#21

FEDERAL MEDIATION AND CONCILIATION SERVICES
VOLUNTARY LABOR ARBITRATION TRIBUNAL
Robert J. Vana
Labor Arbitrator

In the Matter of the Arbitration Between:	FMCS Case No: 18-08293
Oho Civil Service Employees Association Local 11, AFSCME, AFL CIO (the "Union")	OPINION AND AWARD Grievance of Russ Adams
-and-	
City of Mount Vernon, Ohio (the"City")	

The oral hearing for this matter was held on November 27, 2018 in a conference room of City Hall in Mount Vernon , Ohio, before Robert J. Vana, the arbitrator who was mutually selected by the parties.

Jonathan J. Downes, Esq. presented the case on behalf of the City . Also present on behalf of the City were: Richard Mavis, Mayor; Joel Daniels, Safety Service Director; Edward Berg, Seasonal Worker and Scott DeHart, Esq.

James Beverly, OCSEA Staff Representative presented the case on behalf of the Union. Also present on behalf of the Union were: Annissia Goodwin, OCSEA Operations Director, Charles Adams, Grievant and Chris Hagner, Union President.

There was no objection raised as to the arbitrability of the grievance, and the grievance is properly before the arbitrator for a final and binding resolution.

A stenographic record of the arbitration proceeding was not taken. Both parties filed

post hearing briefs (the "Post Hearing Briefs"). The Post Hearing Briefs, along with the documents submitted into evidence and this Opinion and Award constitute the entire record for this case.

GRIEVANCE

Under the date of August 2, 2018 , the following Grievance Form was filed on behalf of the Grievant (the "Grievance"):

> "Nature of Grievance; Article and Section Violated:
>
> Article 11 Corrective Action11.2 Discipline action 11.4 Progressive Discipline policy. Union feels there was excessive discipline, not progressive discipline. Group 1 Offense, list of offense is oral reprimand, and management went to 5th offense which is up to termination or reduction in pay or position.
>
> Statement of Facts:
>
> [The Grievant] was accused of making statements to summer help.
>
> Resolution Requested:
>
> Place Grievant back on previous job and follow language of the Contract and work rules and policies."

ISSUE

The issue presented to the arbitrator for his final and binding determination is stated as follows:

> "Did the City violate the terms of the CBA when it demoted and reduced the pay of the Grievant, and if so, to what remedy, if any, is he now entitled?"

DOCUMENTARY PROVISIONS

The arbitrator finds the following documents, in pertinent part, to be relevant to the final and binding resolution of the Grievance:

A) COLLECTIVE BARGAINING AGREEMENT

***

ARTICLE 7 MANAGEMENT RIGHTS

7.2 Sole and Exclusive Rights The sole and exclusive rights and authority of the City include specifically, but not limited to, the rights listed in O.R.C. Section 4117.08(C), numbers 1-9:

***

(5) Suspend, discipline, demote or discharge for just cause, or lay-off, transfer, assign, schedule, promote or retain employees.

***

***

ARTICLE 11 CORRECTIVE ACTION

11.2 Disciplinary Actions Disciplinary action on measures shall include only the following:

(a) oral reprimand (records of oral reprimand may be placed in the employee's personal file);
(b) written reprimand;
(c) suspension with or without pay;
(d) forfeiture of paid leave
(e) reduction in pay/and or position; and
(f) discharge

Counseling, coaching, and performance improvement plans will not be considered discipline and are not grievable under the Grievance Procedure.

***

11.4 Progressive Discipline (a) Except in extreme circumstances wherein the employee is found guilty of serious misconduct including conduct that is potentially criminal, dishonesty, insubordination, sexual harassment, etc, or instances where the conduct of the employee justifies more severe discipline (up to and including discharge), discipline will normally be applied in a corrective, progressive, and uniform manner in accordance with this Agreement.
(b) Progressive Discipline and the level of discipline shall take into account the nature of the violation, the impact on the Department and the City, the employee's record of discipline and conduct.

***

B. WORK RULES

***

(B)(5) Civil Rights

(a) Employees are to respect the basic rights, as prescribed by Law, of all fellow Employees, Supervisors and the Public.
(b) Abuse, threats, obscene gestures or harassment or intimidation toward co-workers, supervisors, or the Public will not be tolerated.
***
(e) . . . [C]onduct which would "single out" an individual or jeopardize general safety is prohibited.

