

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABORERS' UNION LOCAL NO. 464

and

MID-STATES CONCRETE INDUSTRIES

Case ID: 295.0000

Case Type: A

(James Wallis Discharge Grievance)

AWARD NO. 7910

Appearances:

Daniel Burke, Business Manager, Laborers' Union Local No. 464, appeared on behalf of the Union.

David Seeley, Director of Human Resources, Mid-States Concrete Industries, appeared on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and Company respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide the James Wallis discharge grievance. A hearing, which was not transcribed, was held on March 31, 2015, in South Beloit, Illinois. The Union filed its brief on April 17, 2015. On April 29, 2015, the Company notified the undersigned that it was not filing a brief in the matter. That same day, after receiving a copy of the Union's brief via email, the Company requested the opportunity to file a response to the Union's brief. In a conference call the next day, the Company withdrew their request to respond to the Union's brief. As a result, the record in this matter closed on April 30, 2015. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Was there good cause for the employee's discharge?

PERTINENT CONTRACT PROVISION

The parties' 2012-2015 collective bargaining agreement contains the following pertinent provision:

ARTICLE IX. DISCHARGE AND SUSPENSION

The Employer may discharge any employee for good cause. An employee charged with an offense justifying immediate discharge will be informed of such offense in writing at the time of his discharge, and a copy thereof shall be sent to the Union. All discharges must be made in the presence of employee's Stewards. The Employer shall give at least one (1) warning notice in writing of a complaint for other offenses (those not involving immediate discharge) against such employee, to the employee and the Union. If the offense complained of in the warning letter is not repeated within six (6) months from the date of the warning letter, then such warning letter will be deemed to have served its purpose and shall no longer be in effect.

Discharge without a warning notice is authorized in cases of:

1. Dishonesty;
2. Falsification of your time card.
3. Theft
4. Sabotage
5. Leaving work during scheduled work hours without written permission from lead man or management
6. Fighting
7. Possession or use of weapons
8. Conduct that denigrates or shows hostility or aversion toward an individual because of his or her protected basis
9. Blatant disregard of safety likely to cause serious injury

Objection to any discharge must be made within ten (10) days of said discharge. The matter shall then be discussed by the Employer and the Union as to the merits of the case. The employee may be reinstated under other conditions agreed upon by the Employer and the Union. Failure to agree shall be cause for the matter to be submitted to arbitration as provided in Article VIII on Grievance and Arbitration. The arbitrator shall have the authority to order full, partial or no compensation for time lost. ...

BACKGROUND

The Company manufactures precast cement slabs used in construction. The Union is the exclusive collective bargaining representative for the Company's manufacturing employees.

James Wallis was initially hired by the Company in 2004. In 2006, he was discharged for poor work performance, damaging equipment and failing to report damage to property. Insofar as the record shows, Wallis' discharged was not grieved.

In January 2014, the Company rehired Wallis. He worked in a part of the Company's facility known as the Yard.

On September 17, 2014, Wallis received a written warning for not stacking wall panels per procedure. This written warning was not grieved.

FACTS

In November 2014 (all dates hereinafter refer to 2014), two separate incidents occurred at the Company which involved inappropriate workplace behavior by someone. The perpetrator in each incident was unknown. These two incidents came to be known as the stolen radio incident and the sticker incident. The details of each incident and the Company's investigation into same are reviewed below.

The Stolen Radio Incident

On November 6, a supervisor discovered that his handheld radio was missing from his personal cabinet. After he discovered the radio was gone, he sent out an email that described the radio in detail and asked for its return. In that email, the supervisor said that he had engraved 31-1 on the back of the radio. Additionally, the supervisor announced over the Company's work radio that someone had stolen his radio and he wanted it returned.

The radio described above was later found in the Yard's charging station. When it was found, it was discovered that the belt clip on that radio had been replaced with a different belt clip.

The original belt clip from the stolen radio was later located. Specifically, it was found on James Wallis' handheld radio. When it was found, there was a yellow sticker that had been placed on the clip. That yellow sticker had been placed there to cover something. When the yellow sticker was pulled off, it covered an engraved number. The number that was engraved was 31-1. The word "James" was written on the yellow sticker.

