

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WINNEBAGO COUNTY HIGHWAY DEPARTMENT EMPLOYEES'
UNION, LOCAL 1903, AFSCME, AFL-CIO**

and

WINNEBAGO COUNTY

Case 406
No. 68261
MA-14171

Appearances:

Attorney John A. Bodnar, Winnebago County Corporation Counsel, 448 Algoma Boulevard, Oshkosh, Wisconsin 54903-2808, appearing on behalf of the Respondent.

Ms. Mary Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, W5670 Macky Drive, Appleton, Wisconsin 54915, on behalf of the Union.

ARBITRATION AWARD

Winnebago County Employees' Local 1903, AFSCME, AFL-CIO (herein the Union) and Winnebago County (herein the County) were, at all pertinent times, parties to a collective bargaining agreement dated October 3, 2007 and covering the period January 1, 2007 – December 31, 2009. On September 3, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a one-day suspension issued to bargaining unit member Rick Carow (herein the Grievant). The undersigned was assigned to hear the dispute pursuant to a joint request from the parties and a hearing was conducted on January 21, 2009. The proceedings were not transcribed. The Union filed its initial brief on February 19, 2009 and the County filed its initial brief on February 26, 2009. The Union filed a reply brief on March 8, 2009 and the County did not file a reply brief whereupon the record was closed.

ISSUES

The parties did not agree to a statement of the issues

The Union would frame the issues as follows:

Did the Employer violate the collective bargaining agreement when it issued a one-day suspension to Rick Carow without just cause?

If so, what is the appropriate remedy?

The County would frame the issues as follows:

Did the Employer violate the collective bargaining agreement when it issued a one-day suspension to Rick Carow?

If so, what is the appropriate remedy?

The Arbitrator adopts the issues as framed by the County.

PERTINENT CONTRACT LANGUAGE

ARTICLE 8

DISCIPLINE

SECTION A.

An employee may be suspended, discharged, demoted, or otherwise disciplined for just cause. The sequence of disciplinary action shall be written reprimands, suspension and discharge. Any employee receiving disciplinary action shall receive written notice of such discipline and reasons for same. The Union shall also be provided a copy of all discipline. The employee shall receive a copy of said written notice of the discipline at the end of the work day that the discipline is imposed.

The above sequence of discipline need not be followed in situations calling for immediate suspension or discharge.

No written reprimand shall be valid after twelve (12) months from its issuance after which time all references to the discipline shall be removed from any and all records.

...

SECTION D.

The County may establish and enforce reasonable rules in connection with the operation of the Winnebago County Highway, Solid Waste, Airport and Parks Departments and the maintenance of discipline in said operation by the County.

OTHER RELEVANT LANGUAGE

**HANDBOOK OF EMPLOYMENT POLICIES
COVERING REPRESENTED EMPLOYEES
OF
WINNEBAGO COUNTY**

9. DISCIPLINARY ACTION

SECTION A

PURPOSE. Disciplinary action in the employment setting is taken for the purpose of modifying or eliminating unacceptable behavior or job performance on the part of an employee. This chapter sets forth the general disciplinary policy of Winnebago County regarding covered employees.

SECTION B

GENERAL DISCIPLINARY POLICY. In keeping with the purposes of disciplinary action as stated in Section A, the policy of Winnebago County is that of encouraging the implementation of disciplinary action whenever the behavior or job performance of an employee is such that it interferes with or adversely affects the efficient or effective fulfillment of the mission of the department or that of the County organization. Disciplinary actions may include oral and written warnings, demotions, suspensions and dismissals depending on the circumstances in the individual case.

County employment is viewed as a privilege. As a representative of Winnebago County to the public, or the provider of a service to the internal organization, each employee, as a condition of employment, accepts a fundamental obligation to promote and protect the interests of his employer. Dedication to duty, service to others, and the promotion of harmony and productivity in the workplace are the cornerstones upon which the entire employment relationship is based and are the primary reasons for which the employee is retained and compensated. In keeping with this principle, each employee is expected to render a "fair day's work for a fair day's pay."

Any disciplinary actions taken are to be applied fairly and be commensurate with the behavior or job performance giving rise to such actions and will occur after a complete investigation and verification of the incident at hand. Supervisors are encouraged to contact the Department of Human Resources before beginning any investigation or taking disciplinary action. If the action sought is suspension or termination of employment, the Director of Human Resources must concur before any action is begun.

SECTION C

GROUND FOR DISCIPLINARY ACTION. The following constitutes a partial list of the more commonly cited grounds for disciplinary action, but should not be considered a complete list:

. . .

2. Insubordination (refusal to carry out a reasonable order, insolence, talking back, arguing, verbal abuse or assault of a supervisor, co-worker, or member of the public).

BACKGROUND

The Grievant herein, Rick Carow, has been employed by the Winnebago County Highway Department for 29 years and, at the time of the events surrounding the grievance herein was a Class II Operator, which involved largely performing duties as a truck driver. In March 2008, the County posted a job opening for the position of Airport Maintenance Equipment Operator, which was due to expire on March 23. Carow signed the posting and was the senior employee to do so. On March 26, 2008, at approximately 7:15 a.m., Highway Commissioner John Haese called a brief meeting on the floor of the maintenance shop to discuss the posting. Present at the meeting were Haese, Carow, Maintenance Superintendent Bill Demler and Union Steward Ed Carpenter. At the time, other Department employees were in the shop getting ready for the work day. At the meeting, Haese informed the others that a concern had been raised that Carow had not signed the posting in a timely fashion and that no decision regarding filling the position would be made until the timeliness issue was resolved. When Haese finished he asked the employees to acknowledge that they understood the information. Demler and Carpenter stated that they did and Carow began walking away. Haese asked Carow again to acknowledge the information and Carow did not answer. Haese asked a third time and Carow nodded his head. Haese then ordered Carow to answer, at which time Carow returned, faced Haese and said "Yes, sir!" in a loud tone of voice. Haese then told Carow that in the future he was to acknowledge and respond to questions from management. Carow again answered loudly, "Yes, sir!" at which point Haese dismissed him from the meeting.

At approximately 3:00 p.m. on March 26, Carow was summoned to Haese's office for a disciplinary meeting. Attending the meeting, in addition to Haese and Carow, were Demler, Carpenter, and Louis Clark, a Foreman and former Union Steward whom Carow had asked to attend. At the meeting, Haese asked Carow to explain his conduct and Carow told him he had responded to Haese, but Haese did not hear him. Haese stated that he did not believe Carow and issued a one-day suspension for insubordination. Carow filed a timely grievance and the matter was processed through the steps of the contractual grievance procedure to arbitration.

POSITIONS OF THE PARTIES

The County

The County asserts that insubordination covers a variety of conduct, including refusal to carry out a reasonable order, insolence, talking back to a superior, arguing with a superior, or verbal abuse of a superior. Arbitrators have typically regarded insubordination as a serious offense, which violates management's rights to control the methods and means by which work is performed.

The testimony of John Haese and Bill Demler shows that Carow refused to obey a simple order from Haese to verbally acknowledge his understanding of the procedure that would be used to resolve the posting issue. When ordered to respond, Carow did so in an exaggerated and insolent manner. The underlying charge of insubordination is thus clearly established.

It is also clear that the penalty was warranted. Carow's actions were not only insubordinate, but also constituted a physical challenge to Haese. The County acknowledges that Carow had not been disciplined within the previous year, but also points out that Carow had received counseling in 2007 about the need to verbally respond to his supervisors when ordered to do so. The County also points out that Carow has in the past been dealt with for anger management issues in the workplace. Given the circumstances of the incident and Carow's past history, a one-day suspension is deemed appropriate.

The Union

The Union disputes that the incident on March 26, 2008 warranted discipline. The Union acknowledges that insubordination is a serious offense, but argues that Carow did not refuse an order from management and his behavior was not insubordinate. Carow did not initially hear Haese due to a hearing impairment, but when he heard him he acknowledged Haese's question. He did answer loudly "Yes, sir," but this does not constitute objectionable language or abusive behavior. The County refers to past incidents involving Carow being instructed to acknowledge supervisors, but there are no records of such incidents and no discipline was issued. Further, Carow was not warned that future failures to respond could subject him to discipline.

At the disciplinary meeting, Carow testified that he told Haese that he initially did not hear him. Haese stated that he did not believe Carow without giving an explanation for his opinion. Further, Demler was asked at the meeting whether Carow answered him when questioned and Demler said he did and did not have a problem with Carow. Karon Kraft, the County Human Resources Director, testified that she did not speak to Carow about the incident, even though the County Employment Policies Handbook requires a complete investigation and verification of the incident and concurrence of the Human Resources Director before discipline is issued. This violates the County's obligation to conduct a fair investigation.

The County has failed in meeting its burden to prove the existence of just cause for discipline and the grievance should be sustained.

County Reply

The County waived a reply.

Union Reply

The Union asserts that the County's argument exaggerated the facts of the incident and contradicted the testimony at hearing. Specifically, the County claimed Carow put his face up against Haese's when he answered, but the testimony of all witnesses was to the effect that he was several inches away. Further, the County referred to "physical altercations" involving Carow in the past, but no evidence of such was offered at hearing, only references to discussions with Carow regarding verbal confrontations. The County asserted that its purpose in disciplining Carow was to send a message that future such misconduct would not be tolerated. If so, and assuming *arguendo* that just cause existed, the County should have utilized progressive discipline, which it did not.

The Grievant is a long-term employee without a history of discipline. The County did not offer evidence of insubordination, only that Carow did not initially hear Haese and, when he did hear answered, "Yes, sir." The grievance should be sustained.

DISCUSSION

In a disciplinary case, such as this one, it is the employer's burden to prove that it had just cause for issuing the discipline to the employee. The standards required to establish the existence of just cause have been characterized by arbitrators in a number of ways, but for the purposes of this case it is sufficient to state that a finding of just cause requires that the employer prove that 1) the employee engaged in conduct for which discipline is warranted and 2) the degree of punishment is commensurate with the seriousness of the offense.

Here, Robert Carow was issued a one-day suspension for alleged acts of insubordination consisting of refusing to initially answer the Highway Commissioner when asked to acknowledge understanding of the status of the issue of Carow's posting for another position and then answering insolently when ordered to respond. The parties are in dispute over both the facts surrounding the incident and the appropriateness of the degree of discipline imposed.

As to the incident, it appears to be clearly established that when Commissioner Haese initially asked the group in the meeting to acknowledge his statement, both Maintenance Superintendent Demler and Union Steward Carpenter did so verbally. Carow claimed to have done so, as well, but none of the others heard him. While there was testimony that there was noise in the shop at the time, the parties were in proximity to each other and it is doubtful that

if Carow spoke none of the others would have heard him. Notably, however, Demler testified that as he was walking away Carow nodded in an exaggerated manner to indicate his understanding. Haese appears to have been either unaware of or dissatisfied with his response, however, and demanded that Carow return and answer verbally. It was at this point that Carow returned and, in the County's version, got nose to nose with Haese and shouted "Yes, sir!" Haese then told Carow that in the future he was to respond to instructions from management, at which point he again shouted, "Yes, sir!" The Union's version is that Carow did not initially hear Haese due to a hearing problem and responded as soon as he heard Haese speak to him. Carow acknowledged that he spoke loudly, but claimed that it was due to the noise in the shop and his training in the military as to how to respond to orders. He claimed he had no intention to be insolent. He further stated that he was about 18 -24 inches away from Haese when he spoke.

The difference in the accounts is significant because the County claims that Carow's behavior also posed a physical threat to Haese, which buttresses its claim of insubordination and the seriousness of Carow's actions. Added to this is the County's claim that Carow had previously been disciplined for physical violence in the workplace, giving added weight to Haese's concern that Carow might attack him.

