

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF LAKE MILLS

and

JEFFERSON COUNTY EMPLOYEES, LOCAL 655-C, AFSCME, AFL-CIO

Case 40
No. 68542
MA-14265

(Termination of Employment Grievance)

Appearances:

Steven C. Zach, Attorney, Boardman, Suhr, Curry and Field LLP, 1 South Pinckney Street, Fourth Floor, P.O. Box 927, Madison, Wisconsin 53701-0297 appeared on behalf of the City of Lake Mills.

William Moberly, Staff Representative, AFSCME Council 40, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53737 appeared on behalf of Local 655-C and Grievant, Mike Worden.

ARBITRATION AWARD

The City of Lake Mills, herein the City, and Jefferson County Employees, Local 655-C, AFSCME, AFL-CIO, herein the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Union and the City jointly filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by the Union concerning the termination of employment of one of its members, Mike Worden, herein Worden or Grievant. The parties jointly requested that Commissioner Paul Gordon be designated the arbitrator. Hearing was held in the matter on March 27, 2009 in Lake Mills, Wisconsin. No transcript was prepared. The parties filed written briefs and the record was closed on May 20, 2009.

ISSUES

The parties stipulated to a statement of the issues:

Did the City have just cause to terminate Grievant, Mike Worden?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

- 2.01 The management of all City business and direction and of the working forces is vested exclusively in the Employer including, but not limited to: the right to hire, suspend, promote or demote, discipline or discharge for proper cause, to lay off, to transfer because of lack of work or other legitimate reasons, to contract out work for economic reasons, to determine the type, kind and quality of service and work, to plan and schedule any training programs, to create, promulgate and enforce work rules and amend same from time to time, to determine what constitutes good and efficient public service, and all other functions of management and direction not expressly limited by the terms of this Agreement. The Employer has the right to assign any employee to any work which he is capable of doing.

...

ARTICLE III – GRIEVANCE AND ARBITRATION PROCEDURE

- 3.01 A grievance is defined as a dispute by an employee and/or the Union officer over the interpretation, application or enforcement of the specific provisions of this Agreement, and shall be handled as follows:

...

ARTICLE V – DISCIPLINARY PROCEDURE

- 5.01 It is understood that the exercise of proper reasonable disciplinary measures belong to management, and it, therefore, is agreed that the Employer may in its discretion suspend or discharge employees without additional warning or notice when objectionable infractions or offenses have been committed by an employee. Written justification for disciplinary action shall be filed with the employee's personnel file and shall be available to the bargaining unit.

BACKGROUND AND FACTS

Grievant had been employed by the City for nineteen and one-half years as of November 11, 2008, when his employment was terminated by the City. He worked as a general laborer in the Parks Department, cemetery and wastewater treatment plant. His termination was a result of a physical altercation with another City employee on November 4, 2008, which related to a prior discipline of Grievant in October 2008, which in part involved the same individual. The City alleged Grievant violated several work rules in the City Employee Handbook:

Section 6: EMPLOYEE CONDUCT

GENERAL RULES OF CONDUCT

Your honesty, appearance, behavior, and performance reflect this City's image to our citizens, taxpayers and customers. The following general rules are for the mutual protection of all employees, and violation may result in immediate discipline, including possible termination. Inclusion on this list is not to be considered the only grounds for discipline, but is necessary for everyone's protection.

...

- D. Refusal to obey orders of management (insubordination).
- G. Fighting, threatening or engaging in disorderly conduct.
- H. Harassment of any kind.
- I. Abusive language or disrespectful behavior.

...

Grievant signed a receipt for the Handbook in October of 2002.

The City provided Grievant with a written Termination Notice on November 11, 2008. The Notice referenced, among other things, Grievant's prior disciplines consisting of three verbal warnings and two written warnings. On 09/28/92 he received a verbal correction for performance transgression, procedure violation. On 8/1/02 he received a written reprimand for insubordination wherein he had three times refused a supervisor's directives to clean up a mess he had made with grass residue, responded to the directives argumentatively and "flipped off" the supervisor in front of another employee as he left. On 12/20/04 he received a verbal correction for performance transgression, procedure violation. On 11/13/06 he received a written warning for insubordination and policy/procedure violation wherein he punched in for overtime without being called in during non-working hours, started a hostile conversation with another employee over the call in using profane and disrespectful language, and contacted two city council members over the incident rather than using the grievance procedure in the Union

contract. As part of the related written performance improvement plan he was required to maintain a respectful workplace attitude. Grievant's formal written reaction was: "I do not agree to this letter." On 10/16/08 he received a verbal correction for performance transgression, procedure violation wherein he did not keep the cemetery grounds and park restrooms kept up completely and to an acceptable level of quality, as well as conducting personal business on work time. Complaints had been attributed to citizens and other employees. Among seven listed deficiencies, one included intimidation of other employees reporting his work habits. Part of the related improvement goals included he needs to specifically and immediately correct the seven items of concern listed above, and he will be monitored and any future infractions will result in further disciplinary measures. Grievant responded in writing that it was "unjustified!", and started the grievance process under the collective bargaining agreement challenging the discipline. That grievance process was not completed before his termination in November, 2008 and apparently was not pursued thereafter.

