

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**CITY OF DE PERE MUNICIPAL EMPLOYEES UNION,
LOCAL 358, AFSCME, AFL-CIO**

and

CITY OF DE PERE

Case 95
No. 69688
MA-14707

Appearances:

Mr. Randall W. Etten, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 3347 Mardon Lane, Green Bay, Wisconsin 54313, on behalf of the Union.

Attorney Judith Schmidt-Lehman, City Attorney, City of De Pere, 335 South Broadway, De Pere, Wisconsin 54115, on behalf of the City.

ARBITRATION AWARD

The City of De Pere Municipal Employees Union, Local 358, AFSCME, AFL-CIO (herein the Union) and the City of De Pere (herein the City) were, at all pertinent times, parties to a collective bargaining agreement dated February 19, 2009 and covering the period January 1, 2008 through December 31, 2010. On March 15, 2010, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration concerning the discharge of bargaining unit member Patrick Linnane. John R. Emery, a member of the WERC's staff, was appointed to arbitrate the dispute. A hearing was conducted on June 30, 2010. The proceedings were transcribed. The parties filed initial briefs by August 6, 2010 and reply briefs by August 23, 2010, whereupon record was closed.

ISSUES

The parties stipulated to a statement of the issues, as follows:

Did the City have just cause when it terminated the Grievant?

If not, what is the remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 3
Management Rights

The Association recognizes that, except as otherwise provided in this Agreement or as may affect the wages, hours, and working conditions of the members of the Association, the management of the City and its business and the direction of its work force is vested exclusively in the Employer in that all powers, rights, authority, duties, and responsibilities which the City had prior to the execution of this Agreement customarily exercised by management or conferred upon and vested in it by applicable rules, regulations and laws, are hereby retained. Such rights include, but are not limited to, the following:

...

- d. To discipline or discharge employees for just cause;

...

OTHER RELEVANT LANGUAGE

City of De Pere
Rules and Regulations

...

Section 34 Prohibited Conduct

The following activities or conduct are prohibited at the work place and/or when involved in the employment relationship. The City has established a policy of progressive discipline with normal progression being:

1. Oral reprimands (with written notation in the employee's personnel file);
2. Written reprimand
3. Suspension
4. Discharge

Some or all of the preliminary steps in progressive discipline shall not be required in instances where the conduct of the employee represents a sufficiently serious infraction of the employment relationship justifying immediate suspension or discharge. Prohibited conduct shall not be limited to:

...

D. Personal Actions and Appearance

...

2. Intimidating, interfering with, harassing or using abusive language to others.

BACKGROUND

Patrick Linnane, the Grievant herein, was employed by the City of De Pere as a Garbage and Recycling Truck Driver in the Street Department since 2002. The record indicates that Linnane has a reputation for being temperamental and over the years he has been counseled for outbursts in the workplace. In August 2007, Linnane was given a thirty day suspension as a result of threats made against co-worker Bruce Edinger and was required to attend an anger management course before returning to work, which he did. There is no record of Linnane receiving any additional discipline before the events that are the basis for the grievance herein.

On November 30, 2009, Linnane was working his normal route, as was Gerald Pavlik, another Garbage and Recycling Truck Driver. At some point Pavlik contacted Linnane on the Department radio and informed him that he had missed part of his route. It was later discovered that it was, in fact, Pavlik, not Linnane, who had missed part of his route, but Pavlik did not acknowledge this, which upset Linnane. On December 2, 2009, Street Superintendent Al Luberda called a meeting in the Department break room to discuss improper use of Department radios as a result of Pavlik's comments. When the meeting began, Linnane appeared upset and at one point said to Pavlik, "How long do we have to hold your fucking hand," at which point he was admonished by Luberda to not use such language. There were no other exchanges between Linnane and Pavlik at the meeting. Later during the meeting, two Water Department employees, Kim Johnson and John Kleuskens entered the break room, at which point Linnane said, "We are having a meeting here." This led to a heated exchange between Linnane and Kleuskens in which Kleuskens said they had a right to be there and that if Linnane didn't like it he could "take it up with my boss." At that point Johnson left the room, but Kleuskens and Linnane continued arguing until Kleuskens eventually said, "Let's go talk to my boss," at which point Linnane replied, "Let's go, Kleuskens, lets go." Kleuskens then left, but said "Bring it on!" to Linnane as he went out the door. During the confrontation Luberda told both Linnane and Kleuskens to "knock it off," but he considered the matter closed after Kleuskens left and took no other action. Nothing else of note occurred at the meeting and there is no record of any subsequent confrontations between Linnane and either Pavlik or Kleuskens.

