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IN THE MATTER OF ARBITRATION BETWEEN

KANSAS CITY AREA)
TRANSPORTATION AUTHORITY)
Employer,)
and)
AMALGAMATED TRANSIT UNION)
LOCAL 1287)
Union.)
_____)

Winrow Written Warning
FMCS No. 060223-02220-7
Grievance 2005-FC-18

Appearances:

For the Authority:

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OPINION AND AWARD

The parties stipulated that the matter is properly before the arbitrator, that all steps of the grievance procedure have been satisfied or waived and that there are no issues of substantive or procedural arbitrability. A hearing was held on May 18, 2006, at the offices of the Kansas City Area Transportation Authority in Kansas City, Missouri, at which time the parties were given the

opportunity to present evidence including relevant exhibits and to examine and cross examine witnesses. The parties stipulated that the arbitrator shall retain jurisdiction for the purpose of remedy. Subsequent to the hearing the parties submitted briefs to the arbitrator, at which time the hearing was declared closed.

ISSUE

At the hearing, the parties stipulated to the following statement of the issue:

Whether the Authority issued the November 14, 2005 warning ticket for just cause? If not, what is the remedy?

COLLECTIVE BARGAINING AGREEMENT

The Kansas City Area Transportation Authority (hereinafter sometimes referred to as the "Authority") and the Amalgamated Transit Union Local 1287 (hereinafter sometimes referred to as the "Union") are parties to a Collective Bargaining Agreement for the period from August 26, 2005 through December 31, 2007. (Joint Ex. 1) The relevant language of the Collective Bargaining Agreement includes the following:

Section 1.12. Management - Discipline.

(b) The Union further recognizes that the power of discipline is vested exclusively in the Authority, and it will not attempt to interfere with or limit the Authority in the discharge or discipline of its employees for just cause; subject, however, to the right of any employee to whom this Agreement is applicable and who may be discharged or disciplined, to present as a grievance, for action in accordance with the grievance procedure hereinafter in Section 1.13 set forth, the question whether he has been discharged or disciplined for just cause; but neither (a) the appointment, promotion, demotion, discharge or discipline by the Authority of any individual to or in any official, supervisory or other classification excluded from the collective bargaining unit of employees to which this Agreement is applicable, nor (b) the retention in service, discharge or suspension by the Authority of a probationary or temporary employee (as defined in Section 1.5), shall present a grievance hereunder or be subject to the provisions hereof, and the Authority's action in relation thereto shall be final; nor shall any other discipline imposed upon a probationary or temporary employee present a grievance hereunder or be subject to the provisions

hereof unless it is claimed that the discipline thus imposed violates any other provision of this Agreement.

EVIDENCE

The Kansas City Area Transportation Authority operates public transportation services in the metropolitan Kansas City area. It operates a Transportation Department, which employs some 500 bus drivers, as well as a maintenance department. Within the maintenance department, the Facilities Maintenance unit is responsible for, among other things, cleaning and maintaining the Authority's buildings. The Union represents bargaining unit employees within both the Transportation and Maintenance Departments.

Michael Kuhler has been employed by the Authority since 1971, except for one year away from the Authority in 1976-1977, as a bargaining unit mechanic and, since 1998, as a facilities service worker supervisor. Among Kuhler's duties is the supervision of four full-time and two part-time facility service workers who are responsible for cleaning the Authority's Building One, a two story facility where many of the Authority's offices are located. Joint Exhibit 6 is a Notice of Job Opening for the position of facilities service worker on the 4 p.m. to midnight shift. The duties include such tasks as floor cleaning and maintenance, window and wall maintenance, trash removal, sweeping, dusting, cleaning offices, locker rooms and lavatories, and other duties generally related to janitorial functions as may be assigned by the supervisor. At the end of each shift, the facilities service workers is to complete a checklist which identifies the areas of the building that he or she cleaned during the shift. (Joint Ex. 7) Checking off a box is a representation by the facilities service worker that he or she performed the required cleaning in the area of the building identified by the box such as, for example, upper lobby, office restrooms,

lobby restrooms, office lunchroom, etc.