The Sticker Incident

On November 7, two stickers were discovered on a piece of equipment known as the shuttle lift in a part of the Company's facility known as the Yard. One sticker was on the cab's outside window and the other was on the cab's inside window. One sticker said in all capital letters "GINO SUCKS." The other sticker said "NIGGER." These stickers, which were about the size of a car bumper sticker, were identical in appearance – black print on a solid yellow background. The Company's Human Resources Director, Dave Seeley, considered both stickers offensive, particularly the latter because it referenced a racial slur. Consequently, Seeley conducted an investigation to determine who it was that made these stickers and placed them on the shuttle lift.

First, Seeley interviewed four employees who worked in the Yard: James Wallis, Jason Thompson, Dilynn Dugar and Theodiss Newsome. None of these employees asked for a union representative to be present at their investigatory interview. When Wallis was interviewed, he told Seeley that he knew nothing about either sticker; that he was not the culprit; and that he had not heard any rumors about who might be the culprit. The other three Yard employees who were interviewed said the same thing, to wit: that they were not the culprit nor did they know who was. Thus, all four employees essentially said they didn't know anything about the two stickers, who made them or who placed them on the shuttle lift in the Yard.

Second, Seeley determined that the Gino referred to in the "GINO SUCKS" sticker was a former employee.

Next, Seeley was able to determine that the two stickers were printed by a label maker located in the Yard shipping office. Yard employees have access to that office. That label maker has a carbon copy roll that shows all the stickers made on the machine in sequential order. The carbon copy roll showed that stickers were created and printed that said: WORK ORDERS, NIGGER, 26DILLY10, GINO SUCKS and SHANE. (Note: these five words/phrases were all printed in capital letters.) As part of his investigation, Seeley learned who created and printed the stickers that said WORK ORDERS and SHANE. Seeley further determined that these two stickers were made for legitimate business reasons. Seeley further determined that the three stickers in the middle of that listing of five (i.e. those stickers that said NIGGER, 26DILLY10 and GINO SUCKS) were not made for legitimate business

reasons. While Seeley considered the stickers which said NIGGER and GINO SUCKS to be offensive, the sticker which said 26DILLY10 was simply perplexing.

In an attempt to determine who printed those three stickers, Seeley interviewed some of the previously mentioned employees again.

Seeley first interviewed employee Dilynn Dulgar, who is sometimes called Dilly as a nickname. In this interview, Dulgar told Seeley the following: 1) that Wallis “did it”; 2) that the number 26 on the 26DILLY10 sticker referred to Wallis’ old football jersey number; 3) that he saw Wallis with the 26DILLY10 and GINO SUCKS stickers in his hand; 4) that Wallis gave the 26DILLY10 sticker to Theodiss Newsome; and 5) that after the two stickers were discovered on the shuttle lift, he and Wallis had a conversation about them (i.e. the stickers) wherein Wallis “freaked out” because he figured he was going to be caught and said he was “screwed.”

Following that interview with Dulgar, Seeley interviewed Wallis a second time. At the start of this interview, Seeley asked Wallis again if he knew anything about the stickers placed on the shuttle lift. Wallis replied that he did not know anything about them (i.e. those stickers). Thus, Wallis responded the same as he did in his first interview. Seeley then told Wallis that he (Seeley) had learned from the label maker that there was another sticker that had been created that said 26DILLY10. Seeley asked Wallis if he knew anything about that sticker. Wallis replied that DILLY could possibly refer to Dilynn Dulgar. With regard to the two numbers referenced on either side of the word DILLY, Wallis said that 26 was his old football jersey number. Other than that, Wallis said he had no idea where the 26DILLY10 sticker came from, and he was not involved in its creation. Seeley then ended this interview.

Seeley then interviewed Theodiss Newsome a second time. Newsome told Seeley that he used to play on the same football team as Wallis, and Wallis’ jersey number was 26 and his number was 10. Newsome also told Seeley that Wallis gave him a sticker that said 26DILLY10. Newsome said he put that sticker on his hardhat, but someone later removed it. Newsome also said he didn’t know who did that.

