

OPINION AND AWARD

OF

DAVID S. PAULL

In the Matter of the Arbitration Between

CITY OF PRINCETON, MINNESOTA

AND

**AMEICAN FEDERATION OF STATE, COUNTY and
MUNICIPAL EMPLOYEES, MINNESOTA
COUNCIL 65 (AFL-CIO)**

(Todd D. Ross, Grievant)

Date Issued: January 10, 2010

Minnesota Bureau of Mediation Services 09 PA 0940

OPINION

Preliminary Matters

The Arbitrator was selected by mutual agreement from a list provided by the Bureau of Mediation Services, State of Minnesota. A hearing was conducted in Princeton, Minnesota, on September 9 and October 28, 2010. The City of Princeton, Minnesota (City) was represented by Richard J. Schieffer a lawyer with offices in Minneapolis, Minnesota. The American Federation of State, County and Municipal Employees, Minnesota Council 65, was represented by Teresa L. Joppa. Ms. Joppa is also a lawyer and maintains her office in Moorhead, Minnesota.

At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. No stenographer was present.

After the witnesses were heard and the exhibits were presented, the parties agreed to present simultaneous final arguments in writing, postmarked on or before December 6, 2010. The briefs were postmarked in a timely manner and the last brief was received on December 10, 2010. Thereafter, the case was deemed submitted and the record was closed.

Issue

The parties agree on a statement of the two issues presented:

Did the City have just cause to discipline Mr. Ross for three days without pay for an incident occurring on June 12, 2008, and if not, what is the appropriate remedy?

Did the City have just cause to discipline Mr. Ross for five days without pay for incidents occurring on March 27, 2009, and June 29, 2009, and if not what is the appropriate remedy?

Neither party has raised an issue of procedural arbitrability.

Relevant Contract Provisions

The following contractual provisions are deemed pertinent to this grievance:

Article V – EMPLOYER AUTHORITY

- 5.1 The EMPLOYER retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personal; to establish work schedules; and to perform any inherent managerial function not specifically limited by this AGREEMENT.
- 5.2 Any term and condition of employment not specifically established or modified by this AGREEMENT shall remain solely within the discretion of the EMPLOYER to modify, establish, or eliminate.

Article 6.5 – ARBITRATOR'S AUTHORITY

- A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this AGREEMENT. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the employer and shall have no authority to make a decision on any other issue not so submitted.
- B. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law . . .

ARTICLE XIII: DISCIPLINE

13.1 The EMPLOYER will discipline employees only for just cause. Discipline will be in one of the following forms:

- a. oral reprimand;
- b. written reprimand;
- c. suspension; demotion; or
- d. discharge.

SUMMARY OF FACTS

The Parties

The City is a political subdivision established pursuant to the laws of the State of Minnesota. The City and the Union are signatory to a collective bargaining agreement (CBA). The CBA is effective by its terms for the period beginning January 1, 2007, and ending December 31, 2009. A copy of the CBA was placed in evidence. The parties agree that the exhibit is the agreement applicable to this dispute.

Pursuant to the CBA, the Union is the sole and exclusive bargaining representative in a bargaining unit certified by the State of Minnesota Bureau of Mediation Services, Case No. 02-PCE-1066, more particularly described as follows:

All employees of the City of Princeton, Minnesota, who are public employees within the meaning of Minn. Stat. 179A.03, subd. 14, excluding supervisory, confidential and essential employees.

Seven specific classifications are listed in the CBA, including general maintenance, police secretary, finance clerk, custodian and liquor clerk.

The grievant, Todd D. Ross, has been employed by the City as a general maintenance worker since 2003. Mr. Ross served in the Army for the three year period ending 1987. Prior to his employment with the City, Mr. Ross worked in several occupations including landscape worker, carpenter, mechanical maintenance and electrical technician.

On September 18, 2005, Mr. Ross was involved in an ultra light aircraft accident, unrelated to his employment. As a result, Mr. Ross sustained a closed head injury. On July 21, 2008, by City Administrator Mark Karnowski, wrote Mr. Ross a letter indicating that, since the accident, his supervisors noted that Mr. Ross exhibited forgetfulness, an inability to recall assigned tasks, episodes of inattentiveness and inappropriate displays of anger in the workplace. Mr. Ross confirmed that after this accident, he experienced periods of memory loss.

The City is located on the border of Mille Lacs and Sherburne counties and is situated between two branches of the Rum River. Because of the confluence of the two river branches, areas near these waterways are prone to flooding.