***

GROUP I OFFENSES

***

11. Threatening, intimidating, coercing, or interfering with subordinates or other employees.
***
21. Unsatisfactory work or failure to maintain required standard of performance.

***

GROUP II OFFENSES

***

4. Conduct violating morality or common decency, e.g., sexual harassment
***
10. The making or publishing false, vicious or malicious statements concerning employees, supervisors, the City or operations.

***

15. Use of abusive or threatening language toward supervisors, or fellow employees.

***

E(1) General Policies and Procedures for Parks, Buildings and Lands Department

***

Dealing with the Public:

***

Employees will be courteous to all citizens and City employees they deal with.

***

BACKGROUND

The City of Mount Vernon is a small town located in Ohio. The City's Parks Department is responsible for the operating and maintaining the City's various parks and recreation areas, including Ariel Foundation Park (the "Park") which opened in 2015. The Park is a 250-acre public space developed by the City on a former industrial site. Within the Park grounds are architectural ruins, lakes, an observation tower, walking trails, steel sculptures and a museum, all sites meaningful to the public.

Work at the Park is mostly seasonal. The City relies on seasonal workers to accomplish the Parks maintenance demands during the spring and summer months.

The Grievant has been an employee of the Parks Department since 2002, initially as a Maintenance Worker. On February 22, 2016, the City placed the Grievant in the supervisory role of Parks Foreman. As Parks Foreman, the Grievant was responsible for supervising, leading and managing four (4) full time and nine (9) seasonal workers. The Grievant, in his role as Parks Foreman, reported to the City's Superintendent of the Parks Department (the "Superintendent"),

who, in turn, reports to the Safety-Service Director for the City (the "Director").

In 2018, the City hired a new group of seasonal workers, including seasonal worker Berg ("Berg"). Berg, who was hired in May of 2018 by the City, was responsible for mowing, weed-eating, tree trimming, and Park upkeep and directing the seasonal crew. The Grievant designated Berg, based upon Berg's substantial previous employment supervisory experience, as the "Crew Leader" for the other seasonal workers assigned to the Park.

Berg resigned from his seasonal job with the City on July 27, 2018, citing the Grievant's alleged unprofessional conduct in a series of incidents he ultimately described to the Director. Specifically, Berg described the following incidents of unprofessional conduct exhibited by the Grievant:

Incident 1. A seasonal co-worker previously asked the Grievant for time-off from work on a specific day. The Grievant asked the co-worker to remind him when the day got closer. When the co-worker reminded the Grievant approximately a week before the approved day off, the Grievant allegedly berated the co-worker telling him, several times, "you don't tell me, you ask me" and that "I'm your boss."

Incident 2. Several monuments in the Park are dedicated to notable local figures. One such monument was a memorial to the former City Superintendent of Parks, who had worked over 30 years for the City (the "Subject Monument"). Berg and other seasonal workers found the Subject Monument was broken, and brought it into the shop for repair. When the Grievant saw the Subject Monument in the shop for repair, he allegedly became irate, allegedly making foul remarks about the deceased former Superintendent of Parks. The Grievant was alleged to have said he hoped the former Superintendent of Parks died a long, miserable, agonizing death and that the Grievant would (urinate)[1] on his grave.

[1] A more profane term was alleged to have been attributed to the Grievant.

Incident 3. Berg contacted the Grievant asking for a gasoline delivery to the Park for the crew's mowers. The Grievant allegedly responded in a gruff manner, "you'll get it when I get there." Berg, then said "whatever", and ended the call. Later, the Grievant came to the Park, without the requested gas, to argue with Berg about the call.

Incident 4. The Grievant had instructed the crew to notify him of any unusual issues or repairs that were needed within the Park. On one occasion, Berg identified a toilet in the women's restroom that was not flushing properly. Someone had previously 'jury-rigged' a temporary repair to fix the same problem. Berg re-engaged the "jury-rigged' mechanism to avoid any immediate issues, and informed the Grievant of the need for repair. The Grievant allegedly told Berg, "it's none of your concern" and criticized Berg for his initiative in re-engaging the temporary fix.

Incident 5. The Grievant had directed the work crew to pick up overflowing trash at a pavilion in the Park. Berg indicated the Grievant implied in an email to the City Safety- Service Director that the crew had not done their job properly the previous day. When the crew arrived to address the overflowing trash, the crew discovered the trash was not overflowing. The crew then removed the trash that was contained in the less than half-full trash barrels. Berg and the crew reached out to the Grievant to explain the report of the over-flowing trash bins was inaccurate. The Grievant allegedly responded he was not interested in hearing any explanation.

Incident 6. The Park contains approximately 15 barrels for its patrons to use for trash. Each barrel has a 3 inch hole on the side, near the bottom. Berg observed the raccoons were reaching into the trash cans and pulling out trash on a daily occurrence. Berg asked the Grievant if he could cover the holes in order to stop the raccoons from scattering trash, but the Grievant responded "no", allegedly without explanation. Since the problem continued, Berg decided to fashion metal plates and install them over the holes.

The Grievant called Berg and was extremely upset. The Grievant was on the speaker phone and the other crew members were present for the conversation. The Grievant allegedly demanded to know "who the hell put them damn metal things on my trash cans" and berated Berg for installing the cover plates. Berg agreed to remove the plates.

Incident 7. Allegedly incensed about Incident 6, the Grievant drove to the Park to talk with Berg. Grievant initiated the conversation by stating "if I sounded a little gruff, I didn't mean to . . ." However, the Grievant allegedly quickly became agitated about the trash barrels and continued criticizing the crew for weed-eating a ditch unnecessarily.

Berg indicated to the Director that Incident 7 was the last straw for Berg, who then tossed his keys into the Grievant's truck, indicating "I'm done".

Berg then contacted the Director requesting an exit interview, which subsequently was held on July 30, 2018. Berg informed the Director that his decision to resign was motivated entirely by the Grievant's unprofessional supervision and his belittling conduct toward Berg and other seasonal workers. Based upon Berg's exit interview, which echoed concerns raised in the past by another employee, the Director believed the allegations were very serious and that the Grievant was not fit to be a supervisor.

On August 2, 2018, a pre-disciplinary conference was conducted with the Grievant concerning the allegations made by Berg. The Grievant denied the allegations. The Director did not believe the Grievant's denials were credible based upon his previous working relationship with the Grievant. The Grievant allegedly offered no explanation for the incidents, nor any contrary evidence. The Director determined that the conduct reported by Berg violated City work rules and that the Grievant had violated the City's expected standards of conduct.

Effective Monday, August 6, 2018, the Grievant was demoted and assigned to work as a Maintenance Worker on the Distribution and Collection Crew in the Water/Wastewater Department.

As a result of the foregoing, the Union filed the Grievance on behalf of the Grievant. The

Grievance was processed through the parties' contractual grievance procedure without resolution. The Grievance is now before the arbitrator for a final and binding resolution.

SUMMARY OF THE POSITION OF THE CITY

As a threshold matter, the City notes that in the Grievance, the Union did not challenge the City's conclusion that Grievant had engaged in the conduct alleged by Berg and that his conduct violated the City's standards of conduct. The CBA requires that a grievance indicate the Articles/Sections alleged to be violated, and the Union indicted only two Sections in its Grievance: CBA sections 11.2 and 11.4. CBA Section 11.2 provides the forms of disciplinary action, which may include "reduction in pay/and or position." The Union does not contend in the Grievance, nor did it argue at the hearing, that the form of discipline assessed on the Grievant in this case was improper. CBA Section 11.4 indicates that the City will normally apply principles of progressive discipline. This seems to be the basis of the Union's complaint. However, section 11.4 clearly provides for deviation from progressive discipline principles where "the conduct of the employee justifies more severe discipline." In this case the Director determined that the Grievant's improper conduct was serious enough to warrant demotion from a supervisory position, which is appropriate and necessary based on the Grievant's conduct.

The Grievance does not challenge the "just cause" to demote the Grievant, it only challenges the penalty. The grievance is devoid of any reference to Article 11, Section 11.1, which provides, in pertinent part, that no employee shall for disciplinary reasons be reduced in pay or position except for just cause. The Union, in essence, by the language of the Grievance, acknowledges the misconduct of the Grievant, but challenges the demotion as being overly harsh for the misconduct acknowledged.

Further, at the arbitration hearing the Union not only sought to have the Grievant reinstated to his position as Parks Foreman, but for the first time, requested that the Grievant be awarded all lost wages and that he be made whole. The arbitrator should not permit the Union to expand the scope of the remedy sought beyond that which is expressly requested in the Grievance.

The evidence in this matter clearly indicates the City had just cause to demote the Grievant. The Grievant acknowledged his awareness and understanding of the City's work rules and policies. The City's work rules are clear and concise, giving the Grievant clear notice that discourteous, disrespectful, uncooperative behavior toward subordinates and others is not tolerable and would result in corrective action.

The Grievant signed to acknowledge his receipt of multiple performance evaluations from 2007 to the present. Nearly every evaluation includes critical feedback about the Grievant's lack of flexibility, cooperation, and communication skills. The Grievant was also coached in June 2016 after concerns with a seasonal worker were raised to the Director, putting the Grievant squarely on notice of the City's expectation that he communicate effectively and respectfully toward seasonal workers and other colleagues.

The Director conducted a fair investigation of the issues raised by Berg, which were reduced to writing and were specific in nature. The Grievant replied only with a blanket denial of the allegations, which the Director did not find credible. The Director reviewed the Grievant's employment history and personnel file before moving forward with any disciplinary action.

Further, the Director determined that Berg was credible and the Grievant's blanket denial lacked credibility. It is the prerogative of the employer to weigh credibility and make

determinations in the first instance. The Director properly weighed the credibility of Berg through the lens of Berg's extensive supervisory experience and training. Berg had received extensive training, and had years of hands-on experience in managing performance, communicating, and developing workers. Berg's credible testimony was not challenged at the arbitration hearing. No witness testified to support the Grievant.

Berg had no incentive to lie. While Berg enjoyed his seasonal worker role, his work at the City was a source of retirement income and was of personal interest, not a livelihood.

The decision to demote the Grievant was reasonable. The demotion penalty was proportional in response to the Grievant's ineffective supervision of seasonal workers. The Union's primary contention in its grievance and at the hearing was that the City failed to follow the principles of progressive discipline, but failed to identify what would be "progressive" given the Grievant's position and nature of his conduct. Progressive discipline needs to be corrective. No discussion is offered by the Union of how Progressive discipline would effectively correct the behavior of the Grievant. Progressive discipline would not correct the manner the Grievant has treated subordinate employees over the past several years, notwithstanding the efforts of the City to train and coach the Grievant how to effectively supervise.

The Director testified, in determining the appropriate discipline to be applied in this matter, he considered the Grievant's past performance evaluations as part of the record, and that the Grievant's conduct was exacerbating an existing problem the City faced with attracting and retaining seasonal workers, who are indispensable to Park operations. The Director testified he believed Berg's account because, based on his own past experience working with the Grievant, these were the very types of comments and behaviors he had personally observed from the

Grievant.

The demotion of the Grievant was the appropriate action. The discipline is reasonably related to the Grievant's continued destructive conduct toward subordinates. The arbitrator should affirm the reasoned decision of the City. The City's decision to demote the Grievant is reasonable and consistent with the CBA, City work rules, and standards of performance of a supervisor with the City.

For the foregoing reasons, the Grievance should be denied and his demotion affirmed.

SUMMARY OF THE POSITION OF THE UNION

The Grievant has sixteen (16) years and eight (8) months of service with the City. With regard to the demotion of the Grievant, the Union has proven by way of testimony at the arbitration hearing that the City did not use progressive discipline as required by the CBA section 11.4, which provides that discipline will normally be applied in a corrective, progressive, and uniform manner. Progressive discipline and the level of discipline shall take into account the nature of the violation, the impact on the Department and the City, the employee's record of discipline and the employee's record of performance and conduct.

The Grievant had no prior disciplinary action in the personnel file and had "meets" or above evaluations from 2015 to the present. The City did an incomplete investigation into the unsupported allegations made by seasonal worker Berg. Although the City requested a written summary of the complaints Berg alleged, the Grievant was not given the opportunity to respond with a written statement of his own.

The Superintendent of Parks did no independent investigation into the allegations of

Berg. Rather the investigation was conducted by the Director, who also then served as the grievance hearing officer on August 23, 2018. As testified by the Grievant at the arbitration hearing, he believed that the Director had already determined that the Grievant was guilty of the misconduct alleged by Berg, without the Grievant being afforded the necessary due process.

On August 3. 2018, the Grievant was given a letter stating he was being removed from his position as Parks Foreman and his pay was to be reduced. The Union asserts that the discipline applied was excessive and punitive, and not corrective or progressive as required by the CBA.

