

IN THE MATTER OF ARBITRATION BETWEEN

State of Minnesota,
Department of Transportation,

Employer,

and

DECISION AND AWARD

BMS CASE NO. 10PA0522

AFSCME Council 5, Local 106,

Union.

ARBITRATOR:	Stephen A. Bard
DATE OF HEARING:	April 9, 2010
PLACE OF HEARING:	South St. Paul, Minnesota
DATE OF RECEIPT OF POST-HEARING BRIEFS:	April 30, 2010
DATE OF DECISION AND AWARD:	May 11, 2010
GRIEVANT:	Mark Burkhartzmeyer

APPEARANCES:

For the Employer:
Mr. James G. Jorstad
Labor Relations Representative Principal
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For the Union:
Ms. Carole Gerst
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Business Agents
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INTRODUCTION

This matter came on for arbitration before Neutral Arbitrator Stephen A. Bard, on April 9, 2010, at 9:00 a.m. in the Union Hall in South St. Paul, Minnesota. The Employer was present with its witnesses and was represented by Mr. James G. Jorstad. The Union was present with its witnesses and was represented by Ms. Carole Gerst and Ms. Cindy Nelson.

Testimony and exhibits were taken at the time of the hearing and at the conclusion thereof the parties agreed to simultaneously serve and submit briefs on April 30, 2010. The parties stipulated that there were no issues of timeliness or arbitrability and that the matter was properly before the Arbitrator for a decision on the merits.

ISSUES

1. Did the Employer violate the Collective Bargaining Agreement when it terminated the employment of the grievant?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

The following provisions of the Collective Bargaining Agreement are relevant to a decision of this case.

ARTICLE 16---DISCIPLINE AND DISCHARGE

Section 1--Purpose.

Disciplinary action may be imposed upon an employee only for just cause.

Section 5--Discharge.

The Appointing Authority shall not discharge any permanent employee without just cause.....

FINDINGS OF FACT

The Arbitrator finds that the following facts are either not in dispute or have been established by a fair preponderance of the evidence by the party having the burden of proof.

1. The grievant, Mr. Mark Burkhartzmeyer, was employed as a “Transportation Generalist” by the Minnesota Department of Transportation for about two years. He was hired by the Metro District in July 2007. In December 2007, he transferred to the District 6 Office of MnDOT in Owatonna to work on a bridge crew. Between December 2007 and April 2008, while working on the bridge crew, the grievant had three incidents with co-workers and his supervisor which the Employer characterizes as “angry outbursts.” These included arguments with co-workers over work assignments and an exchange with his supervisor over use of compensatory time on a cold day.
2. The Employer describes these and other incidents which occurred later as “altercations”, “angry outbursts” or “heated exchanges.” Not surprisingly, the grievant minimized the behavior as not being as extreme as the Employer asserts.
3. His behavior while on the bridge crew was disruptive enough that, according to the supervisor, Dennis Iverson, the entire bridge crew told their supervisor they did not want to work with him.
4. In December 2008, the grievant bid into a road maintenance position in the Faribault truck station where he was employed until he was discharged in August 2009. He had no prior discipline. His overall evaluation in his April 2008

performance appraisal was “meets expectations,” and in the June 2009 appraisal it was “needs improvement.”

5. The grievant was on notice that any bullying behavior in the workplace was unacceptable. MnDOT has a written Zero Tolerance of Workplace Violence Policy which was furnished to him. Additionally, MnDOT trained him for three hours on a respectful workplace. The Zero Tolerance policy includes threats of violence as well as actual acts of physical violence.

6. From December 2008 to June 2009, the grievant displayed a number of angry, vulgar outbursts while working on the maintenance crew. One such instance was when he was upset about being assigned to flagging duty by Supervisor Kruckeberg. While in the break room in the Faribault Truck Station with other co-workers, using his cell phone the grievant called Kruckeberg. When he did not get an answer he liked, he hung up the phone, threw it on the table, and loudly shouted “That fat tub of shit!.” Another incident happened when the grievant learned he would not be sent to the Spring Maintenance Expo. The grievant called Nancy Skalicky to inquire why he was not selected. After hearing the explanation, he hung up the phone, and loudly shouted “Fucking Bitch!” In yet another incident, after he had exchanged heated words with Craig Schafer, the grievant said “If he’d have said one more thing, I’d have punched him.” And in yet another incident, when Supervisor Kruckeberg gave the grievant his performance evaluation on June 1, 2009, the grievant threw it on the table and yelled, “This is fucking bullshit.”

7. It is clear from a preponderance of the evidence that the grievant caused

serious morale problems among his co-workers both on the bridge crew and the road crew. They didn't like working with him because he was so argumentative and his presence caused dissension in the workplace. It is also clear, however, that prior to June 5, 2009, the grievant did not threaten anyone with violence. His conduct, while clearly disruptive, did not violate the Zero Tolerance policy against violence in the workplace.

8. On Friday, June 5, 2009, according to the testimony of Al Terpstra, a co-worker, the grievant took him aside into an area where the two were alone and expressed his anxiety over who was reporting to their supervisor about some of the grievant's inappropriate use of state equipment. Mr. Terpstra testified that the grievant stated: "I don't think you would, but if it was you, I would beat the shit out of you." Terpstra took this as a direct threat and responded by walking away and leaving the room.

Terpstra testified that he had, in fact, recently informed Supervisor Kruckeberg and Assistant District Engineer Panek about the grievant's misconduct of misuse of a state vehicle. Terpstra testified that he was frightened and that he took the threat seriously. He promptly contacted a co-worker, Perry Wingen, seeking guidance on how to handle the situation. Terpstra spent three hours talking to Wingen on the evening that the threat occurred. During the following weekend Terpstra also discussed the threat with his co-worker, Tony McCracken. Then, on Sunday, June 7, Terpstra and his wife called Supervisor Kruckeberg to report the threat. On June 8, 2009, the grievant was placed on paid investigative leave.

9. In his testimony, the Grievant denied that the so called threat to Terpstra ever took place. He admitted being frequently moody and irritable at times which he blamed on medications he was taking since a traumatic brain injury he suffered in a work accident on April 29, 2008. This testimony was contradicted by his supervisors and co-workers on the bridge crew who testified that his angry outbursts preceded that accident. The grievant never requested an accommodation for disabilities arising from that accident.

10. Numerous witnesses testified that working with the grievant adversely affected them. Cam Ihrke stated that the frequent, erratic outbursts by the grievant were stressful for him. He didn't know what to expect each day at work. The stress caused him to be irritable at home with his wife and children. Tony McCracken testified that The grievant's outbursts caused him so much anxiety that he went to his doctor and was prescribed anti-anxiety medication. Craig Schafer testified that he lost sleep over the situation perpetuated by the grievant, and sought counsel from his clergyman. Al Terpstra testified that he and his wife bought guns for protection due to the grievant's threat.

11. After the threat against him was reported by Terpstra, a full investigation of the grievant's conduct on that and other occasions was undertaken on behalf of the Employer by Patty Eckdahl, Human Resources Supervisor. Ms. Eckdahl conducted interviews with numerous co-workers and supervisors of the grievant, as well as the grievant himself, and obtained detailed accounts of the alleged Terpstra threat as well as other incidents involving the grievant in the workplace. These interviews,

along with Ms. Eckdahl's impressions of each witness she interviewed, were summarized in a written Investigation Report dated August 18, 2009 which was placed in evidence.

12. The final decision to discharge the grievant was made by Mr. Mark Panek, Assistant District Engineer. In arriving at his decision that discharge rather than a lesser form of discipline was appropriate for the grievant, Mr. Panek reviewed the Investigation Report prepared by Ms. Eckdahl. He considered that so many employees had expressed discomfort as a result of the grievant's behavior as well as the threat against Terpstra which he felt was real and serious. He concluded that the grievant posed a safety threat to other employees and that by threatening Terpstra he had violated the Zero Tolerance policy on workplace violence.

Mr. Panek testified that he never actually considered a lesser form of discipline but that he would not have terminated the grievant's employment based solely on his other conduct if the grievant had not actually threatened Allen Terpstra. Mr. Panek also testified that although the Collective Bargaining Agreement does not **require** progressive or "step" discipline, there is an unwritten practice at MnDot to impose progressive discipline for conduct not posing issues of violence or safety. Mr. Panek admitted that except for the threat to Mr. Terpstra, there had been no previous reports in the record of complaints by other employees that the grievant had threatened their safety, nor had the grievant previously received any form of discipline.

13. On August 17, 2009 the grievant was sent a letter discharging him effective

at the close of work on August 18, 2009 for violating MnDOT's Policy on Zero Tolerance of Violence in the Workplace. Specifically, the discharge notice singled out the threat against Terpstra. The notice also stated as grounds that the grievant had made "recurring and disrespectful comments toward others." The grievant was given a Loudermill hearing on August 18, 2009, after which the Employer's final decision was to discharge the grievant.

