

**IN RE ARBITRATION BETWEEN:**

---

**UNIVERSITY OF ST. THOMAS**

**and**

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 120**

---

**DECISION AND AWARD OF ARBITRATOR**

**FMCS CASE # 060504-55873-7**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**March 12, 2007**

IN RE ARBITRATION BETWEEN:

---

University of St. Thomas,

and

DECISION AND AWARD OF ARBITRATOR  
FMCS CASE # 060504-55873-7  
Dominic Tacheny grievance matter

Teamsters Local 120.

---

**APPEARANCES:**

**FOR THE UNION:**

Martin Costello, Hughes & Costello  
Dominic Tacheny, grievant  
Harry Villella, Union steward

**FOR THE UNIVERSITY:**

Phyllis Karasov, Moore, Costello & Hart  
Edna Comedy, Assoc. V.P. Human Resources  
Kirsten Ireland, HR Partner  
Wes McCarty, PHP Supervisor  
Gerald Anderley Assoc. V.P. for Facilities  
Steve Uhls, Manager of Cust. Services

**PRELIMINARY STATEMENT**

The hearing in the above matter was held on January 31, 2007, at the Minneapolis Campus of the University. The parties presented oral and documentary evidence at that time. The parties presented post-hearing Briefs, which were e-mailed to the arbitrator on February 16, 2007 at which point the record was closed. Appearances were as noted above.

**ISSUES PRESENTED**

The issues as framed by the arbitrator are as follows: Did the University have legitimate business reasons within the meaning of Article Three, section 1 of the collective bargaining agreement to terminate the grievant? If not what shall the remedy be?

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement covering the period from February 1, 2005 to January 31, 2008. Article Three provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service.

## **UNIVERSITY'S POSITION:**

The University took the position that it had legitimate business reasons to terminate the grievant for his conduct on March 6, 2006 and for the long history of insubordinate, harassing and otherwise inappropriate communications to co-workers and supervisors. He has been warned repeatedly, including 3 separate written warnings to refrain from using profane, or abusive language and continued to do so until the University had no choice but to terminate him for his conduct. In support of these contentions the University made the following contentions:

1. The grievant has been employed as a Building Service Worker since 2001. He was well aware and has been specifically advised of the University's policies against work place harassment and the requirement to maintain a respectful demeanor in and around the workplace.

2. Despite this, the grievant has a long and very checkered history of problems in this regard. The University offered numerous examples of the grievant's difficulties in getting along with his co-workers, threats to co-workers, abusive language towards co-workers and supervisors and a plethora of phone messages in which the grievant criticized co-workers for their failure to do their jobs and criticizing supervisory staff for their failure to do anything about it.

3. The grievant has insulted his supervisor by saying such things directly to him as "do you even have a high school education" and "you're a joke" and "you don't know how to manage people." In addition, the grievant continues to leave voice mail messages regarding his co-workers' ability to do their jobs, sometimes several within a very few minutes of each other and many times very critical of his fellow workers and supervisors.

4. These are but a few examples of the kinds of communications the grievant has engaged in over the years. The grievant never denied making these statements at the hearing.

5. The grievant was also given 3 specific written warnings about this very sort of conduct in the past along with several meetings to discuss his inappropriate behavior in the workplace. Management met with him in April of 2004 to discuss his behavior and the inappropriateness of leaving multiple voice mails about his co-workers. They issued a general letter in May of 2006 to all Building Service Workers advising them of the need to be respectful in the workplace. The grievant got that letter and there was some evidence to suggest that his conduct was what precipitated it.

6. The University issued a warning letter to the grievant in July of 2004 in connection with an incident of a few weeks earlier in which the grievant swore at 2 co-workers, one of whom was the Union steward. Those employees filed a complaint with Public Safety and a report was filed on that.

7. The University issued him a written warning in August of 2005 by Gerald Anderley for an incident involving another co-worker and for threats made against that co-worker and to his supervisor. The letter advised him that further incidents of this kind would be subject to discipline including termination. The grievant did not grieve either of these written warnings.

8. In December of 2005 he had another interaction with a co-worker which again required the intervention of Public Safety personnel. This was grieved but was not pursued past the grievance steps in the agreement. The Union attempted to “hold the matter in abeyance” but that procedure does not exist in the agreement between the parties and the University sent a letter to the Union indicating its disagreement to hold the matter open. It further outlined that the grievance would either have to be dropped or proceed to arbitration. The Union did not take further steps to proceed to arbitration and the University considered the matter dropped at that point.