There were no witnesses presented to corroborate the testimony of Berg. This case is strictly a matter of Mr. Berg's word, as a short term seasonal worker against the word of the Parks Foreman, with over sixteen (16) years of service for the City. The City has not carried its burden in showing that the Grievant committed any misconduct in his capacity as Parks Foreman. If the arbitrator finds that the Grievant's conduct, in any way fell short of a reasonable standard, then the arbitrator must find that demotion for such violations was overly excessive and harsh. The penalty imposed does not fit the alleged misconduct.

The Union respectfully requests that the arbitrator sustain the Grievance, place the Grievant back into his position as Parks Foreman with all lost wages. Further, the Union requests the Grievant be made whole as if the demotion never occurred.

DECISION

The primary role of an arbitrator in a discipline matter is twofold: 1) to determine if the employer proved if an employee committed the misconduct alleged ("Question 1") and 2) to

determine if the discipline imposed was reasonable considering the degree of misconduct ("Question 2").

In regard to the matter before this arbitrator, the City urges that Question 1 has, essentially, been stipulated by the Union. The City argues the Grievance does not contest that just cause exists for discipline. Rather the Union contests the discipline imposed as being "excessive, not progressive."

While technically the City advances a logical argument that the determination of the Grievant's misconduct may not be at issue, the degree of misconduct must nonetheless be evaluated to determine if the penalty imposed fits the misconduct proven.

It is clear that the demotion of the Grievant was singularly based on the comments made by seasonal worker Berg. It is evident that the City gave great deference to Berg's past experience in managing, training and supervising employees in his professional career. The career experience Berg brought to his post-retirement employment as a seasonal worker with the City was very influential on the City. It was also evident from the evidence that since reliable seasonal workers were difficult to attract and retain by the City, that Berg was a seasonal worker the City was displeased over his resigning.

In the opinion of the arbitrator the evidence establishes that over the course of the summer the Grievant and Berg developed a difficult working relationship; perhaps even a very strong personalty conflict. While at first the fault appears to be that of the Grievant in his management style, ultimately, over time, Berg did not back off in his response. The 7 Instances Berg cited, and the City relied upon in this matter, indicated that Berg was, at some point, a difficult seasonal employee to manage as well. The instances where Berg covered holes in trash

barrels in direct defiance to the Grievant's instructions is one such example. Additionally, Berg had the crew weed-eat an area that the Grievant indicated should not have been done. While the City viewed the Grievant's agitated reaction to those instances as curtailing the initiative of Berg, others might have viewed Berg's actions as being insubordinate. The fact the Grievant reacted negatively in some of the instances cited is neither surprising or unreasonable in the view of the arbitrator.

Accordingly, the arbitrator does not put as much weight on the comments made by Berg as did the City. As a result, the arbitrator is concerned over the level of investigation that went into the assertions of Berg. The timeline starting with the exit interview with Berg to the demotion of the Grievant was very short. The City, candidly, acknowledged that the critical factor was the credibility of Berg versus the credibility of the Grievant. No other investigation took place. There was no interview conducted with other seasonal workers to corroborate Berg's accusations.

Of significance to the arbitrator is the fact that the Director, as the investigator, relied heavily on his own observations of the Grievant's past conduct and treatment of subordinates (the "Director's Observations"). The Director believed Berg, as a result of the Director's own observation of similar conduct by the Grievant. The Director's confidence in Berg was further buttressed by comments of a former seasonal worker (the "Former Seasonal Worker") who left the employment of the City as a result of the Grievant's conduct toward him and allegedly other workers. In June of 2016, the Former Seasonal Worker submitted the following list of eight (8) specific concerns regarding the Grievant's conduct (the "Prior Accusations"), including the following:

- Some of the female seasonal workers have experienced an uneasy atmosphere around [the Grievant] when he uses sexually crude language. When he talks about his personal conquests to the male employees it also brings a strong feeling of uneasiness.
- Continually refers to seasonal workers as "property" and reminds us that we are all "disposable."
- All of his belittling and downgrading towards the seasonal workers makes it difficult to maintain a positive moral (sic).
- He continues to rant during work hours to fellow city employees about issues that do not pertain to those not involved. This is a prime example of Russ' inability to effectively lead a department or employees.

As a result of the Former Seasonal Worker's Prior Accusations, the City, at that time, counseled the Grievant on his management conduct.

The arbitrator is of the opinion that Berg was somewhat biased against the Grievant based upon the aforementioned personalty conflict. However, given the Director's Observations and the Former Seasonal Worker's Prior Accusations, the arbitrator is of the opinion that Berg's testimony was sufficiently corroborated to find that the Grievant does have a pattern of managerial misconduct.

