

IN THE MATTER OF ARBITRATION)
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 BETWEEN)
)
 SERVICE EMPLOYEES INTERNATIONAL)
 UNION, LOCAL 503,)
 OREGON PUBLIC EMPLOYEES UNION,)
)
 Union,)
)
 and)
)
 DEPARTMENT OF TRANSPORTATION,)
 STATE OF OREGON,)
)
 Employer.)

ARBITRATOR'S OPINION
AND AWARD
GRIEVANCES OF
DAVID SUTKOWSKI
MICHAEL ATWOOD

HEARING SITE: ODOT Offices
Astoria, Oregon

HEARING DATES: March 23 & 24, 2006

POST-HEARING BRIEFS DUE: Postmarked May 5, 2006

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REPRESENTING THE UNION: Joel L. Rosenblit
Legal Department
SEIU Local 503, OPEU
1730 Commercial Street, S.E.
P.O. Box 12159
Salem, OR 97309-0159

REPRESENTING THE EMPLOYER: Sally A. Carter
Assistant Attorney General
Department of Justice
1162 Court Street, N.E.
Salem, OR 97309-0159

ARBITRATOR: Gary L. Axon
P.O. Box 190
Ashland, OR 97520
(541) 488-1573

I. INTRODUCTION

This case involves four grievances filed by two employees concerning an overlapping series of events. David Sutkowski (Grievant) and Michael Atwood (Grievant) are Transportation Maintenance Specialists based at the Humbug Maintenance Shop in Region 2 of District 1 of the Oregon Department of Transportation (ODOT or Employer). Three grievances concern the denial of Union representation to Mike Atwood. The other grievance concerns a one-step, one-month pay reduction given to David Sutkowski for allegedly saying the word "fucker" after trying to hang up the phone following a telephone conversation with District manager Mike Spaeth. The Employer denied the grievances. The Union advanced the cases to arbitration. The grievances were consolidated for arbitration before this Arbitrator.

II. STATEMENT OF ISSUES

The parties were unable to agree on a statement of the issues. The Employer posed the following:

(1) Did Michael Atwood have any contractual right to Union representation during his December 30, 2004 meeting with Mike Spaeth?

(2) Did the Oregon Department of Transportation have just cause to issue David Sutkowski a One-Step, One-Month Pay Reduction? If not, what is the remedy?

The Union stated the issues to be:

(1) Was David Sutkowski disciplined without just cause and without progressive discipline, in violation of Article 20, Section 1 of the Collective Bargaining Agreement? If so, what is the remedy?

(2) Did the Employer refuse "to respect that when an employee is acting in his/her role of Steward, the relationship is different than that of supervisor and employee" in violation of Article 10, Section 6 of the Collective Bargaining Agreement? If so what is the remedy?

(3) Did the Employer engage in reprisal, coercion, intimidation, or discrimination against a Union Steward for protected Union activities as prohibited by Article 10, Section 8 of the Collective Bargaining Agreement? If so, what is the remedy?

(4) Was Michael Atwood denied Union representation on December 30, 2004 in violation of Article 20, Section 5 and Article 21, Section 7 of the Collective Bargaining Agreement?

(5) Was Union Steward David Sutkowski denied the right to represent Mr. Atwood in violation of Article 10, Section 10 of the Collective Bargaining Agreement? If so, what is the remedy?

Based on the submissions of the parties, the Arbitrator formulates the issues as follows:

(1) Did the Employer violate Article 20, Section 5, and Article 21, Section 7, of the Collective Bargaining Agreement when it denied Union representation to Michael Atwood on December 30, 2004?

(2) Did the Employer violate Article 10, Section 10, of the Collective Bargaining Agreement when it denied David Sutkowski the right to represent Michael Atwood at the meeting on December 30, 2004?

(3) Did the Employer have just cause to issue David Sutkowski a one-step, one-month pay reduction? If not, what is the appropriate remedy?

III.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 9 - MANAGEMENT'S RIGHTS

Except as may be specifically modified by the terms of this Agreement, the Employer shall retain all rights of management in the direction of their work force. Rights of management shall include, but not be limited to, the right to:

- (a) Direct employees.
- (b) Hire, promote, transfer, assign, and retain employees.
- (c) Suspend, discharge, or take other proper disciplinary action against employees.
- (d) Reassign employees.
- (e) Relieve employees from duty because of lack of work or other reasons.
- (f) Schedule work.
- (g) Determine methods, means, and personnel by which operations are to be conducted.

ARTICLE 10 - UNION RIGHTS

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Section 6. Union Steward Representation. The Employer agrees that a Union Steward system exists for employee representation available to all employees covered by this Agreement and also agrees to respect that when the employee is acting in his/her role of Steward, the relationship is different than that of supervisor and employee.

...

Section 8. The Employer agrees that there shall be no reprisal, coercion, intimidation, or discrimination against any Union Steward or elected officers for protected Union activities. It is recognized that only certain protected activities are permitted during work hours.

...

Section 10. Union Stewards will be granted mutually agreed upon time off during regularly scheduled working hours to investigate and process grievances, and to represent bargaining unit employees in investigatory interviews, upon notice to their immediate supervisor. . . .