Subsequent to the confrontation in the break room, Kleuskens and Johnson approached their foreman, Daniel Carpenter and told him Linnane had confronted them and said, "What the fuck are you doing in here?" which Carpenter reported to Luberda. Luberda then reported the matter to Street Department Director Scott Thoresen. Thoresen instructed Luberda to obtain written statements about the incident from all the attendees at the meeting and, once they were obtained, then reported the matter to Human Resources Director Jackie Nystrom, who commenced an investigation. During the course of the investigation, Nystrom and Thoresen interviewed Linnane, Luberda and Kleuskens, but none of the other employees attending the meeting. During his interview, Linnane told Nystrom that he felt he was being harassed by Kleuskens, and that this had gone on for a period of years. He was asked to put his concerns in writing, which he did and provided the document to Thoresen on January 6, 2010. Subsequent to that meeting, the City made the decision to terminate Linnane and, on January 13, 2010, Thoresen gave Linnane a termination letter, which stated, as follows:

Dear Pat,

Thank you for meeting with us last week to provide additional information regarding your conduct on December 2, 2009. We have considered the information you have provided.

Pat, we find your actions on December 2, 2009 to be completely unacceptable. Through eyewitness statements gathered as well as by your own account, it is clear that your behavior that day towards fellow co-workers was disrespectful, harassing, abusive and intimidating. Specifically, you engaged in abusive, harassing behavior during a department meeting in which you openly used profanity, specifically the "F" word toward your co-worker, Gerald Pavlik, and his work abilities while in his presence. Your statements toward Mr. Pavlik were negative, demeaning, disrespectful and abusive.

Late in that same meeting, John Kleuskens, a co-worker you admitted to having ongoing issues with, entered the room and you angrily confronted him, telling him a private meeting was going on. It is important to note that you did not make similar comments to a different employee who entered the room minutes before Mr. Kleuskens had entered the room. AS John was gathering the information his supervisor requested, an exchange of words occurred and you threatened John saying: "Let's go, Kleuskens, let's go." Angrily confronting John when he entered the room and your threat to "let's go" was intimidating, harassing and disrespectful behavior towards Mr. Kleuskens.

Your behavior amounts to serious violations of Section 34 of the City's Rules and Regulations, which specifically prohibits the use of abusive language towards others and prohibits intimidation in the workplace, In addition, on August 9, 2007, you received a 30-day unpaid suspension for threats to another employee and intimidation in the workplace, in addition to mandatory Employee

Assistance Program sessions to address anger management. Included in that discipline was notice that any future threats, harassment, intimidation or the like made by you would be grounds for your immediate termination of employment with the City of De Pere.

Based on your conduct on December 2, 2009, and based upon your prior discipline of August 9, 2007, we are terminating your employment effective immediately.

This will be your last day of work. You will continue to have insurance benefits through the end of January. Your last paycheck will be January 29, 2010 and will include payment for all accrued benefit time due to you.

Please gather your City Identification Card, Field Key and Building Key and return them to me. Please take all your personal belongings with you when you leave today.

Thank you.

Sincerely,

Scott Thoresen
Director of Public Works

Subsequent to receiving the notice of termination, the Union filed a grievance on Linnane's behalf on January 18, 2010. The grievance was denied and the matter was advanced to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The City

The City asserts that the Grievant was discharged for two separate incidents of abusive, intimidating and harassing behavior on December 2, 2009, each of which warranted discipline. The first incident was Linnane's confrontation with Gerry Pavlik, wherein he directed vulgar profanity toward a co-worker by using the word "fuck." It is clear from the context of the statement, and from Linnane's later written statement, that this was an act of disrespect based on Linnane's belief that Pavlik was an unsatisfactory employee. The evidence of eyewitnesses shows that Linnane was agitated, red-faced and angry at the time and that he intended the comment to be abusive, harassing and intimidating and that Pavlik found them to be so. Pavlik has a right to work in a workplace free of abusive and harassing conduct and the City has a duty to provide such a workplace. Linnane tried to justify his behavior by blaming his conduct

on Pavlik's mistaken radio comment two days earlier, but this is not an adequate excuse. Linnane could have addressed the matter privately with Pavlik over the previous two days, but instead chose to publicly humiliate him. This was abusive, intimidating conduct and clearly violated the City's Rules and Regulations.

