

**IN THE MATTER OF ARBITRATION
BETWEEN**

**OLMSTED COUNTY EMPLOYEES
ASSOCIATION,**

Union,
and

**THE COUNTY OF OLMSTED,
MINNESOTA,**

Employer.

**ARBITRATION DECISION
AND AWARD
BMS Case No. 10-PA-0322
(Neville Discharge)**

Arbitrator: Andrea Mitau Kircher
Date and Place of Hearing: June 9 and 24, 2010
Date Record Closed: August 10, 2010
Date of Award: September 10, 2010

APPEARANCES

For the Association:

Zaidee Martin, J.D.
Ron Rollins, J.D.
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For the Employer:

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INTRODUCTION

The Olmsted County Employees Association (“Association”) and the County of Olmsted, Minnesota (“Employer” or “County”) are parties to a Collective Bargaining Agreement (“Contract”), Joint Exhibit 1. The Contract was effective January 2009 through December 2009. The Association filed a grievance on August 24, 2009, which the parties were unable to resolve,

and in accordance with the Contract, the matter was referred to arbitration. The parties duly selected the undersigned as the arbitrator from a list provided by the Minnesota Bureau of Mediation Services.

On June 9 and 24, 2010, the Arbitrator convened a hearing at the Olmsted County Courthouse in Rochester, Minnesota. During the hearing, the Arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties agreed to file briefs simultaneously by U.S. mail on August 6, 2010, and the record closed when the Arbitrator received the last brief on August 10.

ISSUE

Was Jeanette Neville discharged from employment for just cause?

FACTS

At the time of her discharge, Grievant Jeanette Neville was a maintenance worker for Olmsted County in charge of cleaning the 6th floor of the Government Center on the night shift. This work included cleaning courtrooms and rest rooms. The Grievant was discharged from employment because of an incident that happened August 5, 2009.

On August 5th, Bruce Dutton, the Grievant's supervisor, received a complaint that one of the courtrooms on the sixth floor, Courtroom 4, had been observed to be dusty. This complaint came from Bruce Dutton's supervisor, Scott Vreeman, who had received it from the Court Administrator.¹ Mr. Vreeman directed Mr. Dutton to see that the dusty courtroom was cleaned and advised him not to divulge the name of the complainant, because to do so might "cause trouble".

¹ The complaint was originally made by an employee of the Juvenile Correction's staff who observed the dust and was interested in the possibility of her "juvenile crews" cleaning up the courtroom after hours.

The complaint about the dusty courtroom became the incident leading to dismissal of Ms. Neville. Bruce Dutton approached Ms. Neville with the written complaint, but he would not show it to her. He directed her to dust all four courtrooms that night. Ms. Neville was upset by this. She took great pride in her cleaning work and went about it in a very methodical way. She argued with him and suggested it must be the fifth floor courtrooms that were dusty, not hers. She also believed that it would have been impossible to accomplish her regular cleaning duties and dust all the courtrooms during the same shift, because it would take too long. She did not verbally express all of these concerns or ask her supervisor to set some priorities for that night's work. This was not the first time the two employees had trouble communicating. Mr. Dutton had complained to his superiors that Ms. Neville did not take direction from him well, and that she argued with him.

Mr. Dutton decided to show Ms. Neville the dusty courtroom in response to her argument. They toured Courtroom 6 looking for dust and found very little. For reasons unknown even to him, he did not take her to Courtroom 4 from which the dust complaint arose. The conversation between the two parties escalated into an argument where both were frustrated and upset. Ms. Neville, who is probably old enough to be Mr. Dutton's mother, lost her temper and slapped him hard on the shoulder. Mr. Dutton testified that he did not know why she was upset and that he was completely surprised.

The slap did not create serious physical harm. When Ms. Neville slapped Mr. Dutton, she hit him on his shirt sleeve. The blow made a "cracking" sound. Ms. Neville testified that she hit him harder than she meant to. She didn't mean to hurt him, but intended to "swat him out of the way" so she could get back to work. Mr. Dutton responded by saying "ouch" and departed. He testified that the slap left a red mark on his shoulder, but it is unclear how long this

visible sign remained. Two days after the incident he reported it to his supervisor. Mr. Dutton has four brothers, who apparently have hit him in the past, but he testified that he never expected to be hit at work. “Emotionally, it was a traumatic experience,” he said.

