VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

Between:

Union,

-and-

CASE: LYONS #6

THE UNIVERSITY,

Employer.

Gr: Jim Green/Suspension

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OPINION AND AWARD

BACKGROUND /FACTS

The Grievant, a long service employee, is classified as Athletic Facility Worker II and assigned to the University golf course. The particular incident that gave rise to a three day disciplinary layoff allegedly occurred on February 16, 2004. The Grievant was charged by the Assistant Athletic Director, in relevant part:

> . . . In this incident, it was alleged that while you were driving in a University vehicle, you passed two co-workers in their vehicle on the north side of Big Arena and called them "fucking assholes." The follow-up investigation has shown that this incident did take place. Not only is this an example of harassment and attempted intimidation of fellow employees but you were needlessly out of your work zone at the time that it happened.

After a review of his disciplinary record, including a 10-month disciplinary layoff, he was given a 3-day unpaid DLO (Joint Ex. 3). The Grievant's immediate supervisor was not involved in the disciplinary process or recommendation. Rather, the supervisor of the co-workers, the Assistant Athletic Director, Facilities and Game

Operations, Mr. Carrot, issued the discipline. He is not in charge of the University golf course as a part of his responsibilities. Both he and one of the co-workers gave testimony in the Grievant's termination case that the writer heard. (Joint Ex. 4). The Grievant had been terminated in August, 2002 by Mr. Carrot. The Grievant was reinstated but without back pay in May, 2003. One of the witnesses, Diane Apple was also involved and referred to as a co-worker. The other worker is her husband, who is also employed by the University. The parties could not settle this dispute and a grievance was filed February 20, 2004.

The 2nd Step answer given in March, 2004, states in relevant part that:

> Our investigation shows that you initiated inappropriate communication with two employees with whom you have had a problematic relationship in the past. Although you deny the allegation, our investigation leads us to conclude that you did engage in the misconduct for which you were disciplined. In the hearing you contended that the employees who accused you of the misconduct, had in fact consistently harassed you by coming into our work area, and on at least two occasions, one of them "flipped you off' (that is, made what is generally considered to be a profane hand gesture). You stated that you informed your supervisor of this, and that the employees were supposed to not enter your work area. The investigation shows that the employees in question were not told to not come into your work area (the golf course), but were advised that they should call and notify supervision first, so that if possible, you could be removed from the area to reduce the chances of you seeing them. This was not due to any misconduct that could be determined they were engaging in, but to reduce your negative reaction and subsequent loss of productivity. The activities that the employees were engaging in were work duties such as getting gasoline, and driving a forklift along the off-road pathway from the golf course to the new tennis facility. . . .

The grievance was denied and the matter was appealed to arbitration. At hearing the Grievant and Scott Peach, Grounds Keeper II (crew leader/team leader), testified on behalf of the Grievant and in support of the grievance. The Employer

presented Diana Apple, Vince Apple, both employees of Athletic Facility Department, and Mr. Carrot, Assistant Athletic Director.

In addition to the above, the following exhibits were admitted:

J-1 Collective Bargaining Agreement
J-2 Grievance Chain (grievance and 2nd Step answer)
J-3 Suspension Notice
J-4 Arbitration Award dated May 27, 2003
J-5 Prior discipline (7/11/02)
J-6 Prior discipline (4/29/02)
E-7 Grievant's notes from his daily diary

The standard of review of disciplinary matters is one of just cause and is clearly set forth in the Collective Bargaining Agreement, Article 38, Discipline, Section A, paragraph 287a.

ISSUE

WHETHER THE 3-DAY SUSPENSION WAS FOR JUST CAUSE?

DISCUSSION

In this case the testimony presented by the Apples indicates that on February 16, 2004 while they were exiting the Big Arena in their vehicle, the Grievant passed them in a vehicle. He apparently mouthed the words referred to in Joint Ex. 3. The Grievant claims that both individuals "flipped him off" at the time. They deny that occurred. Likewise, the Grievant denies that he said or mouthed anything.

