

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

**INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS UNION
LOCAL 426,**

Petitioner,

HF No. 20 G, 2009/10

DECISION

v.

**CITY OF BERESFORD,
Respondent,**

This matter comes before the Department of Labor based on Petitioner's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. A hearing was held before the Division of Labor, in Beresford, South Dakota. Jay M. Smith and Camela C. Theeler appeared on behalf of Petitioner, IBEW Local 426. Thomas H. Frieberg represented the Respondent, City of Beresford. T.J. Von Wald appeared as counsel For Travis Watkins.

Issues

1. Whether the City's decision to discharge Mr. Watkins on May 4, 2010, was for just cause?
2. If not, what is the appropriate remedy?

Facts

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

Petitioner, International Brotherhood of Electrical Workers Union, Local 426 (Union) is the collective bargaining representative for the employees of the Respondent, City of Beresford, South Dakota (City). The Union and the City are parties to a collective bargaining agreement (Agreement), which is effective by its terms from January 1, 2010 through December 31, 2010.

Travis Watkins was a lead lineman with the City's electrical department and a party to the terms of the Agreement. Watkins was also a volunteer fireman and a member of the Beresford volunteer ambulance service. Watkins had been employed with the City for twelve years at the time of the incident that lead to his termination.

On April 30, 2010, Watkins returned home after his regular shift at the City electrical department and began working in his garage. Following dinner with his family, Watkins

returned to his garage to continue working. Watkins' family dog, Gus attempted to come in the garage but was unable to because his shock collar prevented him from going into that area without receiving a shock. Watkins removed the shock collar¹ and allowed Gus to come into the garage with him.

Between 9:30 p.m. and 10:00 p.m., Watkins received a page from the fire department that there had been an accident. Without informing his wife, Watkins left for the fire station. Watkins and the rest of the crew were dispatched to a fatal vehicle accident north of Beresford on Interstate 29. Watkins and the crew returned to the fire station between 1:00 a.m. and 1:30 a.m. on May 1, 2010.

After putting equipment away, Watkins and several members of the crew stayed at the station to have a couple beers and talk. Denise Gertsman was volunteering for the ambulance crew that evening and worked the accident scene. She returned to the station at the same time as Watkins and the others were there.² Watkins talked briefly with her about her two sons. Gertsman's sons work as linesmen for a former employer of Watkins and he often provided information about available jobs that the boys might be interested in. Sometime after this conversation, Watkins finished his second or third beer and went home.

When he arrived at home at approximately 2:00 a.m., Watkins noticed Gus' shock collar sitting in the garage and called for the dog. When he was unable to find Gus, he looked around the yard and around a couple of houses in the neighborhood before getting in his car to search for the dog.

Watkins drove around the neighborhood looking for Gus. Watkins thought he saw the dog at one point and parked his car in front of the senior community center and started calling for Gus. He went between the houses north of the community center, but was unable to find Gus. As Watkins was returning to his car he noticed a spotlight and hid. Because he had been drinking, Watkins testified that he was afraid that if he was stopped by police he could be issued a DUI since he had been driving and would possibly lose his job.³ Watkins hid next to one of the houses.

Sergeant Dave Steckelberg, a member of the Beresford Police approached Watkins and asked him what he was doing. Watkins responded that he was looking for his dog. At this point, Officer Aaron Jurgensen⁴ approached Watkins and asked if the dog was inside the house, to which Watkins replied, "No". Watkins, Steckelberg and Jurgensen then went up to the front of the house and knocked on the door. The homeowner,

¹ Gus wore two collars, the shock collar and a collar with his license and veterinary tags. Watkins only removed the shock collar on the night in question. Prior to moving into the city, the Watkins family lived outside of town where Gus was allowed to roam freely.

² The station housed both the fire and ambulance crews.

³ A DUI charge could result in the loss of his CDL, which was a requirement for his job with the City.

⁴ Officer Jurgensen was not on duty at this time, he lives near Ms. Gertsman and had called Officer Steckelberg to report seeing someone in her yard.

Denise Gertsman, was informed that Watkins had been in her yard and she confirmed that he did not have permission to be there.

Sergeant Steckelberg then offered to drive Watkins home. Watkins was not handcuffed, he was not arrested, and sat in the front seat of the police car on the way home. When they reached Watkins' home, the officer made no attempt to confirm that Gus was at home or if he was missing. Watkins told his wife what had happened and she went out to look for Gus. Mrs. Watkins walked to where Watkins had left his car parked outside the senior community center. She too was unable to find Gus, and when she returned home with Watkins' vehicle, the dog was in the backyard.

