

**IN THE MATTER OF ARBITRATION
BETWEEN**

)	Issue: 4-Shift Suspension
)	
CITY OF BRAINERD, BRAINERD, MN.)	BMS Case No.: 07 – PA – 0990
)	
“Employer” or “City”)	Hearing Site: Brainerd, MN
)	
and)	Hearing Date: June 4, 2008
)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 31)	Briefing Date: July 15, 2008
)	
“Union” or “IBEW”)	Award Date: August 13, 2008
)	
)	Arbitrator: Mario F. Bognanno

JURISDICTION

Pursuant to the relevant provisions in the parties’ 2006 – 2007 Collective Bargaining Agreement (“CBA”), this case was heard on June 4, 2008, in Brainerd, Minnesota. Through their designated representatives, the parties waived Article VIII, section 5.B. of the CBA that requires an Award within thirty (30) days of the submission of the parties’ briefs. Both parties stipulated that the matter was properly before the Arbitrator for a final and binding determination. Both sides were given a full and fair opportunity to present their cases. Witness testimony was sworn and cross-examined. Exhibits were introduced into the record.

At the close of the hearing, the Union reserved the right to call an additional witness who was unavailable on the hearing date. Subsequently, the Union elected not to call this witness. The record was closed as of the conclusion

of the June 4, 2008 hearing date. The parties filed timely post-hearing briefs on July 15, 2008. Thereafter, the Arbitrator took this matter under advisement.

APPEARANCES

For the Employer:

Thomas A. Fitzpatrick, Esquire, Brainerd City Attorney

Kristy Schubert, Human Resource Coordinator

Fred Underhill, Fire Chief

Deb Doucette, Retired Fire Department Administrative Specialist

Kurt Doree, Fire Equipment Operator

Daniel J. Vogt, City Administrator

For the Grievant:

Patrick M. Krueger, Esquire, Attorney at Law

Angela J. Christenson, Esquire

Mark Glazier, Business Manager, IBEW, Local 31

Lance Davis, Fire Equipment Operator

Mark Turner, Fire Equipment Operator

Grievant

I. FACTS AND BACKGROUND

The Employer in this case is the City of Brainerd. The City maintains and operates a Fire Department staffed by full-time Fire Equipment Operators (“FEO”) and paid on-call volunteers, among others. The IBEW, Local 31 is the exclusive bargaining agent of the employees in Fire Department’s bargaining unit. The Employer and Union are parties to a negotiated CBA. (Joint Exhibit 1)

The Grievant and witnesses Kurt Doree, Lance Davis and Mark Turner are all full-time FEOs. Deb Doucette, Administrative Specialist, retired on June 2, 2008, shortly before the instant hearing, after nearly twenty (20) years of full-time employment with the Fire Department.

On February 20, 2007, following an investigation, Fire Chief Fred Underhill disciplined the Grievant by placing him on an unpaid suspension for four (4) shifts. (Employer Exhibit 9) This suspension followed a suspension of one (1) shift that was administered on August 17, 2006, for a similar infraction. (Employer Exhibit 4) The August 2006 suspension was followed by counseling sessions held on October 3 and November 1, 2006. (Employer Exhibits 6 and 9) These disciplinary/counseling actions are now reviewed in more detail.

A. One (1) Shift Suspension – August 17, 2006

On July 28, 2006, the Grievant and FEO Doree had an argument, witnessed by Fire Chief Underhill, among others. Subsequent to this altercation, a disciplinary memorandum dated July 28, 2006 was issued, setting forth the grounds for the Grievant's one (1) shift suspension:

... I expect you to perform the duties that you have been assigned and to act in a professional manner at all times.

Therefore, as a result ... of the threatening manner in which you touched Mr. Doree and your admission that you touched Mr. Doree during a verbal altercation, I have concluded that discipline is warranted.

