

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE AREA TECHNICAL COLLEGE

and

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, LOCAL 587

Case 512

No. 70578

MA-14992

Appearances:

Attorneys Amy D. Hartwig and Steven A. Nigh, Michael Best & Friedrich LLP, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin, 53202, appearing on behalf of Milwaukee Area Technical College.

Attorney Jonathan R. Eiden, Sweet & Associates, LLC, 2510 East Capitol Drive, Milwaukee, Wisconsin, 53211, appearing on behalf of Milwaukee District Council 48, AFSCME, Local 587.

INTRODUCTION

Milwaukee Area Technical College (“MATC”) and Milwaukee District Council 48, AFSCME, Local 587 (“Union”) are parties to a collective bargaining agreement (“Agreement”) that provides for final and binding arbitration of disputes arising thereunder. On January 28, 2011, the Union filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning disciplinary action taken against the Grievant. The filing requested that the Wisconsin Employment Relations Commission provide a list of seven Commission-employed commissioners and/or staff members from which an arbitrator could be selected, and from that list the undersigned was selected. A hearing was held on June 15, 2011, in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. A transcript of the proceeding was made. The parties each submitted an initial post-hearing brief and subsequently, on August 10, 2011, notified that undersigned reply briefs would not be filed. On that date, the record in this matter was closed.

ISSUE

The parties stipulated to the following as a statement of the issue to be heard:

Did the Employer have just cause to discharge the Grievant on October 7, 2010, and, if not, what is the appropriate remedy?

BACKGROUND

The Operations Department at the MATC Milwaukee campus oversees facility maintenance functions, including custodial services. An Operations Department employee assigned to custodial tasks is referred to as a building service worker (“BSW”). There are different classifications of BSWs at MATC, the relevant ones in this case being the BSW I classification and the BSW II classification. BSW Is are to assigned established routes, such as cleaning a certain floor of a building or a defined area, like a gymnasium or a specific kitchen. BSW IIs also are assigned to established routes, but those assigned tasks are more limited in scope to allow BSW IIs the flexibility to perform other tasks during their shifts, as well. BSW IIs also are expected, for example, to deliver custodial supplies to BSW Is and to pull out any large equipment to be used during a particular shift. All BSWs also are expected to perform any additional custodial tasks assigned during a shift, including the “backfill” work left by employees who are absent for a shift.

Each shift in the Operations Department is overseen by a supervisor. A shift supervisor is responsible for, among other things, handing out any extra work that needs to be performed on a shift, including backfill work. This work is distributed at a daily, pre-shift meeting involving the supervisor and all the employees on the shift. On Friday, September 24, 2010, Harry Yogurtian, the regular first-shift supervisor, was filling in for Luis Vasquez, the regular second-shift supervisor. Where it is Yogurtian’s style to assign any backfill work to his employees, Vasquez typically seeks volunteers to handle such work. When Yogurtian fills in for Vasquez on the second shift, he makes some effort to follow Vasquez’s system of seeking volunteers.

On the evening of Friday, September 24, 2010, there were approximately four BSWs absent from the second shift. The regular route of one of these employees includes the cleaning of a particular kitchen in the S building. At the shift meeting, Yogurtian sought volunteers for the backfill work that needed to be completed. The Grievant was a second shift BSW II, whose regular route required him to clean a kitchen in the C building. The Grievant volunteered on the evening of September 24 to also handle S building kitchen job. In doing so, the Grievant said to Yogurtian, “I’ll do it this one time, because I’m a good guy”.

On the following Monday, September 27, 2010, Yogurtian again filled in for Vasquez as the second-shift supervisor. Also on that day, the BSW who regularly cleaned the S building kitchen was again absent from work, and that work again needed to be reallocated. Prior to the beginning of the second shift, Yogurtian made the determination that the Grievant again would be assigned to the S building kitchen job. Thinking back to the previous Friday when the Grievant had said that he would clean the S kitchen only one time, Yogurtian anticipated that the Grievant would be unhappy about the assignment. Wanting to avoid an incident with the Grievant at the shift meeting, Yogurtian spoke to the Grievant in the hallway prior to the meeting about the anticipated assignment. Yogurtian asked the Grievant, "do you want to hear it now or do you want to hear it in there?" When the Grievant asked Yogurtian what he was talking about, Yogurtian told the Grievant about the assignment. Yogurtian testified at hearing that the Grievant responded "no fucking way". The Grievant testified that he did not say he would not do the assignment at that point, but acknowledges that he used profanity in his response to Yogurtian.

A few minutes later, the shift meeting began. There were nineteen BSWs in attendance at the meeting, including the Grievant. Because the table in the conference room where the meeting occurs is too small to seat the number of people in attendance, many stand around the perimeter of the room during the meeting. During the meeting, Yogurtian identified several backfill tasks that needed to be completed, and he sought volunteers for those tasks. Then Yogurtian looked at the Grievant saying, "and you have the kitchen". Yogurtian had not sought volunteers for the S building kitchen job, as he had done for the other backfill tasks. In response, the Grievant walked from where he had been leaning against a wall into the center of the room and, in a loud voice, stated to the people located around the room, "I wish some of you lazy pieces of shit would stand up and say, 'I'll do some extra work, I'll volunteer', but you don't - you don't do shit, you lazy mother fuckers". These are the specific statements the Grievant testified, at hearing, to having made. Other witnesses testified that the Grievant also identified them as a "bunch of bitches" and made other profane statements that were variations of these expressions. The witnesses also testified that, as the Grievant was making these statements, he was agitated, was shouting or screaming, moving around the room, pointing at individuals in the room, and waving his arms around. After this outburst Yogurtian stated to the Grievant, "so I'm taking this as your resignation", to which the Grievant responded "no, I'm going to finish the shift on my own terms." Then, having left the room and standing near its doorway, the Grievant stated, referring to Richard Dries, the director of the Operations Department, "get Dries' ass in here. I've got to talk to him".

Subsequent to the meeting, Yogurtian wondered if he should call public safety regarding the incident, but instead decided to contact Dries and report to him what had occurred. Dries then called the Grievant on one of the two-way radios that are used to communicate among Operations Department employees. Dries asked the Grievant if he was feeling alright, and the Grievant said he was not. Dries asked him if he would like to go home, and the Grievant said that he would. Dries gave the Grievant permission to do so, and he told the Grievant that he should report to him at 2:00 on the following afternoon.

On the morning of September 28, 2010, Dries and Dan McColgan, a management employee from the MATC Labor Relations Department, began an investigation into the incident. Dries and McColgan interviewed Yogurtian, as well as two other employees who had been present at the shift meeting on the previous evening. The two employees corroborated the information that had been provided by Yogurtian regarding the Grievant's comments and conduct. Later that afternoon, Dries and McColgan met with the Grievant, as scheduled. The Grievant was accompanied at the meeting by a representative of the Union. The Grievant also confirmed the events of the prior day, asserting to Dries and McColgan that he had been frustrated by having to fill in for absent employees. During a brief caucus, Dries and McColgan concluded that it was appropriate to put the Grievant on suspension. They returned to the meeting and informed the Grievant of that fact and that they intended to continue the investigation to determine whether there were grounds for termination. The Grievant testified at hearing that he realized he was in trouble at this point. In the course of the subsequent investigation, every employee who had been present for the September 27 shift meeting was interviewed.

On October 7, 2010, Dries and McColgan again summoned the Grievant to a meeting. The Grievant was accompanied at this meeting by two representatives of the Union. During the meeting, a number of questions were posed to the Grievant regarding matters that had come up during the investigation. The Grievant also informed Dries and McColgan that, after the September 28 investigative meeting, he contacted the Employee Assistance Program ("EAP") available to MATC employees made an appointment right away. The Grievant indicated that he had attended three EAP meetings in the time since their September 28 conversation and, in the process, had developed anger management strategies. One of these strategies included a "CCC" mantra: "I didn't cause it; can't control it; there's no cure for it". Also, on his own initiative, the Grievant had developed "SSW": "show up, shut up, and work". The Grievant arrived at the October 7 meeting with documentation confirming that he had attended the EAP meetings he described.

