

BEFORE THE ARBITRATOR

In the Matter of a Dispute Between
AFSCME LOCAL 235, CITY OF SUPERIOR EMPLOYEES UNION
and
CITY OF SUPERIOR

Case 214
No. 72170
MA-15248

AWARD NO. 7895

Appearances:

Lance Nelsen, Representative, AFSCME Local 235, City of Superior Employees Union, 2408 Maryland Avenue, Superior, Wisconsin, 54880, appearing on behalf of Union.

Cammi Koneczny, Human Resources Administrator, City of Superior, 1316 N. 14th Street, Suite 301, Superior, Wisconsin, 54880, appearing on behalf of the City.

ARBITRATION AWARD

On July 12, 2013, the City of Superior and AFSCME Local 235, City of Superior Employees Union, filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of the Commission's staff, assigned to hear and decide a grievance pending between the parties. A hearing was conducted on November 21, 2013, in Superior, Wisconsin. No formal record of the proceedings was taken. Briefs were filed and exchanged by January 6, 2014.

ISSUE

The parties could not stipulate to the issue to be decided.

The Union regards the issue to be:

Did the Employer discipline Ruby Berg with just cause, and, if it did, did it properly use progressive discipline when it did so? If the Employer acted without just cause, or failed to properly use progressive discipline, what is the remedy?

The City regards the issue to be:

Did the City violate ARTICLE 10 – DISMISSALS of AFSCME Local 235, City of Superior Employees Union’s collective bargaining agreement when it disciplined Ruby Berg with a one-day, unpaid suspension served on October 17, 2012? If yes, what is the remedy?

Both issues, as framed, will be addressed in this Award.

BACKGROUND AND FACTS

Ruby Berg, the Grievant, has been employed by the City of Superior (hereinafter “City” or “Employer”) since April 2002. Berg has been employed as a staff assistant in the Environmental Services Division since 2006. In her position, Berg works in an office with another employee, who is also a staff assistant. Over the course of her employment with the City, Berg has received a number of warnings and counseling related to her interpersonal skills. The matter which led to this proceeding was a one-day suspension, issued on October 12, 2012. However, that suspension was preceded by a number of warnings.

On April 12, 2007, Berg was given a counseling report for sending “... an e-mail that was discourteous to another employee” The Grievant was directed to bring concerns to her supervisor. The counseling report indicates that it is the Employers’ obligation to “... maintain professional courteous communication”

On June 1, 2010, the Grievant was given a written reprimand for an incident which occurred on May 19, 2010. The reprimand included the following:

This memo will serve as a written reprimand for your actions on May 29, 2010 as described below. This incident was investigated and included a questioning session with you with your union representative present.

While in the employee lunchroom, you were approached by a fellow employee and asked about a data disk. You became immediately upset and began speaking very loud, swearing and waiving your hands and arms around. You used the word “f*ck”

several times in your angry outburst, and also called Dan Romans a “f*cking idiot.” Your use of profanity, even though denied by you, was verified by three other employees who witnessed the incident.

You were counseled in May 2007 for similar behavior of being discourteous to another employee. In that action you were defensive and refused to take blame for your behavior. In this current incident you are also refusing to accept responsibility for your actions. Your response to being upset is inappropriate work place behavior, your statement regarding Dan Romans is unprofessional and insubordinate. You have violated City Policies 16.01 – Disciplinary Actions, 16.02 – Insubordination Guidelines for Discipline, and 20.20 – Workplace Environment Policy. Based on this information, a written reprimand is appropriate. Continued behavior of this kind will result in further, more progressive discipline, up to and including termination.

Berg was referred to employee assistance.

On August 8, 2010, Berg was given another counseling report. That report included the following:

Supervisor’s Statement: On August 18th Ruby confronted Kathleen Howard in the mezzanine caged area regarding where storage items had been placed. In that confrontation Ruby raised her voice and used aggressive gestures. Use of physical intimidation is not appropriate behavior in the workplace and is a violation of HRP 20.20. Ruby received a written reprimand three months earlier for displaying very similar behavior. In the previous incident Ruby was not able to control her behavior or recollect her inappropriate actions. In this incident Ruby was not able to control her behavior but was able to recollect what she had done. This improvement is insufficient.