. . .

ARTICLE 20 - DISCIPLINE AND DISCHARGE

Section 1. The principles of progressive discipline shall be used when appropriate. Discipline shall include, but not be limited to: written reprimands; denial of an annual performance pay increase; reduction in pay; demotion; suspension without pay; and dismissal. Discipline shall be imposed only for just cause.

. . .

Section 5. Upon request, an employee shall have the right to Union representation during an investigatory interview that an employee reasonably believes will result in disciplinary action. The employee will have the opportunity to consult with a local Union Steward or Field Representative before the interview, but such designation shall not cause an undue delay. Er. Ex. 2.

IV. STATEMENT OF FACTS

Mike Atwood

Grievant Atwood was hired as a Transportation Maintenance Specialist in January 2000. Shortly after he was hired, he contracted Hepatitis C from a tattoo needle. Because of the disease, he was required to take medical leave under the Family and Medical Leave Act (FMLA) and had his doctor fill out forms for the Employer. ODOT rejected the doctor's statements. Atwood filed grievances and BOLI charges over the denial of the FMLA leave. The BOLI charges are still pending. On January 9, 2004, Grievant Atwood was given a Letter of Concern for the tone of a voice mail message he left with an office administrator about the denial of FMLA leave to take care of his wife when she was ill during her pregnancy. Un. Ex. 8.

In December 2004, management had a number of issues regarding the way Grievant was filling out daily timecards and monthly timesheets. On December 29, 2004, Atwood met with Sandy Tagliavento, an office support payroll worker, who helped Grievant straighten out his timecards. The forms were corrected so that Grievant's December 2004 payroll check could be issued.

Following the meeting with Tagliavento, Grievant Atwood met with District manager Spaeth and Sheryl Sloane, the office manager. Spaeth told Atwood that he would like him to keep the next topic of conversation in perspective because it would clarify expectations about payroll record keeping. Spaeth handed Atwood a letter labeled "Letter of Concern." Un. Ex. 10. After Atwood read the document, he expressed the belief that Spaeth was setting him up for dismissal, and Atwood expressed a number of other negative comments about ODOT.

Grievant Atwood then stated he wanted Union representation because of the disciplinary letter. A round of exchanges occurred between Spaeth and Atwood during which Spaeth told Atwood at least four times that the letter was not a disciplinary action. Atwood responded four times that he believed he was being denied his right for Union representation and he again asked for Union representation. The request was denied. The Letter of Concern included a final sentence that read as follows:

Failure to do so will be an indication that you are either unable or unwilling to faithfully perform the duties of your position.

Un. Ex. 10.

The final sentence of this letter is similar to the final sentence in the January 9, 2004 Letter of Concern.

Grievant Sutkowski represented Atwood as his Union steward in his prior conflicts over the FMLA leave and timecards. When Sutkowski heard of the December 28, 2004 Letter of Concern, he sent an e-mail to Spaeth that same afternoon that said: "Your continued attempts to harass and intimidate Michael Atwood will not be tolerated." Un. Ex. 12. Spaeth responded the next morning with an email to Sutkowski that labor management meetings between Sutkowski and Atwood's immediate manager Mark See are canceled. Un. Ex. 13. Spaeth stated to Sutkowski in his email that: "I will establish other lines of communication with SEIU." Un. Ex. 13. The Union does not claim that Union representation was required for Atwood at the December 29, 2004 meeting.

On December 29, 2004, Spaeth called Steve Larkins, the Transportation Maintenance Coordinator for Humbug, and asked the Humbug crew who would be available for weekend work if weather conditions necessitated overtime. Larkins is a represented employee and coordinated the daily workload out of the Humbug shop.

On the morning of December 30, 2004, Larkins asked various crewmembers if they would be available for overtime that weekend. Sutkowski and another worker, John Brown, volunteered to work on the weekend. Grievant Atwood said he was available on Friday and Saturday, but not on Sunday. Larkins asked Atwood why he could not work on Sunday. Atwood responded that he would not be available for Sunday work because he would be in church. Larkins was concerned about the statement because Atwood had previously made himself available for Sunday work and had worked on Sundays.

Larkins telephoned Spaeth and advised him of the conversation with Atwood about Sunday work. Spaeth wondered why Atwood had been able to work the

previous Sundays, and as a manager he was responsible to work with employees on issues of religious accommodation. Spaeth explained he was familiar with the protocols to be followed as required by federal and state laws. Spaeth told Larkins to bring Atwood to the District office.

Spaeth called Greg Hall, a business agent and Statewide Coordinator with the Union. Spaeth told Hall that he was going to be bringing Atwood to the District office and wanted Hall to be on the phone as a facilitator to keep Atwood focused during the meeting. Spaeth told Hall the meeting was not an investigation, but rather it was to be a discussion about expectations and to allow Spaeth to find out what was needed in order to be able to fulfill ODOT's religious accommodation obligations. Spaeth was well aware of the difficulties that had occurred during previous meetings with Atwood about Letters of Concern. Hall agreed to be available as a facilitator.

