

**IN RE ARBITRATION BETWEEN:**

---

**TEAMSTERS LOCAL 160**

**and**

**DAKOTA COUNTY**

---

**DECISION AND AWARD OF ARBITRATOR**

**BMS 09-PA-0945**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**December 1, 2009**

IN RE ARBITRATION BETWEEN:

---

Teamsters Local 160

and

Dakota County

---

DECISION AND AWARD OF ARBITRATOR  
BMS Case # 09-PA-0945  
Gary Lukkes grievance

**APPEARANCES:**

**FOR THE UNION:**

Frederick Perillo, Attorney for the Union  
Gary Lukkes, Grievant  
Tom Nelton, Business Representative

**FOR THE COUNTY:**

Pam Galanter, Attorney for the County  
Nancy Hohbach, Deputy Employee Relations Director  
Richard Setter, Private Investigator  
Troy Bentson, Highway Maintenance Worker  
Dave Haan, Highway Maintenance Worker  
Daniel Endres, Maintenance Crew Chief  
Dave Giles, Highway Maintenance Worker  
Kevin Schlangen, Fleet Manager  
James Bell, Highway Maintenance Manager  
Mark Krebsbach, County Engineer

**PRELIMINARY STATEMENT**

The hearing in the matter was held on October 6 and 7, 2009 at the Dakota County Administration Offices in Hastings, Minnesota. The parties submitted Briefs that were received by the arbitrator on November 17, 2009 at which point the record was closed.

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2008 through December 31, 2009. Article VII provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Minnesota Bureau of Mediation Services. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

**ISSUES PRESENTED**

The parties stipulated to the issues as follows: Did the County have just cause to terminate the grievant? If not what shall the remedy be?

## **COUNTY'S POSITION:**

The County's position was that there was just cause to terminate the grievant for his actions in this matter. In support of this position the County made the following contentions:

1. The grievant has a long history of abusive, erratic and threatening behavior that puts his co-workers on edge and even makes them feel threatened. It also compromises job safety and the work performance and efficiency of the work crews. In addition, he has created a hostile work environment due to his volatile and threatening/bullying behavior.

2. The County further asserted that it has tried for years to accommodate his requests and has placed him in various different positions in order to try to find him a work environment that is better suited to him. None have worked even though the grievant has been with the County for many years. Further, he continues to make unfounded allegations against other employees and has essentially taken up more time with the HR Department than almost any other employee in the County.

3. The County asserted that the grievant is an employee that few if any of his co-workers want to work with, many are actually afraid of and none completely trust. The County asserted that he is someone who his co-workers fear may "snap" and become violent and assaultive – even to the point of becoming murderous.

4. The grievant threatened his Union steward in April of 2006 when he swore and used very harsh language towards him and told him to "watch his back." This statement was heard by several supervisors who were quite alarmed by the ferocity of the statement and the grievant's tone of voice. They indicated that they felt afraid of the grievant and that they would always be very careful never to anger him lest he become violent or aggressive towards them.

5. The steward involved, who is also a County employee, indicated that he was concerned for his safety and that he has even had bad dreams about the grievant doing something horrible to him. Several other employees have also indicated over time that they feel very threatened, have purchased guns for protection in case the grievant decided to come to their homes or stalk them after work. One even went so far as to tell family members about the grievant and to tell them that if anything happened to him, as in being killed – they should suspect the grievant first and foremost.

6. The County asserted that the incident that gave rise to this matter occurred on September 12, 2008 when the grievant was working on a replacement of a culvert job in Dakota County with a work crew. Several of the crew testified that the grievant became agitated, nervous and was acting very strangely at the work site. The job was relatively straightforward and involved replacing a length of culvert that had been crushed. When they discovered that more of the culvert needed to be cut than they had originally thought the grievant became even more agitated and upset. He called the crew together and told them, "This ain't no BS" in a harsh and angry tone. The crew was stunned by this since the project could be done easily and everyone had been in a good mood and was working together well – except for the grievant. The grievant then began pacing around and got into a backhoe and began moving dirt and sand. The crew was puzzled by this and waited for a supervisor to come to the site to direct the work. Despite the grievant's allegations that the crew was harassing and making fun of him, the County asserted that its investigation showed that no such harassment occurred. The County asserted that the grievant simply grossly overreacted to the crew's antics that day and assumed, wrongly, that they were poking fun at him and undermining his position. They were simply killing time and engaging in horseplay while the supervisor drove out to the site and were making funny noises into traffic cones and imitating chickens since there were some chickens across the road from the site. The County asserted that the crew was not directing any of their comments at the grievant nor were they trying to upset him by anything they were doing.

7. The County's impartial investigator confirmed that the crew was not directing their comments at the grievant and that there was no evidence of the crew creating a hostile work environment against the grievant – indeed the investigator found that it was quite the opposite.

8. The County further asserted that the grievant yelled at the supervisor when he got there and left the worksite without authorization, for which he was given a written reprimand. That too was made a part of the eventual termination action against the grievant.

9. The grievant returned to the shop and immediately contacted the HR Department to make allegations that the work crew was creating a hostile work environment and harassing him. The County retained an outside investigator in Mr. Richard Setter. Mr. Setter is an experienced and competent and objective investigator who has a long career in law enforcement. The County felt that was necessary in order to maintain objectivity in this circumstance and to avoid any allegation of favoritism or impartiality.

10. Mr. Setter conducted a thorough investigation and interviewed a dozen witnesses and others about the work environment. What he found was that the work crew did not create a hostile environment but that the grievant's actions and statements were quite disturbing and that he in fact created a hostile work environment against his coworkers.

11. Only days after the September 12, 2008 incident at the culvert, the grievant made various threatening and alarming statements, such as "I have nothing left to lose" and I am out to get management no matter what it takes and that people better "watch their back." He also told people that he has a bevy of lawyers and that he will sue people and that he, "has a book on management and that he will take them all down." He further made statements specifically naming certain County employees and supervisors he was going to "take down" and specifically indicated that Bob Egan had "F\*\*cked him over" and that he was going to get what was "coming to me." The grievant has further made statements, when viewed in context are chilling; such as "my back is to the wall" and "I have nothing left to lose."