* * *

Progressive discipline for Ruby’s use of aggressive gestures and tone of voice, use of profanity, intimidation, and insubordinate behavior has advanced through written reprimand. If Ruby is not able to refrain from the use of these behaviors for 6 months (March 13th 2011) depending on the severity of the incident,

Ruby will receive a minimum of suspension from work without pay or her employment will be terminated. This six month timeframe does not prohibit progressive discipline for similar actions beyond that time.

On July 27, 2011, Berg was given a performance evaluation which was generally favorable. It did contain the following directive

As a condition of employment, Ruby must develop and maintain an effective work relationship with the other clerical services staff.... Ruby needs to demonstrate improvement in the areas of oral communication, organization and acceptance of supervision.

The evaluation had the following memo attached, which outlined the concerns management had over the work environment:

Clerical Services Productive Work Relationship

This document is meant to document the City's approach to handling the lack of a functioning work relationship between Ruby Berg and Erica Zielinski. The approach is based on a discussion with EAP on Thursday 7/6/11. The City has invested in improving the work relationship in the form of meetings with Supervisors, and paid time to receive counseling from EAP. Through this effort we have established a path to achieving a productive work relationship between clerical service staff. From this point forward, it is up to Ruby and Erica to work together to follow the path and reach the goal. The City expects the clerical staff to work together to resolve their differences as they arise. This increase in cooperation would correspond with reduction in concerns and a greater ability to resolve issues at the clerical level. Certainly management will provide support and guidance as necessary but cannot be a substitute for clerical staff finding ways to work together in a cooperative manner.

Examples of differences where clerical staff should be working together in a cooperative manner whenever possible include:

- Odors issues: cleaning products, food, perfume and floor mats, etc.
- Use of the upper countertop.
- Actions being taken without the other's knowledge ([v]an usage, [t]ravel, [m]oving or arranging office supplies or

- stations, writing or sending instructions to staff, moving personal belongings)
- Debate over who is the “lead” and associated responsibilities.
 - Debate over which procedure should have been utilized in a particular situation.
 - Asking management for an answer that would most easily be answered by the other clerical staff member.

As clerical services work relationship deteriorated, management’s roll evolved into that of a judge to determine which employee was right and which was wrong. This will not continue. If clerical service staff need to have the intent of a policy or procedure clarified, it is management’s roll to provide that information. It is the responsibility of clerical staff to work together to determine the best approach to following the policy or procedure consistently considering issues case by case.

As discussed in EAP, clerical staff are to discuss issues face to face and in real time at their work stations using respectful tone and body language.

Clerical staff must show continual improvement in their work relationship with the development of a productive work relationship substantially complete by the end of the third quarter (end of September). Evidence of failure to develop a productive work relationship will be addressed using the progressive disciplinary policy up to and including termination of both employees.

On April 19, 2012, Berg was given the following written reprimand:

This memo will serve as a written reprimand for your actions on April 11, 2012 as described below.

Erica Zielinski contacted City management to communicate a concern about you accusing her of intentionally sickening you with her use of products she knew would affect your chemical sensitivity. Though the information communicated to Erica was taken out of context, investigation did reveal that you did make negative statements regarding your perception of Erica’s behavior to other ESD staff. Your own statements to Chris Daube indicate that Erica asked you if there was something wrong when you

propped the door open and your response was that you were having an issue. That was an opportunity for you to discuss your issue with Erica. Your act of bringing concerns you have with Erica to other ESD staff and not addressing them directly with Erica, or with a manager, is inconsistent with the expectations documented in your 7/25/2011 performance evaluation (see highlighted areas – attached) and your clerical staff meeting on 1/9/2012.

To help resolve your working relationship with Erica, the City paid you to attend counseling with Erica through the EAP program on June 6th, June 22nd, and July 7th of 2011. The resulting recommendation of these meetings was also included in your 7/25/2011 performance evaluation.