Pioneer Park Incident

On June 12, 2008, Mr. Ross was assigned to spray pesticides in city parks and other community areas. In order to accomplish this task, Mr. Ross utilized a small truck with a portable spraying unit installed in the box. The truck was described as smaller than a pickup truck but larger than a golf cart. The spraying unit consists of a small pump, a plastic tank containing a mixture of water and commercial pesticide and hand held wand for spraying. The spray unit is not fastened to the truck and the plastic tank is not fixed to the spray unit.

Mr. Ross is supervised by Robert J. Gerold, Public Works Director. Mr. Gerold was working on that same evening, assisting with a local parade activity. Because Mr. Ross participated in the parade, he did not arrive at the shop until approximately 9:45 p.m. Mr. Ross began to spray for mosquitoes at approximately 10:45 p.m., beginning at a

local recreation area known as Pioneer Park. This park is a community area bordered by the Rum River and, as a consequence, is one of those areas prone to occasional flooding.

While spraying the pesticide, Mr. Ross hit a stump, which disabled the ability of the truck to move. Thereafter, Mr. Ross removed the key from the ignition, walked back to the shop and returned the key to its place. Mr. Ross made no effort to return for the vehicle or call for help. He did not call his supervisor.

Later that evening, it rained heavily in the location where the vehicle was abandoned. The water rose to the level of the bed on which the sprayer was situated. The vehicle was completely inaccessible. On June 13, 2008, Mr. Gerold and another employee retrieved the unit.

Mr. Gerold testified that the City maintained an oral work rule requiring that all city equipment be returned at the end of the work day. If an item of equipment was not returned, Mr. Gerold testified, the status of the equipment must be reported to a supervisor by whatever means was available, including his cell phone. Mr. Gerold testified that he communicated the substance of this rule to Mr. Ross on more than one occasion. Mr. Gerold also testified that he was technically available to receive reports of emergencies 24 hours a day.

Section 12(D) of the City work rules provides that employees are obligated to report “any unsafe condition or act to their department head or safety representative immediately.”

The next day, June 13, 2008, Mr. Gerold asked Mr. Ross why he had not been advised that the truck had become disabled. Mr. Ross replied that he did not think Mr.

Gerold was at home. At the hearing, he stated that he did not call Mr. Gerold on the cell phone or the radio because he did not want to “bother” him at home after hours.

The record established that the incident exposed the Rum river and its aquatic animal, reptile and plant life to possible environmental damage from a possible release of the pesticide chemicals contained in the sprayer tank. Mr. Gerold testified to his belief that there was a danger that the rushing water might have ripped the plastic connecting the hose to the tank and spill the contents into the river. There was no testimony to indicate the volume of chemicals in the tank or what the existing volume might have had on the river.

Fairview Hospital Incident

All City employees who hold commercial driver’s licenses are subject to random drug tests. The record establishes that Mr. Ross had been tested for drugs on more than one occasion.

Mr. Ross was randomly selected for a drug test on June 29, 2009. After being notified, Mr. Ross was assigned to appear at the Fairview Northland Medical Center (Fairview or Hospital), a local medical facility in the City of Princeton. Accompanying him was Mr. Gerold, Public Works Director, Pete Donner, a truck driver and Keith Koehler, a supervisor in the Public Works Department.

Upon arrival at the Hospital, Mr. Ross was processed by lab technician Linda Johnson. Ms. Johnson works as a phlebotomist at the Hospital and has been so employed for about 14 years. Prior to June 29, 2010, Ms. Johnson had not met Mr. Ross or any other City employee.

Mr. Ross encountered Ms. Johnson in the lab area, which includes a waiting area with seating for between 10 and 12 people. The room is about 14 feet square and contains a counter and desk area. The lab area is intentionally kept quiet by the Hospital. In addition to Mr. Ross, the City employees who accompanied him and Ms. Johnson, a woman and her small child were present in the room.

Upon being greeted by Ms. Johnson, Mr. Ross immediately stated, "I need to piss right away lady." Ms. Johnson advised Mr. Ross that all drug test patients must wait 10 minutes because if they are attempting to bring in a urine sample from someone else, the temperature of that sample would drop in a 10-minute period indicating that it is not fresh. Ms. Johnson asked Mr. Ross to sit in the waiting room. He sat down near the woman and her child and again stated, "I have to piss right now." Thereafter, Mr. Ross uttered the following statements in a loud voice. "Fucking cunt. I'll show her. I'll just jack-off into the cup and she can use that as my specimen."