The Grievant also brought with him to the October 7 investigative meeting a written apology regarding the incident at the shift meeting, and he read it to Dries and McColgan. It read as follows:

The comments I made on Monday, September 27th at the 3 p.m. crew meeting were wrong. The frustrations I expressed were not intended to change, help, or in any way affect your work performance. These comments were made in ignorant rage, made from a sick and sleep-deprived man. I was overworked. Then I was engaged in a way that seemed at the moment to be a personal challenge. I blew up. I am not a monster.

I immediately enrolled in an anger management program through the EAP. With help I identified the obvious problems I was facing. We developed ways to be more open and friendly and unchallenging as I can. Some crew members can recall that I know from north campus know me to be a totally different me.

One of the Union representatives who accompanied the Grievant to the October 7 meeting testified that the Grievant cried as he read this apology. The Grievant also explained to Dries and McColgan during the meeting that he felt he needed to communicate the way he had at the shift meeting to convey to Yogurtian how frustrated he was with always having to fill-in for people who were not present for their shifts.

At some point during the meeting, Dries and McColgan caucused with one another. The caucus was very brief, probably lasting no more than five minutes. After the caucus, Dries and McColgan presented to the Grievant a termination letter that stated the following:

On September 28, 2010 an investigatory fact-finding meeting was held with you and your Union representation. At the conclusion of the meeting you were you were [sic] placed on unpaid suspension, pending investigation for possible discipline/discharge for your offensive, abusive and anti-authority conduct which occurred on September 27, 2010.

At the time of your suspension you were advised that the District was reviewing the above matter and your employment status. You were sent a letter on September 29, 2010 confirming the above. At this time the District has concluded its investigation. This letter is to communicate the District's decision regarding your employment status.

Please be advised that your employment with the College is terminated effective, October 7, 2010. The reason for your termination is your offensive, abusive and anti-authority conduct which occurred on September 27, 2010. Specifically, upon your supervisor communicating a work assignment to you on the afternoon of September 27, you stated that you would not do the assignment and directed several disparaging, offensive and abusive comments, laced with profanity, towards your supervisor and your second shift co-workers. The group was gathered for a meeting to review work assignments. In making your remarks, you were pacing and repeatedly shaking your arms and hands at the group, and the tone of your voice was extremely loud and hostile.

If you have any questions pertaining to possible accumulated benefits, please contact the Human Resources department at 414-297-6504. You will be contacted by Human Resources in the near future regarding any remaining benefit issues.

At the time of the Grievant's discharge, he had been working as a BSW II at the MATC Milwaukee campus for one year. Prior to that, he had worked for approximately nineteen months as a part-time employee in the Food Services Department at the MATC Mequon campus. During the course of his employment with MATC, prior to his discharge, the Grievant never had been disciplined. Dries and, more often, Yogurtian had directly supervised the Grievant on numerous occasions in the year he had worked as a BSW II, and neither had ever witnessed the Grievant engage in conduct of the kind that occurred on September 27, 2010.

The Grievant had, however, discussed the subjects of anger management and the use of profanity in the workplace with members of MATC management on previous occasions. In January of 2010, the Grievant had met with Donna Goodwin, the associate vice president of human resources and labor relations, in conjunction with a disciplinary investigation. Specifically, the Grievant had been moving furniture when he overheard a coworker, Daniel Manlick, making the following statements about him to other coworkers: "wow, he's really getting into it", "he must not be getting any pussy" and "he must be a fag". The Grievant responded to these statements by saying to Manlick, "you know, I don't know you told you that, but I'm going to tell you, you need to shut up and get the fuck out of here". Manlick had filed a complaint regarding the incident with MATC administration, asserting the Grievant had been the aggressor. When Goodwin was speaking with the Grievant regarding the incident in the course of the investigation, he admitted to her that he had used the word "fuck" during the exchange, that he was a "hothead", "goes off", has a hard time reigning himself in, and had had that problem for a while. The Grievant was not disciplined in conjunction with this event, but Goodwin stated to the Grievant that aggressive behavior in the workplace could be a performance issue that might lead to discipline up to and including termination, and she suggested that he seek EAP help if necessary.

