police officer.

The other fact question is whether Grievant said to the work crew "Do any of you Hispanics speak English?" or if he said "Do any of you speak English?" The City argues, over the Union's hearsay objection, that he did use the word "Hispanic" in his question as Eifort complained about. The Union argues that Grievant did not use the word "Hispanic", and that no witness to the question actually testified. Grievant testified that he did not use the word in his question. He also testified that he didn't recall, it may have slipped, he doubts it because he speaks Spanish and he would just say do any of you speak English. Eifort's statement was not offered to prove that the work crew was Hispanic, but that the word was said in the context of the question. It is a statement purported to be made by Grievant. When his supervisors later asked him if he said that, Grievant did not deny saying it, but defended the use of the word as it is used properly in other contexts. This is an implied admission to having said it. This admission is further supported by his belatedly admitted use of the word in his voicemail message to Eifort where he said "... you've got some Hispanics". This is a statement Grievant denied making until his supervisors told him they had a recording of it. He also used it when he was asked by the Dispatcher about the roofers' description, and when he described the roofers to Officer Belanger. Setting aside for the moment the question of propriety or context, he clearly said "Hispanic" at least three times during his stop. Grievant was using the word at the site, impliedly admitted using it in the question, and testified that it may have slipped. The undersigned is convincingly persuaded that he did say "Do any of you Hispanics speak English?"

¹ The undersigned does not find persuasive the conjecture offered at the hearing by the Police Officer to the effect that these out of state people he didn't know doing roofing work with sharp knives and hammers could be wanted for homicide and planning something by not being cooperative. While such a general rule of caution as is indicated in the Officer's concerns may be valid because safety is always a concern for a Police Officer, such conjecture could apply to anyone the Officer is not familiar with in any situation. The point at issue here is that Grievant had already told the Officer he didn't get a whole lot of cooperation from them before they went to the residence together.

The just cause analysis requires determining if the City established conduct by the Grievant in which the City has a disciplinary interest. The City has a management right to make rules and policies for its employees to follow which are in compliance with the collective bargaining agreement. The City has a right and a legal duty to be sure that its employees do not discriminate or harass people based on race, national origin, and other identifiers. The policy invoked by the City here is in furtherance of those goals and violations of that policy result in a disciplinary interest. The same is said for the City policy against intimidating, interfering with or using abusive language toward others. This latter policy is alleged by the City to have been violated when Grievant said “fucking inquisition” in the Inspection’s office in front of another employee and a member of the public when he was told to come to a meeting about the inspection. Even though the Union argues that no one testified that they actually heard the statement or were intimidated or felt abused by it, Grievant admits he said it, it was in a public place within the hearing of the public and other employees, and Grievant apologized for saying it. This is abusive language and it was used generally toward anyone within its hearing. The City has a legitimate interest in not allowing its employees to say things like that in a governmental public place in front of other employees and members of the public. It casts the City’s legitimate operations in a disfavorable light. It also shows disrespect and an interference with the legitimate roles and duties of supervisors who are investigating things, especially complaints from citizens, which they should be doing. Grievant violated this policy. The Union argues that he is being unfairly punished for this because others are not disciplined for similar things. The record establishes otherwise. While sometimes an employee swears and is not disciplined, the City has disciplined other employees for similar statements. The City is not singling out Grievant or depriving him of any due process by disciplining him for this violation.

The swearing incident was connected to the investigation of the inspection incident, and was part of the letter of discipline that suspended Grievant for three days. The suspension did not differentiate between the swearing and the inspection. Although the letter of discipline does not actually say it, both were treated by the City as an overall incident.

Turning to the alleged violation of the policy against discrimination and harassment, the policy applies to employees. It applies to employees as they are doing their jobs regardless of where they may be located. Grievant was doing his job while he was inspecting the roofing job. Among other things, the policy provides that:

The City of Green Bay will not tolerate, condone, or allow harassment by any employee or other non-employees who conduct business with the City.

The policy specifically prohibits harassment:

No employee shall either explicitly or implicitly ridicule, mock, deride, or belittle any person.

and

Employees shall not make offensive or derogatory comments to any person, either directly or indirectly, based on race, color, sex, religion, age, disability, sexual orientation, marital status, or national origin. Such harassment is a prohibited form of discrimination under state and federal employment law and/or is also considered misconduct subject to disciplinary action by the City of Green Bay.

Among the Employee responsibilities are:

Refraining from participating in, or encouragement of actions that could be perceived as harassment

The policy contains definitions, including:

Harassment/Discrimination on any basis (race, sex, age, disability, etc.) exists whenever:

Submission to harassing conduct is made, either explicit or implicit, as term or condition of an individual's employment; submission to or rejection of such conduct is used as the basis for an employment decision affecting an individual; the conduct interferes with an employee's work or creates an intimidating, hostile or offensive work environment. Such conduct is prohibited under this policy and §111.31-111.39, Wisconsin Statutes.

