

ARBITRATION AWARD

April 7, 2010

CITY OF [REDACTED]
[REDACTED], Michigan

-and-

AFSCME, MICHIGAN COUNCIL 25
Local No. [REDACTED]

FMCS Case No. 09-04220
A21599-[REDACTED]-09

Subject: Discharge - Attempted Theft - Unauthorized Use of
City Equipment

Statement of the Issues: Whether the City had
just cause for discharging [REDACTED] on July 8,
2009? If not, what should the remedy be?

Contract Provisions Involved: Articles 9, 11 and 45
of the July 1, 2003 Agreement.

Statement of the Award: [REDACTED] discharge was
not for just cause. He should be reinstated
promptly and made whole for his loss of earnings
or other benefits. He was guilty, however, of
unauthorized use of City equipment and his record
should reflect a two-day suspension for this
offense. Those two days wages should be deducted
from his overall back pay. Thus, the grievance is
granted in large part and denied only with respect
to the two-day suspension.

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BACKGROUND

The City discharged ██████████ on July 8, 2009, for the following alleged misconduct:

...being an active participant in the theft or attempted theft of City property, participation in covering up this issue, and involvement with the unauthorized use of City equipment.

The Union urges that ██████████ was not guilty of any of these offenses and that discharge, even if he were guilty, was an excessive penalty. It seeks his prompt reinstatement with full back pay.

The events in question involved the following City personnel - ██████████, ██████████, and ██████████, Public Works employees, and ██████████ who was the Acting Supervisor of these employees on the day in question, Sunday, May 24, 2009. The essential facts, at least with respect to Lehto, seem undisputed. The parties differ as to the significance of those facts, particularly ██████████ intent in assisting the other employees with the repair of ██████████ trailer.

The City Garage contains two different piles of material. One is referred to as "black top" or "new patch" or "cold mix". It consists largely of old asphalt and is used by City employees in making road repairs. It has real money value. The other pile is a gravel and dirt mixture, brownish in color, and of no value. It is sometimes referred to as the "old mix"

██████████ did not testify at the arbitration hearing. But his involvement in this incident can nevertheless be clearly seen from a statement he later made to the ██████████ County Sheriff's Department and from the statements (or testimony) of others. Shortly before Sunday, May 24, ██████████ called his supervisor, ██████████, and sought permission to remove some of the gravel/dirt mixture, the old mix, for his personal use. ██████████ gave him permission to do so. He took his own tractor-trailer to the Garage on

Sunday, May 24 at about 3:00 p.m. to secure this material. He needed help and stopped at [REDACTED] home to ask for his assistance. [REDACTED] joined him and noted at the Garage that [REDACTED] was taking "black top". He thought it was wrong to remove that material from the Garage and asked [REDACTED] whether he had permission to do so. [REDACTED] said he had permission. And [REDACTED] then got a skidster from the Garage and began taking "black top" from the pile, moving it to his trailer, and dumping it on the trailer bed. Apparently the weight of the "black top" was large enough to bend the trailer axle and cause one of the trailer tires to fall off. The tire rolled away and was retrieved by [REDACTED]. He realized that in order to reattach the tire he would need new lug nuts and bolts which he had in his home.

At about this time, [REDACTED] finished his shift and was returning to the Garage. [REDACTED] stopped him and asked him for a lift back to his home where he could pick up the needed tire parts. The two men were friends and [REDACTED] agreed to drive him. After they returned, [REDACTED] soon realized that [REDACTED] was moving "black top" out of the Garage for his personal use. He asked [REDACTED] whether he had permission to do so and [REDACTED] said he did. [REDACTED] asked [REDACTED] to assist with the repair and they worked together briefly before realizing that the tire could not be reattached without raising the trailer body. That could not be accomplished with the skidster. [REDACTED] then asked [REDACTED] to get a loader from the Garage to lift the trailer. [REDACTED] then went and got the loader but refused to operate it to lift the trailer.¹ [REDACTED] operated the loader and lifted the trailer but [REDACTED] and [REDACTED] quickly determined that they would be unable to replace the tire. And [REDACTED] promptly began using the skidster to remove the "black top" from his trailer. Some of this material was placed on the roadway. And at about this time, [REDACTED] left the area. Before leaving, he told [REDACTED] that he was going to call [REDACTED] tell him what had happened, and ask whether [REDACTED] really had permission to take the "black top".

¹ [REDACTED] testified that he and [REDACTED] "did not get along" and were not friendly.

A few hours later, ██████ made this telephone call. When he inquired about what ██████ had told ██████, ██████ replied he had given his permission to remove the "old stuff" only, referring to the brownish dirt and gravel. ██████ then told him "you have a problem, you should go to the Garage because the trailer is broke and there's black top all over and he ██████ didn't know what kind of mess they left". ██████ replied that he "wasn't going down there [because] he'd been drinking and he would talk to [██████] on his next day of work". ██████ asked him to keep his report confidential because he "didn't want a conflict with ██████". ██████ spoke to ██████ on May 27, his next workday, and asked whether he'd checked out his earlier report. ██████ answered that he "will take care of it".

Although ██████ did not testify, he gave a written statement to the City on June 2 which by and large confirmed ██████ view of his conversations with his supervisor. He stated in part:

....he ██████ got a call from... [██████]
...Sunday afternoon stating that... ██████ was taking mix from the DPW [Garage] site. ██████ asked to keep his name and this conversation confidential. He [██████] had given permission a week before to take the old stuff. It was dirt and dumpings and [I] wanted to take it to the compost pile and get rid of it anyway...

An ██████ resident whose property apparently overlooked the Garage had observed the loading and unloading of the trailer on Sunday, May 24, and had concluded that an attempted theft of City property was involved. He took a series of photographs of what he'd observed. And several days later, he telephoned the City Clerk to report a theft. The City Manager was informed and he in turn advised the Sheriff's office. He conducted his own investigation, interviewing the people involved and reviewing the applicable City policies. He concluded that ██████ was guilty of the following offenses:

Group II

4. Unauthorized use of City property for Private work...

Group III

5. Stealing or similar conduct...

The City discharged [REDACTED] on July 8, 2009, primarily for his alleged participation in the theft or attempted theft of "black top" on May 24 and his unauthorized use of City equipment, that is, the loader he took from the Garage. A grievance was promptly filed protesting the discharge. When the parties were unable to resolve their differences in the grievance procedure, the Union appealed the case to arbitration. A hearing was held in [REDACTED] Michigan on February 26, 2010. The City was represented by [REDACTED] [REDACTED], Attorney; the Union was represented by [REDACTED] [REDACTED], Attorney. No transcript was made of the proceedings. Post-hearing briefs were submitted on March 26, 2010.

DISCUSSION AND FINDING

There are two issues in this case. The first is whether [REDACTED] is guilty of any of the misconduct with which he has been charged. The second, assuming guilt, is whether discharge was a reasonable penalty.

It is clear that [REDACTED] received permission from supervision to remove the "old mix", the gravel/dirt mixture, and that he sought to remove the "black top" instead. When he was later interviewed by the Sheriff's Office, he said that "he messed up...[and] shouldn't have done what he did". He admitted "taking the...newer black top from the City" even though "he knew what he did was not right..." He plainly intended to steal material of value

from the City.² The question before the arbitrator is whether [REDACTED] intended to assist [REDACTED] in this theft, whether he became a participant. The City says he did; the Union says he did not.

For the following reasons, I find [REDACTED] not guilty of this charge. First, there is not a shred of evidence that [REDACTED], before arriving at the Garage around 3:00 p.m. on May 24, had any conversation with [REDACTED] or [REDACTED] about removing "black top" from the Garage. He knew nothing of [REDACTED] intentions until he saw him loading his trailer with "black top". He and [REDACTED] "did not get along"; they were not friends. He had no reason whatever to assist [REDACTED] in his attempted theft.

Second, [REDACTED] action in driving [REDACTED] from the Garage to his home to pick up tire repair parts seems little more than offering help to a friend. And his willingness to remain in the Garage area to help [REDACTED] try to reattach the tire to the trailer seems no different. Indeed, when he first realized that [REDACTED] may have been engaged in misconduct, he specifically asked him whether he had the City's permission to take the "black top". He would hardly have asked such a question had he been part of a planned theft.

Third, even though [REDACTED] was reassured by [REDACTED] that supervision had given him permission to take the "black top", he continued to doubt the legitimacy of what was happening. As he was leaving the area, he told [REDACTED] that he was going to call [REDACTED] to find out whether [REDACTED] really had permission. He made that call a few hours later. [REDACTED] said he had given permission to [REDACTED] to take the "old mix". [REDACTED] testified that he then told [REDACTED] "you have a problem, you should go to the Garage because the trailer is broken and there's black top all over and he [REDACTED] didn't know what kind of mess they left". These words in effect accused [REDACTED] of stealing material. [REDACTED] was not called as a witness to deny [REDACTED]

² I assume [REDACTED] was discharged. I have no knowledge as to whether he filed a grievance and, if so, how that grievance was resolved.

account. His failure to mention this statement in his June 2 interview may have been due to the fact that he'd been "drinking" that Saturday or to the roughly ten days that had passed since this May 24 conversation.

Fourth, ██████ was still concerned about this situation on May 27. He again asked ██████ what action had been taken as a result of his May 24 report. Had he actually been involved in the attempted theft, he would hardly have been pursuing the matter in this manner. A formal investigation had not even begun at this point. All of this suggests that ██████ merely happened on the scene where an attempted theft was in progress and helped a friend attempt to replace a tire.

True, ██████ was aware that ██████ was taking "black top" out of the Garage for his own use and that the "black top" had real value. No doubt that was why he asked ██████ whether he had permission to do so. But even when ██████ replied that he had permission, ██████ doubts persisted. So much so that ██████ called ██████ later that same day to find out whether ██████ really had permission. When he learned that ██████ had not given permission to remove "black top", ██████ warned ██████ that he "ha[s] a problem...", that he should "go to the Garage", that "black top" was "all over" the road outside the Garage. He may not have said, in so many words, that "████████ is removing 'black top'..." but that plainly was the sense of his message. And ██████, in an interview at the Sheriff's office, did not refute ██████ account of what he'd told ██████. Because ██████ was not called as a witness at the arbitration hearing, he was never questioned in any meaningful detail on this point. I accept ██████ account of what he told ██████. I do not believe ██████ was a party to ██████ planned theft.

My conclusion is that ██████ was not guilty of a theft or attempted theft. Nor indeed did he seek to "cover up" the theft. On the contrary, he tried to make supervision aware of the misconduct.

As for the remaining charge, it is true that [REDACTED] [REDACTED] a loader out of the Garage at [REDACTED] request for the purpose of raising the trailer to enable the tire to be reattached. [REDACTED] had not received permission from supervision to do so. Nor was it reasonable to assume that permission to remove material from the Garage necessarily included permission to use City equipment to help with the removal. Most likely [REDACTED] never thought about the City restriction on the use of City equipment for private work. Nor did he ask [REDACTED] if he had sought permission to use the loader. This plainly was an unauthorized use of City property. Such behavior is an offense under City policies, the penalty for a first offense being "instruction and a two-day suspension".

AWARD

[REDACTED] discharge was not for just cause. He should be reinstated promptly and made whole for his loss of earnings or other benefits. He was guilty, however, of unauthorized use of City equipment and his record should reflect a two-day suspension for this offense. Those two days' wages should be deducted from his overall back pay. Thus, the grievance is granted in large part and denied only with respect to the two-day suspension.



Richard Mittenthal, Arbitrator