Spaeth wrote out an outline of the topics he planned to discuss with Atwood. When Atwood arrived at manager Spaeth's office, Spaeth attempted to reach Hall but was unsuccessful. Spaeth tried 20 to 30 times, leaving messages, trying to get Hall in on the conversation. Spaeth told Atwood to come down the hall to his office. Atwood refused to enter the office and alleged that Spaeth was violating his *Weingarten* rights. Spaeth explained that this was not a disciplinary action and Atwood continued to ask for Union representation. After unproductive discussions between the two men, Spaeth asked Atwood to return to the waiting area and again tried to get Hall on the phone. His attempts were unsuccessful.

A call from Sutkowski was put through to Spaeth. Spaeth advised Sutkowski that Hall would be representing Atwood at the December 30, 2004 meeting.

Spaeth tried again to reach Hall, but was unsuccessful. Spaeth then called Sutkowski at the Humbug Maintenance Shop to let Sutkowski know he [Spaeth] would be proceeding without Union representation. Spaeth told Sutkowski that the meeting with Atwood was not an investigatory meeting, but rather concerned expectations. Sutkowski told Spaeth that he would be there to represent Atwood in about 20 minutes. Spaeth directed Sutkowski to stay at the Humbug shop and not to leave the premises.

Spaeth and Sutkowski continued to argue over whether or not Atwood was entitled to Union representation. After several exchanges, the telephone conversation ended with Sutkowski threatening Spaeth with an unfair labor practice. Sutkowski attempted to hang up the phone. As he was doing so, and before the phone actually disconnected, Spaeth and Sloane heard Sutkowski say "fucker" and then the phone beeped as if Sutkowski was trying to dial a phone. Sutkowski testified that he does not recall saying "fucker."

Sutkowski was in the lunchroom when the telephone conversation with Spaeth took place. Several other employees were hanging around the lunchroom during the telephone conversation between Spaeth and Sutkowski. Union witnesses John Brown and Jodi Underhill testified they did not hear Sutkowski say "fucker." Flagger Lynn Bergeson also heard the confrontation between Sutkowski and Spaeth but denied hearing Sutkowski use the word "fucker." Bergeson heard Sutkowski say, "I'll see you in court."

Atwood was waiting in the hallway during Spaeth's conversation with Sutkowski. Spaeth went down the hall to the waiting area and had Atwood come back to the office and cautioned Atwood to be respectful and not interrupt. Spaeth told

Atwood that Hall was not on the phone and the meeting was not an investigation. Spaeth told Atwood that the meeting was in order to discuss expectations concerning what may be required for availability for weather-related purposes. Atwood again asked for steward Sutkowski, and asserted his *Weingarten* rights. Spaeth replied that he understood *Weingarten* rights, but the meeting was not an investigatory meeting.

Spaeth explained to Atwood that they were there because of Atwood's comments to Larkins that he would no longer be available to work Sundays due to his religious beliefs. Spaeth reviewed sections of the TMS position description and job announcement pertaining to working overtime, and noted that Atwood had recently worked a Sunday. Spaeth advised Grievant Atwood that he [Spaeth] needed to understand what had changed so that he could accommodate the religious beliefs.

There is a conflict between Atwood and Spaeth as to exactly what other discussion occurred. Atwood testified Spaeth asked what had changed and asked for documentation of his churchgoing. Atwood asked Spaeth if he was questioning his religious beliefs. Spaeth said no. Spaeth testified he did not then or ever ask Atwood any questions about his religion, or ask for documentation from his church or his pastor about Atwood's church attendance.

Atwood made a number of statements about alleged violations of his civil rights and rights to Union representation. Grievant Atwood also explained that he could be available to work if he could be reached at home. Spaeth concluded the meeting by summarizing to Atwood that both that day's discussion and the discussion of the day before were concerned with managerial expectations to Atwood of what is expected from him.

Atwood testified he did not go to church on January 2, 2005. There was no inclement weather that weekend and none of the employees were required to work that weekend.

David Sutkowski

After the December 30, 2004 meeting, Theresa Albert and Shay Allen of ODOT Human Resources began an investigation into the events of that day. They interviewed David Sutkowski on January 19, 2005. After introductory questions and comments about being honest and forthcoming in the investigation, Albert asked Sutkowski about his knowledge of ODOT's workplace harassment policy. Albert then proceeded to query Sutkowski about his knowledge of what occurred on December 30. In particular, Albert asked Sutkowski about his use of the word "fucker." Sutkowski replied that he did not "recall" saying the word.

Sutkowski also told Albert and Allen that a coworker of his, John Brown, had been sitting next to him during the phone conversation and did not recall hearing Sutkowski using the expletive. Shay Allen followed up with an interview of Brown. On January 25, 2005, Allen spoke by phone with Brown, who told her that he did not hear Sutkowski use the expletive in question. However, Brown told Allen that he was not present for the entire conversation. Brown said he left while Sutkowski was on the phone because it was not his business.