At this point, Ms. Johnson approached Mr. Ross and again explained the reason why it was necessary for him to wait 10 minutes. She also stated that anything he had to say could be said to her directly. Mr. Ross then stated, "Oh, I get it now. I understand." As Ms. Johnson returned to her desk, Mr. Ross uttered the word "bitch." Upon hearing Mr. Ross stated this word, Ms. Johnson determined that she could not tolerate this type of behavior and reported the incident to her supervisor and Senior Director of Diagnostics, Steven Pareja. Mr. Pareja immediately reduced Ms. Johnson's report to writing. A more formal written account in the form of a letter was provided to City Administrator Mark H. Karnowski, at his request.

Ms. Johnson described Mr. Ross' behavior as "bucky," a term she defined as grumbling, angry, belligerent, condescending and insulting. Mr. Koehler overheard a part of the encounter between Mr. Ross and Ms. Johnson. Mr. Gerold and Mr. Donner were not present during a part of the interaction.

On July 23, 2009, Mr. Karnowski conducted a formal meeting with Mr. Ross. After being shown Mr. Pareja's letter, Mr. Ross denied making any of the comments alleged. Mr. Karnowski then advised Mr. Ross that several others had heard at least some of the interaction. Thereafter, Mr. Ross acknowledged that he had, in fact, made the comments alleged by Mr. Pareja. At the first day of hearing, Mr. Ross again denied and later acknowledged speaking to Ms. Johnson in such a manner. On the second day of hearing, Mr. Ross testified that the comments were made, not by him, but by a co-worker who was at that time no longer employed by the City.

It is not difficult for City Public Works employees to be recognized as such by members of the public. Each employee wears a uniform with a City logo on it. Similarly, Hospital employees have no difficulty determining when a City employee appears for a drug test, as the paperwork associated with the transaction identifies them as such.

Attempt to Obtain Medical Information After Pioneer Park

Subsequent to the chemical sprayer incident in June of 2008, the City placed Mr. Ross on administrative leave with pay. On July 21, 2008, Mr. Karnowski sent a letter to Mr. Ross asking him to submit to a medical evaluation by a board certified neuropsychologist. The letter noted that, in the opinion of his supervisors, Mr. Ross's

work performance had suffered “significant deterioration” since his 2005 accident. The letter specifically referred to the June 12 incident and two vehicle accidents in 2007.

“We are concerned,” stated Mr. Karnowski, “that your current performance issues may stem from the injuries you sustained in 2005.” Mr. Ross was assured in the letter that no penalty or action would be taken against him if he chose not to be so evaluated.

“Instead,” the letter stated, “we would continue to monitor your performance. Disciplinary actions for past and future incident, if warranted, may be taken in accordance with the terms of the collective bargaining agreement.” The letter was copied to Leanne Kunze, Mr. Ross’ Union representative.

Mr. Ross responded by letter of July 25, 2008. In this letter, Mr. Ross indicated that he was not willing to be evaluated by a neuropsychologist. “I have been under the care of board certified health professional since my accident in 2005,” he stated, “and have provided the proper release from my doctor.” He criticized the City for assigning him work that should have been performed by a “licensed electrician” and further stated that “It took the union and Board of Electric intervention to put a stop to such work assignments . . . This feels like retaliation.” He also criticized the City for failing to complete the investigation of the sprayer incident after “more than a month.” Mr. Ross indicated his willingness to undergo a “Functional Capacity Test.”

The City responded to Mr. Ross’ letter on July 30, 2008. In this letter, the Mr. Karnowski once again reviewed the reasons for its initial request. Mr. Karnowski also stated:

Finally, I am concerned about your use of the words “retaliation” and “discrimination” in your letter. If there are circumstances you feel amount to retaliation or discrimination, I would invite you - either by yourself or with the assistance of your union representative -to write down in detail

the basis for your concerns and send them to me. The City will not tolerate unlawful discrimination or retaliation, and we will review and respond appropriately.

No such letter was placed in evidence. In the month of August, 2008, the City and the Union continued to communicate on this issue of the medical evaluation, but Mr. Ross did not agree. By letter of September 16, 2008, the City stated that, “Unless Mr. Ross has provided medical documentation suggesting a different conclusion or course of action, the City will assume at that point that there are no medical issues impairing his performance, and he will be expected to fully discharge the duties of his position.” The City gave Mr. Ross until September 24, 2008, to either provide the medical information or return to work. Mr. Ross did return to work on September 24, 2008. There is no evidence to indicate that Mr. Ross provided the City any of the information it originally sought.

On October 28, 2008, Mr. Ross was advised that it had hired a licensed private investigator to conduct an employment investigation into the “actions and potential omissions” of Mr. Ross on June 12, 2008. Mr. Ross was interviewed by the investigator on November 21, 2008.

