

Brooks #1

**AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL**

IN THE MATTER OF THE ARBITRATION BETWEEN:

Employer

-and-

Union,

Case: Employee 1/ Suspension

DECISION

ISSUE:

Did the Employer have just cause to suspend Grievant without pay for two calendar days because of his insubordination? The suspension period covered one 24 hour duty day and one off-duty day, resulting in 14.4 hours of pay loss.

BACKGROUND:

The July 1, 1984 - June 30, 1986 Collective Bargaining Agreement between the parties governs these proceedings. Article VIII. GRIEVANCE PROCEDURE, Section 3, Step 3. Arbitration, b, of the Agreement provides for final and binding arbitration as the last step of the grievance procedure. Under Article X. DISCHARGE AND DISCIPLINE, Section 4, b.(1) of the Agreement, after Employee 1, Grievant, was notified on September 11, 1984 of his two day suspension without pay, the instant matter was initiated by a Demand for Arbitration filed by the Union on October 1, 1984, alleging violations -inter alia- of Articles X and XIII of the Agreement. The claim that Article XIII, the layoff and recall section of the Agreement was violated was withdrawn at the hearing. Article X. is a non-substantive provision which describes

procedures to be followed in discharge and other disciplinary cases. Article IV, MANAGEMENT RIGHTS, of the Agreement reserves to the Employer the right to discipline or discharge for proper cause... As the Union's brief observes, the question here is whether that Article was violated.

The undersigned held a hearing on this matter at City A on March 11, 1985, at which time each party was given full opportunity to present evidence on its behalf. At the hearing, and implicitly in its post-hearing brief, the Union conceded Grievant engaged in misconduct, but argued the resulting penalty was excessive to the extent that it went beyond a reprimand and, therefore, was imposed without proper cause.

FACT:

The Employer has approximately 280 fire service employees working for it. The chain of command in the fire service is Chief, Deputy Chief, Battalion Chief, Captain, Lieutenant, Fire Equipment Operator and Fire Fighter. There are other positions in the service, but they are not relevant to these proceedings. The outcome of this matter depends in part on credibility resolutions. In this respect, any reader of this Decision accustomed to private sector smokestack industry collective bargaining must bear in mind that every City A fire service employee is in the Union bargaining unit with the lone exception of the Fire Chief. Michigan statutes specifically permit this. Except for the Chief, supervisors who enforce discipline do so against fellow bargaining unit members.

On June 5, 1984, Fire Chief Person 1 directed a memo to all department personnel which announced a physical evaluation test of the ability of recruits to perform fire fighting duties. The memo stated it also would be necessary for current members of the department to take the test. It consisted of eight evolutions or exercises each individual was required to complete.

Except for Grievant, who was on leave at the time, all (or nearly all) personnel had taken the test and it was decided to repeat it a second time, with certain modifications. On August 21, 1984, two companies consisting of the total of seven employees were called without advance notice to take the test, commencing around 1:00 p.m. Grievant, who was in one of the two selected companies, was still eating his noonday meal when he was informed by Lt. Person 2, his supervisor, that the test was about to be given to their company.

As they drove to the testing site, Grievant related his feelings to Lt. Person 2 toward the agility test, as witnesses described it, and stated he was definitely against taking it. According to Lt. Person 2, who was called as a Union witness, Grievant was very agitated on the way over and became loud in his protest. Lt. Person 2 testified that "Grievant has a temper and it gets away from him". When they arrived, Lt. Person 2 informed Battalion Chief Person 3 that the latter "was going to have a problem" with Grievant.

Battalion Chief Person 3 explained the eight evolutions to the seven employees scheduled to take them. He credibly testified that Grievant interrupted the explanation repeatedly, claiming the supervisors' who developed and were administering the test were unqualified to do so and "didn't know what they were doing. He also remarked that the -Fire Department Olympic is going to kill somebody, referring to the testing and that the department would be sued because of it.

Grievant's testimony disputed particular phrases or words Battalion Chief Person 3 in his testimony attributed to Grievant during the interruptions of the Battalion Chief's explanation of the test to the seven employees. However, Grievant did not deny the thrust or tenor of the Battalion Chief's testimony about Grievant's conduct on that occasion.

When his/her turn arrives, the individual taking the test completes each of the eight

evolutions and then the next individual starts. When Grievant's turn came he complained about a sore back. Battalion Chief Person 3 then inquired whether Grievant was capable of taking the test, and Grievant stated that he was physically capable of doing so. The Battalion Chief then informed him that he would be expected to take the test, like the other employees. Grievant then stated that he was being ordered to do so in the presence of witnesses, referring to the other employees.

At this stage, Grievant expressed a desire to talk to the Union's steward and Battalion Chief Person 3 replied that Grievant could go ahead and call him. Grievant replied according to Battalion Chief Person 3's testimony, "You idiot, you don't even know who the steward is", and repeated his request for the steward, indicating it was a supervisor's obligation to initiate such action.