On February 11, 2005, following a conversation between Albert and Hall, Hall sent Albert an e-mail concerning Sutkowski. Hall testified at the arbitration hearing that the substance of the e-mail was true. When Sutkowski asked Hall for advice on how to handle the situation, Sutkowski admitted to Hall that he had called Spaeth a

"fucker." Hall also explained that Sutkowski assumed the phone conversation had ended and Spaeth was no longer on the line when he used the term.

In a letter dated March 3, 2005, Jeff Scheick, Region 2 Manager, notified Sutkowski that he would receive a one-step pay reduction for one month. Scheick wrote in the Notice of Discipline in relevant part as follows:

FACTS SUPPORTING THIS ACTION:

Unprofessional conduct:

- 1) On December 30, 2004 you had a conversation with your manager, Mike Spaeth regarding serving as a union representative for Mike Atwood's expectation meeting being held on this day.
- 2) Your manager informed you that union representation was not needed, as this was not a disciplinary meeting.
- 3) Prior to disconnecting the call, you called your manager a "fucker." This was witnessed by employee Sheryl Sloan, who was also present in this meeting.
- 4) After this phone call you immediately phoned former Union Organizer Greg Hall and admitted to him that you did direct profanity at your manager and needed guidance on how to handle the situation.
- 5) On January 19, 2005 Theresa Albert, Region 2 Human Resource Manager, Shay Allen, Human Resource Generalist, and Randy Davis, Union Steward, met with you to discuss the allegation that you directed profanity at your manager. During this investigative meeting, Ms. Albert directed you to be honest and forthcoming, and that not following this directive could lead to disciplinary action.
- 6) When questioned, you stated you did not recall directing profanity at your manager. You also stated you did not recall being angry, only agitated. You further stated this was not a violation of the work place harassment policy because you do not remember directing profanity at anyone.

SUMMARY:

Just cause exists for this action. You provided false and/or misleading information about directing profanity at your manager, thereby violating the directive to be honest and forthcoming that was set forth at the beginning of the investigatory meeting.

The ODOT Workplace Harassment Policy prohibits behaviors and statements that do not contribute to a positive, productive, and respectful work environment, which include profanity. The verified expletive you used was disrespectful and demeaning and does not support or comply with the policy. You have a responsibility to meet the District Expectations, which requires you to manage your emotions appropriately to the workplace and contribute to a positive work environment. You are expected to conduct yourself in a professional manner that reflects positively on ODOT.

Your conduct fails to meet the minimum standards ODOT can reasonably expect from its employees. This action is intended to impress upon you the need for more responsive action on your part.

You are hereby notified that you are directed to immediately and consistently comply with ODOT policies, and district expectations. Failure to comply with these directives will result in further disciplinary action, up to and including dismissal from state service.

Although it is your responsibility to ensure you are successful, your manager is available to clarify questions you may have, or provide coaching if needed.

...

Er. Ex. 3, pp. 2, 3.

V. POSITIONS OF THE PARTIES

A. The Union

Michael Atwood

The Union takes the position that Grievant Atwood was denied Union representation during an investigatory interview that he reasonably believed would result in disciplinary action. The right to Union representation in such situations that occurred on December 30, 2004 is based on court cases, NLRB decisions, and ERB decisions and is established in the Collective Bargaining Agreement. Citations omitted. The United States Supreme Court has established that an employer may not deny request for Union representation at an investigatory interview, which the employee reasonably believes, might result in discipline. The Oregon Employment Relations Board has followed the *Weingarten* approach to Union representation.

Moreover, the parties have placed into the contract in both Article 20, Discipline and Discharge, Section 5, and in Article 21, Grievance and Arbitration Procedures, Section 7, language which mirrors the *Weingarten* rule and clearly was intended to give employees all of the statutory *Weingarten* rights and make them enforceable through the grievance and arbitration procedures. Steward Sutkowski was denied his right to represent Atwood if the December 30 meeting was an investigatory interview. The Union submits that the interview was investigatory and Atwood had a reasonable belief that the outcome of the meeting would be discipline.

When Spaeth asked Atwood what had changed since he had worked on Sunday, December 12, and asked him to provide documentation about why he could no longer work on Sundays, the Union claims Spaeth was gathering information.

According to the Union, the act of asking questions to elicit information and asking for documentation of Atwood's churchgoing habits created an investigatory interview.

The Union maintains Spaeth went into the meeting with an agenda that showed he intended to get information out of Atwood about why Atwood could no longer work Sundays. He wanted to know what had changed and wanted documentation about why Atwood could no longer work Sundays. Spaeth proceeded to ask questions that demonstrate he was investigating Atwood's refusal to work on Sunday. If he had found there was no basis for Atwood's refusal to work on Sundays, Spaeth could have disciplined Atwood for refusing to meet the expectations of the position description.

While Spaeth characterized the meeting as merely an intention to go over the expectations to work weekends as needed, ODOT cannot evade application of *Weingarten* rights by mischaracterizing the nature of the meeting. The Union submits that even if the meeting started as a review of expectations, it became an investigatory interview when Spaeth attempted to elicit information from Atwood.

