

**IN THE MATTER OF ARBITRATION
BETWEEN**

City of Duluth

Employer,

**OPINION AND AWARD
(Swanson Discipline)**

and

BMS Case No. 11PA0939

December 20, 2012

AFSCME Minnesota Council 5

Union.

**A. Ray McCoy
Arbitrator**

Appearances

For the Employer: City of Duluth

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Duluth, MN 55802

For the Union: AFSCME Minnesota Council 5

Ms. Diane Firkus
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AFSCME Minnesota Council 5
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Jurisdiction

The Parties processed the individual grievance through all relevant steps of their grievance procedure and notified the arbitrator of his selection by letter dated August 5, 2011. The Parties selected November 29, 2011 as the hearing date. The hearing was conducted on that date beginning at 10a.m. in Room 106A, Duluth City Hall, 411 W. 1st Street, Duluth, Minnesota. The Parties agreed the matter was properly before the arbitrator for resolution. The Parties were given a full and fair opportunity to present their respective cases including the examination of witnesses and introduction of documents in support of their positions. The Parties elected to give oral closing arguments in lieu of post-hearing briefs. The record was therefore closed on November 29, 2011. The Parties define the scope of the arbitrator's authority as follows:

“The arbitrator shall no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. He or she shall consider and decide only the specific issue(s) submitted to him or her in writing by the parties, and shall have no authority to make a decision on any other issue not so submitted to him or her...The arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way the application of laws and rules and regulations having the force and effect of law...The decision shall be based solely upon his or her interpretation of the meaning or application of the express terms of this Agreement to the facts of the grievance presented.” (*2010 Agreement Between the City of Duluth and Local 66 of AFSMCE Council 5 for Basic Unit Employees*; hereinafter “Agreement”)

Issue

Whether the Employer had just cause to discipline the Grievant? If not, what should be the remedy?

Relevant Contractual Provisions

- 36.1 Discipline: Disciplinary action may be imposed upon an employee only for just cause. Disciplinary action may be grieved by the employee through the regular grievance procedure as provided in this agreement. Disciplinary action shall include only the following: 1) written reprimand; 2) suspension; 3) demotion, or removal. Except in the case of a severe breach of discipline any suspension, demotion, or removal action shall be preceded by a written warning. An employee shall be given the opportunity to have a Union representative present at any questioning of the employee during a meeting with a supervisor for the purpose of determining what disciplinary action against the employee will be taken. If the Appointing Authority has reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before other employees or the public.
- 36.2 Suspensions: (a) The Appointing Authority or any supervisor acting for him or her in his or her absence, may for disciplinary purposes suspend without pay any employee under his or her supervision from the performance of his or her duties for one (1) or more periods aggregating not more than fifteen (15) working days in a calendar year for each disciplinary incident unless the union and the employer mutually agree to a longer period of time. (b) Employee to be notified of suspension: In case the Appointing Authority or the supervisor acting in his or her place suspends any employee, he or she shall forthwith give written notice to the suspended employee stating the reason for the suspension and the duration thereof, and shall forthwith personally deliver such written notice to the employee or send by certified mail to his or her last known address; he or she shall also forthwith send to the Union a copy of such notice sent to the employee. Such notice shall also advise the employee that he or she may grieve pursuant to this agreement if he or she disagreed with the action of the Appointing Authority.

Findings of Fact

The Grievant volunteered for an overtime assignment that required him to represent the Employer at an educational event known as “Earth Tracks.” Earth Tracks is an environmental education program aimed at elementary and middle school students regarding how their actions affect the environment and water quality in particular. The program took place on Saturday, May 8, 2010 at the Lake Superior Zoo. The employer initially informed the Grievant that the overtime assignment would begin at 9:00 a.m. and end at 2 p.m. Later the Employer established that the overtime assignment was scheduled to begin at 10:00 am and to conclude at 2:00pm. The

Grievant's assignment included setting up an exhibit, answering questions regarding City services for members of the public in attendance, breaking down the exhibit and returning it to the workplace. The Grievant was expected to carry out the assignment without a supervisor present. The Grievant arrived at the Lake Superior Zoo at approximately 8:30 a.m. and left at approximately 12:30 pm. The Grievant did not request permission to leave the event early. One other employee also volunteered for the overtime assignment. The second employee had not worked this type of event before. That employee arrived at approximately 9:30 a.m. and also left at 12:30 pm or before the assignment was officially scheduled to end. This second employee testified at the hearing and explained that he had an altercation with one of the children in attendance at the event. The child repeatedly knocked down portions of the City's exhibit and behaved so poorly that the second employee, in a moment of anger grabbed the child by the arms before realizing that losing his temper did not reflect well on himself or the City. However, the employee was so flustered by the experience that he decided he had to leave and could not continue with the assignment. The Grievant did not witness this altercation as he was away from the exhibit hall in the midst of a phone call at the time. The second employee testified that when the Grievant returned and he relayed the story regarding his altercation with the child that the Grievant agreed they should break down the exhibit and leave. The second employee testified that they agreed to submit their end time as 2:00 pm rather than the actual time they left the event which was 12:30 pm.

Another exhibitor in attendance at the Earth Tracks event observed the two employees breaking down the exhibit and leaving the event early and telephoned the Grievant's supervisor about the early departure. When the supervisor confronted the Grievant, he became angry and claimed that he put down an extra hour of work in place of mileage and said that was normal practice. The second employee when confronted about submitting the full 5 hours for the overtime assignment admitted that he had "padded" his timesheet and gave the true number of hours that he was in attendance at the event. The employee also reported to the supervisor the information regarding his altercation with the child. The supervisor decided that the second employee should receive a one day suspension without pay for padding his timesheet. The supervisor decided that the Grievant should receive a two day suspension without pay for

padding his timesheet because he refused to acknowledge that he had in fact padded or lied about the amount of time he spent at the Earth Tracks event. The supervisor characterized the Grievant's conduct as a severe breach of conduct warranting suspension without a prior written warning. The Grievant maintained that the supervisor had informed them in the past to avoid questions from the City's accountants/auditors by substituting hours worked for mileage reimbursement due from a weekend work assignment. The supervisor denied every having informed employees to put hours instead of mileage on their timesheets. Other employees also reported having been told to put hours worked instead of mileage reimbursement resulting from a weekend assignment in order to avoid questions from auditors. The Grievant was asked what hours he wanted to claim for the weekend work but declined to request any hours worked that weekend after being confronted about the amount time originally requested. Neither the Grievant nor the other employee who worked the Earth Tracks event was entitled to mileage reimbursement.

Positions of the Parties

Employer's Position

1. The Grievant falsified a time record on May 8, 2010 and left work early without permission.
2. Falsifying the time sheet is a serious offense and is theft and therefore the discipline of suspension without a prior written warning satisfies the just cause requirement.
3. The Grievant was never told to substitute hours worked for mileage.
4. The Grievant was not due mileage because he did not come to the Garfield Station before heading to the overtime assignment on May 8, 2010 and did not return to Garfield Station when he left the assignment early that day.
5. The City has never had a policy permitting employees to substitute hours worked for mileage when they were eligible for mileage reimbursement.
6. The Grievant had not been told to do so and his co-worker who also volunteered

for the assignment on May 8, 2010 was not told to substitute hours worked for mileage that was due.

7. The second employee who volunteered for the overtime assignment acknowledged that he put down more time than he had worked that Saturday and essentially owned up to his conduct. That is why he received only a one day suspension without pay.
8. The Grievant, on the other hand, refused to acknowledge that he had done anything wrong and given his past record, the Employer felt a two day suspension without pay was warranted.
9. The conduct represents a severe breach and the discipline was fair and just.

Union's Position

1. The Employer did not have just cause to discipline the Grievant for substituting hours worked for mileage.
2. The Grievant was told by a supervisor/manager to place one hour of overtime on his timesheet rather than put down any mileage that was due.
3. Another employee who recently retired heard the same supervisor/manager instruct employees to avoid questions from City auditors regarding request for mileage reimbursements from weekend assignments where mileage reimbursement was due.
4. The retired employee explained that it was a practice that he followed as well.
5. The Grievant was employee of the year in 2006 and was only following directions regarding a practice that has been in place for several years.
6. The Grievant should be made whole and paid for four hours that he actually worked at the Earth Tracks program.

OPINION AND AWARD

The Parties' Agreement requires the Employer to impose discipline only for just cause. The Agreement restricts the Employer's ability to discipline employees in other ways as well. For example, the Agreement requires the Employer to issue a written warning prior to suspending an employee except in cases of a severe breach of conduct. (Agreement at p. 42) In this case, the Employer determined that the Grievant engaged in conduct so severe as to warrant suspension without a written warning. In order to determine whether the Employer had just cause to discipline the Grievant, it is necessary to evaluate the Employer's determination that the Grievant's conduct amounted to a severe breach of expected behavior.

It is clear that the Grievant did not work the number of hours he reported working during the Earth Tracks event. By his own admission when confronted by his supervisor, the Grievant said he put down additional time because he was entitled to a mileage reimbursement and that it was normal practice to substitute additional time rather than claim the mileage reimbursement due as a result of working a weekend assignment. The Union chose not to call the Grievant even though he attended the hearing. Without the Grievant's testimony, the arbitrator has determined that the statements put forth by the Employer and attributable to the Grievant should be given weight in this instance. The arbitrator's decision is supported by the fact that the Union not only conceded that the Grievant made the argument regarding the practice of substituting hours of work rather than claiming mileage due but bolstered that position by bringing forth corroborating witnesses. In short, there is no harm in giving weight to the hearsay evidence presented on this point.

Before discussing the issue of whether there was indeed a practice that existed as described by the Union, it is important to pin down the proper characterization of the Grievant's conduct. The Grievant worked four (4) hours at the Earth Tracks event. If there was a practice of substituting hours worked when a mileage reimbursement was due as a result of a weekend assignment, in order for the Grievant to be considered to have behaved in accordance with that practice, he would have had to both be entitled to a mileage reimbursement and to have properly recorded the time substituted for the reimbursement due. In this case, the Union established that at least two employees understood the formula to be "one hour of overtime in place of ANY"

mileage reimbursement due as a result of the weekend assignment. The Union did not, however, establish that the Grievant was even entitled to a reimbursement as a result of his work at the Earth Tracks event. It is clear that the Employer's policy does not provide mileage reimbursement to any employee simply for traveling from home to the work site or back home at the end of the work day. Mileage reimbursement only kicks in when an employee has to report to work and then proceed to another location to perform certain duties. For example, if the Grievant was required to pick up the exhibit used at the Earth Tracks event and transport it to the Zoo where the event was held, he would have been entitled to mileage reimbursement. Here, however, the exhibit was already set up and waiting for the Grievant when he arrived at the Zoo. Therefore, no mileage reimbursement was due. Likewise, upon leaving the event, had the Grievant packed up the exhibit and taken it back to work prior to making his trip home, he would have been entitled to mileage reimbursement. The Grievant did not take the exhibit back to work that day and therefore was not entitled to reimbursement for travel at the end of the day either. Therefore, even assuming a practice exists as the Union proffered, the facts revealed at the hearing make clear the Grievant was not entitled to mileage reimbursement for attending the Earth Tracks event. The arbitrator finds that the overwhelming weight of the evidence demonstrates that the Grievant knew he was not entitled to a mileage reimbursement but sought to claim one anyway.

When confronted, the Grievant was outraged and decided that he would accept no pay for the actual hours worked and simply wanted to ignore the entire matter in hopes that it would just go away. However, he did not acknowledge his intentional misrepresentation. That what the Grievant did was to intentionally misrepresent the hours worked is made absolutely clear by the testimony of the employee who served with him that day. That employee testified that he understood it was wrong to put down five hours when he actually worked three. When confronted by the discrepancy, he admitted his wrongdoing and corrected his time sheet. That employee also testified that he and the Grievant conferred both about leaving the event early and the exact amount of time to claim on the time sheet. Therefore, there is no doubt the misrepresentation was intentional. However, that does not mean that the conduct should be considered "a severe breach" permitting the Employer to bypass the critical requirement of a

written warning prior to suspension.

The arbitrator finds that the conduct while certainly worthy of discipline does not rise to the level required by the Agreement to suspend without a written warning. The Employer characterized the Grievant's conduct as something that could not be fixed as compared to paperwork errors. The Employer argued that the Grievant's lie was tantamount to theft of property and therefore no written warning was required. The arbitrator agrees that the plain result of the Grievant's conduct was to deceive his Employer into paying him for time not worked. In this case that was one hour of time. Lying or dishonesty with the intent to secure payment for time not worked is what the Employer claims makes the Grievant's conduct "a severe breach." But the employee who worked with the Grievant also did the same and received only a one day suspension. The Employer explained that the lesser penalty given to the second employee was due to his willingness to admit that he lied about the hours worked. Therefore, one day of the Grievant's two day suspension must be considered the result of his refusal to admit he lied about the hours worked. The Grievant, however, was responsible for returning the exhibit to the workplace. He did not do so that day but if he had he would have been entitled to a mileage reimbursement. The Grievant substituted one hour in exchange for the mileage reimbursement he felt he was due. Because the Grievant had in his possession the exhibit used at the Earth Tracks event and would have had to return it to the workplace at some point, it is clear that he did have an additional task that if executed on that Saturday would have entitled him to a mileage reimbursement.

The point is that given these facts, the Grievant's conduct cannot be considered severe enough to bypass the written warning required by the Agreement. Here, the Grievant was entitled to four hours of work, claimed five as a result of his belief that he was entitled to a mileage reimbursement and that he had permission to substitute an hour of work for the mileage reimbursement. Furthermore, the Grievant erred by failing to return the exhibit to the workplace on that Saturday in order to secure his entitlement to the mileage reimbursement. This conduct in and of itself can be considered sloppy but not severe. The arbitrator finds it is a practice that others engaged in as well. As one witness testified, "I followed this practice for weekend events too."

Also in determining the severity of the Grievant's conduct, it is curious that the other employee did not get more serious discipline. First, that employee knew he had no basis to claim entitlement to a mileage reimbursement but put down not one but two additional hours worked on his timesheet. Moreover, that employee's conduct raises serious concerns regarding his ability to represent the Employer at events involving children. As he testified, the reason he wanted to leave the exhibit early was because he had lost control of his temper as a result of a child attending the event. The child, according to the employee's testimony, repeatedly knocked over portions of the City's exhibit. The employee, who was working alone at the time, because the Grievant had left the area to make a personal call, said he grabbed the child by both arms and held him until he realized that others, especially the adults responsible for the child, noticed. The employee grabbed the child tightly enough that the child expressed pain. Realizing that he was creating a very bad situation and that he had lost control, the employee let the child go and decided that he could not continue to work the event. That is what he relayed to the Grievant when the two conferred and agreed that it was best to leave. The Employer did not discipline the employee for grabbing a child which obviously created a danger to the child and did not even mention the treatment of the child by a mature adult as playing any part in its decision to discipline.

The conduct of this second employee toward the child is without question "a severe breach." It was reckless, wanton, shocking, extreme, outrageous and flagrant. The lie told by the Grievant here, in other words, does not invoke the images associated with severe conduct. There is support for the Grievant's claim that substituting hours worked for mileage reimbursement due for weekend work was understood by other employees. Testimony by one now retired City employee was unchallenged by the Employer. He said he recalls his supervisor telling him to do the same, following the same practice and never being disciplined for doing so.

The Employer only inquired as to whether the witness had heard the supervisor tell the Grievant to follow that practice. The arbitrator concludes that considering all of the facts brought forth at the hearing of this matter that the Employer did not have just cause to describe the Grievant's conduct as severe and therefore did not have just cause to suspend the Grievant without first issuing a written warning.

However, it is also clear that even though the Grievant and some of his co-workers understood there to be a practice of substituting hours worked for a mileage reimbursement resulting from a weekend assignment that is not the same as concluding that a past practice existed regarding this matter in the workplace. Even though the evidence supports the notion that the supervisor informally allowed employees to put additional time down for weekend work resulting in a legitimate mileage reimbursement claim, it is clear that there was never an intention on the part of the Employer to adopt such a practice.

The Grievant's behavior more closely resembles the kinds of issues that he has been disciplined for previously. For example, the Employer introduced evidence demonstrating that the Grievant failed to submit his paperwork in a timely fashion, used inappropriate language in submitting his timesheet and failed to submit a full accounting of his daily activities. Here, the Grievant behaved consistently. He understood the requirements to be eligible for a mileage reimbursement, namely that it required driving other than going to and from the work site. Here the work site was at the Minnesota Zoo. The Grievant could have taken the Earth Tracks exhibit back to the workplace after leaving the event and would have been legitimately entitled to a mileage reimbursement. Instead of doing that he claimed the mileage reimbursement and obviously took the exhibit home with him. The Grievant had to return the exhibit to the workplace at some point but given the way he handled the matter no mileage reimbursement was due. This is simply another example of the Grievant taking it upon himself to decide when he would complete tasks and how he would describe his activities in the required paperwork.

The Grievant's conduct in this instance looks sloppy and dishonest but not "severe." The written warning issued to the Grievant in 2010 was designed to correct his sloppy work habits with regard to tardiness in processing his paperwork and refusal to account for a full eight hours of activity each day. That kind of omission could also be characterized as lying with regard to the paperwork requirement as well as sloppy. The Grievant's conduct in this instance is very similar to the behavior he was discipline for at that time. Rather than admit that he did not bring the exhibit back to work that day, he simply claimed the mileage reimbursement and obviously brought the exhibit back to work the next time he felt like doing so. He did not accurately account for his days work at the Earth Tracks event and made decisions regarding his work day

that would normally require permission from a supervisor, especially abandoning the work assignment earlier than scheduled.

As the Employer said in that 2010 written warning, failure to correct these performance issues may result in additional discipline up to and including dismissal. The Grievant's continued refusal to truthfully account for his daily activities and properly complete paperwork, in this case his timesheet, certainly warrants additional discipline. However, the arbitrator declines to endorse the notion that what we have here is a severe breach of conduct warranting suspension without a prior written warning. The arbitrator notes that the Employer did not describe the Grievant's conduct in the required notice as "a severe breach." Rather the Employer described the Grievant's conduct as follows: "Your behavior on May 8, 2010, was insubordinate, reflected poorly of the City in a public setting and showed deliberate disregard for the 'Earth Tracks' event. Falsification of your timesheet is a violation of the City's 'General Standard of Conduct' policy."

The Grievant was clearly insubordinate in that he made decision about the amount of time he would spend at the Earth Tracks event and did not consult with his supervisor about his decision to leave early. Had he done so, his supervisor might have in fact agreed that it was best to leave early in light of the incident with the child. Furthermore, the Grievant did falsify his timesheet in that he claimed time he had not worked and even under his theory claimed time not entitled to because he did not take the Earth Tracks exhibit back to the job site before going home that day. In any event, the Grievant should be disciplined for these performance lapses. However, the Agreement requires the Employer to bypass the use of a written warning only when the conduct is so severe as to be incapable of correction by use of that instrument. This case, while involving dishonesty did not rise to the level of recklessness or outrageousness required to be considered "a severe breach," especially since employees other than the Grievant had in fact substituted hours worked for mileage reimbursements due as a result of weekend assignments. In short, the Grievant did not make up a lie in order to pad his timesheet. But, he did lie about being entitled to a mileage reimbursement. Of course, he was still required to bring the exhibit back to the workplace at some point.

Award

The Grievance is SUSTAINED. The Employer did not have just cause to suspend the Grievant without first issuing a written warning. The Grievant is to be reimbursed for losses resulting from the two day suspension without pay. The Grievant is also entitled to payment of four hours wages for time worked at the Earth Tracks event. The Employer is entitled to substitute a written warning in the Grievant's file but must remove any reference to the suspension.

Respectfully submitted,

A Ray McCoy
Arbitrator

Date: January 20, 2012