Battalion Chief Person 4, who was assisting in administering the test, approached and Grievant informed him that a physician should be in attendance when the tests were given and that he wanted his steward. Battalion Chief Person 4 testified that Grievant also stated to him that it was the supervisor's obligation to contact the steward, and informed Person 4 that he "didn't want to participate in a program run by that idiot", referring to Battalion Chief Person 3. Battalion Chief Person 4 also told Grievant it was the employee's obligation to contact the steward. Nevertheless, he took Grievant to the Training Center area where Person 4 telephoned Person 5; then vice president and chief steward of Union, and turned the phone over to Grievant.

Grievant talked to Person 5 about the matter and, according to Grievant's testimony, Person 5 left it up to him whether to take the test. (A grievance claiming the test, violated Article XXX, the Maintenance of Standards clause of the Agreement, had been filed a week earlier and was pending) Battalion Chief Person 4 and Grievant returned to the testing area and Grievant as

informed he did not have to take the test at that time if his back was sore. He replied that he would go through with it at that time.

One of the ways the test was modified the second time around was to provide a rest break at certain intervals. Grievant completed the first two evolutions and then took the thirty second rest break which had been provided- at that stage. Although he did not complain of injury after completing each of the two evolutions, he apparently strained his back during the first one, and a few hours after he returned to his station after completing the test, he complained for the first time that he had injured his back taking the test and he was taken to a physician for examination. The physician placed him on temporary limited duty.

Returning to Grievant's performance of the evolutions, after the 30 second rest period expired, Battalion Chief Person 3 informed Grievant of this fact. The Battalion Chief testified that Grievant then responded, "You idiot, I'm checking my pulse rate." According to Grievant's testimony, after the Battalion Chief stated the rest period had expired, Grievant replied that his pulse was too high. (He testified he regularly checks his pulse when exercising) The Battalion Chief replied, according to Grievant, "I don't know what you are doing - staring off into space" and Grievant replied, "I have to look at the clock to check my pulse, you idiot." The Battalion Chief then told him to be careful because of the remark he made. Grievant completed the remaining evolutions without incident.

The other participants in the test were in the general area when Grievant's rest period remark to Battalion Chief Person 3 was made. Whether they heard this discussion is not clear. Except for Lt. Person 2, none of them testified before the undersigned. Lt. Person 2 testified that he heard part of Grievant's "raving and ranting" during the explanation by Battalion Chief Person 3 of the tests and that he heard the discussion about who should contact the steward. He testified

that he didn't hear the word "idiot" used at that time but that he didn't hear all of the conversation because he wasn't "paying strict attention". In respect to the discussion during the 30 second break, Lt. Person 2 testified that Grievant "may have raised his voice", but Person 2 wasn't sure, and that he didn't hear Grievant calling Battalion Chief Person 3 an idiot. In respect to this conversation also, he testified he wasn't "paying close attention".

Battalion Chief Person 4 testified that he was in the office part of the time the test was being given and, in any event, he did not hear Grievant call Battalion Chief Person 3 an idiot during the rest break or on the earlier occasion when Grievant wanted to talk to the steward. Grievant denied that he called Battalion Chief Person 3 an idiot at any time that day, except for the single occasion during the rest period when Grievant was taking his pulse.

DISCUSSION:

The Union's brief is premised on the supposition that Grievant momentarily became agitated for understandable reasons and it was then, and only then, that he called Battalion Chief Person 3 an idiot. The brief observes that Grievant's fire company had only a few minutes notice the test was going to be given, and Grievant had just consumed a full midday meal. It further describes the situation as one in which Grievant, who has a history of lower back problems, was in pain as a result of his completion of the first evolution, was short of breath because of the exertion required, and was concerned because of what he considered to be his elevated pulse rate. Finally while in that condition, Battalion Chief Person 3's complaint that Grievant was "staring into space" was, in Grievant's eyes, both "demeaning and provocative."

The Agreement does not specify that any particular penalty is to be imposed for any particular misconduct. Nor does it specify that a series of progressively increased penalties are to be applied against employees who engage in repeated misconduct of limited seriousness. Citing

decisions by other arbitrators in which it was held suspension without pay was too severe for single, momentary acts of insubordination (in circumstances in which the conduct occurred in those cases), the Union argues the undersigned should reduce the penalty imposed upon Grievant to a reprimand without time off. In this respect, the Union notes Grievant is a fifteen year fire fighter with a perfect disciplinary record prior to the August 21, 1984 experience.

In the context in which the Union places Grievant's experiences of that date, there is a serious question whether Grievant's two day suspension could be justified. However, the record portrays a scene significantly different in certain respects from that the Union's brief urges upon the arbitrator.

The conclusion is unavoidable that Grievant was dead-set against submitting to the agility test. He amply displayed this while driving with Lt. Person 2 to the testing site, to such an extent that the Lieutenant predicted Grievant was going to create a problem. Grievant's testimony did not dispute the Lieutenant's concerning Grievant's unprovoked emotional state while driving to the testing site.