The 10/16/08 discipline had been the subject of various discussions including some between Grievant, his supervisor Rob Goetz, and employee Walter Cnare, who is not in the bargaining unit. Cnare was the other employee involved later in the November 4th altercation and only occasionally worked with Grievant. In the 10/16/08 discipline, Grievant had told Goetz that he had said intimidating things to other employees just in fun. He also told Goetz that he wanted to confront the employees who had accused or provided information about him, and had referenced the seventh warning point, which Goetz took to mean a reference to Cnare. Cnare had sarcastically told Grievant earlier that he, Cnare, was the "mole" that Grievant suspected was spying on bargaining unit members and Grievant. Cnare had also expressed concern to Goetz that Grievant had stated to Cnare that he knew where he lived, and he could get you fired. Cnare took that as a threat. Grievant testified that the statement referred to Grievant knowing how long it took Cnare to travel from home to work and was in relation to Grievant's observations of Cnare's tardiness in reporting to work. He denied telling Cnare that he could get him fired. Goetz included the seventh warning point (Intimidation of other employees regarding reporting his work habits) as part of the 10/16/08 discipline because of Grievant wanting to confront his accusers, his having stated that he said intimidating things "in fun," and because of the statements to Cnare. Goetz then informed other Parks Department Employees and Cnare of Grievant being disciplined.

During the summer and autumn of 2008 Grievant worked primarily at the cemetery and took his breaks there. He returned to working out of the Parks and Forestry Department building in early November. The building has a break room with one door, a 3 ft. X 8 ft. table, and several chairs that are on casters or rollers. There is one preferable chair, the others being more run down than the preferable chair. Employees have usual locations and chairs about the table which they use. In the past Grievant had usually used the preferable chair while working from the Parks and Forestry Department building. He considered it his chair for breaks. On Monday, November 3rd Grievant reported to work at that building and during a break, Cnare, who had been hired over the summer as a part-time employee, had moved the preferable chair from the end of the table where Grievant had usually sat, and Cnare was

sitting in it while Grievant was in the room. Grievant told Cnare that Cnare was sitting in his, Worden's, chair. Cnare continued to use that chair for the break that day.

On the morning of November 4, 2008 Grievant and another bargaining unit member, Paul Keller, were in the break room. Keller was seated at the table. Grievant switched some chairs around so that he would have the preferable chair in the location where he usually sits, putting a bad chair with a broken caster on Cnare's side of the table. Grievant left the room to talk to his wife on his cell phone when Cnare entered the room and punched in on the time clock there. Cnare began moving the preferable chair. Grievant noticed this through the doorway and reentered the room saying "no, no, no" while holding his cell phone still in contact with his wife. As Cnare was moving to sit down in the chair, both bumped into each other and jostled with each other for the chair. Cnare got into the chair and had both hands on the arms of the chair while Grievant took hold of the back of the chair with one hand while it was still being moved to the side by Cnare, saying to Cnare to "get out of my fucking chair or I will kick your fucking ass." Cnare said "its not your fucking chair, it's my chair." Grievant again said "get out of the chair; I'm going to kick your fucking ass". The chair continued to spin about as both jostled for position and control of it. In the process either Cnare's shoulder or elbow hit Grievant near the lip, which may have bled and did later swell. Grievant, as he later wrote in a statement to the police, "got pissed off and yelled don't you ever fucking hit me again you son of a bitch." At this point Grievant was standing up at the end of the table, which is near the door, and Cnare was sitting in the chair. Grievant testified that Cnare put his hands up. Cnare testified that he kept his hands on the chair's armrests. Keller testified that Cnare's hands were on the chair. Grievant at that point picked up a short handled broom that was in the corner near the doorway. He said to Cnare to "get out of that fucking chair or I'm going to hit you." Cnare said "don't hit me." Grievant swatted Cnare on the arm near the wrist with the handle of the broom and then jabbed Cnare with the broom handle in the right side of Cnare's rib cage with sufficient force to leave a bruise there of about 2 inches by 2 inches. While jabbing Cnare, Grievant told him to "get out of my fucking chair or I'll kick your fucking ass." Cnare said "no" and stayed in the chair while Grievant prodded the broom handle with his hand in a threatening motion towards Cnare. Cnare then stood up and pushed Grievant, who stood his ground. They both swore back and forth at each other and had their hands back ready to swing at each other. Keller, who witnessed and testified to the entire event, then got in between the two to stop the incident telling Grievant to knock it off because it was not worth it. Grievant threw the broom down and left the room, then left a phone message for Goetz. Keller did not feel safe staying in the break room due to his perception of Grievant being enraged and had been the aggressor. Keller suggested to Cnare to leave and then Keller left to contact Goetz.