12. The County's investigator found that these statements as well as others the grievant made during the period of time both before and after the September 12, 2008 incident, coupled with the grievant's sometimes erratic and volatile behavior created a hostile work environment. Simply stated, his co-workers are afraid of him.

13. Based on the investigation and the need to keep the grievant and his sometimes alarmingly odd behavior away from the work place, the County placed him on administrative leave with pay on December 1, 2008. The County directed him not to come to the work place at all until the end of January. At that time, since the investigation was not quite completed the County Attorney's office specifically directed the grievant by phone not to appear for work on February 2, 2009. Instead of complying with a direct order of management he appeared for work, which caused considerable consternation given the fear that the grievant might "go postal" in the words of some of his co-workers. He was immediately directed to leave the work place and not return.

14. The very next day, despite being given a direct order the day before not to appear at County work sites, the grievant went to a work site where several Dakota County road crew employees were working and engaged in conversation with them. This was again in direct violation of a direct order from management to stay away from County employees and County work sites.

15. The County also cast doubt on the veracity of the grievant's claim that he was at his divorce attorney's office on the 3<sup>rd</sup> since he never raised that allegation at all during any of the grievance steps of this matter. He raised it only at the hearing and the arbitrator should not give it much weight since he had every opportunity to raise this and yet he did not. The grievance steps exist so these issues can be raised and discussed but the Union chose to remain silent on this. Many arbitrators refuse to admit such evidence that is raised at the very last minute and the arbitrator should similarly reject this Johnny-come-lately evidence.

16. The grievant was also found to have lied during the investigatory meetings with Mr. Setter despite being given a clear *Garrity* warning. The County asserted that this shows that they simply cannot trust the grievant and that he must be fired.

17. The County pointed to Policy #3042, which provides in relevant part as follows: **Sexual and General Harassment:** The County is committed to maintaining a workplace that is free from sexual and general harassment. Sexual or general harassment of County employees or applicants for employment is strictly prohibited and will not be tolerated. All employees are expected to comply with this policy and to cooperate with any County investigation undertaken pursuant to this policy.” Not only did the grievant create a hostile work environment in violation of this policy he lied under *Garrity*, which the County asserted was a separate violation of the requirement to fully cooperate with the investigation.

18. The County further pointed to policy #5517, which all employees including the grievant are well aware of. This states in relevant part as follows: Dakota County is committed to violence prevention in the workplace. Dakota County will promote a workplace free from violent acts, intimidation, harassment, physical abuse, threats of violence, vandalism, arson, sabotage and the use of weapons. Dakota County does not tolerate such behavior against County employees by other employees, independent contractors, clients or members of the public. ... Any County employee who violates this policy is subject to discipline up to and including termination.” The County asserted that the grievant violated several portions of this Policy and has done so for years.

19. The County asserted that the totality of the grievant's acts herein, including the unauthorized leaving of the worksite on September 12, 2008, the continual threats against coworkers and two separate acts of insubordination and lying under *Garrity* show that there is ample cause for termination. The County further asserted that reinstatement would cause considerable damage to the working environment and that the co-workers would be greatly concerned for their safety both at work and away from work.

20. The County asserted that the investigation was fair and thorough and countered the allegation by the Union that Mr. Setter was somehow biased against the grievant. The County asserted that there is no evidence that Mr. Setter had anything to lose or gain by finding that the grievant engaged in intimidation and harassment of his co-workers. He assessed the credibility of the interviewees and made a professional judgment based on decades of law enforcement experience that the grievant was not being truthful and that those co-workers who indicated that he has engaged in a pattern of harassment were. The County asserted that it was more than reasonable to rely on the conclusions he reached and that there was no evidence that should persuade the arbitrator otherwise.

21. The County argued that the grievant's history coupled with his continuing penchant for threatening co-workers, making threatening statements and his erratic and volatile behavior makes it clear that he is not remediable and that termination is the only reasonable option in this matter. The County pointed to other arbitral decisions where employees have been fired for what it considered to be similar conduct and argued that the County must act promptly to protect against acts of violence and that the grievant's statements when taken in context shows that he is a tragedy waiting to happen and that it must act now to prevent a workplace tragedy.

The County seeks an award of the arbitrator denying the grievance in its entirety.

## **UNION'S POSITION**

The Union's position was that there was no cause for the termination here. In support of this position the Union made the following contentions:

1. The Union asserted in the strongest way possible that the County has utterly failed to establish proof of any of the charges against the grievant and that there is not even the slightest showing of just cause for any discipline at all much less termination. The Union pointed to the lack of any prior discipline for the incidents the County brought forward and that many of the alleged incidents of harassment or threats are years old for which there never was any discipline or notice to the grievant that his conduct was unacceptable.

2. The Union noted that contrary to the County's assertions that the grievant is somehow a "bad" employee, a safety hazard and is deleterious to the harmonious relationships amongst the co-workers, that his evaluations have been good. Not only are those evaluations quite high, they have been getting better – his 2008 evaluation is actually better than it was in 2007 and showed consistently high ratings. There was no evidence that the grievant was ever told in the evaluation process that his behavior was somehow deficient or that it needed to change – and no evidence whatsoever that he was on a one-way track to discharge.

3. The Union also pointed out that the supervisor's statement that he gave the grievant good evaluations to assuage him as laughably unpersuasive. Further the Union asserted that the supervisor's other statement to the effect that he felt threatened by the grievant yet never notified HR, called 911 or ever took any action to deal with that as so severely undercutting the supervisor's credibility as to render it meaningless. The Union asserted that the grievant is in fact a very good employee whose work performance has never been an issue and has never been the subject of concern, all as evidenced by his evaluations. The Union pointed out that even during the pendency of the investigation over the September 12, 2008 incident and the allegations raised by the grievant and his co-workers; the grievant was given an award by his supervisors for "excelling at collaboration, resourcefulness, being customer friendly and for being a "great co-worker." See Union exhibit 1. The Union asserted that the allegation now that these excellent evaluations and the above referenced award was given because people were afraid of the grievant is idiotic at best.