The grievant, Eddie Winrow III, was hired as a probationary facilities service worker on Friday, July 1, 2005. On that date, Winrow was given a packet of materials by Kuhler relating to his employment and responsibilities, and Kuhler discussed several aspects of the position with Winrow. Among the materials given to Winrow was the Maintenance and Purchasing Department Rules and Regulations. (Joint Ex. 2) This document sets forth, among other things, rules of conduct for bargaining unit employees, violations of which may result in discipline. Among the violations set forth in the Rules is the following:

31. Productivity and workmanship below standard or deliberately restricting output.

First offense: Reprimand (warning notice)

Second offense: Suspend three (3) days

Third offense: Suspend five (5) days

Fourth offense: Discharge

Winrow was to be responsible for cleaning the second floor of Building One. On the day he was hired, July 1, Winrow spent most of the day working with Jeffrey Farr, a long-term facilities service worker who previously had been responsible for cleaning the second floor. Farr testified that he spent that day showing Winrow most of what he needed to do on the second floor, although not all of the duties. Farr was assigned to other duties most of the following week, although he testified that he went to the second floor to check on Winrow and to go over the areas that Winrow had cleaned to further explain how it should be done.

Kuhler typically leaves work about 5:30 or 6 p.m. He testified that he routinely spent time with Winrow in the evenings after Winrow's shift started to go over Winrow's work and responsibilities. Kuhler testified that during Winrow's first several weeks of work, he was not

regularly meeting the Authority's expectations. Kuhler testified that Winrow frequently failed to refill toilet paper and towel rolls in the restrooms, despite being instructed to do so on numerous occasions. Kuhler said Winrow also regularly failed to properly mop the restrooms, and that he failed to dust in the offices.

Kuhler testified that on the morning of August 3, he received a complaint from a day shift facilities service worker that the second floor was not being properly cleaned at night. After the complaint, Kuhler inspected the second floor and found what he described as several deficiencies in cleanliness. Kuhler wrote a list of problems and went over them with Winrow in Kuhler's office on the evening of August 3. (Joint Ex. 9) These included:

1. Mop bucket left full of dirty water.
2. Administration restrooms, both men and women's room short on toilet Paper and sanitary napkins sacks not full in ladies room, also need to use Disinfectant in toilets in both room and vacuum in both rooms. Be sure to Clean and polish sinks, spouts and shutoffs.
3. Did not vacuum in procurement directors
4. Two large blue recycle containers completely full.
5. Trash cans in both Sm. And Lg. Conf. Rooms not emptied.
6. Need to dust in many places throughout the Admin area.
8. Stairway 3 & 4 need more work.
9. Need to vacuum all over the in the admin and drivers area each day
10. You must complete paper work each day and turn in that night.

At about this same time, Kuhler was receiving complaints from his supervisor, Plant Manager John Marcus, that other office employees were unhappy with the cleanliness of Building One, and that Marcus's supervisor, Director of Plant Management Jimmy Chowning had personally insisted that steps be taken to resolve the problem. Shortly thereafter, according to Kuhler, Chowning met with Kuhler and said that "quite possibly" the Authority should

consider terminating Winrow before his probationary period ended.¹ Kuhler responded that he believed he could turn Winrow into a good employee if Kuhler worked directly with Winrow to assist in his instruction. Kuhler testified that it is possible he did not give Winrow enough instruction at the beginning of Winrow's tenure, but after the complaints from Marcus and Chowning, Kuhler began working personally with Winrow on parts of his shifts to give him further instructions.

On August 22, 2005, Kuhler and Marcus met with Winrow. According to a memorandum Kuhler prepared on August 23, he and Marcus informed Winrow "once again of his shortcomings" and told Winrow "that his job performance must improve if he is to successfully complete his probationary period...."² (Joint Ex. 10) According to Kuhler, Winrow had no questions and said he understood the expectations. Kuhler's memorandum of August 23 was not given to Winrow or to a Union representative.

Kuhler prepared another internal memorandum on August 30 to memorialize that he had personally worked with Winrow on two shifts during the previous week to instruct Winrow on his job responsibilities. Kuhler wrote that Winrow "was experiencing some difficulties with his job and we wanted to make sure he was clear on his daily assignments." (Joint Ex. 11) Kuhler testified that from late August to near the end of October, Winrow showed some improvement in his work, but that the quality of Winrow's work was still "inconsistent."