The second incident involved Linnane's confrontation with John Kleuskens and Kim Johnson during the Street Department meeting. Kleuskens and Johnson entered the break room, as they had a right to do, and were angrily confronted by Linnane. The confrontation escalated to the point where Linnane said, "Let's go, Kleuskens, let's go," which Kleuskens took to be a challenge to a fight. Linnane was clearly the instigator of the incident and had no legitimate reason for doing so. He disrespectfully confronted Kleuskens and Johnson for merely entering the room. The Union tried to make an issue of the fact that Kleuskens walked near Linnane on his way to the Water Department desk, but this occurred after Linnane challenged them. Further, Linnane tried to assert that he was being harassed by Kleuskens, but it is clear that Linnane provoked the incident, shortly after his attack on Pavlik. Again, this behavior was a violation of the City's Rules and Regulations.

Whether termination was justified for this behavior involves issues of due process, progressive discipline and disparate treatment. Due process involves an analysis of whether the employee was treated fairly. Here, the City conducted a thorough investigation in which it obtained statements from all of the eyewitnesses, interviewed four witnesses, including Linnane, conducted three meetings with Linnane after the incident to obtain further information and considered Linnane's claims that he was subject to harassment by Kleuskens. It was only after this point that the City determined that Linnane's conduct warranted termination.

With respect to progressive discipline, Linnane received a 30 day suspension in August 2007 for threatening a co-worker's family, to which he stipulated on March 4, 2008. At the time he was given notice that "any further threats, harassment, intimidation or the like by you will be grounds for immediate termination." He testified that he was thus aware that any further incidents would lead to his termination. Human Resources Director Nystrom testified that, given the previous suspension, termination was the next step in progressive discipline and further stated that Linnane had been given opportunities to conform his behavior and had been provided anger management counseling through the City's EAP program.

The Union also seems to feel that Kleuskens should have been disciplined for the December 2 incident, but Nystrom testified that this would have been inappropriate due to the fact that Linnane was the instigator. The written statements reveal that, when confronted by Linnane, Kleuskens responded appropriately by suggesting that Linnane talk to his foreman. The incident escalated when Linnane did not accept that answer. Nystrom reasonably determined that Kleuskens was not the aggressor and should not be subject to discipline.

In summary, the City has determined that it will not accept abusive, harassing and intimidating behavior in the workplace and has instituted a clear policy to prevent it. Linnane has been through training regarding the policy, had been previously suspended for a violation

of it and had been told that further violations would result in his termination. Given that the city's previous efforts with Linnane were unsuccessful, it was given no choice after the December 2 incidents but to terminate him. The City cannot risk further incidents. The termination was justified and the grievance should be denied.

The Union

The Union asserts that the City has failed in its obligation to establish the existence of just cause for its termination of Pat Linnane. In the first place, the City bases its action on previous progressive discipline of Linnane. The Union does not dispute that Linnane has received previous discipline. It is important to note, however, that the August 2007 suspension letter states that "any further threats, harassment intimidation or the like made by you will be grounds for immediate employment termination. This means that termination is not a foregone conclusion, but that discipline, up to and including termination is a possibility. The City had discretion to investigate before making a determination and utterly failed to do so. The City disregarded the events of the meeting and failed in its obligation to thoroughly investigate an incident wherein termination of an employee was at issue. After the incident, the City obtained written statements from all attendees. Then a meeting was held with Linnane on December 15 wherein he stated he felt he was being harassed. He was asked to put this in writing, which he did on January 6, 2010. Public Works Director Thoresen testified that this meeting was a "last chance" for Linnane to provide information to assist in the investigation. This reveals that the City had already determined to discipline Linnane and he was being offered a last chance to change their mind.

