FEDERAL MEDIATON AND CONCILIATION SERVICE

IN ARBITRATION

IN THE MATTER BETWEEN	**:**	**NO: FM&CS 170719-55895**
TRUMBULL COUNTY ENGINEER	**:**	
AND	**:**	Kendall Stauffer
OCSEA, AFSCME Local 11	**:**	

OPINION AND AWARD

ARBITRATOR — **Bruce B. McIntosh**
Impartial Arbitrator Selected from A Federal Mediation & Conciliation Panel

APPEARANCES:

#19

For the Company:

David A. Ripenhoff, Esq.
Attorney at Law

For the Union:

Douglas J. Sollitto, Esq.
Buffy Andrews, Esq.
Attorneys at Law

STATEMENT OF THE CASE

The Bargaining Unit of the Trumbull County Engineer ("Engineer") is represented by the Ohio Civil Service Employees Association, AFL-CIO ("Union").

On March 16, 2016, Grievant, an employee in the Engineers Highway Department was talking with a co-worker prior to their scheduled shift which was to begin at 7:00 A.M. His supervisor was passing within a few feet of this conversation and what he heard drew his attention to them. With the invitation of the supervisor, he

reported that the same statement was repeated two more times. The context of what was specifically said is in dispute.

The next day, the Grievant's supervisor reported the conversation to the Engineer who initiated an investigation by persons both within and without the Engineer's office. On March 17, 2016, the Grievant was placed on Administrative Leave while the investigation continued.

The parties were given a full opportunity to present evidence, cross examine witnesses and to brief their respective positions.

ISSUE

1. Whether or not an attorney subpoenaed by the Union can decline to appear based upon attorney/client privilege.
2. Whether just cause exists for the termination of the Grievant and, if not, what shall be the remedy.

COUNTY'S POSITION

Grievant was discharged for making a harassing, threatening statement toward a supervisor, then lying about it during an internal investigation. Each of these offenses carries a penalty of termination for the first instance. What's more, Grievant had just received a 30-day suspension for harassing and intimidating another individual and attempting to impede an internal investigation.

Against this backdrop, on March 16, 2016, the Highway Department supervisor ("supervisor") walked into the garage bay to place daily work orders in his truck. When he entered, Grievant was talking to a co-worker. As the supervisor passed the two, Grievant was heard to say "when this is all done and said there will be a pile of people

and I will be standing on top." The supervisor asked "what did you say?" and Grievant repeated the statement. Again, "what?" was asked by the supervisor and the initial statement was repeated.

Grievant clearly intended for the supervisor to hear the statement as Grievant's voice was louder as he made the comment. The supervisor looked at Grievant to see if he had any weapons on his person, proceeded into the locker room and also to the employee parking lot and found no weapons. Finding no weapons or instrumentalities that would enable Grievant to carry-out his threat, the supervisor dispatched the crew.

The supervisor testified that he was "bothered" about the incident throughout the work day. As a newer supervisor, he was unaware of what to do. At home that evening, he witnessed a local television news story of a shooting or bombing. Upon hearing the news, the supervisor became more concerned and reported the statement to his supervisor the following day at or about 6:15 A.M. His supervisor reported the matter to the Engineer, and, after being unable to contact the Trumbull County Prosecutor's attorney's office, reached out to a local attorney ("Attorney") who had been used in investigations previously.

The Attorney arrived at the Company that same morning and, upon interviewing the Supervisor confirmed the statement who volunteered to submit to a polygraph examination. The Attorney also asked Grievant whether or not he made the statement to which he replied "no". The Attorney offered all, including Grievant, to take a polygraph examination to which they agreed but Grievant declined.

On March 30, 2016, a pre-disciplinary hearing ("hearing") was held by another attorney who had been used for that process in the past. Two of the preliminary charges

were dismissed but those of dishonesty, threatening harm to the supervisor (insubordination) and harassment/intimidation – creating a hostile work environment were sustained. This report was provided to the Engineer who issued a determination to terminate Grievant.