In my view, in balance the testimony supports the version put forward by the Union to a greater degree than it does that of the County. First, the County's assertion that Carow refused to respond is problematic. Even if one assumes, as I do, that Carow did not initially respond verbally, it is clear from even County witnesses that he did nod his head to acknowledge Haese's question. It is not clear from the record that Haese initially specifically requested verbal acknowledgement. Also, the testimony is unclear as to whether Carow was already walking away when Haese first addressed him. If so, the combination of his hearing loss with the noise in the shop may have precluded his hearing what Haese said. It is not clear on this record, therefore, that Carow's action constituted a refusal to respond to Haese. Also, all witnesses, including Haese himself, testified that Carow was at least 18 inches, and perhaps as much as 5 feet, away from Haese when the confrontation took place. The County, therefore, appears to have engaged in some hyperbole in claiming that Carow "literally put his face up against Mr. Haese's" when he spoke to him.

I am satisfied that when Carow did finally speak to Haese his tone was, and was intended to be, insolent. The record is not clear as to the reasons for his attitude and they are subject to speculation. Perhaps Carow was angry about the delay in awarding the position for which he posted. Perhaps he was frustrated that Haese demanded a verbal response after he had indicated his acknowledgement by nodding. Perhaps it was a combination. Whatever the case, by all accounts his behavior and tone of voice were sarcastic and rude toward his superior. This behavior was, by definition, insolent, which is encompassed within the definition of insubordination set forth in the County's Employment Policies Handbook and, in my view, warranted discipline.

The second prong of the just cause analysis, however, is whether the degree of discipline imposed was commensurate with the seriousness of the offense. I find that it was not. The County argues that insubordination is a “capital offense,” which impairs the employer’s ability to effectively direct the work force and merits departure from the typical multi-stage process of progressive discipline. Indeed, at hearing Haese testified that Carow’s action warranted discharge. The County further argues that Carow’s conduct went beyond insolence and included a threat of physical violence toward Haese, which was heightened by Carow’s history of violent behavior. I find that the County’s position is not supported by the evidence.

It is true that in labor relations there is the concept of the “capital offense,” which is conduct that is considered so egregious that it warrants departure from progressive discipline and resort to severe punishment, up to and including discharge, for even a first offense. Capital offenses typically include such things as assault, theft, gross insubordination, alcohol or drug use on the job and falsification of records. Where the type of misconduct is not capable of specific definition, whether the conduct rises to the level of a capital offense is often a question of degree. This is reflected in the County’s Employment Policies Handbook, which defines insubordination as “...refusal to carry out a reasonable order, insolence, talking back, arguing, verbal abuse or assault of a supervisor, co-worker, or member of the public.” It cannot be reasonably maintained that “talking back” or “arguing” is on the same level as “assault of a supervisor” in terms of severity, or that it would, under most circumstances, warrant the same punishment. Thus, insubordination, as defined by the County, is not a capital offense *per se* and whether it merits departure from progressive discipline depends on the facts of the specific case.

Here, as I have previously indicated, it is clear to me that Carow was angry and responded accordingly. Whether or not his anger was justified, his response was inappropriate under the circumstances and within the context of an employer-employee relationship. A supervisor cannot tolerate insolent behavior from a subordinate, especially when other employees are observing the altercation, otherwise management’s authority is compromised. Nevertheless, I dismiss the County’s contention that Carow posed a physical threat to Haese. First, none of the witnesses testified that they believed Carow might attack Haese and, although angry, he did not act aggressively in my opinion. Also, the record gives no indication of any history of physical violence by Carow and I give no weight to the County’s arguments in that regard. Further, while there was testimony that Carow had been counseled in the past for failure to respond when spoken to by management, it does not appear that he was disciplined, and it is not even clear that the counseling occurred within twelve months of the incident at issue herein. I find, therefore, that this evidence does not provide justification for a departure from progressive discipline. In my view, while Carow’s conduct was insolent, the misconduct was not serious enough to constitute a capital offense warranting going outside the ordinary progression of discipline. Since Carow had not been disciplined during the previous year, a suspension under these circumstances was not justified.

For the reasons set forth above, therefore, and based on the record as a whole, I hereby issue the following

AWARD

The County had did not have just cause to issue a one-day suspension to Robert Carow. The County is ordered to reduce the one-day suspension to a written reprimand, shall pay Carow backpay in an amount equivalent to the wages withheld due to the suspension and shall expunge all references to the suspension from Carow's personnel file.

Dated at Fond du Lac, Wisconsin, this 13th day of August, 2009.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc

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