In late October, Kuhler received complaints from his two supervisors about the

¹ The probationary period consists of 44 complete days actually worked, pursuant to Section 1.5 of the Collective Bargaining Agreement; that equates to approximately two calendar months of work.

² Winrow ultimately completed his probationary period and became a regular, full-time employee.

cleanliness of Building One. Kuhler scheduled individual meetings with each member of the janitorial staff, along with a Union representative, to discuss the need for improvements. Kuhler testified that the primary problems with cleanliness were concentrated on the second floor of Building One, where Winrow was assigned. In each meeting, Kuhler covered a one-page checklist of issues that needed to be addressed. (Joint Ex. 13) Kuhler prepared a memorandum to the file covering his meeting on October 28 with Winrow and Union representative Patrick Cooks. According to Kuhler, Winrow had no questions and stated that he understood the need for improvement. (Joint Ex. 12) Kuhler testified that he asked a Union representative to attend each meeting so there would be no questions about what Kuhler was demanding from the janitorial workforce.

When Kuhler arrived for work on the morning of November 10, he was approached by Jeff Farr, the facilities service worker on day shift who had helped train Winrow. According to Kuhler, Farr complained that the trash had not been emptied by Winrow during the evening shift on November 9. Kuhler testified that a 55-gallon drum in the janitor's closet was full of trash and had not been emptied, and that he also observed that there was a bag full of trash in the copy room, there were full trash cans in two cubicles, that restrooms had been cleaned but toilet paper had not been replaced, table tops and microwaves in the administration lunchroom were dirty, that the sink and drip board in the kitchen area had not been cleaned, that a cubicle in the scheduling and procurement area had not been vacuumed and that a trash can in a conference room had not been emptied.

Kuhler examined Winrow's checklist for the work he had performed the night before, and it indicated that all necessary work had been done, including emptying trash and cleaning the

break room. (Joint Ex. 14)

Farr testified that he sometimes covered for Winrow by taking out trash in the mornings that Winrow was supposed to take out the night before. At other times, according to Farr, he complained to Kuhler that Winrow was not properly performing his job, which left more work for Farr to do the next day. Farr testified that in early November, he complained to Kuhler about the lack of cleanliness in the break area when Farr arrived for work at 7 a.m. Farr testified that other employees have access to the break room, also called the trainmen's room, during the night, so that it is possible the room could have been cleaned the night before, and then dirtied by other employees during the night.

Kuhler spoke to Winrow on the evening of November 10, and noted that there had been problems with cleanliness that morning. Friday, November 11, was the Veteran's Day holiday.

After meeting with Chowning and Marcus, Kuhler issued to Winrow a first offense warning notice on Monday, November 14 for a violation of work rule No. 31, "Productivity and Workmanship below Standard. Detail work is not being done on a daily basis as instructed by your Supervisor." (Joint Ex. 15) According to Kuhler, he met with Winrow and Union Steward Thomas Hernandez on November 14 and told them that trash had been left in various cubicles, in the janitor's closet and in the copy room, that the microwaves had not been cleaned and that the toilet paper and paper towels in the restrooms were not filled. Kuhler also mentioned that he had observed Winrow using his cell phone during work time on November 10. Kuhler testified that Winrow said he had cleaned the microwaves. According to Kuhler, the break area where the microwaves are located had been closed all night on the morning of November 10 until 7 a.m., and that he had previously observed problems with cleanliness in the break area, so he did not

believe Winrow had cleaned that area. Kuhler acknowledged that Winrow may clean the breakroom at any time on his shift, and that it is possible that other employees use the breakroom after it has been cleaned by Winrow.

Kuhler testified that the purpose of the warning notice was to address the entire litany of problems with Winrow's work, not just those that were found on November 10. Kuhler testified that he had previously told Winrow that if his performance did not improve, he would be subject to discipline.

According to Union Steward Hernandez, when he and Winrow met with Kuhler on November 14, Hernandez asked Kuhler for specifics of the problems which led to the discipline. According to Hernandez, Kuhler cited the trash bag in the janitor's closet and the dirty microwaves as the reasons for the discipline. Hernandez noted that someone else might have dirtied the microwave after Winrow cleaned it, and that in any event two such minor incidents did not merit a written warning. According to Kuhler, Hernandez stated at the November 14 meeting that the disciplinary notice was vague, and asked "what in general" had Winrow done to receive the discipline. Kuhler testified that he did not attempt at that meeting to describe everything Winrow had done wrong over the period of his employment.

