
In re the Arbitration between:

The City of Minneapolis, Minnesota,
(Convention Center)

Employer,

and

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

Minnesota Teamsters Public and
Law Enforcement Employees Union, Local No. 320,
Minneapolis, Minnesota,

Union.

Pursuant to **Article 5** of the collective bargaining agreement effective January 1, 2008 through December 31, 2010, the parties have brought the above captioned matter to arbitration.

James A. Lundberg was appointed by the parties as the neutral arbitrator to hear the above matter and issue a final and binding decision.

The parties stipulated that the matter is arbitrable and properly before the arbitrator for a final and binding determination.

A grievance was filed on July 27, 2009.

A hearing was conducted on June 16, 2011.

Post Hearing Briefs were submitted on July 1, 2011 and the hearing was closed upon receipt of briefs.

APPEARANCES:

FOR THE EMPLOYER

**Mike Bloom
Asst. City Attorney
350 South 5th Street, Room 210
Minneapolis, MN 55415**

FOR THE UNON

**Kevin M. Beck
Kelly & Lemmons, P.A.
7300 Hudson Boulevard North
Suite 300
St. Paul, MN 55128**

ISSUE:

Whether the Employer had just cause to impose a five (5) day suspension upon grievant, Candis McKelvy on July 16, 2009. If not, what is the proper remedy?

RELEVANT CIVIL SERVICE RULES:

Civil Service Rules 11.03 (B) -- Misconduct

4. Insubordination (disobedience, abusive language or behavior).
10. Discourtesy to public or fellow employees.
18. Violation of Department rules, policies, procedures or City ordinance.

FACTUAL BACKGROUND:

The grievant, Candis McKelvy, has been employed by the City of Minneapolis for a period of eighteen (18) years. Currently she works at the Minneapolis Convention Center as an Operation Maintenance Specialist (OMS). Her job duties include setting up meeting rooms, refreshing the rooms and cleaning the Convention Center public spaces and restrooms. The Operations Maintenance Specialists at the Minneapolis Convention Center perform at least some of their work in teams of two (2) people.

Ms. McKelvy received disciplinary suspensions on three occasions prior to the July 16, 2009 five (5) day suspension that is the subject of this arbitration. On May 24, 2005 the grievant was given a three day suspension, which was later reduced by settlement agreement to a one (1) day suspension. On April 26, 2006 Ms. McKelvy was

given a five (5) day suspension and Final Warning, which was reduced by settlement agreement to a two (2) day suspension. On May 9, 2007 the grievant received a two day suspension. The discipline in May of 2007 was related to the unsafe or negligent operation of a forklift. The two earlier suspensions were categorized as involving discourtesy and insubordination and cite **Civil Service Rules at 11.03 (B) 4 and 10.**

On May 20, 2009 the grievant's supervisor directed a team of two workers, James McDaniel and Valerie Sweeney, to clean an area of the floor in the building. The mop buckets that had been used earlier by Ms. McKelvy and Ms. Thunder were available and both Ms. McKelvy and Ms. Thunder were on a break. Mr. McDaniel and Ms. Sweeney used the mop buckets to complete the task. Upon completing the task they put clean water into the mop buckets.

When Ms. McKelvy and Ms. Thunder returned from their break, Ms. McKelvy made a comment directed at Mr. McDaniel. Her comment suggested that Mr. McDaniel had failed to clean the mop bucket and replace the water. Ms. Sweeney immediately defended Mr. McDaniel by informing Ms. McKelvy that McDaniel had cleaned and changed the mop bucket. Ms. McKelvy took exception to Ms. Sweeney's comments by informing her that she was talking to Mr. McDaniel. The verbal interaction between the two women turned into an argument, wherein Ms. McKelvy was very loud and viewed by Mr. McDaniel and Ms. Sweeney as threatening.

Ms. Sweeney left the scene in tears and reported the incident to her supervisor.

Mr. McDaniel believed that the argument was about to escalate into a physical altercation. He viewed Ms. McKelvy as the aggressor.

In an investigative interview June 5, 2009, Ms. Thunder acknowledged that the argument was initiated by Ms. McKelvy but gave blame for the argument to both people.

Ms. Thunder said, “Candis said I was not speaking to you [Ms. Sweeney], then both of them felled at each other back and forward.”

Two other witnesses, Mr. Johnson and Ms. Melnick observed the argument. Mr. Johnson observed Ms. McKelvy pointing her finger at Ms. Sweeney and said she was in Ms. Sweeney’s “face.” Both witnesses heard Ms. McKelvy yelling at Ms. Sweeney.

After Ms. Sweeney reported the incident to her supervisor, a investigation was initiated. A questionnaire was prepared and witnesses were interviewed. The interviews were not started until about June 5, 2009. The interviews took place over a period of several days. Some of the questions asked in the interview were open ended in that they asked what happened. Other questions asked during the interview were somewhat suggestive of wrong doing by Ms. McKelvy in that they specifically asked whether specific behaviors were witnessed. For example, “Did you see Candis pointing her finger at you [Sweeney?], while she was upset at Valerie?” It is important to note that some witnesses recalled finger pointing and others did not but the narrative statements consistently reported that Ms. McKelvy instigated the conflict, she was loud and she aggressive in her demeanor.

Ms. McKelvy’s recollection of the incident was not consistent with the balance of the incident reports in that she did not report that her comments were particularly loud nor did she characterize her demeanor as threatening. She also reported that Ms. Sweeney directed profanity at her, which is information not reported in any other investigatory report.

Ms. McKelvy was given an opportunity to be heard in her own defense in a predetermination meeting on June 18, 2009 and she had Union representation. The predetermination meeting addressed several allegations of misconduct in addition to the May 20, 2009 incident. At the predetermination meeting Ms. McKelvy admitted that during the argument with Ms. Sweeney she directed the following comment to Ms. Sweeney: "Come off your high horse, missy."

Ms. McKelvy was disciplined for the May 20, 2009 incident by letter dated July 16, 2009. The letter informed Ms. McKelvy that the following determination had been made as a result of the investigation:

On May 20, 2009 at Lobby E, you directed inappropriate remarks and behaved in an angry and confrontational manner toward fellow employees, Valerie Sweeney and James McDaniel. This behavior went on for a few minutes in the presence of a number of employees in a public space.

The Employer cites three written reprimands in the July 20, 2009 disciplinary letter, which are outside the time limit established in the collective bargaining agreement wherein a written reprimand may be considered when imposing discipline.

Ms. McKelvy was suspended from work without pay for a period of five (5) days beginning July 20, 2009 through July 24, 2009.

The discipline was grieved on July 27, 2009. The parties were unable to resolve the matter in negotiations and the grievance is before the arbitrator for final and binding determination.

SUMMARY OF EMPLOYER'S POSITION:

The Employer argues that it proved by overwhelming evidence that Ms. McKelvy engaged in the misconduct for which she was suspended. She knew and understood the rules under which she was disciplined. She has a disciplinary history of violating similar rules and has not responded to progressive discipline. Finally, Ms. McKelvy's misconduct was egregious and the level of discipline fits the nature of her misconduct.

The Employer relied upon an investigation conducted by one of the Convention Center supervisors. The responses to questions asked of all possible witnesses consistently indicated that Ms. McKelvy initiated negative comments toward Ms. Sweeney, she told Ms. Sweeney that she was not talking to her and the matter escalated from that point in the interaction. The comments of co-workers all differed from Ms. McKelvy in the explanation of why the disagreement escalated. Ms. McKelvy admitted that the situation became hostile but claimed that Ms. Sweeney cursed at her and used the "F" word. No witness confirmed Ms. McKelvy's claim. In fact, no witness suggested that Ms. Sweeney used any inappropriate language. The investigation established that Ms. McKelvy engaged in conduct that violated the work rules for which she was disciplined and that Ms. McKelvy was the aggressor.

The investigation found that Ms. McKelvy's conduct was rather egregious and the level of discipline was consistent with the nature of the misconduct. No employee should be fearful of being verbally abused or intimidated at work. However, Ms. Sweeney was so mistreated by Ms. McKelvy on May 20, 2009 that she left the scene of the incident in tears. Hence, the seriousness of the incident is sufficient to support a five (5) day suspension.

The Employer considered the impact that Ms. McKelvy's conduct had upon her co-worker and her disciplinary history. She had previously been suspended on two occasions for similar misconduct and had been suspended a third time for a safety violation.

The disciplinary language of the collective bargaining agreement does not mandate progressive discipline without regard to the nature of the misconduct. **Article 5 Section 5.02** provides for consideration of the seriousness of an offense and other related factors. In this instance, Ms. McKelvy engaged in serious misconduct and had a history of prior suspensions for similar misconduct. The level of discipline imposed was appropriate.

SUMMARY OF UNION'S POSITION:

The Union alleges that grievant began having trouble at work when her direct supervisor became Mr. Zasada. Prior to 2004 her reviews were very positive. From 2004 forward, when Mr. Zasada was her shift supervisor, Ms. McKelvy started to receive poor work reviews and was disciplined on a number of occasions. Most of Ms. McKelvy's discipline occurred within a 23 month period between May of 2004 and April 2006. She was disciplined only one time between 2006 and May 20, 2009 and that was for a forklift operation incident.

The Employer took far too long to investigate the incident. The interviews of witnesses did not commence until two (2) weeks after the incident and Ms. McKelvy was not interviewed until a month after the incident. The suspension was not imposed until approximately two months after the alleged misconduct. Witnesses over such a long period of time are likely to forget what happened or embellish their recollection.

The Employer relied heavily upon an e-mail that was written by Ms. VanDeVoort, the Supervisor to whom Ms. Sweeney brought her complaint. Ms. VanDeVoort also talked to Mr. McDaniel but no one else. The Employer gave great weight to hearsay and failed to promptly interview all witness.

The investigation was also tainted by prejudicial interview questions, which presumed Ms. McKelvy's guilt. Examples of the prejudicial questions include:

Did you observe Candis yelling and or screaming at Valerie on Wednesday May 20, 2009?

Did you see Candis pointing her finger at Valerie while she was upset at Valerie?

What action did you take and or what did you do to Candis... after she has been upset, yelling at Valerie and or James?

After Bridgit was gone did you see Candis screaming at Valerie again?

Do you feel Candis' actions interfered with the work of others?

The questions were loaded and biased which suggests that the Employer had already concluded that Ms. McKelvy was at fault.

The Employer improperly relied upon prior coaching and written warnings that were remote in time. The collective bargaining agreement does not incorporate "coaching" in the definition of progressive discipline found at **§5.02** of the collective bargaining agreement. "Coaching" is not prior discipline and the coaching took place as much as five years before May 20, 2009. The written warnings relied upon by the Employer were imposed more than two years in the past and may not be considered according to **§5.05** of the collective bargaining agreement which says:

Written reprimands shall not be relied upon to form the basis for further disciplinary action after two (2) years following the date of the written reprimand.

The grievant is an 18 year employee with a sound work record. She has never been disciplined for arguing with a co-worker. The discipline imposed by the Employer is too harsh. The Union also contends that Ms. Sweeney was coached for her involvement in the incident on May 20, 2009 but Ms. McKelvy received a five (5) day suspension. Hence, Ms. McKelvy was treated disparately.

The Union asks that the suspension be set aside and the grievant be made whole through reimbursement of back pay, benefits and seniority.

OPINION:

The Employer has demonstrated by a preponderance of the credible evidence that the grievant engaged in misconduct. The investigation, while slow in developing, obtained narratives from individuals who witnessed the May 20, 2009 incident. The narrative information consistently indicated that the argument and escalation of the argument was driven by Ms. McKelvy. Whether there was clean or dirty water in a mop bucket was absolutely no reason for Ms. McKelvy's loud and aggressive behavior. Under the circumstances described in the narrative portion of the witness statements, it is clear that Ms. McKelvy acted improperly and Ms. Sweeney was intimidated by her.

The investigation was rather slow in developing. However, Ms. McKelvy's co-workers reported what they saw. If they did not see her point a finger at Ms. Sweeney, they did not report seeing finger pointing. If they heard a loud disturbance but did not know how it started, they did not answer questions regarding the origins of the dispute. A slight delay in investigation is not per se prejudicial. In this case the witness statements

did not reflect and animosity toward the grievant nor did any of the witness statements appear to overstate what was witnessed. Hence, the investigation was fair and thorough.

Ms. McKelvy was asked about the incident. In most regards her statement was consistent with witness statements. She reported her initial comment directing Ms. Sweeney to keep out of the conversation and also reported a comment toward Ms. Sweeney about getting off her high horse. The information regarding Ms. Sweeney using profanity is uncorroborated and Ms. McKelvy's assessment of the general dynamic of the argument is inconsistent with the assessment of most of the witnesses. The evidence overwhelmingly supports the position that Ms. McKelvy was the aggressor and engaged in loud and intimidating behavior.

The Civil Service Rules cited by the Employer prohibit the kind of behavior engaged in by Ms. McKelvy and it is clear that Ms. McKelvy knew that intimidation of a co-worker was a violation of work rules.

The impact of Ms. McKelvy's misconduct upon Ms. Sweeney was significant and the Employer gauged that impact to be sufficient to impose a harsh penalty on Ms. McKelvy. Furthermore, the grievant has been suspended from work on two occasions for similar rule violations. The degree of discipline is consistent with the egregious nature of the misconduct, the detrimental impact upon the grievant's co-worker and is progressive in that prior suspensions of shorter duration for similar misconduct are part of Ms. McKelvy's disciplinary history.

The Employer may not rely upon written warnings imposed on Ms. McKelvy more than two (2) years before the May 20, 2009 incident. In this instance, the discipline is consistent with the nature of the misconduct and the disciplinary history without regard

to any prior written warnings or any coaching, which the Union correctly points out is not discipline. If the Employer improperly relied upon written warnings, the degree of discipline does not reflect any penalty augmentation as a result of the prior written warnings.

Ms. McKelvy and Ms. Sweeney were treated differently but the disciplinary treatment is not disparate, because the employees were not similarly situated. Ms. Sweeney had no history of misconduct at the time of the incident, while Ms. McKelvy had three prior suspensions, of which two were for similar misconduct. Additionally, the grievant was clearly the aggressor on May 20, 2009. Treatment is disparate only when similarly situated employees are treated differently.

The grievant's long tenure with the City should have been considered in this disciplinary situation. In many places loud and intimidating conduct like Ms. McKelvy's would have resulted in discharge. The degree of discipline imposed reflects a desire on the part of the Employer to retain a long time and experienced employee.

AWARD:

The Arbitrator finds that the Employer had just cause to suspend the grievant Candis McKelvy for five days. Hence, the grievance is hereby denied.

Dated: July 22, 2011

James A. Lundberg, Arbitrator