Dries also had prior conversations with the Grievant, both in January of 2010 and in August or September of 2010, regarding his interactions with Manlick, in which the Grievant admitted to Dries that he had used profanity towards Manlick. At least twice Dries advised the Grievant not to participate in such rhetoric and that he should remove himself from any situation in which he felt like someone might provoke him.

In March of 2008, another BSW, Michael Poplawski, was disciplined for remarks regarding a supervisor who had disciplined him. Specifically, Poplawski stated to a co-worker, "if that nigger does one more thing, I'll break his neck", and he referred to the supervisor as a "mother fucking nigger". Poplawski's tone while making these statements was described as "angry" and "out of control". For this conduct, Poplawski was suspended for three days for disruptive conduct that included the use of profane, obscene, abusive language. Prior to that incident, Poplawski had been disciplined for attendance issues and for unsatisfactory job performance.

In May of 2009, BSW Daniel Manlick received a verbal warning for participating in an exchange with a kitchen staff which involved the use of obscene language. Later, Manlick was again disciplined for his conduct on three occasions: on January 7, 2010, he engaged in the conduct described above when the Grievant was moving furniture; on February 4, the same day when he had attended a fact-finding meeting regarding the incident of January 7, Manlick made inappropriate comments to another employee while she was on her lunch break, including implying she was a drug user; and on February 23, Manlick made a comment using profanity when the female from the February 4 incident saw him in the lunch room and walked out. For these events, Manlick received a written warning for not staying in his work area and for failing to show courtesy and respect toward other employees.

DISCUSSION

There is no doubt that the conduct in which the Grievant is said to have engaged on September 27 occurred. The Grievant acknowledged having used profanity in the hallway when Yogurtian first told him that he would be assigned to the S kitchen job. The Grievant also acknowledges having, in a loud voice and an angry tone, used profanity in the shift meeting in the presence of Yogurtian and the other BSWs on the shift. The question here is whether MATC had just cause to discharge the Grievant for this conduct. I find that, based on the record before me, MATC did have just cause to discharge the Grievant for the reasons outlined in the termination letter of October 7, 2010.

The Union contends that MATC has failed to meet its burden to prove just cause by neglecting to present sufficient witnesses. Specifically, the Union takes the position that, to meet its burden, the employer was required to present the individuals who considered the evidence regarding the Grievant's conduct and made the ultimate decision to discharge him, so those individuals may be examined at hearing as to the basis for their decision. Dries was the only employer representative to testify at the hearing in this matter. The Union asserts that, while Dries participated in the investigation, it was actually McColgan who made the ultimate decision to discharge the Grievant, and his failure to testify prevents MATC from meeting its burden. I disagree.

The Union's argument on this point is based primarily on Donna Goodwin's testimony. Goodwin described McColgan as the senior human resources professional at MATC who has the appropriate background to be able to make the ultimate discharge decision. Goodwin was characterizing McColgan's role in the disciplinary process, however, not as a way of suggesting that Dries was somehow unqualified to participate meaningfully in the disciplinary process, but rather as a way to explain her own lack of participation in the investigation and discharge decision. Beyond that, Goodwin was explaining McColgan's general role in the MATC organizational structure. She was not describing the way the particular investigation

into the Grievant's conduct occurred. The record in this case establishes that the investigation into the Grievant's conduct was carried out and the ultimate decision to discharge the Grievant was made through collaborative effort by Dries and McColgan. Dries was involved from start to finish: he spoke directly to Yogurtian and the Grievant on the day of the incident; he was involved in the interview of Yogurtian and most of the other employees who were present – McColgan interviewed about five out of the seventeen without Dries present; Dries, along with McColgan, was involved in the both meetings with the Grievant; Dries and McColgan communicated with each other about the investigation nearly every day between September 28 and October 7; and Dries was involved, along with McColgan, in the drafting of the Grievant's discharge letter. This evidence persuades me that Dries was sufficiently involved in the investigation to be able fully portray to the employer's basis for the ultimate decision to discharge the Grievant.