Seeley then interviewed Wallis a third time. This time, Seeley asked Wallis again about the 26DILLY10 sticker, and Wallis responded that he knew nothing about it. Seeley then told Wallis that Newsome had just told him (Seeley) that Wallis gave him that sticker. Wallis initially said in response that he had no idea “how that could be true.” When another person in the room – Chris Olson – offered to go get Newsome and bring him back into the room so that he could repeat what he previously said, Wallis responded that that was not necessary because if Newsome said that Wallis gave him the 26DILLY10 sticker, “it must be true.” After Wallis said that, Seeley reminded Wallis that he had previously denied having any knowledge whatsoever of any of the stickers and now he had just acknowledged that he had given the 26DILLY10 sticker to Newsome. When Seeley said that, Wallis’ demeanor changed, and he went from being calm and collected to angry and agitated. Additionally, Wallis’ voice became more elevated and he spoke in a louder volume. Wallis then announced that he would not

answer any more of Seeley's questions until his union representative was present. Seeley responded in a calm voice that a union representative (i.e. union steward) was not currently on duty so he was ending the meeting and suspending Wallis for the remainder of the workday. Seeley further said that their meeting would resume the next day at 8:00 a.m. at which point a union representative would be on duty and could be present for their meeting. Seeley's remarks made Wallis more upset. Wallis then took out his cell phone and called Efrain Mendiola. Mendiola is a bargaining unit employee who also is a union steward. He was not at work at the time. In response to Wallis making that call, Seeley told Wallis that even if Mendiola could return to work, he (i.e. Seeley) did not want to continue with the meeting because he (Seeley) considered it over. Seeley then directed Wallis to leave his office. Wallis refused to do so and instead stayed in Seeley's office. Wallis told Seeley that once Mendiola got there (meaning the Company's facility), the meeting would resume. Seeley responded by telling Wallis a second time that he was suspended and was to leave his (Seeley's) office and the Company's facility as well. Wallis said nothing in response but still stayed in Seeley's office and refused to leave. This standoff continued for several minutes. The silence in the room was broken when Wallis repeated his assertion that once his union representative arrived, they would "finish this" (meaning finish the meeting). Seeley told Wallis that since he (Wallis) was refusing a direct order to leave, Seeley considered him (Wallis) to now be trespassing, and his next step was to call the police. Wallis replied: "Call them." At that point, another person who was in Seeley's office - Chris Olson - intervened in the standoff. Olson went up to Wallis, physically grabbed him and pulled him out of Seeley's office. After doing so, Olson took Wallis upstairs to the employee break room and tried to calm him down. Once he was there, though, Wallis began yelling various obscenities. These obscenities were directed at Seeley. While Seeley was one floor down from Wallis and the break room, Seeley could still hear Wallis' yelling. In particular, Seeley heard Wallis yell that he (Seeley) was a "dumbass mother fucker." There were an unspecified number of employees in the break room while Wallis had his tirade.

Seeley stayed in his office for several minutes and called the police. Afterwards, he went upstairs to the break room. Once there, Seeley told Wallis that the police were on their way. Seeley then asked Wallis to "please leave" the building. Wallis again refused to do so and instead stayed in the break room. While Wallis was there, Efrain Mendiola arrived on the scene. Mendiola and Olson eventually calmed Wallis down and prevailed on him to leave the building. After being in the break room for about 10 minutes, Wallis left the building without further incident.

Following the incident identified above, Mendiola called union representative Dan Burke and told him what had just happened. Mendiola also told Burke that he (Mendiola) wanted him (Burke) to be at the meeting Seeley had referenced that was set for the next day.