This workplace explosion may have been affected by a number of other underlying circumstances: The County noted that Mr. Dutton and Ms. Neville had competed for the night maintenance supervisory position in 2007. Mr. Dutton was senior in the work place and he was awarded the position, so Ms. Neville may have held this against him. Also, Ms. Neville came to the County in 2005 with a previous 34-year career with K-Mart. When she retired from K-Mart, she had been the Assistant Manager for 27 years managing over 200 employees. She had developed her own ideas about proper supervision in the workplace which may have affected their interaction adversely. Further, the Dutton family and Ms. Neville were previously acquainted, and she had supervised the Dutton brothers at K-Mart when she worked there; Mr. Dutton believed Ms. Neville had said demeaning things about him to his father, telling the father “that I couldn’t do the job.”

Thus, it is easy to believe Mr. Dutton when he stated that he was uncomfortable giving Ms. Neville orders. In addition to these interactions from outside the workplace, Ms. Neville frequently responded to Mr. Dutton’s directives by making remarks that he interpreted as argumentative. At the hearing it was apparent that both parties were still angry at one another even though a year had passed after the Neville discharge. I observed Ms. Neville glaring angrily at Mr. Dutton during his testimony; and one witness testified that Mr. Dutton had filed a complaint of assault with the police department against Ms. Neville in May 2010, nearly a year after the occurrence and just before the arbitration hearing.²

² Testimony, Paula Kath, long-term Association president, who helped the Grievant with this matter. The charge was dropped.

Nonetheless, Ms. Neville was not the only person on the night shift who was unhappy about Bruce Dutton's supervisory skills. In 2009, Mr. Dutton had been working under a provisional appointment as Assistant Maintenance Supervisor for about two years. This job required supervising "14.5" employees. Of the approximately 14 employees under his command, four employees in addition to the Grievant testified about incidents of unpleasant interaction with Bruce Dutton.

- 1) Ray Arnold testified about a phone mail message from Mr. Dutton, who used the word "fucker", although it was not entirely clear from the testimony to whom Mr. Dutton had applied this epithet. Mr. Arnold complained to Mr. Dutton's supervisor, Scott Vreeman.
- 2) Brian Lee Fabian stated that Mr. Dutton became angry at him and swore at him. Further, Mr. Fabian reported that Mr. Dutton had made a derogatory comment to him about costing the county money because of his back condition, which caused him pain and spasms. Mr. Fabian also complained to Mr. Vreeman.
- 3) Employee Ron Krueger, who had worked for the County for 12 years believed that Mr. Dutton, was very demanding and authoritarian in style. Mr. Krueger testified that Mr. Dutton treated the Grievant badly and concluded that Mr. Dutton "wanted to dominate women and run them down."
- 4) Sally Jo Schmidt stated she had difficulties with Bruce several times. When she asked him a question about a chemical they used, he responded "Don't you ever listen?" in a demeaning way.

All of these employees still work under Mr. Dutton's supervision and would have nothing to gain by testifying negatively about his conduct. In addition to the employees Mr. Dutton supervised, another witness, Judge Kevin Lund, whose courtroom was on the sixth floor, testified about an earlier incident he overheard between Mr. Dutton and Ms. Neville. Outside his chambers, Judge Lund heard Mr. Dutton speaking loudly and inappropriately to Ms. Neville when criticizing her use of a parking spot that the Judge had offered her.³

³ The Employer pointed out that Mr. Dutton's hearing loss might lead him to speak louder than necessary. At the hearing, Mr. Dutton's voice was at a normal volume and his hearing loss was not apparent.

Paula Kath, the Association's business agent, spoke to Mr. Vreeman, the supervisor, several times about Mr. Dutton.⁴ She told him that Mr. Dutton exhibited threatening behavior toward the maintenance employees whom he supervised. She stated that his moods and behavior were intolerable for the employees when he became a supervisor. "People are afraid of him," she stated. "Something has got to be done," she told him. Mr. Vreeman did not remember these discussions with the same detail as Ms. Kath. She stated that employees had told her that when Mr. Dutton got upset, he got red in the face, swore, made fists, and yelled at people. When she had described this to Scott Vreeman, his replies were unsatisfactory. He tried to excuse Mr. Dutton's behavior by explaining that he had marital problems and had bad days. Ms. Kath stated that Mr. Dutton should not take it out on the employees he supervised. Although Mr. Vreeman "talked to" Mr. Dutton more than once, there is no evidence of disciplinary action taken against Mr. Dutton for his conduct as a supervisor prior to Ms. Neville's discharge.

The Employer objected to evidence about Mr. Dutton's supervisory skills or lack thereof, claiming it did not excuse an employee hitting a supervisor. Each employee on cross-examination agreed that it was inappropriate for an employee to hit someone in the workplace.