(Employer Exhibit 4) This memo further detailed that the misconduct included "rude or offensive conduct toward another employee" that, according to the City's

Employee Personnel Manual, is a policy violation. (Employer Exhibit 1) This discipline was not grieved and the Arbitrator considers it to be a settled matter

B. Complaint of October 26, 2006

Soon after the Grievant's August 2006 suspension for his rude and offensive conduct toward Mr. Doree, the Chief received a written complaint from another employee, alleging continuing aggressive misbehavior on the part of the Grievant. In a memo dated October 26, 2006, Ms. Doucette reported that the Grievant had become "confrontational and argumentative" with her when she handed him a note pertaining to a routine leaf burning and/or burning permit call she had received from a Baxter, MN resident. Although another FEO employee subsequently checked out the burning complaint, the Grievant essentially brushed off the call, giving the note back to her, concluding it was a Department of Natural Resources ("DNR") matter and "not our issue." (Employer Exhibit 5) This event was witnessed by co-workers, including the Chief.

In her memo to the Chief, Ms. Doucette wrote:

I do not believe we should have to continue to be aggressively confronted by the grievant every time he chooses not to want to do something.

I do not know what can be done, but I for one am tired of his negative aggressive behavior.

I do not want to cause a problem for any of the employees here at the fire department but I do feel this issue with Charlie needs to be re-addressed with him. He continues to be aggressive and confrontational and it creates a very uncomfortable work environment for all of us.

(Employer Exhibit 5) Ms. Doucette testified that she had never before written a memo to the Chief, but she felt that Grievant's negative behavior was a serious problem that warranted action because his conduct was both threatening and contagious.

C. Counseling Sessions – October 3, 2006 and November 1, 2006

On November 1, 2006, following his receipt of Ms. Doucette's complaint, the Chief met in non-disciplinary counseling with the Grievant to discuss his "attitude" and "getting along with others." (Employer Exhibits 5 and 6) Previously, on October 3, 2006, the Chief had a similar non-disciplinary counseling session with the Grievant. (Employer Exhibit 9)

D. Four (4) Shift Suspension – February 27, 2007

On December 12, 2006, the Grievant approached Ms. Doucette, a Notary Public, seeking a personal favor. On that day, the Grievant entered Ms. Doucette's dispatch area and asked her to notarize a bank document that his wife had already signed. Since the law requires that the signature be executed in the presence of the notary, Ms. Doucette testified that she declined, as she had in a similar circumstance, involving a different employee. (Joint Exhibit 2)

Faced with Ms. Doucette's refusal to notarize the signature on his document, the Grievant allegedly pressured her to notarize the document and became angry when she would not. In her letter to the Chief, which was written that same day, Ms. Doucette stated:

He was mad and said he had seen her [his wife] sign it – wasn't that good enough? He left angry but said no more.

(Employer Exhibit 7) Shortly after the Grievant left the dispatching area, Ms. Doucette received a belligerent call from Grievant's wife. Ms. Doucette testified that the Grievant's wife berated her for the inconvenience she had caused by declining to notarize the signature she had not witnessed. Apparently, the Grievant's wife "hung up" on Ms. Doucette. (Employer Exhibit 7)

Ms. Doucette testified that these events left her "crying and shaking." In this same vein, FEO Doree testified that he spoke to her immediately after her confrontation with the Grievant. He testified that at approximately 10:30 a.m., as she was passing through the truck bed area of the Fire Department [on her way home], he observed that she was "crying." Accordingly, he "grabbed" her, asking: "What's the matter?" And she replied: "Charlie attacked me." When asked "Why?" she replied: "I wouldn't notarize something for Colleen" and then she said, "I have to get out of here."

That Ms. Doucette was visibly upset with "tears in her eyes," as she was leaving the Fire Department, is corroborated in Chief Underhill's December 12, 2006, investigatory account of events and by testimony that he too saw her leaving work early that day, "crying." (Employer Exhibit 8)

When questioned on cross-examination, Ms. Doucette stated that during her December 12, 2006 exchange with the Grievant he did not use "foul or derogatory language" and he was not "physically threatening." However, she also testified that he was "mentally threatening," his "body language" betrayed his anger, and as he "persisted, tensions rose." She stated that the whole affair was "unnerving" and that he made her feel "extremely uncomfortable."

