

CASE: BISHOP #1

OPINION

In the matter of voluntary arbitration:

SOMEPLACE, Michigan
Employer

MERC Arbitration Case No.
A06 A-0003

-and-

Mr. J BEAR/Discharge

Union

Appearances:

For the Union: TN, Business Agent

For the Employer: LL, Atty.

BACKGROUND

Mr. BEAR, having approximately twenty-four (24) year's seniority, with the City of SOMEPLACE was discharged by notice of a termination letter dated December 19, 2005. Since subsequent grievance meetings following the Union protest failed to resolve the question of whether or not the discharge was too severe a punishment, the matter was submitted to arbitration. On April 26, 2006, testimony was heard. Post hearing briefs were subsequently filed by both parties and were exchanged simultaneously by the Arbitrator's letter dated May 28, 2006.

On December 8, 2005, Mr. BEAR was an employee of the SOMEPLACE Public Works, (DPW). His duties consisted primarily of maintaining the roads in the city, which in winter months involved plowing snow and salting the roads. In the course of his employment BEAR

developed a series of small projects that would, in his estimation, improve city streets. Sometimes he had supervisory approval for these projects, other times there was no supervisory approval, but there were no repercussions from supervision for this work.

One improvement project where he asked for supervisory approval and did not receive it involved streets that were not in the city and adjacent to a railroad right-of-way. He asked to do this project and twice was told not to do the project. This dispute arises over the fact that he went ahead with the project on December 6 and December 8, 2005.

EMPLOYER'S POSITION

The Employer's position is best summed up by the termination letter dated December 19, 2005 which reads in part

In conclusion, your actions during the time in question violated sections of Appendix B "Offenses", of the Local labor agreement:

1. Group II g - (Willful disobedience to the proper directive of a supervisor or other acts of insubordination). As stated above, you were told not to do this project by at least two different supervisors, at different times. You chose to willfully disobey these orders.
2. Group II a - (Unprofessional Conduct). You stated that you had no intention of reporting this "extra" activity. You specifically chose this time of day because there was less chance of detection by your supervisor. This occurred on two separate occasions, the 6th & 8th of December relative to the same project. You chose to willfully deceive your supervisors.
3. Group III a (The willful misuse of City property). You stated that you used salt/plow truck to grade and checkout this area. You stated that you used two different loaders to grade this area on different occasions and broke the key in one of the loaders. You stated that you also had to use a pick up truck to return

- to the area.
4. Group III b (The removal from the premises, without prior authorization, of any city records, confidential information of other city property, except as necessary in the performance of an employee's duty). You took city property, specifically city equipment, to that location to accomplish a task that was not assigned to you. Not only on this occasion, but by your own admission, you used similar (unassigned) equipment on December 6, 2005 in that location, as well. This was done with the full knowledge that your supervision had not granted you permission to do so.
 5. Group III d (Knowingly falsifying any time keeping records, or intentionally giving false information to anyone whose duty it is to make such records.) Your time sheet for the evening of December 8, 2005 indicated eight (8) hours of overtime salting/plowing and the equipment listed was truck number 40638. You admitted that you did not spend 8 hours of overtime salting and plowing as indicated on your time sheet. Rather you spent time grading property to benefit the residents of SOMEPLACE Township and you also spent time talking with a male resident of that area. None of the extra equipment or time spent on non-assigned duties was listed on your time sheet. You admitted that this was intentional on your part.
 6. Group III d (Knowingly falsifying any time keeping records, or intentionally giving false information to anyone whose duty it is to make such records): You admitted to being in the same location on December 6, 2005, doing similar work for about 45-60 minutes. Your time sheet for that day does not reflect these actions or additional equipment, nor did a supervisor assign you to such a task. You admitted that this was intentional on your part so as to not draw attention to the fact that you had worked on this project without authorization by supervision.

UNION'S POSITION

The Union's position is that the discipline imposed by the Employer is too severe.

DISCUSSION

I. The willful disobedience to a proper directive of a supervisor, referred to as a Group II g offense under the Agreement (Joint exhibit number 1), is based on the fact Mr. CATS

testified that he informed Mr. BEAR not to do the work on MAIN and PORTERA Streets. Mr. BEAR testified that he thought the directive meant "not at this time". It does not mitigate the fact that he had received a directive and chose not to approach the Employer again with a request to do the work prior to performing that work. Mr. BEAR's insistence on doing this work when told not to do so is clearly an act of insubordination.

2. The Unprofessional Conduct, referred to as a Group II a offense, is based on the fact that Mr. BEAR chose to willfully deceive his supervisors. If that is so, then Mr. BEAR has been deceiving his supervisors for several years when he engaged in projects without prior authorization from his supervisors. (Union Exhibit No. 13)

3. The willful misuse of city property is referred to as a Group III a offense. It is difficult to give this offense the degree of severity that the Employer implies given the history of projects completed with various pieces of equipment without prior authorization from supervision.