Discipline for Pioneer Park

On March 27, 2009, Mr. Ross was presented with a letter advising that the City had decided to suspend him without pay for three days for the incident in Pioneer Park on June 12, 2008. The letter, signed by Mr. Karnowski, cited to the violation of several sections of the “city personnel manual and work rules,” including Section 7.2(1) [incompetence or ineffective performance of duties], Section 7.2(8) [carelessness and

negligence in the handling or control of municipal property], Section 10.1[failing to operate safely and perform work according to instructions], Section 12(D)(7)(b) [work according to good safety practices] and Section 12D(7)(E) [report unsafe conditions to supervisor].

The letter contained a summary of the incident and additionally stated:

Your conduct caused damage to the city vehicle involved because it was submerged in water. Your conduct created several risks, including but not limited to, the risk of other damage or vandalism to the city vehicle and spray equipment; the risk that others would access the pesticide and become injured; and the risk that the pesticide would be discharge into the floodwaters, posing an extreme danger to the environment an aquatic life. Your conduct was contrary to the training you received as a pesticide applicator. You conduct could have harmed third parties or the environment, and could have exposed the city to legal liability.

The letter further indicated that the discipline was based on Mr. Ross' prior work record, including vehicle accidents in February and December of 2007, both resulting in one day unpaid suspensions.

The notice of suspension was delivered personally to Mr. Ross on March 27, 2009. Upon receiving the notice, Mr. Ross stated to Mr. Gerold and Mr. Koehler, "I'm not through with you fuckers."

Discipline for Fairview Hospital

On July 28, 2009, Mr. Ross was sent a letter advising that the City had decided to suspend him without pay for five days for the incident at Fairview Hospital on June 29, 2009. The letter, signed both by Mr. Karnowski and Mr. Gerold, referred to the improper language used by Mr. Ross both at the Hospital and the disciplinary meeting of March 27, 2009. The letter noted the inconsistent responses made by Mr. Ross in answer to the

allegations of misconduct. “[B]ecause you acknowledged that you did not initially tell the truth regarding part of the incident until you [were] advised that there were witnesses,” the City concluded, “and because the incident was relayed to the City through the Lab Tech’s supervisor, there is reason to believe that the totality of the allegations are true.” The letter further describes Mr. Ross’s comment to Mr. Gerold and Mr. Koehler as “inappropriate” and “insubordinate.”

The notice concluded by citing to two provisions of the “city’s personnel manual and work rules,” Section 7.2(3) [insubordination] and Section 7.2(7) [unjustified use of offensive conduct or language toward the public, municipal officers, supervisors . . .]”

Work History

For the period beginning August 8, 2004, and ending June 12, 2008, Mr. Ross was disciplined on 13 occasions, including 5 oral reprimands, a written warning and 2 one-day suspensions. For the period June 12, 2008 to June 29, 2009, Mr. Ross was disciplined on 3 additional occasions, including 2 incidents of verbal counseling and one written reprimand. Mr. Ross has a certificate to operate a wastewater treatment facility and has been trained in the use of the chemical sprayer.

Disparate Treatment Allegations

At the hearing, the Union attempted to demonstrate that the discipline imposed on Mr. Ross was in retaliation for several occurrences unrelated to Pioneer Park or Fairview Hospital.

Mr. Ross alleges that the City assigned him electrical work for which he was not qualified, forcing him to report the matter to the State of Minnesota. The City admitted that Mr. Ross was assigned the work and offered evidence to support the view that Mr. Ross was qualified. The record indicates that the City stopped making these assignments once it was contacted by state authorities.

Mr. Ross alleges that the City failed to send him one of his paychecks and instead required him to obtain the check by personal visit. The City introduced evidence indicating that it did not intend to withhold Mr. Ross' paycheck. Mr. Karnowski confirmed that the incident occurred because he did not clearly communicate his orders to the payroll staff.

Mr. Ross alleges that he was disciplined because he reported an alleged theft of scrap metal from the public works building. This allegation proved to be unfounded.

The Union also presented evidence relating to its "disparate treatment" position. The record shows that a City employee received a one day suspension for "yelling and cussing" at a local bank. The record further shows that this same employee received a three day suspension for inappropriate use of the computer. The Union alleges that Mr. Gerold had never been selected for a drug test, even when he hit a radio tower guide wire, causing it to snap and hit the ground.

