BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME, DC40, LOCAL 60, AFL-CIO, CLC

and

CITY OF SUN PRAIRIE

Case 50
No. 70927
MA-15087

(Donahue Grievance)

Appearances:

Mr. Bill Moberly, Staff Representative, AFSCME Wisconsin Council 40, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, appearing on behalf of AFSCME, DC40 Local 60, AFL-CIO, CLC.

Mr. William Morgan, Attorney, Murphy Desmond S.C., 33 East Main Street, Suite 500, Madison, Wisconsin, appearing on behalf of the City of Sun Prairie.

ARBITRATION AWARD

AFSCME, DC40 Local 60, AFL-CIO, CLC, hereinafter "Union" and the City of Sun Prairie, hereinafter "City," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators from which to select a sole arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot of the Commission's staff was selected. The hearing was held before the undersigned on November 22, 2011 in Sun Prairie, Wisconsin. The hearing was transcribed. The parties submitted briefs and the City filed a reply brief, the last of which was received on February 10, 2012, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute, but were unable to agree as to the substantive issues.

The Union frames the substantive issues as:

Did the actions of Duane Donahue rise to a level of seriousness for the Employer to have just cause to terminate Duane from his employment, and if not, what is the appropriate remedy?

The City frames the substantive issues as:

Was there just cause to terminate the Grievant for his admitted theft of City property, and if not, what is the remedy?

Having considered the evidence and arguments of the parties, I frame the substantive issues as:

Did the City violate Articles II and XXVI of the Collective Bargaining Agreement when it terminated Duane Donahue on July 22, 2011? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

. . .

ARTICLE II – MANAGEMENT RIGHTS

2.01 MANAGEMENT RIGHTS

The Union recognizes that all management rights repose in the City. Such rights include:

a.) To plan, direct and control the operation of the work force;

b.) To hire;

c.) To determine the size and composition of the work force and to lay off employees for economic reasons or where management believes continuation of such work would be inefficient or nonproductive;

d.) To establish and enforce reasonable work rules;

e.) To establish and apply uniformly reasonable standards of job performance; and

f.) To suspend, discharge or otherwise discipline employees for just cause;

g.) All of which shall be in compliance with and subject to provisions of this Agreement and provided that nothing contained herein shall be used by management to discriminate against the Union or any employee.

. . .

ARTICLE V – GRIEVANCE PROCEDURE

. . .

f.) If the grievance is not settled in accordance with the foregoing procedures, the Union may refer the grievance to binding arbitration within ten (10) calendar days after receipt of the City Administrator's answer in Step 3. The parties shall attempt to agree upon an Arbitrator within five (5) calendar days after receipt of notice of referral and in the event the parties are unable to agree upon an arbitrator within said five (5) day period, either party may request the WERC to submit a panel of five (5) arbitrators. The parties shall alternately strike names until one name remains and the party requesting arbitration shall be the first to strike a name.

The arbitrator shall set a time and place, subject to availability of the City and Union representatives. All arbitration hearings shall be held in Sun Prairie.

The arbitrator shall act in a judicial capacity and shall not have the right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. He/she shall only consider and make a decision with respect to the issue submitted. In the event the Arbitrator finds a violation of the terms of this Agreement, he/she shall fashion an appropriate remedy. The Arbitrator shall submit in writing his/her decision following close of the hearing or the submission of briefs by the parties. The decision shall be based upon his/her interpretation of the meaning or application of the terms of this Agreement to the facts of the grievance presented. A decision rendered consistent with the terms of this Agreement shall be final and binding upon the parties.

. . .

ARTICLE XXVI – DISCIPLINE

26.01 CONDITIONS OF

> Employees shall not be disciplined, suspended or discharged without just cause. A suspension shall not exceed thirty (30) days. Written notice of the suspension, discipline or discharge and the reason or reasons for the action shall be given to the employee within twenty-four (24) hours with a copy to the unit vice-president. The employee may have a Union Steward or Union Vice-President present at any discipline hearing.

. . .

BACKGROUND AND FACTS

The facts are not in dispute. The Grievant, Duane Donahue, was hired by the City to a maintenance position and worked continuously for 21 years until his termination effective July 22, 2011. The Grievant's Crew Leader was Joe Seltzner. The Grievant's immediate supervisor was Parks and Public Works Supervisor Lee Igl. Larry Herman serves as the City's Director of Public Works. The Grievant's work history was clean except for a written disciplinary sanction issued in 2005 when he and other members of the maintenance department were cited for loitering in the shop area.

On June 18, 2011, Recreation Aquatic Supervisor Rebecca Price was working at the Family Aquatic Center (FAC) during a swim meet. While at the FAC, she observed the lost and found, which is located in a secure area of the FAC. Price observed between 10 and 12 towels in the lost in found. The Grievant was also at the FAC on June 18 because he was called in by Price to deliver toilet paper for the swim meet.

On July 4, 2011, Price received a telephone call from the FAC manager to discuss inaccurate hours posted on the FAC website. During that telephone conversation, the manager also asked about the lost and found towels because a patron was attempting to locate a towel believed to have been left at the FAC. The manager reported to Price that there weren't any towels located in the lost and found. Price did not take any action once she learned that there weren't any towels in the lost and found area.

Two weeks later, Seltzner, the Grievant's Crew Leader, approached Price. Seltzner was in need of towels for a City maintenance project and asked Price if there were any in lost and found to use. Seltzner's question reminded Price that there weren't any accumulated towels in lost and found which prompted her later that day to ask Igl if he knew anything about

the missing lost and found towels.[1] That same day, July 20, Igl followed up with Seltzner. Seltzner told Igl that the Grievant had admitted to taking some towels from lost and found earlier that month.

The Grievant spoke to Igl two times on July 21, 2011. In the first conversation, Igl informed the Grievant that there were some towels missing and that Seltzer had told him that the Grievant had taken them from the FAC lost and found. The Grievant confirmed that he had taken the towels.

Igl met with the Grievant a second time on July 21, 2011. The Greivant's Union representative was Steve Vernig. Igl asked the Greivant if he had taken the towels and asked him when they were taken. The Grievant was unable to identify a date, but informed Igl that it was a Saturday. The Grievant admitted that he took towels from lost and found and that he gave the towels to a family in need.

The following day, the Grievant met with Larry Herman, Director of Public Works; Vernig; and Igl. The Grievant was again asked whether he had taken towels from the FAC. The Grievant again admitted to entering the FAC with his key, taking the towels, and informed the City that he had donated them to a needy family. When asked, the Grievant did not disclose the name of the needy family. The Grievant brought six of his personal towels to the meeting and donated them to the City to replace the towels he had taken.

Later that day, the Grievant was terminated. His July 22, 2011, termination letter read as follows:

> Mr. Donahue:
>
> This letter will serve as your notification of your termination effective July 22, 2011 from employment from the City of Sun Prairie.
>
> In an interview on Thursday, July 21, 2011 with Lee Igl and verified at a meeting on Friday July 22, 2011, with me you admitted that you entered the Sun Prairie Family Aquatics Center after hours on or about July 2, at 9 am. You were not on City duty at this time and you entered the building through a locked door and then took home several swim towels from the lost and found. You indicated that you have since given the towels to a needy family but you returned an equal number of towels to the City which you say are your personal towels returned to the City to replace the towels you took.

---

[1] Igl testified that Price told Seltzer that she and Igl had already discussed the missing towels. Price's testimony does not support that this conversation occurred prior to Seltzer asking Price for the towels. Further, a review of the City's documentation sets forth a different chain of events leading up to Igl speaking with the Grievant on July 20, 2011.

Your action constitutes not only a violation of city policy and procedure, but a violation of the ethics code, and possibly city ordinance and state statute.

Specifically, you made an unauthorized entry to a locked city-owned facility outside of normal business hours and you removed items of value that did not belong to you. We view your unauthorized access to our building and removal of items as theft and intend to file a complaint with the police department.