On November 21, the Union grieved the discipline. (Joint Ex. 3) The grievance was denied by the Authority at Step 2. (Joint Ex. 4) According to Marcus, the Plant Manager who represented the Authority at the Step 2 meeting, Union Steward Hernandez argued at the December 20, 2005 Step 2 meeting that the "examples" of infractions by Winrow, including the trash left in the janitor's closet, failing to clean the microwaves in the administrative lunch room and talking on a cell phone, were minimal and did not warrant a warning. According to

Hernandez, he did not mention that these incidents were cited as examples; rather, they were the Authority's entire basis for issuing the discipline. In his Step 2 response, Marcus noted that Winrow had received special training and had repeatedly been instructed on the need for improvement in his job performance. Marcus cited three previous occasions on which Winrow had been counseled by Kuhler, including August 25 when Kuhler had discussed with Winrow the need to improve his performance and had taken steps to give Winrow additional training, late August when Kuhler had personally stayed on Winrow's shift on two occasions to provide him with training, and October 28 when Kuhler met with Winrow and a Union representative to discuss cleaning procedures "and to further discuss Mr. Winrow's below standard productivity."

Chowning, the Director of Plant Management, denied the grievance at Step 3 by memorandum dated March 15, 2006. (Joint Ex. 5) According to Chowning's memorandum, Hernandez again argued on behalf of Winrow that the infractions cited did not merit discipline. Cloning responded that the Authority had undertaken four occasions of "training, coaching and actions taken to correct and improve Mr. Winrow III's workmanship and productivity" and that the

warning notice was properly issued to correct work not performed on a daily basis as previously instructed, as the job duties are delineated on the Notice of Job Opening Sheet (commonly called the job bid sheet), and through the progression of the events referenced in the attached 2nd Step hearing answer.

Hernandez acknowledged that, at the Step 3 meeting, Chowning stated that the incidents on November 9 were part of an on-going pattern in Winrow's work that had been going on for months, and that is why Winrow had received extra training from Kuhler.

Winrow testified that he was aware that he could be disciplined for failing to properly

perform his job duties, but that Kuhler never stated that Winrow was close to being disciplined or that Winrow had been in danger of not successfully completing his probationary period. Winrow acknowledged that Kuhler had “repeatedly” met with Winrow at the beginning of his shift to discuss tasks that had not been properly completed the previous evening.

Winrow testified that he recalled that at the meeting on August 22, 2005 (referred to in Joint Ex. 10), Kuhler and Marcus reminded Winrow of tasks that needed to be completed, they discussed complaints about his work and they specifically told Winrow that he was not to check off work that had not been completed. Winrow testified that at the October 28 meeting, Kuhler recited that there had been many complaints about the lack of detail cleaning work in the building, but that there were no specific complaints about Winrow’s work.

Winrow did not recall meeting with Kuhler on November 10. At the meeting on November 14, according to Winrow, the problems discussed were the trash left in the janitor’s closet, the lack of cleanliness of the microwave in the administration lunch room, and possibly water having been left in a mop bucket. Winrow told Kuhler that he had cleaned the microwave about 7-8 p.m. on November 9, but that other employees had used it after it had been cleaned. Winrow testified that the 55-gallon drum in the janitor’s closet was only half full of trash, which is why he put it back in the closet rather than emptying it.

AUTHORITY POSITION

The position of the Authority may be summarized as follows:

The grievant received a written warning because his work was not being done on a daily basis as instructed. The grievant did, in fact, fail to complete all of his work assignments on a daily basis over an extended period of time. Kuhler and Farr both testified about the grievant’s

repeated shortcomings, and the grievant acknowledged that Kuhler pointed out each evening tasks that the grievant had missed during the prior shift.

The Union would have the arbitrator focus very narrowly on a few symptoms of the much larger problem, essentially asking to ignore the forest for one particular tree. The Union argues that only two specific failings on the part of the grievant were mentioned during the November 14 disciplinary meeting, failing to empty a trash barrel and failing to clean the microwaves, and so the Authority cannot rely on any other shortcomings in the grievant's work. As to the microwaves, the Union argues that they may have been dirtied by another employee after they were cleaned by the grievant. This argument must fail, however, because the grievant was not disciplined for two isolated incidents. The failings of November 9 were merely the triggering incident. The Authority admits that it would not have issued a written warning to the grievant if he had only one unproductive evening of work. Rather, the grievant was disciplined for a pattern of poor productivity.

Further, the grievant admitted at the hearing that he left the 55-gallon barrel half full on November 9. Also, the Union's attempts to portray the microwaves as having only a small amount of butter failed when it became clear that the "butter" incident happened at a different time, over the Veteran's Day weekend.

Kuhler did not threaten the grievant with impending discipline in connection with the previous counselings because employees already are on notice that discipline may ensue from failing to adequately perform their duties. The Authority agrees that in a poor performance case, management cannot issue a suspension or discharge without first giving the employee express warning that such discipline is likely if the employee does not correct the problem. That is what

management did in this case by issuing a written warning to the grievant that further, more serious discipline may result if the performance is not corrected. The Union would require the Authority to give some “pre-warning” warning, before issuing the formal warning. That is unnecessary and redundant. The grievant acknowledged that he was aware based on his previous counselings with Kuhler that discipline may occur if the problems continued.

Kuhler showed remarkable patience with the grievant and gave him every opportunity to bring his performance to an acceptable level without resorting to discipline. Discipline became necessary only when Kuhler’s other efforts failed to produce the necessary results.

UNION POSITION

The position of the Union may be summarized as follows:

The written warning should be set aside for two reasons. First, the Authority did not prove that Winrow failed to clean the microwave in the administration lunchroom. Having failed to prove one of the two violations that were communicated to the Union as the bases for the written warning, the warning should be set aside. Second, the Authority failed to honor certain fundamental principles of just cause and grievance processing in that the Authority failed to give notice to the Union and the grievant of the facts and positions on which the Authority intended to rely in support of the discipline issued to the grievant. The Union was not apprised of the Authority’s “case” against the grievant until the day of the arbitration hearing. Until then, the Union believed the discipline was based on the information provided to Hernandez that the warning was based on two relatively minor incidents, one of which could not proven.

It is the Authority’s burden to prove that the disciplined employee is actually guilty of the offense upon which the discipline is based and, in light of any proven offense, that the discipline

assessed is warranted. The specific violations upon which the warning is based should be limited to what was clearly communicated to the Union during the processing of the grievance, namely a failure to clean the microwaves and failure to empty a trash container in the janitor's closet. The Authority has failed to prove that Winrow did not clean the microwaves. The evidence suggests that, if the microwaves were dirty on the morning of November 10, it may very well have been because others used the microwaves after Winrow had cleaned them. Even Kuhler acknowledged this possibility. There is nothing to suggest that Winrow having left a bag of trash, by itself, would have warranted a written warning.

Good faith requires a full disclosure of all of the facts and positions taken by the parties at the earliest steps of the grievance procedure. The employer has an obligation to explain its actions in a meaningful way early in the process so as to enable the Union to determine not only how best to present its case but also to determine whether to process the grievance to arbitration. Further, just cause requires that the employee be given notice of the specific charges or conduct upon which discipline is based. Absent such notice, an employee may have no reason to believe or fully appreciate the significance of a perceived problem or that his job may be in jeopardy.

Here, no one told Winrow or the Union that Winrow was in danger of being discharged during his probationary period. Instead, Winrow was led to believe that he had successfully completed his probationary period. Further, although Kuhler may have had discussions with Winrow regarding his job performance, the specifics regarding these discussions were never documented. Written notice is far superior to other forms of notice. Kuhler could have given clear and concise written notice to Winrow specifically documenting his shortcomings and advising him that a written warning would follow if there was not improvement. Instead, Kuhler

wrote memoranda to the file, never showing them to Winrow or to the Union. Kuhler had little difficulty describing in detail at the arbitration hearing what it was that Winrow failed to do. That being the case, Kuhler could have done so in writing detailing for Winrow and the Union the Authority's concerns.

Also, if Kuhler were truly interested in impressing upon Winrow the need for improvement, he could have conducted a meeting with a Union representative present. Kuhler did so in connection with the meetings with all janitors in late October, but did not in connection with other meetings with Winrow regarding his individual performance.