Grievant received the policy and was trained on it. It specifically mentions race and national origin. It prohibits offensive or derogatory comments that are made either directly or indirectly, explicitly or implicitly, and covers actions that could be perceived as harassment. While the policy clearly applies to prevent discrimination and harassment perpetrated on City employees, it also is written broadly enough to apply to and prevent City employees from discriminating against or harassing any person, employee or otherwise.

The first two times that Grievant mentioned "Hispanic" was in his contact with law enforcement while describing the people involved in the roofing project. Such descriptions are not unusual in law enforcement and are used to identify people. There is nothing discriminatory or harassing about this use. As the Union argues, even the citations used by the City have a place to indicate race. There is nothing to suggest that Grievant's references in these circumstances and in this context ridiculed, mocked, derided or belittled any person, either directly or indirectly, explicitly or implicitly. This is not perceived as harassment. These statements by Grievant were not a violation of the policy. He was not disciplined by the City for this, and the letter of discipline does not refer to those two instances.

Context and circumstances are important. As Grievant said to his supervisors, and as argued by the Union, use of "Hispanic" in the name of an organization such as Hispanic Advisory Council, or to describe a culture or its people is not discriminatory. Use of the phrase Hispanic on its face may or may not be racially insensitive.

The other two uses by Grievant of the word “Hispanic” were in a different circumstance and context. In either instance there was no need or reason to use it. They were not being identified in that question and there was no need to distinguish or differentiate them from anyone else at the scene because at that time there was no one else there, including the residence owner. It serves no legitimate purpose. Even if there had been others there, there is still no need. Either the roofers could speak English or they could not. They were either going to communicate and cooperate with him or they were not.² Their race, ethnicity or national origin had nothing to do with this. The question implied or assumed an inability to speak English and tied that directly to race or national origin. This was a gratuitous interjection of race or national origin for no legitimate reason made in a context that can be seen as implicitly belittling. While an inability to speak English in and of itself has no discriminatory implication, an assumption of an inability to speak English due to being Hispanic does carry that connotation. This can be perceived as harassment based on race, ethnicity or national origin. By the complaint of Eifort it was perceived by him and the work crew as such. This is a violation of the policy.

A similar context and circumstance surrounds Grievant’s use of “Hispanic” in the voicemail message to Effort. Again, there is simply no reason to use race or national origin in that context. Either Eifort had a work crew at the address or he did not. Either Eifort was the contractor for the roofing work or he was not. Race or national origin had nothing to do with it. Grievant told his supervisors that the cell phone call was made with someone else’s phone, and having someone take the phone away and flip it closed in the middle of the message. The circumstances lead to the conclusion that it was one of the work crew, not Officer Belanger or the residence owner, who gave and then flipped closed the phone, just after Grievant said “you’ve got some Hispanics”. It is easy to interpret that action as a negative reaction to Grievant’s use of “Hispanics”. There was no need too identify or refer to the race, ethnicity or national origin of the work crew. It serves no legitimate purpose. The fact that there was no building permit posted on the property at the time, or if there was a permit for a licensed contractor, has nothing to do with race or national origin. Use of “Hispanic” associated race or national origin with non-compliance with the building code. Compliance with the building code has nothing to do with race, ethnicity or national origin. To connect the two is offensive, derogatory and belittling. Eifort felt his crew and his company, whose sign was in the City right of way, were being racially profiled. He knew there had been a Police Officer involved. He felt the actions were discriminatory and also placed his company in a bad light because this was connected to the Grievant’s allegation of them being a fly-by-night operation. Grievant cannot erase the connection between his use of race, ethnicity and national origin and a

² The record actually indicates communication and cooperation by the roofers. According to Grievant’s testimony, they did inform him that the owner had the permit and went to get the owner at Grievant’s request. One of them did voluntarily hand the Grievant a cell phone with a number on it that turned out to be the contractor’s wife. One of them helped Grievant look for the permit card about residence. This also relates to whether Grievant had initially waited in his car for the Officer to arrive before contacting the work crew. This communication and cooperation is not consistent with what Grievant initially told Officer Belanger about them not communicating or cooperating with him. The only basis for Grievant to say that to the Officer would be if Grievant had made contact with them before the Officer arrived.

situation where the work has been stopped, a Police Officer with a marked squad car is identifying a work crew, and the residence owner is being cautioned about a fly-by night operation. Eifort's concerns about his crew, his wife, and his business, could be, and were, perceived as harassment or discrimination. Contrary to the Union's argument that no one to whom the phrase was used complained or was Hispanic, Eifort is a person, he is covered by the policy which protects any person, and his crew complained to him. This is a violation of the policy. Grievant's unnecessary mole hill is Eifort's and the crew's mountain.