Ms. Doucette was unable to continue working and left. When she got home, she wrote the Chief a letter describing notary-related incident and stated that she was going to quit her job because "... I certainly cannot continue to work in this type of hostile environment any longer." (Employer Exhibit 7)

She went on to explain:

I am far too upset to return to work today and doubt I would be able to face working the day tomorrow with Charlie. As it was before this, I felt I was constantly being set up something with him and have not been comfortable for a long time. I was hoping things would change – but they have only gotten worse. What a shame we can't just come to work and work.

(Employer Exhibit 6) After receiving this letter, the Chief investigated the incident, interviewing everyone involved. (Employer Exhibit 8)

The investigation culminated in a four (4) shift suspension of the Grievant, as issued by the Chief on February 20, 2007. (Employer Exhibit 9) As Chief Underhill wrote in the memorandum documenting the suspension:

Unfortunately, your behavior towards Ms. Doucette leads me to believe that the previous discipline has not caused a change in the way in which you treat follow employees.

(Employer Exhibit 9) Therefore, based on the incident of December 12, 2006, as well as the earlier events that resulted in a one (1) shift suspension, the Grievant was suspended again on February 20, 2007, this time for four (4) shifts. The Grievant challenged this suspension, filing a grievance on March 6, 2007. Therein, the Grievant claimed that the discipline lacked "just cause." (Joint Exhibit 2) The parties were unable to resolve this grievance and it was advanced to arbitration for final resolution.

II. STATEMENT OF THE ISSUES

The parties jointly stipulated to the following statement of the issue:

Was the Grievant disciplined for just cause? If not, what is an appropriate remedy?

III. RELEVANT CONTRACT AND POLICY PROVISIONS

Below are relevant contract provisions from the CBA. (Joint Exhibit 1)

ARTICLE I. GENERAL CONDITIONS

Section 2. Employer Authority. The Employer retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; including the contracting out for or the transfer, alteration, curtailment or discontinuance of any services; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personnel; to establish work schedules, and to perform any inherent managerial function not specifically limited by this Agreement.

ARTICLE IX. DISCIPLINE

Section 1. The Employer will discipline employees for just cause only.

The applicable policy for the Employee Policy Manual is set forth below.

(Employer Exhibit 1)

SECTION 25. DISCIPLINE FOR JUST CAUSE AND DISCHARGE.

Subdivision 1. Just Cause

Discipline and discharge will be for just cause and will be applied on a non-discriminatory basis. Evidence of just cause will provide the basis for all disciplinary action. Cause for discipline and discharge will include, but is not limited to the following:

- 3) Violation of any work rule, regulation or City ordinance;
- 5) The use of rude or offensive conduct or language toward the public, municipal officers or employees;
- 15) Other incidents which constitute cause.

Relevant portions of the Brainerd Fire Department Policies are reproduced

below. (Employer Exhibit 3)

CHAPTER ONE: INTRODUCTION

1.04 All policies and standards are based on the expectations that employees will accomplish the following:

6. Get along with others, and strive to work in harmony with other employees.

1.05 MANAGEMENT RIGHTS

A policy or standard cannot be written to govern every situation. Employees are required at all times to exercise ordinary common sense in situations not governed by specific policies and standards and behave in a socially acceptable manner, thus promoting a positive public image for the Brainerd Fire Department, its mission, goals and objectives. Failure to do so, when it is shown that the employee is at fault, is misconduct and forms cause for disciplinary action up to and including termination.

CHAPTER THREE: STANDARDS OF CONDUCT

EXERCISING COMMON SENSE, COURTESY AND AFFIRMATIVELY PROMOTING THE ORGANIZATIONS VALUES

Employees shall be professional in the performance of their duties, both with the public and with each other. Such professionalism includes, but is not limited to, being courteous, being tactful, and controlling one's temper, and exercising utmost patience and discretion, even in the face of extreme provocation.