9. The University pointed to the provisions of the collective bargaining agreement at Article Three, section 1 as follows:

The Employer shall have the ability to discharge an employee for legitimate business reasons and shall give at least one (1) warning notice in writing to the employee affected and the Union. ...”

10. The University gave 3 written warnings for the very same behavior. Further, contrary to the Union's assertion, the traditional just cause analysis may not be used here since the employer retained the right to discharge for "legitimate business reasons." Other arbitrators have held that such contractual language sets a different standard for determining the appropriateness of employee discipline. See *Fillmore County and LELS*, BMS 97-PA-132 (Miller 1997). Thus a much lower standard of proof applies.

11. The University argued further that even if the traditional just cause standard were to apply there is still ample justification for discharge. Ms. Comedy testified that she felt the grievant should have been terminated for the December 2005 incident and that the University was being too generous with him given his history.

12. The incident giving rise to the termination occurred on March 6, 2006 during a meeting with the grievant, his Union steward, Ms. Ireland and Mr. McCarty to discuss work issues. This meeting was not established as a disciplinary meeting but was rather to discuss some work issues involving the grievant. What happened at the meeting was not disputed. Mr. McCarty presented his findings about deficiencies in the grievant's work and accused him of slowing down deliberately. The grievant told Mr. McCarty that he was "a bald faced liar" and that he "could burn in hell." He repeated this at least once. The meeting ended after Mr. McCarty indicated he felt threatened. The grievant was terminated the next day for violating the work rules in place and for his disciplinary history.

13. The essence of the University's case is that the grievant has a long and somewhat sordid history of workplace issues and has been warned repeatedly about the need to refrain from the exact type of conduct he exhibited on March 6, 2006. The University argued that the grievant "doesn't get it" when it comes to acting appropriately in the workplace and that the University had simply had enough. There was no reason to believe that he would or could change his behavior and the University was left with no realistic alternative but to discharge the grievant.

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

## **UNION'S POSITION:**

The Union's position is that the grievant's conduct on March 6, 2006 was not threatening and was not in violation of any of the workplace rules in effect. The Union further argued that the multitude of prior instances relied upon by the University are of no evidentiary value and should not be considered in determining whether to discharge the grievant here. In support of this position the Union made the following contentions:

1. The grievant has been with the University since 2001 and is by all accounts a very hard working and dedicated employee regarding his duties. He has never, except for the incident of March 6, 2006, been accused or found to be shirking his duties. The grievant vehemently denied doing so in the March 6<sup>th</sup> meeting as well.

2. The Union argued that the grievant has been the victim of harassment by co-workers in the past as well and that his complaints about that fell on deaf ears.

3. The Union pointed to the multiple voice mail message transcripts and argued that in none of these was he disrespectful or abusive. In most he introduces himself on the tape (these were never anonymous messages left to simply harangue anyone) usually indicated the time of the call and what the concern was. He would say that work that was suppose to be done was not being done or would raise whatever concern he had. He was never yelling or shouting on these calls and at no time ever threatened anyone.

4. The Union pointed to one particular conversation in which the grievant made an oblique reference to an incident at UPS a few days before the call. The University took that to mean that the grievant was threatening violence. One only has to read the transcript to understand that the grievant was concerned about a co-worker, a Mr. Hernandez, to see what he clearly meant. The message was about Mr. Hernandez' abusive behavior and his erratic actions. The grievant was very concerned about this and was raising the issue that Mr. Hernandez had a bad temper and might be a person likely to be violent.

5. While he did get two written warnings that were not grieved he indicated that he never did yell at the co-workers but instead yelled something at another driver who had cut him off. The co-workers simply mistook his statements to be directed at them when they were not.

6. The Union argued that the grievant is a dedicated and very hard worker and does get concerned when he sees inadequate work being done by co-workers. He believes it is his responsibility to bring these concerns to supervisory staff so that they can be addressed. He became frustrated when nothing was done to correct co-workers' deficiencies. No one ever told him he was not allowed to bring these concerns to the attention of management. In fact they told him the opposite and indicated that he was to bring these concerns up but must do so in a respectful manner, which he always did.

7. The Union also argued most ardently that the past issues should not be considered by the arbitrator here since they did not form the basis of the discipline here. The Union argued that the sole incident under consideration should be limited to the March 6, 2006 incident and whether he violated the University's rules on workplace respect and harassment.