The Union also contends that MATC lacked just cause because the Grievant did not have any forewarning of the possible disciplinary consequences of his conduct. I reject this contention with the view that any employee who engages in conduct such as the Grievant's should know, on a basic level, that discharge could result. The Grievant deliberately refused to carry out a work assignment. While the Union suggests that the Grievant's statements were oriented toward his coworkers rather than Yogurtian and, therefore, were not insubordinate, it is apparent that the Grievant's outburst was prompted by Yogurtian's directive regarding the work assignment and that the Grievant's overall reaction constituted a refusal to carry out that assignment. Further, in the process of refusing to do the work Yogurtian had assigned, the Grievant used profanity in the presence of all the other BSWs on the shift. This kind of dialogue was not common in the shift meetings, where, as a coworker testified at hearing, vulgar language had only been used in a joking context in the past. Moreover, the Grievant made his comments in a tone that caused his coworkers to feel unsafe. Employees testified to feeling intimidated, nervous, upset, and scared, said the Grievant "just snapped" and "exploded", and described trying not to make eye contact with the Grievant and moving aside to get out of the Grievant's path. Any reasonable employee would recognize that a blow-up sufficiently volatile to cause such fear could get him fired.

The record also shows that the Grievant had specific knowledge that discipline could result from such conduct. On previous occasions when the Grievant had admitted to exchanges with Manlick that involved vulgarities, but were less volatile, Dries had counseled the Grievant to avoid such situations and Goodwin had warned the Grievant that further incidents could lead to discipline or discharge. The Union argues that the employer's failure to discipline the Grievant for these previous exchanges with Manlick actually misled him into believing that he would not face discipline. There is simply no sense in which the employer's earlier effort to caution the Grievant for more minor events should have warped the Grievant's perception such that he believed his display of September 27 was acceptable conduct.

The Union also argues that MATC lacked just cause for its action because it improperly carried out the investigation. Specifically, it asserts that the investigation was not fair because the employer reached its decision to discharge the Grievant before he was given the opportunity to present his case. The Union bases this assertion on the fact that Dries and McColgan only caucused for five minutes or less on October 7, even after the Grievant made his apology and shared information regarding the EAP counseling he had completed. I disagree that such evidence establishes that the Grievant did not have a fair opportunity to present his side of the story. The employer met with the Grievant twice. They interviewed him on the first occasion about the incident, and posed additional questions on the second occasion. They also interviewed every other person who witnessed the incident. Altogether, they gathered what appears to have been all the information that could have been learned about the event. The fact that Dries and McColgan, at the end of such an investigation, considered the Grievant's apology and EAP information for only a matter of minutes does not undermine the validity of MATC's decision. The information of the apology and the EAP sessions was not so complicated that it required analysis or lengthy deliberation. Dries credibly testified that he and McColgan briefly considered the information during the caucus, and in my estimation that was sufficient under the circumstances. Nor am I concerned that the Grievant's discharge letter apparently had been almost completely drafted prior to the October 7 meeting. As Dries testified, Dries and McColgan were not prevented by a pre-drafted letter from considering any additional information presented by the Grievant at his October 7 meeting. Nothing here suggests that the investigation into the Grievant's conduct was not fair or that the relevant information was not adequately considered.