4. The Union also asserted most strenuously that the grievant has not created a hostile working environment. The Union pointed out that the grievant has diabetes and a neck problem that causes his hands to shake and that the co-workers' assumptions about this are simply wrong. Moreover, the County is well aware of his neck issues as it was a work related injury so any allegation that he "shakes when he is angry" is simply unfounded.

5. Moreover, the phantom allegations about threats to sue people were again unfounded. The grievant has never threatened to sue anyone, does not have 5 lawyers at his disposal as one County worker alleged and has in fact only brought a workers compensation claim against the County (as is his absolute right under state law) and an EEOC action stemming from this action, again as is his absolute right under federal law. The Union pointed out that when the co-workers were examined at the hearing none of them indicated that the grievant has ever threatened to sue them and that all of these allegations are based on the thinnest of hearsay and false accusations.

6. The Union further asserted that the grievant has never threatened physical violence, has never made any statements about guns or bringing guns to work and in fact does not even own one. To the contrary, several of the co-workers who the Union alleged did create a hostile working environment for the grievant openly talked about having firearms in their homes and that they have talked about possibly using them against the grievant if they felt threatened by him. The Union asserted that the County is in fact looking in the opposite direction for people who might be a threat to do real physical harm to people and that it should look to the workers who have indicated that they have guns and have indicated a willingness to use them against people they work with.

7. The Union further asserted that the statements made by the grievant that are the focus of this matter are not threats and cannot be construed as such. His statement to “watch your back” was directed at co-workers to make sure they watched what they did lest the County take some action against them. It was a warning to watch out for the County not for him.

8. The statement that he is “keeping a book on people” was in fact related to the County’s HR personnel directing the grievant to keep a record of the things he felt were being done that may be a violation of law or of the labor agreement. The County now seeks to punish him for doing exactly what they directed him to do.

9. The Union pointed to the investigation done by Mr. Setter and asserted that it was biased against the grievant from the very start. The Union pointed to several conversations Mr. Setter had with the grievant and with the coworkers who in fact supported him and felt that he was neither a safety hazard nor a threat to anyone as aggressive cross-examination rather than objective investigation. The Union pointed particularly to the conversations Mr. Setter had with Scott Barlow and Brandon Reginscheid, both of whom liked the grievant and felt that he was easy to get along with but neither of whom were called by the County. The Union asserted that Mr. Setter apparently did not like the answers given by those people and that he aggressively tried to talk them out of their answers and even went so far as to try to put words in their mouths in a fairly obvious effort to torpedo the grievant. When he was not able to shake their stories he simply dismissed them as not credible. The Union asserted that the County should never have relied on his report and that it was at best an abdication of the County's responsibility to run an objective and impartial investigation. The Union asserted that the County failed completely in this requirement of just case.

10. The Union further asserted that the County may well have violated federal law by terminating the grievant for filing a claim against the County and for filing grievances and raising harassment complaints by his co-workers.

11. The Union pointed to the incident of September 12, 2008 and asserted that the grievant's version of the story is in fact much more credible when one views the testimony of the witnesses who were there. It was apparent that the work crew was making fun of the grievant and his efforts to take charge of the work site. Even County employees acknowledged that it is commonplace for the seniormost employee to run the work site in the absence of a supervisor. Since the supervisor was not there at the relevant time, the grievant took charge of it and the co-workers simply poked fun at him because he tried to take charge of the job.

12. The co-workers also acknowledged that they knew the grievant's propensity to take offense to horseplay and sophomoric humor yet they persisted in talking into traffic cones and made statements about "calling a meeting" which was a direct insult to the grievant's earlier statement to call a meeting. They made chicken-clucking noises, which were calculated to upset the grievant.

13. The Union further asserted that the charge that he left the work site without authorization is equally ludicrous. He had no vehicle and could not leave the worksite. He told the supervisor he was tired of the constant harassment and horseplay by his co-workers, wanted to take the day off (a right guaranteed to the employees under the labor agreement.) The supervisor drove him back to the shop, where another supervisor approved and signed off on his vacation request for the day. The Union argued that there can be no rational way to say that he left without authorization.

14. The Union also, asserted that the grievant was not insubordinate for his actions on February 2, 2009. He was initially told not to report for work until the end of January. The Union first noted that insubordination requires a refusal of a clear order from the supervisor authorized to give an order. Here the conversation upon which the County based its allegation was between the grievant and a County Attorney, which was obviously not the supervisor.

15. Further, given the grievant's natural suspicion at this stage he asked for a letter in writing from the County Attorney's office clearing him not to report for work as he had been told. When that letter did not materialize as promised the grievant was quite reasonably worried about being in a "catch-22" situation wherein he would be disciplined for failure to report and the conversation with the County attorney he had the week prior would be conveniently "forgotten." Under these circumstances he appeared for work in order to make certain he would not be disciplined for failure to appear and to get a direct order from the right people. When he got there he created no uproar or commotion. He reported and was told to leave and he did. The Union asserted that this does not under any definition of the term equal insubordination.

16. Likewise for the next allegation made by the County that the grievant was insubordinate for his actions on February 3, 2009. The Union asserted that he was not under house arrest and that he was free to go to his divorce attorney's office. He did not violate a County directive not to appear at County facilities – in fact he didn't he walked across a public street and chatted with a co-worker for perhaps a few minutes and left. Again, he created no hostile environment and by all accounts the conversation was brief and pleasant.

17. The Union asserted that the fact that he did not raise these defenses until now is because he did not have to. The County bears the burden of proof and the Union has no obligation to raise any defense to discipline until the hearing. Thus the fact that the grievant remained silent as to what he was doing the day he walked across a public street to chat briefly with his friend is of no consequence.

18. The Union asserted that the whole notion that the grievant is “sue happy” as pure fabrication. The Union pointed to the testimony of the County's witnesses all of whom said they had never been threatened with a lawsuit and have never even heard the grievant threatened to sue any of his co-workers. He has a workers compensation claim with the County and an EEOC claim. Further, the claim that he sued some car dealership was frankly wrong. He did not sue them after there was a dispute about damage to his car and the co-workers are simply making this up.

