

Block #1

FEDERAL MEDIATION AND CONCILIATION SERVICE

Opinion and Award in the matter of the arbitration between

Employer (Michigan)

- and -

Union

GRIEVANCE IDENTIFICATION:	Employee Suspension
DATE OF GRIEVANCE:	October 3, 2006
DATE OF HEARING:	June 26, 2007
LOCATION OF HEARING:	City A, Michigan
DATE HEARING CLOSED:	June 26, 2007
DATE POST-HEARING BRIEFS FILED:	August 31, 2007
DATE RECORD CLOSED:	September 7, 2007
ARBITRATOR:	Richard N. Block

ISSUE

Did the Employer violate the collective bargaining agreement when it imposed a two-day suspension on the grievant on October 2, 2006? If so, what shall the remedy be?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE III
MANAGEMENT RIGHTS

Section 3.0 Management Rights

(a) The Employer Council, on its own behalf and on behalf of its electors, hereby retains and reserves unto itself and its designated representatives when so delegated by the Employer Council, all powers, rights, duties, and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Michigan and the United States. Among the rights of management, included only by illustration and not by way of limitation, is the right to hire, recall, transfer and promote employees; to transfer, enlarge, combine, decrease, divide, and rearrange jobs and functions, as well as to assign work as it deems necessary; to reprimand, demote, suspend, discipline and discharge employees; to lay off employees for lack of work or other legitimate reasons; to establish rules; and to maintain discipline and efficiency of employees. The Union reserves the right to grieve when action taken by the Employer under this Section is contrary to a specific and explicit limitation of such Employer rights contained in this Agreement.

FACTS AND BACKGROUND

The public works employees in the Employer, Michigan (hereinafter the Employer)¹ are represented for collective bargaining purposes by Union (hereinafter the Union). There are four full-time employees in the bargaining unit. The grievant in this case, Mr. Employee (hereinafter the grievant), is a lifelong resident of the Employer. The grievant was hired by the Employer on April 15, 1996. His current classification is laborer. On October 2, 2006, the grievant was issued a two-day suspension for an incident that occurred on September 29, 2006.

This case has its roots in incidents that occurred in the spring of 2006. During that period of time, Employer Manager and Police Chief Person 1 had received phone calls from citizens that the grievant had been making disparaging remarks about the Employer. Mr. Person 1 testified he had also heard from members of the Employer Council that the grievant had been complaining about various matters.

Separately, the grievant had previously made an appointment with Mr. Person 1 for May 15 to discuss a hardship-based withdrawal of funds from his pension account, as such a

¹ The Employer has a population of 2,272.

withdrawal required Mr. Person 1's approval. Mr. Person 1 approved the pension withdrawal but took advantage of the meeting to discuss with the grievant the matters regarding the grievant that had been brought to his attention. Mr. Person 1 informed the grievant that he should consider the meeting a counseling session and that he could not tolerate the grievant refusing to bring his complaints through the chain of command. He offered the grievant paid time off to seek other employment, as he concluded that the grievant was unhappy working for the Employer. He also informed the grievant that another such incident would be taken seriously. Mr. Person 1 testified that the grievant declined the offer of paid time off but thanked him for bringing the matter to his attention. The record establishes that a counseling memo was placed in the grievant's personnel file and no grievance was filed as a result of the meeting.

The grievant testified that at the end of the meeting, Mr. Person 1 said to him, “[S]hut your trap, shut your trap, shut your trap, shut your trap and if you don't, I guarantee you are going to wish you had.” The record establishes that Mr. Person 1 did not inform the grievant in advance of the meeting that other matters besides the pension withdrawal would be discussed (Employer. Ex. 8).

On September 25, 2006, the grievant was issued a verbal reprimand because he was observed outside of his work area and interfering with the work of another employee (Jt. Ex. 7). The grievant admits he was speaking with another employee but testified that he was asking that employee a work-related question. This reprimand was not grieved.

The next incident involving the grievant, and the incident that led directly to the suspension, occurred on Friday, September 29, 2006. On that day, the grievant's supervisor, Person 2, had distributed a survey to the four public works employees (Jt. Ex. 5). The grievant was handed his survey by two of his co-workers, as Mr. Person 2 had left the public works

building by the time the grievant arrived at the building. Mr. Person 2 asked the employees to complete the survey over the weekend and return the completed survey to him on Monday, October 2. The grievant testified that, because of the September 25 discipline, he believed the purpose of the survey was to single him out and use the answers against him. The grievant testified he went to the Building A (the Employer offices) to see Mr. Person 1, but Mr. Person 1 was not in the building.