While the Director's Observations and the Former Seasonal Worker's Prior Accusations firmly support Berg's accusations, such evidence cuts both ways. It is clear from the City's evidence that the City has had notice for some period of time, at least from June 2016 to the date of his demotion, that the Grievant has been managing in an unprofessional, arguably even an abusive, manner. Notwithstanding that notice, the City had taken no action to discipline the Grievant. The Former Seasonal Worker's Prior Accusations resulted in only "counseling" or "coaching". Subsequent admitted Director Observations of the Grievant's conduct resulted in no discipline.

In the opinion of the arbitrator, the foregoing establishes that the City has established just

cause for discipline at this time. The question to be addressed now, is if the City complied with Article 11 of the CBA. Article 11, entitled Corrective Actions, provides, in Section 11.2, as follows:

> Disciplinary Actions Disciplinary action on measures shall include only the following:
> (a) oral reprimand (records of oral reprimand may be placed in the employee's personal file);
> (b) written reprimand;
> (c) suspension with or without pay;
> (d) forfeiture of paid leave
> (e) reduction in pay/and or position; and
> (f) discharge
> Counseling, coaching, and performance improvement plans will not be considered discipline and are not grievable under the Grievance Procedure.

Section 11.4 also provides as follows:

> Progressive Discipline (a) Except in extreme circumstances wherein the employee is found guilty of serious misconduct including conduct that is potentially criminal, dishonesty, insubordination, sexual harassment, etc, or instances where the conduct of the employee justifies more severe discipline (up to and including discharge), discipline will normally be applied in a corrective, progressive, and uniform manner in accordance with this Agreement.
> (b) Progressive Discipline and the level of discipline shall take into account the nature of the violation, the impact on the Department and the City, the employee's record of discipline and conduct.

The arbitrator notes that the Progressive Disciplinary obligation of the City is contractual and not a matter of policy. The contractual provision for Progressive Discipline provides for advancing the discipline to more severe discipline depending on the nature of the misconduct However, the arbitrator finds the evidence did not indicate that the Grievant's conduct in June of 2016 constituted such severe misconduct that required any more than a "counseling" or "coaching". Yet the alleged conduct in June of 2016 appears to be similar, if not more severe,

than the conduct of the Grievant currently under review.

In the City's Step Three Response to the Grievance, the City indicates the following:

> "Time after time [the Grievant] has failed when it comes to his interactions with other employees. The City has repeatedly and progressively, given him feedback about his behavior. This feedback and training has not resulted in improvement."

Feedback and training does not constitute progressive discipline.[2] Improvement in performance is the cornerstone of a progressive discipline program, yet the Grievant was never placed in the Progressive Discipline program negotiated by and between the parties..

The arbitrator finds that the Step Three Response fails to address its obligation to comply with the Progressive Discipline contractual obligation for what was identified as a "time after time failure" by the Grievant. It is difficult for the arbitrator to understand if the Grievant's conduct has been so severe as to warrant such a significant penalty as demotion, why the City did not take action earlier to correct the behavior of the Grievant through the Progressive Discipline contractual provision. The City apparently found the behavior of the Grievant to be tolerable notwithstanding, the Former Seasonal Worker's Prior Accusations and the Director's Observations of the conduct, until it was no longer tolerable and the subject discipline was invoked.

The concept of progressive discipline is to provide stronger and stronger degrees of discipline in order to provide notice to an employee that such continued behavior will place the employee in jeopardy of very serious discipline. Without progressive discipline properly

---

[2]The City established that the problem of the communication has long been cited in performance evaluations for the Grievant. However, the Grievant was promoted to the position of Parks Foreman by the City with knowledge of the Grievant's communication deficiencies. The City did provide training for the Grievant to improve his communication and managerial skills. However, such training does not replace the contractual obligation of progressive discipline.

invoked, an employee lacks required notice that his/her continued conduct is going to subject him/her to very serious discipline. Arguably, an employee could be led down a "primrose path" of believing his conduct is acceptable.

When similar misconduct results first in "counseling" or "coaching", and then two (2) years later results in demotion and reduction of pay, it appears the opportunity for employee behavior improvement through progressive discipline was never attempted.

