

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

**TODD LARSEN,
AFSCME LOCAL 169,**

HF No. 15 G, 2011/12

Petitioner,

v.

DECISION

CITY OF HURON,

Respondent.

This matter came before the Department of Labor & Regulation when Todd Larsen filed a Petition for Hearing on Grievance pursuant to SDCL 3-18-15.2. The Department conducted a hearing on November 1, 2012, in Huron, South Dakota. Matthew Miller appeared on behalf of Petitioner, Todd Larsen. 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 XI of the Collective Bargaining Agreement entered into between the City of Huron and the AFSCME Local 169, when it suspended Todd Larsen for 30 days without pay?

Facts:

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

1. Todd Larsen (Larsen) is a long time employee of the Solid Waste Department of the City of Huron (City). In the spring of 2011, he held a Maintenance III position and was the third highest ranking employee of the Solid Waste Department. Only the foreman, Tim Schwartz (Schwartz) and the Department Superintendent Dale Fortin (Fortin) ranked above him. Larsen was a valued employee with good evaluations.
2. When Schwartz retired from the foreman position in May of 2011, Larsen applied for the position. However, he was not hired for the position.

3. Karen Weeldreyer (Weeldreyer) was promoted to Foreman on May 23, 2011. Weeldreyer was the first female to be hired as a supervisor in the Solid Waste Department.
4. Larsen was unhappy about Weeldreyer's promotion to foreman. He did not believe that she was qualified for the position. Schwartz, the prior foreman, had come from 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.
5. As a result of Larsen's feeling toward Weeldreyer, their relationship became strained and was tense. He avoided her. He ignored her and did not answer her questions. He did not respond to her greetings. He did not look her in the eye.
6. Outside of Weeldreyer's presence, Larsen referred to her in derogatory terms.
7. On July 7, 2011, Weeldreyer instructed Larson to crush the rubble pile and push up the Freon. He did neither.
8. On July 15, 2011, Weeldreyer asked Larsen whether they could flip the cutting edge on the loader or whether they needed to use the new one. Larsen did not answer her question. He simply stated that he was watching the cutting edge.
9. Maintenance of the conveyor was Larsen's responsibility. On September 6, 2011, Weeldreyer noticed that the fluid on the conveyor was empty. On the 7th she overheard another employee tell Larson that the fluid was empty. Larsen responded with a shrug. On September 9, 2011, Larsen delegated another employee to add fluid to the conveyor.
10. Fortin instructed Weeldreyer to order a truck for September 27, 2011, to haul out a load of cardboard. Larsen is often called upon to help load the cardboard because a Maintenance III is needed to operate the equipment. On the 27th, Larsen began arguing with Weeldreyer because he did not think that there was enough cardboard to make up a 40,000 lb. load. The scale operator called Fortin because Weeldreyer and Larsen were yelling at each other in her office. As a result, Fortin called in another supervisor to help get control of the situation.
11. On November 7, Weeldreyer told Larsen to work on the used oil burner. Larsen did not do so. Instead, he performed another task first and worked on the oil burner at a later time.
12. Larsen also challenged Weeldreyer about changing the November route driver schedule when Larsen had nothing to do with the scheduling of routes.

13. Fortin had several conversations with Larsen from July through November 2011 in which he explained to Larsen that Weeldreyer was in charge and that he had to obey her orders and that it was inappropriate for him to argue with her.
14. As a result of a complaint filed by an employee of the Solid Waste Department, the City decided to investigate the actions of the entire Solid Waste Department. To accomplish this, the City hired Lisa Marso, a Sioux Falls attorney to conduct an independent investigation of the Solid Waste Department.
15. Marso completed her investigation and made a report dated December 12, 2011. Her investigation found misconduct on the part of Larsen.
16. After Marso provided the City with her report, Superintendent Fortin made a recommendation to the City Commission that Larsen's position with the Solid Waste Department be terminated.
17. After following the grievance procedures set forth in the CBA, the City Commissions suspended Larsen for 30 days without pay and required him to take anger management classes.
18. Larsen filed a Petition for Hearing on Grievance, dated March 12, 2012, with the Department of Labor & Regulation.
19. Larsen is active member of the AFSCME Local 169 (Union)
20. 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.

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

Analysis:

Grievance

Larsen has filed a grievance with the Department. 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. Larsen complains that the City violated, misinterpreted or inequitably applied Article XI of the CBA when it suspended Larsen for 30 days without pay.

Marso’s Findings:

The City Commission’s decision to suspend Larsen was based in part on the findings of Marso’s investigation. The Department reviewed Marso’s report and concludes that her investigation was conducted fairly and that its findings were well founded. Marso interviewed all the employees of the Solid Waste Department. All the employees interviewed, with the exception for Larsen and another employee who was also disciplined as a result of this investigation, confirmed that Larsen’s actions towards Weeldreyer were volatile, hostile and inappropriate.

Section 11.03 (A):

Section 11.03 (A) of the CBA authorizes the City to suspend without pay an employee for "just cause". Among those items identified as "just cause" by the agreement 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 Larsen's actions toward Weeldreyer constituted insubordination as defined by Section 11.03 (A). In Marso's investigation, the employees of the Solid Waste Department told Marso that Larsen spoke of Weeldreyer in derogatory terms when she was not present. They also indicated that he avoided her. He ignored her and did not answer her questions. He did not respond to her greetings and did not look her in the eye. These incidents were all disrespectful.

Larsen was insubordinate on July 7, 2011, when he did not crush the rubble pile and push up the Freon as directed by Weeldreyer. He was also insubordinate on July 15, 2011, when he did not answer Weeldreyer's question concerning the loader cutting edge, and, again, on November 7, 2011, when he did not work on the used oil burner as directed by Weeldreyer.

Larsen's arguments with Weeldreyer about loading the cardboard and the November route driver's schedule were both disrespectful of Weeldreyer and disobedient of Fortin's directives to obey Weeldreyer's directions and admonishments not to argue with her. Larsen also neglected his duties when he did not fill the oil on the conveyer.

Individually these incidents are not significant. However, when viewed together, they show a pattern of behavior toward Weeldreyer which extended over a 4 or 5 month period during which Larsen had been admonished by Fortin that Weeldreyer was in charge and that she needed to be obeyed.

Fortin tried to work with Larsen during the transition of the foreman position. During this time, the City tolerated behavior from Larsen which most employers would not have. Nevertheless, when Larsen's attitude and behavior toward Weeldreyer did not change after 4 or 5 months and numerous admonishments, the City was justified in disciplining Larsen.

Larsen complains that his punishment was overly severe under the circumstances. However, the Department's role here is only to determine whether the City violated the terms of the CBA when it suspended Larsen. Its role is not to substitute its preference of punishment for that imposed by the City.

Larsen also argues that the City's actions in this case were in retaliation for his Union activities. Yet, he has presented no evidence to support that contention. Therefore, the Department concludes that the City's discipline of Larsen was prompted by his

inappropriate behavior toward Weeldreyer and not by his Union activities. Moreover, the Department finds that the City did not violate, misinterpret or inequitably apply Article XI of the CBA when it suspended Larsen for 30 days without pay.

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. Larsen 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 of Fact and Conclusions of Law. 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 29th day of August, 2013.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

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