19. The Union raised the very real possibility that his co-workers are fabricating their “fear” of the grievant in order to get him fired because they don't like him. It is clear that the grievant feels threatened by them and that he does not engage in their idiotic and sophomoric humor and antics. As a result, they trumped up these unfounded allegations which are frankly just not true. The Union asserted that upon examination, the co-workers who testified against the grievant all acknowledged that he had not threatened them directly, never talked about doing any type of physical violence against them or anybody else, had never threatened to sue them and never physically assaulted them or bullied them in any way. The allegations were based on the most inadmissible hearsay and unfounded innuendo and should be rejected by the arbitrator.

20. The Union pointed to the County's use of old allegations for which the grievant was never warned nor disciplined. The Union argued that the fundamental requirement of just cause is notice. Here the allegation regarding the alleged threats made against Mr. Giles occurred in 2006, nearly three years before his termination. It was a discussion between the grievant and Mr. Giles in the context of a Union meeting and that does take it out to the purview of the workplace. The grievant was understandably upset about some of the statements made in a meeting involving his employment and wanted to make sure the Union was representing him properly. Further, the conversation was overheard by County supervisors yet they chose to do nothing about it.

21. With respect to the other nebulous allegations of a "history" of threats and intimidation the Union asserted that most if not all of these were never brought to his attention. The Union asserted that the County has known about these old allegations, even if they occurred, for years and if they were serious then they are serious now. The County should have done something about them then, thus giving the grievant an opportunity to challenge them then or to take corrective action. The fact that the County did not do so strongly implies that the County knew all along that these older allegations were trivial all along.

22. The Union turned finally to the allegation that the grievant lied under the Garrity warning when interrogated by Mr. Setter. The Union asserted most strenuously that the County's allegation here is circular at best. What the County is in effect saying is that the grievant must have lied since he did not admit to the very allegations giving rise to the termination. Further, if one looks at the statements and the questions it was apparent that the grievant was asked if he felt that he threatened anyone and he answered truthfully that he did not.

23. Finally, there was ample evidence that the grievant is in fact telling the truth and that there were other co-workers who backed up his story. If one believes the grievant and the employees who back up his story then one must assume that the co-workers were lying. It was only because of the tainted nature of the investigation that the County assumed the grievant was lying. A lie is an intentional misrepresentation of a fact or a statement that the utterer knows to be false. There is no evidence that the grievant made any such statement.

24. The essence of the Union's claim is that the grievant did not walk off the job without authorization on September 12, 2008, never made any threatening statements at any time and never disobeyed a direct order of management. The County's allegations are based on pure fabrication by co-workers who just don't like the grievant and want him fired because he won't participate in their antics and because he makes them nervous. Just cause requires more than that and is not present here.

Accordingly, the Union seeks an award sustaining the grievance, reinstating the grievant to his former position and to make the grievant whole for all lost time and accrued contractual benefits.

### **DISCUSSION**

The County's case proceeds on several grounds. First, that the grievant walked off a job site on September 12, 2008 without authorization or permission. Second that the grievant made threats both explicitly and implicitly by the grievant against his co-workers and that his actions and words created a hostile work environment contrary to the established policies of Dakota County. Third, that he threatened to sue people and that these statements also created fear of reprisals and retaliation by the grievant. Fourth, that he violated specific work directives not to appear at County facilities or on County work sites on two separate occasions on February 2 and 3, 2009. Finally, the County based its decision to terminate the grievant on the grounds that he lied to the investigator under a *Garrity* warning. As will be discussed below, the evidence on this record was insufficient to support any of these allegations.

The grievant has worked for the Dakota County road department for approximately 15 years. He has no prior disciplinary notices or warnings of any kind on his record. His evaluations over that same period have been generally quite good as well. He received ratings of “above” or “exceeds expectations” on virtually all of his performance appraisals over time. Further, and significantly, the record was devoid of any counseling, coaching or warnings given to him prior to the September 12, 2008 incident herein about his behavior and nothing to demonstrate that his demeanor was inappropriate or that it could potentially be creating a hostile work environment. This will be discussed more below but there was thus no showing of any notice to him over time that his behavior was somehow “wrong” or that he was placing himself in a position where discipline could result.

The arbitrator took some note of the testimony from his supervisor that he gave these high marks on the grievant’s performance appraisals because he was afraid of him. The supervisor indicated that even though he was so afraid of the grievant that he gave him high marks, sometimes the highest marks achievable, on evaluation after evaluation, he did so in order to placate the grievant and avoid any confrontation with him. He apparently never thought to consult the HR department about this situation or call for security of any kind. The evidence showed that at no point had the grievant ever made any truly threatening statements to the supervisory personnel at the County nor any indirect threats about them to anyone else. For a supervisor to give good, even exemplary, performance reviews for years without so much as even a passing mention of the problems for which the grievant is being terminated now that were supposedly a “problem” for years, as asserted by the County, and then to come to a hearing and testify under oath that he “didn’t really mean it” is simply not credible. This testimony frankly rang about as hollow as it possibly could on this record. There was quite literally nothing to support that allegation and this testimony was given no weight.<sup>1</sup>

---

<sup>1</sup> It should be noted that there was no allegation of deficient work performance other than a few obtuse references to some possible safety violations or that his co-workers were made to feel unsafe around. Those were given little weight either on this record since there was nothing more than passing references to it made by the very same coworkers with whom the grievant has had some personality conflicts over time. Without evidence of work performance deficiencies of some sort, no determination of deficiencies in work performance could be made.

One of the fundamental prerequisites in any employee discipline case is notice. The employee must be forewarned in some way that his or her actions if continued will lead to discipline or discharge. That did not happen here and severely undercut the County's case.

The grievant sustained a work injury in 2005 that necessitated a neck surgery in 2006. He was out of work for approximately 19 months as the result. The evidence showed that the grievant's medical condition causes his hands to shake occasionally. There was no evidence to show that the grievant's shaky hands are related to anger or threatening behavior. The allegations by co-workers who professed to be afraid of the grievant were simply overreacting to his medical condition.