ASSOCIATION POSITION

The Association argues that discharging Ms. Neville is a disproportionate management response to her action. The Association agrees with the Employer that physical violence toward another employee in the workplace is wrong. But the Association claims that Bruce Dutton's behavior toward his employees, his targeting of Ms. Neville, and the fact that there was no discernable action taken by County supervisors, despite numerous complaints, constitute

⁴ Ms. Kath is a long-term County employee who was a founder of the Employee's Association in 1974. She stated that there are 500 employees in the Association, and they have had only one other disciplinary grievance arbitration during her long experience with the Association.

circumstances that should mitigate the Grievant's penalty. It alleges that the facts support only a short suspension, not a discharge. The Association argues that Ms. Neville did not intend to hurt Mr. Dutton, but merely wanted to get his attention so he would listen to her and then leave her to get on with her work. The Association claims that poor supervisory skills caused this problem, and it is unfair to discharge Ms. Neville, an employee with no previous record of discipline, when it was the County's lack of effective action that placed her in an untenable position.

EMPLOYER POSITION

The Employer claims that its Workplace Violence Prevention Policy prohibits acts of physical violence, and even if it did not have such a policy, it is common knowledge that County employees cannot hit each other at work. The Employer argues that violence against a supervisor shows a lack of respect for the supervisor and management, irreparably harms the employee-supervisor relationship and directly affects the supervisor's ability to manage the workforce effectively. Thus, when an employee hits her supervisor in anger as Ms. Neville did, the appropriate penalty is discharge.

DISCUSSION AND DECISION

Article 19 of the Contract provides that the County must only discipline employees for just cause. It is uniformly understood that the Employer has the burden of proving that it met this standard. Not only must it show that the employee committed misconduct, but also, that discharge is a justifiable consequence of the employee's actions. The "just cause" concept allows an employee's termination in two types of situations: a single incident of very serious misconduct or the final step in the progressive discipline process.⁵ The Employer argues,

⁵ See, Discipline and Discharge in Arbitration, Norman Brand, ed., ABA Section of Labor and Employment Law, BNA, 1999, at 68. Citations omitted.

essentially, that any form of hitting a supervisor constitutes “very serious misconduct” leading to automatic discharge. The Association contends that the arbitrator is bound to review the specific facts of a case to determine whether discharge is a disproportionate consequence to the offense. If the punishment does not fit the crime, the Employer has not demonstrated just cause. Both of these constructs have arbitral support⁶, and unless written into the contract, I do not favor automatic penalties.

The County discharged Ms. Neville for violating its Workplace Violence Prevention Policy which states in pertinent part:

Violence is the threatened or actual use of force against a person or a group that either results or is likely to result in injury, death, emotional damage, or coerced behavior...
Olmsted County will not tolerate any acts of violence to persons or property...
All employees...are held accountable should they commit acts of violence in the workplace.

This policy is external to the labor contract and does not call for an automatic penalty, but for accountability, an exercise in weighing the facts of a particular case.⁷

The Employer, the Association and the Grievant, agree that swatting a supervisor is not an appropriate response to frustration and anger, and that she should be accountable for this conduct. The specific issue remaining is what the appropriate penalty should be.

The Association contends that the Grievant’s penalty should be less than discharge because of mitigating factors. One of these factors concerns the Employer’s accountability for the way supervisors treat staff. The evidence persuades me that management has lost its way in dealing with Bruce Dutton as a supervisor. Mr. Vreeman, Dutton’s supervisor, did not appear to

⁶ See, i.e., *Allegheny Ludlum Steel Corp.*, 22 LA 255 (1954) and *Welch Foods, Inc. and UF&CW Local 825* 112 LA 69 (1998)

⁷ The Employer argues that men and women should be held strictly accountable for the same conduct. In terms of workplace violence, it points out we should be aware of gender differences in our thinking about physical violence. While a man hitting a woman may seem to be more egregious conduct than a woman hitting a man, both genders should be similarly accountable, and hitting a supervisor calls for discharge regardless of gender. This potential for gender bias is worth consideration, but is not determinative.

have taken complaints about Mr. Dutton seriously. He did not remember most of them until reminded on cross examination. He said he spoke to Dutton about these issues. There is no evidence that he took disciplinary action against him except for a note to the file about one a complaint received after the discharge of Ms. Neville. Mr. Dutton was sent to seven training classes relevant to improving his skills from June, 2007-July, 2009. Helen Monsees, Facilities Manager, and Mr. Vreeman's supervisor, testified she thought the problems in the department were caused by the fact that Mr. Dutton had a "different" communications style than his predecessor, and that all supervisors are moody or speak to us rudely sometimes. She stated that Mr. Dutton has come to see her every couple of weeks "to discuss situations, how to be a better supervisor, and how to communicate with staff...I spent a lot of time coaching him." Ms. Monsees expressed a personal belief in Mr. Dutton's ability to improve. It is significant that Mr. Dutton's skills in communicating effectively with employees who report to him have improved so little over two years with as much attention as Ms. Monsees has given him.