The Company's Work Rules and Grievant's prior discipline provided him with forewarning or knowledge that he could be terminated for making threatening and harassing comments and for dishonesty.

The Work Rules were reasonable because they related to the orderly, efficient, and safe operation of the Employer's business. Everyone is currently aware of workplace violence. The very serious incidents that have occurred in the workplace and the publicity surrounding them have resulted in a changing attitude in our society. Additionally, co-workers and supervisors should not have to endure harassment and threats/intimidations by the Grievant. Additionally, employees must be expected to tell the truth, particularly in internal investigations about serious conduct.

Grievant requested to continue the pre-disciplinary hearing advising that he had a VA appointment. The Collective Bargaining Agreement provides that the employee must attend the hearing unless medically excused by a bona fide physician statement. Grievant did not produce any such statement and the hearing was conducted as scheduled on April 4, 2016.

The Employer expects the Union will argue that nobody asked Grievant what he meant by the comment. However, as the Hearing Officer explained, such a question would have been fruitless since Grievant denies making the comment at all. Grievant's supervisor was completely candid in his testimony in acknowledging that he should have

reported the matter on the day that it happened. He testified that he believed that he put the public in harm's way and was concerned that whole day and night. Still, he ultimately reached the right conclusion on his own to report the matter and then acted to report it upon his arriving early the next morning.

Employers cannot bear the risk of employing an individual who has made serious threats of workplace violence and, in fact, can be held for negligent retention for continuing to employ such an individual. Termination is appropriate irrespective of the employee's length of service given the severity and risk of the situation.

The Union argument that the discipline was issued untimely is unsupported. The Engineer issued the discipline on April 14, 2016, by certified mail well within the ten working days provided by Article 6, Section 4 of the CBA. In the language of the Agreement the parties delineate between when discipline is "issued" versus the date of "receipt". The day upon which Grievant finally chose to pick-up his mail, his "receipt" of it on April 25, 2016, is only relevant to how many days he had from that point to file his grievance. Grievant was not denied the opportunity to grieve the decision.

Grievant was discharged for making harassing, threatening statement toward his supervisor, then lying about it during an internal investigation. Each of these offenses carries a penalty of termination on their first instance.

The Trumbull County Engineer respectfully requests that the grievance be DENIED.

UNION'S POSITION

The evidence and testimony shows that Grievant was having a conversation with a co-worker prior to the start of the shift and his supervisor heard a piece of the

conversation. Clearly his supervisor did not think it was a serious issue as he did not report it until the next day.

There is no question that there was a brief conversation between Grievant and his supervisor. The context of the conversation is what is in question. Grievant's account was that when this is all said and done there will be a pile of people and he would be standing on top of them. Regardless of which version the Arbitrator may believe he still must ask himself, if this is what the supervisor heard, then why didn't he take action and why didn't he ask the simple question of what did you mean by that statement. Management acknowledged in the arbitration that failure to report or the delay in reporting an incident this serious is a very serious offense, however, management did not discipline the supervisor or even conduct and investigation of his delay.

The supervisor gave both of the employees their work assignments and sent the Grievant out to work in the general public for the rest of the day. Management stated that they relied on the Supervisor and the co-worker's statement to come to the conclusion that the incident happened and that it was a threat. But, it took Management three different tries with the co-worker to get what they were trying to put together on the Grievant. He was not a credible witness at all. He was coached, at best, to get the third statement.

On March 17, 2016, the day after the alleged incident, the Grievant was called to the office and questioned by Management for approximately two minutes. He was never given Union representation. Corrective Action states "an employee **shall** be entitled to the presence of a Union Steward at an investigatory interview" upon request, if he/she has reasonable grounds to believe that the interview may be used to support disciplinary

action against him/her." The Grievant's right to representation was violated. The Grievant was not given Union representation. He never asked for Union representation because the meeting was brief and he was never advised that it was in an investigation.