The evidence further showed that the statements allegedly made to create a hostile work environment occurred for the most part prior to September 12, 2008. There was a paucity of evidence to support the assertion that the grievant made any threatening statements after that incident.

One of the final background facts that was particularly relevant here was the certificate awarded to the grievant on October 31, 2008 by the Transportation Manager. This award, given to the grievant well after September 12, 2008 and for his work after that date as well, indicated that the grievant was "excelling at collaboration, resourcefulness, being customer friendly and for being a great co-worker." There was no evidence that this was given to the grievant because management was afraid of him or to placate him some how. Rather the evidence showed that this award was given to him for the very reasons the certificate said it was – i.e. for being a great co-worker.

So it is that the inquiry turns to the specific allegations made against the grievant. To be sure, the evidence showed that the grievant is difficult to work with; is suspicious of the motivations of management at the County and that he does in fact create considerable work for County HR personnel. There was little question that he does make people feel uncomfortable at times and that his behavior can be somewhat odd and erratic. That however is not the question and cannot be the basis for disciplinary action. The question is whether he created a hostile work environment by threatening co-workers, disobeyed direct orders and lied during the investigation.

## **SEPTEMBER 12, 2008 INCIDENT**

The incident that gave rise to the investigation of harassment occurred on September 12, 2008 when the grievant and a work crew were dispatched to a remote site to replace a length of damaged culvert. The grievant was the senior employee at the site and there was no supervisor at the site

There was some dispute about whether the grievant was told to take charge of the crew by his superiors. The grievant thought that Mr. Endres had criticized him for failing to properly take a lead role in the days prior to the incident. On one occasion, a co-worker had parked a County vehicle the wrong way on a road at a work site and had failed to put up safety cones. The evidence showed that Mr. Endres had told the employees to “be smarter than the poles they were putting in the ground,” or words to that effect. The grievant took this statement personally while the supervisor indicated that he meant it as a general statement to the whole crew and did not direct it at the grievant.

Communication is the key to all human interaction and when it fails bad things can happen. That was never truer than here. It was not unreasonable for the grievant to take this somewhat personally; even though there was no evidence that the supervisor spoke directly to him or was intending that the grievant take this more personally than the other employees. It was clear that the general culture so to speak within the County Road Department was that the senior person is the de facto lead person on a site. This is not surprising and witnesses on both sides of the matter acknowledged this. Accordingly, the grievant may well have seen this as criticism of his role in that regard since he was a fairly senior person. This however is only by way of background to what occurred on the 12<sup>th</sup>. The reasons why the grievant may have been upset is frankly less important than what actually occurred that day.

The evidence showed that the grievant was the senior person on the work crew at the culvert and that he assumed a lead role. The evidence was also abundantly clear from the evidence adduced at the hearing and from the statements of the people who were there and were interviewed as a part of this case, that the employees were in fact poking fun at the grievant.

Whether they intended for him to take it so personally or not, it was quite clear that the work crew knew the grievant, knew how touchy he can be, saw how uncomfortable he was and yet persisted in their infantile antics while they waited for a supervisor to show up to direct them as to what to do with the culvert.<sup>2</sup> The grievant called the crew together that day to ask their opinions about what to do. Whether this was a good idea is not strictly at issue; the decision about cutting the culvert was not the basis of the discipline in this case. Further, even though Mr. Barlow may have had more seniority it was clear that the grievant was on site more and that it was generally accepted that the grievant was “running the site.”

The evidence was also clear that the road crew used traffic cones to make various noises, including chicken clucking sounds at some live chickens that were near the site. One co-worker described several members of the work crew as “goofing off like usual.” See County exhibit 23 at page 9. There was also a dispute about whether the crew was undermining the grievant’s role there and were mocking him. The preponderance of the evidence showed this to be more likely than not. As noted above, the crew knew the grievant and saw how nervous and edgy he apparently was that day. While there was nothing on this record to show that his actions were threatening that day, it was clear that for whatever reason, the grievant was agitated and upset about something. He claimed that it was because the crew was mocking his request for a meeting and making these idiotic noises and that he felt this was directed at him.

---

<sup>2</sup> It should be noted that the County’s discharge action here was not based on the grievant’s lack of decisiveness in determining what to do with the culvert or whether the crew could simply have dug up a few more feet of it and gotten a longer piece but rather was based on leaving the site without authorization and creating a hostile work environment. Thus it matters little whether there was indecision about whether to cut the pipe or not.

In order to avoid confrontation he retreated to the backhoe. That is where he was when Mr. Endres appeared at the site and began talking to the grievant. The totality of the evidence shows that rather than confront or get angry at the co-workers who were harassing him, he left the immediate area and began working with the backhoe. The grievant can hardly be said to be a confrontational person in view of evidence of this nature.

The evidence showed that once Mr. Endres arrived, he had a conversation with the grievant who immediately expressed his frustration working with the crew. Mr. Endres made the crew apologize to the grievant but the evidence further showed that he was so agitated and upset by that point he asked to be taken off the worksite and driven back to the shop.

The County asserted that the grievant insisted and essentially ordered the supervisor to be taken off the site. This reveals some confusion as to how this works – Mr. Endres was the supervisor, not the grievant. It was not for the grievant to order the supervisor to do anything. Moreover, there was no direct order given the grievant to stay on the site. Instead, contrary to the County’s assertions, the supervisor granted the grievant’s request and drove him back to the shop. Once there the two spoke with Mr. Bell about the incident. Without going into excruciating detail, the evidence showed that Mr. bell granted and approved the grievant's request for vacation that day. Under these circumstances, it simply cannot be said that the grievant “walked off the job” or left without authorization. In fact, he asked for and received authorization – twice. The evidence fails to support the allegation that the grievant left the worksite without authorization.