The Union next argues that Atwood had a reasonable belief on December 30, 2004, that the investigatory interview would result in discipline. The evidence shows that when considered in the totality of the circumstances, Atwood had an objectively reasonable belief prior to and during the meeting that he was subject to discipline. Atwood had a prolonged battle with ODOT over FMLA rights and on the previous day, December 29, 2004, he was issued a Letter of Concern. Un. Ex. 10. Spaeth advised Atwood if his behavior did not change, that it might lead to discipline.

Although Spaeth insisted the meeting was about expectations, he did not tell Atwood that he would not be disciplined as a result of the meeting. The subject

matter of Spaeth's investigation was whether Atwood could still work Sundays and whether he had lied about his refusal to work Sundays. His refusal to work Sundays would be subject to discipline if either were true. The interview was a formal meeting in the District office, with an ODOT witness and note taker Sheryl Sloane present. The Union concludes that Atwood possessed the requisite "reasonable belief" to be afforded a Union representative upon his repeated requests.

The Employer tried to pick the Union representative for Atwood and when that representative was not available, management would not allow Grievant to have steward Sutkowski as his representative. Manager Spaeth is not entitled to pick and choose who the Union representative will be.

David Sutkowski

The Union avers that Grievant Sutkowski was disciplined without just cause and without progressive discipline. Even if Sutkowski said "fucker," he cannot be disciplined for saying that word when he was acting in a steward capacity. When an employee is acting in their capacity as a Union representative, that employee is engaged in protected activity. Discussion at grievance meetings is not a violation of law merely because it is loud or hostile. In the view of the Union, when an employee wears their steward's hat, and not their employee hat, the status is elevated to a level equal to management. The National Labor Relations Board has acknowledged "some profanity and even defiance must be tolerated during confrontations over contractual rights." Grievant Sutkowski's behavior was not so egregious as to lose the protection he had while engaging in steward activities.

Grievant Sutkowski was clearly acting as a steward and not as an employee during his telephone call with Spaeth on December 30, 2004. Spaeth admitted during cross-examination that Sutkowski was acting as a shop steward when he was on the telephone. He was trying to assert his rights to represent Atwood. Sutkowski had not returned to employee status when he allegedly said the word "fucker." He had tried to hang up the phone and call Greg Hall. Engaging in Union activity on breaks, lunch, and before or after work is protected activity.

Article 10, Section 6, of the Collective Bargaining Agreement takes the equality of status principle stated in the case law and makes it a contractual right. According to the Union, ODOT violated that clause of the contract by treating Sutkowski as an employee subject to discipline for the word he allegedly said immediately after speaking to Spaeth about representing an employee as a steward. Sutkowski could not violate the Workplace Harassment Policy when he was acting as a steward, and not as an employee. The Workplace Harassment Policy does not cover stewards when they are acting as stewards, but only when the employee is no longer a steward and acts as an employee.

It is the position of the Union that the Collective Bargaining Agreement and labor law governs a steward's behavior, not Employer policies. Thus, the Arbitrator should concur with the Union that the policy under which Sutkowski was disciplined is inapplicable.

Moreover, the evidence clearly shows that if Sutkowski said the word, he did not direct it at Spaeth, because he thought he had hung up the phone before he said it, as Sheryl Sloane wrote in her contemporaneous account. Spaeth's attempts at the

hearing to claim that Sutkowski said "fucker" and then tried to hang up are contradicted by Sloane's notes and are not plausible. The Union concludes the Employer cannot meet its burden of proof that Sutkowski said "fucker", but even if he said it, he cannot be punished for saying the word.

The Union strongly asserts that no discipline may be given for the alleged act of saying "fucker." However, if the Arbitrator determines discipline is warranted, a lower level of discipline should have been given. Article 20, Section 1, states that the principles of progressive discipline shall be used when appropriate. Sutkowski had never been disciplined for similar behavior prior to his argument with Spaeth about *Weingarten* rights. An isolated incident of allegedly saying one curse word after being denied contractual and statutory rights does not warrant the level of discipline meted out by ODOT. The Union asserts the punishment was not progressive and did not fit the alleged crime.

The Union takes the position that Sutkowski did not lie when he told ODOT's investigators that he did not recall saying the word "fucker." He never told the Employer that he did or did not say the word. Sutkowski has been consistent and straightforward throughout this process that he could not remember saying the profanity. His failure to remember saying the word is entirely plausible. In order to prove that Grievant Sutkowski lied, the Employer must show that he did recall saying "fucker." The only evidence the Employer had that Sutkowski lied about not recalling whether he said the word was Hall's first version of what happened. The Union maintains that Hall, a former employee of the Union, is not a credible witness. He has changed his version of the events several times.

The Union concluded in its post-hearing brief as follows:

David Sutkowski was disciplined without just cause and without progressive discipline. The Employer did not recognize that Sutkowski was acting as a Steward when he allegedly used a curse word. The Employer engaged in reprisal and discrimination against Sutkowski for his protected Union activities.

Mike Atwood was denied Union representation in violation of the collective bargaining agreement and Union Steward David Sutkowski was denied the right to represent Atwood.

We ask that you order the Employer to pay lost wages for the pay reduction of Dave Sutkowski and to purge the discipline from his record. We also ask that you order the Employer to cease and desist from denying *Weingarten* rights to employees. Brief, p. 35.

