

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

TEAMSTERS LOCAL 749,

HF No. 2 G, 2008/09

Grievant,

v.

DECISION

CITY OF MADISON,

Respondent.

This matter comes before the Department of Labor based on a Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. MacDonald Smith of Smith & McElwain Law Offices, Sioux City, Iowa and Onna B. Dominiack of Cutler & Donahoe, LLP, Sioux Falls, South Dakota, appeared on behalf of Grievant. David J. Jencks of Jencks & Jencks, P.C., Madison, South Dakota, appeared on behalf of Respondent. A hearing was held before the Department of Labor, Division of Labor and Management on May 26, 2009, in Madison, South Dakota.

Issues

1. Whether there was a violation, misinterpretation, or inequitable application of the negotiated agreement when Mr. Skluzacek was discharged on June 26, 2008.
2. If there was a violation, misinterpretation, or inequitable application of the agreement, what is the proper remedy?

Facts

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

General Drivers & Helpers Union, Local 749 (Union) and the City of Madison, South Dakota (City) are parties to a collective bargaining agreement (Agreement). The Agreement applies to the employees of the City's Public Works Department. Article 4 of the Agreement addresses management rights. Article 10 and 11 of the Agreement contains provisions regarding the discipline and discharge of these City employees and establishes a grievance procedure.

Chuck Skluzacek (Skluzacek) was hired by the City in June 2001. He held several positions during his employment with the City. On June 19, 2008, Skluzacek was employed in the Public Works Department. On that same date, Skluzacek was involved in a workplace disagreement between Skluzacek and another employee, Rick Nighbert

(Nighbert). At about 1:00p.m., on June 19, 2008, approximately twelve or thirteen City employees met at the City's maintenance shop. Nighbert, the union steward approached the group to request that each sign up to work an additional hour to cover the City Public Works telephones between the house of 4 and 5 p.m. during the summer. Discussions about the sign-up sheet became heated; some employees raised their voices. During the discussion, Skluzacek became frustrated. He walked over to Nighbert, placed his hands on Nighbert's shoulders and stated that he "was done with his fucking union" and that he [Nighbert] could "take his union and shove it up his ass." Skluzacek testified that he then turned and walked away. Nighbert testified that there was a shove that made him take a step back as Skluzacek released his hands from his shoulders and walked away. Skluzacek then returned to work and did not have any further contact with Nighbert. The meeting between Nighbert and the rest of the City employees lasted an additional five or ten minutes.

Heath Von Eye, the Public Works Director, was not present at the meeting on June 19, 2008. Ultimately, Nighbert reported the incident to Von Eye when he returned to the office. Von Eye conducted an investigation of the incident involving Skluzacek and Nighbert. Von Eye obtained statements from Nighbert and two foremen, Kim Verhey and Bob Thill, who were present at the time of the incident. Von Eye also met with and interviewed Skluzacek. Von Eye also consulted with the City Human Resource Department. Von Eye concluded that Skluzacek's actions on June 19, 2008 constituted "[b]ehaviors or actions interpreted by a reasonable person as carrying the potential for violence and/or acts of aggression" which under the City's Personnel Policy and Procedures Manual was considered workplace violence.

The City notified Skluzacek of his immediate discharge by letter dated June 26, 2008. The Union grieved the discharge, and absent resolution of the grievance, and appeal was made to the Department of Labor.

Other facts will be developed as necessary.

Whether there was a violation, misinterpretation or inequitable application of the Agreement when Mr. Skluzacek was discharged on June 26, 2008?

SDCL 3-18-1.1 provides the definition of a grievance as follows:

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.

The Department’s role in resolving a grievance is defined by SDCL 3-18-15.2, which provides 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, if notice of appeal is filed with the department within thirty days after the final decision by the governing body is mailed or delivered to the employee. 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.

The burden of proof is on the grievant. *Rininger v. Bennet County Sch. Dist.*, 468 NW2d 423 (SD 1991).

Article 4 of the Agreement provides that the City has a management right to “reprimand, suspend, discharge or otherwise discipline employees for just cause...” Article 4 of the Agreement further provides that such “rights and power shall not be exercised arbitrarily or unfairly to any employee and shall not be exercised so as to violate and provision of this contract.”

Article 11 of the Agreement specifically addressed the City’s right to discipline its employees. Article 11 provides that, “[t]he employer shall not discharge, suspend, or discipline any employee without just cause.” Article 11 further states,

When disciplinary action is necessary, it is the responsibility of the supervisor to initiate, administrate, and carry through the proper action.

The causes for which an employee may receive progressive disciplinary action include the following but not limited to:

- (1) incompetency or inefficiency;
- (2) violation of safety rules;
- (3) disregard for authority and willful failure to obey lawful orders;
- (4) deceit or falsification of records;
- (5) disclosure of confidential information;
- (6) theft or other acts of turpitude tending to discredit the City;
- (7) use of or under the influence of intoxicating liquor or drugs on the job or in or on City property;
- (8) abuse of sick leave privilege
- (9) continued tardiness;
- (10) Any action with is detrimental to the efficiency or effectiveness of the operation of the City;

- (11) Any action which is detrimental to or discredits the City;
- (12) Any action which threatens the safety and security of the City Employees or the general public;
- (13) A violation of a departmental rule or procedure.

Whenever the City determines the disciplinary action is to be imposed upon an employee, Step 1-5 will be followed when appropriate, however a department head may at his or her discretion choose any level of discipline provided it is commensurate with the severity of the action.

- (1) For first offense, depending upon severity, a verbal reprimand or written reprimand;
- (2) For second offense, depending on the severity, a written reprimand or up to or including suspension without pay or demotion;
- (3) For third offense, depending on the severity of the offense; up to or including suspension without pay, demotion, or discharge.
- (4) 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 and alcohol). Theft or other acts of moral turpitude or in any other manner converting Employer's property, disregard for authority and willful failure to obey lawful orders, assaulting a City Officer, Supervisor or Employee on the premises of any conduct which threatens the safety and security of City Employees or the general public;
- (5) A reprimand or other disciplinary action shall remain as a part of the employee's regular record for a period of twenty-four (24) months.

The Union argues that the City violated both Article 4 and Article 11 of the Agreement in discharging Skluzacek. The Union first argues that the City violated Article 4 of the agreement because the City's investigation of the June 19, 2008 incident was inadequate to conclude that Skluzacek had engaged in conduct warranting his discharge, therefore the City's exercise of its right to discipline for just cause was arbitrary, unfair and ultimately in violation of the Agreement. The Union argues that although a dozen employees witnessed the incident, the City only obtained statements from a few of them and interviewed on Skluzacek. The Union argues that based on the several differences in the witnesses' version of the events and assessment as to the severity of Skluzacek's conduct should have led to further investigation. Union alleges that failure to investigate further led to the arbitrary and unfair exercise of the City's management right to discharge for cause.

The City argues that it did not violate Article 4 of the Agreement when it discharged Skluzacek. The City argues that an investigation was conducted by the City Public Works Director, Heath Von Eye, in that he interviewed the parties, consulted his support staff, and gathered statements from eyewitnesses. The Agreement does not set forth

what constitutes an adequate investigation. The Agreement only requires that the supervisor, in this case Heath Von Eye, to initiate, administrate, and carry through the proper action. Von Eye upon learning of the incident conducted an interview with Skluzacek and took statements from several witnesses. The City's conclusion that Skluzacek's actions warranted dismissal was not arbitrary or unfair. Grievant has failed to establish by a preponderance of the evidence that Respondent violated, misinterpreted, or inequitably applied its article 4 of the Agreement.

The Union also argues that the City violated Article 11 of the Agreement because the City lacked just cause for the discharge as the discharge was not commensurate with the severity of Skluzacek's conduct. The Union argues that the incident did not involve a physical altercation or a fight between Skluzacek and Nighbert, and the evidence does not support any verbal threat of physical harm toward Nighbert or use of weapons. The Union argues that the totality of the circumstances demonstrate that the incident did not involve violence in the work place or actions which would be interpreted by a reasonable person as carrying the potential for violence and/ or acts of aggression

The City argues that it did not violate Article 11 of the Agreement when it discharged Skluzacek. The City argues that it has the right to discipline and discharge its employees for just cause. The Agreement provides that the department head may use his or her discretion to choose the appropriate discipline as long as it is commensurate with the severity of the action.

The City of Madison Policy and Procedures Manual, Section 3.2 addresses workplace violence Section 3.2 provides in relevant part:

For the purposes of this policy, violence and threats of violence include, but are not limited to:

- A. Any act which is physically assaulting
- B. Any substantial threat to harm or to endanger the safety of others
- C. Behavior or action interpreted by a reasonable person as carrying the potential for violence or acts of aggression.
- D. Any substantial threat to destroy property
- E. Possession on work site of any weapon or dangerous instrument (e.g., any type of firearms, certain knives, brass or metal knuckles, etc.)- unless required by position duties (i.e. Police Officer)

Threatening behaviors, acts of aggression and violence will result in appropriate action by the City, up to and including dismissal. Civil and criminal penalties will be pursued as deemed appropriate. It is the responsibility of every employee of the City to take any threat or violent act seriously, to consult with appropriate personnel and to take action as recommended by these resources and guidelines.

In the course of Von Eye's investigation there were slight differences in the descriptions of the incident, however all the witnesses testified that the altercation involved an aggressive approach, vulgar language and unwanted physical touching. Based upon his investigation, Von Eye concluded that a reasonable person could certainly infer that an aggressive approach, vulgar language and unwanted physical contact carried the potential for violence or threatened the safety and security of City Employees. Grievant failed to establish by a preponderance of the evidence that the Respondent violated, misinterpreted, or inequitably applied Article 11 of the Agreement when it discharged Skluzacek.

Conclusion

Grievant has failed to establish by a preponderance of the evidence that Respondent violated, misinterpreted, or inequitably applied its agreement, contract, ordinances, policies, or rules. Grievant's requests for relief in its Petition for Hearing are denied.

Respondent shall submit proposed Findings of Fact, Conclusions of Law, and an Order consistent with this Decision, within ten (10) days from the date of receipt of this Decision. Grievant shall have ten (10) days from the date of Respondent's Findings and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Respondent shall submit such stipulation, along with an Order in accordance with this Decision.

Dated this 14th day of August, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

Taya M. Dockter
Administrative Law Judge