14. After the discharge of the grievant, the Union filed its Grievance Statement and the parties followed the grievance procedure through the various steps to and through the Arbitration hearing.

POSITION OF THE UNION

The arguments of the Union in support of the grievance can be summarized as follows:

1. The employer's witnesses are not credible due to the internal inconsistency of their testimony and the differences between the stories they told the investigator and the version they gave at the hearing.
2. No previous reports were made to any supervisors or noted on performance evaluations regarding the grievant's outbursts or employees' fear of him.
3. The grievant was the victim of disparate treatment. A more serious threat by another employee only resulted in a referral to anger management, while termination was the only option considered for this grievant's alleged threat.
4. The Employer has not carried its burden of proof that any direct threat was made by the grievant to Allen Terpstra. The proof was simply one person's word

against another and the threat was not corroborated. Also, Mr. Terpstra's delay in reporting the incident along with other inconsistent conduct by him makes his version not credible. Finally, if the conversation was as Allen Terpstra claims, there was not a direct threat against him personally. If, as Terpstra claims the grievant actually made the alleged threatening statement, Terpstra was also informed by the grievant that he was not the person suspected of telling the supervisor about his potential misuse of a work truck.

5. If the threat against Terpstra isn't proven, the other allegations of "outbursts", even if proven, would not by themselves support a termination of employment, especially in the absence of any previous discipline or complaints against the grievant by co-workers that grievant's conduct put them in fear for their safety.

6. Progressive discipline, as defined in the labor agreement, was never considered. Discipline is to be corrective not punitive. Termination should only be used as a last resort and only after the employer can fully document previous corrective actions attempted.

7. The grievant's medical conditions which contributed to his outbursts and behaviors are now under control and are a mitigating factor.

8. The grievant is not a danger to his coworkers, his supervisors or anyone else. He may be a moody employee making it difficult to work with, but the employer made no indication of this on his work performance evaluations prior to the accident nor was any corrective action taken. Mood swings alone are not evidence of violent behavior. The employer did not offer the Employee Assistance Program to the grievant until he was terminated. .

POSITION OF THE EMPLOYER

The Employer's arguments in support of its action are summarized below.

1. The Employer demonstrated that there was just cause to discharge the grievant for violating the Zero Tolerance Policy and for having numerous angry, vulgar outbursts. The evidence demonstrates that The grievant threatened to "beat the shit" out of Al Terpstra, and had numerous outbursts over a period of months. He was a short term employee with a mediocre work record. The grievant engaged in serious misconduct that warrants discharge.
2. MnDOT conducted a fair and thorough investigation, and the testimony of the maintenance crew, clearly demonstrates that the grievant's behavior was bullying and belligerent and was repeated over the course of many months. The grievant admitted that he sometimes engaged in angry behavior. He testified that he was more moody and irritable than the rest of the crew.
3. It is the obligation of an employer to provide a workplace where employees can work safely and efficiently. Workplace morale is an important concern of management. Morale and co-worker trust are not simply desirable outcomes; they are safety issues. The grievant and his co-workers work in dangerous conditions along the roadways and bridges. They must work as a team. They rely upon each other in dangerous situations. Angry, vulgar outbursts, and the disharmony caused by a crew member constantly bucking the team, distract everyone from the job at hand. This erodes trust and confidence. Furthermore, it creates a tangible

diminution of the work crew's effectiveness and safety.

4. The grievant was repeatedly put on notice that his bullying behavior was unacceptable. MnDOT trained him for three hours on a respectful workplace. MnDOT has a Zero Tolerance of Workplace Violence Policy. The Zero Tolerance Policy was provided to him by email. In two separate performance evaluations he was advised and counseled about the importance of working well with crew members, being a team player, and having a positive attitude

5. In this case, there is no evidence that additional counseling would change the grievant's behavior. Indeed, the record reveals that as his supervisors more closely scrutinized and addressed the grievant's inappropriate behavior, he became more aggressive and threatening. The grievant's resistance to correction from supervisors further underscores the appropriateness of dismissal. The grievant's own actions reveal that he is not redeemable.

6. The grievant's denial of the threat against Mr. Terpstra is not credible. The grievant denies threatening Al Terpstra. However, Mr. Terpstra is more credible. Mr. Terpstra's co-workers and all supervisors testified without qualification that he is an honest and respected man. Mr. Terpstra has nothing to gain by fabrication.