Notifying the Union that the written warning was based on a violation of Rule 31 is insufficient to satisfy the requirements of due process that an employee be informed in reasonable detail of the charges against him and given the chance to tell his side of the story in connection with each of the matters upon which the discipline is based. If an employer fails to do so, arbitrators have frequently reduced the penalty imposed, even if the employee is clearly guilty of the offense charged.

Hernandez made it clear throughout the processing of the grievance that the Union's position was that the two incidents apparently relied upon by the Authority did not warrant a written warning. Hearing Hernandez' repeated and consistent argument, it was incumbent upon the Authority to set the record straight by informing Winrow and the Union of the specific failings by Winrow which led to the discipline. Thus, the Union did not have the opportunity to effectively evaluate the grievance and to respond to the Authority's case. Neither Marcus nor Cloning testified that such disclosure was made to the Union at the Step 2 and Step 3 grievance meetings. The language of the Step 2 and Step 3 decisions is certainly ambiguous and cannot be

used to contradict Hernandez' clear recollection of what was discussed at those meetings.

ANALYSIS

The Authority acknowledges that the instances of poor work performance of which the grievant is accused on November 9 would not, by themselves, constitute a basis for formal discipline, even at the level of a written warning or reprimand. There is a considerable difference in the testimony of Kuhler, on behalf of the Authority, and Hernandez and Winrow about the amount of detail Kuhler explained when he described Winrow's poor performance on November 9. All witnesses agree that Kuhler mentioned both the trash left in the janitor's closet and the microwaves in the administrative lunchroom, although Kuhler believes he described additional shortcomings in Winrow's work from that night.

Kuhler acknowledges that he did not go into any detail about Winrow's previous poor work performance.

That Winrow improperly left trash in the container in the janitor's closet is not in dispute; Winrow admits this shortcoming. The evidence as to the microwaves is considerably less convincing. Ultimately, it must be concluded that it is reasonably possible that Winrow cleaned the microwaves on the night of November 9, and that other employees used the microwaves and left them dirty after Winrow had performed his duties.

Nonetheless, whether or not the Authority proved by a preponderance of the evidence that Winrow failed to clean the microwaves in the administrative lunchroom on November 9, which it did not, is a moot question if, as the Authority contends, Winrow was not disciplined for his conduct on November 9, but rather for a pattern of poor performance extending for the entire term of his employment and only culminating with the conduct of November 9.

Generally speaking, an employer is not limited to only the final event as a basis for imposing discipline. It is not unreasonable for an employer to impose discipline which is triggered by a seemingly minor infraction that would not in itself warrant discipline if that infraction is, in fact, the culmination of a series of infractions which the employer has sought, unsuccessfully, to correct through means short of formal discipline. Imposing discipline when the last straw finally breaks the camel's back is legitimate, provided the employer proves that the grievant did in fact commit the last infraction, that the previous infractions were also part of the bases for discipline, and that the requirements of due process were satisfied.

An employer is also not obligated to expressly warn an employee that discipline may ensue if his or her conduct is not corrected, provided the employee is reasonably on notice of the possibility of such discipline. Poor performance or, to cite the language of the Authority's Rules and Regulations, productivity and workmanship below standard, is hardly an esoteric subject. Except in unusual circumstances, employees usually know when their work is below the standard expected by their employer, particularly when the employer, as here, has gone to considerable lengths to try to correct the previous poor performance. The grievant had been made aware on numerous occasions of his shortcomings. He received special training. He acknowledged that Kuhler on several evenings would go over the grievant's work from the night before and point out mistakes that the grievant had made. In late August, Kuhler and Marcus informed Winrow that he was in danger of not passing his probationary period if his work did not demonstrate marked improvement. Further, Winrow received a copy of the Authority's Rules and Regulations when he began his employment; those rules state that employees may be subject to progressive discipline for below standard productivity. Finally, Winrow himself acknowledged

that he was aware that discipline may result from poor work performance.