The next morning (Tuesday, November 11), Wallis returned to Seeley's office accompanied by union representative Burke. At the outset of their meeting, Wallis told Seeley that the reason he (Wallis) had his outburst the previous day was because he felt Seeley was, in his (Wallis') words, "pestering him with questions." After Wallis made this statement, Seeley continued his interview with Wallis where it had ended the previous day (namely, with Seeley

asking Wallis about the 26DILLY10 sticker). When asked this time about that sticker, Wallis responded that he “vividly” remembers that sticker. Wallis then told Seeley that he found the 26DILLY10 sticker in the Yard on the ground and subsequently gave it to Theodiss Newsome. Wallis said that the reason he did so was because that sticker had Newsome’s old football number on it (i.e. number 10). After Wallis said that, Seeley asked him why he had not said that in his prior interviews, to which Wallis replied that he had not remembered it at the time, but now he did, and recalled it “vividly.” Wallis also told Seeley that previously Seeley had only asked him if he made the stickers. Wallis repeated his assertion that he had no clue who made the stickers.

In that same interview, Seeley also asked Wallis about the stolen radio. In response, Wallis told Seeley that he had no knowledge of the stolen radio or how it (i.e. the stolen radio) ended up in the Yard’s charging station. Wallis also told Seeley that he had no knowledge how the clip from the stolen radio ended up on his radio. Wallis also told Seeley that while he was the one who wrote the name “James” on the yellow sticker (that covered the engraved number 31-1), he did not put the yellow sticker on the clip. Wallis told Seeley that the yellow sticker mysteriously appeared on his clip one day, and after it was there, he wrote his name on the yellow sticker.

At the end of the interview, Seeley discharged Wallis. Seeley gave Wallis and Burke a discharge notice that provided, in pertinent part:

Today, 11/11/2014, employee: James Wallis
working in position, Yard
is being assessed a Termination
for the following conduct:

- Insubordination
- Disobeying direct order
- Withholding information within an HR investigation(s)
- Involvement in racial slur sticker found on cab of shuttle lift

Following Wallis’ discharge, the Union filed a grievance on his behalf. The grievance was appealed to arbitration.

* * *

As part of his preparation for the upcoming arbitration hearing, union representative Burke interviewed three Yard employees: Dulgar, Steve Graham and Jason Thompson. Burke also obtained a written statement from Wallis.

As part of his preparation for the upcoming arbitration hearing, Seeley had Dulgar write a statement concerning Wallis’ involvement in the sticker incident. Therein, Dulgar said among other things that he saw Wallis with both the 26DILLY10 and GINO SUCKS stickers

in his hand. Dulgar also said in his written statement that Wallis pointed out the GINO SUCKS sticker to him on the shuttle lift.

On January 31, 2015, Dulgar sent Burke the following email concerning Wallis' discharge:

My name is Dilynn Dulgar from Midstates. You got a written statement from me a while back that I'm afraid isn't true. Dave Sealy (sic) informed me that I shouldn't tell anyone of my confession if i wanted it to stay unknown that i was in fact the one that saw James with the supposed stickers. I wasn't aware that i would have to appear before the whole board to tell everyone my story and would no longer be unseen from everything hence the fact that my security of having a job at mid-states would be in jeopardy. Dave was in fact the one that brought it to my attention that i should have told you the truth right off the bat. I wanted to write you to apologize for any extra work i may have caused in lying to you and let you know that Dave does in fact have my truthful statement and i will have to appear before you in this case. if you have any further questions feel free to get a hold of me at any time thank you and sorry for any inconvenience that i may have caused. I look forward to hearing from you very soon.

* * *

Dulgar quit his job with the Company the day before the arbitration hearing convened. In doing so, Dulgar told Seeley that he did not want to testify at the hearing. Dulgar did not appear at or testify at the hearing.

Newsome also no longer works for the Company. Newsome did not appear at or testify at the hearing either.

DISCUSSION

The contract language applicable to this discharge case is found in Article IX of the collective bargaining agreement (CBA). There, it provides that the Company "may discharge any employee for good cause." What happened here is that the Company discharged Wallis. Given that disciplinary action, the obvious question to be answered here is whether the Company had good cause for doing so.