The undersigned does not find persuasive the City's argument that Grievant's use of a Police Officer was discriminatory or harassment. It is not unusual to have law enforcement present on an inspection. Here it was part of the context and circumstances in which Grievant then went on to ask "Do any of you Hispanics speak English?", and say "you've got some Hispanics" in violation the policy as explained above. While not a violation in and of itself, it set a more dramatic scene which made the perception of harassment more likely when he did use the phrase. But Grievant had a right and a duty to investigate the lack of a displayed building permit where roofing work was being done. He did not get cooperation from them as he initially told the Officer. One of his reasons was that he needed to see that these guys were not taking work away from legalized workers. It might be possible, and troubling, to conclude that reason was that the work crew were illegally in the United States, a reason that would be based on race, ethnicity or national origin. But Grievant's concern was that the crew be licensed, being from Pennsylvania, Texas or elsewhere. He disavowed attempting to enforce the referenced Chapter 6 of the City Code pertaining to contractors hiring legalized citizens. There was a van with out of state license plates and no visible building permit. He was not familiar with the crew or the contractor, and thought it may be a fly-by-night, unlicensed, operation. There is no persuasive evidence that he profiled or singled out this crew or contractor based on race, ethnicity or national origin. His comments to the residence owner did not have any racial, ethnic or national origin references. He has been helpful to Spanish speaking people in the Inspections office. There is no reason to believe his motivation was tainted by anything discriminatory.

The undersigned is also not persuaded that Grievant's use of "Hispanics" violated the policy intentionally or was motivated by any racial, ethnic, national origin or any other basis to discriminate or harass. These are not flagrant, ethnic slurs. These matters are contextual. He had received the policy and a fair reading of the entire policy does, contrary to the arguments of the Union, give him direction and notice of the type of conduct the policy is designed to prevent. The City is not attempting to brand him as a racist. There are no set procedures on how an Inspector is to inspect or fulfill their duties. Grievant actually availed several ways of attempting to see if there was an issued permit and why it was not visibly posted. He did call his office, contacted the residence owner, contacted the crew and contacted the contractor. His violations are in the realm of misfeasance, not malfeasance.

The City having established conduct in which it had a disciplinary interest, the just cause analysis requires determining if the discipline imposed reasonably reflects the employer's disciplinary interests. Just cause does include fundamental notions of due process and fairness.

Here the process was fair. The Union argues that the investigation was insufficient because the work crew was not contacted by the City. But the City did have a telephone conversation with Eifort during his complaint call. It did interview the residence owner. Officer Belanger was at the investigatory meeting. Grievant was interviewed. Grievant made admissions, implicit or otherwise. This was not so lacking of an investigation as to deprive Grievant of due process.

The policy against discrimination and harassment on its face considers violations to be serious employee misconduct, and violation “will result in discipline up to and including termination, with repeated violations, even if ‘minor’ resulting in greater level of discipline as appropriate.” Here there are two violations of this policy and the swearing violation. Grievant received a three day unpaid suspension. The suspension letter included the use of the Police Department at the roofing scene. The clear inclusion of that cannot be excised from the discipline imposed. The Police involvement by Grievant was not a violation of the policy, as explained above. Normally that would give rise to whether or not the other violations justified the three day suspension. However, that hair does not have to be split because at this point Article 12(A) comes into play. It states:

ARTICLE 12 DISCHARGE

(A) The Employer shall not discharge or suspend any employee without just cause, and shall give at least one (1) warning notice against such employee to the employee in writing and a copy of the same to the Union affected, except that no warning need be given to an employee before he/she is discharged due to dishonesty, being under the influence of intoxicating beverages while on duty, drug addiction, or other flagrant violations. The warning notice provided herein shall not remain in effect for a period of more than nine (9) months from date of said warning. Discharge or suspension shall be in writing with a copy to the Union and to the employee affected.

The language specifically requires there be at least one warning for a suspension, and the warning is removed after nine (9) months. The record is clear here that there was no warning to Grievant within nine (9) months for these types of conduct or any discipline at all. Thus, the collective bargaining agreement prohibits and prevents a suspension in this case.

Article 2(B) does give the City the right to discipline for just cause. That right is limited by Article 12(A) when it comes to the discipline of suspension, as just noted. Both of these Articles must be given meaning. This is where Article 12(D) applies, which provides that should it be found that the employee has been unjustly discharged, or suspended, he/she shall be reinstated and be compensated for all time lost except as otherwise determined by agreement between the Employer and the Union or by direction of the impartial arbitrator. Here all of the actions of the Grievant were considered by the City in imposing the three day suspension. There were three violations of policy by Grievant. The collective bargaining

agreement prevents a suspension in any event. Accordingly, the level of discipline, especially given the contextual nature of the discrimination and harassment violations, is appropriately set at a written warning for the three violations.

Accordingly, based upon the evidence and the arguments of the parties, I make the following

AWARD

1. The grievance is sustained in part and denied in part.
2. The discipline will be reduced to a written warning and the three (3) day suspension will be removed from Grievant's personnel file.
3. The City will make Grievant whole for the wages and benefits associated with the three (3) day unpaid suspension.

Dated at Madison, Wisconsin this 27th day of May, 2009.

Paul Gordon /s/

Paul Gordon, Arbitrator