A21723-1250-09

American Arbitration Association
Dispute Resolution Procedure

MI AFSCME, Council 25

Union,

and

AAA Case No. 54 390 01293 09
Grievant: [redacted]
Arbitrator: Samuel E. McCargo

City of [redacted]

Employer.

This matter was heard by the Arbitrator pursuant to Article 10, Step 2 of the Collective Bargaining Agreement between the City of [redacted] and Local Union [redacted], AFSCME on March 2, 2010 at the City of [redacted], [redacted], Suite [redacted], [redacted], Michigan [redacted]. At the conclusion of the hearing, the parties agreed to file post hearing briefs postmarked on or before April 5, 2010. The post hearing briefs were submitted to the American Arbitration Association on April 1, 2010; and the American Arbitration Association established a May 6, 2010 due date for the Arbitrator's Opinion and Award.

APPEARANCES

Union	Employer
Betty J. Gaston [redacted]	[redacted], Labor Director [redacted] Building & Grounds Superintendent [redacted], Labor Relations Assistant

Statement of Facts

The Grievant, Mr. [redacted], is classified as a Building and Grounds Maintenance Specialist with the City of [redacted]. He has been employed by the City of [redacted] since November of 1989. Prior to the current incident, his record is clear of any disciplinary history.

In December of 2007, Mr. [redacted] was hired by the City of [redacted] as the Building and Grounds Maintenance Superintendent. Prior to Mr. [redacted] employment, the Grievant had worked in a full-time capacity within the Building and Grounds Maintenance Division of the City of [redacted] for approximately 19 years.

At the time of the employment of Mr. [redacted] a practice existed under previous supervisors that permitted buildings and grounds maintenance employees to work through their lunch period and leave work early. In March of 2008, Mr. [redacted] decided to terminate this past practice. Instead of allowing employees to work through their lunch period and leave work early, Mr. [redacted] determined that employees within the Building and Maintenance Division would be required to work a full work day. Mr. [redacted] also decided to implement a policy that prohibited employees from returning to City Hall during their lunch

break if they were dispatched or assigned to outlying buildings during the day.

In order to terminate the preexisting past practice and implement the new policy requiring buildings and grounds employees to work a full work day, Mr. [redacted] called a meeting of the buildings and grounds maintenance staff. The meeting was conducted in March of 2008.

Mr. [redacted] testified that all employees under his supervision attended the meeting in March of 2008. He admitted that no written summary of the meeting was prepared; and there was no sign in sheet for the meeting. Mr. [redacted] remembered, specifically, that seven maintenance employees attended the meeting, including the Grievant, [redacted].

The Grievant testified, however, that he was fully aware of the prior practice allowing employees to work through their lunch and leave early. He testified that he did not attend Mr. [redacted] meeting in March of 2008. The Grievant also stated that he was absent quite frequently between August 2007 and September 2008 because his mother was very ill. According to Mr. [redacted] he spent a significant amount of time caring for his mother. He did not recall attending the meeting at which Mr. [redacted]

rescinded the past practice and established the new policy requiring a full work day.

The Arbitrator is convinced that the testimony of Mr. [redacted] is credible. His recall of the Grievant's attendance at the March 2008 meeting was clear. In addition, the evidence in the record establishes that the conduct of all maintenance employees under Mr. [redacted] supervision was consistent with the new policy from March 2008 until July 2009. The record also reflects that the conduct of Mr. [redacted], the Grievant, was consistent with the new policy. Mr. [redacted] had no record or evidence of working through his lunch period and leaving work early from March 2008 until July 2009.

On July 24, 2009, Mr. [redacted] began the first day of a one week vacation. Shortly before Mr. [redacted] began his vacation, he assigned Mr. [redacted] to perform certain tasks while Mr. [redacted] was out on vacation. Specifically, Mr. [redacted] was directed to give special attention to a rodent problem at one of the City buildings.

On July 30, 2009, while Mr. [redacted] was still out on vacation, he received a call at home from one of the City facilities. As a result of the call, Mr. [redacted] called the Grievant in order to direct him to respond to the request for maintenance service. Mr. [redacted] spoke to Mr.

[redacted] on more than one occasion on July 30, 2009. During one of the telephone conversations, Mr. [redacted] admitted that he was not at work. He stated that he had worked through his lunch period, and left work early. He admitted that no one had given him permission to do so. Mr. [redacted] also stated that he could not respond to the request for maintenance service; and he could not find another employee to serve as a replacement.

Mr. [redacted] reminded Mr. [redacted] that there was no longer any policy or practice allowing employees to forego their lunch and leave work early. He told Mr. [redacted] "you know it". He instructed Mr. [redacted] that he was not to engage in this practice again.