On May 1, 2010, Watkins met with Larry Christensen, the Chief of Police to discuss the incident and what might happen next. Christensen suggested that Watkins apologize to Gertsman and smooth things over. Following this suggestion, Watkins phoned Gertsman several times, but was unable to reach her. The following day, Watkins and his wife saw Gertsman at church, where both Gertsman and Watkins attend services. Following the service, Watkins and his wife approached Gertsman⁵ in their vehicle, rolled down the window and apologized for the incident.

On May 3, 2010, Watkins reported to work and completed his shift without incident. On May 4, 2010, Michael J. Nordquist, the electric superintendent for the City, and Jerry Zeimetz, the City Administrator for the City, presented Watkins with a notice indicating that they intended to recommend his termination from employment with the city. The notice indicated that Watkins had committed an act which constituted moral turpitude, which threatened the safety and security of the general public and discredited the City. Under Article VIII, Section D of the Agreement, the City determined that based upon the nature of the conduct, no reprimand would be necessary to discharge Watkins. At the time of his discharge, Watkins had not been arrested or charged with any crime.

Article VIII of the Agreement provides in relevant part,

All City employees are responsible for carrying out city policy for the good of the city and its citizens. When disciplinary action is necessary, it is the responsibility of the supervisor to initiate, administrate and carry through the proper action. Employee shall not be disciplined, suspended or discharged **without good cause** (emphasis added).

Article VIII, Section 1 of the Agreement identifies the grounds, for which an employee may receive disciplinary action, including:

L. Any action which is detrimental to or discredits the city

⁵ Gertsman was in her vehicle at the time and when the Watkins' pulled up next to her, she rolled down her window to talk to them.

- M. Any action which threatens the safety and security of the city employees or the general public.
- N. A violation of departmental rule or procedure

Article VIII, Section 2 of the Agreement provides what disciplinary action can be taken. Section 2 provides,

- A. For first offense a documented verbal reprimand
- B. For a second offense, a written reprimand shall be issued with a penalty up to a suspension without pay
- C. For a third offense up to a suspension without pay and including, demotion or discharge.
- D. No reprimand shall be needed to discharge an employee for being under the influence of alcohol or drugs while on duty, (subject to the city's work rules relating to chemical dependency on drugs or alcohol) theft or other acts of moral turpitude or in any other manner converting employers property, disregard for authority and willful failure to lawful orders, assaulting a city officer, supervisor or employee on the premises or any conduct which threatens the safety and security of city employees or the general public.
- E. A reprimand or other disciplinary action shall remain as a part of the employee's permanent record for a period of forty-eight (48) months from the last completed date of disciplinary action.

Article III does not define what constitutes moral turpitude nor does it define conduct which would threaten the safety and security of city employees or general public.

The Union filed a timely grievance and by stipulation of the parties, the grievant waived step 1 and 2 of the grievance procedure and proceeded directly to a hearing before the Beresford City Council on May 13, 2010. The City Council determined that looking into Gertsman's windows without permission threatened her safety and security as a resident of the City of Beresford and that Watkins' actions constituted an act of moral turpitude. The Beresford City Council, on May 17, 2010, unanimously voted to deny the grievance and discharge Watkins as an employee of the City. Mayor Fedderson entered Factual Findings and Conclusions detailing the reasons for terminating Watkins.

Upon his termination, Watkins filed this Petition for Hearing on Grievance with the Department of Labor. Other facts will be determined as necessary.

Analysis

Whether the City's decision to discharge Mr. Watkins on May 4, 2010, was for just cause as required by Article VIII of the Agreement?

A grievance is defined by Article VI of the Agreement as follows,

A grievance is defined as any dispute involving the application or alleged violation of any provision of city policy, or work activity, or dispute involving the interpretation of a union agreement with the City that cannot be satisfactorily resolved as a result of a discussion between the aggrieved employee and his/her immediate supervisor.

The Department's role in resolving a grievance is defined by SDCL §3-18-15.2. SDCL §3-18-15.2 reads, in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the department of labor . . . The department of labor shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employees and the governmental agency.

Deference is not given to the City Council's decision by the Department in a grievance review. Rather, the Department issues an order based upon its own investigation and hearing. SDCL §3-18-15.2; See *Cox v. Sioux Falls Sch. Dist.* 49-5, 514 N.W.2d 868 (S.D. 1994). The burden of proof is on the grievant. *Rininger v. Bennett County Sch. Dist.*, 468 N.W.2d 423 (S.D. 1991).

The Union argues that the City's decision to discharge Watkins on May 4, 2010, lacks just cause and is therefore in violation of the Agreement. The Union argues the City's assertion that Watkins was window peeping lacks merit and therefore the decision to discharge Watkins based on the conclusion that Watkins was window peeping was not merited. The Union further argues that the City's decision lacks a factual basis as there is no evidence that Watkins threatened the safety and security of the general public or engaged in an act of moral turpitude, and therefore there was no just cause. And finally, the Union argues that the decision to discharge Watkins is excessive when the record is viewed as a whole.

Watkins testified live at the hearing before the Department. Watkins' testimony about the events of April 30, 2010 was credible. Mrs. Watkins also testified at the hearing. She testified that after Officer Steckelberg brought Watkins home, she was unable to find the dog at home, and went out to look for him herself. She walked around the neighborhood and walked towards where Watkins had left his vehicle. Still unable to find the dog she returned to their home, where the dog was found in the backyard, still not wearing his shock collar. She further testified that it was not unusual for the dog to run off. Ms. Watkins was a credible witness.

The Union presented testimony from Aaron Jurgensen. On April 30, 2010, Jurgensen had been employed as a police officer for the City of Beresford. At the time of the hearing, he was no longer working for the City of Beresford, but had moved to Spearfish where he was working as a police officer.

Officer Aaron Jurgensen had been called to the fatal vehicle accident scene on April 30, 2010, to provide assistance with traffic. Shortly before 2:00 a.m., he was returning home when he saw a person running through Gertsman's yard. Officer Jurgensen, a neighbor of Gertsman was aware that she was going through a difficult divorce and thought perhaps it was her spouse harassing her. Jurgensen continued to observe the situation from his home across the street while he called on-duty officer, Sergeant Steckelberg. Officer Jurgensen testified at hearing that he could see Gertsman's house from his driveway. He testified that the front yard was lit by a street lamp and there were no trees blocking his way. Jurgensen testified that the individual leaned toward the windows of Gertsman's home for a couple seconds. Jurgensen approached the house after Steckelberg arrived, Jurgensen did not conduct any further investigation. He did not look for the dog nor did he confirm that the dog was or was not at Watkins' residence. Jurgensen testified that he had worked with Watkins as a fellow City employee and was surprised to find Watkins when he approached the house. He testified that "it was very uncharacteristic of him".

The City Council relied heavily on Jurgensen's testimony concerning the events of April 30, 2010, when determining whether Watkins had engaged in acts of moral turpitude that threatened the safety and security of the public. At the grievance hearing before the City Council, Jurgensen testified that he was 50 to 100 yards away from Gertsman's home when he made his observations. At the hearing before the Department, he testified that he was 100 feet from Gertsman's home, and admitted that he had difficulty at judging distances. Despite his difficulty judging distances, he testified with certainty that the individual he saw at Gertsman's window was a foot or less from the window and looking directly into them. Jurgensen further testified that he was unsure if there were any lights on at Gertsman's home, despite testifying that he could clearly see that the individual was mere inches away, and that Jurgensen himself approached the house when Officer Steckelberg arrived and had an opportunity to observe the house more closely. Jurgensen's testimony was not conclusive and not persuasive.

Sergeant David Steckelberg also provided live testimony at the hearing. On the night of the incident, Sgt. Steckelberg had also been dispatched to the scene of the fatal accident. He had returned to his patrol duties when he received the call from Jurgensen reporting a figure walking through Gertsman's yard. He approached the person and asked what was going on. At that time he recognized the man as Watkins. Watkins told him that he had been looking for his dog. Steckelberg asked why he had been hiding to which Watkins replied he had been drinking and was scared he would get in trouble. Sgt. Steckelberg's report later indicated that he did smell a strong odor of alcohol on Watkins. Steckelberg later discovered that Watkins vehicle was parked across from that area, but did not further investigate how Watkins had been searching for his dog nor did he confirm that the dog was or was not at the Watkins' residence after dropping Watkins off. Steckelberg couldn't say why he made no further investigation. He testified,

I don't know why I didn't. I quite frankly was hoping the situation would end as soon as it – it had been a long night and this was kind of something I wasn't expecting. And it just – it wasn't—I probably should have gotten out and looked around a little bit but...

Steckelberg testified that he'd known Watkins for several years and had never had any problems with him before. He testified that he was surprised by the incident because he didn't expect Watkins to be in this circumstance.

Denise Gertsman testified that she had known Watkins for several years and had been on a number of ambulance calls with him. Gertsman had also been at the scene of the accident and had been involved with transporting the victims in her ambulance that evening. She testified that when the officers told her Watkins had been in her yard, she was "completely shocked" and that she had not thought it was in his nature to try and peek in her windows. Gertsman had not seen any one in her yard that evening and her only knowledge of the incident was when Jurgensen told her that Watkins had been looking in her windows. Gertsman testified that she no longer feels safe in her home.

Mayor Fedderson testified that he took part in the City Council proceedings. He testified,

Well there was a tremendous amount of conversation. To set the stage I guess, this was something that we were dealing with that was very puzzling for all of us and surprising to all of us o the city council. Knowing Travis as we have and as an excellent worker and so on and so forth, it was very troubling for the city council.

He testified that the City Council was convinced that Jurgensen saw what he saw because they took it upon themselves to go over to his house and view Gertsman's home from Jurgensen's driveway.⁶ Mayor Fedderson went on to testify that an incident of this nature violated trust and the safety and security of the residents.

You know you have a person that's employed that does go out to the homes and might, for one reason or other have to turn off the electricity to that home or whatever it might be. He does have to go to the door. You know, and the bottom line is, we're – this is a Small Town, USA. If I sneeze today, everybody's going to know about it. And that's just the way it is. Because, I don't care, rumors start and everybody knows everything else that goes on. Even as much as you try to keep it under wraps, it seems like it happens. And we would have to – it put us in an ugly position. We had to do something about the situation.

⁶ It should be noted that the investigation conducted by the city council members did not take place at 2 o'clock in the morning under the same conditions as when officer Jurgensen reported the incident.

The City Council determined that there was no reason for Watkins to be crouching next to the house if he was looking for his dog and that common sense would dictate that he ask the police for assistance if he was in fact looking for his dog. The City further determined that the time Watkins said he left the station and looked for the dog was not possible because he would have had to drive several blocks in 10 minutes. The City Council concluded Watkins was window peeping and that the act of window peeping constituted an act of moral turpitude and conduct that threatened the safety and security of the public giving the City just cause for the termination.

The City argues that Watkins was not out looking for his dog on the night of April 30, 2010, but rather that he was window peeping with the hopes of seeing Gertsman in some state of undress. The City argued that Watkins had the perfect opportunity because he had known Gertsman to be at the scene of the accident and handling the accident victims. They concluded that he knew she would change out of her soiled clothes and/or shower presenting an opportunity to see her unclothed.

The City based this argument on a possible scenario that Watkins was seeking out Gertsman in attempt to see her undressed. The City attempted to discredit Watkins by introducing off color remarks that Watkins had made about his time as a young linesman and suggesting that Watkins' attempt to apologize after church the day after the incident made Gertsman feel as if the Watkins' were trapping her. Based on the record and the evidence produced, these allegations are simply unfounded. There no evidence in the record that Watkins had any prurient relationship with Gertsman or that he had any inclination to act in that manner. In fact the testimony of all witnesses was that window peeping would be very out of character for Watkins and they were all surprised by the incident. In fact, Watkins was ultimately never charged or convicted with the crime of window peeping.

The Agreement identifies grounds for dismissal as acts of moral turpitude that tend to discredit the City. Termination is a serious discipline and the Agreement requires that it must be for just cause. The decision to terminate must be rooted in fact and must not be based on conjecture, speculation, or possible scenarios of what may have happened. The evidence presented does not support a finding that Watkins's actions rise to this level and therefore the termination was not authorized or appropriate under the Agreement. The City's decision to terminate Watkins on May 4, 2010, lacked just cause as required by the Agreement.

Petitioner has met its burden to establish that the City's decision to discharge Watkins on May 4, 2010, was not for just cause, and therefore constitutes a misapplication or violation of the Agreement. Petitioner's request for relief as set forth in its Petition for Hearing on Grievance is granted in all respects. The Department will retain jurisdiction over any issues regarding the determination the amount of back pay and benefits.

Conclusion

Grievant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Respondent shall have fifteen (15) days from the date of receipt of Grievant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Grievant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 19th day of April, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR

/s/ Taya M Runyan

Taya M. Runyan
Administrative Law Judge