On August 5, 2009, Mr. Dutton directed Ms. Neville to do what she took to be an impossible task. His inability or unwillingness to listen to Ms. Neville or explain the problem in a way that made sense to her is not a sufficient reason for her to respond violently. But swatting someone's shoulder in exasperation is different in degree than other more serious types of workplace violence such as threatening or intending to harm someone. Ms. Neville expressed anger and frustration, but not intent to harm Mr. Dutton. Intent to harm someone by physical contact is a significant factor and should be considered when determining an appropriate penalty. Mr. Dutton reported that he suffered a stinging sensation and a red mark on his skin as well as surprise and delayed anger. He waited two days to mention the incident to his supervisor and a year to file assault charges. The reasons for this timetable remain murky. Although swatting

someone's shoulder is an inappropriate workplace communication, the magnitude of harm was minimal, and there is no evidence that Ms. Neville intended to hurt Mr. Dutton. The exact words that passed between the two employees is unclear, but both employees apologized for their conduct.

The County believes, essentially, that by hitting her supervisor, Ms. Neville "crossed the line" of behavior that can be allowed in the work place. It argues that Ms. Neville cannot return to the workplace because her actions had irreparably harmed the employee-supervisor relationship affecting the supervisor's ability to effectively manage the workforce. The flaw in this argument is substantial evidence shows that the County had a hand in causing this line-crossing, because it allowed a corrosive atmosphere to develop on the maintenance night shift. That atmosphere existed for a long time, despite the County's knowledge of the problem. It cannot be a healthy or even common circumstance that over twenty-five percent of a department has complained to the supervisor's supervisor about how staff is treated in the work place. Ms. Kath, with her years of labor/management experience, testified that if one or two employees complain about a supervisor, it is just a personality clash; but if more employees complain, something is wrong with the supervisor. She effectively countered Ms. Monsees' view of Mr. Dutton's conduct when she stated, "Swearing and yelling at employees is not a "supervisory style". Even accounting for the possibility of hyperbole, Ms. Kath was a credible witness, and I find that the County's conduct increased the likelihood of an explosive incident like the one that occurred on August 5. This is a mitigating factor.⁸

The County proved just cause for discipline, but not for discharge. Progressive discipline, a core component of just cause, dictates that Ms. Neville's sanction should be reduced because of a combination of mitigating factors. First, when she swatted Mr. Dutton she did not

⁸ See, i.e., *Welch Foods and UF&CW Local 825*, 112 LA 69 (1998)

intend to hurt him, and violence of this magnitude does not require summary discharge, especially when coupled with the fact that the County does not come to this grievance with “clean hands” as set out above. Second, Ms. Neville apologized for her conduct, and it is very unlikely to recur. If it does, with a substantial suspension on her record, discharge would swiftly follow. Third, she has never been previously disciplined, and her work record shows she is a conscientious, competent maintenance worker. The Employer can benefit further from her industrious efforts.

Finally, I am aware that this decision does not solve the County’s problems in its maintenance night shift. As tempting as it may be, it is not the arbitrator’s job to solve these problems, but to determine in a very close case whether the County established substantial evidence that it had just cause to discharge the Grievant. As to the concern that a penalty less than discharge will set a bad precedent for future incidents, each case must be decided on its own merits. An employee who does not have a clean work record or who is in different circumstances than Ms. Neville’s may well be subject to a more stringent penalty.

AWARD

The grievance is sustained in part and denied in part. The Employer did not have just cause to discharge the Grievant because discharge is contrary to the principle of progressive discipline and a disproportionate penalty imposed without regard to mitigating circumstances and the Grievant’s previous good record and years of service.

The discharge shall be reduced to a disciplinary suspension without pay through February 20, 2010, and the Employer shall reinstate Ms. Neville within 15 days from the date of this decision and award. The Grievant shall be made whole commencing on February 21, 2010, including back pay subject to a set-off for any earnings or unemployment compensation received from that day to the date of this award. The Grievant’s entitlement to fringe benefits and

seniority accumulation shall be consistent with such entitlements for other employees who have been on disciplinary layoff. Ms. Neville's personnel records shall be corrected to reflect this determination.

Dated: September 10, 2010

Andrea Mitau Kircher
Arbitrator