

**IN THE MATTER OF THE
VOLUNTARY ARBITRATION
BETWEEN**

CITY OF WESTLAND,

Employer,

-and-

Gr.: Thomas Sharp/ 5 Day Suspension
Log No: A-25709-1602-11

MICHIGAN AFSCME COUNCIL 25,
LOCAL 1602,

Union.

ARBITRATION OPINION AND AWARD

APPEARANCES

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ISSUE

WAS THE GRIEVANT'S FIVE DAY SUSPENSION FOR JUST CAUSE, AND IF NOT, WHAT SHOULD BE THE REMEDY?

Tom Sharp, the Union vice president, was given a five day suspension on October 25, 2011 for conducting an investigation of the deputy director by visiting a local business owner. Kevin Buford, the Director of the Department of Public Service, wrote:

To: Tom Sharp

From: Kevin L. Buford
Director

Date: October 25, 2011

On October 17, 2011 you presented to Personnel Director Cindy King a letter from you in reference to official City of Westland business that was being conducted by William "Benny" McCusker. It was later discovered that you in fact drove a City of Westland street sweeper, vehicle #212, up to the location of Alexander the Greats restaurant and had a discussion with the owner pertaining to his previous conversation with Deputy Director McCusker. It is my understanding that your job assignment for the day was to be street sweeping streets in the City of Westland, and in fact your activity log for the date of October 17, 2011 states that that was what you were doing from 8:30 am until 5:00 pm. Your actions that day by going to this Westland business and inquiring about official City of Westland business that was being conducted by Deputy Director McCusker is a violation of the City of Westland work rules.

Please allow this letter to serve as written notice that you will be given five (5) days off of work for this serious violation. You are scheduled to be off work without pay on Wednesday October 26, 2011 through Tuesday, November 2, 20.11.

In the future if this type of action continues, increased discipline up to and including termination of employment with the City of Westland.

The Union grieved on November 4, 2011, asserting that Mr. Sharp was performing Union business and acting as the Union president. The Union wrote:

Grievance No. 11-04-11

Grievant: Tom Sharp

Employee Tom Sharp is grieved due to the City giving him a 5 day suspension for violating work rules.

The City claims that Tom Sharp drove city vehicle #212 street sweeper per his job assignment for the day. We do not dispute that Tom Sharp was sweeping the City between the working hours of 8:30 am - 5:00 pm. However, we did not realize that performing assigned tasks was a violation of work rules. Perhaps the City does not approve that Tom Sharp presented a letter to the Personnel Director as part of his duties as acting Union President (John McNally was on vacation on October 17). Mr Sharp has the right to conduct Union business on working hours per Article 4 E2. He asked and was granted permission from his foreman, Jake Thomas, to visit Alexander the Great's Restaurant to conduct Union business. In an effort to be mindful of City time, he made his visit on his personal break time, which may have ran over slightly.

This is Mr. Sharp's first disciplinary action in his 13 year tenure with the City of Westland. The Union feels that a 5 day suspension is excessive. This was a blatant case of discrimination against a Union officer, which is a violation of both Article 4 I and Article 4 J. Additionally, as a courtesy, the City should have met with Tom Sharp to discuss the situation and to determine if there was cause for discipline. Also, the purpose of intent was violated under the current Bargaining Agreement (sic). A violation notice must include the work rule that was violated, the level of disciplinary action, and the signature of the Personnel Director per City work rules under work rules and policies "enforcement."

The grievant and the Union seek employee Mr. Sharp be paid his five days of time, this reprimand removed from his personnel file, and he be made whole.

Cindy King, the Director of Personnel, responded, in part, on November 18, 2011 that Mr. Sharp had acted improperly towards a citizen in violation of City Work Rule Level 3, #2 and in violation of Level 3, #6 by deliberately interfering with the operation of the department. Ms. King wrote:

TO: Randy Rohraff, C&M Steward
FROM: Cindy C. King, Personnel Director
DATE: November 18, 2011
SUBJECT: Response to Grievance 11-04-11 Tom Sharp
Disciplinary Suspension

Management respectfully declines to grant the relief sought by the Union in the above grievance, namely that Mr. Sharp be given back five days' time, the reprimand be removed from his file and he be made whole.