The investigation itself was flawed. The City obtained written statements from all employees who witnessed the incidents, but only interviewed Linnane, Kleuskens, Thoresen and Street Superintendent Al Luberda. The only participants interviewed were Linnane, Kleuskens and Luberda and from these interviews the termination decision was made. The others were only first questioned about the incidents at the hearing. Linnane stated he felt that he was being harassed by Kleuskens, which the City discounted, even though Kleuskens had been suspended in 2005 for harassing and intimidating behavior toward Linnane. Nystrom stated she reviewed Linnane's complaint and determined that nothing more needed to be done, despite the fact that she stated the City uses progressive discipline and that in progressive discipline the next step after suspension is termination. Her statement about the Kleuskens suspension was that this was closed and dealt with in 2005. Apparently progressive discipline applies to Linnane, but not to Kleuskens. Nystrom conducted no investigation, but summarily wrote off Linnane's concerns. The City Attorney argued that Linnane's complaints could not be confirmed because he did not provide dates, but he was not asked to provide these even though the events were noted in his planner. The City also referred to an ongoing pattern of behavior on Linnane's part, but there is nothing in his personnel record to corroborate this. If additional counseling took place, the City had an obligation to inform Linnane that these events could be considered in future discipline, but did not do so. The City apparently considered the passage of time between incidents when reviewing Kleuskens' behavior, but did not do so with Linnane. The City may consider previous discipline in determining appropriate action, but

cannot rely solely on the previous incident. Its actions here do not meet the standard of just cause.

Regarding the Pavlik incident, two days before Pavlik had accused Linnane on the Department radio frequency of missing part of his garbage route. This was heard by other employees. This was the reason Luberda called the December 2 meeting, which he made clear at the outset of the meeting. Pavlik violated the Department radio protocol and embarrassed Linnane and Linnane had a right to be upset. Pavlik had the opportunity to admit his mistake and apologize to Linnane before the meeting, but chose not to do so. Linnane's frustration was increased by the fact that Pavlik received extra help and direction from management, but continued to make more errors than others on his route. This led him on December 2 to state, "How long do we have to hold your fucking hand?" Luberda cautioned him to not use such language and there is no evidence of other profanity used by Linnane during the meeting. The termination letter accuses Linnane of "negative, demeaning, disrespectful and abusive statements" toward Pavlik, but in fact there was only one statement. Further, the City does not consider the negative, demeaning, disrespectful and abusive nature of Pavlik's statement about Linnane. After the meeting Luberda considered the matter closed and this only changed when he was told that Linnane would be dealt with differently. Previously, Thoresen had told Luberda that he would have a free hand in evaluating and dealing with his staff. Yet, Thoresen moved to discipline Linnane despite Luberda's view that the incident was "not that big of a deal."

Harassment is defined as an ongoing course of conduct, yet here there is only evidence of an isolated incident. There is no evidence of a pattern of conduct by Linnane against Pavlik. Further, there is no evidence that Pavlik felt harassed by Linnane. When asked for a written statement about the meeting, Pavlik did not mention Linnane's comment to him and at hearing testified that, while Linnane's comment was unwelcome, he expected it after the November 30 incident and he did not even remember that Linnane had used profanity. Further, other than Luberda, none of the others at the meeting noted the comment in their statements, indicated that it was not something they felt was out of the ordinary or needing to be addressed.

The second incident upon which the discharge was based was the confrontation with John Kleuskens. It must be remembered here that Kleuskens had previously been suspended for confronting Linnane in 2005, and before that had been disciplined for a confrontation with another employee. It is clear that Linnane and Kleuskens have a strained relationship. When Linnane told him he was interrupting a meeting, Kleuskens could have excused himself or he could simply have gotten what he came for and left. Instead, he chose to engage Linnane and escalate the situation. Kleuskens claimed to have been harassed, but instead of avoiding confrontation, which a truly harassed person would have done, Kleuskens deliberately went out of his way to walk past Linnane in close proximity. The City describes Linnane as angrily confronting Kleuskens, but this is not confirmed by any of the other witnesses besides Kleuskens. Further, the City insinuates that the comment "Let's go, Kleuskens, let's go" was a challenge to a fight, when in fact it was ambiguous. Kleuskens had asked Linnane if he wanted to go see his foreman and even Kleuskens testified that he was not sure whether Linnane's

response was an agreement to do so or a challenge. Linnane did not get up or in any other way indicate he intended to fight Kleuskens. Nevertheless, Kleuskens left the break room and immediately went to his supervisor to accuse Linnane of harassment, which set the wheels in motion for his termination.

Throughout this process, the City failed to make a thorough investigation, abused the concept of progressive discipline and treated Linnane disparately compared to Kleuskens. It is clear that there was not just cause for termination and that Linnane was targeted from the outset. The grievance should be sustained.