B. The Employer

Mike Atwood

The Employer takes the position that Grievant Atwood had no contractual right to Union representation during the December 30, 2004 meeting with management staff. According to ODOT, Atwood did not have a reasonable belief that his December 30, 2004 meeting with Spaeth was an investigatory interview that would result in disciplinary action. The burden of proof is on the Union to demonstrate the Employer denied Grievant Atwood Union representation on December 30, 2004. Even if Atwood truly believed that the meeting was going to result in discipline, any such belief was not reasonable based on the totality of the circumstances.

Article 9, Management's Rights, makes it clear that management is entitled to direct its workforce in order to carry out ODOT's statutory objectives. In the context of this portion of the case, the Management's Rights clause is instructive

because a reasonable evaluation of the facts demonstrates that Spaeth's actions on December 30, 2004 were in fulfillment of his every day duty to manage the workers under his direction and were not disciplinary in nature. Manager Spaeth has been employed in a managerial capacity for over 20 years and has extensive experience in dealing with issues of religious accommodations in order to abide by federal and state laws.

Had Atwood fulfilled his duty as an employee who listened to his manager, he would have been able to quickly mentally process the meeting was not a disciplinary investigation. Instead of listening responsibly, Atwood chose to ignore Spaeth's attempts to explain the situation to him. During the course of the meeting he became agitated and repeatedly demanded Union representation. Grievant's failure to listen calmly to Spaeth and process his manager's words was not reasonable.

Regarding the Union's claim that Atwood suffered past bad treatment by management, the Employer maintains this position is without factual support. The fact that Grievant Atwood has been working for ODOT since 2000 without ever receiving so much as a Letter of Reprimand--the first stage of progressive discipline--severely undermines the Union's arguments. The campaign that Atwood and Sutkowski perceive is pure fantasy.

Atwood did not provide testimony at the hearing to prove he had any reason to believe he had violated the expectations laid out in the Letter of Concern issued on December 29 and at the meeting of December 30, 2004. Atwood's testimony at the arbitration hearing seemed to indicate that he believed the December 30, 2004 meeting would lead to discipline because it followed so closely the meeting over the

Letter of Concern. Since there is no evidence of any timecard or payroll activity by Atwood in between the two meetings, he had no reasonable basis to form the belief that the December 30 meeting was a disciplinary one. Spaeth repeatedly informed Atwood that this was not a disciplinary meeting.

Atwood's prior behavior on January 9 and December 29, 2004, and his testimony at the hearing demonstrated that he is unable or unwilling to work through the correct test for whether he is entitled to Union representation. Atwood testified that his interpretation of *Weingarten* rights is that he is entitled to Union representation any time he is in fear of losing his job. This interpretation is contrary to law and the Collective Bargaining Agreement. The legal test for a reasonable belief is based on the totality of the circumstances. In the instant case, the totality of the circumstances adds up to a conclusion that there was "no reasonable belief" that the meeting between Spaeth and Atwood would result in disciplinary action. The meeting was geared toward expectations and religious accommodations, there was no evidence that Atwood was engaged in wrongdoing or that Spaeth thought he was guilty of misconduct. Spaeth told Atwood the meeting was not disciplinary. There is no evidence that any other employees have been disciplined for requesting religious accommodations.

In sum, the Union has failed to carry its burden to show Grievant Atwood had a "reasonable belief" that the December 30, 2004 meeting with manager Spaeth was an investigatory interview that would result in discipline in violation of Article 20, Section 5, of the Collective Bargaining Agreement. Therefore, ODOT asks that all grievances pertaining to the lack of Union representation at the December 30 meeting be denied.

David Sutkowski

The Employer argues that ODOT had just cause to issue Grievant Sutkowski a one-step, one-month pay reduction because of Sutkowski's use of profanity on December 30, 2004, and his action in providing false or misleading information during the ensuing investigation. Although ODOT has committed itself to a policy of progressive discipline, the Collective Bargaining Agreement does not require that each kind of discipline begin at one specific step and move through each level. Under the circumstances present in this case, ODOT submits the combined course of events justified the pay reduction.

The evidence proved the Employer met the just cause standard under the generally accepted test of the seven elements of just cause. First, the Employer demonstrated that Sutkowski had notice of the policies concerning both the profanity and false/misleading information charges. It is axiomatic that employers are entitled to truthful statements from their employees on matters pertaining to the conduct of business.

Second, the Workplace Harassment Policy is important to ODOT's workplace culture. According to the Employer, Sutkowski's use of profanity had a dual effect. The deliberate disrespect shown by Sutkowski in directing the pejorative term in question at one of his managers would have been detrimental to the workplace environment even if he had uttered the term while in a room with only Spaeth and Sloane present. However, Sutkowski used the profanity in the presence of other employees who were taking their lunch break at the Humbug Maintenance Shop. Allowing Sutkowski to abuse the District manager would lessen respect for

management and impede management's ability to control and direct the workforce. Grievant's status as a Union steward does not shield him from discipline when he conducts himself in a way as to undermine a positive, respectful, and productive workplace. If the profanity had taken place in a grievance meeting behind closed doors, the Union in the instant case might be in a better place to make the argument that Grievant's statement was protected because of his Union status.

