

**IN RE ARBITRATION BETWEEN:**

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**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,  
AFSCME COUNCIL 5, LOCAL 66**

**and**

**SPIRIT MOUNTAIN RECREATIONAL AREA AUTHORITY**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS 16-PA-0396**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**April 4, 2016**

IN RE ARBITRATION BETWEEN:

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AFSCME Council 5

and

DECISION AND AWARD OF ARBITRATOR  
BMS 16-PA-0396  
Kelly Towns Grievance

Spirit Mountain Recreational Area Authority

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**APPEARANCES:**

**FOR THE UNION:**

Sandra Curtis, Business Representative  
Kelly Towns, grievant  
Joanne Schovein Steward

**FOR THE CITY:**

Steven Hanke, Attorney for the City  
Gretchen Ransom, Dir. of Mountain Services  
Ryan Able, Lift Mgr.  
Lisa Johnson, Manager of Campground Services

**PRELIMINARY STATEMENT**

The hearing was held March 17, 2016 at the Duluth City Hall. The parties presented oral and documentary evidence at which point the record was closed. The parties waived post-hearing briefs.

**ISSUE PRESENTED**

The parties stipulated to the following issue: Did the employer violate the contract when it issued a three-day suspension on May 1, 2015 to Kelly Towns?

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2012 to June 30, 2015. Article 26 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Bureau of Mediation Services.

**RELEVANT CONTRACTUAL PROVISIONS**

**ARTICLE 3 – MANAGEMENT RIGHTS**

The Authority and the Union recognize and agree that except as expressly modified in this Agreement the Authority has and retains all rights and authority for it to direct and administer the affairs of the authority and to meet its obligations under federal, state and local law, such rights to include but not be limited to, the rights specified in Minnesota Statutes, 179A.07, subdivision 1; ... to make and enforce reasonable rules and regulations; ... and any matters of inherent managerial policy, including but not limited to, such areas of discretion or policy as the functions and programs of the Authority, its overall budget, utilization of technology, the organizational structure, selection of personnel and direction.

## **ARTICLE 10 – DISCIPLINE AND DISMISSAL**

Section 1. After an employee has successfully completed probation, disciplinary action may be imposed only for just cause. Disciplinary action shall include only the following: written reprimand, suspension, dismissal.

Except in the case of a serious breach of discipline, any suspension or dismissal shall be preceded by a written warning.

Section 2. An employee shall be given the opportunity to have a union representative present at any questioning during an investigation that may lead to disciplinary action against the employee.

Section 6. Each employee shall be furnished with a copy of all performance evaluations or disciplinary entries in his/her personnel file and shall be permitted to respond. The contents of an employee's personnel file shall be disclosed to the employee upon his/her request. They shall also be disclosed to the employee's Union representative upon the written request of the employee. In the event a grievance is initiated under the Grievance Procedure, the Authority shall provide a copy of any items from the employee's personnel file, pertaining to the grievance, upon request of the employee.

## **ARTICLE 26 – GRIEVANCE PROCEDURE**

Section 1. Should any employee feel that his/her rights and privileges under this Agreement have been violated and/or a controversy or dispute arises as to the application or interpretation of any provision of this Agreement, said controversy or dispute shall be settled as provided herein.

## **ARTICLE 27 – SAFETY AND REPORTING OF INJURY**

... Employees covered hereby, in the performance of their jobs, shall at all times use safety devices and protective equipment which is furnished to them hereunder and comply with the safety, sanitary, and fire regulations issued by the Authority.

### **FACTUAL BACKGROUND**

The facts of this matter were straightforward. The grievant is a long time employee of the Authority, employer, and is currently employed as a lead worker. The evidence showed that her job can be quite stressful at times and that she can at times react in a less than professional way to the stresses of the position. Her evaluations showed that she is conscientious and very hard working.

Several of the recent evaluations contain comments regarding the need to remain calm and professional and that despite some strides made in that regard, there remained a concern. Union exhibit 3 contains a statement that the grievant "has made improvements in recent years as far as maintaining a calm and professional demeanor with both customers and employees." These statements imply that there had been problems in this regard in the past and that the grievant was aware of them.

Union exhibit 4 contained a statement as follows: “despite the stressful environment, I [her supervisor at the time] would really like Kelly to work on always maintaining a calm, professional and pleasant demeanor with her employees, co-workers, and the customers. We have talked about this in the past and have made attempts to improve, but I feel Kelly could continue working to find ways to alleviate the stress and ensure positive professional conduct at all times.”

These evaluations were from 2012 and 2011 but showed that there have been concerns raised over this in the past and that the grievant was aware of the potential problem.