The office of Employer Finance Director Person 3 is also located in the Building A. Ms. Person 3 testified that the grievant came to her office at approximately 3:30 pm on September 29. The grievant testified that he went to Ms. Person 3's office because she often handles personnel matters, she was a long-service employee of the Employer, and he had often discussed matters with her. Ms. Person 3 testified that the grievant was upset and angry and that his voice was "loud and aggressive." She also testified that the grievant was holding the survey in his hand and asked her if the survey had come from her office. Ms. Person 3 responded that she had not seen the survey, although she knew what it was because Mr. Person 2 had talked about it. Ms. Person 3 testified that the grievant called Mr. Person 2 a "fucking peckerhead," although she also testified that the grievant was "just blowing off steam."

The grievant testified that he was concerned because he had been written up only a few days before the survey, and he thought that the survey might be used to place his job in jeopardy. The grievant testified that when Ms. Person 3 said she did not know anything about the survey, he said "it must be something my boss came up with" and he "added an adjective or two."

Ms. Person 3 testified that former Employer President Person 4, who, with an electrician, was working on some electrical wiring in a room across the hall, heard the conversation and asked if everything was "OK." Ms. Person 3 testified that Mr. Person 4 was in her office for less

than a minute. She testified that the grievant then left the office and went into the lobby of the building.

The record establishes that while the grievant was in the lobby, he encountered Employer President Person 5, who was in the building to check her mail. Ms. Person 5 testified she greeted the grievant. Ms. Person 5 testified that the grievant started to talk to her, and that he seemed upset and agitated. Ms. Person 5 testified that the grievant produced an envelope and pulled out a document from the envelope (Employer. Ex.10). Ms. Person 5 testified that the grievant asked her if she knew anything about the questionnaire, and wanted her opinion on it. Ms. Person 5 testified that the grievant's voice was louder than a typical conversational voice, although the grievant testified that he did not believe his voice was loud. Ms. Person 5 also testified that the grievant complained about his supervisor, Mr. Person 2, as well as other matters. Ms. Person 5 then testified that the grievant described a recent incident where he had been given a task. Following completion of the task, the grievant needed more instruction and looked for another DPW employee, Person 6. Ms. Person 5 testified that the grievant told her that Mr. Person 2 saw them talking. Ms. Person 5 testified that the grievant told her Mr. Person 2 told him to take direction from him and not coworkers, and that the grievant seemed to be upset about that (Employer. Ex.10).

Ms. Person 5 testified that she repeatedly told the grievant that there was a complaint procedure in place plus the collective bargaining agreement, and that he should be taking the issues up with his supervisor, Mr. Person 2. Ms. Person 5 testified that the grievant left the building around 4 pm (Employer. Ex.10).

Ms. Person 5 also testified that she has known the grievant since the mid-1990s, and she did not feel physically threatened by the grievant. Ms. Person 5 testified that the grievant was not antagonistic towards her, but that he was agitated about the questionnaire.

The record establishes that the grievant completed the survey and gave the completed survey to Mr. Person 2 on October 2. The grievant testified Mr. Person 2 looked at his answers and shredded the completed survey without discussing his answers.

On October 2, Mr. Person 1 called the grievant into his office. In response to Mr. Person 1's inquiry, the grievant declined representation by another employee. At the end of the meeting, Mr. Person 1 handed the grievant a letter informing him that he was suspended for two days for failing to follow the complaint procedure² and violating Work Rules 12³ and 16.⁴ On October 3, the Union filed a grievance on the grievant's behalf. The parties were unable to resolve the grievance, and the instant arbitration resulted.

POSITIONS OF THE PARTIES

Position of the Employer

The Employer contends that the grievant engaged in the actions that were the basis of the suspension. The Employer notes that the grievant had been previously warned about following the chain of command in the Employer. The Employer also notes that the grievant was upset about the questionnaire, and entered the Building A and complained about the questionnaire in a loud and angry tone to Ms. Person 3 and Ms. Person 5. The Employer notes that the grievant also

² The Employee Policies and Procedures Handbook promulgated by the Employer includes a complaint procedure (Jt. Ex. 6).

³ Work Rule 12 prohibits “(t)he making or publishing of a false, vicious, malicious, or disparaging statement concerning any employee, supervisor, or the Employer” (Jt. Ex. 6).

⁴ Work Rule 16 prohibits “(d)isorderly conduct, horseplay, threatening, abusing, or misplacing property belonging to the Employer or another employee” (Jt. Ex. 6).

referred to his supervisor as a “fucking peckerhead.” This tantrum attracted the attention of outside contractors who were working in the building. The Employer notes that the grievant made no attempt to discuss his concerns with Mr. Person 2 or Mr. Person 1.

The Employer notes that there is no significant conflict in the testimony regarding the facts of the case. Mr. Person 1, Ms. Person 3, and Ms. Person 5 all agreed on the occurrences on September 29. Any differences between their testimony and the testimony of the grievant must be resolved in favor of the Employer, as the grievant, like all disciplined employees, has an incentive to testify falsely in order that the discipline will be reduced or overturned.

The Employer notes that, if the grievant had complaints or concerns, he had an obligation to follow the chain of command. This is a reasonable requirement and essential to the efficiency of any workplace. The grievant could have spoken to his supervisor, used the complaint procedure in the handbook, or, if he believed the Employer had violated the collective bargaining agreement, filed a grievance under the collective bargaining agreement.

The Employer notes that the grievant violated Handbook Rule 12, which prohibits making a “false, vicious, malicious, or disparaging statement” about an Employer employee or supervisor. The grievant repeatedly criticized his supervisor and referred to him as a “fucking peckerhead.” This profanity constituted a vicious and malicious personal attack on this supervisor.

The Employer also argues that the grievant violated Handbook Rule 16, which prohibits “disorderly conduct, horseplay,” and “threatening, abusing,” harassing, or interfering with another employee, supervisor, or member of the public. The grievant accosted Ms. Person 3 and Ms. Person 5 in the hallway while they were performing official duties and confronted them in a loud, angry manner. The grievant’s conduct attracted the attention of the electrical contractors. It

clearly meets the standard of disorderly conduct and threatening, abusing, harassing, and interfering with another employee or supervisor.

The Employer argues that this conduct was serious. The grievant had been warned about it on a previous occasion. Based on this, the Employer contends that the two-day suspension was lenient; it was clearly warranted. Thus, the Employer requests that the grievance be denied.

Position of the Union

The Union contends that the grievant's actions on September 29, 2006, did not warrant discipline. The Union contends that the grievant did not violate the Employer's complaint procedure, did not make vicious, malicious, or disparaging comments to Ms. Person 3 and Ms. Person 5, and did not constitute a threat that affected the orderly conduct of the Employer's business.

The Union contends that the grievant attempted to follow the chain of command. The grievant was concerned that the survey was to be used against him; the grievant was unaware that the survey would be distributed. He received the survey from another employee and the employees on duty were unable to answer his questions. Mr. Person 2 was also not available to answer his questions. The grievant sought out Mr. Person 1, but he was not available. The grievant then spoke to Ms. Person 3, with whom he had previously dealt on employee relations matters. The meeting with Ms. Person 5 was by chance. The grievant was upset. He had legitimate concerns about the survey. He had every right to ask supervision about the survey. The Union notes that, eventually, he did complete the survey.

The Union also contends that the grievant also did not engage in disorderly or harassing conduct. He was in the Building A for only 10-15 minutes. Ms. Person 3 testified that she was not offended or frightened by the grievant's remarks. He was simply "blowing off steam." The

grievant was not out of control, menacing, or disruptive. Rather, the Union contends that the grievant's actions were in direct response to the Employer's unprofessional actions in distributing the survey without anonymity.

The Union also notes that the grievant is a long-time member of the community. He grew up in the Employer, attended school there, and has a life-long acquaintance with many residents. Community matters are discussed, and, in this small community, some comments made their way back to Mr. Person 1. The grievant was not aware that Mr. Person 1 was referring to these community actions when he mentioned that the grievant had not followed the "chain of command."

As an Employer employee, the grievant does not forfeit his First Amendment rights. Discussion of labor matters are of public concern and an employee may not be disciplined for discussing them.

The Union contends that the incident on September 29 was minor. It did not warrant a two-day suspension. The Union requests that the grievant be awarded back pay and the discipline be removed from his record.

DISCUSSION

Although the collective bargaining agreement in this case does not contain a "just cause" limitation on discipline, I find that such a limitation is implied. The "just cause" limitation on discharge is sufficiently well-established in arbitration that an arbitrator must require clear and irrefutable evidence that the parties did not intend to require the Employer to show just cause for discipline.⁵ No such evidence has been offered in this case.

⁵ *Elkouri and Elkouri: How Arbitration Works*, 6th Ed., Alan Miles Ruben, Editor-in Chief, Washington, D.C.: The Bureau of National Affairs, 2003, pp. 930-31.

In a discipline or discharge case under a just cause provision, there are three questions that must be addressed: (1) did the grievant commit the act or acts for which he was disciplined or discharged?; (2) if so, did the employer provide the grievant with due process?; and (3) if so, did the employer take into account all mitigating circumstances? Each of these questions will be addressed.

Did the Grievant Commit the Act or Acts For Which He Was Disciplined?

The discipline in this case was issued because of the grievant's actions on September 29, 2006. The Employer claims that those actions violated its rules and policies.

The Employer's discipline was based primarily on the testimony of Ms. Person 3. Ms. Person 3 testified that the grievant was "loud and aggressive" when he came to her office to inquire about the survey, and that he called Mr. Person 2 a "fucking peckerhead." Ms. Person 3 also testified that the grievant's volume was such that it attracted the attention of two persons working in the room across the hall. I find Ms. Person 3 was a credible witness. She does not supervise the grievant, so she would have no interest in whether the grievant receives discipline. The grievant testified he has spoken to her in the past; therefore the record establishes that she holds no ill will towards the grievant that would constitute a motive for fabricating testimony against the grievant. Moreover, the testimony of Ms. Person 3 was uncontroverted.

Accordingly, I find that the record establishes that the grievant was loud and aggressive and used profanity toward his supervisor in the Employer Hall, a public building, during business hours. The grievant's use of profanity constitutes "(t)he making or publishing of a . . . vicious, malicious, or disparaging statement concerning (a) supervisor" in violation of Work Rule 12. His volume and the fact that he attracted the attention of uninvolved bystanders constitute "(d)isorderly conduct" in violation of Work Rule 16.

I find without merit the Union's contention that the grievant did not engage in disorderly conduct. Clearly, using profanity in a loud voice in the Employer offices at a time when the building was open to the public constitutes "disorderly conduct." The fact that the grievant may not have harassed anybody, acted in a disruptive or menacing fashion, or that Ms. Person 3 was not frightened by the grievant's remarks is irrelevant. His conduct was disorderly, and that is sufficient to constitute a rule violation. That the grievant may have been "blowing off steam" does not excuse his behavior.

Even if it is assumed that the grievant's actions were in direct response to the Employer's actions in distributing the survey without anonymity, and even if it is assumed that the survey could have been administered differently, the grievant's actions are still not excused. That the grievant may have been concerned about the survey did not give him license to use a profanity to describe Mr. Person 2 or to raise his voice in public. Whatever concerns the grievant had regarding the survey could have been addressed the following Monday, at which time the grievant could have contacted his union representative.

The grievant was also disciplined for failing to use the chain of command regarding his complaints. This discipline was based on his encounter with Ms. Person 5 on September 29 immediately following his statements to Ms. Person 3. The testimony of Ms. Person 5 and the grievant establishes that the grievant raised his concerns about the survey and Mr. Person 2 with Ms. Person 5. Clearly, Ms. Person 5 was not part of his chain of command. In addition, it was improper to discuss the matter with Ms. Person 5 in public. Although neither Mr. Person 2 nor Mr. Person 1 were available on September 29, as noted, there was no reason offered on the record why the grievant could not have waited until the next business day, October 2, to raise his concerns within the chain of command or to file a grievance. Based on the foregoing, I find the

grievant's actions in raising his concerns with Ms. Person 5 constituted a failure to use the chain of command, in violation of the work rules.

The grievant's conversation with Ms. Person 5 does not constitute an exercise of free speech. The grievant was not raising a concern as a member of the community. Rather, he was raising a personal employment-related matter with Ms. Person 5. Even as a citizen, the grievant still has the obligations of an employee.

Did The Employer Provide the Grievant with Due Process?

There is no contention on the part of the Union that the Employer denied the grievant due process. I also find that the grievant's actions were sufficiently serious that they warranted a two-day suspension. Acting in a disorderly manner and using a profanity to describe a supervisor in an area open to the public are serious offenses. Given the grievant's actions, it is not unreasonable for the employer to skip oral and written warnings and impose a suspension.

Did The Employer Take Into Account All Mitigating Circumstances?

The only circumstances on the record that might be considered mitigating are the facts that the grievant is a long-time resident of the Employer and a ten-year employee. Even if these are mitigating circumstances, the discipline imposed was not discharge with a job loss, but a two-day suspension. Thus, these circumstances, even if they are considered mitigating, are given less weight than they would be given in a discharge case. Accordingly, I find that mitigating circumstances do not warrant reduction of the penalty.

CONCLUSION

The Employer did not violate the collective bargaining agreement when it imposed a two-day suspension on the grievant on October 2, 2006.

AWARD

The grievance is denied.

October 23, 2007

Richard N. Block
Arbitrator
East Lansing, Michigan