BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL 346

and

CITY OF WASHBURN

Case 22
No. 70281
MA-14930

(Mattson Discharge)

Appearances:

Attorney Timothy W. Andrew, Andrew & Bransky, P.A., 302 West Superior Street, Suite 300, Duluth, Minnesota 55802-5125 appearing on behalf of Teamsters Local 346.

Attorney Mindy K. Dale, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the City of Washburn**.**

ARBITRATION AWARD

Teamsters Local 346, hereinafter referred to as the Union, and the City of Washburn, hereinafter referred to as the City or the Employer, are parties to a Collective Bargaining Agreement (CBA) which provides for final and binding arbitration of certain disputes, which CBA was in full force and effect at all times mentioned herein. On October 28, 2010, the Union filed a Request to Initiate Grievance Arbitration and asked the Wisconsin Employment Relations Commission to assign a staff arbitrator to hear and resolve the Union's grievance regarding the termination of Robert Mattson. The Parties requested a member of the Commission's staff be assigned as Arbitrator and the undersigned was appointed as the Arbitrator to hear and decide the matter. Hearing was held on the matter on January 19, 2011 in Washburn, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. This matter is properly before the Arbitrator. The hearing was not transcribed. The parties filed initial post-hearing briefs and replies by March 12, 2011 marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The parties were able to stipulate to the issues to be decided by the Arbitrator as follows:

Did the termination of Robert Mattson violate the Collective Bargaining Agreement?

If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 - DISMISSAL

DISMISSAL: The City agrees that it will act in good faith in the dismissal of any employee. Should the Union present a grievance in connection with the dismissal of any employee within ten (10) days of such dismissal to the City, the dismissal shall be reviewed under the terms of the Grievance Procedure as specified in Article 4.

ARTICLE 4 - GRIEVANCE PROCEDURE

. . .

Step 3. Procedure:

. . .

C. Step Three: . . .

1. The decision of the Arbitrator shall be in writing and shall set forth his/her opinions and conclusions on the issues submitted to her/him, in writing, and/or at the hearing.

2. The decision of the Arbitrator shall be binding for both parties, shall be final, and is limited to the terms and conditions set forth in this Agreement.

3. The Arbitrator shall not have any authority to make any decisions amending, changing, subtracting from, or adding to the provisions of this Agreement.

ARTICLE 5 - MANAGEMENT RIGHTS

. . .

B. Without limiting the generality of the foregoing, this includes the right:

. . .

3. To suspend, demote, discharge and take other disciplinary action against employees;

. . .

APPENDIX A - HOURLY WAGE

Note: the following wage rates are taken from Appendix A, 1/1/10:

	WAGE RATE
Park/Street Laborer	$15.20
Cemetery Sexton/Street Laborer	$17.35

BACKGROUND

The Grievant is a 23 year employee of the City. He has worked in the Public Works Department since his hire and, at the time of his termination, was the Cemetery Sexton/Street Laborer. Mike Decur is the Public Works Department Supervisor. It is the Public Works Department which exercises domain over the cemetery and its operations. The Public Works Department also has a working foreman, Ron Leino, whose duties include assigning work to the Public Works staff and maintaining records of Public Works functions, including the cemetery.

The Hoefling family scheduled the burial of the cremated remains of their parents and uncle for August 24, 2010. This date was scheduled by telephone with Public Works Director Decur, who placed the event on the calendar posted on the door leading to the employee's break room. Prior to this date, Grievant had engaged in some conversations with Missy Hoefling and with Tim Bratley of the Bratley Funeral Home regarding the type and number of grave sites required and about the purchase of headstone markers for the graves.

The Public Works Department's daily routine includes a morning meeting of all personnel. At this meeting the Supervisor (Decur) and the working foreman (Leino) "line out" the staff, meaning they give the staff their work assignments for the day. On August 24, 2010, no one at the morning meeting remembered the Hoefling burial and so no one was "lined out" to do it. This oversight went unnoticed until later that afternoon when the Funeral Director and the family arrived at the cemetery for the burial service. Upon finding that no preparations had been made for the burial Mr. Brately made two phone calls to the Public Works Department in his attempt to find out what had gone wrong. The record is unclear regarding which individual in the Department took the first call. The record does indicate that the Grievant took the second call and immediately went to the cemetery to take care of the burial. The burial went off on schedule.

