

**SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT**

**RICH SKORHEIM,
AFSCME LOCAL 169,**

HF No. 14 G, 2011/12

Petitioner,

v.

DECISION

CITY OF HURON,

Respondent.

This matter came before the Department of Labor & Regulation when Rich Skorheim, filed a Petition for Hearing on Grievance pursuant to SDCL 3-18-15.2. The Department conducted a hearing on October 31, 2011, in Huron, South Dakota. Matthew Miller appeared on behalf of Petitioner, Rich Skorheim. Gerald Kaufman represented Respondent, City of Huron.

Legal Issue:

This case presents the following legal issue:

Whether the City of Huron violated, misinterpreted or inequitably applied Article XII of the Collective Bargaining Agreement entered into between the City of Huron and the AFSCME Local 169, when it terminated the employment of Rich Skorheim?

Facts:

Based upon the testimony and evidence provided at hearing, the Department finds the following facts by a preponderance of the evidence:

1. Rich Skorheim (Skorheim) was a long time employee of the Solid Waste Department of the City of Huron (City).
2. The Solid Waste Department's former Forman, Timothy Schwartz, and Skorheim began greeting each other in the morning by saying "fuck you" or giving each other "the finer" which means the same thing. The practice of giving each other "the finger" spread to the other members of the Solid Waste Department who were all men at the time.
3. After Schwartz retired, Karen Weeldreyer (Weeldreyer) was promoted to Foreman on May 23, 2011. Weeldreyer was the first female supervisor in the Solid Waste Department.

4. Prior to Weeldreyer's promotion, the employees of the Solid Waste Department were instructed by City management, not to say "fuck you" and not give each other "the finger".
5. In lieu of saying "fuck you" or "giving the finger", Skorheim initiated the idea of using the "thumbs up" sign to convey the same message. Some of the male members of the Solid Waste Department then began using the "thumbs up" sign.
6. J.T. Hakes (Hakes) is a female scale operator within the Solid Waste Department and in October 2011, she learned of the hidden meaning given to the "thumbs up" sign.
7. After this discovery, Hakes told Skorheim and other members of the Solid Waste Department to stop giving the gesture to her. She further told them that she would report any further occurrences.
8. On November 25, 2011, Skorheim was observed by Hakes and Weeldreyer giving the "thumbs up" sign to Hakes. Weeldreyer's testimony that she knew by the look on his face what his intended meaning of the sign meant was compelling and persuasive.
9. When Schwartz retired, Skorheim and others within the Solid Waste Department applied for the Foreman position. Skorheim had more than 20 years of service with the City at the time.
10. Skorheim was unhappy about the choice of Weeldreyer as the new Foreman. Schwartz had a strong background in maintenance and Weeldreyer did not. She put more emphasis on paperwork and administration while paperwork had not been a high priority with Schwartz. Consequently, Skorheim believed that Weeldreyer lacked the experience for the job and did not like the additional paperwork. The fact that Weeldreyer was a woman also factored into his dislike of her and it is likely that he resented her because he believed that she had been promoted "over him" and others within the Department.
11. As a result of Skorheim's feeling toward Weeldreyer, "friction" developed between them and their relationship was tense.
12. Skorheim gave the "thumbs up" sign to Weeldreyer and became defiant of her. When she instructed him to do preventive maintenance on the trucks and complete the new preventative maintenance form, he would argue with her.
13. On one occasion, Skorheim wanted to get off work early. Weeldreyer stated that he could not leave until he had completed the preventative maintenance form. An argument ensued and he told her to just "write him up".

14. On one occasion, a part fell off of a new truck that Skorheim was operating because the bolts had not been tightened prior to starting the route. Skorheim blamed the incident on another employee stating that the other employee had done the preliminary inspection.
15. On another occasion, Skorheim wanted to leave early. Weeldreyer told him that he could not leave work until his route was completed. After Skorheim left, Weeldreyer discovered that garbage had not been collected on a portion of his route. So she had to send another driver out to complete the route. Skorheim stated that he thought another employee was going to pick up that portion of the route.
16. Outside of Weeldreyer's presence, Skorheim referred to her as a "bobble head", stated that she did not have "a brain in her head, that she was lazy, brain dead, a dumb bitch, and a female in a man's world". He has also said that she is a "stupid bitch, cunt, idiot" and when speaking of her to others, called her "girlfriend".
17. After Skorheim gave Hakes the "thumbs up" sign on November 25, 2011, she reported the incident to Superintendent Dale Fortin. Hakes report prompted the City to hire Lisa Marso, a Sioux Falls attorney to conduct an independent investigation of the activities at the entire Solid Waste Department.
18. While speaking to the Superintendent of the solid Waste Department and the Human Resources Coordinator on November 28, 2011, Skorheim pretended not to know of the hidden meaning of the "thumbs up" sign.
19. Skorheim's most recent employee evaluation noted a pattern of poor behavior and the need to improve workplace communication and substandard performance.
20. Marso completed her investigation and made a report dated December 12, 2011. Marso's investigation found misconduct on the part of Skorheim.
21. During the informal grievance hearing process, Skorheim admitted that he knew the meaning of the "thumbs up" sign.
22. In this case, Skorheim alleges that City violated, misinterpreted, or inequitably applied Article XI of the Collective Bargaining Agreement (CBA) in place at the time of his termination.
23. Section 11.03 (A) of the CBA states the following:

Just causes for all discipline, including dismissal or suspension without pay, include, but are not limited to those areas listed below. Any

employee may be given lesser disciplinary treatment than suspension without pay or dismissal.

- (a) Theft from the employer.
- (b) Intoxication, drinking or being under the influence of alcohol when reporting to work or while on the job.
- (c) In possession of or being under the influence of an illegal drug.
- (d) Insubordination (which includes but is not limited to refusal to do the work as directed, lying, and disrespect shown to any other city employee, including department heads, and disrespect shown to a member of the governing board or to the public).
- (e) Neglect of duty (neglect of duty means intentionally not doing assigned job).
- (f) Willful or reckless destruction of the employer's property, or damage to or loss of city property due to the gross negligence or improper use of city property.
- (g) Unauthorized absence.
- (h) Conviction of a felony or crime of domestic violence (including a suspended imposition of sentence).
- (i) Sexual harassment of another individual while at work.
- (j) Loss of driver's license which results in the employee not being able to perform his/her duties.
- (k) Making disparaging remarks (including but not limited to racial slurs) while at work regarding another person based on the other person's race, ethnic background or national origin.

CBA Article XI.

24. Additional facts will be discussed in the analysis below.

Analysis:

Grievance

SDCL 3-18-1.1 defines "grievance" as:

The term "grievance" as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a "grievance" and is not subject to this section.

SDCL 3-18-1.

Marso's Findings:

The City Commission's decision to terminate Skorheim's employment was based in large part on the findings of Marso's investigation. The Department reviewed Marso's investigation report after hearing the testimony at the hearing. The Department was struck by the fact that many of the conclusions reached by Marso during her investigation were the same or quite similar to those reached by the Department during the testimony. Examples of those similarities follow:

First, Marso stated that Schwartz, the former foreman, was heavily involved in equipment operations but was not strong on paperwork. The Department found that Schwartz's background had been in maintenance but that he lacked administrative skills. This was demonstrated when Schwartz stated that he should not have allowed the crew to give each other "the finger" as long as he did. This was an understatement. A good administrator would never have allowed the practice to begin.

Marso concluded that there was probable cause that Skorheim gave Hakes the "thumbs up" sign on November 25, 2011. After the testimony at hearing, the Department was also convinced that this incident had occurred.

Marso stated that tension/friction existed between Weeldreyer and Skorheim. The Department found this to be true as well. This fact was evidenced by Skorheim's continued questioning of her decisions and his arguments with her.

Both the Department and Marso found that Skorheim's behavior toward Hakes and Weeldreyer was disrespectful and inappropriate.

The Department also agreed with Marso's conclusion that Skorheim's behavior towards Weeldreyer and Hakes did not appear to rise to the level of sexual harassment. While Skorheim's treatment of Weeldreyer contained elements of sexual bias, the source of his hostility towards her seemed to be his belief that Weeldreyer did not deserve her promotion to Foreman.

Finally, the Department concurs with Marso's conclusion that Skorheim's union activities played no role in his termination. Even if the City had been motivated to terminate Skorheim for his union activities, his behavior provided it with ample cause to achieve that result.

Based on the above conclusions, and a review of those individuals interviewed by Marso and the documents considered by her, the Department concludes that Marso's investigation was fair and impartial and that her conclusions were well founded.

Section 11.03 (A):

Section 11.03 (A) of the CBA authorizes the City to dismiss an employee for just cause. Among those items identified as just cause are Insubordination and neglect of duty. Subsections (d) and (e), respectively. Insubordination includes the refusal to do the work as directed, lying, and showing disrespect of other city employee. Neglect of duty means intentionally not doing assigned job tasks.

The evidence indicates that Skorheim showed disrespect toward Hakes when he gave her the “thumbs up” sign on November 25, 2011. The Department is convinced that he intentionally gave the sign to Hakes after she had asked him to stop.

He showed disrespect toward Weeldreyer when he called her a multitude of names, including “stupid bitch”, “cunt” and “idiot”. He also showed disrespect for her when he argued with her over a variety of issues including one incident on September 9, 2011, when Skorheim wanted to leave early but was told by Weeldreyer that he needed to stay until he had the preventative maintenance form completed. During this episode, he also showed scorn for the City and its disciplinary system when he stated that she should just “write him up” rather than make him complete the form. This response indicates that Skorheim was not intimidated by the discipline for his actions.

Skorheim also showed disrespect for the City and those officials who finally ordered the Solid Waste Department to quit “giving the finger” to each other when he suggested substituting the “thumbs up” sign for “the finger” to signify the same meaning and again suggesting using a “wave” when ordered to quit using the “thumbs up” sign. The act also shows a willful disobedience of an order given by the City.

This attempt to avoid obeying the substance of the orders by making a superficial change to the sign given is more reminiscent of a member of a playground gang of nine year old boys, than a senior, long time employee of a municipal government within this State. Indeed, this entire “thumbs up” episode is a sad reflection on all those employees who participated in such antics.

Next, Skorheim neglected his duties when he failed to complete a pre-route inspection on the day that a part fell off the truck that he was operation. He also neglected his duties and was insubordinate by refusing to do the work as directed on the day that he failed to complete his route after Weeldreyer had instructed him to complete the route before leaving work for the day. On both these occasions, Skorheim demonstrated a disturbing tendency to blame his misconduct on other employees.

The Department believes that Skorheim lied on a number of occasions. However, for purposes of this Decision, it finds that Skorheim lied to the Human Resources Coordinator and the Solid Waste Superintendent on November 28, 2011, when he feigned knowledge of the hidden meaning of the “thumbs up” sign.

In light of these facts, the Department finds that the City did not violate, misinterpret or inequitably apply Article XI of the CBA when it terminated Skorheim’s employment.

While acknowledging that some punishment was due, Skorheim argues that termination was too severe a punishment. The Department disagrees. Skorheim's misconduct was intentional and repeated. In addition, Skorheim displayed a notable disregard of less harsh forms of discipline when he told Weeldreyer to just write him up rather than make him complete the preventative maintenance form on the day that he wanted to leave early.

Skorheim also complains that progressive punishment was not utilized prior to dismissal. However, there is no provision within the CBA which requires the City to utilize progressive punishment before terminating his employment. Under the circumstances in this case, the City Commission acted within its discretion when it terminated the employment of Skorheim.

Conclusion:

The City shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty days of the date of the Decision. If it desired, the City may also submit Proposed Findings of Fact and Conclusions of Law. Skorheim shall have twenty days from the date of the receipt of the City's Findings of Fact and Conclusions of Law to submit objections thereto and/or Proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law. If they do so, the City shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 8th day of July, 2013.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

 /s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge