Schneider #11

EXPEDITED ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION
BETWEEN,

Grievant: Employee 1

Employer

-and-

Union

BEFORE:	Karen Bush Schneider, Arbitrator
PLACE OF HEARING:	Employer Facility 250 Some Street City A, Michigan
DATE OF HEARING:	January 29, 2003
DATE OF AWARD:	January 31, 2003
RELEVANT CONTRACT PROVISIONS:	Articles 15, 16, and 19 of the an Agreement
CONTRACT YEAR:	2000-2003
TYPE OF GRIEVANCE:	Discipline

AWARD SUMMARY

The grievance is denied.

Karen Bush Schneider, Arbitrator

ISSUES PRESENTED

1. Did the Employer have just cause to issue Grievant, Employee 1, a letter of warning dated August 29, 2002, charging him with "conduct unbecoming?"

   The Employer responds, "Yes."

   The Grievant/Union responds, "No."

2. If the Employer did not have just cause to issue Grievant the letter of warning dated August 29, 2002, what should be the remedy?

   The Employer requests that the grievance be denied.

   The Grievant/Union request that the grievance be granted, and that the letter of warning dated August 29, 2002, be expunged from Grievant's personnel record, as well as from all Employer records.

THE EMPLOYER'S CASE

The Employer maintains that it had just cause to issue Grievant, Employee 1, a letter of warning for conduct unbecoming as a result of an incident which occurred on August 21, 2002.

Grievant is a part-time flexible Distribution Clerk (PTF) at the City B, Employer Facility. He has been employed as a clerk since March of 1994.

On August 21, 2002, Grievant participated in a heated discussion with another employee, Employee 2, during which he directed profanity at her, including use of the words, "fuck," "dam," and "shit." Grievant's statements to Employee 2 were stated loudly enough to disrupt the work of other employees in the area and to be audible to customers in the lobby nearby.

Employees Employee 3 and Employee 4 testified that they witnessed Grievant's exchange with Employee 2 on August 21, 2002. Grievant spoke in a loud and angry tone and directed profanity toward Employee 2. Grievant's statements were loud enough to be heard throughout the room, as well as in the customer lobby. Both Employee 3 and Employee 4 provided the Employer with written statements corroborating what they witnessed. Although these witnesses conceded that the staff swear from time to time, neither had heard a discussion as loud or as heated as the one Grievant participated in.

The discussion was broken up by Supervisor 1, the 204B Supervisor on duty on August 21, 2002. Supervisor 1 was working at her computer a short distance away from where the conversation was taking place between Grievant and Ms. Employee 2. She overheard Grievant use the words, "fuck," "dam," and "shit." She went over to Grievant and told him to "cool it." Grievant responded by stating, "No, I will not. You had better tell her to shut up." Supervisor 1 then went to Employee 2 and directed her to go to her work. Supervisor 1 reported the incident the following day to the Customer Service Supervisor, Supervisor 2.

Supervisor 2 subsequently conducted an investigation and spoke with both Employee 2 and Grievant on or about August 22, 2002. Supervisor 2 testified that when she questioned Grievant about the incident, he became angry. He told her that he didn't care what she had to say and that "[her] sister (Employee 2) had a big mouth." Grievant did not deny the argument with Employee 2 or the use of profanity directed toward her.

Employee 2 discussed the incident with four employees and obtained their statements. Supervisor 2 had previously had discussions with Grievant about his conduct. Further, Grievant had received discussions from other managers about his behavior. Due to Grievant's conduct on August 21, 2002, as well as prior discussions with him, Supervisor 2 determined to issue the lowest level of discipline, a letter of warning. Further, she issued Employee 2 a formal discussion since Employee 2 had a "clean record."

Manager 1, testified that several people came to her on August 22, 2002, and advised her of the incident involving Grievant and Employee 2. The matter was turned over to Supervisor 2. Subsequently, Manager 1 concurred with the discipline issued to Grievant by Supervisor 2.

Manager 1 conducted the Step 2 hearing on behalf of the Employer Hearing. At no time did either the Grievant or Union deny Grievant's conduct. Instead, they argued that the date of the incident identified in the letter of warning was incorrect, that Supervisor 2's investigation had not been thorough since she had not questioned all witnesses and that she was biased since Employee 2 was her sister.

The Agreement prohibits Employer employees from engaging in obnoxious or offensive conduct toward other persons or creating unpleasant working conditions. It requires that employees be "courteous." Grievant violated Agreement and the Employer had just cause to issue the letter of warning dated August 29, 2002.

THE UNION'S/GRIEVANT'S CASE

The Union and Grievant maintain that the Employer did not have just cause to issue the letter of warning dated August 29, 2002. Grievant was provoked by Employee 2 and attempted to terminate the conversation with her before the 204B Supervisor had to intervene. Further, Grievant was not afforded due process since the date of the incident was incorrectly stated in his letter of warning as August 22, 2002, rather than August 21, 2002; the statements of Employee 6 and Employee 7 were disregarded by the Employer; and the Employer's investigation was tainted by bias as a result of the familial relationship between Supervisor 2 and Employee 2.

Employer employees, Employee 6 and Employee 7, testified that Grievant had been provoked by Employee 2. She had begun the conversation by yelling at Grievant about something that Grievant had not been involved in. While Employee 6 acknowledged that Grievant did swear during the conversation, she stated that some employees do swear and that supervisors have been known to yell at employees. Employee 7 did not hear Grievant swear and maintained that Grievant continued working throughout his conversation with Employee 2.

Grievant testified in his own behalf. He stated that on August 21, 2002, he was sorting parcels when Employee 2 began a conversation with him. She was already upset and was talking to him about something that had absolutely nothing to do with him. Grievant told her to leave the area, but she did not until the 204B Supervisor came over to speak with him. Grievant told the 204B Supervisor that she needed to talk to Employee 2.

On August 22, 2002, Grievant and another employee were summoned into Supervisor 2's office to speak with her about an incident involving hampers. At the end of the conversation, Supervisor 2 stated to Grievant that she understood there had been an incident on the work room floor the previous day. Grievant responded by stating, "Yes, your sister was running her mouth off." Supervisor 2 did not allow Grievant to tell his side of the story. She did not tell him that she was considering issuing a letter of warning.

Grievant has overheard other employees swear. They had not been disciplined.

Steward 1, the Union Steward, testified that he investigated the grievance following the issuance of the August 29, 2001 letter of warning. He interviewed employees Employee 6 and Employee 7, as well as two other carriers who had not observed the incident.

At the Step 1 grievance hearing, Steward 1 asserted that Supervisor 2 had not conducted a thorough investigation. She had not been aware that employees Employee 7 and Employee 6 had witnessed the incident. Further, the letter of warning described the date of the incident as August 22, 2002, rather than August 21, 2002. In Steward 1's opinion, the incorrect date was indicative, not merely of a typographical error, but of a poor investigation by Supervisor 2.

Lastly, Steward 1 was concerned that Supervisor 2 conducted the investigation given the fact that the other party to the incident was her sister. The other employee only received a formal discussion, rather than a letter of warning.

Grievant's discipline was punitive under the circumstances.

OPINION

This Arbitrator has reviewed the relevant provisions of the Agreement, specifically Articles 15, 16, and 19, the Agreement, specifically Section 000.0, the testimony of the witnesses, the documentary evidence, as well as the arbitration awards tendered by the parties at the conclusion of the hearing. For the reasons which follow, the Arbitrator concludes that the Employer has proven that just cause existed for the issuance to Grievant of the letter of warning dated August 29, 2002.

A. Did the Employer give to the Grievant forewarning or foreknowledge of the possible or probable disciplinary consequences of the Grievant's conduct?

The Agreement clearly prohibits employee conduct which may be characterized as "obnoxious or offensive to other persons or to create unpleasant working conditions." Directing profanity towards a co-worker in a heated discussion would certainly fall under the above-quoted prohibition.

Further, Grievant had received a number of discussions prior to August 21, 2002, regarding his behavior. He was on notice that professional, courteous behavior was required in the work place.

B. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might properly expect of the employee?

It cannot be gainsaid that a rule which prohibits offensive behavior in the work place is reasonably related to the orderly, efficient, and safe operation of the Employer. Employees have the right to expect that they will be treated as professionals and with respect.

C. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Following the incident of August 21, 2002, Supervisor 2 conducted an investigation. She spoke not only with Grievant, but also with the other employee to the controversy, and four direct witnesses to the incident. She obtained written statements from the witnesses. The witnesses uniformly attested to the fact that Grievant engaged in a loud argument with co-worker Employee 2 and inappropriately directed profanity toward her.

D. Was the Employer's investigation conducted fairly and objectively?

The Union contends that the Employer has not met this criterion of just cause. The Union and Grievant first argue that the investigation was flawed because it was conducted by a supervisor who happened to be the sister of one of the two employees involved in the controversy. Bias can be assumed from the mere fact that the supervisor's sister only received a formal discussion, whereas Grievant received a letter of warning.

Looking at all the facts in this matter, this Arbitrator cannot agree with the contention of the Union and Grievant that the investigation was conducted unfairly. While it was not prudent for the Employer to have an investigation conducted by a relative of one of the parties in the controversy, the investigation appears to have been broad and the proof irrefutable. Witness statements were obtained from at least four employees, including one supervisor. Supervisor 2 spoke to both the Grievant and Employee 2. Both employees were given discipline consistent with their work record. Lastly, the investigation results and the discipline assessed to Grievant was reviewed by Employee

Nor is the Arbitrator persuaded that the investigation is fatally flawed as a result of the Employer's not taking into account the witness statements of employees Employee 6 and Employee 7. Employee 6 confirmed that Grievant had indeed directed profanity towards co-worker Employee 2. The real gist of Employee 6's and Employee 7's statements was not that Grievant hadn't engaged in the conduct alleged, but rather that Employee 2 had provoked Grievant's behavior. Even assuming that that was true, Employee 2's conduct did not give Grievant license to behave unprofessionally. If she had baited him, he should have stepped away from the conversation and advised his supervisor.

E. At the investigation, did the Employer obtain substantial evidence or proof that the employee was guilty as charged?

Witnesses Employee 3, Employee 4, and Supervisor 1 all confirmed Grievant's misconduct. Grievant himself did not deny the behavior. Accordingly, the Employer had proof of Grievant's rule violation.

F. Did the Employer apply its rules, orders, and penalties evenhandedly and without discrimination to all employees?

The Union and Grievant argue that Grievant received differential treatment due to the fact that he received a letter of warning, while the other offending employee only received a formal discussion. However, Grievant had received a number of discussions in the past regarding his conduct. Both Supervisor 2 and Manager 1 expressed serious concern regarding Grievant's conduct on August 21, 2002, and the need for the Employer to impress upon him that his behavior had to change. The lowest level of discipline following formal discussions is a letter of warning.

Nor is the Arbitrator persuaded that the Employer treated Grievant

differently in light of the fact that other employees, including managers, have used profanity in the work place. There is a difference between utilizing profanity, such as an expression of exclamation, as opposed to directing it in a hostile manner towards a coworker.

> G. Was the degree of discipline administered by the Employer reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the Employer?

The discipline in this case was a letter of warning. It is the lowest form of discipline recognized in the National Agreement.

Additionally, Grievant had received a number of discussions prior to the issuance of the August 29, 2002 letter of warning. Those discussions had all focused on Grievant's work place conduct. While discipline is intended to be corrective in nature, there reaches a point where informality must yield to a more formal process in an attempt to shape employee behavior. This clearly appears to be such a situation.

For the foregoing reasons, the Arbitrator concludes that the Employer had just cause to issue Grievant the letter of warning, dated August 29, 2002.

AWARD

The grievance is denied.

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Karen Bush Schneider,

Arbitrator Dated: January 31, 2002.