Following the events of August 24, 2010, and pursuant to a complaint made by a member of the Veteran's group which had attended the burial service, City Administrator Scott Kluver was advised that the Grievant had not tended to the burial because he had been "at lunch." Following an investigation into the events relating to the August 24, 2010 burial, the Grievant was terminated and this grievance followed.

THE PARTIES' POSITIONS

The Union

The CBA's requirement of "Good Faith" in the dismissal of an employee is synonymous with a just cause standard. A "just cause" standard is, absent a clear proviso to the contrary, implied in a modern collective bargaining agreement. Arbitrator Melvin Newmark said:

> Today, even where a contract fails to include any general limitations as to the right to discharge, arbitrators conclude that a just cause restriction is implied in modern collective bargaining agreements in the absence of a provision to the contrary. PFIZER, INC., 79 LA 1234 (1982), citing ROHR INDUSTRIES, 78 LA 981, 982 (Sabo, 1982).

In the instant case the parties have addressed discipline through a "good faith" standard. Thus, it would be incongruent to interpret that standard as something less than as if the parties had negotiated no standard at all.

The fact that the Grievant was disciplined while the Public Works Director and Working Foreman were not, amounts to disparate treatment. The Director and the Foreman knew about the burial and forgot about it just as the Grievant did. Enforcement of the rules and assessment of discipline must be exercised consistently. All employees must be treated essentially the same absent a reasonable basis for variations in the treatment. The prohibition against disparate treatment is set forth as one of Daugherty's seven tests of just cause. The sixth test says: "had the company applied its rules, orders and penalties without discrimination?" ENTERPRISE WIRE, 46 LA 359 (Daugherty, 1966). A 'no' answer to any of the seven tests renders just cause to fail.

Grievant does not have the exclusive duty to handle burial duties at the cemetery. Hence, any argument that the Hoefling burial was Grievant's exclusive responsibility due to his status as Cemetery Sexton is not supported by the evidence. The City's burial records show that other employees handled burials; Tom Allen and Barb Zepczyk both testified that they had performed funeral tasks alone in the past; and Leino never contended that it was Grievant's responsibility to keep track of the burials at the cemetery. Further, there had been conversations with Leino about keeping a clipboard in his truck to keep track of the burials. The fact that the Public Works Department missed this burial was due to oversight and the fact that the City did not have an effective system to track the burials.

The Grievant did not engage in outside employment nor did he solicit Missy Hoefling to purchase a headstone or speak about the funeral home director in a derogatory manner. Even if he had, these things would not support the discharge of Grievant. Hoefling's testimony shows that the Grievant suggested that one plot would be sufficient for all of the urns in the Hoefling family and that the Grievant acted in the best interests of the Hoeflings. Her testimony was much more subdued than her letter to the Mayor and leads one to conclude that her letter was clouded by high emotions.

It was not disputed at the hearing that Grievant had discontinued all outside employment when he had been directed to back in 2003. Kluver admitted that he had no evidence that the Grievant engaged in any outside employment since 2003 and any claim that he solicited Missy Hoefling for personal gain or bad mouthed the Bratley Funeral Home is without merit and cannot support discharge.

The fact that directional arrows had not been put out does not support discharge. Directional arrows are just one small piece in the bigger communications breakdown and lack of a reminder system to make sure events at the cemetery are recalled. The Grievant testified that he normally would not place such arrows for a cremation burial because he created them (the arrows) for funeral services. He explained that if cars coming from a funeral service go all different directions within the cemetery the hearse cannot get to the gravesite or easily leave the cemetery following the funeral. For this reason, he does not normally use arrows for cremation burials but only for funeral services.

The Grievant's work record does not support termination. He has only had two disciplinary events over the past eight years and none in the past twelve months. His work record is essentially clean. He is a good employee who is able to perform his job well in the future and be an asset to the City.

The City

The City's discharge of the Grievant was in "good faith." The Management Rights provision of the CBA give the City the right to discharge the Grievant and the CBA establishes that this right is subject to a "good faith" standard. There is no "just cause" standard in the CBA and the Arbitrator is constrained from imposing one since the CBA limits his authority to the limited terms and conditions set forth in the CBA.

The City's actions were done in good faith and should be upheld. First, it conducted a good faith investigation which was triggered by a call from the Mayor based on a citizen complaint. It spoke with the family member involved and requested a letter documenting the events; it spoke with the funeral director; it interviewed the Public Works Director; it interviewed Foreman Leino and obtained his statement and it interviewed the Grievant. By placing him on paid leave during the investigation it gave him clear notice of the gravity of the situation and it gave him a days' notice of the scheduled meeting forewarning potential disciplinary action along with the opportunity to have a Union representative with him at the meeting.

The City found reasonable/credible evidence that the Grievant solicited the family of the deceased to purchase a headstone, made disparaging remarks about the funeral director and was negligent in terms of service preparations. This evidence was generated by a letter written by Missy Hoefling, which the City found to be credible. The fact that she was reluctant to testify at the hearing stems from a genuine desire not to get anyone "in trouble." The Grievant attempted to solicit the purchase of a headstone from him (Grievant) as opposed to the funeral home. This was an attempt to solicit a private venture over the funeral home's business. Confirmation of the fact that Grievant was advancing his own agenda and not that of Missy Hoefling is his presentation of a list of vendors of headstones which Hoefling declined to accept. The actions of the Grievant, at a minimum, created the inference that Bradley's (funeral home director) headstones were over priced which, in and of itself, was unacceptable behavior.

The Grievant's advocacy of one plot versus two plots, while it may have been in the Hoefling's best interests financially, this advice "crossed the line" as a City employee by putting the City in a position of appearing to advocate certain plot selections to the exclusion of other headstone vendors with whom Hoefling was working.

Regarding the fact that the funeral services preparations were forgotten is not in dispute. What is disputed is the fact that it was the Grievant who was responsible for the preparations and that the Director and the Foreman had no responsibility for the funeral activities. Both of these supervisors testified that it was the Grievant's responsibility and to accept the Grievant's version of the evidence discredits the testimony of these two supervisors. Hoefling testified that she was told by the City to deal directly with the Grievant for cemetery services. This is buttressed by the fact that the Public Works Director, Decur, wrote the date and time on the "white board" advising Grievant of the event. Further, the funeral home director had called the City and been informed that everything was in order because the burial was "listed on the white board."

The Grievant's description of his role at the cemetery is not consistent with the CBA (which refers to the Grievant's job as that of "Cemetery Sexton/Street Laborer") or to the job classification of "Cemetery Manager" (which gives the Grievant responsibility for the cemetery and for digging the graves and upkeep of the grounds). It strains credibility to imagine that other employees remained silent while Grievant received additional pay as the Sexton when they themselves were tasked to do work at the cemetery too. Also, the morning meeting testimony was inconsistent. It is not credible that the Director and the Working Foreman both "had no clue as to the level of Grievant's job responsibilities" suggesting that their failure to tell Grievant about the burial that morning is indicative that they presumed he knew about it and would handle it.

At the unemployment compensation hearing the Grievant was asked whether the buck stopped with him when it came to the cemetery, he answered that it did. This is further proof of Grievant's exclusive dominion over the cemetery. The burial records entered into evidence also show that the Grievant exercised primary control over the activities at the cemetery.

Discharge was a reasonable consequence due to the Grievant's solicitation dating back to 2003; to his negligent and inefficient performance of his job duties (2009 suspension for failing to

install a culvert properly and concealing the damage); and to conduct unbecoming a city employee ("ruffled the feathers" of a private citizen relating to snow removal resulting in a written complaint against the Grievant).

The City urges this Arbitrator to sustain the discharge of the Grievant on the basis that his record supports discharge. His history is one of denying responsibility for his actions. His job requires responsibility, especially relating to his cemetery duties, and his "not responsible" position is at odds with the testimony of both Director Decur and Foreman Leino. The City asks "What was the Grievant being paid for? He wasn't just a member of the pack: the buck stopped with him". The City has lost trust in the Grievant and as Arbitrator Hahn said in PLYMOUTH SCHOOL DISTRICT, MA-11820 (Hahn, 2002):

> The District argues that it cannot trust the Grievant and should not be put in a position of re-employing someone the District cannot trust. I do not find this to be an arbitrary position or a position without support in the record. And, therefore, I do not find the discharge to be arbitrary.

Even if the Arbitrator applies a just cause standard the City has met that standard as defined in PEPSI-COLA BOTTLERS OF AKRON, INC.., 87 LA 83 (Morgan, 1986):

> In applying the rule of just cause, it is necessary to define the term. It simply means that the employer did not act arbitrarily, capriciously, discriminatively (sic), or without basis in fact. Whether or not the Arbitrator would have acted the same way in a given fact situation is immaterial. . .