### **ALLEGATIONS OF THREATS OF TOWARD CO-WORKERS**

Just as the First Amendment to the U.S. Constitution exists to protect unpopular speech, the just cause standard exists in labor agreements to protect unpopular workers. Just cause requires more than a showing that people don’t like the grievant; it requires a showing that the grievant violated work rules and that those violations were so serious that they warrant discipline.<sup>3</sup>

---

<sup>3</sup> As a side note, the evidence showed that a great many coworkers did like the grievant and did not see him as a threat or a safety hazard. See, e.g. Statements of Reginscheid and Barlow herein.

Having said that however, neither the just cause standard nor the 1<sup>st</sup> Amendment protects a specific threat to do harm to a co-worker in the workplace. It is against this backdrop that the case regarding threats in the workplace proceeds. As will be discussed more below, the evidence provided no support whatsoever that the grievant made any threats of harm of any kind against co-workers and that the fears as stated by the County's witnesses were both irrational and illusory at best.

#### **INCIDENT OF APRIL 2006**

Initially, the County asserted that the grievant made threatening statements against Mr. Giles in April 2006. Several things are clear about that incident. First, it happened in April of 2006. It was also clear that whether there were threatening statements made or not (although as will be discussed below it was clear that his statements did not rise to the level of being threatening under any circumstances), at no point until the discharge here was the grievant ever made aware that his statements were in violation of any County policy. As noted above, it is incumbent on any employer operating under a just cause standard to give adequate and timely notice to an employee that their conduct is unacceptable. Here that was utterly lacking. The evidence showed that County supervisory employees overheard the conversation in question yet did nothing about it. Under these circumstances it can hardly be said that adequate notice was give to the grievant. More to the point, in the intervening years, there was no evidence that the grievant undertook to act out any threat against Mr. Giles, or any other employee for that matter. This evidence shows again that there was a lack of any evidence of intent to do physical harm or violence of any kind against anyone.

Moreover, the statements in question even assuming they were made exactly as the County asserted, were not threats. It is important to note too that these statements were made in the context of a Union meeting about Union business. The grievant, who had been a Union steward for several years himself prior to Mr. Giles becoming the steward, confronted Mr. Giles in April 2006 about Union business. He told Mr. Giles, "I want you in this meeting but if you know what's good for you, you better keep your F-g mouth shut! If you don't you will be F-g sorry!"

Even assuming these statements were made just as the County alleged, it is difficult to see how this could reasonably be construed in this context as a threat of physical violence. It is important to assume that the arbitrator was not born on the moon and that while some statements, even similar statements in terms of the words used, could be construed as a threat, these were not.

It was also clear that even though Mr. Giles spoke to County managers about the incident at the time and he indicated he was not threatened by the statement and did not want to make a big deal about it. Once again, the evidence adduced by County witnesses at the hearing did not square well at all with reality. Mr. Giles indicated at the hearing that after this he has had bad dreams about the grievant doing something horrible to him. It was apparent that this was the first time anyone had confronted the grievant with this evidence. There was some evidence to suggest that the first time Mr. Giles raised any concern about the grievant or these “bad dreams” he was having about him was during the investigation of this matter; nearly three years after the incident in question. Credibility in cases like this can sometimes be difficult to assess but here it was not. Most importantly, it will be a sorry state of affairs in the labor relations world if a 15-year employee can be fired because another employee has bad dreams about him.

Finally there is some merit to the Union’s claim that the conversation in question was in the context of Union business. Clearly, Mr. Giles was at the time of the April 2006 conversation, operating as a steward. The Union pointed out that under PELRA and the overwhelming weight of arbitral authority, an employee acting in the capacity of a steward is not acting in the capacity of an employee. There is little question that Mr. Giles was acting in that capacity and so any statements made must be taken in a different light and be treated almost as though they occurred off duty.

If the grievant had made a true threat of physical violence towards Mr. Giles in April 2006, it may well have been subject to discipline because it happened on County property and within earshot of County supervisors. However, here the great preponderance of the evidence shows that the statements made, while stated in an angry tone, did not rise to the level of a threat. Accordingly, the allegation of threats made stemming from the April 2006 incident fails for lack of sufficient proof.

### **CREATION OF A HOSTILE WORK ENVIRONMENT**

The main set of allegations against the grievant was that his actions and words created a hostile work environment by making threatening statements and creating an overall atmosphere of fear throughout the work force. The evidence did not support these allegations.

One of the main allegations was that the grievant was “sue happy” and that he frequently threatened to start lawsuits against anyone and anything that displeased him. Many memos and messages make reference to this but the evidence showed that these were little more than conjecture much like adolescent ramblings about the reputation of another kid in Junior High School.

Upon examination, the witnesses who testified on behalf of the County and who testified against the grievant at the hearing all acknowledged that they had never heard the grievant threaten to sue them. Moreover, they had not even heard him directly threaten to sue anybody else.

At best, there was a rumor going around that the grievant had said that he had several lawyers at his disposal whom he could call upon to commence a legal action against those people who got in his way. There was no evidence that he had such a bevy of legal eagles under his control. Moreover, the rumors were in many cases patently false. Several of the employees heard that the grievant had sued a local car dealership. The grievant acknowledged that he did have a minor dispute with a dealership over some body damage done to the vehicle when some work had been performed on it. The evidence showed however that this was resolved without resort to legal action of any kind.

The grievant was at the time involved in a divorce and was represented by an attorney in that action. This of course is his right and a most prudent course of action in any event. Further the grievant was injured in a work related accident in 2005. He eventually retained an attorney to represent him before the Workers Compensation Division pursuant to Minnesota Statutes Chapter 176. This again is his absolute right.

There was in fact no evidence of any threats made of legal action against any of his co-workers. There were some rather vague references made by the grievant about getting what was his and that he felt that the County had violated certain of his rights under the labor agreement. He openly blamed some of his supervisors for these perceived transgressions. There was never sufficient evidence to establish whether the grievant was in fact correct about this or not. On this record it mattered little whether he was correct or not in his assertions that the County had violated his rights. Again, at best, his threat of action, whatever that was, was never shown to be anything more than to file a grievance or start a lawsuit against the County. There was never any evidence that he stated or intended to sue anyone individually.