Grievant went to City Hall to talk to Goetz, who was not there. Grievant then returned to the break room where only Cnare remained seated in the preferable chair. Grievant was "still pissed." He said to Cnare "I'll ask you one more fucking time, please get out of my chair." Cnare said "take your fucking chair and pushed it towards Grievant, who then sat in the chair. Grievant and Cnare had another short argument over the chair and whether Cnare was the mole who complained about Grievant in the October discipline, with both insulting the

other. Grievant testified to the effect that Cnare used derogatory language about Mexicans, which Cnare denied saying because his wife is Hispanic. Cnare then left the room.

When Goetz found out about the incident he went to the Police Department about it and had Keller go to the Police Department and make a statement. Cnare and Grievant also both went to the Police Department and made statements about the incident. The Police Department, through Officer Wallace, followed up getting written statements from them and also took a statement from Grievant's wife as to what she heard over the cell phone. No charges were issued by the Police Department.

Cnare, who testified that he is not afraid of Grievant, was not disciplined over the incident. The City suspended Grievant immediately and he received a Termination Notice from the City over the incident which was dated November 11, 2008. The Termination Notice recited an essentially similar, but shorter, version of the events set out above, contained the dates and general subject matter of Grievant's prior disciplines, and contained an explanation of the discipline as follows:

Disciplinary Decision

Based upon its investigation into this incident and other matters raised by it, the City terminates Michael Worden's employment with the City of Lake Mills. The investigative reports accompany this document. This termination is the result of Worden's intimidation and physical assault of another employee.

Additional reasons for the decision to terminate are as follows:

Worden was given a documented verbal warning on October 16, 2008, which is also attached, and which is believed to have been the catalyst for the profane and violent outburst on Nov. 4, which was directed specifically at Cnare. In that Oct. 16 warning, Worden was told he was required to specifically and immediately correct several behaviors, one of which was to cease his intimidation of other employees due to their reporting on his work habits. By failing to follow this directive, Worden was in violation of Paragraph D, Insubordination, on page 29 of the employee handbook, which Worden agrees to and acknowledges in writing to have received on October 16, 2002. A copy of this agreement and acknowledgement is attached.

In addition to using profane language, which violated Paragraph 1, Abusive language or disrespectful behavior, on page 29 of the employee handbook, and committing violence toward Cnare, which violated paragraph G, fighting, threatening, or engaging in disorderly conduct, on page 29 of the employee handbook, Worden also called Cnare a "mole" because of Worden's belief that Cnare was the employee responsible for complaining to the supervisor sometime prior to the supervisor's issuance of the October 16, 2008, verbal warning.

Such behavior may be considered to be in violation of Paragraph H, Harassment of any kind, on page 29 of the employee handbook.

Additionally, besides calling Cnare a mole on Nov. 4, Worden told Cnare prior to Nov. 4 that Worden know where Cnare lives, which Cnare has understood to be a veiled threat to Cnare's and his spouse's safety. Such threats may be considered to also be in violation of Paragraph H, Harassment of any kind, on page 29 of the employee handbook.

Besides this veiled threat against an employee's safety, other employees in the department have expressed various specific concerns about their safety and well being because of working with Worden. Such concerns include worrying about what Worden may do in retaliation for their cooperation in the investigation arising out of this incident, and as a result of any disciplinary action that may be taken.

Grievant grieved the termination contending management violated Article II of the collective bargaining agreement concerning management rights. The Grievance was denied, leading to this arbitration.

At the hearing in this matter Grievant testified that he picked up the broom and used it in self defense to get Cnare's hand out of his face, feeling as though Cnare might hit him. Grievant feels the incident over the chair was really stupid. Grievant felt he was being cornered and being attacked by Cnare, who can show up late, go home early, and take breaks when he wants. He testifies that Goetz doesn't do anything about it, and that Keller is a person who likes to egg people on and get others to do things for him.

At the hearing Grievant also testified, among other things, that he believed the City, particularly Goetz, was out to have his employment terminated because Goetz was mad at him over his union activities. Grievant explained that he has been active in union negotiations to prevent Goetz, a supervisor, from performing bargaining unit work. He also felt there might be layoffs coming. Due to his seniority, Grievant said he is not likely to be laid off were there to be any layoffs. According to Grievant, this caused the other employees to treat him differently and, according to him, the October 16th warning, this termination proceeding and the events underlying them have been taken to have him fired so that others would not get laid off. He felt Cnare baited him into a fight.