The threshold question is what standard or criteria is going to be used to determine "good cause." As is normally the case, neither the term "good cause" nor the more common

term “just cause” is defined in the parties’ CBA, nor is there contract language therein which identifies what the Company must show to justify the discipline imposed. Given that contractual silence, it’s up to the arbitrator to determine what standard of review he will use to review the employer’s discipline. While arbitrators differ in their manner of analyzing what good cause means, one commonly accepted approach – and the approach the undersigned has applied in hundreds of discipline cases – consists of addressing these two elements: first, did the employer prove the employee’s misconduct, and second, assuming the showing of misconduct is made, did the employer establish that the discipline it imposed on the employee was commensurate with the offense given all the relevant facts and circumstances. That’s the approach I’m going to apply here.

As just noted, the first part of the good cause analysis being used here requires a determination of whether the Company proved the employee’s misconduct. Before I address that matter though, the following context is important.

As was noted in the introductory paragraph of the **FACTS** section, in November 2014, two separate incidents occurred at the Company’s facility which involved inappropriate workplace behavior by someone. I’m referring, of course, to the sticker incident and the stolen radio incident. Management didn’t know who was responsible for either incident, so it did what management does under these circumstances – it investigated same to try and determine who the perpetrator was. In their investigation, the Company’s main focus was on the sticker incident. Since the offensive stickers were found on a piece of equipment in the Yard, the Company’s HR director (Seeley) started his investigation by interviewing the four employees who work in the Yard. Seeley ended up interviewing some of these employees several times. One of the employees who was interviewed several times was Wallis.

Following those interviews, Seeley concluded that Wallis had engaged in four acts of misconduct. He specified them as follows on the discharge notice:

- Insubordination
- Disobeying direct order
- Withholding information within an HR investigation(s)
- Involvement in racial slur sticker found on cab of shuttle lift

The first three items on this list deal with matters that occurred during Wallis’ interviews. The fourth item on this list involves the underlying sticker incident.

I’m going to address the fourth item on the discharge letter first because, chronologically speaking, it occurred prior to the other matters on the list.

As was noted in the **FACTS** section, someone printed out stickers on the label maker that said GINO SUCKS and NIGGER. Someone then stuck these two stickers on the cab of a piece of equipment in the Yard.

Before I address the question of who printed and posted those two stickers, I'm first going to comment on the significance of those stickers.

The undersigned surmises that if the person responsible for the stickers had just printed and posted the GINO SUCKS sticker, the Company would not have felt compelled to either investigate the matter and/or punish the perpetrator. Here's why. The record reflects that the Gino referenced on this sticker was a former employee. The word that I consider significant in the previous sentence is the word "former." Thus, the Gino referenced on this sticker no longer worked for the Company when that sticker was discovered on the shuttle lift. Had it been different - and Gino still worked for the Company when that sticker was discovered - then the Company would have been obligated to investigate the matter to ensure that its employees are not subjected to an offensive workplace environment. However, since the person referenced on the sticker was no longer an employee, that altered the landscape, so to speak. That's because broadly speaking, former employees do not usually complain to management about things after they are gone. Insofar as the record shows, that was the situation here (meaning that the former employee did not complain to the Company about his name being referenced in this fashion).

Having essentially just minimized the import of the GINO SUCKS sticker, I'm certainly not going to do that to the NIGGER sticker. That sticker used a well-known racial slur. It was offensive on its face. One of the Company's responsibilities is to ensure that it provides a workplace wherein employees are not subjected to racial slurs and taunts. That being so, it was a given that when the Company learned of the NIGGER sticker, it had no choice but to take action to ensure that it did not occur again. Failure to do so would be to the Company's detriment.

Having commented on the import of those two stickers, the focus now turns to the question of who printed and posted them.

While Seeley suspected that it was Wallis who did those things, Seeley decided that he couldn't prove it. As a result, Seeley decided to charge Wallis with what can fairly be described as a lesser offense. Seeley could do that. The lesser offense that Seeley came up with was that Wallis was "involved" in the "racial slur sticker" matter.

I've decided to structure my discussion on that charge by first addressing the other stickers. In my view, doing that helps put the NIGGER sticker in an overall context.