When Mr. [redacted] returned to work during the first week of August, 2009, he conducted an investigation of the time records of all building and maintenance staff for the time he was out on vacation. He discovered that four of his crew members had worked through lunch on Friday, July 24, 2009 and gone home early. In addition, he learned that Mr. [redacted] and Mr. [redacted], a new temporary employee, had worked through lunch and left work early on four consecutive days during Mr. [redacted] vacation. See CX3. They had engaged in this practice on July 27, 28, 29 and 30, 2009.

The four maintenance crew members who worked through their lunch period on July 24, 2009 received a written reprimand from Mr. [redacted]; and no grievance was filed. Mr. [redacted] had been assigned to work with the Grievant during Mr. [redacted] vacation. As a result of Mr. [redacted] four day violation of the policy prohibiting working through lunch periods and leaving work early, he received a written warning from Mr. [redacted]. The Grievant received a one day suspension without pay for his four day violation of the policy prohibiting maintenance employees from working through their lunch period and leaving work early. See UX5.

Statement of the Case

The Union argues that the Grievant's due process rights were violated because the City failed to give the Grievant adequate notice of the change in policy and practice regarding working through lunch periods and going home early. In addition, the Union argues that the City is prohibited from enforcing the oral policies created by Mr. [redacted] in March 2008 because there was an established past practice and the City may not properly rely upon unwritten conflicting rules to support disciplinary action against the Grievant. The Union also argues that the City engaged in improper disparate treatment when it imposed a written

reprimand on all other employees who violated the new policy, but imposed a more severe discipline on the Grievant. The Union also argues that the City failed to properly consider mitigating factors in this case, including the Grievant's discipline free record. Finally, the Union argues that the use of a one day unpaid suspension as discipline for the Grievant is inconsistent with established principles of progressive discipline.

The City disputes the allegations of the Union. It argues that the past practice that allowed employees to work through their lunch period and leave work early was properly terminated by the notice given all maintenance staff in March of 2008 by Mr. [redacted] The City also argues that the Grievant, Mr. [redacted] was present at the meeting and received notice of the termination of the past practice. The City argues that the Grievant intentionally violated the new policy directive prohibiting working through lunch periods and leaving early; and did so while Mr. [redacted] was absent on vacation. The City argues that the level of discipline imposed was appropriate in this case, and consistent with basic principles of progressive discipline. In addition, the City argues that the difference in the penalty imposed on the Grievant was justified because the Grievant was a more senior employee

with quasi-supervisory responsibility at the time of the infraction. The City argues that the disciplinary action should be sustained.

Statement of Issue

Did the City Have Just Cause to Impose a One Day Unpaid Suspension on the Grievant for Violating the City's Policy Against Working Through Lunch and Leaving Work Early?

Discussion

It is undisputed in this record that prior to March of 2008, supervisors in the City's Building and Grounds Maintenance Division had allowed employees to work through lunch periods and leave work early. A past practice clearly existed. It is also clear to the Arbitrator, however, that Mr. [redacted] unequivocally rejected and terminated this practice in March 2008.

While there is no written policy memorializing Mr. [redacted] decision in this regard, the evidence in the record corroborates his account of the actions he took in March of 2008. The most telling evidence is the uniformity of the conduct of maintenance staff between March of 2008 and July of 2009 when none of them worked through their lunch periods and left work early. In addition, no maintenance employees other than the Grievant provided

evidence challenging Mr. [redacted] account of the March 2008 meeting. The Arbitrator finds Mr. [redacted] position more credible than that of the Grievant regarding the termination of the past practice. The Arbitrator is convinced that the Grievant and other maintenance employees were fully aware of the new policy prohibiting working through lunch periods and leaving work early. The Arbitrator does not accept the Union's argument that it was simply a "coincidence" that the majority of the maintenance staff waited until Mr. [redacted] was on vacation to engage in conduct in direct violation of the new policy.

Mr. [redacted] also testified that his workload was so heavy that it was a "coincidence" that he worked through his lunch break and went home early on four days during his supervisor's vacation. The Arbitrator does not find this testimony credible. Based on the evidence in the record, the Arbitrator is convinced that the policy was intentionally violated by the Grievant on July 27, 28, 29 and 30.

The Arbitrator also notes that the Union's argument regarding "progressive discipline" is not persuasive. The discipline imposed in this case, written reprimands and a one day suspension, are all consistent with mild disciplinary penalties. Much room is left beyond these

penalties to gradually increase the punishment and encourage corrective action. Imposing a written reprimand or a one day suspension for an intentional violation of a policy or directive of a supervisor is consistent, in the Arbitrator's opinion, with basic notions of corrective discipline. They are also consistent with appropriate considerations of mitigating factors, such as a discipline free record.

The Union's argument regarding the inequities in the penalty between employees who violated the same rule raises more serious concerns. It is clear that all of the maintenance employees who were disciplined, including Mr. [redacted] (temporary employee), violated the same policy or directive during the same general time frame. The City contends that it was justified in treating the Grievant differently because of his long term employment and his supervisory status during the week when the infractions occurred.

The Arbitrator is satisfied that there were sufficient differences in the circumstances between employees who violated Mr. [redacted] policy and/or directive on a single day as opposed to the Grievant who violated it for four consecutive days. As between the Grievant and maintenance employees with "single day" violations, the Arbitrator is

satisfied that a one day suspension without pay for four consecutive days of the rule violation does not represent an unreasonable disparity from the written reprimand imposed on maintenance staff employees who engaged in a "single day" violation of the policy and directive.

On the other hand, the Arbitrator is not convinced that the reason proffered by the City for the difference in the penalties imposed on Mr. [redacted] and the Grievant was justifiable. In the treatise, How Arbitration Works (Elkouri & Elkouri, 2003; pgs. 995 & 996), the guidelines for reviewing disparate penalties are summarized as follows:

> It generally is accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same, unless a reasonable basis exists for variations in the assessment of punishment (such as different degrees of fault, or mitigating or aggravating circumstances affecting some but not all of the employees). Applying this general rule, one decision recognized: "[T]here must be reasonable rules and standards of conduct which are consistently applied and enforced in a non-discriminatory fashion. It is also generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner: thus all employees who engage in the same type of misconduct must be treated essentially the same.
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> Discrimination is an affirmative defense and, therefore, the union generally has the burden of proving that the employer improperly discriminated against an employee. Thus, "[i]n order to prove

> disparate treatment a union must confirm the existence of both parts of the equation. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantially like those of individuals who received more moderate penalties.

It is undisputed in this record that the Grievant had no supervisory authority over Mr. [redacted] while Mr. [redacted] was on vacation. He was a more senior and experienced maintenance employer than Mr. [redacted]; but not a supervisor of Mr. [redacted]. There is no evidence in the record that Mr. [redacted] ordered Mr. [redacted] to violate the policy prohibiting working through lunch and leaving work early. Mr. [redacted] may have been influenced by the Grievant's conduct, but there is no evidence that he was compelled by the Grievant's conduct to violate the policy or directive of Mr. [redacted]. In addition, the Grievant's longevity with the City is not a sufficient factor to support the disparity in discipline because the Grievant's long term employment was discipline free.

The Arbitrator is convinced that both Mr. [redacted] and the Grievant engaged in misconduct warranting discipline. The Arbitrator is not satisfied, however that the City has met its burden of proof in establishing a justifiable basis for limiting Mr. [redacted] discipline to a written reprimand, while imposing a one day suspension without pay on the Grievant.

The City was free to impose a one day suspension on Mr. [redacted] and it chose not to do so.

In such cases, arbitrators generally scrutinize the varied penalties:

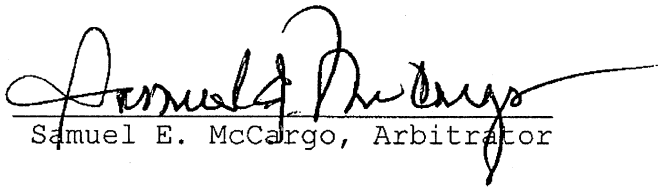
> Where the union does prove that rules and regulations have not been consistently applied and enforced in a nondiscriminatory manner, arbitrators will refuse to sustain a discharge or will reduce a disciplinary penalty. (How Arbitration Works (Elkouri & Elkouri, 2003; pg. 997)

Here, the Arbitrator finds that the level of discipline imposed on Mr. [redacted] for engaging in the same conduct as the Grievant is the appropriate benchmark for the discipline of both Mr. [redacted] and the Grievant in this case. Since the City decided to impose a written reprimand on Mr. [redacted] it would be inappropriate to impose a higher discipline on the Grievant without reasonable and objective justification for the disparate treatment. That justification does not exist in this case. As a consequence, the discipline imposed on the Grievant must be reduced to the same level as that of Mr. [redacted] i.e., a written reprimand.

AWARD

Grievance granted in part. The Grievant engaged in misconduct that justified disciplinary action by the City. The level of discipline imposed on the Grievant was not excessive or inconsistent with progressive discipline

standards. It was, however, unequal and incongruent with the level of discipline imposed on Mr. [redacted]. Since the City imposed a written reprimand on Mr. [redacted], the Grievant's discipline must be reduced to a level consistent with that of the discipline imposed on Mr. [redacted], i.e., a written reprimand.



Samuel E. McCargo, Arbitrator

Dated: May 6, 2010