City Reply

The City asserts that the Union bases its argument that Pavlik and Kleuskens were the responsible parties for the incident on inaccurate representations of the testimony of Steve Bloemer and Al Luberda. The City asks that those assertions of fact and supporting arguments be stricken. The City also notes that the Union attempts to blame Pavlik and Kleuskens for Linnane's behavior. In fact, however, he is responsible for his own actions and had he done nothing wrong there would be no need to deflect blame.

The Union asserts that Linnane's behavior toward Pavlik was justified by Pavlik's failure to apologize for the November 30 incident, that he had a right to confront Pavlik, that swearing occurs all the time in the street department and that nothing was meant by use of the word "fuck." This argument has no merit.

If Linnane had been angry about Pavlik's comments on November 30, he would have addressed them. Instead he attacked Pavlik's competence in an effort to intimidate and humiliate him, despite the fact that Luberda characterized him as a good employee. Also, it is clear from the fact that Pavlik found Linnane's comment unwelcome and inflammatory, and that Luberda remonstrated with him, that Linnane's use of the word "fucking" was not commonplace. No one swore after Luberda's statement and it is clear that the workers were all aware of the City's policy regarding abusive language. It is also ridiculous to suggest that Linnane had the right to confront Pavlik. Whether he had a right to be upset, there were other better avenues to address the situation and he did not have the right to confront a co-worker. Finally, this was not just the use of a casual swear word. Linnane intended to abuse, harass and intimidate Pavlik, which Pavlik found unwelcome and inflammatory. This created an environment the City will not tolerate as it tries to create a harassment-free workplace.

The Union dismissed the "Water Department incident" by asserting that Kleuskens was the aggressor, that Kleuskens and Johnson improperly entered the meeting and that Kleuskens harassed Linnane, evidenced by his discipline for doing so in 2005. It is clear that Linnane went after Kleuskens and Johnson the minute they entered the room. Nothing suggests that Kleuskens started anything. Further, Kleuskens and Johnson had a legitimate reason for being in the room and it is not unusual for workers in other departments to enter the room during meetings. It is also not clear why Linnane felt he had the right to question Kleuskens and

Johnson being there. There is also nothing to the argument that Kleuskens escalated the situation by deliberately walking past Linnane. Clearly Kleuskens was not the instigator; Linnane was.

Finally, the Union claims that Linnane did not receive due process because the City relied on extraneous information, others who should have been disciplined were not, and the City conducted an inadequate investigation. First, the testimony of both Thoresen and Nystrom makes it clear that Linnane was terminated for the two incidents on December 2, plus his previous suspension. The previous counseling Linnane received was not part of the City's determination. It is true that Linnane was not disciplined between August 2007 and December 2, 2009, but this does not mean that Linnane was a problem free employee. The counseling he received attests to the fact that there ongoing behavior issues. It is also not true that Linnane's discipline was predetermined, otherwise why hold a last chance meeting on January 6 to allow him to raise mitigating circumstances? As to whether Kleuskens should have been disciplined, there is no comparison between his suspension in 2005 and Linnane's in 2007. Further, there is no evidence that Kleuskens ever incited a confrontation with Linnane after 2005. There is also no evidence that Pavlik's actions on November 30 were malicious or false, only that he was mistaken. There was, therefore, no basis for disciplining him. There is also no merit to the argument that the City conducted an inadequate investigation. It obtained statement from the witnesses that corroborated that Linnane provoked the confrontation with Kleuskens and Johnson. The evidence is also overwhelming supporting the occurrence of the Pavlik incident. The follow-up interviews corroborated the written statements and, in fact, Linnane's own statements about his conduct are evidence enough for the City's response. The investigation was thorough and its length did not deprive the Grievant of due process.

Union Reply

The Union disputes that Linnane's conduct on December 2 required termination. The witnesses are not in agreement as to what was said by Linnane to Pavlik. The overwhelming evidence supports the view that Linnane was not trying to be hostile or inflammatory. His use of the word "fucking" in this context was just a dropped swear word. The City's characterization of it as a vulgar profanity is an attempt to paint Linnane as abusive and harassing, which he was not. It is clear from Pavlik's testimony that he did not feel harassed or intimidated, as he didn't even remember Linnane's comment. The incident was handles appropriately by Luberda and should have been dropped there.

