

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**OSHKOSH CITY EMPLOYEE UNION,
LOCAL 796, AFSCME, AFL-CIO**

and

CITY OF OSHKOSH

Case #374

No. 69058

MA-14458

(Kalmerton Discipline)

Appearances:

William Bracken, Labor Relations Coordinator, Davis & Kuelthau, Post Office Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the City of Oshkosh.

Mary Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, W5670 Macky Drive, Appleton, Wisconsin 54915, appearing on behalf of the Oshkosh City Employees Union, Local 796.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, the City of Oshkosh (hereinafter referred to as either the City or the Employer) and the Oshkosh City Employees Union (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as the arbitrator of a dispute concerning a suspension imposed on Steve Kalmerton. The undersigned was so designated. A hearing was held on November 9, 2009 at the City's offices, at which time the parties submitted such exhibits, testimony and other evidence as was relevant to the dispute. No stenographic record was made. The parties submitted briefs and reply briefs, the last of which was received on December 2nd, whereupon the record was closed.

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

ISSUES

The issues before the arbitrator are:

1. Was the Grievant, Steve Kalmerton, suspended for just cause? If not,
2. What is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE VIII – SUSPENSION-DEMOTION-DISCHARGE

Suspension: Suspension is defined as the temporary removal without pay of an employee from his/her designated position.

a. **Suspension for Cause:** The Employer may for disciplinary reasons suspend an employee at any time. Any employee who is suspended, except probationary and temporary employees, shall be given a written notice of the reason for the action and a copy of such notice shall be made part of the employee's personnel history record and a copy shall be sent to the Union. No suspension for cause shall exceed 30 calendar days.

...

BACKGROUND

The facts of this case are largely undisputed. The Grievant is Steve Kalmerton, a Groundskeeper with the City's Parks Department. His normal work day is from 7:00 a.m. to 3:00 p.m., with a morning break between 9 and 9:15. Breaks are normally taken at the work site.

On February 12, 2009 he was assigned to repair park benches at the Park Shop on Witzel Avenue. At 7:15, he advised his supervisor, Operations Manager Vince Maas, that he needed some stop nuts for the project, and Maas said he would get some. At 8:00, Maas noticed the Grievant pulling out of the parking lot in a City-owned pickup, and he assumed he was going to haul benches. Maas drove to Menards to buy the stop nuts and some paint. The drive took him approximately 15 minutes. When he entered the store, he saw that a vendor show was in progress. He went to the paint department, and then to the hardware section. As he walked to the hardware department, he noticed a table where the store was serving breakfast to its customers. The Grievant was sitting at the table, having breakfast.

Maas went out to the parking lot and positioned his vehicle to observe the Grievant's pickup truck, and see how long he stayed at the breakfast. However, another vehicle blocked his view, and when he checked, the pickup was gone. He drove back to the shop, and saw the Grievant leaving to deliver a load of park benches to Menomonee Park. He called Sue Brinkman in the Human Resources Department, and discussed what he had seen. They decided to interview the Grievant, and scheduled an investigatory meeting with him, Union President Bill Sitter and Steward Paul Brown for February 19th.

At the interview, the Grievant conceded that he had attended the breakfast, using a City-owned vehicle, and that he had not sought permission to do so. He estimated that he spent about fifteen minutes eating, then left and returned to the shop. He also agreed that he had no role in making purchases for the City, and said the invitation to the event was sent to his home address. He told the City representatives that he was taking his morning break early, but conceded that between the round trip and the time spent eating, he had devoted between thirty-five and forty-five minutes to the breakfast. In the course of this meeting, Paul Brown informed Brinkman and Maas that employees had attended vendor events and contractor's meals from time to time in the past without being disciplined, and identified Bill Sitter, Tom Bauer and Dennis Knicklebien.

Maas and Brinkman interviewed the three men about their attendance at the events. Sitter had attended several such events, 6 or 7 of which were sponsored by Diggers Hotline, and one of which was sponsored by Lincoln Contractors. The Diggers Hotline events were held after working hours, but the Lincoln Contractors event was held over the lunch hour. He attended that with his crew chief and stayed for between thirty and forty-five minutes. While they were there, the crew chief discussed different products relevant to the Department with the vendors, Ritter recalled seeing a City supervisor at the Lincoln Contractors event. Tom Bauer attended two noontime events at Menards, one in 2004 and one in the summer of 2008, with the permission of his supervisor. While at the events, he picked up materials for the Department. Dennis Knicklebien attended one noontime event at Menards in the summer of 2008, while there to pickup materials for work.

Maas and Brinkman discussed how to respond to the Grievant's attendance at the Menard's breakfast. They decided that the cases of Sitter, Bauer and Knicklebien were not comparable, since they all had purchasing authority for Department, while the Grievant did not, and thus there was at least some connection between the contractor events and their job duties. Further, the events they attended were at the lunch hour, and in most cases involved picking up materials for the Department, not a special trip just to eat. They also considered the fact that the Grievant was in a one year "last chance period" as the result of a disciplinary agreement from the preceding May. The Grievant had been investigated for removing City property from the workplace without permission, and agreed to the imposition of a three day suspension. The written agreement provided, in part:

2. Kalmerton agrees that he shall serve an unpaid disciplinary suspension on May 28, 2008 through May 30, 2008 for his failure to utilize the proper check out procedure of City equipment and for taking of City product. It is understood that this disciplinary suspension is precedent for any future discipline and shall remain a part of Kalmerton's personnel records with precedent value permanently.