8. Turning to that meeting specifically, the Union argued that the grievant went as directed to the meeting with his steward. In that meeting, Mr. McCarty accused him of essentially a workplace slow down in protest of some sort for what was going on at work. The grievant took great offense to this since he takes such pride in his work. Instead of becoming angry he simply told him that this statement was a "bald faced lie." He then indicated that Mr. McCarty could "burn in Hell" for such a statement. The grievant is a religious individual and takes the Biblical prohibition against bearing false witness very seriously. The Bible teaches that doing so can result in a person burning in Hell. The grievant never raised his voice, never made any sort of movement or gesture that was threatening or intimidating in any way. For Mr. McCarty to say that he was "threatened" by this statement is disingenuous at best. When the grievant attempted to apologize immediately after Ms. Ireland and Mr. McCarty stormed out of the meeting, his entreaties were rebuffed and the meeting ended.

9. The Union noted that he was allowed to return to work the next day before being fired. If the University had truly believed we was a threat they would have terminated him right on the spot on the 6<sup>th</sup>, but they did not.

10. The essence of the Union's case is thus that the grievant's behavior on March 6, 2006 in no way rose to the level of a threat nor did it violate any University policy or directive regarding workplace communication. He was respectful and was simply giving his opinion regarding unfounded and untrue accusations that were leveled at him. Moreover, his history of warnings should not be used to establish the truth of the allegations made that formed the basis of the termination. Many are hearsay, most were innocuous and none showed the type of behavior the University claims he exhibited.

The Union seeks an award reinstating the grievant to his former position with the University with full back pay and all accrued contractual benefits.

### **DISCUSSION**

Many of the essential facts are undisputed while some were very hotly contested indeed. The grievant was hired as a Building Service Worker in 2001. By all accounts he does a good job in that capacity and was a dedicated and hard worker who did a good job performing his duties insofar as the cleaning and other job related duties were concerned.

His history of workplace communication and interaction with co-workers and supervisors was quite another story however. The record reveals that he has a very long history of disputes with co-workers about a variety of matters and that he has raised concerns about their job performance on multiple occasions. The University put into evidence many voice email messages from the grievant to various officials in which the grievant raised concerns about being harassed without any real details about that and about others not doing their jobs. He continued to raise these concerns for years. A review of these messages shows however that he did not act inappropriately in any of the messages.

He never threatened anyone in any of these communications nor did he indicate that he would resort to any other action that could reasonably have been perceived as a threat. These messages in and of themselves, while probably annoying to the University, did not constitute the basis for disciplinary action. He was never told he could not make these calls nor was he ever disciplined or warned about the content of any of them with perhaps the exception of the UPS comment raised regarding Mr. Hernandez. In that message the grievant told his supervisor about an incident at UPS wherein apparently some workplace violence occurred. Reading that message shows clearly that the grievant was talking about Mr. Hernandez as the potential threat and is asking the University to do something about Mr. Hernandez. There was no evidence to suggest that the grievant was threatening any sort of workplace violence in that message.

Of more concern is the history of written warnings given to him over the course of approximately a year and a half prior to the March 6, 2006 incident. He was given a written warning in July 2004 for an incident in which the grievant swore at two fellow employees as he left work. The grievant claimed that these comments were directed at another driver who had cut him off. This statement was not found to be credible however. This appears to be the first time this was raised and did not appear to have been something the grievant indicated at the time he was given a formal written warning about this incident.

It is clear, as will be discussed below, that the University need only give one written warning under the terms of the collective bargaining agreement prior to discharge so employees should know that a written warning is a serious matter. For an employee to receive such a warning and not raise a defense to it, not grieve it and then raise this sort of claim many months afterward, in the face of a termination, undercuts the credibility of such a statement made now. The evidence shows that he in fact did swear at fellow workers in June of 2004. That however does not mean that he was guilty of any of the March 2006 conduct as alleged.

It is axiomatic that prior discipline may not be used to determine the truth or falsity of accusations regarding the present incident but may be used to determine the level of appropriate discipline. It should also be noted that the multiple prior messages in 2004 and 2003 were not considered in this matter. These were not disciplinary in nature and were made in an attempt to cast aspersions in the grievant's character. What was considered were the 3 prior written warnings, the lack of any grievance on the first 2 of these and the apparent dropping of the grievance on the 3<sup>rd</sup> of these warnings, and the grievant's continued inability to conform his conduct to the legitimate desires of the employer in this case.