The County asserted that many of his co-workers were unsophisticated people who were understandably nervous that they would be sued and would then have to retain attorneys themselves in order to defend themselves against this unsubstantiated onslaught of lawsuits by the grievant. Frankly, this argument rang hollow as well. First, television docudramas notwithstanding, the County could easily have explained to these individuals that the County would likely defend them in any allegation of a violation of his contractual or statutory rights while at work. Moreover, there was no evidence that these fears were at all rational - simply stated, the witnesses who testified at the hearing were not shown to be so unsophisticated that they could reasonably fear a lawsuit by the grievant. Accordingly, this part of the County's case also fails for lack of proof.

Next there is the allegation that various inflammatory statements made by the grievant created a hostile workplace environment and created fear from his co-workers of violence by the grievant. Again, upon a review of the actual evidence, it was shown that the fears were not reasonable and in many cases were, as the Union suggests, created by an atmosphere of irrational innuendo and rumor created more by whispers behind the grievant's back than anything else.

As noted above, the 2006 incident was both stale, in a context that is very different than the normal workplace exchange between workers, since it was between the grievant and his Union steward. Moreover, while it was shown to have been a heated exchange it did not contain even the slightest actual threat. Certainly in a different time and place the statement that "you'll be sorry" could be taken as a threat. All such comments must be taken in context and in this context there was no threat.

The more substantive piece to the County's case had to do with certain other statements, such as "Watch your back," or "I have nothing left to lose" or "I'm going to take [certain named people] down" or words to that effect. First, there was a paucity of evidence that these statements were in fact made after the September 12, 2008 incident. Significantly, none of the witnesses who testified at the hearing could recall hearing the grievant make any sort of threatening statements to them or even in their experience to anyone else. At best they could say that they heard it from someone else. While arbitrations are not governed by the formal rules of evidence, this sort of hearsay and even double hearsay severely undercuts a party's case, especially if that is all there is to the case.

Several other employees also verified that they had never been threatened nor had they ever felt threatened by the grievant. See e.g., Statement of Brandon Reginscheid, County Exhibit 23 at page 19-21 and Statement of Gary Nunn, County Exhibit 24 at page 21 -23 and Statement of Scott Barlow, County exhibit 21 at pages 18, 22, 27-28. These statements along with the admissions made at the hearing by the very witnesses called by the County to testify against the grievant show undeniably that the grievant's statement, while probably coarse, did not rise to the level of a threat of any kind.

The overall record showed that the grievant does not get along well with some of his co-workers. He does however get along well with others who are apparently not part of the group with whom he does not get along. The record also showed that the same employees who were at the work site on September 12, 2008 are all close and a bit of a clique and that the grievant is not a part of this group. It was quite clear that the grievant is in their minds a bit odd but to ascribe a violent motivation to him was completely unsubstantiated by the evidence.

Certainly, any employer is allowed to take action to protect its workers from violence and to provide a safe work environment and it need not wait until violence occurs before taking such action. As in *IBT #320 and City of Mankato*, BMS # 02-PA-1251 (Jacobs 2002), cited by the employer, statements about bringing a gun and shooting someone are actionable immediately and that discharge may well be appropriate in such a case.

This case is entirely distinguishable. There was never any such statement made or intimated here. There was no evidence that the grievant ever threatened physical violence at all. He never made any statements about guns or violence nor was there any evidence that he has any propensity toward violence. Frankly, the statements by County's witnesses about the tragedy at Columbine and other acts of workplace violence around the country how they are afraid that the grievant might "snap" and kill people sunk to an adolescent level of fear mongering that was completely unfounded and severely undercut the credibility of those making them.

While it was shown that the grievant felt that he had been treated badly after his return from disability following his work injury, this was little more than griping about the way he had been treated by management and not being allowed to work with certain equipment. As will be discussed more below, his statement that he was "keeping a book" on management was in fact motivated by the County's HR representative telling him to do just that so he could document the ways in which he felt he was being discriminated against or that the County was violating his contractual or other rights.

Moreover, his statement about “getting what was coming to me” was completely misconstrued by the County’s managerial team and the investigator hired to investigate this matter. See County exhibit 13. That statement can only be reasonably interpreted to mean that the grievant was going to try to get what was owed him or “coming to him” under the labor agreement or other statutory schemes. It was not, as asserted by the County, a statement that the grievant was going to somehow harm the supervisor but was rather a statement that the grievant would make sure the County granted to him what he felt was entitled to under the labor agreement.

The grievant did make some statements about being out to get people. In a different context, such a statement could well be taken as a threat and the grievant would be well advised to stop making them. Here however, given the total lack of any evidence of violent propensities, the passage of time between his making such statements and the time he was fired and the lack of credibility by many of the County witnesses, the evidence did not support a finding of a threat on this record.

Finally, several County witnesses indicated that the grievant’s sometimes jittery behavior and shakiness causes them discomfort. As noted above, the grievant is excitable and often engages in unusual behavior but there was no evidence that this causes him to be unsafe or that these actions are threatening. His shakiness was the result of his work injury. For the co-workers to assume that his disability equates to a physical threat, as the Union suggested, says as much about them as the grievant.

The creation of a hostile workplace requires more than that people don’t like an employee. It requires specific actions designed to create fear or of sexual or other prohibited harassment. There was little doubt that some of the grievant’s co-workers are uncomfortable around him. It was also clear that some of those same co-workers have harassed him both directly and indirectly.<sup>4</sup> On this record there was guilt enough to go around in that regard.

---

<sup>4</sup> Much was made about the County’s investigator and whether he was or was not impartial and objective. The County asserted that he was an experienced investigator while the Union claimed that his interrogation technique was flawed at best and aggressively partisan at worst. No specific findings are made about whether Mr. Setter did or did not perform an impartial investigation. The conclusions reached here are based on the evidence adduced at the hearing and the statements of the various employees that were taken by the investigator. Obviously too, his “conclusions” about whether there was the creation of a hostile work environment were given little weight. That decision is for the arbitrator to make alone.