3. From the date of this Agreement and for a period of one (1) year thereafter, Kalmerton agrees to serve a last chance period. During this period of last chance, Kalmerton agrees that in the event he becomes involved in the taking of any City property without permission, or fails to properly use the City check out procedure for equipment, such conduct shall be "cause" for immediate discharge pursuant to the Collective Bargaining Agreement between the City and the Union.

Brinkman and Maas conferred with City Administrator John Fitzpatrick, and the three of them decided to impose a five day suspension, which is the normal step in progressive discipline after a three days suspension. The notice of suspension was issued on March 4, citing the Grievant for three violations of Section 14 of the City's personnel policies, specifically unauthorized use of City property, failure to perform his work assignments efficiently and being wasteful of working time. This grievance was filed on March 16, 2009, protesting the suspension as not supported by just cause. It was denied at the lower stages of the grievance procedure, and was referred to arbitration. Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the City

The City takes the position that Kalmerton admitted taking at least double the allowable break time in order to attend the breakfast event at Menards. He took an early break, without permission, and used a City vehicle and City time for what was obviously a personal trip. He had no work related reason for making the trip. He had no authority to make purchases on his own, and he did not claim to have gone to Menards for any business reason.

Although there is evidence of other employees attending similar events in the past, those cases are easily distinguishable. First, in some cases, prior permission was received from management. In other cases, the events were held outside of working hours. The events that took place during work hours were held in conjunction with the lunch hour, and the employees attending the events had purchasing authority for the City. In all but one case, while the employees were at stores for these events they picked up materials for the City, and thus there was no special trip made. In the one case where the employees didn't pick up materials - Sitter's trip to Lincoln Contractors - the employee was in the company of his crew chief for whom the trip was business related.

The City argues that it is not opposed to employees attending customer appreciation events, if the attendance is in conjunction with other City business or is done with permission. However, the City should not be expected to tolerate employees making special trips, and extending their break time, in order to enjoy a free breakfast. The City clearly had just cause to discipline the Grievant, and five days was the next appropriate step in the progression of discipline according to the written agreement the parties made in May of 2008. Thus the grievance should be denied.

The Position of the Union

The Union takes the position that the City had no cause to discipline the Grievant. Certainly he took an early break without permission and drove a City truck to Menards for the breakfast. However, in so doing he was merely doing what other employees had often done in the past, without any disciplinary consequences. The City's own policies require that rules be applied fairly and consistently, and that penalties will be uniform and will match the infraction. Here, the Grievant was assessed a five day suspension, while other workers who did precisely the same thing were simply reminded to seek permission for these events in the future. Why, the Union asks, are the other employees given advance warning while the Grievant is given none?

The Union argues that it is fundamentally unfair for the City to impose serious discipline on the Grievant for engaging in conduct that, as far as he knew, was perfectly acceptable. He was not aware that he had no authority to make purchases any more, and he was not aware that the City had changed its prior policy of letting employees attend customer appreciation events. If the City wants to change the rules, it can do so, but it must first give employees notice of the changes so that they can conform their behavior to the new requirements. An unknown rule cannot be enforced. Having failed to make this change in policy known to employees, the City cannot impose discipline on the Grievant. Accordingly, the grievance must be granted and the Grievant made whole.

DISCUSSION

The issue in this case comes down to whether there was just cause for any measure of discipline. If there was, the last chance agreement governs the penalty, and the City is correct that five days would be the next step in the progression of discipline. The central question is whether the Grievant had reason to know that he would be disciplined for taking part in the customer appreciation breakfast at Menards on February 12, 2009. The Union is correct in arguing that the City cannot simply change its policy on these outings without first providing clear notice to the employees. For the following reasons, I conclude that the Grievant did not have a reasonable basis for believing that he could simply take an early extended break to go to breakfast without permission, and that the City's recourse to discipline was warranted.

The Grievant admits to having made the trip for no purpose other than availing himself of a free breakfast. He had no business purpose for going to Menards that day. Unlike every other case cited by the parties, he did not pick up supplies for the City or engage in any discussion of products related to the Department's operations. The trip was not incidental to some other City business, and it was not timed to coincide with the lunch break. This was purely a case of the Grievant going out to breakfast. The fact that the breakfast was sponsored by a City supplier does not change the character of the excursion.

Moreover, if the Grievant truly believed that there was no problem with taking an early break to attend the breakfast, it is odd that he didn't mention that he was going to Menards when he told Maas he needed stop bolts for his work on the park benches. That would seem to have been a fairly natural thing to do, since one of them was going to have to go to the hardware store for the bolts. The Grievant claims that he believes that he still had the authority to make purchases if he was sent out to do so, and thus there would have been no reason not to mention to Maas that he was going to Menards anyway and could pick up the bolts. The fact that he did not mention the trip to Maas suggests that he understood that it was not authorized, and would not be authorized.

The Grievant admits to having taken his morning break early, and having extended it by at least twenty minutes. While I credit Sitter's testimony that employees have some flexibility in their breaks and do not always take them on the job site, that flexibility does not include taking a break an hour early, taking it fifteen minutes from the job site, or extending the break to more than double its normal length. I conclude that the Grievant's decision to have breakfast at Menards was not based on some good faith reliance on past practice, or a reasonable belief that the City would not object to him taking an early and extended break. Accordingly, I find that the suspension issued to him was supported by just cause.

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

AWARD

1. The City had just cause to suspend the Grievant, Steve Kalmerton, for five days.
2. The grievance is denied.

Dated at Racine, Wisconsin, this 25th day of January, 2010.

Dan Nielsen /s/

Daniel Nielsen, Arbitrator

dag
7529