

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF WAUKESHA

and

AFSCME, LOCAL 97

Case 184

No. 69319

MA-14568

(Tim Kujawa Grievance)

Appearances:

Ms. Donna Whalen, Human Resource Director, City of Waukesha, 201 Delafield Street, Waukesha, Wisconsin, 53188-3520, appeared on behalf of the City.

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 044316, Racine, Wisconsin 53404-7006, appeared on behalf of the Union.

ARBITRATION AWARD

On November 9, 2009 the City of Waukesha and AFSCME, Local 97 filed a request with the Wisconsin Employment Relations Commission, requesting the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a dispute pending between the parties. A hearing was conducted on April 9, 2010 in Waukesha, Wisconsin. No formal record was taken. Post-hearing briefs were filed and exchanged by May 7, 2010.

This Award addresses a written warning issued to employee Tim Kujawa.

BACKGROUND AND FACTS

Tim Kujawa, the grievant, has been employed by the City of Waukesha, in the Parks and Recreation Department, since 1988. Mr. Kujawa works the day shift, from 7:00 a.m. to 3:30 p.m. Some time after work hours on April 30, 2010 Mr. Kujawa realized that he had left his cell phone at work. At approximately 7:30 p.m. he returned to work to retrieve his phone, parked his vehicle near the front door of the Main Shop, and proceeded into the building to get his phone. As he proceeded to enter the building, Mr. Kujawa saw a City vehicle operated by Dan Smerling, who is also a City employee. Smerling works second shift, and was on duty.

As Kujawa was entering the parking lot, Smerling was leaving. As Kujawa got out of his car and entered the building Smerling turned his truck around and positioned himself so that he could record the license plate of Kujawa's car. It was Smerling's testimony that he took down the license plate in order to "keep an eye on the building". When Kujawa emerged from the building he saw Smerling and hollered, "Dan, what do you want?" When there was no response he repeated the call. According to Kujawa he called out in a raised voice due to the distance the men were apart. According to Smerling, Kujawa's tone of voice was hostile. The two men recognized one another as employees of the City. However, they do not know one another well. At the time it appears that while Smerling recognized Kujawa as a City employee, he did not know Kujawa by name.

Smerling exited the parking lot as quickly as he could, without responding to Kujawa. Smerling drove to Woodfield Park, a City park located approximately 3 miles from the Main office. Kujawa followed him.

When Smerling arrived at the park, he pulled his truck into a short driveway, slightly longer than the truck itself. The front of the driveway had a barricade and sign. Upon his arrival at the park, Smerling called Everett Bunzel, the Building Maintenance Supervisor, to report that another City employee had been yelling at him. As the men were on the phone, Kujawa pulled up behind Smerling and parked his car perpendicular to, and overlapping, Smerling's truck. The testimony varies as to how much overlap of vehicles there was. According to Smerling, the Kujawa vehicle blocked his truck almost completely. He indicated that the front of Kujawa's car was in line with the passenger side of Smerling's truck. He testified that he was effectively blocked in. Kujawa indicated that he positioned his car so that he could call to Smerling out of his window. He indicated that his car overlapped the back of Smerling's truck by less than one quarter of the back of the truck. Kujawa testified that Smerling was not blocked in.

Both Smerling and Kujawa testified that Kujawa, seated in his car, called out to Smerling, asking "what do you want". Both indicated that that Kujawa was positioned behind Smerling for two minutes or so. Kujawa testified that he was just trying to find out why Smerling was recording his license plate. Smerling testified that Kujawa was angry, yelling, and that he was mad and hostile. Smerling indicated that he felt threatened.

As this was transpiring, Everett Bunzel told Smerling to call Pete (Operations Manager). Smerling did attempt to call Pete, but could not reach him. He called Bunzel back, and Bunzel advised him to call the police. Before Smerling could call the police, Kujawa drove away. Bunzel's phone records show that there were 6 minutes between the two calls he received from Smerling.

Smerling subsequently went to the police and filed an incident report.

Following the incident, the City conducted an investigation into what had occurred. Both men were interviewed. Following the investigation, the City issued the following warning:

June 1, 2009

Mr. Tim Kujawa
Grounds Maintenance Crew – Horticulturalist

RE: Employee Incident Report of 4/30/09
Parks, Recreation & Forestry (PRF) Department (parking lot)
& Woodfield Park South

Dear Mr. Kujawa:

Based upon the investigative interviews that have been completed, your actions that took place the evening of 4/30/09 to follow (from the PRF Department parking lot to the Woodfield South parking lot area) and verbally confront an on-duty second shift worker of our department, violates the following Human Resources policies:

B(3), b: Improper interference with the ability of employees to perform their expected job duties is not tolerated

B(6), #11: Employees will not restrict or interfere with others in the performance of their jobs or engage or participate in any interruption of work.

B(6), #12: Employees will not engage in fighting, threats, intimidation, horseplay, or harassment of the public or employees

In consideration of the aforementioned City Work Rules violations, this letter serves as a formal written reprimand that any future non-compliance to prescribed City Work Rules may lead to disciplinary action up to and including termination from employment.

Please let me know if you have any further questions regarding this matter.

Sincerely,

Peter Traczek /s/
Peter Traczek, Manager
Parks & Forestry Operations

A grievance was filed, and denied.

ISSUE

The parties stipulated to the following issue.

Did the Employer have just cause to issue a written reprimand to the grievant for the events occurring on the evening of April 30, 2009?