Regardless of whether law enforcement views your actions as criminal, we believe your misconduct is of the highest level. Therefore, at this time you are being terminated. You are required to return all city-issued keys and equipment. You may contact the Human Resources Department regarding the payment of your last check and any questions regarding continuation of your benefits.

Sincerely,

/s/
Larry Herman, Director of Public Works

The Union grieved the termination on August 1, 2011. The grievance was advanced to the third step level at which time it was denied by the City which places it properly before the Arbitrator.

ARGUMENTS OF THE PARTIES

City

The City asserts that the Grievant committed theft, violated the City's policies, and violated his employer's trust. The City maintains that just cause has been met and the termination should stand.

The City points to the four part test commonly used to establish theft in an employment setting. See Brand, *Discipline and Discharge in Arbitration,* BNA 2nd Ed. At p. 295. The City points out that the towels belonged to members of the public who left them at the pool; that the Grievant took them, without authorization; and that he planned to do so. Moreover, it is immaterial if he says that he donated them to a needy family.

The Union's assertion that although the Grievant's conduct was wrong, it did not justify termination is misguided. The parties' discipline process allows for suspension and termination if just cause exists. The City must trust that its employees are not taking from it, its patrons or the public for whom the employer serves. Thefts of even of nominal amounts

have been upheld by arbitrators. SCHOOL DISTRICT OF NEW RICHMOND, Case 42, No. 57561, MA-10675 (Crowley, 12/99) and VILLAGE OF THIENSVILLE, Case 8, No. 52332, MA-8921 (Knudson, 4/96).

The Grievant violated state law and City policies section 5, 7, 26 and 28. He conceived a plan to take possessions that were not his own. He violated the City's integrity and honesty expectations and termination was warranted.

Union

The City's decision to terminate the Grievant failed to meet the just cause standard. Not only did the City discriminate against the Grievant, but the penalty imposed was not reasonably related to the seriousness of the offense and the Grievant's past work record.

The Grievant immediately admitted that he had taken the towels from the FAC. He did not attempt to cover up or make excuses for his actions. He recognized his poor judgment and made amends.

The Grievant's actions are a far cry from theft. The towels in question were abandoned by their rightful owners. The City regularly recycled lost towels, either using them itself for maintenance projects or giving them to another patron to use or giving them to a community organization. The City did not have the owners' permission to do this. The City cannot discipline the Grievant for doing exactly what the City has a history of doing.

Another example of differential treatment is the City's focus on the Grievant entering the FAC with City issued keys. There is no question that other employees regularly enter City facilities during off hours. On one occasion, AJ entered the City shop with his keys only to find another employee in the shop using city water to wash his personal vehicle. The City must treat all employees in the same manner.

The City's decision to terminate the Grievant was an excessive sanction in light of prior discipline issued for similar infractions. Before the Grievant, two employees of the City were disciplined for theft. The first, JY, removed hinges from a door and took the hinges home for his personal use. JY's discipline was a five day suspension. Another employee, AJ, drove a plow truck under a bridge with the box up which caused approximately $3500 damage the truck. AJ was disciplined for not properly reporting the accident and received a one day suspension. Both of these instances are more egregious than the Grievant's, yet the Grievant was terminated.

The City claims it cannot trust the Grievant, yet the Grievant was forthright when asked about the towels and tried to rectify the situation by replacing the towels. The Grievant is a long time employee with a good work who exercised poor judgment in one instance. That one instance is not so egregious as to warrant termination.

The Union respectfully asks that the arbitrator find for the Union and order the City to reinstate the Grievant to his previous position with full back pay and all the rights and benefits he would have enjoyed had he not been unjustly terminated.

City in Reply

The City takes issue with the Union's claim that a binding past practice exists. The City acknowledges that there may have been a past practice of using towels for personal use, but that practice was terminated. The Grievant knew that the practice was terminated as evidenced by the fact that he did not seek permission to take the towels and his admission that he did not ask because he did not want to get anyone into trouble.

The Grievant's taking of the towels was theft. The fact that Price did not immediately pursue an investigation to locate the missing towels or that the City did not press criminal charges does not make the Grievant's actions anything less than theft.