Finally, the Union argues that MATC's prior handling of the situations involving Manlick and Poplawski establishes that the disciplinary action taken against the Grievant was too harsh. Again, I disagree. Neither of these employees committed insubordination by directly refusing to carry out a directive. Contrary to the Union's contention, Manlick's act, in January of 2010, of leaving his worksite was not equivalent to the Grievant's outright refusal, in the presence of his supervisor, to clean the kitchen in the S building. Further, neither of these employees made statements that directly intimidated an entire group of coworkers, as the Grievant did here. Although Poplawski's statements, in addition to being deeply offensive, displayed extreme anger and were threatening toward his supervisor, they were not made directly to the supervisor. This difference is meaningful. Further, the fact that Poplawski had previous disciplines does not change this conclusion. A cumulative consideration of Poplawski's other disciplines for unrelated conduct does not put Poplawski's conduct on par with the Grievant's directly insubordinate, directly intimidating outburst.

Putting aside the comparables, it is necessary to evaluate whether MATC had just cause for its decision not to discipline the Grievant under a progressive model. The record suggests that MATC has followed the principles of progressive discipline in the past.¹ Prior to his discharge, the Grievant never had been disciplined as an MATC employee. Viewed in isolation, this fact suggests that some lower level of discipline was appropriate. It is well-established, however, that some incidents of misconduct are sufficiently serious as to warrant skipping over the steps of progressive discipline. Because of the combination of factors already discussed, I find that the Grievant's misconduct was sufficiently serious to justify MATC's decision to proceed as it did.

Further, I find that there were no mitigating factors that would have dictated a different outcome. The Grievant had only been doing his BSW job for a year and his part-time food services job for nineteen months prior to that, so longevity does not weigh in his favor. I also am not persuaded that other factors raised by the Union mitigate the severity of his actions. Specifically, the Grievant told Yogurtian on the day of the incident and testified at hearing that he was feeling sick; he further indicated that he was tired and overworked; he also explained that he was frustrated with frequent absences by his coworkers, and had the feeling that he gets "dumped on" a lot; and he was frustrated with Yogurtian's failure to seek volunteers for the kitchen job on the day of the incident. Even considered in combination, these factors do not add up.² The Grievant was merely being asked to do his job, and none of the factors that allegedly influenced his behaviors are at all extraordinary or sufficient in any other way to mitigate the seriousness of his conduct.

Moreover, I regard with some dubiousness the Grievant's apology, his decision to seek EAP assistance, and his claim of success with those anger management sessions. First, the Grievant apparently decided to apologize and attend anger management classes only after he realized at the September 28 meeting that his job was in jeopardy. The decision to apologize was made during the second meeting, after he failed to bring himself under control and do so on the day of the incident or during the meeting on the following day. Further, the evidence before me suggests that the Grievant's volatility in the workplace was building over a period of months. Employees testified at hearing that they were already scared of the Grievant before the September 27 incident occurred. Still, he ignored warnings by management that he should bring his temper under control and, if necessary, seek EAP assistance to do so. A final incident wherein the Grievant lost his temper to the point of causing fear and intimidation on

¹ While MATC has argued that, under its Agreement with the Union, it was not obligated to follow progressive discipline, the record before me suggests MATC has taken a different view in the past. Dries testified at hearing that Manlick was given a written warning specifically because such discipline was the next step under a progressive model.

² This conclusion even accounts for a hypothetical assumption that Yogurtian normally would have sought volunteers to do the kitchen backfill work, but instead assigned it to the Grievant on September 27 for no other reason than to establish Yogurtian's authority as a supervisor on the heels of the Grievant's assertion on the previous Friday that he would only clean the kitchen once.

the part of his coworkers cannot be excused by the eleventh-hour decision to attend three anger management sessions. This is particularly true where the Grievant's portrayal of the September 27 incident, even at hearing, was not free from an effort on the Grievant's part to shift blame for his behavior to other factors.

Now, having considered the record as a whole, the undersigned makes and issues the following award.

AWARD

The grievance is DENIED.

Dated at Madison, Wisconsin, this 8th day of November, 2011.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator