

Brooks #4

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION

BETWEEN:

Employer (Michigan)

and

Union

Grievant: Employee,

DECISION AND AWARD

DECISION

The issue here is whether the discharge action against Grievant should be invalidated because of the Employer's alleged denial of her procedural rights under the Labor Agreement during an investigation by the Employer which led to her permanent removal for the active payroll.

By direct appointment, the parties selected the undersigned to arbitrate and issue a final and binding Award in this matter. He conducted an evidentiary hearing on the matter at the Employer Hall on July 14, 1983 at which time the parties were given full opportunity to call, examine, and cross-examine witnesses and to offer relevant documentary evidence. All witnesses were sworn prior to testifying.

The Collective Bargaining Agreement which the undersigned has been called upon to interpret covers the period of July 1, 1980 -June 30, 1982.

DISCUSSION:

When the moving events in this case occurred, Grievant, a Clerk-Typist II in the Employer Police Department headquarters, had been an Employer employee for over twenty-seven years and was eligible to retire. On February 7, 1983, at 9:49 a.m., Grievant was called into a meeting at police headquarters with Lt. Person 1, who is the Supervisor of the Department's Internal Affairs Unit, Lt. Person 2, and Deputy Chief of Police Person 3. Lt. Person 1 explained that the Department was engaging in a criminal investigation of Grievant's activities in connection with the money she handled in the course of her job duties and he read her constitutional rights to her. She was informed that (1) she had the right to remain silent; (2) anything she stated could be used against her in a court of law; (3) she had the right to have an attorney present before and during any questioning; and (4) if she couldn't afford a lawyer, the court would appoint one for her before any interrogation commenced. Grievant stated that she would voluntarily cooperate with the investigation and waived in writing her above-enumerated rights. The interrogation which ensued was tape recorded.

After being confronted with incriminating evidence against her, Grievant confessed that, for over a period of perhaps a year, she had been embezzling cash she received in the course of furnishing copies of accident reports to the public. The Police Department charges a fee for copies of such reports. Grievant indicated that she wrongfully took an average of about \$14.00 a week in this manner.

Later, during the middle of the investigation, Grievant inquired whether she was going to lose her job and Lt. Person 1 replied, "Employee, that isn't up to me, okay." At the end of the meeting, Deputy Chief Person 3 informed Grievant that she was "suspended as of today pending this investigation." She then inquired how her retirement rights were going to be affected and

Deputy Chief Person 3 responded that he couldn't answer that question and that Lt. Person 1 would get in touch with her.

Immediately prior to this meeting with Grievant, Lt. Person 1 telephonically alerted Employer Labor Relations Supervisor Person 4 that Grievant was going to be interviewed in the course of a criminal investigation, and thereafter an employment relations interview with her and her Union representative might be in order. Mr. Person 4 alerted Local Vice-President Person 5 because the regular steward was unavailable and informed Person 5 that, if an employment interview with Grievant was held, it might lead to discipline.

Immediately after the first interview concluded, Lt. Person 1 telephoned Mr. Person 4 who, together with Local Vice-President Person 5, came to police headquarters and met with Lt. Person 1, Lt. Person 2, and Grievant. Mr. Person 4 informed Grievant that the employment relations investigation about to be undertaken could lead to discipline. Lt. Person 1 commenced the meeting by explaining that Grievant had been relieved from duty pending whatever action the Labor Relations office might take and Grievant then volunteered that she had taken the money in question. Mr. Person 4 then suspended Grievant pending a discharge hearing at the Employer Manager level and informed Lt. Person 1 that Grievant was to be given the opportunity to talk with Union Representative Person 5 before leaving the building and was to be paid until she completed any such discussion. The second meeting ended about 10:55 a.m. and Grievant was paid until 11:00 a.m. that day.

On February 16, 1983, Grievant was given a hearing at the Employer Manager level pursuant to Title VII, Section 108 of the Employer Charter. The same day, the Employer Manager sent a letter to Grievant notifying her that she was discharged effective February 7, 1983, the date of her suspension.

On February 23, a grievance on Grievant's behalf was filed alleging that Article IV, the Management Rights clause which gives the Employer the "right to discipline or discharge for proper cause" and Article XI, Section 6, were violated. Article XI, Section 6. Investigatory Interview, states:

In the event a complaint is made against an employee or where any investigation is conducted which may result in disciplinary action, the following procedures shall apply:

- a. If, during the investigation, an employee is requested to appear before a member of Management, he or she shall be fully advised of the nature of the investigation and that the investigation may result in disciplinary action.
- b. Upon the request of the employee for Union representation, such request shall be granted and the Union shall immediately provide such representation. When such representation has been requested, no questioning shall commence until the Union representative is present (Steward or Chief Steward or Executive Steward).
- c. Employees shall be required to answer questions relating to his/her performance or conduct as an employee of the Employer as it relates to the investigation. Refusal to answer such questions may result in disciplinary action, including discharge.

The Union observes that the opening paragraph of Section 6 provides that the procedural safeguards afforded employees in sub-paragraphs a. and b. of that Section shall apply to "any investigation... which may result in disciplinary action". (Emphasis added) Hence, according to the Union, the Employer had the obligation at the commencement of the first investigatory interview of Grievant by Lt. Person 1 fully to advise her, as it did at the beginning of the second interview conducted by Labor Relations Supervisor Person 4, of the nature of the investigation and that the investigation might result in disciplinary action. Although the transcript of the first interview reveals that Grievant was adequately advised of the nature of the investigation, it is clear that she was not informed, in so many words, that it might lead to disciplinary action against her.