After clear and repeated communication of management's expectation with regard to your behavior, you have been unwilling or unable to meet those expectations. Additionally, you have a history of similar behavior. In June of 2010 you received a written reprimand for insubordination, and you have been counseled twice for discourteous treatment of the public or other employees; once in 2010 and once in 2007.

Continued conduct of this nature will result in suspension from work.

On October 11, 2012, Berg was given a one-day suspension for an exchange she had with a coworker. The incident is described in the suspension letter, whose relevant portions are set forth below:

Subsequent to our September 19th meeting with you and your union representative, we have found that there is justification for progressive discipline. This memo will serve as notice that you will serve a one-day unpaid suspension on Wednesday, October 17th, 2012 for your actions on September 17th, 2012 as described below.

Erica Zielinski contacted City management to relay an incident where she had asked you about the location of some ops sheets and you snapped back at her that "Yes" you had them "BUT THEY ARE STAYING HERE" meaning you were not going to provide them to her and they were going to stay on your desk. As a result of this response, along with your body language that

indicated to Erica that you were upset, Erica asked if you would like to talk. Your response was "No." She then stated "Your body language tells me you're upset," and you responded with "Please don't judge my body language." Erica asked if you would like to talk at a different time when you were not busy, and your response was again "No." Your recollection of this conversation at our meeting did not dispute your responses as stated.

Earlier on this same day you had sent Chris Daube an email expressing your frustrations with Erica that she doesn't give you the courtesy of information. Examples you have in the email included that you are usually the person who distributes e-mail addresses for new ESD employees and Erica had done it. You were additionally frustrated because Erica had discussed the scheduling of a team meeting with her supervisors and had not consulted with you. The connection between your email and Erica's observations of your frustration felt toward her are unmistakable.

While this interaction on its own may not seem deserving of discipline to you, you have been made well aware of the expectations that have been placed on both you and Erica to try and resolve issues between you through communicating directly with each other. These expectations have been outlined to you in a July 25th, 2012 memo to you regarding the FEMA call log investigation; [y]our April 19th, 2012 written reprimand; Employee Assistance Program sessions with you and Erica in June/July 2011; and your performance evaluation dated July 25th, 2011. Additionally you were given an opportunity to discuss your progress toward improved communication with Erica in weekly staff meetings.

You admitted in our September 19th, 2012 investigative meeting that you don't talk to Erica when you are frustrated with something that relates to her. You stated that it doesn't do any good so it is easier to keep it to yourself. However, the direction from your supervisor is and has been to talk with Erica first and then go to management if that is unsuccessful. Management has not received one communication from you that you had an issue with Erica, tried to calmly talk with her about it, and that it was unsuccessful.

The reason that it got to the point of you and Erica being required to first make an attempt to work out your issues between yourselves is because it was becoming a full-time job for your supervisors and Human Resources for things that could very easily have been resolved by simply turning and talking to each other. Your supervisors have spent countless hours working with you and Erica to try and find a resolution in which you could both get along to the point of being productive with your work. Management having to referee and/or play judge between you and Erica was not a sustainable solution. You have continued to disregard the directive to talk with Erica, thus increasing the tension between you and her, and decreasing productivity in the office.

You have previously received the following related discipline:

* * *

Your position with the City requires you to establish and maintain effective working relationships with others and you have been unable to do that. Your history of counseling and discipline demonstrates that you have an inability to control your frustrations and, therefore, you need to work out your issues before your emotions escalate into an inappropriate reaction that will result in further discipline and possibly termination. It has also been recognized in each of these actions that your tone of voice, body language and/or actions have been interpreted as you being angry and/or rude, while you either claim not to have been upset or you defend your behavior.

After clear and repeated communication of management's expectation with regard to your behavior, you have been unwilling or unable to meet those expectations. Continued conduct of this nature will result in further, more progressive discipline.

Berg's coworker, Zielinsli, has also been placed on a progressive discipline track.