Grievant also testified that "turn about is fair play" when questioned about the chair incident and making intimidating comments to others. He testified that what ever is justified goes, in whatever setting. Grievant says he is not intimidated by threatening comments and assumes others are not intimidated either. He testified that saying intimidating things is not appropriate in the workplace. He testified that striking someone with a broom handle is justified in self defense, and other than self defense this is not appropriate conduct.

Further facts appear as are set out in the discussion.

POSITIONS OF THE PARTIES

City

In summary, the City argues that unprovoked, Grievant struck Cnare with a broom and the termination was required. Grievant had received the policy manual prohibiting this conduct and containing consequences including discharge. Even without a written policy, terminations under a just cause standard are routinely sustained in cases of workplace violence, citing arbitral authority. Additionally, Grievant's conduct included two verbal, threatening and unprovoked outbursts against Cnare after being verbally warned against such conduct in the earlier discipline which requires termination.

The City argues that the decision to terminate Grievant is because the City does not tolerate workplace violence and the type of harassment directed at Cnare by Grievant. As testified to by Goetz, some job duties of employees are hazardous and require safety coordination between employees. Grievant's conduct made it impossible to other employees to trust and rely on him in those circumstances.

The City argues that Grievant admitted that an unprovoked physical assault would be justification for termination. The City makes several references to the record as to why Grievant's self defense and provocation defenses are not credible. The City points out inconsistencies in Grievant's version of events, consistencies with the City version of events, the interest, or lack thereof, of the witnesses and parties, among other things.

The City summarizes that the only conclusion which can be drawn from the testimony is that Grievant instigated a verbal barrage directed at Cnare, followed this up with a physical assault on Cnare and then finished with another series of verbal threats and intimidation. Labor relations policy in this state must be that such conduct warrants termination.

Union

In summary the Union argues that termination of Grievant is too extreme of response to a minor scuffle between two employees and, if the scuffle merited discipline, both Grievant and Cnare should have been.

The Union argues that Keller acknowledged on November 4th Grievant placed his chair in the spot he occupies for breaks, that employees have selected favorite chairs and locations for breaks and that Grievant had routinely used the chair in question when assigned to the Parks Department. Grievant's testimony as to the event was not much different from that of Cnare or Keller. As supported by his wife's testimony, who was on the phone during the incident, he did not use profanity. Among other things, Grievant testified that the fact that

Cnare hit him in the lip angered him, and that he then, believing Cnare may hit him, picked up to small broom to defend himself.

Grievant argues that he believed the events that led to his termination were part of an organized effort by his supervisor, Goetz, to get rid of him. Grievant is the most senior among the employees and had job protection against layoff. Earlier in the year he attended an all staff meeting where employees were told the City may have to consider layoffs. Grievant, a member of the bargaining committee, had also submitted proposals to the City that would make it a contract violation for Goetz to perform any bargaining unit work. Believing he could not be laid off and that he was attempting to prohibit Goetz from performing bargaining unit work created animosity between himself and Goetz, and was the basis for Goetz wanting to get rid of Grievant.

The Union also argues that the October discipline for unacceptable work performance included work performance issues for several months earlier. Incidents as minor as driving outside the work area and excessive time talking to co-workers could have been dealt with at the time of Goetz's initial observance, but were not. Instead Goetz chose to issue a Performance Correction Notice months later, which Grievant grieved but he was terminated before meeting with the City.

The Union argues that few facts are in dispute in the matter. Both Grievant and Cnare believed that the chair in question was their chair, and that they had exclusive right to use it during their break and to place the chair at the break table in the spot they considered their spot. On Grievant's first day back to the break room they argued over the chair. The next day Grievant sat in the chair and left to make a phone call. Cnare entered and attempted to move the chair. Grievant responded by telling Cnare to get out of "his chair" and Cnare refused. They jostled over the chair and Cnare jumped in it. As the chair swung around Cnare hit Grievant in the lip with his elbow, busting Grievant's lip. Grievant responded in self-defense by picking up a small handled broom and swatting down at Cnare's outstretched hand. Grievant then, believing his is defending himself, pokes Cnare in the rib cage.

The Union argues that, while employers are obligated to take workplace violence seriously and when substantiated must take corrective action, in the instant matter it is the contention of the Union that the incident did not rise to a level where Grievant should have been terminated. Both Cnare and Grievant appear to have been locked in some childish behavior about a chair that belongs to the City. But as Keller testified, everyone has their favorite chair and location at the break table. Keller testified that both Cnare and Grievant jostled over the chair. Grievant ended up with a bloodied lip and Cnare had his hand swatted and rib cage poked by Grievant. The Police Department investigated the matter and no charges were field.