Joint Ex. 3 suggests that the activity of the Grievant is an example of harassment and attempted intimidation of fellow employees and suggests the Grievant was needlessly out of his work zone at the time that it occurred. On the contrary, the testimony supported that the Grievant was on his way to University stores at the direction of his supervisor. He was going in the right direction, on the right road.

Thus, no conclusion can be drawn that perhaps he was out of his area looking to harass the Apples.

There appears to be some bad blood between the Apples and the Grievant. Mrs. Apple was the principle witness against the Grievant in his termination case. The Employer wisely separated the employees. The Grievant now does not share responsibilities at the stadium, but rather, has been assigned upon his reinstatement, to the golf course. Apparently he made a complaint to his immediate supervisor because the Apples were coming into the golf course area. He would get very upset. He hasn't had any particular problem at the golf course but for the instances where the Apples show up. There are necessarily times when any employee, including the Apples, are directed to complete a task that could include obtaining gasoline, construction type vehicles, etc. from the golf course facilities. Likewise, some of their activity could take them across, as noted in Mr. Orange' response, the road that leads to the tennis facility. The Grievant testified that on a number of occasions he told his supervisor that the Apples had harassed him by "flipping him off' when he was on the golf course job site. These allegations are denied.

The Employer argues that the Grievant has had a history which I observed in the previous opinion, Joint Ex. 4. I found that the Grievant engaged in convoluted reasoning, that he had a problematic attitude, and a long history of being a complainer with an attitude. Surprisingly, he did not appear that way during his testimony in the instant case.

I find it significant that his immediate supervisor, Mr. Smith, who was not available at the time of the hearing, did not agree with the manner in which the discipline against the Grievant was handled. He didn't agree that the Grievant should receive a suspension or any discipline. Rather, according to Mr. Carrot, Mr. Smith

wanted to handle the situation himself. Interestingly, Mr. Carrot is not Mr. Smith' supervisor nor is he the Grievant's supervisor. He decided the discipline himself most likely because the Apples were involved.

There are a couple of problems with the allegations made in Joint Ex. 3. First, the charge, if you will, that the Grievant called the Apples "fucking assholes" is not confirmed, rather, the witnesses said words to that effect were mouthed. In fact, one of them said to the other at the time that it occurred, "Did he say what I think he said?" It occurred in February. As the Union pointed out the windows could have been up. There was no testimony on that. It is interesting that one of the Apples asked the other whether the Grievant said what they thought he said. Query: Could they have actually heard anything? He on the other hand claims that both of the Apples gave middle finger gestures toward him. These actions are the sum and substance of the allegation of harassment and attempted intimidation referred to in paragraph 1 of Joint Ex. 3.

The last sentence of the first paragraph suggests that the Grievant was looking for the Apples to do just what is alleged - to harass and intimidate them. It suggests that he was out of his work zone. But, the evidence discloses that the Grievant was not out of his work zone, that he was on his way, as directed by his supervisor, to University stores to pick up supplies. According to the testimony he was on the most direct route. The Union urges that this is nothing more than a "he said, she said, they said" dispute. It is true the Apples alleged that he mouthed certain words to them but he on the other hand said they were "giving him the finger". It seems after all consideration of this matter that the evidence in this case and the testimony seems to present a draw. There is no independent evidence to confirm or corroborate one's allegations against the other. Obviously, the Employer, as earlier noted, has wisely

separated these employees. If the Grievant and the co-workers abide by the instruction of their supervisors, I think that the two can exist harmoniously without aggravating each other. I cannot find any corroborated evidence that would establish that the Grievant attempted to intimidate or harass the Apples. Therefore, based on the evidence and the provisions of Article 38, Section F, I must find that there was no just cause for the discipline that was assessed and therefore will nullify the disciplinary action taken. This is consistent with paragraphs 287a, 293 and 295.

AWARD

The grievance is granted. The Grievant will paid for all lost time and the three day suspension shall be removed from his disciplinary record.

Respectfully submitted,

John Lyons, Arbitrator

Dated: November 3, 2004