The grievant was again disciplined for comments made to the supervisor in the summer of 2005. He was given a written warning in August 2005. This was apparently for comments made to his supervisors. Neither of the above warnings were grieved and are now a part of the grievant's record. As noted above, they were not considered for the purpose of proving the truth of the allegations in the March 2006 incident but were considered to determine the appropriate level of discipline.

Finally there was the December 2005 incident involving Mr. Hernandez. The grievant was given yet another written warning for the incidents of December 15, 2005. This was troublesome since it very much appears that Mr. Hernandez was the instigator of this incident and that for whatever reason the grievant was given a written warning about it. None of the voice mail messages show a threat of any kind and it was clear as noted above that the grievant's comments about the incident at UPS were clearly not a threat. The record shows that this was grieved initially but that the matter did not proceed to arbitration. It was essentially dropped after the University would not agree to hold the matter in abeyance.

Moreover, the merits of that written warning were not brought before this arbitrator and there was no jurisdiction conferred to address that allegation or that grievance. As such there is no jurisdiction to determine the merits of that in this context and since the matter appeared to have been

dropped, it must be taken at face value. The record thus shows that there were 3 prior written warnings for very similar conduct and that this conduct is also quite similar to the conduct of March 6, 2006.

Turning now to that incident it is clear that there are few factual disputes about what happened at that meeting. The grievant attended a meeting with Ms. Ireland and Mr. McCarty along with his Union steward, Mr. Villella. During that meeting Mr. McCarty accused the grievant of a work slow down and accused him of not doing his job properly. The grievant disagreed with this and did then say to Mr. McCarty words to the effect of “you’re a bald faced liar” or “that’s a bald faced lie.” He also told him that he could or would “burn in Hell” for such a statement. The grievant testified that Biblical teachings show that a person bearing false witness in violation of one of the Ten Commandments would burn if the fires of Hell for doing so. He apparently said this on more than one occasion.

The meeting abruptly ended when Mr. McCarty indicated that he felt threatened. The facts do not show that the grievant raised his voice nor did he make any movement or gesture that could reasonably be perceived as threatening. Given these facts it was not reasonable that Mr. McCarty would have felt threatened. These statements, while inappropriate, were not threatening in any way.

The question however is not whether they were threatening in a physical or even in a verbal way but rather whether they constituted a “legitimate business” reason sufficient to warrant discharge. They do on the unique scenario and the somewhat unique contractual language presented here.

An arbitrator’s jurisdiction derives from the contract. Here, contrary to the Union's assertion that a more traditional “just cause” disciplinary standard applies, the language in the relevant provision of the collective bargaining agreement does not say that and one cannot be implied. If the contract were silent perhaps this would be a different inquiry but the contract says clearly that the University need only show “legitimate business reasons” for discharge.

It further requires one written warning to the employee and to the Union of the conduct complained of. Here there were three. As Arbitrator Miller found in the Fillmore County matter cited above, this is a slightly different and somewhat lower standard for the employer to meet. The

University is correct in that it must show some legitimate reason for termination. Here it has. The University gave the grievant 3 separate written warnings of the conduct it felt was inappropriate. Moreover, for whatever it is worth, the grievant did not appear to stop his behavior despite these warnings. Finally, the record showed that its need to maintain a respectful workplace was legitimate and that the grievant was undermining that legitimate goal.

If a more traditional just cause standard had been required, this case may have been decided quite differently. A just cause standard allows for more discretion to determine whether the punishment imposed is appropriate for the proven violation and would also have allowed a broader discussion of the context in which the March 6, 2006 incident occurred. This did not occur in the work area in the sight or hearing of co-workers. These comments were made in the context of a meeting with the Union about workplace matters involving the grievant. Under a just cause standard an analysis of the reasonableness of the rule alleged to have been violated as applied in the context in which the employer is attempting to use it may also be appropriate. The standard in this contract thus allows the University's case to prevail.

The evidence thus established that the University had "legitimate business reasons" on these facts to terminate the grievant. The grievance must therefore be denied and the discharge sustained.

### **AWARD**

The grievance is DENIED. The parties shall bear the costs of the arbitrator's fee equally as set forth in the statement attached to this Award.

Dated: March 12, 2007

St. Thomas and IBT 120.doc

---

Jeffrey W. Jacobs, arbitrator