"Fundamental employee protections include progressive discipline. Discipline is to be imposed in gradually increasing degrees, except in cases involving the most extreme breaches of the fundamental understanding"[3]. Arbitrators have looked at certain "fairness" issues in the administration of the progressive disciplinary system when deciding to uphold a particular discipline.[4]

In the opinion of the arbitrator, given the totality of the foregoing, the arbitrator finds that by advancing to the discipline step of demotion and reduction of pay, the City has not complied with its obligation under Article 11 Section 4. The Grievant was never given the opportunity to advance through a progressive discipline program to see if his management behavior would improve. It is clear the City can advance an employee to more severe discipline in the contractual Progressive Disciplinary program when the misconduct is deemed egregious. However, when similar behavior results in "counseling" or "coaching" on the first occasion, then two (2) years later similar conduct results in demotion and reduction in pay, the arbitrator cannot find that such conduct is so egregious so as to advance the Grievant to the penultimate

---

[3]Brand & Biren, Discipline and Discharge in Arbitration, 2nd Ed., Ch 2.I.B at pg 36.

[4] Brand & Biren, Discipline and Discharge in Arbitration, 2nd Ed., Ch 2.IV.D, at pg 111.

step of Progressive Discipline. The arbitrator is of the opinion that there exists an absence of fairness or reasonableness in the severity of the demotion penalty. Accordingly, in this matter the arbitrator finds that the penalty of demotion and reduction of pay was overly harsh and excessive, and inconsistent with the City's obligation under Article 11 of the CBA.

There is no question the evidence supports the finding that the Grievant's conduct falls short of the City's justifiably expected standards. There are several instances described by Berg that justify discipline for the Grievant. But for the reasons stated above the arbitrator is of the opinion the discipline imposed upon the Grievant must be adjusted to reflect that absence of past progressive discipline for similar offenses.

As a result of the foregoing, the arbitrator hereby reduces the penalty imposed of a permanent demotion and reduction of pay to a temporary demotion and reduction of pay. The Grievant is to be restored to his position as Parks Foreman forthwith, at the contractual rate of pay for that position. The Union's request for back pay and a make whole remedy must be denied, since there is no loss wages or benefits since the demotion is merely reduced in time.

The finding herein that the absence of past progressive discipline resulted in the subject permanent demotion being considered overly harsh and excessive is hereby rectified by this reduction in penalty. To the Grievant, this adjusted temporary demotion must be considered his notice that continued managerial misconduct may very well result in his termination of employment on the next occasion. The defense of the City's failure to comply with Article 11 of th CBA may well not be available to the Grievant, if future discipline, including discharge, is based on managerial misconduct. The Grievant is now put on notice that future managerial

misconduct may be sufficient to constitute just cause for termination.[5]

The arbitrator will retain jurisdiction in this matter for sixty (60) days for the sole purpose of addressing any issues that may arise regarding the remedy awarded herein. For all other purposes, this decision is final and binding.

AWARD

The Grievance is sustained in part and denied in part. The Grievant's demotion is reduced to a temporary demotion. The Grievant is to be reinstated to the position of Parks Foreman, at the contractual rate of pay for that position, forthwith. The Union's request for back pay and a make whole remedy is denied.

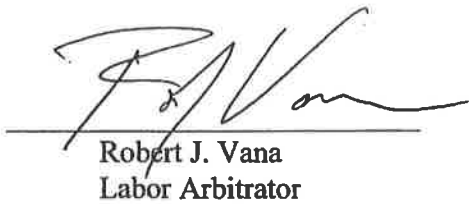
The arbitrator finds that the City was successful in establishing just cause for discipline existed and the Union was successful in establishing that the City did not follow the contractual requirement of progressive discipline in this case. Accordingly, the arbitrator cannot identify a "losing party".[6] Cost of the arbitrator shall be divided equally between the parties.

---

[5] The Grievant would be wise to consider this decision as constituting a last chance opportunity.

[6] Section 12.13 o the CBA provides that the cost of the arbitrator's fee is to be charged to the "losing" party. The term 'losing" was not defined in the CBA. For the reasons stated above the arbitrator cannot determine a "losing" party. Therefore the costs shall be divided equally between the parties.

The arbitrator will retain jurisdiction in this matter for sixty (60) days for the sole purpose of addressing any issues that may arise regarding the remedy awarded herein. For all other purposes, this decision is final and binding.



Robert J. Vana
Labor Arbitrator

Dated and made effective this 11th day of February, 2019, in the County of Knox, State of Ohio.