

Ashford #1

In the Matter of the Arbitration Between:

EMPLOYER

-and-

UNION

[Employee 1, Just Cause/Discharge]

OPINION

Employee 1 was employed as a Water Systems Repair Worker by the Employer. He is a member of the Union. The Employer issued discipline consisting of a 29 calendar-day suspension, pending discharge, for the following:

Possession of firearms, weapons, concealed or otherwise on the Department's premises or while on duty without express legal authority; threatening to do bodily harm to a supervisor. (Joint Ex.3, P.4).

The Union grieved the discipline, contending that the suspension and discharge were not based on just cause, and asking that Employee 1 be reinstated and made whole. The Employer refused to rescind the discipline in subsequent steps of the grievance process, resulting in this Umpire hearing.

DISCUSSION

The Just-Cause Standard. The collective bargaining agreement reserves to the Employer "the right to discipline and discharge for just cause." (Joint Ex.1,§ 2- B). "Just cause" means that "the employer did not act arbitrarily, capriciously, discriminatorily, or

make a decision not based on fact." Fairweather's Practice & Procedure in Labor Arbitration (4th ed.), p. 316.

Progressive discipline. The collective bargaining agreement provides for corrective, progressive discipline. (Joint Ex.1,§ 11-J-2).

Burden of proof. The burden of proving just cause is on the Employer.

The policy. Under the Disciplinary Guidelines of the Department Group IV Dischargeable Offenses include: possession of firearms, weapons, concealed or otherwise on the department's premises or while on duty without express legal authority.

Executive Order No. 12 prohibits workplace violence and expresses a zero- tolerance policy. (Employer Ex. 9). Workplace violence includes, among other things, physical acts directed towards another person, verbal or written statements or gestures with the intent or effect of threatening another. (Employer Ex.9, p.4, I~1). Employees committing workplace violence "shall be subject to appropriate discipline, up to and including discharge." (Employer Ex.9,p. 4,~4, emphasis in original).

The Disciplinary Guidelines also provide:

The departmental guidelines are examples of unacceptable misconduct. However, it is not feasible to identify every possible form of misconduct in advance. Misconduct of a like seriousness will receive disciplinary action in a like manner. (Employer Ex. 8, p. 2).

The existence of a policy alerts employees to the requirements of civility on the job. This Umpire finds that the Employer's policy is a reasonable one, within the scope of the Employer's contractual right to manage the work force. (Joint Ex. 1,§ 2). The question remains whether that policy was applicable to Employee 1's conduct.

Factors to be considered in evaluating just cause. Under the collective bargaining agreement, disciplinary action should be sustained if it was appropriately imposed, considering the factors discussed in the following paragraphs.

The seriousness and circumstances of the particular offense. (Joint Ex. 1, § ll-J-3(a). The circumstances were as follows:

Employee 2 was the Supervisor with approximately 13 years as a supervisor, and 28 years of service. Employee 1 was a member of a hydrant crew, and was one of his immediate subordinates. On Friday, August 24, 2001, Employee 1 made obscene gestures, used abusive language, referring to Employee 2 as a "bitch," who was "fucking with" him, and stated he was going to "get rid of" Employee 2".

On September 6, 2001, Supervisor Employee 2 received a phone call from Doctor 1 of Hospital. Doctor 1, a psychiatrist treating Employee 1, warned that Employee 1 had told her he had a gun in his locker at work and had been thinking about killing Employee 2 for eight months. She also said he said he does not think about it now, but cannot promise he will not think about it again. She would notify Employee 2 and the authorities if Employee 1 left the program against medical recommendation. She stated she had also notified the authorities and the City of Employee 1's threats. (Joint Ex.6, p. 1).

Supervisor Employee 2, having already been verbally abused and threatened by Employee 1, arranged a meeting to discuss the incident on September 6, 2001. Employee 1 stated he had no recollection of the allegations relating to August 24, 2001. The Union representative and Employee 1 assured Supervisor Employee 2 that he did not mean anything personal by his remarks, but was letting off steam because he was stressed out. Supervisor Employee 2 accepted his apology because he had never had to discipline Employee 1 previously, but also stated he would be issued two suspensions for insubordination and for being AWOL.

Due to the nature of the contemplated discipline, security was summoned. Security Officer 1s responded. The officer has been an employee for 22 years, and an investigator for 17 years, investigating criminal activity in the Department. Officer Post-its, Union Steward Employee 3, Supervisor Employee 2, and Superintendent Employee 4 went to the locker area.

Officer Post-its, following procedure, was there to look for possible weapons. He cut the locks off of Employee 1's lockers, numbers 332 and 333. The security officer confiscated the contents including a toy gun, an ice pick, and a large pocket knife. Officer Post-its also found unauthorized property in the lockers, oiz., an Aqua Needle used for metal detection, a brass hydrant opening nut and a hydrant wrench.

Supervisor Employee 2 testified that it is possible to use a knife to remove a rubber gasket. However, he was surprised about the presence of the ice pick in the locker. He has never seen a worker use anything but a chisel and a wire brush to remove the permatax from a gasket.

Officer Post-its admitted that it was not unusual to find a pocket knife in a locker because the employees used them to clean and scrape their boots and clothes. However, in 22 years, the officer had never seen an ice pick at the work site. He asked Union Steward Employee 3 if there could be a legitimate reason for using an ice pick, and he said no.

Superintendent of Maintenance and Repair Employee 4 testified to receiving a call from Employee 5, who had received Doctor 1's call regarding Employee 1's threats. The Superintendent returned to Central Yard from his home to be present during the search. He testified to observing a large knife, an ice pick, and a starter pistol. The pistol was the type used to start sporting events. It was a .32 or .38 caliber, with a 2-inch barrel.

President Employee 6 had 24 years seniority with the Employer, with experience as a Plant Operator and before that as a plant attendant. He testified that a lot of employees have hydrant wrenches; in fact, Employee 6 himself has one. He keeps a hydrant wrench in his locker, plus other tools and wrenches, pliers, screwdrivers, and adjustable wrenches. He keeps such items because he tries to be self-sufficient when problems arise on the job.

President Employee 6 explained that knives may be used to cut hoses, or to cut rope. He always has a knife to use on the job. Some people have their knives hanging on their belts. Maintenance and Repair people have knives because they use them to pack valves. It is not unusual to see someone using a knife. He has never seen anyone disciplined for having a knife. Employee 1 Employee 1 testified that his stepson was shot five times, three days before Christmas of 2000. Before that, in 1999, his son was shot in the head, but survived. He also had financial problems. Employee 1 did not tell anyone of his family problems before his suspension.

Employee 1 went to a treatment facility for alcoholics. He was assigned to Another Hospital in September 2001 for 17 days. Employee 1 said he met Doctor 1 at Another Hospital, but Doctor 1 was not assigned to him. He testified that he had not verbally abused the supervisor, but instead said "ain't that a bitch" in a conversation with Employee 7.

Employee 1 was assigned to a "leak" truck in his employment. Employee 1 said the pocket knife was used to clean off flat surfaces of the hydrants. He used the knife to scrape out packing material used inside the hydrant head plate. Employee 1 stated he used the ice pick for cleaning out grooves in the set nut, and to clean the nipples of drain rods. He said the gun was found in a hydrant; he just threw it in his toolbox and later threw it in his locker. The gun, he said, had a red tip on the end. Employee 1 said it was not unusual to find various items in

hydrants. He had picked up little toy cars and rocks from hydrants, to go into his aquarium.

Although Employee 1 denied saying "bitch" or using the "f" word, he admitted telling Doctor 1, and others, that he had a gun in the locker. He also admitted saying that Employee 2 was already dead; he just needed to kick the dirt over him.

Some of the particular items of evidence are not persuasive. It is certainly possible that Employee 1 used the pocket knife in his work. It is less likely, but still possible, that the ice pick had legitimate uses in the workplace. However, there was no justification for keeping a gun, even a starter pistol, in a work locker. Even if the gun was not an operable firearm, it apparently was rather realistic looking, and certainly could have frightened someone, or could have caused a responding security guard to open fire. Thus, whether the gun itself could fire, its mere presence posed danger to persons in the workplace. Employee 1 had no good explanation why, if he found the gun as he said he did, he was keeping it in his locker at work.

The evidence establishes that Employee 1 committed the offenses for which he was disciplined. He told his psychiatrist he had been thinking of killing the supervisor for eight months; and he had a gun in his locker. He testified to tragic shootings in his family history, and his in-patient treatment for alcoholism. This is reason to feel sympathy for Employee 1, but does not justify his reinstatement, given the potential danger to Supervisor Employee 2 and to other employees. With this history of threatening conduct and dire warnings of danger to come, combined with homicidal ideation, it would be unreasonable to expect the Employer to take this employee back to work without seriously jeopardizing the mental health and the physical safety of supervisors and co-workers.

This was very serious misconduct, as is seen by comparing the circumstances here to the types of circumstances set forth as "Dischargeable Offenses" in the Disciplinary Guidelines, and in consideration of Executive Order No. 12 expressing a zero-tolerance policy towards workplace violence. The discipline imposed, while severe, meets the test of just cause, unless there are substantial mitigating factors.

The employment history of the employee involved including length of service. (Joint Ex. 1, § II-J-3(b)). Employee 1's seniority date is April 30, 1996, giving him somewhat more than five years of seniority at the time of the discipline. Employee 1's employment history militates somewhat in his favor, but it does not outweigh the extreme misconduct.

The recency and nature of prior disciplinary action taken with respect to the employee. (Joint Ex. 1, § II-J-3(c)). Employee 1's previous discipline included a three-calendar-day suspension in August, 2001 for insubordination and being A WOL, just days before the September 6th discovery of the threats on Mr. Employee 2's life, and the gun and other implements in the lockers. (Joint Ex. 3, p.2). Both the nature and the recency of the prior discipline weigh against Employee 1, rather than calling for mitigation.

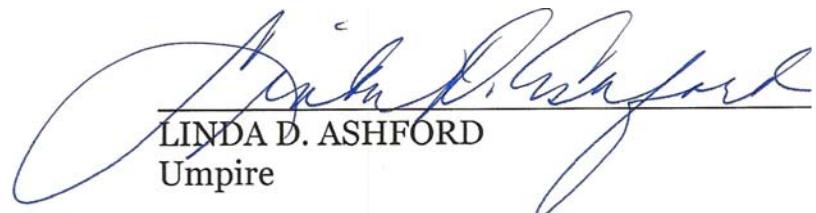
Prior departmental action in comparable situations. (Joint Ex. 1, § II-J-3(d)).

Although there was no particular evidence of prior departmental action, the zero-tolerance policy in itself, and the exhibits referencing security contingency plans for workplace-violence investigations fairly indicates that the Employer takes a strong and consistent policy against workplace violence.

Considering the circumstances, the Employer fairly applied progressive discipline for violation of a reasonable work rule. The Employer has met its burden of showing just cause for discipline in this case.

AWARD

The grievance is DENIED.



LINDA D. ASHFORD
Umpire

Dated: November 3, 2003