The evidence regarding the confrontation with Kleuskens is undisputed. What is disputed is how it is characterized. The City asserts that Linnane admitted to being the aggressor. In fact, Linnane admitted to saying "we're having a meeting," when Kleuskens and Johnson entered the room. It was Kleuskens' reaction that was aggressive by deliberately walking near Linnane and engaging him in an argument resulting in Linnane saying "Let's go, Kleuskens, let's go," to which Kleuskens replied, "Bring it on." Linnane was referring to going to see Kleuskens' foreman, not trying to start a fight, yet the City goes to great lengths to portray him, rather than Kleuskens, as disrespectful, angry and harassing. The City also

discounts the fact that the problems between the two began with Kleuskens behavior in 2005, which led to his own suspension and referral to EAP for anger management training. Kleuskens was given a free pass because the City was looking for an excuse to terminate Linnane.

The City also wrongly refers to incidents wherein Linnane was “counseled” for his behavior as supporting termination. Thoresen testified that both the incidents in question had mitigating circumstances – once when Linnane was suffering from painful kidney stones and once just after his father had died. Thoresen also testified that on the second occasion he was so angry at the other employees’ treatment of Linnane that he cursed them out, for which he was disciplined. It is incredible that the City would now use these incidents as a basis for terminating Linnane. It is also untrue that the City put Linnane on notice that the next discipline he received would be termination. He was told future incidents “will be grounds for” termination. This clearly means it could result in termination, not must. The City had a duty to consider the nature of the offense, which it did not.

It is also clear the City did not do a fair investigation. The investigation took six weeks, but the City only interviewed four witnesses, one being Thoresen, who wasn’t present at the December meeting. Pavlik was not interviewed, leaving his feelings of harassment and abuse unexplored and thus at the discretion of HR Director Nystrom to determine. The City inferred harassment of Pavlik when he never made such a claim and ignored Linnane’s specific claims of harassment by Kleuskens in order to form a basis for termination. The first time the City asked Linnane about his harassment claims was at the arbitration hearing. This constitutes gross negligence on the City’s part. The only explanation for the City’s behavior is that it had predetermined the outcome and thereafter conducted only a pro forma investigation. The grievance should be sustained and Linnane should be made whole.

DISCUSSION

The question in this case is whether the Grievant, Patrick Linnane, was terminated from his position as a Garbage/Recycling Truck Driver for just cause. The existence of just cause involves consideration of a number of factors. This analysis was summed up by Arbitrator Steven Morrison in HURLEY SCHOOL DISTRICT, DEC. MA-11758 (Morrison, 1/21/03) as follows: “...just cause requires a finding that the employee is guilty of the conduct in which he or she is alleged to have engaged and that the level of discipline imposed as a result of that conduct is reasonably related to the severity of the conduct. Just cause mandates not merely that the employer’s action be free of capriciousness and arbitrariness but that the employee’s performance be so faulty or indefensible as to leave the employer with no alternative except to impose discipline. (See Platt, “Arbitral Standards in Discipline Cases”, in *The Law and Labor-Management Relations*, 223, 234 (Univ. of Mich., 1950). Fully entrenched in this definition are the core concepts of due process and fair dealing.” This definition is serviceable in the instant case, as well.

The letter of termination reveals that the discharge was based upon “disrespectful, harassing, abusive and intimidating” behavior toward two co-workers, Gerald Pavlik and John Kleuskens on December 2, 2009, as well as a previous suspension Linnane received on August 9, 2007 for threats made against another co-worker. Both of the December 2, 2009 incidents occurred at a meeting of Street Department employees. In one instance, Linnane stated to Pavlik, “How long do we have to hold your fucking hand,” relative to a dispute they had regarding their respective routes. In the other, Linnane is alleged to have confronted Kleuskens and provoked an argument with him when Kleuskens walked in on the department meeting to get some materials he needed for a meeting of Water Department employees. In the City’s view, in both cases Linnane acted in an intimidating, abusive and harassing manner toward the others. Such acts, if proven and determined to be intimidating, harassing, or abusive, would constitute violations of Section 34.D.2 of the City’s Rules and Regulations.

The record leaves little doubt as to Linnane’s statement to Pavlik. In fact, Linnane, himself, admitted to making the statement. Rather, the Union takes the position that the statement was not intended to be abusive, was not a big deal, and that Linnane was justified in being upset at Pavlik because on an incident two days earlier where Pavlik had wrongly accused Linnane on the department radio of missing part of his garbage route, when, in fact, it was Pavlik who had made the mistake.