Third and fourth, the Employer maintains that it conducted a full and fair investigation into both aspects of the disciplinary charge. Spaeth and Sloane expressed unequivocally that they heard Sutkowski use the profanity. According to ODOT, Sutkowski himself hid behind the disingenuous statement that he did not "recall" using the term at issue. Union witness Brown stated that he did not hear the whole conversation. Having withheld Underhill's name as being present in the lunchroom during the telephone conversation, the Union is now estopped from arguing that the Employer should have invested more resources in attempting to hunt down more witnesses concerning what Sutkowski said.

Fifth, the Employer obtained substantial evidence of both charges on which the discipline is based. The Employer believes its direct witnesses, Spaeth and Sloane, are credible and unbiased, and notes that they have never materially changed their accounts of what happened on the afternoon of December 30, 2004. The testimony of the Union witnesses is not credible given they have told different stories at different times. The evidence shows Sutkowski admitted he used this profanity almost immediately afterwards to Union Representative Hall. At the hearing, Sutkowski admitted he spoke with Hall only three or four minutes after the second call with Spaeth.

Sixth, the discipline imposed on Sutkowski was equitable in light of the Employer's treatment of similar cases. The profanity uttered by Sutkowski was uttered in the Humbug workplace, in front of coworkers. The profanity was above the level of shoptalk to an attack on a supervisor. Employer asserts the evidence further shows that employees are consistently disciplined for providing false and/or misleading information in an investigation.

Seventh, the discipline imposed on Sutkowski is reasonable under all of the circumstances involved in this case. The Employer has shown that Sutkowski was guilty of two charges. A pay reduction for one month is a lower level of discipline. The Arbitrator should conclude the pay reduction was reasonable under all of the circumstances.

For all of the above-stated reasons, the Arbitrator should sustain the Employer's position and deny and dismiss the grievance in its entirety.

VI. DISCUSSION

Mike Atwood

The Arbitrator finds the Union failed to prove by a preponderance of the evidence ODOT violated Grievant Atwood's *Weingarten* rights or Article 20, Section 5 and/or Article 21, Section 7, of the Collective Bargaining Agreement during Grievant's meeting with manager Spaeth on December 30, 2004. Accordingly, the grievance will be denied and dismissed in its entirety. The reasoning of the Arbitrator is set forth in the discussion which follows.

Article 20, Section 5, and Article 21, Section 7, contain identical language concerning an employee's right to Union representation during an investigatory interview. The two sections placed into the contract set forth the principles in *Weingarten* and other cases on the subject of an employee's right to Union representation. Since this is a contract case, I will evaluate the grievance in the context of Article 20, Section 5. Section 5 reads:

Upon request, an employee shall have the right to Union representation during an investigatory interview that an employee reasonably believes will result in disciplinary action. The employee will have the opportunity to consult with a local Union Steward or Field Representative before the interview, but such designation shall not cause an undue delay.

Emphasis added.

Article 20, Section 5 provides employees have the right to Union representation where two conditions are established. First, the right to Union representation is triggered when an employee is subjected to an investigatory interview. Second, the right to Union representation arises in the context of an investigatory interview that "an employee reasonably believes will result in disciplinary action." I hold the record evidence failed to show either of the two conditions was proved to exist during the meeting of December 30, 2004.

I hold that Grievant Atwood did not have a reasonable belief that the December 30, 2004 meeting would result in disciplinary action for five basic reasons. First, Spaeth advised Grievant that the purpose of the meeting was not disciplinary.

Second, manager Spaeth told Grievant Atwood at the commencement of the meeting that the purpose of the meeting was to discuss job expectations regarding

weekend work and to confirm Grievant could no longer work on Sundays because of his religious beliefs.

Third, Spaeth, in the exercise of his managerial prerogative, asked Grievant questions to fulfill the protocol on religious accommodations. The subject matter of the interview was not an area that could result in discipline.

Fourth, Spaeth had no evidence or belief Grievant had violated any Employer requirement concerning weekend work. The December 30, 2004 meeting was held prior to the weekend where management was trying to assure that sufficient staffing would be available to cover the weekend in anticipation of a predicted storm. As of December 30, 2004, Atwood had not refused any order to work the following Sunday.

Fifth, absent from the record is any evidence the Employer had ever disciplined any employee for refusing to perform weekend work. Grievant had worked on Sundays numerous times prior to the December 30, 2004 meeting. Since Atwood started working for ODOT in 2000, he had never been disciplined for any reason, including refusing to work weekends.

The Union argued the meeting of December 30, 2004 was investigatory because the purpose of the questioning was to elicit information that could lead to discipline. The evidence is undisputed Spaeth repeatedly told Grievant that the purpose of the meeting was not disciplinary, but to gather information to accommodate Atwood's religious beliefs. The inquiry was prompted by the fact that Atwood had stated that he could no longer work Sundays because of his religious beliefs.

