



REVIEW COMMITTEE

7.1 - Just Cause-
racial slur,
physical altercation

JUL 18 1990

**CASE CLOSED
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REVIEW COMMITTEE DECISION

D.J. BERGMAN, CHAIRMAN

General Construction Department Grievance No. 3-1922-89-27
Review Committee File No. 1696-90-1

- DECISION
- LETTER DECISION
- PRE-REVIEW REFERRAL

Subject of the Grievance

This case concerns the alleged unjust issuance of a Written Reminder on February 15, 1989 and a subsequent Decision Making Leave on February 28, 1989 to a Miscellaneous Equipment Operator B, General Construction Gas Department.

Facts of the Case

The grievant was issued a Written Reminder on February 17, 1989, listing five separate items of performance and/or conduct deficiencies. The items addressed in the Written Reminder occurred between early November, 1988 and January 27, 1989. The letter states that the grievant 1) repeatedly disobeyed orders and instruction; 2) was argumentative and rude, entering into conversations where he had no business; 3) alienated good working relations with a developer; 4) was argumentative and had created turmoil with his working Foreman and co-workers to the extent they did not want the grievant on the crew; and 5) directed a racial slur to his working Foreman in the presence of two other employees about a black co-worker who had just left the job site.

The grievant was issued a Decision Making Leave on February 28, 1989, with a confirming letter dated March 1, 1989. This DML resulted from a physical confrontation on February 25, 1989 between the grievant and the black employee who was the subject of the racial slur.

Discussion

At the outset, the Committee agreed that racial slurs and physical confrontations constitute unacceptable behavior in the work place and that such transgressions are a serious matter. The disagreement between Company and Union in this case is focused more on the administration of the parties agreed-to Positive Discipline Guidelines than a debate over the appropriateness of disciplinary action.

On April 1, 1988, General Construction Department converted from the former constructive discipline system to the positive discipline system. Upon conversion, the grievant was placed at the Decision Making Leave (DML) level in the attendance category. The Local Investigating Committee met to discuss the current grievances on March 21, 1989. The Report indicates that the converted DML remained active during each of the incidents addressed in the February 17, 1989 Written Reminder and the March 1, 1989 DML.

According to the grievant's working Foreman, in early November, 1988, he instructed the grievant to avoid driving the crew truck on a specific street. The grievant admitted that he disregarded these instructions and continued to utilize the specifically prohibited street.

In mid-November, 1988, the grievant interceded in a conversation related to sick leave usage between the crew Foreman and another crew member. Having returned to the yard later that day to pick up material, the grievant contacted the area General Foreman's office on the subject. The following day, the grievant engaged the crew Foreman in an argument over the issue.

On January 3, 1989, upon his return from vacation, the crew Foreman was informed that the grievant had interceded in a conversation between the temporary crew Foreman and a developer; that he had been rude, abusive and argumentative in telling the developer what PG&E would or would not do on the project; that the developer's representative was "put out" by this abusive behavior.

On January 12, 1989, the crew Foreman instructed the grievant to prepare a material list. Initially, grievant refused, claiming it was not his job to prepare a material list. An argument ensued, following which the grievant was instructed to return to work; he grudgingly did so. He did prepare the list, but in the opinion of the crew Foreman, grievant's work performance slowed noticeably for the next two days.

Later in the day on January 12, 1989, the crew Foreman instructed the grievant to use side tap service tees on short side service stubs. However, without further discussion with the crew Foreman, grievant used top tap tees, claiming he lacked experience with side tap tees.

During a morning tail-board on January 27, 1989, the crew Foreman surveyed the crew about their availability for prearranged overtime the next following weekend. The grievant became loud, abusive and argumentative, threatening to file a grievance. Later that same day, the crew Foreman told grievant three times to perform the task of pulling service wire. The crew Foreman stated that the grievant's work slowed considerably for the remainder of the day "as it always does whenever we have a disagreement".

Around 2:30 p.m. on January 27, 1989, the crew Foreman assigned a crew member to go to another location for the remainder of the day. Following the departure of this crew member, grievant approached the crew Foreman, in the presence of two other crew members. Utilizing racial phrases that are clearly demeaning and humiliating, the grievant questioned the crew Foreman as to why he was allowing the black crew member to go home early, apparently insinuating special treatment.

At a tail-board meeting on January 26, 1989, the grievant and other crew members were reminded of the necessity of securing all vehicles and equipment at the end of the workday. On January 28, 1989, the crew truck assigned to the grievant was found to have the passenger's side window left open overnight.

The crew Foreman stated that on numerous occasions, he has attempted to address his concerns with the grievant, only to be met with arguments and work slow

downs. He further stated that numerous crew members had asked to be reassigned so as not to have to work with or around grievant.

On January 20, 1989, the crew Foreman reported in writing to his exempt supervisor his dissatisfaction with the grievant. On February 6, 1989, the crew Foreman again reported in writing to his exempt supervisor, providing considerable detail related to the above-listed concerns. Whether there were any previous oral reports from the crew Foreman to his exempt supervisor is not addressed in the Local Investigating Committee Report.

On February 17, 1989, the grievant received a Written Reminder in which five specific conduct items were listed, as noted earlier in this Decision.