There are proper and protected avenues by which to protest the unilateral imposition of physical tests upon employees covered by a collective bargaining agreement, and Grievant's manner provided by the Agreement, which challenged the tests. Presumably, Grievant, a former Union officer, was aware on August 21 that the grievance had been filed. Undoubtedly, he was after he talked on the phone with then-Chief Steward Person 5.

Nevertheless, continuing his provocative and emotional approach to the matter, Grievant took it upon himself, during Battalion Chief Person 3's explanation to the test participants, to challenge the test. He did so in a manner which directly and clearly disparaged his superior officers.

With this setting in mind, and weighing all the factors present in the full circumstances in which they occurred, the undersigned is unable to accept Grievant's recollection of certain aspects of the August 21 events over those of other witnesses. It should be recognized, initially, that Battalion Chiefs Employee 1 and Boas displayed no tendency while on the witness stand to exaggerate or otherwise attempt to embellish the events in the case. Often, when on the witness stand, supervisors are defensive of management's prerogative to manage. They also tend to take umbrage at the conduct of those they supervise which challenges this authority. Neither Battalion Chief revealed such a tendency on the witness stand. Without being aware of the bargaining union relationship which existed among the five witnesses who testified before the undersigned to events which transpired in this case, one might be surprised over the completely dispassionate manner in which the testimony adverse to Grievant was offered.

An amicable relationship existed between the Battalion Chiefs and Grievant prior to the events of August 21 and, to everyone's credit, especially Grievant's, continues to exist today. Neither Battalion Chief had any reason, when he originally complied with the Fire Chief's directive to furnish a written statement-of the events, -or at any time subsequently, to enlarge beyond the bounds of truth. Grievant, on the other hand, is attempting to vindicate his conduct and clear his record.

Battalion Chief Person 4's testimony flatly contradicted Grievant's, denial that the latter called Battalion Chief Person 3 an idiot at any time other than during the rest period. Person 4 was an innocent bystander, so to speak, who was attempting to ameliorate the situation Grievant had created over whose responsibility it was to call the steward. Bose had absolutely no face to save, no position to vindicate, and the undersigned is unaware of any proper basis upon which his testimony that Grievant stated he didn't want to participate in a program run by that idiot

[Battalion Chief Person 3] should be discredited.

The Union concedes that Battalion Chief Person 3 accurately testified Grievant called him an idiot during the rest break. Nothing in the record or in the parties' briefs suggests why Battalion Chief Person 3 would fabricate his testimony, consistent with his written statement of a few days after the events that Grievant referred to him as an idiot when the dispute over who should call the steward arose.

The undersigned concludes that Grievant called Battalion Chief Person 3 an idiot, not once, but three times on August 21. In this context, Grievant's misconduct must be viewed as more serious than if it had been limited to the single, momentary experience suggested by the Union.

The undersigned's proper function is to interpret the parties' Collective Bargaining Agreement and apply it to the facts of this case. His authority does not extend to the point that he is free to substitute his Judgment for Management's concerning the most appropriate penalty to have imposed upon Grievant in the circumstances, and, if his judgment differs from Management's, to substitute it for Management's. His authority is more narrowly limited: He is to resolve only the question whether the two days suspension without pay was severe to the point that it was unreasonable. An unreasonably severe penalty cannot be reconciled with the "proper cause" limitation placed by Article IV. Section 1 of the Agreement upon the Employer's right to discipline. In the undersigned's judgment, the penalty was not excessive, at least to that extent.

Crediting Grievant's statements that Battalion Chief Person 3 asked him why he was staring into space, and that his back hurt when he made the "idiot" remark, it must be recognized that this behavior was an extension of a course of conduct by Grievant which had the effect, if not the intent, of disparaging Management in general and Battalion Chief Person 3, because he

was in charge of the test, in particular. Although this was the first time Grievant had engaged in misconduct in his fifteen year history of employment which, indeed, is an enviable record, the Fire Department had a right to expect him to cooperate with its programs. Whether or not one views the Fire Department as a para-military organization, it is especially important that its members conduct themselves in a fashion which does not challenge or disparage the lawful commands of their superior officers.

As the Union has observed, Grievant apologized to Battalion Chief Person 3 because of his conduct during the rest break, but this did not occur until weeks later when a hearing was held on the matter by Employer representatives. At that time, Grievant was attempting to reduce the penalty imposed upon him to a minimum. Finally, the Union adduced testimony that Battalion Chief Person 3, in effect, has indicated he is of the opinion the penalty imposed upon Grievant was too severe. Battalion Chief Person 3 places these statements in a different context. Because all Fire Department service personnel are in the bargaining unit, except the Fire Chief, he is the only person in the department who determines discipline. Looking at the situation pragmatically, and crediting the Union's version of the Battalion Chief's comments about the appropriate penalty, little weight can be given to these statements attributed to Battalion Chief Person 3.

The undersigned concludes that the Employer had proper cause to impose a two day suspension without pay upon Grievant because of his August 21, 1984 misconduct.

Jerome H. Brooks

Arbitrator

May 11, 1985