The Grievant was never interviewed to offer any mitigation and Management never took into consideration what the statement was in the manner presented by the Supervisor. The Grievant offered an Affidavit to try and get his side of the story that it was Management's drive to get him out of the place of employment through any means possible. The Grievant neither threatened harm to a supervisor nor was he insubordinate.

The Grievant only had three days to prepare for the Pre-D that the Company scheduled on April 4, 2016. He requested it to be rescheduled. The Grievant only had approximately 3 days to prepare for the Pre-D even if he didn't need to reschedule it due to his doctor appointment.

Management was targeting the Grievant not only for exercising his rights under the contract as a Union member but because he filed a lawsuit against the Trumbull County Engineer. Even the prior disciplines show that they were targeting him for Union activities.

The Seven Tests for Just Cause were not followed. Management did not conduct an investigation before making a decision about taking disciplinary action. Management only looked for evidence to support their theory. Management did nothing to reconcile conflicting statements by witnesses and they did not discount information they could not validate if they would have. They did not give the Grievant a chance to appear with a representative at any time to tell his side of the story and respond. He was forced to write an affidavit because Management would not reschedule 1 day for his doctor's

appointment to get his blood pressure medicine with the Veteran's Clinic. In an investigation the subject should always be interviewed and he was not.

The Union respectfully requests that the Arbitrator sustain the grievance. That all discipline be removed from his record, reinstate him to his position as Labor 2, payment of all lost wages, return leave balances that would have accrued from the date of removal, and provide Grievant the ability to buy back any leave cashed out after his termination, restore his seniority to his date of removal, pay all documented medical, dental and vision expenses that Grievant and his family incurred since his removal, return him to his shift assignment and the good days that he held when he was removed and payment of all retirement contributions.

PROCEDURAL OBJECTION MADE PRIOR TO THE HEARING

Prior to the first day of hearing on the merits on September 8, 2017, the parties issued multiple subpoenas, signed by the Arbitrator and returned to the parties who served them on the witnesses. Among those subpoenaed was an attorney who was and has been involved in administrative hearings as counsel for the Engineer. The Employer challenged the appropriateness of this subpoena based upon the attorney/client privilege asserted by the witness.

On September 5, 2017, the Arbitrator conducted a pre-hearing conference call with the parties to address this and other issues. After considering the positions of the parties, the Arbitrator advised their representatives that it is his function as the neutral to sign the subpoenas but has no capacity to enforce the request nor command the witnesses to appear. The attendance of a subpoenaed witness may only be compelled by filing a request in the Court of Common Pleas of the County where the hearing would be held

whose function would be to determine whether or not the witness could be compelled to attend or excused for the any reason including, but not exclusive of, attorney/client privilege.

OPINION

Prior to the beginning of the shift in one of the Trumbull County Engineer's facilities, two employees, one of whom was the Grievant, were engaged in a conversation in the Engineer's Highway Department. While this conversation was occurring, their Supervisor walked by the two of them. He testified that he heard the Grievant state "when this is all done and said there will be a pile of people and I will be standing on top" whereupon the supervisor asked Grievant, "what did you say?" Grievant repeated his statement whereupon the Supervisor asked Grievant, again, "what?" The Supervisor testified that after this last request for the statement, that he looked Grievant up-and-down and finding no guns went into the locker room to see if there were any weapons in or around Grievant's locker and then went to the parking lot and looked in the window of Grievant's vehicle to see if he could find any. When he found nothing, the Grievant was dispatched for his work day.

That evening, the Supervisor testified that he was concerned about this incident but, as a new supervisor, he was unsure what to do. That evening while watching television he testified that there was a news story of a shooting or bombing and decided to report the incident to the Company the next day.

When this information was provided to the Engineer he, at first, attempted to counsel with the County Prosecutor to see whether or not any action should be taken in that venue but was unable to get any response. He, thereupon, contacted an attorney

("Attorney") who had involved himself in other matters of investigation with the Engineer's office in the past, reported what Grievant's Supervisor had told him whereupon this attorney came to the facility that morning.