The Union further argues that while the City suggests employees are afraid of retaliation by Grievant, as of the hearing four months later, Keller had not heard a thing from Grievant and he made no threats against him. Cnare testified he was not afraid of Grievant.

The City investigated the matter and chose to terminate only Grievant and did nothing in response to Cnare striking Grievant in the lip. It is the position of the Union that the City should have either disciplined both Cnare and Grievant, or they should discipline neither.

The Union argues that Grievant is a 19 year veteran with the City and has committed a substantial amount of his life to public employment in returned earned a good wage and a pension. Termination for what can best be described as a minor dispute between co-workers that resulted in them jostling over a chair is far too extreme of a penalty. The City did not show just or proper cause to Justify Grievant's termination. The Union requests that he be reinstated with full back pay and benefits.

DISCUSSION

The City terminated Grievant's employment for violation of four work rules all surrounding the physical altercation on November 4, 2008 between Grievant and Cnare. The Grievance contends this is was violation of the collective bargaining agreement in Article II – Management Rights. Section 2.01 of that Article provides the City with the right to "...discipline or discharge for proper cause...." Proper cause is not defined in the agreement. This is essentially a "cause" or "just cause" provision. The parties stipulated that the issue is just cause. The agreement does contain Article V – Disciplinary Procedure, which will be discussed below as part of the just cause analysis. 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 V of the parties' agreement.

The first element of just cause requires the City to establish conduct by the Grievant in which the City had a disciplinary interest. Article II of the collective bargaining agreement provides the City with the right "to create, promulgate and enforce work rules and amend the same from time to time". Here the City has referred to four work rules from the Employee Handbook which it contends were violated by Grievant. The City has a management right to establish reasonable work rules of the nature in the handbook. They include:

- D. Refusal to obey orders of management (insubordination).
- G. Fighting, threatening or engaging in disorderly conduct.
- H. Harassment of any kind.
- I. Abusive language or disrespectful behavior.

The City would have an interest in that type of conduct even without the formality of a handbook. The Union does not argue that such interests do not exist with the City, and

acknowledges the City's interest in the seriousness of workplace violence. The events of November 4th implicate all of the above work rules. The City has a disciplinary interest in the conduct that occurred.

Just exactly what conduct occurred as to some of the lesser details is a matter of dispute in this case. In general there is little dispute as to the basic events. Grievant was disciplined by the 10/16/08 verbal warning, including the directive about intimidating other employees. The undersigned is convinced that that was specifically referring to Cnare as well as any other employees. It is also established that on November 4th Cnare was taking the preferred chair when Grievant returned to the room, they both tried to get into the chair and bumping each other, scuffled some for it. Cnare had his hands on the arm rests and ended up in the chair with Grievant holding onto the back of the chair. Grievant told Cnare to get out of the chair. As the chair spun about Grievant got hit in the mouth by an elbow or shoulder in the process. Grievant said to Cnare "don't you every fucking hit me again, you son of a bitch!" After that Grievant picked up a short broom and first swiped Cnare's arm or hand with it and then jabbed Cnare in the side hard enough to leave a bruise. Cnare then got up out of the chair and pushed Grievant. Throughout the incident both swore at each other. Grievant left the room after Keller broke up the two. Keller was concerned for his and Cnare's safety. A short time later Grievant returned to the room where only Cnare remained. They again argued over the chair and whether Cnare was the "mole" who had been involved in the 10/16/08 discipline.

There is some dispute as to exactly who said exactly what during the November 4th chair incident. The differences in detail have been resolved as set out in the above Background and Facts portion of this Award. These fact findings are drawn from uncontroverted statements (both verbal and written) by the witnesses, and from the testimony of Paul Keller, who was in the best position to see and hear what was going on without being distracted by the very events themselves. The undersigned is not persuaded by Grievant's testimony that Keller was part of a conspiracy to have Grievant fired. There is no credible evidence for that claim and Keller's credibility is not impeached. The Grievant contends that Cnare said he was taking his chair at the start of the incident, and Cnare denies saying that. To the undersigned this is not dispositive either way, other than to be accurate and thorough as to what happened. The testimony of Grievant's wife has been considered as to what she heard over the cell phone. The undersigned is persuaded that hers is not the more accurate testimony when compared to that of Keller and the written statement of Grievant. Particularly, she testified she did not hear any profanity, but did hear someone say "I'm taking your chair". Keller, who was in the room, did not hear that said by Cnare. Keller did hear Grievant mention the chair when he first returned to the room and heard both swear, Grievant several times. Additionally, Grievant testified to uttering several profanities during the incident and in his written statement wrote out several profanities that he said to Cnare during the chair incident.