As was noted in the **FACTS**, the carbon copy roll on the label maker in the Yard office showed that five stickers were created on that machine. The three stickers germane to this discussion are the ones which said NIGGER, 26DILLY10, GINO SUCKS. While the import of the NIGGER and GINO SUCKS stickers has already been addressed, the 26DILLY10 sticker is different in that its meaning is not readily apparent. That's where the interviews with the Yard employees helped give the sticker some context. In those interviews, Seeley learned that DILLY was the nickname for employee Dillyn Dular. Seeley also learned that the

numbers 26 and 10 were the numbers that were on the old football jerseys for Wallis and Newsome, respectively. In that sense then, the reference to 26 and 10 has meaning when one considers that it referenced something that two employees had in common (namely, once being on the same football team). While Seeley learned the foregoing about the meaning of the 26DILLY10 sticker, he also slowly discovered who was involved in its creation. This happened as follows. Wallis twice denied that he had any involvement whatsoever with the 26DILLY10 sticker. After that, Newsome told Seeley that Wallis had given him that particular sticker. In his third interview, Wallis said – as he had previously – that he knew nothing about that sticker. When Seeley told Wallis that Newsome had identified him (Wallis) as the person who gave him (Newsome) that sticker, Wallis said that what Newsome said was true (meaning that Wallis had, in fact, given that sticker to Newsome). Since Wallis was in possession of the 26DILLY10 sticker and gave it to Newsome, it's logical to conclude that he (Wallis) must have been “involved” in creating and printing the 26DILLY10 sticker.

This conclusion is buttressed by the following. In his written statement, Dulgar said that he saw Wallis with the 26DILLY10 sticker in his hand. Dulgar said in that same statement that he also saw Wallis with the GINO SUCKS sticker in his hand. It logically follows from these unrebutted statements that Wallis was “involved” in creating and printing those two stickers.

Having just found that Wallis had some involvement with the 26DILLY10 and GINO SUCKS stickers, that still leaves the question of whether Wallis had any involvement with the NIGGER sticker. As the Union noted, Wallis denied any involvement with the creation of that sticker. To support that premise, the Union avers that Wallis did not know how to run the label maker. However, as noted above, I've already found that Wallis was “involved” in creating and printing the 26DILLY10 and GINO SUCKS stickers. While it's true that there's no proof that Wallis had anything to do with creating and printing the NIGGER sticker, the carbon copy roll on the label maker showed that sticker was made immediately before the 26DILLY10 and GINO SUCKS stickers. That being so, it's not much of a stretch to conclude that the NIGGER sticker was created and printed by the same person who created and printed the 26DILLY10 and GINO SUCKS stickers. Under these circumstances – where I've concluded that Wallis was “involved” in creating and printing the 26DILLY10 and GINO SUCKS stickers – I further find that he was likewise “involved” with the NIGGER sticker. In so finding, it is expressly noted that the level of proof that the Company had to supply to sustain this charge is very low. That's because the Company did not charge Wallis with being the perpetrator of the NIGGER sticker; instead, it just charged him with being “involved” with same. That's a low bar to clear, so to speak, and the Company cleared it.

Next, I conclude that the Company substantiated the charge on Wallis' discharge notice that he withheld information during an HR investigation. My basis for this finding is subsumed into the discussion above where it was noted that Wallis eventually admitted that he gave the 26DILLY10 sticker to Newsome. What's noteworthy about that admission is that it undercuts Wallis' previous denials of having anything to do with the 26DILLY10 sticker. It's apparent

from the foregoing that Wallis withheld information during the Company's sticker incident investigation. He should not have done that.

While my discussion thus far has been limited to the sticker incident, the charge on Wallis' discharge notice that he withheld information during an HR investigation was not limited to just that one topic. That charge also applies to the stolen radio matter. In the stolen radio matter, Seeley decided to not charge Wallis with stealing the radio. Instead, he simply charged Wallis with withholding information during the HR investigation into that matter. Once again, the Company could do that (make a lesser charge against Wallis). As a result of that lesser charge, I don't need to decide in this case if Wallis stole the supervisor's radio. Instead, the sole question related to the matter that's before me is this: Did Wallis withhold information during an HR investigation on the stolen radio matter? The record evidence conclusively establishes that he did.