7. The Union's argument that discharge is a harsh penalty, and there was no progressive discipline is without merit. There is no express requirement for progressive discipline in the labor agreement. Arbitrators frequently uphold summary discharge for serious offenses such as insubordination, theft, and threatening co-workers.

8. The Union assertion, as a mitigating factor, that the grievant's outbursts are attributable to a vehicle accident and medications he is taking is unconvincing. First, Dennis Iverson testified that The grievant's belligerence started long before the accident.. Second, the medical evidence submitted by the union belies the argument. Finally, while he was working, the grievant never claimed to have a disability. However, even if he had, a disability does not excuse the misconduct. Additionally, there is no evidence to support the assertion that the grievant's threat to Al Terpstra was caused in any way by the accident or medication.

9. The Union's allegations of disparate treatment were not proven. It is the union's burden to produce evidence of disparate treatment, and it failed. It produced no evidence of sufficiently similar cases of comparable threatening and bullying. In contrast, Mr. Panek testified that he fired a 35-year supervisor for bullying behavior similar to the grievant's misconduct.

DISCUSSION

BURDEN OF PROOF

In discharge grievances, the Employer bears the burden of proving the misconduct by a preponderance of the evidence. For the reasons discussed below, the Arbitrator finds that the Employer has carried its burden of proof.

ISSUES

Existence of Just Cause

Legal Standard

The Employer's Zero Tolerance Policy is designed to provide a workplace free of any and all acts of violence. It broadly defines violence as, "[T]he threatened or actual use of force that results in or has a high likelihood of causing fear, injury, suffering or death." The policy requires employees to "...treat co-workers and others in the workplace with dignity and respect and manage conflict appropriately." The policy does not provide a loophole for contingent threats, indirect threats, or any kind of threat. As argued by the Employer, if it is found that the grievant in fact made the alleged statement to Mr. Terpstra, then "...no reasonable reading of the policy supports the assertion that grievant did not violate it."

There is ample arbitral authority for the proposition that violation of such a policy, especially when coupled with a sustained pattern of other workplace behavioral transgressions, constitutes just cause for termination of employment. In addition to this Arbitrator's decision in the case of *State of Minnesota v. AFSCME Council 5*, BMS Case No. 08 PA 1439 (1/21/09), the case cited by the Employer of *In Re Modine Manufacturing Co. and Sheet Metal Workers International Ass'n.*, 121 LA 1457 (Arb. Nicholas Duda Jr.) is strikingly similar to the instant case on its facts. The *Modine* decision supports the right of an employer to discharge an employee for violation of a zero tolerance policy similar to this policy for making an almost identical threat to his supervisor.

Sufficiency of Proof

As always, resolution of conflicting testimony ultimately comes down to the credibility of witnesses. In the instant case, numerous co-workers testified about the pattern of this grievant's abusive workplace behavior over a substantial period of time. Although the Union did point out some contradictions and inconsistencies in the testimony of some of these witnesses, the Arbitrator deems these to be of the type that are found in every case and result from normal human failure to precisely remember details of past events which seemed to have no particular importance at the time. The overall impression on the Arbitrator of this cumulative testimony was that these witnesses had nothing to gain by bearing false witness against another Union member and co-worker and were sincere, credible and generally consistent in their various accounts of a history of disruptive workplace behavior by the grievant. In particular, the critical testimony of Allen Terpstra was supported by virtually unanimous descriptions of him by these witnesses as a man of total honesty and integrity and with absolutely no apparent motive to invent his story. The Arbitrator had the same impression of him. The attempts by the Union to impeach his testimony and attack its importance by pointing out the "conditional" nature of the threatening statement and Mr. Terpstra's delay in reporting the matter did not impress the Arbitrator. Mr. Terpstra's behavior after the threat was made seems to the Arbitrator entirely consistent with a troubled and frightened person carefully weighing his options by discussing the situation with other co-workers and his wife before reporting it.

The grievant's flat out denial of the threat is similarly unpersuasive. Obviously, with his job on the line, the grievant has a strong motive to deny the chief piece of evidence

against him. However, this is not a simple situation, as suggested by the Union, of one man's word against the other with no more reason to believe one than the other. The grievant has a history that belies his truthfulness and Mr. Terpstra does not. The Arbitrator is persuaded by a preponderance of evidence that the grievant did, in fact, make the threatening statement to Mr. Terpstra.