Of much more importance is the fact issue of what Grievant said during the initial scuffle for the chair and, especially as he hit and jabbed Cnare with the broom handle. Again, the testimony of Keller persuades the undersigned that Grievant said the several versions to Cnare of "get out of my fucking chair or I will kick your fucking ass." Grievant wrote that he

“was pissed.” This demonstrates to large extent that Grievant was the aggressor in the entire episode. It also demonstrates that Grievant was not acting in self defense when he picked up and used, twice, a broom handle on Cnare. His stated purpose at the time was to get Cnare out of the chair. Moreover, Cnare was still seated in the chair when Grievant picked up and used the broom. Grievant could have either stayed where he was or even left the room through the door that he was right next to if he felt threatened by Cnare. Grievant contends he was hit in the mouth by Cnare and that Cnare then raised his hands toward him. But even Grievant in his written statement says he did not know if getting hit in the mouth was intentional or not on Cnare’s part. And he did not know if it was with Cnare’s shoulder or elbow. What is clear is that it happened as they were scuffling for the chair as the chair was being moved about in the process. After that, both Cnare and Keller say Cnare kept his hands on the chair armrests while Grievant hit Cnare with the broom. Grievant contends Cnare put his hands towards him. Keller’s observations are, again, found to be the most accurate and persuasive. This all leads to the conclusion that Grievant was not threatened by Cnare and was not in a position to need to defend himself. He was not being attacked by Cnare. And, Grievant neither remained standing at the end of the table while Cnare sat, nor left the room, either of which would have ended the incident at that point. He did not go to Goetz or anyone else in management to complain about the use of the chair or about getting hit in the mouth. Instead, he picked up the broom and used it to hit Cnare to get the chair. Only then did he go to complain to Goetz.

Cnare’s taking the preferred chair used by Grievant and Grievant being hit in the mouth during a scuffle Grievant engaged in to retake the chair by force was not a provocation for Grievant’s then picking up a broom, threatening and hitting Cnare with it twice, again swearing at and threatening Cnare, and later accusing him of being the mole.

The undersigned is also persuaded that the events underlying the 10/16/08 discipline are accurate as far as they are set out in the written record of that verbal warning and as testified to by Goetz. That discipline may have been the subject of a grievance, but it remains the discipline of record and has not been overturned. And, again, there is no credible evidence on any conspiracy by Goetz, the other employees, or management to get rid of Grievant so that their testimony should not be believed.

Considering all of the above, the City has demonstrated conduct on the part of Grievant in which it had a disciplinary interest. These facts were essentially set out in the Termination Notice. Grievant did violate four separate work rules by his conduct on November 4th. The City has established that Grievant violated work rule D, Insubordination, by threatening, swearing at and hitting Cnare all in an intimidating manner, then accusing him of being the “mole”, on November 4th after Grievant had been told to cease intimidating employees as part of the 10.16/08 discipline. Grievant violated work rule G, fighting, threatening, or engaging in disorderly conduct, by the threat to Cnare that he would “kick you fucking ass” and hitting him with a broom, then calling him the “mole” on November 4th. Grievant violated work rule H, Harassment of any kind, by calling Cnare the “mole” on November 4th after the 10/16/08 warning, and also violated that rule earlier by having previously told Cnare

he knows where he lives which was a veiled threat. Grievant violated work rule I, Abusive language or disrespectful behavior, when he swore at and used profane language towards Grievant several times and hit Cnare with a broom twice on November 4th.

The undersigned will not consider a current violation the earlier referenced violation of work rule H as to the matter prior to November 4th when Grievant told Cnare that he knew where he lived and could get him fired. It appears that those statements were made as part of the reason for the 10/16/08 discipline. As a matter of due process Grievant cannot be disciplined twice for that. His violation of the directive not to intimidate employees is however, one of the new violations set out immediately above.

The second element of just cause is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest. This normally considers the nature of the conduct and the employee's employment history. Grievant's employment was terminated for his conduct which violated four separate, but related, work rules. The Union argues that the incident did not rise to the level where Grievant should have been terminated and that termination is too extreme of a response to a minor scuffle between two employees. The Union also argues that if the scuffle merited discipline, both parties, Cnare and Grievant, should have been disciplined. The City argues that terminations under a just cause standard are routinely sustained in cases of work place violence. In addition, the City argues that the verbal, profane, threatening and unprovoked outburst prior to the physical attack and another series of verbal threats afterward happened a month after Grievant was warned about engaging in such conduct targeted against the assumed source of information in the earlier discipline requires termination. The City does not tolerate workplace violence and the type of harassment directed at Cnare and is concerned for the safety of other employees.

It is understandable that the Union characterizes the events of November 4th as a minor scuffle. But it was more than that. Grievant attempted to regain the chair by use of force. It was a scuffle that Grievant then elevated to a physical attack on another with a broom, the equivalent of a blunt instrument. Grievant was the aggressor in the incident. Grievant hit Cnare with the broom twice, jabbing him hard enough to leave a 2 inch by 2 inch bruise. He used profanity and threats throughout the incident - all to obtain the use of a chair. This is workforce violence and, as explained above, it was not a matter of Grievant's self defense. As he was using the broom Grievant was demanding that Cnare get out of the chair. The attack with the broom was not provoked by Cnare, even though Cnare knew that Grievant considered the preferable chair to be for his, Grievant's use. Squabbling over a chair is not provocation for threats and a physical attack.

The Union acknowledges that employers are obligated to take workplace violence seriously. In this case there is an Employee Handbook which clearly states that the "following general rules are for the mutual protection of all employees, and violation may result in immediate discipline, including possible termination." The four work rules that Grievant violated are then included. Whether this is a strict zero-tolerance policy or not, it is appropriate to place this case in the context of how workplace violence is viewed generally in the

arbitration setting. Thus, there is the following from Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., pp. 1020, 1021:

D. Workplace Violence

In recent years the issue of workplace violence also has come to the forefront of public and employer concerns. Increased violence in the workplace has prompted employers to implement specific policies to protect workers from both physical harm and threats of physical harm. A sensitivity to the disturbing accounts of workplace violence certainly had contributed to the view that an employer's obligation to provide a safe working environment requires (1) zero tolerance for violence policies, and (2) the discipline or removal of employees who threaten or engage in violence. In *Golden States Foods Corp.*, an employer was found to have just cause to discharge an employee who grabbed a fellow employee, when, just 6 weeks before the incident, the employer had implemented a zero-tolerance "Anti-Violence Policy". As another arbitrator recognized:

Violence in the workplace is a serious concern to employers. The law requires that when an employer receives information of threats [of violence], the employer must respond....Receiving such information directly or by way of hearsay is irrelevant. An employer must act on such information.

In adopting such a zero-tolerance policy for actual or threatened violence, one company cited guidelines from the California Department of Industrial Relations' Division of Occupational Safety and Health. These guidelines state that "[s]ome mental health professionals believe the belligerent, intimidating or threatening behavior by an employee or supervisor is an early warning sign of an individual's propensity to commit a physical assault in the future.

Pursuant to such a policy, employees who make threats of physical violence in many cases are subject to the same discipline (i.e., discharge) as for actual workplace assaults. Arbitrators increasingly are requiring employers to take seriously an employee's threats of physical harm. In one case, the arbitrator held that the company had an obligation to remove an angry employee who made provocative remarks about the murder of employees at the post office and about getting a shotgun from home. In yet another case, the employer was found to have violated its safe work environment obligation under its collective bargaining agreement when supervisors failed to stop or take action against an employee who threatened another employee with physical harm and emotional, social, and psychological distress. However, some arbitrators, while upholding the discharge penalty for fighting, find acceptable a discipline of less than discharge where only oral arguments but no physical violence occurred.

Arbitrators also sometimes mitigate discharges where the employee's action was not intended to be "violent" or was out of character and the employee expresses regret.

(citations omitted)

Similarly, from Brand, *Discipline and Discharge in Arbitration*, pp. 271, 272, there is:

A. Fighting

Arbitrators have defined fighting as a physical attack or struggle involving the exchange of blows, or a strike by one upon another with an intent to harm or injure. Employers have an obligation to provide for the safety of their employees, which includes protecting them from violence by other employees. Employees who engage in fighting can be disciplined or discharged for the misconduct. Arbitrators have upheld the discharge of an employee after a first offense for fighting. Arbitral authority also supports the discharge of all employees who are actively involved in a fight.

Discipline for fighting, even immediate discharge, is not contingent on a workplace rule expressly prohibiting the conduct. Certain types of conduct are so inherently improper that no published rule is necessary to prohibit them in order to make them subject to discipline. Arbitrators take a number of factors into consideration when deciding whether discipline is justified.

(citations omitted)

In this case Grievant's conduct includes a physical attack with a broom, threats, profanity and intimidating statements. He had been warned just weeks before against intimidating employees. Even then he wanted to confront those who had provided information to management about him. He has a disciplinary record over several years which documents argumentativeness, abusive language, being disrespectful of others and insubordination. He had been warned in the 11/13/06 written warning that he "needs to maintain a respectful workplace attitude." Despite these prior, relatively recent warnings, Grievant has not been able to refrain from profane, abusive, threatening, intimidating and violent conduct. The 10/16/08 discipline clearly indicates that other employees are concerned for their safety. Keller was concerned for his and Cnare's safety in the November 4th incident. The City noted employee safety concern in its Termination Notice. Given the above, termination of Grievant's employment does reasonably reflect the City's disciplinary interest.