The focus now turns to the two remaining charges in Wallis' discharge notice. Both charges involve Wallis' conduct during his third interview with Seeley.

One charge is that Wallis disobeyed a direct order. This charge references what Wallis did in his third interview after Seeley asked him to leave his office. Here's some pertinent context. Wallis had just acknowledged that he gave the 26DILLY10 sticker to Newsome. At that point, Wallis knew that his story was falling apart and his demeanor changed from being calm and collected to angry and agitated. He then announced he would not answer any more questions until his union representative was present. Seeley calmly responded that a union representative was not currently on duty so he was ending the meeting and suspending Wallis for the remainder of the day. Seeley's remark made Wallis more upset. Wallis then called Union Steward Mendiola who was not at work at the time. Responding to that, Seeley told Wallis that even if Mendiola could return to work, Seeley considered the meeting over. Seeley then directed Wallis to leave his office. Wallis didn't comply, but instead stayed where he was in Seeley's office. That was a big mistake on Wallis' part because when a supervisor tells an employee to do something, they are supposed to do it. Simply put, employees are to comply with work directives from management whether they like it or not. That's a so-called cardinal rule of the workplace. By refusing to leave Seeley's office when directed to do so, Wallis disobeyed a direct work order. Thus, the charge that Wallis disobeyed a direct work order was substantiated.

The final charge in Wallis' discharge notice is that he was insubordinate. This charge references what Wallis did after Olson intervened in the standoff between Seeley and Wallis and physically pulled Wallis out of Seeley's office. Olson then took Wallis upstairs to the employee break room and tried to calm Wallis down. Once he was there, though, Wallis began yelling various obscenities. These obscenities were directed at Seeley. Specifically, Seeley heard Wallis yell that he (Seeley) was a "dumbass mother fucker." That was another big mistake on Wallis' part. It would be one thing if Wallis had uttered this colorful phrase in a way that Seeley didn't hear it. Wallis didn't do that though. Instead, Wallis yelled it loud enough that Seeley, who was one floor down from Wallis, could still hear it. The Union tries

to minimize Wallis' action in this regard by emphasizing that Wallis didn't utter this phrase directly to Seeley's face. While that's true, it doesn't matter. That's because Seeley heard the obscenity and there's no question – given the circumstances – that the phrase was directed at him. Another so-called cardinal rule of the workplace is that employees are not supposed to cuss out and insult supervisors. Such language obviously undercuts the inherent authority of a supervisor in the workplace. That was especially true here because there were an unspecified number of employees in the break room while Wallis had his tirade. Since Seeley could hear at least part of Wallis' verbal diatribe against him, it can be surmised that the employees in the break room could hear it too. Seeley ultimately chose to characterize what Wallis did here as “insubordination.” While that term has many applications and usages in the workplace, the only application that needs to be addressed in the context of this matter is whether an employee calling their supervisor a “dumbass mother fucker” qualifies as insubordination. I find that it does.

Based on the discussion above, I find that the Company substantiated all four of the charges that it made against Wallis in its discharge letter.

* * *

Next, I'm going to address the defenses which the Union raised to try to excuse Wallis' actions or deflect blame elsewhere.

First, the Union contends that Seeley “harassed” Wallis during his interviews. I find no support in the record evidence for that contention. As for the Union's implicit related contention that Wallis was subjected to an unreasonable number of interviews, it suffices to say that an employer has an inherent right to interview employees as many times as they want.

Second, the Union contends that Wallis should not have been charged with disobeying a direct order because he eventually left Seeley's office and later the building. Thus, as the Union sees it, Wallis complied with Seeley's directive. This defense misses the mark because it ignores the fact that Seeley twice directed Wallis to leave his office, and Wallis twice refused to do so. It's noteworthy that even when Wallis did leave Seeley's office, he didn't do so on his own accord. Instead, what happened was that another employee – Chris Olson – literally and figuratively grabbed Wallis and pulled him out of Seeley's office. Under these circumstances, Wallis does not get credit for complying with Seeley's directive to leave his office.

Third, I'm going to address the contention that Wallis raised at the hearing that his standoff with Seeley occurred after he told Seeley that he (Wallis) wanted union representation. While it's true that employees have the legal right to have union representation in meetings which can lead to discipline – such as this kind of meeting at issue here – there was a practical problem with complying with that request here. It was this: the union representative that Wallis wanted present was Mendiola and he (Mendiola) was not at work at the time. Seeley told Wallis that under those circumstances (where Wallis wanted Mendiola present and Mendiola

was not at work), their meeting was over and would resume the next morning (when a union representative could be present). While Wallis wanted the meeting to continue yet that day, Seeley decided that their meeting was over. That was Seeley's call to make. Said another way, Wallis did not get to dictate whether his meeting with Seeley continued that same day.

Finally, the Union attacks the credibility of former employee Dulgar. Dulgar is the employee who told Seeley that Wallis "did it." Additionally, as part of Seeley's preparation for this hearing, Dulgar wrote out a statement for Seeley wherein he said, among other things, that he saw Wallis with the 26DILLY10 and GINO SUCKS stickers in his hand. The Union contends that Dulgar later contradicted these statements in the email he sent to Burke on January 31, 2015. Specifically, the Union relies on the second sentence in that email which said: "You got a written statement from me a while back that I'm afraid isn't true." According to the Union, that statement undercuts Dulgar's credibility. In order to determine if that's the case, I need to review what Dulgar wrote. When Dulgar made this reference to a "written statement" that "isn't true," it's unclear to the reader whether Dulgar was referring to Burke's interview notes with Dulgar (which Dulgar signed) or the written statement Dulgar made about Wallis' involvement in the sticker matter. Dulgar made the latter statement at Seeley's directive. Both of these documents could be considered "written documents." Notwithstanding this confusion, I conclude that the second sentence in that email referred to Dulgar's conversation with Burke (when Burke interviewed him). Here's why. Later in Dulgar's email he said: "I wanted to write you to apologize for any extra work I may have caused in lying to you" The last word just referenced ("you") had to refer to Burke because Dulgar sent that email to just one person – Burke. Seeley was not even copied on the email. Thus, Dulgar admits that he lied, but the person who he lied to was Burke, not Seeley. In that same sentence, Dulgar goes on to say that "Dave does in fact have my truthful statement" The inference which I draw from the foregoing is that Dulgar stands by the written statement he gave to Seeley and disavows what he told Burke. Dulgar's doing that buttresses the conclusion I already reached that Wallis was indeed involved in creating and printing the three stickers referenced above.

Having reviewed those defenses and found them unpersuasive, I find that Wallis is responsible for his actions. Those actions constituted misconduct.

* * *

The second part of the good cause analysis being used here requires a finding of whether the disciplinary penalty which the Company imposed was appropriate under the circumstances. Based on the following, I find that it was. First, it is noted that nothing in the parties' CBA requires that a lesser form of discipline had to be issued in this particular case. All the CBA says is that the normal progressive disciplinary sequence is for an employee to receive a written warning prior to discharge. That had happened here because Wallis received a written warning just two months prior to his discharge. Second, in many discipline cases, the Union makes a disparate treatment argument that attempts to show that other employees engaged in the same type of misconduct but received lesser discipline (than was imposed here).

In this case, the Union made no such argument. The obvious inference under these circumstances is that no other employee had ever engaged in the same type of misconduct that Wallis did and was not fired for it. It therefore follows that Wallis was not treated unfairly or subjected to disparate treatment in terms of the punishment imposed. Finally, in those cases where I've overturned a discharge, or reduced discipline, one common reason why I've done that is because a charge or charges made against the employee was not substantiated. Here, though, that did not happen. As my discussion shows, I found that the Company substantiated all four of the charges that it made in its discharge notice. Since those charges were substantiated, I have no objective factual basis for overturning the discharge.

Given the foregoing, I find that Wallis' discharge was not excessive, disproportionate to his offenses, or an abuse of management discretion, but rather was reasonably related to his proven misconduct. The Company therefore had good cause to discharge Wallis.

In light of the above, I issue the following:

AWARD

That the Company had good cause to discharge James Wallis. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 24th day of June 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones, Arbitrator