Positions of the Parties

The City

The City begins its statement of position by addressing the evidence in the drug testing incident. “[T]here can be no doubt that Mr. Ross used the obscene and inappropriate language described . . . [by] Mr. Pareja and Ms. Johnson,” it asserts. The City notes that Ms. Johnson conducted herself as a credible witness at the hearing. Despite what the City describes as her appearance “as a person who is not easily provided or perturbed by outrageous word or conduct,” she withdrew from the incident and reported to her supervisor, rather than confront Mr. Ross. Mr. Pareja, the City maintains, then followed procedure by requiring Ms. Johnson to “repeat exactly” the words Mr. Ross used and recorded them in his computer.

The City compares these witnesses to Mr. Ross, who it asserts “has changed his position and his story” about this incident several times. In his *Laudermill* hearing, the City contends, Mr. Ross denied that he had made the statements and said the witnesses were “100 percent lying.” However, the City argues, “[W]hen advised that two witnesses had heard him say at least some of the words,” he again acknowledged that “he was the speaker.”

Mr. Ross, the City contends, again denied the incident in the first day of the hearing. At the second day of the hearing, the City asserts, Mr. Ross again acknowledge that the words were spoken but by a co-worker, and not by him. However, the City asserts, the Union never produced Mr. Donner in this regard.

The City takes the position that Mr. Ross' use of the "obscene, profane and inappropriate words" was not spoken in the workshop, where they may not have "required intervention by management." Rather, these words were stated in a public hospital with members of the public present." The City contends that Mr. Ross spoke the obscenities to Ms. Johnson "in direct response to her patient explanation to him of proper medical procedures, with rancor and for the intended purpose of embarrassing, humiliating and insulting her." In addition to Ms. Johnson, the City notes, Mr. Ross exposed a woman and her child who were sitting next to him.

The City maintains that the specific words used by Mr. Ross are especially egregious, citing cases. "These violations constitute misconduct," argues the City, "and provide just cause for the 5 day suspension without pay."

The City also addresses the evidence relating to the incident involving the chemical sprayer. There is little dispute, the City contends, as to the facts and recounts them methodically. To the City, the only real "factual issue" is Mr. Ross' denial that the work rules required him to inform his supervisor immediately. In this regard, the City refers to the testimony of Mr. Gerold, to the effect that if a "piece of equipment cannot be returned to the shop, the worker in charge of that equipment must notify his supervisor, thereby transferring to the supervisor, the responsibility for injury, loss or damage to the equipment." The City contends that this rule is well supported by good reasons, including the expense of replacing sophisticated equipment and Mr. Ross' statement indicating he did not call because it was late in the evening.

Again, the City refers to Mr. Ross' lack of credibility. On the first day of the hearing, the City argues, Mr. Ross testified that he did not call the supervisor because it

was too late to call. On the second day, the City contends, Mr. Ross stated that there was no requirement that he call. The City asserts that these inconsistencies further undermine the credibility of Mr. Ross.

Finally, the City addresses the claim that Mr. Ross has been subjected to discrimination and retaliation. The City contends that several of these claims were refuted from a factual standpoint, including the comp time claim, the control of funds matter and the electrical qualification matter.

The City contends that Mr. Ross does not contend that he is a member of any protected class, which renders his claims unsustainable, citing *Danz v. Jones*, 263 NW 2d 395 (Minn. 1978).

In any event, the City contends, “Mr. Ross has filed to meet this burden because he has not shown a single incident of retaliatory animus of the part of any City official.” The City also takes the position that the repeated incidents of misconduct on the part of Mr. Ross justified the discipline imposed.

“On this evidence, the City suggests, “the discipline imposed upon Mr. Ross by the City in both instances should be affirmed.

The Union

The Union takes the position that neither suspension is justified by the “true facts” of this dispute. In addition to its factual contentions, the Union asserts that there can be no justification for the discipline due to evidence establishing of disparate treatment and retaliation.

With regard to the first suspension relating to the spraying vehicle, the Union argues Mr. Ross did nothing wrong. When it became clear that he would be unable to move the vehicles from the low spot, the Union contends, Mr. Ross removed the keys and deposited them in the shop. The Union contends that in doing so, Mr. Ross was following “standard practice” in not contacting a supervisor. The Union further asserts that there was “no reason to believe the truck was at risk for being flooded.” The Union argues that the water only reached the floorboard of the vehicle and that there was never a danger from the chemicals in the spray tank. The amount of damage to the vehicle, the Union contends, was minimal, estimated to be between \$500 and \$800.

The Union notes that, although the incident occurred on June 12, 2008, the investigation into the incident was not commenced until October of 2008, when the City hired an independent investigator. Mr. Ross, the Union argues, was not interviewed until November 21, 2008, nearly 5 months after the fact. The Union argues that the actual discipline was not issued until March of 2009, approximately 9 months after the event.

The Union takes the position that the City caused the delay by creating a “stalemate over possible discipline and a medical examination the City demanded Mr. Ross to undergo.” The Union suggests that Mr. Ross’ doctors had “cleared him to work and that should be sufficient.”

The Union contends that the City “attempted to withhold his paycheck” in an attempt to coerce Mr. Ross to agree to the medical exam they wanted. The Union further suggests that the City offered a shorter suspension if Mr. Ross agreed to refrain from filing a grievance.

With regard to the drug test incident, the Union asserts that the suspension was imposed in the context of “questionable practices” within the Public Works Department, as reported by Mr. Ross. Mr. Ross reported what he believed to be the improper collection and use of funds derived from the sale of scrap iron. The Union implies that the report is connected to the retirement of the Department Head, Mr. Mismash. The second incident, the Union contends, is a report by Mr. Ross that two of his co-workers were “cheating on their time sheets.” The Union further contends that the actions of Mr. Ross in both of these cases angered his co-workers and that Mr. Ross “was unpopular with his co-workers for reporting fraudulent behavior.”

The Union described the facts of the drug testing incident as “greatly disputed” by the parties. Mr. Ross, the Union asserts, testified that “he absolutely did not say anything offensive except for his use of the work “piss” initially. The Union asks why the co-workers present did not hear anything offensive.

The Union takes the position that there is insufficient evidence to establish misconduct, especially “given the lack of supporting testimony from two of the three City employees present.” The City has the burden of proof, the Union notes, and its motives are “greatly biased due to the past reports Mr. Ross made to local and state officials about the electrical work, scrap iron sale and comp time misuse.”

To demonstrate “disparate treatment” in this case, the Union first notes that Mr. Gerold “has never undergone a drug test or been disciplined even when he’s been involved in a serious accident or incident.” Specifically, the Union refers to the damaged the radio tower guide wire and when he “had a very serious accident using a city mower at this home.” The Union also refers to the City employee who received only a one day

suspension for “yelling and cussing” at a bank employee and a 3 day suspension for “inappropriate use of the computer.”

“The behavior the City of Princeton tolerates, by some employees,” asserts the Union, “is unusual to say the least when you think about what other Minnesota cities and counties have done when faced with similar behavior.”

The Union asks that the grievances be sustained for both suspensions, especially when “other City of Princeton employee discipline, or lack of it, is reviewed.” The Union summarizes its contentions by asserting that “Mr. Ross is being punished for having stepped out of line and reporting misdeeds by city officials and co-workers.” The Union asserts that the discipline is “unfair and wrong.”

Discussion

Applicable Standards

The parties in this case have combined for resolution two separate grievances challenging two independent incidents, both resulting in significant discipline. The same principles apply to both matters.

Pursuant to the CBA at Article XIII, Section 13.1, discipline must be only for just cause. In each case, the basic question is whether the employer acted fairly in issuing the discipline. The term “just cause” refers to a rule of reason which protects employees from unjust discipline and any procedure that fails to protect basic employment rights.

The concept of workplace fairness must also apply to the employer. In this case, the CBA at Article V reserves to the City a number of rights including the power to operate and manage all employees, facilities and equipment. This clause must be read to permit the City to enjoy a reasonable amount of discretion in setting forth appropriate rules of conduct and production, subject to the obligation to make employees aware of these rules, either by direct publication or by consistent enforcement.

Just cause requires that all employees be judged by the same standards. The rules must apply equally to all. However, the requirement of equal treatment is not interpreted to mean that the same penalty must always be issued for the same offense. Many other factors are involved and, to comply with the standard, the level of discipline must be tailored to fit the infraction in the context of the individual employment history.

In this regard, the CBA at Article XIII, Section 13.1 contemplates a system of progressive discipline ranging from reprimand, suspension, demotion and discharge.

This clause, when combined with the just cause provision, constitutes a sure path toward fair discipline, both substantive and procedural.

Pioneer Park

The parties do not significantly dispute what occurred on June 12, 2008, at Pioneer Park. Mr. Ross was operating a small truck fitted with a chemical spraying apparatus late that evening after a community parade. The truck hit a stump and it was immediately rendered inoperative. Mr. Ross did not revisit the vehicle or call to report the accident. Rather, he lifted the keys from the truck, walked back to the shop, deposited the keys and drove home. Later that evening, it rained heavily and flooding occurred in the area in which the vehicle was left, subjecting it to damage and environmental risk. Eventually, Mr. Gerold retrieved the apparatus using a boat. There is no evidence that any of the chemicals escaped into the water. Further, there is no evidence that Mr. Ross or any other City employee had any information about the then pending rain storm.