(Employer Exhibit 3)

IV. POSITION OF THE EMPLOYER

The City initially maintains that it had "just cause" to suspend the Grievant for four (4) shifts based on City and Fire Department policies, the events of December 12, 2006, and prior discipline for the same type of misconduct. With respect to its policies, the City argues that they are reasonable and necessary to promote an effective, efficient and safe work environment, particularly among employees in inherently dangerous jobs who must "trust" and be able to "rely"

upon one another. The Brainerd Fire Department Policies require that employees "... get along with others, and strive to work in harmony with other employees." It further demands that employees "behave in a socially acceptable manner...."

The Department policies also contain the following standards of conduct:

Employees shall be professional in the performance of their duties, both with the public and with each other. Such professionalism includes, but is not limited to, being courteous, being tactful, and controlling one's temper, and exercising utmost patience and discretion, even in the face of extreme provocation.

(Employer Exhibit 3) In addition, the Employer points out the Grievant had been oriented in both the City and Department policies and that he was provided copies of both sets of policies. (Employer Exhibit 2) Nevertheless, the Employer insists, the Grievant persisted in a pattern of behavior which was "aggressive and confrontational" with some of his co-workers: Conduct that undermines Employer efforts to promote a spirit of teamwork, trust and harmony.

Next, the Employer calls attention to Ms. Doucette's December 12, 2006, letter to Chief Underhill, in which she explained, "... I constantly felt I was being set up for something with him and have not been comfortable for a long time." (Employer Exhibit 7) The Employer speculates that Ms. Doucette's "set up" concern may have been a reaction to the fact that in the past the Grievant has tape recorded conversations with co-workers and the Chief. The Employer contends that the larger point is that although the Grievant knew that professional, courteous and tactful interaction among co-workers was a fundamental expectation of the City, he pursued a course of conduct which it

described as “aggressive confrontation.” When the Grievant was suspended for his August 2006 verbal altercation with FEO Doree, he was warned that further behavior of this kind would result in more serious disciplinary consequences. In addition, the Employer points out, to encourage positive behavioral modification Chief Underhill and the Grievant had at least two (2) follow-up counseling meetings. Ultimately, however, the City concludes that these efforts failed because on December 12, 2006, the Grievant mistreated Ms. Doucette.

With respect to the events of December 12, 2006, the Employer notes that when Grievant became angry at Ms. Doucette because she would not notarize the document in question, she concluded that the atmosphere was so hostile that her only remedy was to quit. Further, after Chief Underhill had completed an extensive investigation into the notary episode, he rightly concluded that (1) the Grievant’s treatment of Ms. Doucette was inexcusable; (2) the Grievant’s pattern of aggressive and confrontational behavior *vis a vis* co-workers was continuing; and (3) further discipline was warranted. As the Chief wrote in his disciplinary memo:

Frankly, I assumed that as a result of the discipline previously administered and the October 3rd discussion, your behavior would change. Unfortunately, the recent incident confirms that your behavior towards some co-workers has not improved.

(Employer Exhibit 9) Accordingly, the Employer contends that the four (4) day suspension it issued was both corrective and a judicious use of progressive discipline.

Finally, the Employer points out that despite the Grievant's attempt to minimize the seriousness of his December 12, 2006 encounter with Ms. Doucette, its harmful impact on her is undeniable. Moreover, for a never disciplined, twenty (20) year employee to propose to quit her job because of the poisonous work climate created by Grievant graphically demonstrates the negative consequences of his persistent destructive behavior. The City urges that it had "just cause" to discipline Grievant and that the grievance be denied.

V. POSITION OF THE UNION

The Union begins by noting that the burden of proving "just cause" in this case rests with the City and that the quantum standard that must be met is that of "clear and convincing" proof, which the Union argues the City failed to achieve. Indeed, the Union contends that the record's only uncontradicted evidence shows unequivocally that the Grievant was suspended because of the actions of his wife, and not because of his own actions.

To emphasize this point, the Union observes that Chief Underhill was unable to identify the specific nature of the misconduct that the Grievant is accused of having committed on December 12, 2006. Indeed, the Union further observes that Ms. Doucette admitted that the Grievant was not "rude," "offensive," or "physically threatening."¹ Moreover, the Union continues, even though Ms. Doucette testified that as her conversation with the Grievant unfolded she could feel the tension rising and she became nervous she could not describe the physical actions or the body language of the Grievant that might explain her

¹ The record shows that Ms. Doucette testified that the Grievant was not "rude" or "offensive," but in the qualified sense that he had not used "foul language."

feelings. In this vein, the Union points to the inconsistency between the fact that Ms. Doucette is alleged to be the victim of the Grievant's rude and offensive behavior *versus* the fact that she testified under oath that the Grievant was neither rude nor offensive nor physically threatening. What then, the Union rhetorically asks, is the factual and legal basis for suspending the Grievant?

Ultimately, the Union concludes, that the event that brought on Ms. Doucette's tears and caused her to leave work on December 12, 2006 was "... not the grievants, but his wife.": The Grievant was not punished for his behavior but for that of his wife.

Next, the Union argues disparate treatment. First, with regard to the July 28, 2006 incident involving FEO Doree and the Grievant, the former was not disciplined even though unrebutted testimony suggested that he was the "instigator." Second, there is nothing in the record to support the claim that the Grievant was "confrontational and argumentative" on October 26, 2006: He merely returned the "leaf burning" note to Ms. Doucette, told her to call the DNR and left the area. This all happened in the presence of the Fire Chief and, yet, he did nothing because nothing happened that was inappropriate. Third, FEO Turner testified that Ms. Doucette was not disciplined when she became aggressive toward him when he signed the "run" book and she thought that he should not have. Fourth, the Grievant testified that Ms. Doucette was not disciplined when she came "unglued" when he questioned the need for a doctor's slip, which he did not need as a point of fact. Last, the Grievant testified that there was no discipline issued when training materials were intentionally withheld

from him and when he was “struck in the head” by keys thrown by a co-worker. The Employer’s job standards are not uniformly applied, the Union concludes.

Finally, the Union contends that even if the Grievant had engaged in the alleged misbehaviors, the discipline issued in this case was excessive. But, in the final analysis, the Union urges that the Grievant’s suspension was imposed due to the actions of his wife; and, therefore, the suspension was arbitrary and capricious and, for this reason, the grievance ought to be sustained.

VI. DISCUSSION

The Grievant was suspended for four (4) shifts because of an incident that allegedly occurred on December 12 2006. On that date, the City alleges, the Grievant’s interaction with Ms. Doucette amounted to “The use of rude or offensive conduct or language toward the public, municipal officers or employees,” which is a violation of section 25, subdivision I, paragraph (5) of the City of Brainerd’s Employee Policy Manual. (Employer Exhibits 1 and 9)

Nothing in the record of this case calls into question the reasonableness of this policy, particularly as it applies to employees whose work is inherently dangerous and, by necessity, requires interpersonal trust and respect. Moreover, nothing in the record questions whether the Grievant was properly informed of said policy or policies, as he is a relatively long-term employee who began working for the City on a paid, on-call basis in May 1991.

Further, it is undisputed that prior to the December 12, 2006 incident, the Grievant had been put on notice that the Employer would not tolerate violation of the referenced policy. Specifically, on August 17, 2006, the Grievant was issued

a one (1) shift suspension for the verbal altercation he had on July 28, 2006, with FEO Doree. This incident involved the "... threatening manner in which [the Grievant] touched Mr. Doree ..." (Employer Exhibit 4) This discipline was not grieved and for present purposes this matter is determined to have been settled on the basis of facts alleged at the time. In addition, the record in evidence shows that the Grievant was the subject of non-disciplinary counseling by the Fire Chief on October 3, 2006 and November 1, 2006. These were private, informal counseling sessions having to do with the Grievant's attitude toward co-workers and with merely "getting along" with them, according the Chief Underhill's testimony. (Employer Exhibits 6 and 9) Also, there were other meetings held on October 6, 2006 and on February 9, 2007, involving the Grievant, co-workers and other relevant individuals pertaining to the matter of "getting along."

The facts outlined above suggest to the Arbitrator that prior to the events of December 12, 2006, the Grievant was in an early stage of progressive discipline. Indeed, Chief Underhill's August 17, 2006 one (1) shift suspension letter states in this regard:

It is hoped that the discipline you are receiving from this incident will be considered a learning experience and that we will not need to take more severe disciplinary action in the future relating to this kind of behavior.

(Employer Exhibit 4) In the opinion of the Arbitrator, the Chief was a credible witness and his efforts to encourage the Grievant to change his behavior seemed to be genuine. Indeed, there is no credible evidence of anti-Grievant animus on his part, and the Chief does not seem prone to drawing quick judgments or to

“shoot from the hip”. Further, the Arbitrator concludes that the Chief’s investigations of the instant matters were evenhanded and thorough, and for this reason his documented findings are heavily weighted herein.

As a result of the alleged events of December 12, 2006, the Grievant was issued a four (4) shift suspension, moving further up the chain of progressive discipline. The City alleges the Grievant’s dealings with Ms. Doucette on December 12, 2006, amounted to “rude or offensive conduct” toward a co-worker, in violation of section 24, subdivision 1, paragraph (5) of the City of Brainerd’s Employee Policy Manual. (Employer Exhibit s 4 and 9)

The Union demurs, claiming that it is uncontroverted that the Grievant did not direct “foul or derogatory language” toward the Grievant and that he did not “physically threaten” her and that Chief Underhill could not identify the specific nature of the Grievant’s misbehavior. The Union urges that this evidence certainly does not amount to “rude or offensive conduct,” as the Employer claims. The Union goes on to hypothesize that Ms. Doucette left work in tears on December 12, 2006, because of her upsetting telephone conversation with the Grievant’s wife: A conversation for which the Grievant ought not to be held responsible.

These contrasting interpretations of December 12, 2006 events begs an answer to the question, “What happened on that day?” Based on a careful review of the record evidence, the Arbitrator reaches the following findings of fact and conclusions. First, Ms. Doucette and the Grievant were the only parties to witness the exchange of December 12, 2006. Nevertheless, it is uncontroverted

that the controversy stemmed from the Grievant's failed attempt to persuade Ms. Doucette to notarize a signature that she did not witness, as is required by law of all notarial officers. (Joint Exhibit 2) For the Grievant to ask Ms. Doucette to notarize a signature that she did not witness is disconcerting and it gives credence to Ms. Doucette's observation that as their conversation unfolded she could feel the tension rising, as he became "mad." The direct and cross examined testimony that Ms. Doucette gave at the hearing was consistent; Ms. Doucette, as a former employee, had little or nothing to gain from being less than candid with the Arbitrator and certainly less to gain than did the Grievant; and Ms. Doucette, a twenty (20) year employee, had a good work record, having never been disciplined. The Union's suggestions that Ms. Doucette was the "aggressive" one and not the Grievant, and that "you don't cross Deb Doucette" or that "one [doesn't] step out of line in her office" are all affirmative claims that were not proven.

Second, it is uncontroverted that when Ms. Doucette left work on December 12, 2006, she was "crying." Something happened to upset her. Something happened that was "unnerving" and that made her feel "extremely uncomfortable," to quote from her testimony. As Ms. Doucette was leaving work that day, FEO Doree asked her, "What's the matter? She replied, "Charlie attacked me." Based on this exchange, arbitral notice is taken of the fact that Ms. Doucette did not mention her telephone conversation with the Grievant's wife, which the Union argues was the event that drove her to "tears."

Third, it is uncontroverted that the Grievant did not use “foul” or “derogatory language’ and that he was not “physically threatening” toward Ms. Doucette, as the Union claims. However, based on these findings, the Arbitrator cannot conclude that the Grievant was not “rude or offensive.” Critically, Ms. Doucette consistently testified that the Grievant was “mentally threatening” and that his “body language” betrayed his anger. Moreover, even though the Chief could not specifically define what the Grievant had done that was “rude or offensive,” he had no trouble observing that the Grievant treated Ms. Doucette “poorly.”

For guidance pertaining to the meaning of the terms “rude” and “offensive,” as these terms are used in the City’s Employee Policy Manual, the Arbitrator referred to *The Random House Dictionary of the English Language*, Random House Inc., New York (1981). Therein, the term “rude” is defined as:

1. discourteous or impolite, usually deliberate: *a rude reply*. 3. rough in manners or behavior; unmannerly; uncouth. 9. violent or tempestuous, as the waves. Syn. 1. ... impertinent, impudent, ...;

and the term “offensive” is defined as:

1. causing resentful displeasure; highly irritating or annoying: *offensive television commercials*; 4. pertaining to offense or attack: *offensive movement*. Syn. 1. displeasing, ..., unpleasant.

With reference to these definitions, it certainly is reasonable to conclude that to “mentally threaten” another person, and to manifest anger through “body language,” and/or to treat another person “poorly,” as the Grievant did in this case, is to be rude – in the “violent or tempestuous” meaning of the word; and is

to be offensive – in the “displeasing,” “attack” and “unpleasant” meaning of the word.

For the reasons and the evidence reviewed above, it is determined that the Grievant did in fact violate the City’s prohibition against “rude and offensive” conduct toward a co-worked. However, this conclusion alone is not dispositive of the matter. The Union raises two (2) additional defenses. First, the Union claims disparate treatment. However, this defense is weak and unconvincing. The specific episodes of inconsistent treatment referenced by the Union include, among others, a “key throwing” incident; the charge that on one (1) occasion the Grievant’s training materials were “intentionally withheld;” and that the Grievant’s suspension was too harsh *vis a vis* another City employee who was suspended for 200 hours for wrecking a City squad car. The evidence presented with regard to these and other occurrences was vague in its detail and often left the Arbitrator wondering whether the Employer was even aware of the charged incidences.

Second, the Union claims that the Grievant’s suspension was imposed because of his wife’s actions, which is patently unfair. To prove this charge, the Union relied on Ms. Doucette’s testimony. The critical exchange on cross-examination was as follows:

Q: She called you names and screamed at you?

A: True.

Q: So the wife upset you?

A: Yes.

* * *

Q: With respect to the December 12, 2006 incident, was it the Grievant’s wife that “broke the camel’s back?”

A: Yes.

Based on this testimony, the Arbitrator is persuaded that the conversation between Ms. Doucette and the Grievant's wife did contribute partly to Ms. Doucette's episode of "crying and shaking" and to her decision to leave work on December 12, 2007. That is, in the absence of the wife's telephone call, it is reasonable to conclude that Ms. Doucette's reactions to the Grievant may not have been as remarkable and, as a consequence, the level of the City's discipline may have been lower. But this conclusion does not pardon the Grievant for his misconduct on that day, which constituted a serious violation of policy and does warrant discipline. To underscore this conclusion, on re-direct examination, Ms. Doucette testified that she was able to "partition her feelings," as they related to her exchanges with the Grievant and with his wife.

In summation, on December 12, 2006, the Grievant was rude and offensive to co-worker Doucette. His misconduct was primarily responsible for causing Ms. Doucette's "shaking and crying" state of that day, as well as for her complaint that it was "impossible to continue any longer to try to work under such hostile conditions." (Employer Exhibit 7) However, in as much as the Grievant was not solely responsible for the adverse developments of December 12, 2006, the Arbitrator concludes that the Employer's discipline action in this case was too harsh. A more proportionate and equitable level of progressive discipline is three (3) unpaid shifts: Representing a twenty-five (25) percent reduction in the Employer-imposed discipline.

VII. AWARD

The Grievant was disciplined for “just cause.” However, for the reasons discussed above, the level of discipline imposed in this case shall be reduced from four (4) shifts to three (3) shifts. The Grievant shall be “made whole” for one (1) shift.

Issued and Ordered on this 13th
day of August, 2008 from
Tucson, AZ.

Mario F. Bognanno, Arbitrator