As part of his investigation he spent a brief period of time with Grievant who denied making the statement previously discussed. The attorney, thereupon, interviewed and took statements from the Supervisor, the employee with whom Grievant was having the conversation. This employee initially stated that he did not recall the precise statement but, later did so and confirmed the verbiage identified by the Supervisor. The Attorney then obtained the services of the owner of Polytech Associates who had all the necessary qualifications to testify regarding the administration and opinions made when conducting the examination to determine whether or not the responses were truthful. He, first, talked to Grievant who denied making the statement. He, thereafter, interviewed both the supervisor and coworker together with submitting them to polygraph testing and both identified the verbiage previously discussed. Since the polygraph operator was advised that Grievant denied making the statement, he opined that a polygraph test would not be of benefit.

On March 30, 2016, a pre-disciplinary hearing notice was given to Grievant advising of the scheduled date Monday, April 4, 2016, at 9:30 A.M. Grievant advised that he had a Veteran's Administration medical appointment for April 4th and requested that it be continued to the 5th of April, 2016. The Labor Agreement ("CBA") between the Union and the Engineer advises that an employee must "attend the hearing unless medically excused by a bona-fide physician's statement which details the nature and extent of the incapacitating illness. In the event of such absence, the hearing will still be

held. . . . Absence of any other reasons shall not be considered a waiver of appeal rights." (CBA Article 6, Section 4). The Notice advised Grievant that he was being charged with the violation of the following work rules: (1) dishonesty, (2) threatening harm to a supervisor (and subordination), (3) insubordination-abusive language to a supervisor, (4) any other failure of good behavior – abusive language to a fellow employee, and (5) harassment/intimidation – creating a hostile work environment.

The Grievant did not present any physician's medical excuse for his inability to attend on the 4th of April. At the hearing, evidence was presented and was received in evidence that the Department of Veteran's Affairs had scheduled Grievant for an appointment for April 4, 2016 at 8:20 A.M. the purpose of which was to obtain a refill of his blood pressure medication.

The pre-disciplinary hearing did go forward on April 4, 2016 beginning at 10:50 A.M. An Attorney who had been previously selected by the Company to be a pre-disciplinary hearing officer was retained. At the hearing, the owner of Polytech Associates reported, after an examination of the supervisor and the co-employee present during the incident, who had changed his initial statement before the polygraph was administered subsequently stated that "well I had some tine to jog my memory". He did, nevertheless, testify that he did not know Grievant to be a violent person but, that, those not knowing him could have been frightened, concerned and distressed by what he said.

The requirements for attendance at a pre-disciplinary hearing permits an employee to have a date changed based upon a medical excuse for that date and/or time. Grievant did not obtain or proffer such an excuse and failed to appear. The hearing was scheduled for 10:00 A.M. Ultimately, Grievant, during the arbitration produced a

doctor's note that he was scheduled to pick up his blood pressure medication at 8:20 A.M. on the day of the hearing which was scheduled for 10:00 A.M.

Grievant did, subsequent to the Pre-Disciplinary hearing, present an affidavit under oath and sworn to on April 8, 2016. In the Affidavit he advised that he "had a medical appointment at the VA Medical Center Outpatient Clinic scheduled for April 4, 2016 at 9:30 A.M." He continued that his appointments were made six months in advance although the schedule for his April 4, 2016 appointment was dated "3/21/2016". Neither the Affidavit nor the scheduled notice advised of any medical condition that would have permitted Grievant to be absent for the scheduled Pre-Disciplinary hearing. The Affidavit did challenge what his supervisor and co-employee said was about people or bodies lying all over the floor which Grievant stated "was his choice of words, not mine." He further testified that the subject of his conversation was that the (Cleveland) Browns are losing "a lot of people" and that with all the lawsuits currently pending that there would be "less people around here".