There are other matters that need to be considered. One of the most important is the fact that Grievant has been an employee of the City for over 19 years. However, his employment history with the City over that time has not been a good one. While the disciplines in 1992 and 2002 might normally be considered too remote or stale to be of much

bearing, they do demonstrate along with the other more recent disciplines that Grievant has had problems conforming to reasonable work rules. The City has tried to correct those problems. He has not been able to conform to the rules, as set out above. Several prior disciplines were for insubordination and similar argumentative conduct which has now escalated to a physical attack with a broom. And having long term employment does not justify what he did. Nor does it allow him any exemption from following work rules and being responsible for the consequences of his actions. As previously explained, there was not a sufficient provocation for his conduct, and he was not acting in self defense. And it is very troubling that at the hearing in this matter he maintained an attitude that “turn about is fair play”, evincing an aggressive attitude and lack of insight into the nature and effect of his actions. Even after the broom incident and having left to find Goetz, when he returned to the break room rather than having cooled down, he was “still pissed” and continued to argue with Cnare. Months later, at the hearing in this case, even though he had not threatened anyone since November 4th, rather than expressing any remorse over the event, he continued to maintain that the other employees and those in City management were conspiring to get rid of him over labor relations matters – a position that is completely unfounded and definitely unproven.

This leads to the further conclusion that further progressive discipline would not be effective in correcting his conduct as an employee. Another employee improvement plan has no more likelihood of success than the previous ones he has had. In that regard, Article V of the collective bargaining agreement comes into play. It states:

- 5.01 It is understood that the exercise of proper reasonable disciplinary measures belong to management, and it, therefore, is agreed that the Employer may in its discretion suspend or discharge employees without additional warning or notice when objectionable infractions or offenses have been committed by an employee. Written justification for disciplinary action shall be filed with the employee’s personnel file and shall be available to the bargaining unit.

This is strong contract language in the City’s favor. Grievant’s actions are objectionable infractions and offenses. He had received prior warnings. This clause provides the City with the discretion to discharge him without additional notice or warning. This clause is also reconcilable with the proper cause requirement for discipline or discharge contained in Article II. That is because discharge here as analyzed above is reasonably related to the disciplinary interest without first needing suspension or further warning. It is a reasonable disciplinary measure that comports with just cause.

There yet remains the argument of the Union that Cnare was not disciplined for his involvement in the chair incident when he, too used profanity, scuffled and pushed Grievant. While Cnare’s action in taking the chair he knew Grievant wanted is childish and annoying, Grievant’s reaction and conduct is totally out of proportion to the conduct of Cnare. It was Grievant who attempted to regain the chair by force when he grabbed its back after Cnare was moving it. There is no indication that Grievant’s getting hit in the lip was anything other than

the accidental result of him, as well as Cnare, trying to get into a chair that was moving about on coasters. It was then that Grievant exacerbated the situation by picking up the broom rather than having the matter end at that point or leaving. It was only after Grievant hit Cnare twice with the broom that Cnare got out of the chair and pushed Grievant. Cnare did not use a broom or any other instrument. This is clearly more in self defense than any claim Grievant can make. And Cnare had not been previously warned about workplace attitude and intimidation as Grievant had. Their conduct was significantly different, which justifies treating them differently. This principle is generally recognized by arbitrators. See, Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., pp. 995-997. Concerning Cnare pushing Grievant, from Brand, *Discipline and Discharge in Arbitration*, pp. 274-275 on the topic is:

6. Self-Defense. A nonaggressor in a fight may receive more lenient discipline or escape discipline, if it can be shown that after the fight began the nonaggressor merely defend herself. In such a case, the employee can rely on the “well established right of reasonable self-defense.” One arbitrator held:

It is a fundamental law of nature and of common and statutory law, that a person may use force to protect himself against the aggressions of another. Such protective acts however must be defensive, not retaliatory. As soon as the assailant desists, there can be no further need for defense.

Even where “the non-aggressor may not be entirely free from blame, it is generally held that the non-aggressor may receive a lesser penalty than the aggressor.”

(citations omitted)

Cnare was the nonaggressor. His and Grievant’s conduct was greatly different. The City has not been shown to have discriminated against Grievant by not disciplining Cnare. Grievant was not discriminated against or discharged for Union activities as opposed to Cnare, who is not in the bargaining unit. Grievant is not the subject of unequal treatment to the extent that his discharge should not be otherwise upheld.

The City had just cause to terminate the employment of the Grievant. Accordingly, based on the evidence and arguments in this case, I make the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 5th day of August, 2009.

Paul Gordon /s/

Paul Gordon, Arbitrator