Claiming that the towels have no value is extraordinary. Not only were they valuable to the patrons who were coming back to claim the and to the community organizations that would eventually receive them, but more relevant to the Union's claim, they had value to the Grievant. If they did not have value, why would the Grievant have taken them?

As for the comparisons between the Grievant's discipline and the disciplines of JY and AJ, the underlying facts and circumstances of the two incidents are dissimilar to the Grievant's infractions. AJ was in an accident. JY took hinges from a door which the owner of which had no intention or expectation of ever receiving back and he did so without trespassing on City property.

The one former employee whose actions were most similar to the Grievant was a code enforcement officer who converted an inoperable motorcycle for his own use. This employee took what could be viewed as abandoned property on the side of the road and did not break and enter City premises. This employee was terminated.

The City had no knowledge that employees were entering City buildings for personal use. Lacking knowledge, the City cannot be found to have allowed off duty entry.

The Union has failed to adequately challenge the just cause standard. The Grievant was guilty of theft and trespass. He violated the public trust and therefore, the City has just cause to terminate his employment. The City respectfully requests that the grievance be denied.

Union in Reply

The Union declined to file a reply brief.

DISCUSSION

The issue in this case is whether the Grievant's actions merit termination.

It is undisputed that the Grievant entered the Family Aquatic Center (FAC) without permission on a Saturday with his City-issued keys. The Grievant was not in pay status. The Grievant's purpose in entering the FAC was to take towels which he had seen days earlier in the lost and found. The Grievant took approximately six towels and gifted them to a needy family.

The City's July 22, 2011 letter explains the reason for the Grievant's termination as:

. . .

> Your action constitutes not only a violation of city policy and procedure, but a violation of the ethics code, and possibly city ordinance and state statute.
>
> Specifically, you made an unauthorized entry to a locked city-owned facility outside of normal business hours and you removed items of value that did not belong to you. We view your unauthorized access to our building and removal of items as theft and intend to file a complaint with the police department.

. . .

The City's stated reason, per the letter, for the Grievant's termination was for entering the FAC without authorization and "removing items of value" that were not his. At hearing and in its brief, the City also argued that the termination was based on numerous enumerated violations of state law, various City rules, policies and codes. There is no evidence to indicate that the City at any point in time identified the specific rule, policy, or code violations which it believed the Grievant to have violated nor that the City informed the Grievant of any particular rule, policy or code which served as a basis for his termination. Lacking this notice, and given that the City has articulated exact behaviors for which it based its termination, I will focus on those behaviors and reasons.

To reiterate, there is no question that the Grievant engaged in the behavior for which he was disciplined. He entered a City facility during off-hours in non-pay status with his City issued keys and took towels from the lost and found area. The Grievant did not have permission to enter the facility nor to take the towels. The remaining question is the level of discipline.

The Union challenges the discharge asserting the City failed to comply with two tenets of just cause. First, it asserts that the City did not apply the rules, orders and penalties in a fair manner. Second, it maintains that the penalty of termination was not reasonably related to the seriousness of the offense and the Grievant's past record.

I start with the Union's charge of differential treatment. The Union points to two employees who were disciplined, but not terminated for offenses which the Union finds comparable. Employee AJ received a one day suspension for a vehicle accident caused by his negligence. There was no theft or unauthorized access involved in that accident. The misconduct for which AJ was disciplined is not sufficiently similar to the Grievant's and therefore it is not a comparable offense warranting a comparable sanction.

Moving to the second employee, JY, he removed hinges from a door at the recycle center while in pay status. The hinges did not belong to him and he did not have permission to take them. The City attempts to distinguish JY's actions claiming that he was new to the recycling center and therefore did not know the rules, and that the owner of the hinges had no expectation of continued ownership. JY was not a new employee to the City and knew or should have know (just like the Grievant) that misappropriating the hinges was wrong, regardless of where or what City department that JY was working. I am struck by the challenge of comparing an employee who commits theft while in pay status to an employee who commits theft on his own time - which is worse? Fortunately, that question need not be answered because what separates the Grievant's conduct from that of JY is the Grievant's premeditation.

Igl and Herman both testified that the Grievant admitted that he had planned to enter the FAC on that Saturday to obtain the towels. The City's notes from the July 22, 2011 meeting indicate, “Mr. Donahue went to the FAC with the sole intent of taking the towels. He had thought about doing this for 2-3 days prior.” The Grievant did not testify nor did Joe Seltzner. The Grievant's decision to not testify does not create a negative inference on this record since it is undisputed that he committed the act for which he was disciplined, but does leave the testimony of Herman and Igl unchallenged and therefore credible.

The City offered an additional example of employee discipline to support its position that the Grievant's termination was consistent with prior disciplinary sanctions. The employee involved was a code enforcement officer who came upon an abandoned motorcycle while in paid status. The officer tagged the motorcycle and attempted to locate the owner without success. The officer later took the vehicle to his home, repaired it and then used it. When the City learned that he had taken the motorcycle, the City terminated his employment. Evidence was not offered to establish the code enforcement officer’s tenure or prior disciplinary record. The City appears to conclude that the Grievant's misconduct is similar to that of the code enforcement officer. There is no question that both the code enforcement officer and the Grievant planned and effectuated the taking of property which they both believed to have been abandoned, but the Grievant's termination also encompassed the additional infraction of unauthorized access to the facility.

Employee AJ was disciplined for an event very different in scope and intent to that of the Greivant. Employee JY's misconduct was similar, but lacked unauthorized entry and

premeditation. The code enforcement officer comparison is valid. The code enforcement officer's misconduct was similar to that of the Grievant and he was terminated.

At this point, it is necessary to address the Union's claim that other employees entered City facilities/property, without authorization, and were not terminated and/or disciplined. Union witness Al Johnson testified to two instances where employees were in the shop during off hours. On both occasions, Johnson entered the shop to obtain personal items that he needed prior to the next work day. On one of those occasions he encountered a co-worker washing his personal vehicle in the facility with City water.[2] There was no evidence offered to indicate the City was aware that employees were entering City property for personal business, much less for the purpose of washing personal vehicles. The City cannot be held accountable for employee actions and/or misconduct for which it did not have knowledge.

As to the Union's characterization of the towels as having "no value," even if it was true, it is immaterial. I concur with Arbitrator Francis W. Flannagan who opined that "the value of stolen property should not be used in determining the severity, or lack thereof, of discipline." GILBARCO, INC., 93 LA 604, 608 (Flannagan, 2/89).

I move to the Union's claim that discharge is too severe a sanction in these circumstances. The Grievant cooked up a plan to remove towels that had been left in the lost and found. That plan included entering the facility with his City keys after his work day ended. He did so when the FAC was closed. The FAC management and staff were not present and he avoided having to explain or justify his actions. Although he did so with keys that were issued to him and therefore he had the authority to use those keys, he did not have the authority to use them for the purpose of taking items that did not belong to him. The Grievant's actions were calculated, willful, and beyond the pale of acceptable behavior.

There is no question that that termination is the most severe sanction that an employer can mete out in a disciplinary situation. But, I concur with those arbitrators that find theft to be a "cardinal offense." The Grievant's misappropriation of property "extends beyond the value of the property taken. Such action abrogates a fundamental principle of the employment relationship because it contravenes the employee's responsibility to act in the interest of the employer and not to do the employer injury." Bornstein, Gosline, and Greenbaum, *Labor and Employment Arbitration*, 2nd Ed. (Matthew Bender, 2002) at p. 20-2. The Grievant, through is intentional acts, breached the bond of trust with the City and his termination was not excessive.

[2] The record is silent as to whether the employee that Johnson saw washing his personal vehicle in the shop was a union, management or non-represented employee.

AWARD

1. No, the City did not violate Articles II or XXVI of the Collective Bargaining Agreement when it terminated Duane Donahue on July 22, 2011.

2. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 8th day of May, 2012.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

LAM/gjc
7802