There was also some evidence of prior warnings, both oral and written regarding a lack of professionalism towards guests and staff, see Employer exhibits at page 31. The written warning reflected at page 31 was from December 2014, only a few months before the incidents in question and again showed that there were concerns about professional demeanor in the workplace. See also, Employer exhibit at page 33, a warning notice regarding treating a customer rudely. See also, page 34.

Further, it was clear that the job description requires good customer service relations and the need to be respectful of guests and customers as well as staff. The employer is a ski resort and recreational facility that caters to campers, skiers, families with young children and the evidence showed that there is a need to be calm and professional in order to present a positive and professional attitude at all times.

We now turn to the events of April 29-30, 2015. The evidence showed that on April 29, 2015 the grievant was painting in a stairway area of the facility. Her manager appeared and saw that the grievant was barefoot at the time. The manager, Ms. Ransom, asked the grievant to speak to her privately and directed her to put her shoes on. Ms. Ransom explained that appropriate footwear is a requirement of both employer policy, see Employer exhibit at page 25-26 and OSHA requirements. Clearly, appropriate footwear is a safety concern and the manager’s directive to put her shoes on that day was reasonable.

The grievant questioned the policy and asked where that requirement could be found but eventually complied and put her shoes on. The shoes were approximately 100 feet away from where she was working and the manager's concern was that she could have stepped on something, slipped as the result of being barefoot or had something fall on her feet. There was also evidence that the manager has required other employees to put on shoes, or to put on better shoes, i.e. replacing open toed sandals with closed toe shoes, at other times and in other places within the facility.

For whatever reason the grievant became quite upset that day but eventually complied with the order and put her shoes on. There was no evidence that the grievant yelled or became upset beyond that on April 29<sup>th</sup> however and nothing further occurred at that time.

The following day the grievant appeared about an hour and a half early for work. The grievant lives about 25 minutes away from Spirit Mountain and had an earlier appointment in Duluth that day. Rather than driving all the way home only to have to turn around very shortly thereafter and come back to work, she decided to go to work and wait for her shift to start. It was not entirely clear where the grievant was at the time the incident on April 30<sup>th</sup> occurred. There was some claim that she was in an area accessible only to employees but the preponderance of the evidence showed that she was in a public area, watching a movie on her cell phone. She had taken her shoes off to relax and was not working at the time this incident occurred.

The manager walked by and saw that the grievant was again barefoot. The manager testified credibly that she calmly asked the grievant put her shoes on whereupon the grievant said that she was a "customer" and did not have to put her shoes on as she was off the clock and not working.

There was a dispute about what exactly was said next. The grievant indicated that at some point in the conversation the manager insisted that she put her shoes on and told her to do so or she would "write her up," presumably meaning that she would issue some form of employee discipline. The evidence was not completely clear but at some point the two left the immediate area and went outside where the grievant became far more upset.

When the manager asked the grievant what was so hard about just putting her shoes on the grievant became very angry, using profanity and saying that she was not on the F’g clock or words to that effect. This was done in a very loud voice and other employees noticed the disruption. See statements of Ryan Abel and Lisa Johnson. Both of those employees noticed the confrontation and saw that the grievant was visibly upset even though they could not hear the exact words being used. On this record it was clear that the grievant used profanity toward her supervisor several times in a very loud and angry voice.

The following day the grievant was issued a three-day suspension for refusal to wear appropriate footwear after being told to do so and for rude and unprofessional behavior toward her manager, Ms. Ransom, using profane language and repeatedly questioning the validity of the requirement.

The union grieved this in a timely manner and the matter proceeded to arbitration. The parties agreed that there were no procedural arbitrability issues and that the matter was appropriately before the arbitrator for consideration.

**EMPLOYER’S POSITION:**

The employer’s position was that there was no contract violation in the matter and that there was just cause for the imposition of a 3-day suspension on these facts. In support of this position the employer made the following contentions:

1. The employer contended that the violation of the requirement to wear appropriate shoes was a serious issue and that even though the grievant was not on the clock at the time the order was given on April 30<sup>th</sup>, she was still subject to the requirement to follow the directives of her supervisors.
2. The employer noted that the facility was closed to the public at the time this happened and that the grievant was not there “as a customer” but rather was there as an employee who arrived early and was waiting to go to work. Had she been there 5 minutes early the order and the violation would have been equally as valid.

3. The employer pointed to its own policy as well as OSHA requirements that appropriate footwear be worn to prevent injury or accident to employees or customers. The employer further pointed out that if the grievant had been injured in some way due to the lack of footwear, especially after being told the day before that she needed to wear shoes at all times when in the facility, there could well have been liability under the worker's compensation statute, Minn. Stat. ch. 176. It was for this very reason that the order was both reasonable and valid.

4. The employer also noted that the grievant's actions violated the time honored "obey now and grieve later" rule that has been part of the workplace landscape for decades. Here though, instead of complying with the reasonable directive of management, she not only failed to comply but argued and used profanity on several occasions, yelling directly in her supervisor's face during this encounter. This was both disrespectful and inappropriate in every way. It was also insubordination on two levels – first for failing to comply with the directive and second for her abusive tone of voice and language in yelling at her supervisor.

5. The employer also noted that had this been a single incident it might not have imposed a full 3-day suspension but the grievant has been told about her need to remain calm in her evaluations as well as having been disciplined for it in the recent past.

6. Finally, the employer asserted that there was no remorse shown or contrition demonstrated during any part of the grievance process. The grievant never apologized for yelling at Ms. Ransom or using the "F" word repeatedly. She has never demonstrated any showing that a mere written reprimand or other non-economic sanction would cause her to amend her behavior. Thus the suspension was deemed appropriate by management in this instance in order to impress upon the grievant the need to remain calm and not "fly off the handle" like this in the future.

7. The employer countered the claim that the grievant's prior discipline was not discipline as clearly contrary to the notices themselves. The prior warnings both oral and written were clearly given to the grievant and clearly showed that they were disciplinary.

8. Finally, the employer countered the union's claim that the employer had some obligation to give all disciplinary notices to the union. The employer acknowledged that it has to give them to the employee but the contract does not provide that such notices be given to the union unless there is a specific written request to do so. Here there was not; thus no violation of the procedure occurred.

The employer seeks an award of the arbitrator denying the grievance in its entirety.

### **UNION'S POSITION**

The union's position was that the employer violated the labor agreement by suspending the grievant under these circumstances. In support of this position the union made the following contentions:

1. The union repeatedly asserted that the grievant was not on the clock and was not being paid when the April 30<sup>th</sup> incident occurred. She was for all intents and purposes a customer and deserved to be treated as one.

2. The union also asserted that this is a ski resort, where people frequently run around in their stocking feet without shoes on. In fact, that is the very nature of this place – with people renting boots, or taking their boots off and on and walking around to various places in the area. The union and the grievant asserted that no customer has ever been told to put their shoes on while walking around in the public areas of the facility.

3. The union and grievant also introduced photos of staff members' children without shoes on inside the facility. No one told them to put their shoes on or to leave the facility yet the grievant is being disciplined for doing exactly what any customer might do. The union argued that the grievant was not there in the capacity of an employee at the time this occurred on April 30<sup>th</sup> and was not subject to management's direction. She thus had no obligation to follow any "orders" issued to her when she was off the clock.

4. The union pointed out that the grievant is an extremely hard worker who is both conscientious and loyal. Her job is a very high stress position and she comes to work every day with an attitude to get the job done.

5. The union asserted that this duplicitousness shows disparate treatment to the grievant and that she is being singled out by management for some reason. The union asserted that the grievant is being treated differently.

6. The union also asserted that Ms. Ransom threatened the grievant during the encounter on April 30<sup>th</sup> with discipline and that is why the grievant became upset. The grievant merely questioned the need for shoes when she was sitting in a chair watching a movie – just like any customer might have been doing in a similar situation.

7. The union also asserted that given her dedication to her job and the underlying notion that discipline should be corrective rather than punitive, the discipline issued here is overly harsh. There is no need to jump to a 3-day suspension here given the curious nature of the original order and the threat made by Ms. Ransom that touched off this verbal altercation in the first place.

8. The grievant asserted that the prior “warnings” were not really discipline but were rather simply reminders about her behavior. The union further asserted that many of these notices were not given to the union as required by the terms of the contract. Thus they should not be used as evidence of prior disciplinary action.

The union seeks an award of the arbitrator sustaining the grievance and making the grievant whole for all lost wages and contractual benefits due to the employer’s actions here.

## **DISCUSSION**

### **WAS THE ORDER TO PUT SHOES ON VALID?**

The initial question is whether the order given on April 30<sup>th</sup> was valid, since it was given to an employee who was off the clock but on the employer’s premises. It was a bit surprising that such a simple set of facts gave rise to a somewhat complicated analysis. Clearly, the grievant was on premises yet she was off the clock.

The general rule is that employees' off duty conduct is not subject to the employer's control or direction. Here however, the facts are different from the "typical" off duty conduct case as the employee was there because she was an employee. She was not there as a customer – as one could be in an off duty status here to engage in skiing or some other activity that customers of the facility might do. The facility was not open to the public at the time this incident occurred. The grievant was there as an employee but who simply showed up early for her convenience.

Elkouri notes as follows: "Off-duty employees have a general obligation to observe plant rules while on company premises. They may be subject to discipline for their misconduct, even though the misconduct (which will often adversely affect employee morale, discipline, or other legitimate company interests) occurs while they are off duty and in a nonworking area of the plant, such as the company cafeteria or parking lot." Elkouri and Elkouri, *How Arbitration Works*, 7<sup>th</sup> Ed BNA Books at section 15.3.A.ii at page 15-14. Elkouri cites to several cases where employees were disciplined for misconduct even though they were off duty and were off premises but only a short distance away.

Elkouri notes that this rule is not absolute. In one case an arbitrator refused to sustain the discharge of an employee who engaged in a fight with a co-worker at a company picnic where the fight was quite probably related to alcohol provided by the company. See, *AFG Industries*, 87 LA 1160 (Clarke 1986). See also, *Texas Utilities Generating*, 82 LA 6 (Edes 1983); *Greyhound Exhibit Group*, 89 LA 925 (McIntosh 1987), both of which involved drug offenses occurring off duty.

Elkouri further notes that "even when off duty conduct on company premises occurs, the employer must prove that off-duty, on premises misconduct has a nexus to the employer's legitimate business interests in order to subject the offending employee to employer discipline." Elkouri at section 15.3.A.ii, page 15-14 and 15-15. Citing *Providence St. Peter Hospital*, 123 LA 473 (Gaba 2006), there the arbitrator reduced the penalty to a written warning, from discharge, where an off duty employee threatened a hospital security guard. The arbitrator ruled that the fact that the altercation occurred on company premises with another employee was sufficient to establish nexus, just as here.

Here there was a nexus to the work given that the grievant was on company premises a short time prior to the start of her shift. Further, she engaged in a verbal altercation with a supervisor. The union argued that the evidence did not firmly establish what safety concerns were really involved while she engaged in that activity since the grievant was watching a movie while sitting in a chair. The overall record thus showed that the order given might have been in some measure about exerting control over the employee rather than alleviating any risk to her sitting there with her shoes apparently next to her while watching a movie waiting for her shift to start. The employer implied that the grievant may well have been testing the limits of the order given only a day before. On this record it was not completely clear whether either of those was the case but there was something afoot between the two people involved in this exchange that caused it to become so heated on April 30<sup>th</sup>. At the end of the day, whether the order was reasonable (although a strong argument can be made that it was despite the grievant's off duty status at the time) was not the deciding factor.

The facts revealed a mixed bag of analytical forces that appear to cut in both directions. The grievant was on premises and was there not as a customer but rather as an employee. She engaged in a heated verbal altercation, discussed more below, with a supervisory employee. These factors supported the employer's claims insofar as establishing a nexus to the work place was concerned.

On the one hand, the employee was off duty and was not engaged in an activity that was shown to subject her to any special or increased risk. While this case is not about whether any injury she might have sustained would or would not be covered by worker's compensation, recent decisions in *Dykhoff v Xcel Energy*, 840 NW 2D 821 (Minn. 2013) and *Henson v Uptown Drink*, No. A15-0493, (Minn. App Dec. 21, 2015) (unpublished) might have undercut a claim to a work related injury.<sup>1</sup>

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<sup>1</sup> Both cases require a clear nexus to the work activity in order to establish a work related injury. In *Henson*, the employee was off duty and injured in a fight with a customer. Even though the fight took place on premises the Court of Appeals held that it was not work related since there was no nexus to work and the employee was not engaged in activity in furtherance of the employer's interests. Likewise, the grievant was not engaged in any such activity here either and was simply there early awaiting the start of her shift. While there might be circumstances where an injury might have been covered, had the employee been doing something else, those facts are not involved here. This result is governed by these unique circumstances and facts.

On the other hand, there are also reported cases of employees injured on their way into work or where they were off the clock at the time of injury where liability under the Minnesota Workers Compensation Act was found. See, *Hohlt v University of MN*, No WC15-5821 (W.C.C.A. February 3, 2016) (appeal pending); *Villarreal v AAA Galvanizing*, No. WC13-5575 (W.C.C.A. October 4, 2013); *Jensen Linnell v ISD 831*, No. WC10-5197 (April 29, 2011); *Moe v University of Minnesota* No WC 08-208 (W.C.C.A. April 27, 2009). While this case is not about worker's compensation injury per se, it was certainly about preventing one since Ms. Ransom was quite specific in her directive to the grievant and at the hearing that she was concerned about preventing possible injury.

These cases demonstrate that the facts very much govern the eventual result, which appears on this record to be exactly what Ms. Ransom was trying to avoid in giving the directive. It was not clear whether any injury sustained on April 30<sup>th</sup> before the grievant was actually working would have been covered by worker's compensation and there would have been no way to know that until the injury happened. All the more reason to take steps to prevent it. On this record the directive to put her shoes on was not unreasonable given the circumstances. We now turn to the remaining claims and defenses raised by the union.

### **PRIOR WARNINGS AND DISCIPLINARY ACTION**

There was also little merit to the claim that the prior warnings were not disciplinary. They certainly were and say so in bold type on the front page. While the grievant may have seen them as advisory they were disciplinary warnings, and at least one of them was for a similar type of a conduct.

Further, there was little merit to the claim that the employer could not use those prior disciplinary notices and warnings in support of the degree of discipline because the employer failed to give the union appropriate notice. The union claimed that all disciplinary notices must be given to the union but the contract did not provide for that.

The grievance procedure cited above requires that the employee shall have the right to have a union representative present at any questioning regarding discipline and that the contents of an employee's personnel file shall be disclosed to the union upon the written request of the employee but there is no automatic requirement to provide the union with each and every disciplinary notice as the union alleged. There was also no evidence of a written request for that information filed by the grievant in this case.

### **DISPARATE TREATMENT**

Likewise, there was no evidence that the grievant was singled out for disparate treatment on this record. Ms. Ransom also testified credibly, and the overall record supported, that she has directed other employees to do the same, i.e. put on appropriate footwear, when she has observed others with sandals or without appropriate shoes.

The grievant also testified credibly that if she had been on the clock and had been working, she would have worn her shoes, since she had been told to do so the day before. Having said that, had the grievant simply obeyed then and grieved later the result might well be quite different. Here though her reaction to the order was inappropriate. Ms. Ransom testified credibly, whether she threatened to "write the grievant up" or not, that the grievant swore at her repeatedly and became very agitated to the point of yelling directly in Ms. Ransom's face. It was clear that this was inappropriate behavior, even though it was off duty, because it occurred on premises with a supervisory employee. Others could have heard it and the evidence showed that this was in a relatively open and public area. While there were no customers there, other employees were exposed to the events and the coarse language. The grievant's actions in response to the order on April 30<sup>th</sup> crossed the line.

There was little question on this record that the grievant's reaction to the order given by the supervisor was inappropriate – whether the order was valid or not. In spite of the competing policies both for and against the argument on whether the order was reasonable or not, the overall record here

established the order was certainly not unreasonable nor was it shown to have been difficult or burdensome for the grievant to comply with.

The remaining question is what to do with this. The order itself given on the 30<sup>th</sup> was perhaps unnecessary given what the grievant was actually doing at the time the order was given. Had the grievant simply complied with it and not engaged in the profanity and shouting that ensued this case might not have proceeded the way it did. She did however engage in the very sort of unprofessional behavior she had been warned about in the past. While there were no customers there that fact did not soften the result. Neither did the fact that the other employees there did not hear all the details of the altercation. As noted above, the grievant's reaction to Ms. Ransom's request was the determining factor here.

Several options were considered. The option of sustaining the grievance in its entirety was rejected due both to the arguably reasonable nature of the order on the 30<sup>th</sup> and the grievant's history. The grievant's claim that she did not understand the prior warnings, especially those about unprofessional behavior in the workplace rang hollow. These were clearly disciplinary notices and warnings and are entitled that at the very top of the notices.

Some thought was devoted to "splitting" the consequences given the nature of the order. That too was rejected as an arbitrator should not second guess the motivations of a supervisor in these circumstances. This is not to say that a penalty may not be reviewed or changed. They can and frequently are when reviewed through the lens of appropriate just cause. Here though the grievant's actions had consequences and while a 3-day suspension might seem a bit harsh given what happened and the fact that the grievant had been issued written warnings in the past but no shorter suspensions, it was not so unreasonable as to fail under a just cause analysis. The grievant had been given multiple prior written warnings and had been told about her need to remain calm and professional in response to stressors like this. On this record, a more serious consequence was not unreasonable.

Accordingly, on this record, the grievance is denied for the reasons set forth above.

**AWARD**

The grievance is DENIED as set forth above.

Dated: April 4, 2016

AFSCME #5 and City of Duluth.doc

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Jeffrey W. Jacobs, arbitrator