The incident with Kleuskens is not so clear cut. The information provided by the witnesses, and Linnane himself, indicates that Kleuskens and another Water Department employee, Kim Johnson, entered the department break room during the Garbage and Recycling crew’s meeting, at which point Linnane said “We are having a meeting in here,” or words to that effect. Kleuskens indicated he had a right to be there and told Linnane that if he had a problem he should talk to Kleuskens’ foreman. From that point, the exchange grew into an argument, and, when passing through the room to a work table, Kleuskens appears to have deliberately gone out of his way to walk near to where Linnane was sitting as they argued. Ultimately, Kleuskens invited Linnane to go meet with his foreman, to which Linnane replied, “Let’s go, Kleuskens, let’s go.” The argument was broken up by Street Superintendent Al Luberda, but as he left, Kleuskens apparently said to Linnane, “Bring it on.” Kleuskens and Johnson then went to their foreman, Dan Carpenter, and told him Linnane had said to them, “What the fuck are you doing in here,” and Kleuskens said he felt harassed. Carpenter reported this to Luberda, who then passed it on to Public Works Director Scott Thoresen. Thoresen and Human Resources Director Jackie Nystrom then commenced the investigation which ultimately led to Linnane’s termination.

The investigation conducted by the City involved interviews by HR Director Nystrom with Linnane, Kleuskens, Luberda, and Public Works Director Thoresen. The other attendees at the meeting were asked to provide written statements about their observations. Interestingly, Pavlik was not interviewed, even though he was ostensibly the target of one of Linnane’s outbursts. Linnane, Luberda and Kleuskens also provided written statements. The other employees providing statements were Carrie Glim, Kim Johnson, Bruce Edinger, Bruce Sigl, Steve Bloemer and Pavlik.

None of the written statements, including Pavlik's, mentioned the Pavlik incident except Luberda's, which simply stated that he admonished Linnane for using a profanity, but did not repeat Linnane's comment or indicate that it was directed at Pavlik. This even though Thoresen testified that he directed Luberda to obtain statements about both the Pavlik and Kleuskens incidents. Regarding the Kleuskens incident, the witnesses agree that Linnane initially spoke to Kleuskens and Johnson and said something like "Can't you see we are having a meeting here?" and that Kleuskens responded by saying "If you have a problem, go talk to my boss," although none of the accounts agree as to the exact words spoken. . Johnson stated that Linnane "started yelling" at them and Kleuskens stated that he "blew up." Of the other employees, none describe Linnane as being angry, except Pavlik, who described Kleuskens as being angry, as well. All agree that thereafter both Linnane and Kleuskens became angry and raised their voices. Linnane's statement, corroborated by that of Bruce Sigl, indicates that Kleuskens deliberately walked around the tables in the room, both to and from the Water Department table, in order to pass through a narrow gap between Linnane and the wall and that at one point he "got in Pat's face." There is no evidence that Linnane ever got out of his chair or made any physically aggressive moves toward Kleuskens. Again, most witnesses agree that Kleuskens again invited Linnane to go talk to his boss and that Linnane responded with, "Let's go, Kleuskens, let's go," or words to that effect. Kleuskens stated he felt that Linnane was trying to provoke him, but Linnane testified that he meant "let's go talk to the boss." Luberda then broke up the argument and Kleuskens left, but according to Luberda and Bloemer, apparently said "Bring it on," to Linnane as he did so.

Water Department Foreman Dan Carpenter testified that after this incident Kleuskens and Johnson came to him and said Linnane had said to them, "What the fuck are you doing in here," and Kleuskens complained that he was being harassed. Carpenter further stated that, but for the allegation of Linnane using profanity he would not have pursued the matter with Luberda. No evidence from any of the eyewitnesses supports a finding that Linnane swore at Kleuskens. Luberda, in turn, took Carpenter's complaint to Thoresen because of the claim of harassment. Luberda testified that he did not personally believe that Linnane's behavior was harassment, but that when harassment is alleged he has no discretion but must take the matter forward to Thoresen. Thoresen and Nystrom then conducted their investigation, which consisted of obtaining the written statements and talking to Linnane, Kleuskens and Luberda. During his interview on December 15, Linnane told Thoresen and Nystrom that he felt he was being harassed by Kleuskens ever since Kleuskens was suspended for confronting him in 2005. Linnane was asked to put his claim of harassment in writing, which he did, and provided to Thoresen and Luberda on January 6. This was, in Thoresen's and Nystrom's view, a "last chance" for Linnane to provide information to mitigate his discipline. Nystrom said that she looked at Linnane's documentation, but determined that it needed no further investigation and did not ask Linnane for additional details or investigate further. One week later, Linnane was discharged.