RELEVANT PROVISION OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 10 – DISMISSALS

- 10.01** The City of Superior agrees that it will act in good faith in the discipline or discharge of any employee. No employee will be disciplined or discharged except for just cause.
- 10.02** In the event a disciplinary action is taken against any Union employee, a notification of such action shall be given in writing to the employee and the Union stating the reasons said action shall be taken and when it will commence.
- 10.03** All disciplinary action and discharges shall be subject to the grievance and arbitration procedure of this Agreement.

The City uses counseling, oral and written reprimand, suspension, demotion and dismissal as progressive discipline measures as appropriate to resolving issues of discipline.

DISCUSSION

I believe there was just cause to issue the Grievant a one-day suspension.

The Grievant's behavior was disciplinable. The City has the right to maintain a minimal level of cooperation and civility in the workplace. The City is entitled to have employees maintain a sufficient professionalism toward one another so as to permit the work to go forward. Much of the complained about behavior of the Grievant has had an adverse impact on accomplishing the work of the Employer. It has adversely impacted the morale of coworkers. It has distracted others from their work and has absorbed disproportionate management time and energy.

The incident which brought about the suspension was a relatively modest event. However, it was preceded by years of workplace disruption and progressive discipline. The behavior described in the June 1, 2010 reprimand was as inappropriate, unprofessional and insubordinate as described. The City has a significant interest in controlling such workplace behavior. The Grievant was warned that if such behavior persisted, significant discipline could follow.

Two months later the Grievant was counseled for similar behavior that was altogether inappropriate to the workplace. That counseling also threatened increased discipline if the behavior continued.

In the Grievant's July 2011 evaluation, the City expressed a continued concern over the ability of two employees to work together. The dysfunctional relationship between the Grievant and her coworker was identified as a source of discord and inefficiency and it consumed management time for no good reason. It was at approximately this time that coworkers who were noncombatants in the office struggle came forward to complain about the Grievant and how stressful it was to be around the inappropriate behavior.

The Grievant was directed to deal with her coworker over the day-to-day functioning of the office. Once again, more serious discipline was threatened if things did not change.

On April 19, 2012, the Grievant was reprimanded. The reprimand was prompted by the Grievant's failure to handle workplace issues with her coworker. The point of the warning was that the Employer had gone to great lengths, in both time and effort, to create and support a work environment which allowed employees to perform their jobs without ongoing friction. Once again the Grievant was warned. This time she was specifically warned that if her conduct continued it would lead to a suspension.

The behavior persisted and five months later the September 17, 2012 conduct led to a suspension. While the conduct leading to the suspension was not as egregious as the earlier behavior, it followed over two years of remediation effort by the City. The Grievant announced that she would not provide a document that her coworker needed to do her job. She was unwilling to talk the issue through with her coworker even though she had been trained and directed to do so. It was one more instance of inappropriate workplace behavior. Berg had been specifically counseled as to how to behave and warned that she would be suspended if she persisted in disrupting the workplace and refusing to handle matters with her coworker.

The Union complains that there is no basis to discipline Berg simply because the two coworkers dislike one another. This ignores the workplace implications of the Grievant's behavior. The work is not getting done. The employees were counseled and directed to deal with one another to the extent it was necessary to get the work done. The Grievant refused. The workplace was disrupted and management was once again dragged into a situation that should not exist. Other employees have been forced to endure the stress that is produced when these antics occur. The City has a legitimate disciplinary interest.

The Union notes that the mother of the coworker is a supervisor with the City and infers that favoritism may be at play. Nothing in the record supports such an inference. The coworker has also been subject to discipline. There is no indication the supervisor intervened in the disciplinary process. Those responsible for the discipline testified, without contradiction, that there was no interference in the process.

The Union contends that there was a lack of progressive discipline. A number of the incidents referred to in the disciplinary letter are more than a year old, and the Union regards them as stale for purposes of progressive discipline. The Grievant has been warned numerous times over a two-year period to modify her behavior. Those warnings have not cured the problem. The last written warning was issued on April 19, 2012. The suspension was issued for behavior which occurred on September 17, 2012. There is nothing stale about the warnings.

AWARD

The grievance is denied.

Dated at the City of Madison, Wisconsin, this 15th day of September 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

William C. Houlihan, Arbitrator