4. The removal of city equipment from the premises without prior authorization... of other city property is referred to as a Group III b offense. Again, it is difficult to give this offense the degree of severity that the Employer implies given the use of city equipment prior to this event that was not specifically authorized by the city.

5. The falsifying of time records is referred to as a Group III d offense by the Employer. This is an offense that both the Union and the Employer representatives testified to as being accurate for up to the first six hours of a shift, but were not always accurate as to equipment used for the last two hours of a shift.

6. The Group III d offense listed by the Employer as knowingly falsifying time keeping records... is essentially a repeat of the Group III d offense listed above, with the exception

that this offense occurred on December 6, 2005. Indeed, it clearly shows that had Mr. BEAR not admitted to using city equipment during the last 45 to 60 minutes of his shift, the Employer would not have ever known about the use of the equipment on December 6, 2005.

Mr. CATS and Mr. BEAR testified to the fact that time sheets are not always accurate. They said that the time sheets reflect what happens in terms of equipment and work at the beginning of a shift. It was not an uncommon practice to deviate from the assigned work, or get additional equipment, during the last two hours a shift without amending or correcting the time cards or records.

The Employer can't have it both ways. On one hand the Employer allows and even expects employees to be motivated to direct some of their own work and to correct minor problems without supervisory authority. On the other hand, the Employer has allowed a practice to prevail where individual employees use Employer resources to correct minor problems with little or no oversight during the last two hours of a shift. Consequently the Employer should not fault employees if they do not get supervisory permission right down to the last minute of a shift and/or require them to account for all equipment and materials used.

The Employer has the right to supervise employees, to inventory materials, and regulate the use of equipment, but the Union's exhibit No. 13 shows that considerable latitude has been given to employees to use the own initiative in determining what work is to be done. When you allow practices as outlined in the Union's exhibit No. 13 where Mr. BEAR and other employees have on more than one occasion used the Employer's equipment and material to do their own initiated work projects, the Employer has allowed a practice to exist.

The Employer can certainly correct this practice for all employees. In this Arbitrator's opinion, however, the Employer cannot selectively enforce it with one employee—Mr. BEAR.

At no time was any evidence presented that showed Mr. BEAR gained anything financially or materially from the work he performed. Consequently, the items listed as Group II a through Group III d offenses are tainted by custom as exercised by the Employer and are not fairly imposed on Mr. BEAR.

I turn now to prior discipline issued to Mr. BEAR, as included in Employer exhibit number 14. Regardless of the severity of the offense, the Employer decided to impose discipline as a Group I offense. The offense occurred in June of 1996. Group I offenses are accumulative for one year. It has been nine and one half years since that offense occurred. I can assign no value to that discipline in regard to this proceeding.

CONCLUSION

This Arbitrator views insubordination or refusing to obey a directive as a very serious matter. It may be justified only in rare occasions of personal or public safety. The Union and the Employer, however, have chosen to list this offense as a Group II offense, which by itself does not rise to the level of discharge. Although the arbitrator concurs with the union that discharge is too severe a penalty to impose on Mr. BEAR at this time, both the Union and Mr. BEAR should be aware that this award places him on his notice that his conduct on the job for the next three years will condone no misconduct. Notice is taken of Section II, Paragraph 11.1, in the Agreement between the parties that, "The arbitrator shall have full authority in any way the facts justify to alter or change discipline or discharge penalties imposed by management."

Mr. BEAR is to be reinstated to his job without back pay effective July 19, 2006. Further, that the Employer properly found him in violation by willfully disobeying a directive from his supervisor. This violation, which is a Group II g offense, is to remain cumulated in his file for the period through to July 19, 2009. Further, that this award shall be considered a second Group II offense until July 19, 2009.

Harry W. Bishop, Arbitrator

List of Exhibits in MERC Arbitration Case Number A06 - A - 0003

Joint Exhibit - Number 1 - Agreement between City of SOMEPLACE, Michigan, a home rule city and the Local.

Joint Exhibit - Number 2 - Grievance Chain between the Employer and the Union

Employer's Exhibit - Number 3 - Investigation Notes - Meeting with Mr. BEAR dated 12/14/05

Employer's Exhibit - Number 4 - Time Sheet dated 12/06/05

Employer's Exhibit - Number 5 - Time and Equipment Sheet dated 12/06/05

Employer's Exhibit - Number 6 - Time and Equipment Sheet dated 12/06/05

Employer's Exhibit - Number 7 - Time and Equipment Sheet dated 12/06/05

Employer's Exhibit - Number 8 - Time Sheet dated 12/08/05

Employer's Exhibit - Number 9 - Time and Equipment Sheet dated 12/08/05

Employer's Exhibit - Number 10 - Time and Equipment Sheet dated 12/08/05

Employer's Exhibit - Number 11 - Map of work areas

Employer's Exhibit - Number 12 - Section of Map work area

Union's Exhibit - Number 13 - Jobs initiated by Mr. BEAR while on other assigned jobs

Employer's Exhibit - Number 14 - 1996 Discipline notice to Mr. BEAR