**INSUBORDINATION FOR APPEARING AT A COUNTY FACILITY AND WORKSITE ON  
FEBRUARY 2 & 3, 2009.**

The County placed the grievant on a paid leave in order to conduct the investigation about workplace harassment in December 2008. The leave was set to expire on January 27, 2009. On that date, the grievant was contacted by an Assistant County Attorney and told not to report, as he had been previously told to do by his direct supervisors, on February 2, 2009. The grievant asked for this to be put in writing. The evidence showed that the County Attorney agreed to provide him a letter absolving him from the responsibility of appearing for work on February 2, 2009.

The evidence showed that the letter promised by the Attorney did not appear and that the grievant was concerned about not showing up for work even though his supervisors had told him to and the letter had not shown up.

He appeared for work and was almost immediately confronted about why he was there. He was told to leave and he did. There was no incident or scene and the grievant testified credibly that he wanted to be sure he would not be placed in a Catch-22 situation for failing to come to work.

Insubordination requires the intentional refusal to perform an order of management. It requires a clear order from a person authorized to make it and a clear refusal under circumstances that would lead a reasonable grievant to understand that the refusal will be treated as insubordination subjecting him to serious discipline. Few any of those elements were present here. Assuming *arguendo* that the County Attorney was even authorized to give the order, the letter promised by the Attorney did not appear when it was promised.<sup>5</sup>

---

<sup>5</sup> Why the grievant's direct supervisor did not simply make the call to the grievant on January 27<sup>th</sup> to tell him not to come to work was not made clear at the hearing. Obviously this might well have alleviated much, if not all, of the confusion on this one point but did call into question the County's motives and its process here.

There was also no indication that coming to work when the letter did not show up would place the grievant in an insubordination situation. His concern that failing to show up for work would have as high a likelihood of discipline as appearing for work would was not unreasonable given the circumstances. There was insufficient evidence to support the allegation of insubordination on this record.

Next there was the claim that the grievant was insubordinate for appearing at a County work site the following day. The evidence showed that the grievant was at his attorney's office and saw his friend working on the same street. He then walked across a public street, exchanged a few pleasantries with his co-workers and left. There was no evidence that he interfered with the operation or that he attempted to impact the ongoing investigation in any way. Further, as the Union pointed out, he was not under some sort of house arrest or under a prohibition from going to his divorce attorney's office. The County crew was working on a public street and there was no specific prohibition from the grievant talking to his friends at the County. Had there been evidence that he disrupted the work or that he attempted to interfere with the investigation in any way the result here might have been different but there was no such evidence.

The County asserted that the arbitrator cannot accept the grievant's testimony on this count since he had the opportunity to say this during the grievance steps but did not. First, while evidence of statements made or not made during a grievance step meeting can be helpful in determining credibility or resolving conflicting testimony, the Union is correct in that the employer bears the burden of proof and that the Union does not have to present its defense at the grievance steps. The arbitrator cannot pass on the wisdom or acceptability of this gambit, since the whole purpose of grievance steps is to encourage a forthright and open communication in an attempt to resolve the dispute, a Union is allowed to wait until the hearing to present substantive defenses to the employer's claims of discipline.

Also, there is no evidence on this record to counter the grievant's testimony. The record shows that he indeed was meeting with his divorce attorney and simply briefly walked across the street and chatted briefly with some friends there. No direct evidence of this incident by the County and the grievant's version is accepted. Again there was insufficient evidence to establish that the grievant refused a clear direct order of management. the County could not have prohibited him from walking on a public street where coincidentally there was a county crew. Moreover, he was under no specific, or even an unspecific, prohibition from talking to people at the county nor any evidence that he knew that doing what he did on the 3<sup>rd</sup> would result in discipline.

### **LYING DURING THE INVESTIGATION UNDER THE GARRITY WARNING**

The County alleged that the grievant lied to the investigator under a *Garrity* warning and that his actions warrant serious discipline. The assertion that the grievant lied to the investigator appeared to come entirely from the investigator. Further, the basis for the allegation is that the grievant would not admit to threatening his co-workers as the investigator apparently wanted him to.

Simply stated, the failure to admit to wrongdoing does not in all cases result in a finding that someone is lying. Moreover, while it was not entirely clear which actual questions were allegedly answered untruthfully, it appears the claim comes from the questions about whether the grievant threatened his co-workers. What is a true threat depends on the context and is frankly a conclusion that rests with an arbitrator, not the investigator, in these circumstances.

The grievant's testimony was reviewed as well as his statement given to the investigator especially pages 29-32 of his and 41-42 of his statement. The grievant was asked if he ever made statements like "you better watch your back or I'm going to f\*\*k you over." While it may be splitting hairs but no one indicated that he made that statement. It was apparent that he may have made the "Watch you back" statement at some point, perhaps several years ago, but it was not followed by the rest of the statement. Because of the way in which the question was asked it cannot be said that the grievant lied when answering it.

The investigator followed up with a question as follows: “Anything that could be construed as threatening or harassing conduct from you towards them?” The grievant answered “no” to that question and is apparently this answer that is one of, if not *the*, main focus of this allegation.

The question asked that the grievant somehow answer for the co-workers. Moreover, other than the one statement referenced above, the grievant was not asked about any specific conduct – only about his perceptions of general conduct and he answered those questions honestly based on his perception of what he had done. This frankly did not rise to the level of lying. Lying is the intentional misrepresentation of a fact the declarant knows to be untrue.

That simply did not happen here. Accordingly, there was no evidence on this record to support the allegation that the grievant lied under oath and under a Garrity warning.

## **REMEDY**

Having determined that there was no just cause for any discipline the remedy follows directly, the grievant must be reinstated to his former position with all back pay and accrued contractual benefits reimbursed. The grievant's record is to be expunged of any and all record of the discipline meted out in this matter.

## **AWARD**

The grievance is SUSTAINED. The grievant is to be reinstated to his former position with the County within five (5) business days of this Award with all accrued back pay and contractual benefits as set forth above. The grievant's record is to be expunged of any and all record of the discipline meted out in this matter.

Dated: December 1, 2009

IBT 160 and Dakota County Lukkes award

---

Jeffrey W. Jacobs, arbitrator