The City contends that the truck and its chemical sprayer constituted an “unsafe condition” within the meaning of the work rules at Section 12(D)(7)(e) and that the failure of Mr. Ross to report what had occurred promptly was misconduct sufficient to justify the discipline issued, a 3-day unpaid suspension. The City further contends that the failure of Mr. Ross to act violated other rules, including those requiring that work be completed in a competent, careful, proper and safe manner.

The Union, in contrast, asserts that no rule required Mr. Ross to report the occurrence to Mr. Gerold and that there was, on that evening, “no reason to believe the

truck was at risk for being flooded.” The Union notes that the damage to the truck was minimal and that no dangerous condition was created. The Union also contends that discipline in this case was unduly delayed, referring to the City’s attempt to obtain medical information and the completion of the formal investigation.

The evidence presented by the City in this case is sufficient to justify the conclusion that Mr. Ross violated Section 12(D)(7)(e) of the work rules when he failed to notify Mr. Gerold that the chemical sprayer truck had become disabled in Pioneer Park. Mr. Ross was trained in the use of the chemical sprayer. He knew or should have known that the chemicals were dangerous and should have recognized the “unsafe condition” as set forth in the rule. The conduct was also in violation of Section 7.2(1) [ineffective performance of duties], Section 10.1 [failing to operate in a safe manner] and Section 12(D)(7)(b) [duty to work safely].

These rules are reasonably related to the efficient and safe operation of the City’s Public Works Department and were adequately communicated to the employees and Mr. Ross.

However, there is reason to reduce the 3 day suspension in this case. Mr. Ross failed to comply with a standing order. But the evidence does not suggest carelessness or negligence on the part of Mr. Ross, in violation of Section 7.2(8). Mr. Ross began the spraying work late in the evening, at almost 11:00 p.m. The City does not suggest that the time Mr. Ross began his spraying duties was improper or incorrect. There was no evidence to indicate that the City disapproved of this start time or that Mr. Ross was not authorized to begin work at this time.

Even in June, it is dark by 10:45 in the evening. Even assuming the vehicle was equipped with headlights, operating it in the dark of night must have contributed to the collision with the stump. Mr. Ross was not using the equipment in a negligent or careless manner when he hit the stump, disabling the vehicle. Moreover, no one anticipated the heavy rain that enhanced the consequences of Mr. Ross' failure to report.

There was a considerable delay on the part of the City in reaching the final result. The Union persuasively points out that Mr. Ross was not interviewed until November 21, 2008, almost five months after the incident, and that the discipline was not issued until four months later, a total period of about nine months.

The evidence sufficiently establishes that Mr. Ross was placed on paid administrative leave until September, 24, 2008, the period in which the City attempted to obtain additional medical information. There is no reason to believe, as Mr. Ross suggested in his letter, that this effort on the part of the City was in any way improper. There was nothing arbitrary, discriminatory or retaliatory in this request. Rather, the City clearly expressed a legitimate, job-related reason for seeking this additional information and sought it in a reasonable manner. The legitimacy of the request and the fact that Mr. Ross was being paid at this point establishes that this part of the delay was not inappropriate. However, the City did not hire an investigator in this case until late October of 2008, four months after the incident and over a month after Mr. Ross returned to work.

The principles which surround the concept of just cause require that discipline be issued in a timely manner, that is, within a reasonable period following the occurrence of the alleged misconduct. While the evidence is more than sufficient to explain the long

delay between the date of the occurrence and Mr. Ross' return to work, the record does not contain a sufficient explanation of the 5 month delay from September 24, 2008, to the date of resolution in March of 2009. *Cissell Manufacturing Co.*, 95 L.A. 937 (Kindig, 1990) [Grievance sustained because the investigation was not completed within a reasonable period of time, in this case deemed to be 30 days from the occurrence of the incident]; *Ralston Purina Company*, 102 L.A. 692 (Duda, 1994) [Four month delay between the date of the incident and the discipline deemed insufficient to reduce discipline where grievant deceived the employer for 18 months].

Fairview Hospital

Unlike the Pioneer Park matter, the parties have a basic factual dispute in the Fairview incident. Through the testimony of Ms. Johnson and Mr. Gerold, the City asserts that Mr. Ross used "obscene, profane and inappropriate" words during his interactions at the Fairview and the March disciplinary hearing when the discipline was communicated to him. The Union, in contrast, directly challenges the testimony of Ms. Johnson and Mr. Gerold on this point, asserting that the discipline is not justified in the context of what it considers are the "true facts." The City, in response, raises the issue of Mr. Ross' credibility. In this regard, the City maintains that Mr. Ross must be determined not to have told the truth because he "changed his position" and what it describes as his "story" several times.