I have little doubt that the grievant was hardly a model employee from the beginning of his employment through November 14 when he was issued the written reprimand. I also have little doubt that the grievant was well aware of his supervisors' dissatisfaction with his overall performance. The fact that the grievant ultimately survived his probationary period in late August or early September, and that only when Kuhler pleaded with his supervisors to be given an opportunity to work personally with the grievant to improve his performance, was itself not a reasonable basis for the grievant to believe that he was by then performing at a satisfactory level.³

The question then becomes whether the requirements of due process were satisfied in the Authority's handling of the grievant's discipline. One of the basic tenets of due process is that the parties to the grievance procedure be put on notice of the bases for the discipline which is issued. The Authority was certainly aware of the grievant's shortcomings and fully intended that the written reprimand was the result of a litany of instances of poor performance by the grievant since the inception of his employment. It also is reasonable to conclude based on the evidence that the grievant himself was aware of at least most of his performance problems, given the lengths to which Kuhler went to point them out and seek to correct them. Thus, the grievant himself probably had good reason to believe that the discipline of November 14 was based on his lengthy list of failings over an extended period, merely triggered by his performance on November 9. The Union, however, is an equal player in this process. It has the right, and it is charged with the obligation, to conduct a full and fair investigation of the stated reasons for the

³ There was at least some implication in the evidence that the grievant was given some degree of special consideration out of deference to his father, who had given many years of commendable service to the Authority.

discipline and, when it believes in its judgment to be appropriate, to conduct a vigorous defense of the bargaining unit employee it represents. If the Union is not placed on notice of the reasons for the discipline, it is effectively prohibited from conducting an investigation and defense, which is an integral part of due process.

The Authority was not, of course, obligated to have a Union representative present on those occasions when Kuhler met with the grievant to counsel him informally about the need for improvement or on those occasions when Kuhler personally worked with the grievant in an effort to improve his performance. None of those instances involved discipline or were reasonably expected to directly lead to discipline. With hindsight, however, it certainly would have been advantageous to the Authority's position in this arbitration proceeding to have called for the presence of a Union representative because involving the Union in the earlier informal counselings would have done much to eliminate the Union's argument that it was never, until the arbitration hearing, given notice of the specific failings by the grievant that led to his discipline. The one time the Authority did meet with the grievant with a Union representative present was part of a series of meetings Kuhler held with all of the service workers to impress upon them the need for improved performance by the entire department. The grievant's specific shortcomings were not addressed in that October 28 meeting.

The evidence was that on November 14, the Union⁴ was informed that the grievant was being disciplined for failing to empty the trash in the janitor's closet, for failing to clean the microwaves in the administrative lunchroom, and possibly for some other infractions on the night of November 9. Following the Step Two grievance meeting, Marcus pointed out the janitor's

⁴ In the person of Steward Hernandez.

closet problem and the dirty microwaves, and noted that on previous occasions the grievant had received informal counseling and special training. It was a reasonable conclusion on the part of the Union that the Company had disciplined the grievant for his conduct on November 9, in light of the fact that the grievant was well aware that his work on that night was unsatisfactory due to the special counseling and training he had received.

The Union could not, however, reasonably be required to infer from either Kuhler's statements on November 14 or Marcus' written Step Two response that the grievant was actually being disciplined for a series of performance problems stretching out over the past three-plus months. Chowning's Step Three response likewise shed no further light on the bases for the discipline in that it, too, recited that the events of November 9 were, in the opinion of the Authority, more significant than the Union was suggesting in light of the previous training and counseling that the grievant had received.

Ultimately, the Union never was informed that the grievant was being disciplined for all of the performance shortcomings he had exhibited over the previous three-plus months, it was never told the specifics of those previous performance problems, or that the problems of November 9, although seemingly minor on their face, were only the triggering event, the final straw. As a result, the Union was effectively prevented from conducting a full and fair investigation of the bases for the discipline and from preparing a vigorous defense of the charges which ultimately were leveled against the grievant at the arbitration hearing.

The Authority's failure to fully notify the Union of the reasons for its discipline of the grievant was thus inconsistent with the Authority's due process obligations under the grievance and arbitration process of the Collective Bargaining Agreement.

AWARD

For the reasons set forth above, the grievance is sustained. The Authority did not have just cause to issue the written reprimand, or warning ticket, to the grievant on November 14, 2005. That reprimand is to be removed from his record. Any subsequent discipline that may have been issued to the grievant and which is based on a progression of discipline following the November 14 written reprimand is to be adjusted accordingly.



Eric M. Schmitz

Arbitrator

September 18, 2006

St. Louis, Missouri