The pre-disciplinary hearing officer dismissed charges 3 and 4 but determined that the statement to Employers Managementthat "there would be a pile of people with me standing on top of it" constituted a threat of harm and harassing/intimidating conduct. In addition, it was determined that the Grievant's denial of what was reported to have been said by the only two others that were there was dishonest and his conduct was of the upmost seriousness in the workplace.

It is unfortunate but true that any inkling of violence in the work place has become a more serious item that cannot be ignored nor can one speculate upon whether or not such statements have viability. Grievant having made this purported statement

loud enough for the passing by of his supervisor and repeating the exact same language in response to the question "what?" and, then, a third time demonstrated that Grievant meant to say what two others heard. Although it does not describe that he meant harm, nor was it initially directed specifically to the Supervisor, the fact that the threat never described how or who became one of the "bodies", the Engineer's decision to terminate cannot be found to be without just cause. Hindsight is 20/20 and, if, only the Grievant would have said he was joking or even laughed, indicating any of these statements were humorous or not to have a threatening context prevents the Arbitrator from reducing the penalty. The employees and his supervisor all termed what they heard to be threatening and serious. Moreover the Supervisor's action in searching the locker room and Grievant's car for guns before he and other employees began work the day of this incident demonstrates a legitimate concern.

Having found no weapons, the Supervisor, recognizing his responsibility to direct work that needed to be done by his employees sent them on their mission which was principally cleaning up roadside trash which limited the interaction of the Grievant with members of the public for their tasks for that day.

A beginning of the investigation by the Engineer was to ask Grievant if what he was heard to have said was true. The fact that he did not attempt to qualify or dilute what he said but simply denied it, supports a finding of dishonesty when those present were quite explicit and consistent regarding what was said.

Although the first statement was shared with a co-employee and not the Supervisor, the second and third by having been directed to the Supervisor after he said

"what" was a violation of the Rules of insubordination and threatening harm to a supervisor.

The Union resourcefully challenged the offer of previous discipline of the Grievant. The Arbitrator acknowledged the objection by the Union and advised the parties to brief whether or not it should be considered as evidence. Even without definitive statements in their briefs with respect to the propriety of the previous discipline, the hearing officer and the Engineer clearly ignored this discipline as a contributing factor in their decisions. The finding that the statement having been made and directed to the Supervisor were of such a serious nature that previous progressive discipline was not be a factor in the determination by either the Engineer or the Arbitrator.

The Union argued that the termination letter did not adhere to the temporal requirements of Article 6, Section 4 of the CBA. Pre disciplinary decisions are required to be rendered by the Company within ten days after hearing. Although the certified mail receipt was beyond the period of time, the notice was clearly dated within that period. Whether or not the Notice of Discipline to Grievant was timely is only an important component in determining whether time prerequisites for the filing of a grievance. There being no violation by the Union in the filing of the grievance it is and was properly before the Arbitrator for decision.

The challenge to the Engineers being present during the entire hearing when there was a motion made and granted for separation of witnesses, does not prevent the Employer to have a representative present and to be identified as a witness during the entire hearing as well as being able to testify. Similarly, the Grievant as well as a

designated representative for the Union would have the same entitlement as the designated representative of the Company.

It was disturbing to observe that the Employer refused to reschedule the hearing when the original notice was but three to four days before the hearing. The request by Grievant for a continuance, however, was that he had scheduled appointments with the VA which were difficult and take months to obtain. It became apparent from the evidence that the request for the continuance was not for an incapacitating medical condition with the opinion of a bona fide physician. The VA "appointment" was a 8:20 A.M. on the 4th of April with the hearing scheduled for 10:00 A.M. but did not even begin until more than 20 minutes later. Failure to request a delayed start time rather than a rescheduling of the hearing with so many others already identified as being scheduled does not merit an excuse for failure to attend.

AWARD

Based upon the foregoing opinion, the grievance is denied.

Pursuant to the Collective Bargaining Agreement, the remaining fees and expenses of the Arbitrator shall be shared by the parties.

Dated: October 20, 2017 /s/ Bruce B. McIntosh
Arbitrator