Eight days following receipt of the Written Reminder, the grievant and the employee who was the victim of the racial slur were at the same job site. The grievant approached the black co-worker, allegedly in an effort to apologize for his earlier inappropriate statement. Additionally, grievant asked the co-worker to relate what he had been told by the exempt supervisor and/or crew Foreman about the racial slur incident. After being told two or three times by the black co-worker that he did not wish to talk about the matter, the grievant persisted by repeating his conversation with the crew Foreman during which the racial slur occurred. At this point, the black employee struck the grievant. For his involvement in this incident, the grievant was elevated to the DML level of positive discipline.

As previously stated, the Committee is not in disagreement over the question of whether disciplinary action was appropriate. At issue is the Union's belief that the positive discipline system was misapplied in this case.

Company's Position

Company conceded that the Department's failure to coach and counsel the grievant related to incidents prior to the racial slur was inconsistent with the intent of the positive discipline system, assuming that management was aware of the prior incidents. Company also conceded that, under those circumstances, reaching backwards for conduct and performance problems and including them in the Written Reminder was inconsistent with the intent of positive discipline. However, Company argued that, standing alone, the incident of the racial slur necessitated disciplinary action and was serious enough to warrant a Written Reminder; that even had the other incidents not occurred, a Written Reminder would have been meted out to the grievant.

Assuming justification for the Written Reminder, Company argued, the next incident (the act of provoking a physical altercation) also warranted disciplinary action. Inasmuch as the grievant was then at the Written Reminder level of positive discipline in the conduct category and the subsequent incident was also in the conduct category, Company was compelled to place the grievant on a DML.

Union's Position

Of concern to Union is the fact that the multiple incidents, which occurred over a period between early November 1988 and late January 1989, were first addressed in the Written Reminder on January 17, 1989. Union pointed out the provisions of Section II (A) of the Guidelines, which state:

"A. Coaching and Counselling

"Coaching/counseling is the expected method for the supervisor to inform an employee about a problem in the areas of work performance, conduct, or attendance. The objective of performance coaching/counseling is to help the employee recognize that a problem exists and to develop effective solutions to it. Since it is the supervisor's approach to a performance problem that often brings about the employee's decision to change behavior, it is critical that the supervisor be prepared. Coaching/counseling is intended to be a deliberation and discussion between the supervisor and employee. Normally, performance problems can be resolved at this step."

The Guidelines continue, stating:

"B. Positive Discipline Steps

"When an employee fails to respond to counseling or a single incident occurs which is serious enough to warrant a formal step of discipline, the supervisor will have several options, depending on the seriousness of the performance problem."

In the case at hand, the exempt supervisor did not coach and counsel the grievant on any of the incidents addressed in the Written Reminder. The written notice from the crew Foreman to the exempt supervisor identified eight separate instances of alleged inadequate work performance or unacceptable conduct, occurring over a period of nearly three months. However, grievant was disciplined for each by inclusion in the Written Reminder.

Union argued that the supervisor's failure to utilize the coaching and counseling feature of positive discipline denied the grievant the opportunity to do that which coaching and counseling is primarily intended to do - modify behavior which management finds unacceptable. Had the grievant been subjected to coaching and counseling related to performance and conduct problems as they surfaced, arguably the later incidents may not have occurred. Had he been coached and counseled but failed to respond appropriately, surely he would have been discharged. Absent the coaching and counseling, however, no one can unequivocally predict whether grievant would have responded in an appropriate, positive manner.

Along a similar line, in this case Union is also concerned about the Department's apparent practice of accumulating multiple incidents and bringing all to the forefront simultaneously. Union believes the Department seeks to ensure the disciplinary action is sustained simply by virtue of the number and/or volume of conduct and performance violations. Such "sandbagging" is, in Union's opinion, clearly contrary to the intent of the positive discipline system. Because the Department addressed eight work performance and conduct problems which occurred over a period of nearly three months in a single disciplinary action, Union opined the Department believed none of the incidents standing alone would rise to the level necessary to sustain a Written Reminder, and that the additional incidents were included to bolster the Department's position.

As to the issue of the DML, Union agrees that the grievant provoked the physical altercation by repeatedly pressing his co-worker to tell him what the exempt supervisor said about the incident, even though this co-worker made it crystal clear two or three times that he did not what to talk to the grievant. In the course of this apparent one-way conversation, the grievant stated that he repeated the racial slur.

The grievant acted inappropriately in provoking the incident and the co-worker acted inappropriately by striking the grievant. Where such facts exist, neither party to the altercation may escape disciplinary action. Were there no dispute over the appropriateness of the Written Reminder issued to the grievant eight days prior, Union would agree that the DML was issued for just cause.

Decision

This case has been the subject of considerable debate between the parties at the various levels of the grievance procedure, but such debate has not resulted in an agreeable conclusion. Whether disciplinary action was warranted based on the incidents reported in this case has not been the focal point, however. The parties agree that disciplinary action was appropriate and justified, although no agreement was reached on the level of discipline because of the arguments identified above.

During the discussion of this case, the Committee was informed that no further disciplinary action has occurred since the issuance of the DML and that all active disciplinary action involving the grievant was deactivated effective February 28, 1990.

Based on the above, the Committee agreed to close this case without adjustment and without prejudice to the position of either party. Such closure should be so noted by the Local Investigating Committee.

FOR COMPANY:

Rodney J. Maslowski
 Ronald A. Morris
 Robert C. Taylor
 David J. Bergman

By _____

Date _____


FOR UNION:

Arthur D. Murray
 Patrick S. Nickeson
 Fred H. Pedersen
 Roger W. Stalcup

By _____

Date _____

By 

By 

Date 7-5-90

Date 6/28/90