Mr. Sharp initiated an investigation concerning the conduct of a member of management and based upon a conversation overheard by Local 1602 members involving DPS Superintendent Benny McCusker and the owner of Alexander the Great's Restaurant. This discussion did not include or concern any Local 1602 members. Mr. Sharp has disingenuously claimed he was conducting Union business contrary to the letter he sent to me dated October 17, 2011 stating that he was made aware that Superintendent McCusker had allegedly been rude and unprofessional with this business owner. Mr. Sharp states "I believe this should be investigated and he be treated no different than any other employee. please advise me on the outcome." Apparently, Mr. Sharp, instead of suggesting to me that the matter be investigated, chose to investigate the matter himself. Mr. Sharp acted outside his role as Union Vice-President. Superintendent McCusker is not a member of Local 1602, he is a member of Management.

Mr. Sharp's role as Union Vice-President is to represent the interests of members of Local 1602. The City disagrees with the Union's contention that Mr. Sharp was acting under the auspices of Article 4. E. 2 (sic). Article 4. E. (I can find no E. 2 in the current CBA) affords

the President of Local 1602 a reasonable amount of paid release time to perform his/her duties, and in this particular matter, has no application anyway.

The alleged conduct of the DPS Superintendent did not concern a Local 1602 member. Mr. Sharp commits a Level 3 violation of the City work rules #2 "Threatening, intimidating, coercing or harassing sexually or otherwise - other employees, citizens or vendors." Mr. Sharp's visit to the business owner had the effect of coercing or harassing this business owner.

Mr. Sharp commits a violation of Level 3 work rules #6 as he deliberately interfered with a plan of operation or deliberately misrepresented a department's operations, policies or procedures. Following this business owner's contact with Mr. Sharp, the business owner asked management why a laborer would come to his business to question him about his conversation with Superintendent McCusker. Mr. Sharp's actions reflected poorly upon the professional manner in which claims of poor treatment are handled by management. Mr. Sharp interfered with operations and policies. It merits note the business owner did not file a complaint concerning his conversation with Mr. MCCusker.

Mr. Sharp also violated the City work rules concerning the use of City vehicles or equipment. Regardless of whether Mr. Sharp was utilizing a break period for which he may have ran over slightly, as the Union alleges, Mr. Sharp used the City's street sweeper to drive from the southwestern part of the City to the northeastern part of the City to conduct his personal investigation into the conduct of a member of management.

Management questions Mr. Sharp's contention that he had permission from Foreman Jake Thomas to take leave time in order to conduct Union business. Mr. Sharp has demonstrated in the past his knowledge that any leave time for conducting Union business must be granted by department directors; in this case either DPS Director Buford or DPS Superintendent McCusker or me, and no such leave time was granted by any of us.

I was contacted by Mel Brabson, AFSCME Council 25 Staff Representative, the day Mr. Sharp received his suspension. Mr. Brabson explained that, Tom had called him and advised him that he had been suspended for conducting Union business. In questioning

Mr. Brabson, he told me that Tom told him he was suspended for investigating an incident concerning a clerical employee who received a suspension. The matter for which a clerical employee was recently suspended had nothing to do with the matter concerning the Alexander the Great business owner and DPS Superintendent McCusker.

The CBA sets forth conditions violated by Mr. Sharp, among them Purpose and Intent "to promote orderly and peaceful labor relations for the mutual interest...;" Article 10. Management Responsibilities including "direction of the working forces...;" and Article 13. A. Work Rules which are the City's responsibility to enforce.

The City welcomes employees making management aware of situations in which a City representative may have acted improperly and in fact, the City encourages this communication so that Management can take steps to ensure City employees are professional and promote our objective of good communication and good service in the City. Management duly notes the Union's position that notices of discipline should include the work rule being violated. Doing so ensures clarity so that the effected employee understands the reason behind said discipline; it is not a requirement as the Union contends "a violation notice must include the work rule... violated..."

The City respectfully declines to grant the relief sought and remind the Union and Mr. Sharp that future instances of similar conduct will result in progressive discipline up to and including termination of employment.

An arbitration hearing was held on April 25, 2012. Testifying for the Employer were: Benny McCusker, Deputy Director, Department of Public Services; Jade Smith, Deputy Mayor and Cindy King, Personnel Director. Testifying for the Union were Thomas Sharp, Vice President and Paul Sypniwski, Steward. Post-hearing briefs were submitted.

BACKGROUND

At the time of this matter Foreman Thomas's wife, an AFSCME employee at Westland, was given a three day suspension for being rude to a customer. Mr. McCusker wrote on September 28, 2011:

MEMORANDUM

To: Jennifer Thomas, Senior Secretary
From: Benny McCusker, Deputy DPS Director
Date: September 28, 2011
RE: Suspension - Citizen Complaints

In follow up to our meeting yesterday regarding recent citizen complaints about your conduct (this is to notify you that beginning September, 29, 2011 you will be suspended for three (3) days in accordance with Work Rules.

Again, as we discussed yesterday, there were several incidents between September 8 - 12, 2011 where citizens called to complain that they were treated rudely and unprofessionally by you when they called our department (see attached). Upon investigation these complaints were deemed authentic. This is unacceptable behavior.

This conduct is disappointing and unwarranted. It reflects badly not only on you but on the department and every employee in the City. This is not the first time you have been reprimanded for this behavior. On September 16, 2010 you were given a verbal reprimand about your conduct by Kevin Buford and on December 7, 2010 you received a suspension due to insubordination and citizen complaints. You also received anger management counseling.

A review of work rules finds that again your conduct incorporates violations of Levels 2 and 3 work rules and a three (3) day suspension is the appropriate discipline for this conduct.

This memo shall be placed in your personnel file and please be advised that any similar conduct in the future will result in progressive discipline up to and including termination.

Tom Sharp, the Union vice president for the past two years, heard that Deputy Director McCusker had been rude to a citizen. Mr. Sharp submitted the following letter to the City on October 17, 2011:

Dear Ms. King :

It has come to my attention that Benny Mc Cusker was being rude and unprofessional with the owner of Alexander the Greats Restaurant. This was witnessed by Office Staff. I believe this should be investigated and he be treated no different than any other employee. Please advise me on the outcome.

Should you have any question about this request, please do not hesitate to call me.

Also, on October 17, the Local took a statement from several bargaining unit members, who said that they had observed Mr. McCusker raise his voice and actually yell at the owner of the Alexander the Great Restaurant.

Mr. Sharp said that on October 17 the Union president was off work for a week, and that the Union's constitution provided that he assume the duties of the president.

Mr. Sharp stated that he felt that his investigation of the Thomas and McCusker matters had shown that Ms. Thomas had received disparate treatment in comparison to Mr. McCusker. He further decided to speak with the owner of the Alexander the Great Restaurant about his interaction with Mr. McCusker.

Ms. Sharp testified that he received permission from his foreman, Mr. Thomas, to drive his street sweeper to the restaurant while on a break. He states that he identified himself to the owner as the Union vice president, and explained that he was performing an investigation for the Local.

Mr. Sharp quotes the owner as saying that he had spoken with Mr. McCusker and that he was “rude and should be fired.” The Grievant denies coercing or intimidating the owner.

Mr. Sharp said that he had used the street sweeper in the past to conduct Union business. The Grievant adds that he does not put Union business in his log, if the length of that business is less than an hour. In this case, he says that the conversation with the business owner was less than one hour.

Mr. Sharp said that he made a PERA request, and was advised that the owner had not made a complaint against him. He adds that he believes that based upon the first paragraph of the Work Rules, that these rules apply to all City workers and not just those in the Local. This led him to explore a disparate treatment defense.

Mr. Sharp said that he had no reason to previously investigate his boss, Mr. McCusker. Paul Sypniwski, a steward, testified that he had historically gone to his foreman for release time to conduct Union business. He adds that he has used a City vehicle to conduct Union business.

Deputy Director McCusker testified that Mr. Sharp, “Can’t investigate what I do.” He added that Ms. Thomas was given a three day suspension for her actions.

Mr. McCusker stated that he took a call from the owner of the Alexander the Great Restaurant, who complained about the size of his water bill. Mr. McCusker stated that the owner was frustrated, and “I had to talk over him.” The director said that he did not hang up on the owner and that the conversation ended with his agreement to conduct a review of the water bill.

When the Union complaint was made against him, Mr. McCusker said that the deputy mayor interviewed the business owner. Mr. McCusker adds that the Grievant’s log fails to show that he met with the owner on October 17th, and he denies that he was aware of a one hour rule for showing

Union business. Mr. McCusker further states that street sweepers only go 25 mph, and that the Grievant had traveled four miles to meet with the owner.

Mr. McCusker said that he did not want the Grievant to engage in an investigative meeting with the business owner. He further said that the foreman was not authorized to grant the Grievant authority to engage in an investigation.

Mr. McCusker testified that a 15 day suspension of the Grievant was contemplated, but that a decision was made to reduce it to five days. The assistant director said that the foreman was not disciplined for allowing the Grievant to go on Union business.

The deputy mayor, Jade Smith, testified that the Work Rules do not apply to him or Mr. McCusker, who are appointees. He further said that he interviewed the business owner, who told him that the Grievant had tried to get him to file a complaint against Mr. McCusker based upon the way he was treated, and that this disturbed the owner. The owner did not file a complaint against Mr. McCusker; neither did he file a complaint against Mr. Sharp. Mr. Smith said that the Grievant did not have the authority to interview the owner.

Cindy King, the Personnel director, said that the Work Rules are not applicable to appointed officials. She testified that the Grievant violated Level 3, Conduct Rule #6, which states:

Level 3 Offenses

Conduct Rules

* * *

6. An employee shall not deliberately interfere with any plan of operation or deliberately misrepresent any of the department's operations, policies or procedures.

* * *

Ms. Smith further said that the Grievant violated Level 3, Conduct Rules #2, which says:

2. Threatening, intimidating, coercing, or harassing sexually or otherwise – other employees, citizens, or vendors (see sexual harassment and anti-discrimination policies.)

The Work Rules provide for the following guidelines:

Level 3

5 to 30 days for a first violation. Progressive increase in penalties can be expected for additional violations in the level that may eventually lead to termination.

Ms. King said that a request to leave work for Union business should go through her office, and that that did not occur in this case. She adds that she does not regard the Grievant's trip to the restaurant as Union business, because Union members are not permitted to investigate management employees. Ms. King maintains that the Grievant interfered with City business, insofar as the Union cannot investigate members of management.

PERTINENT CONTRACT PROVISIONS

ARTICLE 13 GENERAL PROVISIONS

A. WORK RULES

The City reserves the right to publish work rules from time to time. (These will become effective immediately with twenty~four (24) hours after publication.) The Union reserves the right to challenge the reasonableness of any work rule through the grievance procedure.

* * *

ARTICLE 4 REPRESENTATION

* * *

B. GRIEVANCE COMMITTEE

The City shall recognize a Grievance Committee composed of the President and two (2) stewards who shall come from the recognized steward representative areas.

* * *

I. NO DISCRIMINATION AGAINST UNION MEMBERS

There shall be no discrimination against any employee because of his membership in the Union or because of his acting as an officer or in any other capacity on behalf of the Union.

J. GUARANTEE OF RIGHTS

The City shall not discriminate against any employee because of age, sex, marital status, race, nationality, religious or political beliefs and activity or for Union activity.

K. UNION RESPONSIBILITY

The Union recognizes its responsibility as bargaining agent and agrees to represent all employees in the bargaining unit without discrimination.

POSITION OF THE UNION

It is asserted that Mr. Sharp, as the acting president, could investigate the charge of disparate treatment by interviewing the business owner. As part of its duty of fair representation, it is maintained that Mr. Sharp was required to make an investigation of this matter, which included a review of the disparate treatment allegation.

The Union emphasizes that the foreman, as was customary, gave Mr. Sharp permission to engage in Union business during release time. It is further asserted that the Grievant took his City vehicle to conduct the investigation as was customary.

The Union contends that Article 4 was violated when the Grievant was disciplined for performing Union duties.

It is maintained that there is insufficient evidence to conclude that Mr. Sharp coerced the business owner. It is also emphasized that the owner did not file a complaint against Mr. Sharp, and his statements at the hearing are seen as being hearsay.

The Union further denies that the Grievant interfered with any operation, because he was simply doing his job as an officer of the Union. The Union also notes that the foreman was not called as a witness to rebut the allegation that he gave the Grievant permission to take Union leave.

A due process violation is alleged because the Grievant was not interviewed prior to the charges being brought against him. The specific charges, it is noted, were not initially provided to the Grievant, and this is said to represent an additional due process violation.

The Union asserts that the Grievant lacked notice that he could be disciplined for performing a Union investigation under the circumstances of this case. The two charged rule violations are argued to be unrelated to the investigation. The Employer's investigation is further argued to lack objectivity.

The Union contends that the Employer acted to improperly intimidate the Union. The disciplinary penalty is asserted to lack proportionality. The Employer's actions are argued to deter the Union from engaging in investigations.

POSITION OF THE CITY

The City maintains that the Grievant was simply acting to get his boss in trouble under the guise of Union business and disparate treatment.

The City argues that the Grievant was not entitled to release time, and that only the Union president could be released from work. In any event, it is maintained that the Grievant did not have

permission for management to leave for Union business. Also, it is argued that the foreman did not have the authority to grant the Grievant permission to engage in Union business.

The City argues that the arbitrator in the Thomas arbitration held that the behavior by McCusker was not relevant to the charge of disparate treatment, because Mr. McCusker was not situated the same as the Grievant, insofar as he is a member of management. The City argues that Mr. McCusker is not even subject to the same Work Rules as the Grievant.

The City argues that the Grievant attempted to conceal going to the restaurant owner, by not placing his visit in the log or otherwise by talking with management.

A due process violation is denied insofar as the Grievant received notice of the charges against him, and an answer was properly filed pursuant to the requirements of the contract. The City also contends that Ms. King spoke with the Grievant prior to discipline. Any potential error is argued to be irrelevant, insofar as the Grievant admitted his involvement.

DISCUSSION

As a general proposition, the Union has the right and obligation to investigate grievances; however, it cannot coerce or intimidate citizens in the course of that investigation. That would go past allowable behavior for a union.

Mr. Sharp is charged with violating Level 3, #2 by coercing or harassing the business owner. However, the business owner did not testify at the arbitration hearing. He also did not file a written complaint against the Grievant. The owner's hearsay statement to the deputy mayor cannot be credited to support serious discipline against Mr. Sharp, absent an opportunity for the Union to cross-examine the business owner and an opportunity for the arbitrator to determine his credibility. Therefore, there is insufficient evidence to support a Level 3, #2 violation.

Next, Mr. Sharp is charged with violating Level 3, #6 by:

Mr. Sharp commits a violation of Level 3 work rules #6 as he deliberately interfered with a plan of operation or deliberately misrepresented a department's operations, policies or procedures. Following this business owner's contact with Mr. Sharp, the business owner asked management why a laborer would come to his business to question him about his conversation with Superintendent McCusker. Mr. Sharp's actions reflected poorly upon the professional manner in which claims of poor treatment are handled by management. Mr. Sharp interfered with operations and policies. It merits note the business owner did not file a complaint concerning his conversation with Mr. McCusker.

This charge goes to the heart of whether the Grievant should have interviewed the business owner. There is arbitrable authority for the proposition that the treatment of management employees is irrelevant to the treatment of bargaining unit employees as it pertains to a disparate treatment argument. This apparently was the ruling of the arbitrator who heard the Thomas case.

However, there is no showing that Mr. Sharp had the experience or sophistication to know that an alleged action by management would be irrelevant to the Thomas case. In fact, there are arbitration cases that have allowed management actions to be compared for disparate treatment arguments. In any event, it was not shown that the Grievant understood that a disparate treatment argument involving management would be without effect at the Thomas arbitration.

I would agree that the interview of the business owner was outside of the purview of a typical disparate treatment case, insofar as Mr. Sharp was involved in the investigation of a management member, as opposed to another member of the bargaining unit. Therefore, the investigation of Mr. Sharp was somewhat misguided, particularly based upon the subsequent ruling of the arbitrator in the Thomas matter.

However, there was no showing that Mr. Sharp acted in bad faith or that he was otherwise acting except to further the interest of the Grievant in the other case. Mr. Sharp did not know that the arbitrator in the Thomas case would preclude his disparate treatment argument involving members of management.

In particular, paragraph K of Article 4 states, "The Union recognizes its responsibility as bargaining agent and agrees to represent all employees in the bargaining unit without discrimination." Mr. Sharp's actions can be seen as being a furtherance of this contractual requirement.

Further, the rule in arbitration is that a union representative enjoys a special immunity from discipline if he/she acts in good faith to represent a union member. Elkouri and Elkouri in *How Arbitration Works* (BNA 6th Ed., p.252) state:

Arbitrators have been reluctant to uphold discipline of union stewards engaged in grievance representation if it interferes with the union's grievance handling responsibilities or otherwise threatens to disrupt labor/management relations. Many disciplinary actions are set aside or reduced because the 'cause' for the discipline (often abusive language and heated exchanges with supervisors) emerged from, or was related to, union steward duties.

I am persuaded that Mr. Sharp acted in good faith to represent his member in a disparate treatment defense. However, because disparate treatment was not specifically relevant to that case, some discipline, but not a five day suspension, is appropriate. Pursuant to the Doctrine of Special Immunity, the discipline should be reduced to a written reprimand, which will expire one year after the date of discipline under Section 3A of Article 5.

The key point is that Mr. Sharp was acting in good faith as a Union official, and believed that the disparate treatment defense required a conversation with the restaurant owner. There was

insufficient proof to establish that the restaurant owner was coerced or harassed, and therefore the discipline should be significantly reduced.

There is also insufficient evidence to conclude that the Grievant was prohibited from using the street sweeper, a City vehicle, to conduct an investigation. Regarding authorization for the interview, the City maintains that the foreman was without authority to release him. However, the foreman did not testify to deny that he gave the Grievant permission to interview the restaurant owner. It appears that the foreman had the apparent authority to allow the interview, even if the actual authority resided with management. In particular, there is no showing that the foreman was disciplined for improperly allowing the Grievant to engage in an interview of the owner.

Based upon the above, the due process arguments of the Union would not require a different result. The Union is on notice going forward, that behavior by management will not be generally relevant to a disparate treatment defense.

AWARD

For the foregoing reasons, the discipline is modified to a written reprimand, which will expire pursuant to Section 3A of Article 5, one year from the date of discipline. The result in this proceeding is required by the Doctrine of Special Immunity and paragraph K of Article 4.



Mark J. Glazer
Arbitrator

September 4, 2012