If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 2 – MANAGEMENT RIGHTS

2.01 The Union recognizes that except as specifically limited by this Agreement, the City has the right to manage and direct the work force which includes but is not limited to the right to hire, promote, layoff, demote or transfer employees, discipline or discharge employees for just cause; to determine the number of departments and type of services to be performed, to introduce, change or eliminate equipment, machinery or process, to subcontract work provided no full-time employee is laid off or suffers a reduction of regular hours of work, to determine the number of positions and classifications, to abolish and/or create positions, to direct the job activities of the employees, assign work to employees, to schedule hours of work and shift assignments, to determine the size of the work force including the number of employees assigned to any particular operation and to establish reasonable rules and regulations. All other rights of management are expressly reserved to management even though not enumerated above. Nothing contained in this section shall be construed to divest the Union or any employees of any rights granted by any provisions of this Agreement.

POSITIONS OF THE PARTIES

It is the view of the City that Kujawa followed Smerling out of the parking lot and to the park. Once there, the City contends that the grievant blocked Smerling's vehicle and began to shout at him. The City regards Smerling's testimony as more credible because Bunzel corroborated that Smerling was upset and related that his vehicle had been blocked in. The City contends that even if you accept the grievant's account of how he parked, it would have been extremely difficult for Smerling to back out without risk of hitting the grievant's car. It is the view of the City that the work rules cited in the reprimand are directly relevant in that Kujawa's actions constituted threats, harassment, and intimidation of another employee. It is the view of the City that Kujawa's actions interfered with Smerling's ability to do his job.

The Union points to the behavior of Smerling as threatening to Kujawa. Smerling positioned his vehicle to record Kujawa's license plates, even after he recognized who Kujawa was. Smerling never answered Kujawa, when the latter man attempted to find out why Smerling was recording his license plates. Had he simply responded, it is the view of the Union that we wouldn't be here. It is the view of the Union that the behavior of Smerling, and not Kujawa, was inappropriate and provocative.

If any discipline is appropriate, the Union contends that a verbal warning would be more appropriate.

DISCUSSION

While both men were in the parking lot, Smerling saw Kujawa enter the lot, park his car, and enter the building. This occurred after normal working hours. It is unclear when Smerling recognized Kujawa, but in the absence of such recognition, Smerling's observing what the man was doing and taking down his license plate was both prudent and appropriate. At some point he recognized Kujawa as a co-worker. At that moment he knew who Kujawa was and had his license plate recorded. When Kujawa noticed what Smerling was doing, he called out to Smerling. The only dispute is the tone of voice used by Kujawa.

Smerling did not respond. Rather, he exited the parking lot quickly. I find that odd. Under the circumstances, I would expect a response. Kujawa was curious and likely annoyed to see a co-worker monitoring his return to the shop. It is not surprising that he would want to know what Smerling was doing. If, for some reason, Smerling was suspicious as to what Kujawa was doing in the shop after work hours, Kujawa could have immediately addressed such a concern. Kujawa's asking Smerling what he wanted was the quickest and most obvious way to address the matter.

Smerling left the parking lot and headed to the park. At the time he was on his work shift and in a City truck. Kujawa followed him. There was some dispute as to whether or not Kujawa consciously followed Smerling or was coincidentally on his way home. I believe he followed Smerling, based on the record as a whole, including Kujawa's written statement to that effect. Smerling pulled into a short driveway, which was blocked in the front. Kujawa pulled up behind him, partially blocking the rear of the truck. Testimony varies as to how much of the truck was blocked, but under Kujawa's testimony there was sufficient overlap to raise the possibility that Smerling might have struck Kujawa's car had he attempted to back out.

What followed was bizarre. Smerling was trapped in his city truck, calling supervisors. He did not get out because he was intimidated by Kujawa. He did not back out because he believed Kujawa had him pinned into the space. Kujawa was in his car, yelling to Smerling. Kujawa did not get out. It is unclear to me why Kujawa did not get out of his car and go and talk with Smerling. It was Kujawa's testimony that all he wanted to do was talk to Smerling. He testified that his own behavior was neither belligerent nor confrontational. Smerling had not responded to Kujawa in the parking lot. He did not respond to Kujawa in the park.

Both men testified that the park incident lasted for about two minutes. However, the phone records of Everett Bunzel indicated that there were 6 minutes between the two phone calls placed by Smerling to Bunzel. Bunzel testified that the initial call from Smerling included a complaint that there was another City employee yelling at him behind Woodfield Park. Bunzel also testified that Smerling indicated that the employee was still there when he made the second call, and left during the second conversation. I believe the park incident lasted for more than two minutes.

At some point, the legitimate inquiry into what Smerling was doing transitioned into harassment and torment. After they left the parking lot, the men drove approximately 3 miles to the park. It was Kujawa's testimony that he drove past the park entrance, and then turned around, entered the park and pulled up next to Smerling. It was Kujawa's testimony that he sought eye contact with Smerling in order to talk with him. He testified that he saw Smerling on the phone. It is in this context that Kujawa sat in his car calling out to Smerling, for somewhere between two and six minutes.

Sufficient time had passed to allow Kujawa's annoyance to pass. He made a series of deliberate decisions to follow Smerling, who was working. Kujawa did not park his car away from the truck, walk over and engage Smerling in a conversation. He pulled up behind the truck, partially blocked it, and then hollered out the window while he observed Smerling on the phone. It was reasonably apparent that Smerling did not want to talk with Kujawa. Notwithstanding that fact, Kujawa persisted. He did so in a manner which went beyond a simple effort to communicate and avoid a misunderstanding. Kujawa's conduct in the park did serve to harass Smerling. It also interfered with Smerling's ability to do his job.

The City issued a written warning. Under the circumstances the level of discipline was warranted.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 14th day of May, 2010.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

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