Article IX, Section 3, Step 2.13(b), which was added to the Agreement during the 1980-82 contract negotiations, provides that stealing and possession or use of drugs during working hours or on Employer property are proper causes for summary discharge. Rule 1 of the Employer's Rules and Regulations, which apply to employees in Union's bargaining unit, makes stealing Employer property grounds for disciplinary action up to and including discharge. The Employer argues that it was obvious to Grievant at the beginning of the criminal investigatory interview that proof that she stole Employer money necessarily might result in disciplinary action against her. It is noted in this respect that Grievant testified before the undersigned that she assumed at the commencement of the criminal investigatory interview that she might be disciplined.

The Employer argues in effect that, if is assumed, arguendo; that the Section 6 requirement were applicable to the first interview, no harm resulted from the failure to notify Grievant that the investigation might result in disciplinary action because it was obvious to her from the outset that she might be disciplined and reiterating the obvious would have accomplished nothing.

As the Union analyzes the situation, Grievant had the absolute right to the notice required by Section 6(a) and the Employer's failure to provide it prejudiced her rights: Although Mr. Person 4 did comply fully with the requirements of Section 6(a) at the commencement of his investigation, Grievant having confessed to her guilt just moments before, was in no position to do otherwise during the second interrogation. Hence, according to the Union, the second confession was invalid and improperly was used to establish proper cause for the ensuing involuntary termination.

Because the undersigned agrees with the Employer that Article XI, Section 6 was inapplicable to the first interview, he finds it unnecessary to resolve the questions discussed above pertaining to the effect of Grievant not having been informed at the first interview that discipline might result. Article XI, which is entitled "Discharge and Discipline", involves activities and actions which affect the employment relationship between the Employer and its employees and Section 6 must be read in that light.

Grievant's first interview was part of a criminal investigation which took place because a law had been broken and not because Grievant was an employee of the Police Department whose employment status had to be re-evaluated. Similar conduct by a member of the Union bargaining unit employed elsewhere within the Employer government or by a non-Employer employee in respect to the property of his/her employer could result in a similar investigation by the Employer Police Department. As Lt. Person 1 indicated in effect to Grievant, his interview was not intended to, and did not, deal with Grievant's employment rights, the only subject matter with which Section 6 is concerned.

As the Employer noted during the oral argument, if Section 6 also applies to investigations by the Police Department of alleged criminal activity of Union bargaining unit members, complications develop in respect to those individuals' constitutional rights. Section 6.c requires the employee to answer questions during an investigatory interview on pain of possible disciplinary action, including discharge, for refusing to do so.¹ However, during a criminal investigation, any individual may exercise his/her fifth amendment rights against self - incrimination and remain silent. The Union attempts to avoid this dilemma by arguing

¹ Sponick et. al. v. Detroit Police Department, 49 Mich App 162 (1973), suggests that clauses similar to Section 6.c are valid under Michigan law: 'The City employee must obey the command of the clause to answer questions related to his work performance or conduct, but such statements may not be used in subsequent criminal prosecutions against the employee.'

that an employee is entitled to both his/her constitutional rights and his/her rights set out in Section 6.a and b of the Agreement. However, when the employee's constitutional rights clash with the employee's Section 6.c duty to answer questions, the Section 6.c duty is abrogated because the Federal Constitution has a preemptive effect.

The difficulty with this argument is that it selectively applies the Section 6 term "any investigation" only to those provisions of Section 6 which benefit the employee. Searching within the four corners of Section 6, one finds nothing which justifies such a selective and awkward reading of that Section and there is no evidence in the record extrinsic of the Collective Bargaining Agreement which suggests such a reading was intended by the parties.

Grievant's first interview was part and parcel of an investigation intended exclusively to determine whether she should be prosecuted for embezzling funds from the Employer. The interview was not intended to, and did not, serve the purpose of determining whether she should be disciplined as an employee. Although Deputy Chief Person 3 informed Grievant at the end of the criminal investigation interview that she was suspended, the purpose was to remove her from her desk, where she might destroy evidence useful in the criminal case, pending an employment relations investigatory interview which was to, and did, take place very shortly thereafter. It was at this second interview when the determination was made that Grievant should be suspended from the payroll and exactly when this was to Occur.

It is possible to conduct an investigatory interview which seeks to determine both whether an individual should be prosecuted for committing a crime and whether the individual should be disciplined as an Employer employee. The manner in which Section 6 applies in such an instance is not dealt with here. When the investigatory interview of an Employer employee has only a single purpose, namely, to determine whether to prefer criminal charges against the

person, as was the case here, the undersigned concludes that Article XI, Section 6 is inapplicable. Accordingly, Grievant's contractual rights were not denied to her because Lt. Person 1 did not inform her at the beginning of the criminal investigatory interview that it might result in disciplinary action.

AWARD

Grievance dated February 23, 1983, protesting the action by the Employer which suspended and then permanently removed Employee from the active payroll, is without merit and is denied.

Jerome H. Brooks

Arbitrator

Dated: August 2, 1983