Just cause simply means that an employer, acting in good faith, has a fair reason for disciplining an employee, which reason is supported by the evidence. The misconduct must be directly connected with an employee's work, represent a willful disregard of the employer's interests and be inconsistent with an employee's obligations to the employer. Here, the Grievant's actions meet those standards and hence the City had just cause to terminate him.

The Union's Reply

The CBA should be read to contain a just cause provision. At the very least the City must have acted reasonably with regard to the termination and not in an arbitrary, capricious or discriminatory manner. Not only was the City unreasonable but it acted in a disparate manner by failing to impose any penalty on Mike Decur or Ron Leino when those employees engaged in the same conduct and had the same, or greater, responsibilities.

The City failed to prove that Grievant had engaged in outside employment or demonstrated conduct unbecoming a City employee. These assertions stemmed from the letter written by Missy Hoefling which were, at times, in direct conflict with her testimony at hearing.

The City's Reply

Good faith and 'just cause' are not synonymous. In this case we have an explicit standard, a 'good faith' standard, negotiated by the parties. The cases cited by the Union deal with situations where the CBA did not contain a standard at all and the Arbitrator was required to apply one. Here we have an enumerated standard - good faith.

The "white board" was visible to the Grievant and he should have seen it.

City Administrator Kluver denied that he based his decision to terminate, at least in part, on the erroneous allegation that Grievant refused to prepare the grave site because he was on his lunch break. Kluver denied that this allegation was erroneous based on the evidence contained in the Hoefling letter and, hence, it is the City's position that this allegation was true and a sufficient reason to terminate.

The Missy Hoefling dictated her letter to her husband. He did not write the letter for her. She was upset about how the Grievant handled the burial and did not stretch the truth. What was apparent was that with the passage of time she became more reluctant to testify as she felt victimized and was ostracized by the Grievant's family and peers.

The Union has failed to identify any inconsistencies in Hoefling's testimony. Also, the statistical evidence supports the conclusion that it was the Grievant who had primary control over the cemetery. Good public relations skills are required for the cemetery sexton position. It is reasonable for the City to expect that the sexton will keep his personal opinions in check when dealing with the public. He should not be offering commentary on deals and discounts and the cheaper way to go in terms of funeral preparations and disparaging local businesses. His history includes members of the public coming to City Hall to complain about his behavior and if he had acknowledged responsibility "we would have a different situation, but he didn't".

DISCUSSION

The initial question to be addressed is the issue of the legal standard to be applied to the Grievant's discharge. The City argues that a "just cause" standard would not be appropriate due to the fact that the CBA contains language referring to "good faith" relating to the dismissal of an employee and that this language precludes the application of a "just cause" standard. This language is found in ARTICLE 3 - DISMISSAL and reads as follows:

> DISMISSAL: The City agrees that it will *act in good faith in the dismissal of any employee*. Should the Union present a grievance in connection with the dismissal of any employee within ten (10) days of such dismissal to the City, the dismissal shall be reviewed under the terms of the Grievance Procedure as specified in Article 4.(Emphasis added.)

No reference to "just cause" or "cause" is found anywhere in the CBA.

> Today, even where a contract fails to include any general limitations as to the right to discharge, arbitrators conclude that a just cause restriction is implied in modern collective bargaining agreements *in the absence of a provision to the contrary*. (Emphasis added.)

PFIZER, INC., 79 LA 1234 (Newmark, 1982), citing ROHR INDUSTRIES, 78 LA 981, 982 (Sabo, 1982). The contract in this matter does have a provision to the contrary and it is "good faith." This Arbitrator has no authority to add to or subtract from language in the CBA. If the parties had intended to include a "just cause" standard I believe they would have said so. This construction is not inconsistent with my prior decisions referenced by the Grievant. Those were based on contracts which referenced "cause" in some way in the body of the contract as opposed to the present one. Hence, I conclude that the appropriate legal standard to be applied relating to the discharge of the Grievant is exactly what the parties say it is, a "good faith" standard.

Having concluded that the proper standard to be applied in this matter is one of "good faith" I now look to the particular facts in support of the discharge to determine whether "good faith" has been met. "Good faith" requires that the Employer's actions be free of capricious or arbitrary behavior. In this instance I find that it is not.

First, there is the issue of the Grievant's conduct. He has been charged with engaging in outside employment by soliciting Ms. Hoefling for the purchase of a headstone. The evidence does not support that allegation. Ms. Hoefling testified that the Grievant merely suggested that she shop around for a headstone because some were less expensive than others. He did mention that a friend of his sold headstones but Ms. Hoefling was specific as to the fact that he exerted no pressure and was "looking out for" her best interests. She did not feel pressured in any way. The record suggests that she ultimately purchased her headstone from the Bratley Funeral Home. He was also charged with suggesting to Ms. Hoefling that she purchase one cemetery plot instead of two. She had initially requested two plots because she wanted to place the urns of her two handicapped brothers next to her parents and believed that two plots would be required to accomplish this purpose. The Grievant advised her that one plot would be sufficient to bury the remains of roughly nine persons so one plot would suffice to fill her needs. Ultimately she decided on two plots but, again, testified that the Grievant applied no pressure upon her to make that decision and that he was simply looking out for her best interests. The allegations relating to the Grievant's solicitation of Ms. Hoefling for the headstone and the number of plots required stem from the letter Ms. Hoefling (written by her husband) sent to the City. This letter was couched in terms much more damning than her testimony at hearing and most likely was the product of high emotion at the time of its writing. Its author did not testify and there is no way to determine if there were other dynamics involved in its composition, therefore I tend to give Ms. Hoefling's verbal testimony more weight than the allegations in the letter.

Another issue raised by the City in support of the termination of the Grievant was the fact that he failed to place arrows to the grave site at the cemetery. The Grievant credibly testified that

he created the markers for the purpose of placing them at the cemetery when there was a procession following a funeral. Without the directional arrows cars coming from a service have a tendency to go in several different directions within the cemetery. This gets confusing and occasionally makes it difficult for the hearse to get to the burial site or easily leave the cemetery after the burial is over. So, it is questionable if the arrows would have been used in this instance anyway. In any event, this fact, in and of itself, could not support the termination.

The Grievant's work record, while somewhat spotty, does not rise to the level of supporting discharge under a good faith analysis. Over the previous eight year period of time, he received discipline for the negligent installation of a culvert for which he received a one day suspension without pay. Prior to that incident he received two disciplines: a verbal warning for arguing with a citizen over snow removal and an instruction to discontinue his outside business of making grave marker foundations. There is no evidence in this record that he had not discontinued this business or that this business had anything to do with the events herein considered.

Finally, the issue of the responsibility for taking care of the burials must be addressed. It is true that the Grievant was the designated Cemetery Sexton and was paid roughly two dollars more per hour for that designation. Thus, he may not completely escape liability for missing the Hoefling burial. The record demonstrates that he was not the only employee who performed burials at the cemetery, although he was the primary person to perform that task. There is no evidence, however, that Grievant had the sole responsibility for tracking the events at the cemetery or that he was solely responsible for overseeing the operations there. The event was scheduled on the calendar board leading to the break room and visible to him daily from the time it was initially scheduled until the day of the burial. He should have been aware of the date and time of the burial and he does not suggest otherwise. He testified that he should have been aware of the burial but forgot about it and that he should have taken care of it at the morning meeting on the day of the burial. In his defense though, he points out that there were two other persons who had responsibility for the event and also failed to remember it. The Public Works Department Director, Decur, was (or should have been) aware of the event and should have, as the Department Head, reminded the Grievant of the burial at the daily morning staff meeting. He saw the same calendar board every day and had the same opportunity as the Grievant to see and remember the event. He failed to do so. In addition to the Director, the lead worker, Leino, knew (or should have known) of the event. He viewed the same calendar board daily that the other two men did and should have advised the Grievant of it at the morning meeting. Both of these supervisors testified that they had the duty and the responsibility to assign (line out) work to the staff at the morning meetings. On the morning of the burial they neglected to remember the burial and assigned Grievant to another task which he dutifully performed. All three neglected to remember the burial that afternoon. It slipped through the cracks. The calendar system is what broke down here, not the acts solely of the Grievant. The City needs to develop a more efficient system of keeping track of cemetery events, especially when the event is scheduled into the future. In fact, the record demonstrates that the need for a more effective cemetery event reminder system had been discussed with management in the past but nothing had been done about it.

Hence, I believe the discharge of this Grievant was arbitrary and capricious and cannot stand.

Based on the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

The termination of Robert Mattson did violate the Collective Bargaining Agreement.

The Grievant shall be reinstated and made whole for any and all losses suffered as a result of his termination.

The Arbitrator shall retain jurisdiction of this matter for a period of 60 days pending the implementation of this award.

Dated at Wausau, Wisconsin, this 19th day of April, 2011.

Steve Morrison /s/
Steve Morrison, Arbitrator

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