It is clear to me that Linnane's conduct toward Pavlik on December 2 violated Section 34 of the City's Rules and Regulations. His statement, "How long do we have to hold your fucking hand?" in the context of a department meeting was, in my view, abusive

language. On the other hand, the Kleuskens incident is not so clear for several reasons. First, Luberda, the supervisor on the scene, did not feel the incident involved harassment or merited discipline. Other than Kleuskens and Johnson, the only witness who described Linnane as initially angry was Pavlik who stated that Kleuskens seemed angry, as well. Once the argument escalated, all witnesses agree that both Linnane and Kleuskens were angry and had raised voices. Both made comments to the other that could have been construed as an invitation to fight, but Kleuskens actually moved physically toward Linnane during the encounter, not vice versa. Both later made claims of harassment against the other. Nevertheless, Kleuskens received no discipline whatsoever, whereas Linnane was fired. If the distinction is that Linnane started it by his initial comment, "Can't you see we're meeting here?", that, in itself, does not rise to the level of conduct necessary to support a termination. There is also no adequate explanation for why the City would buy Kleuskens' claims of harassment based on the December 2 incident, but did not make any inquiries into Linnane's list of harassing incidents by Kleuskens. The impression given is that the City chose to believe Kleuskens and accept evidence that supported his claims, and chose to disbelieve Linnane and disregard evidence that supported his position. This disparity in treatment undercuts the viability of the City's investigation and casts doubt upon its conclusion. In short, I cannot see on this record how one could reasonably come to the conclusion that one employee should receive no discipline and the other merited termination. The disparity of the treatment of the two employees convinces me that due process was wanting in the handling of the incident.

Further, while I recognize that Linnane's statement to Pavlik was a violation of Section 34, I do not agree that it was serious enough in degree to warrant termination. The City points to Linnane's 2007 suspension as the penultimate step in progressive discipline and argues that the next logical step thereafter for a further offense is termination. It buttresses this argument by pointing out that Linnane was told at the time that any future infraction would be grounds for termination, so he was on notice. Thoresen even referred to the stipulation entered into by the parties at the time as a "last chance agreement," although it was not. There are two things wrong with this argument. First, it makes no allowance for the passage of time. In the City's view, theoretically the suspension and warning that future infractions could result in termination could last for the remainder of his working life with the City, no matter how long that might be and no matter that he had an otherwise clean record. Clearly, this would be unfair. Yet the City gives no indication that the passage of time is relevant in the determination of progressive discipline, at least as regards Linnane. The second problem is that it does not take into account the severity of the final infraction. Here, more than two years after his last previous discipline, albeit a thirty day suspension, Linnane made one insulting comment to a co-worker and engaged in an argument with another, who, in my view was equally culpable, for which he was terminated. Clearly the comment to Pavlik violated the City's work rule, but does not appear to have been a matter of significance to any of those present, including Pavlik himself. Luberda, the supervisor on the scene, told Thoresen that the matter had been handled and was not a big deal when he reported it. With the Pavlik incident, therefore, while some degree of discipline was warranted, termination was unjustifiably severe. With the Kleuskens incident, it is not clear to me on this record how the City could discipline one employee and not the other for a situation for which they were both at fault., and which the undisciplined

employee arguably escalated by his physical behavior. This, to me, is the definition of disparate treatment. Further, while there is no bright line for determining how much time must pass before past discipline should no longer be considered, it seems to me that after two years, with no intervening acts, it should no longer automatically warrant moving to the next step in the progression of discipline.

For the foregoing reasons, and based upon the record as a whole, I hereby enter the following

AWARD

The City did not have just cause when it terminated the Grievant. The discipline is to be reduced to a two-day suspension and the Grievant's personnel record will so reflect. The Grievant is to be reinstated with back pay at the pay rate in effect at the time of his termination, reduced by any income he may have earned in the interim, or any unemployment compensation benefits received. He shall also receive any other benefits and pension contributions to which he might otherwise have been entitled and experience no loss of seniority.

The Arbitrator will retain jurisdiction for a period of 60 days after issuance of the award to resolve any issues arising in its implementation.

Dated at Fond du Lac, Wisconsin, this 18th day of November, 2010.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc
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