The City submitted sufficient persuasive evidence to establish the Mr. Ross did change his position on this point throughout the processing of this grievance. The record shows that Mr. Ross denied the incident entirely at first, only to acknowledge his use of

improper language after he was advised that he was overheard by two persons. At the hearing, Mr. Ross at first denied the incident and then, later in the hearing, acknowledged his use of the words. On the second day of hearing, Mr. Ross again denied the incident by asserting the improper words were expressed by a co-worker.

Having observed him over a two day period, Mr. Ross did not appear to be a person who would intentionally or deliberately depart from the truth under oath. Rather, Mr. Ross presented himself as a sincere person who was, at time, struggling to do his best to recall the pertinent events. However, the frank and open demeanor projected by Mr. Ross at the hearing is not a basis to adopt his testimony as persuasive or reliable in this case. In fact, Mr. Ross' internally inconsistent positions, as the City asserts, rendered his testimony generally unpersuasive.

However, this result is not based on the conclusion that Mr. Ross was not a credible witness, but because his memory does not appear to be completely reliable. Both parties submitted evidence to indicate that Mr. Ross was involved in a serious ultra light aircraft accident in 2005, sustaining a serious injury to his head. As a consequence, Mr. Ross has displayed periods of forgetfulness and lack of concentration.

There was no expert medical testimony presented. However, observation of Mr. Ross indicated the existence of, to some degree, a memory issue. Mr. Ross confirmed this in his own testimony. Mr. Ross' testimony cannot be adopted, not because it was intentionally untruthful, but because of Mr. Ross' admitted memory problems.

Allegations of discourtesy are generally sustained where there is convincing evidence to establish occurrence and where adverse consequences, such as public

embarrassment or disruption of operations are the result of the abusive behavior. *Summit County and ASCME 1229*, 121 LA 1681, (Skulina, 2005).

In this case, the evidence of these elements is clear and convincing. The memory problems experienced by Mr. Ross do not operate to excuse his offensive behavior.

Appropriate Remedy

The Union suggests that the discipline in this case was in retaliation for several of Mr. Ross' activities unrelated to Pioneer Park and Fairview. However, the Union failed to present sufficient evidence of misconduct on the part of the City. All of the alleged occurrences were adequately explained. The Union's evidence of "disparate treatment" on the part of the City was similarly insufficient.

The discipline issued to Mr. Ross for the Pioneer Park incident must be reduced to a written reprimand. Mr. Ross failed to comply with the rule requiring him to report unsafe conditions. However, Mr. Ross was not careless or inattentive. The incident occurred in darkness. Additionally, the evidence did not justify the delay that occurred in notifying Mr. Ross of the discipline.

The five day unpaid suspension issued by the City in the Fairview Hospital incident is well justified by the record.

Having carefully considered the testimony and exhibits received into evidence, as well as the positions of the parties, it must be concluded that the City did not issue a 3 day unpaid suspension to Todd D. Ross for just cause for the incident occurring in Pioneer Park on June 12, 2008. The discipline is reduced from a 3 day unpaid suspension

to a written reprimand and Mr. Ross should be made whole with regard to any lost wages and benefits. Further, the City did issue a 5 day unpaid suspension to Mr. Ross for the incidents occurring at Fairview Hospital and the disciplinary meeting on June 29, 2009, and March 27, 2009.

The Pioneer Park grievance is *SUSTAINED*. The Fairview Hospital grievance is *DENIED*.

A W A R D

1. **IT IS THE OPINION** of the Arbitrator that the City did not discipline Todd D. Ross for just cause by issuing him a 3 day unpaid suspension for the incident occurring in Pioneer Park on June 12, 2008. The discipline is reduced to a written reprimand and Mr. Ross should be made whole with regard to any lost wages and benefits.
2. **IT IS THE FURTHER OPINION** of the Arbitrator that the City disciplined Todd D. Ross for just cause for the incidents occurring at Fairview Hospital on June 29, 2009, and at the disciplinary meeting of March 27, 2009.
3. **IT IS THE AWARD** of the Arbitrator that the Pioneer Park grievance is *SUSTAINED* and that the Fairview Hospital grievance is *DENIED*.

January 10, 2010
St. Paul, MN

David S. Paull, Arbitrator