Americans with Disabilities Act

Legal Standard

Employers may discipline an individual with a disability for violating workplace conduct standards, even if the misconduct resulted from the disability. The Americans with Disabilities Act does not protect employees who violate job-related conduct standards. Moreover, even the Equal Employment Opportunities Commission recognizes that an employer can discharge a physically or mentally disabled person for threatening behavior.

Sufficiency of Proof

There was no direct evidence other than the grievant's own testimony that his behavior was the result of medication he was taking for injuries. He never requested an accommodation under the ADA for this reason. There was testimony that the behavior pre-dated the injury. Finally, as pointed out above, the law does not prohibit an Employer from enforcing a zero tolerance for violence policy even if it is established that the behavior is caused by an underlying disability or the treatment for that disability. Accordingly, the Arbitrator has rejected this defense.

Progressive Discipline

Legal Standard

The Union argues that the grievant was not given adequate counseling, was not given warning that his behavior might lead to discipline of any kind, let alone discharge, and was not given the opportunity to correct his behavior by the application of step discipline. The Arbitrator does not agree with these arguments for the following reasons.

In the instant case there is no express requirement in the Collective Bargaining Agreement for progressive discipline. Steps of discipline are described in the CBA but are not expressly required in every case. Even without such a contractual requirement, however, in appropriate cases Arbitrators have held that before summary discharge is justified the employer should have applied progressive or “corrective” discipline. The guiding principal is that the degree of penalty should be in keeping with the seriousness of the offense. Extremely serious offenses such as open insubordination or theft from an employer are typical of cases justifying discharge without prior warning or attempts at corrective discipline. Less serious offenses like careless workmanship or chronic tardiness are generally held to require a milder penalty than discharge aimed at correcting the behavior. As might be expected, Arbitrators differ on when conduct is sufficiently serious as to justify summary discharge. However, in cases of violence and threats of violence, summary discharge is often deemed appropriate for a first offense. See, *e.g.*, *Central Soya Co.*, (74 LA 1084).

Sufficiency of Proof

The Union's position on this issue fails for two separate reasons. First, the evidence clearly establishes that although the grievant may not have been expressly warned that his conduct could lead to discipline, he was in fact counseled on more than one occasion about his job performance and the importance of getting along with his co-workers. The Arbitrator is persuaded by the Employer's argument that additional counseling on the point was unlikely to succeed. Second, the threat to a co-worker is sufficient, even standing alone, to justify summary discharge without imposing progressive discipline.

Disparate Treatment

Legal Standard

In *Elkouri & Elkouri*, How Arbitration Works, Sixth Edition, there is the following discussion of the subject of unequal or discriminatory treatment at pages 995-996:

"It generally is accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same, unless a reasonable basis exists for variations in the assessment of punishment (such as different degrees of fault, or mitigating or aggravating circumstances affecting some but not all employees). ...Where a reasonable basis for variations in penalties does exist, variations will be permitted notwithstanding the charge of disparate treatment. Discrimination is an affirmative defense and, therefore, the union generally has the burden of proving that the employer improperly discriminated against an employee. Thus, in order to prove disparate treatment, a union must confirm the existence of both parts of the equation. It is not enough that an employee was treated differently than others, it must also be established that the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties."

Sufficiency of Proof

The Union raised allegations of disparate treatment. Specifically, the Union claimed that approximately two years ago another employee stated that he would “wait outside the building and shoot people as they came out,” and no discipline resulted other than a referral to anger management. The only proof of this was the testimony of one witness, Charlene Hofius, the Union’s Chief Steward. No other details concerning the incident or the circumstances or work history of the other employee were furnished. The Union produced no evidence of similar cases of threatening and bullying.

Mark Panek, the manager who decided to discharge the grievant, testified that he had no knowledge of the purported situation described by Ms. Hofius. In contrast, Mr. Panek testified that he fired a 35-year employee for behavior similar to the grievant’s which violated the Zero Tolerance policy.

The Arbitrator takes note of the relatively lenient discipline administered to the other unnamed employee whose verbal threat was, on its face, even more frightening than the threat made by the grievant to Allen Terpstra. Notwithstanding this concern and the apparent disparate discipline administered, the Arbitrator finds that the Union has not carried its burden of proof on this affirmative defense. There was virtually no detailed evidence provided of the factual circumstances of the other case. Therefore, the Arbitrator has no way to determine how similar the facts were to the instant case, or whether or not the more lenient discipline imposed was justified by mitigating circumstances.

DECISION AND AWARD

For the above stated reasons the grievance is denied.

Respectfully Submitted

Stephen A. Bard, Arbitrator