Moreover, Grievant had not refused an order to work the following Sunday. At the time of the meeting on December 30, 2004 between Spaeth and Atwood, it was impossible to discipline Grievant for failing to work on a Sunday that had not arrived. Further, the evidence is undisputed Grievant had worked Sundays prior to the December 30, 2004 meeting, so he was not facing discipline for a prior incident. All of the information sought by Spaeth pertained to future events that may or may not occur. None of the questions directed at Atwood by Spaeth were intended to elicit information regarding prior incidents that would lead to discipline.

I concur with the Employer that Grievant Atwood was not a good listener. He obviously ignored Spaeth's statements that the meeting was not disciplinary. The evidence also shows Grievant became agitated over a straightforward request for information that would allow Spaeth to accommodate Grievant's stated religious beliefs. As previously discussed, Grievant missed the point that the Sunday in question had not arrived so there was no issue concerning the propriety of whether he had actually failed to work as directed.

It is also the Union's argument Grievant had a reasonable belief that the December 30, 2004 meeting could lead to discipline based on prior issues Grievant had experienced with the Employer over the Letter of Concern issued on December 29, 2004. Atwood's claim that management was out to discharge him from ODOT is not reasonable in the face of the evidence. The Employer had never disciplined Grievant for any reason during his four-year tenure at ODOT.

The content of the Letter of Concern issued on December 29, 2004 was devoted exclusively to timecard and pay issues. There is no evidence any timecard

and/or pay issues had surfaced between December 29 and December 30, 2004. When coupled with the fact Grievant was told the meeting of December 30, 2004 was not disciplinary, there are no grounds to find Grievant had a reasonable basis to believe that the meeting would result in disciplinary action.

Grievant Atwood testified he had a right to Union representation whenever he was in fear of losing his job. Grievant's right to Union representation under *Weingarten* or Article 20, Section 5, is conditioned not on fear. Section 5 states in part: "an employee shall have the right to Union representation during an investigatory interview that an employee reasonably believes will result in disciplinary action." Emphasis added.

Based on the totality of the circumstances, I conclude Grievant did not have a reasonable belief the December 30, 2004 meeting was an investigatory interview or a reasonable belief the meeting "will result in disciplinary action."

The grievance of Mike Atwood is denied and dismissed.

The Union also asserted that David Sutkowski in his role as a shop steward was denied the right to represent Grievant Atwood. Since I concluded that Grievant had no right to Union representation during the meeting of December 30, 2004, the Union's claim Sutkowski was denied the opportunity to represent Atwood must be denied.

David Sutkowski

The Arbitrator finds the Employer proved by clear and convincing evidence there was just cause to discipline Grievant Sutkowski in the form of a one-step, one-month pay reduction. Accordingly, the grievance will be denied and

dismissed in its entirety. The reasoning of the Arbitrator is set forth in the discussion which follows.

I find Grievant Sutkowski did utter the word "fucker" at the conclusion of a volatile telephone conversation with manager Spaeth. The comment was made in the break room at the Humbug shop. Other employees were present in the break room who could readily overhear Grievant Sutkowski's words.

It is unnecessary for your Arbitrator to further review in detail the testimony and argument in the discussion section of the Award. I credit the testimony of manager Spaeth and office manager Sloane that they heard Grievant utter the profanity at the conclusion of the telephone conversation. In order to accept the Union's claim Grievant did not call Sutkowski a "fucker", I would have to find Spaeth and Sloane fabricated their testimony. I hold there is no basis in the record to conclude Spaeth and Sloane manufactured the testimony on what they heard Sutkowski say.

Moreover, former Union representative Hall testified Sutkowski admitted to him that he called Spaeth a "fucker." While Hall's testimony standing alone probably would not sustain the charge, I hold his testimony corroborates that of Spaeth and Sloane. Hall's testimony lends credence to the testimony of Spaeth and Sloane that further undercuts Grievant's excuse that he did not recall using the expletive in reference to Spaeth.

Turning to Grievant's testimony that he did not recall using the term at issue, I find his testimony is not credible. Grievant Sutkowski is an experienced employee and shop steward who understands that if you call your supervisor a profane name in the presence of other employees, consequences are likely to follow. I concur

with the Employer's position that Grievant Sutkowski's testimony that he did not recall directing the word "fucker" at Spaeth was a misguided attempt to avoid responsibility for his conduct.

Union witness John Brown testified he "did not hear David Sutkowski call Mike Spaeth a fucker." Un. Ex. 17. Brown's testimony is undercut by the fact he also testified he did not hear the entire conversation between Spaeth and Sutkowski. Further, the testimony of other Union witnesses was also compromised by the fact that the testimony was couched in the phrase "I did not hear Sutkowski use the word." In sum, the Union's witnesses' testimony is that they did not hear him use the word "fucker." None of the Union witnesses testified unequivocally that Grievant did not call Spaeth a "fucker." Thus, I must conclude the Union's evidence was insufficient to contradict the testimony of Spaeth and Sloane that they heard Grievant direct the profanity at manager Spaeth.

ODOT also charged Sutkowski with providing "false and/or misleading information about directing profanity at your manager, thereby violating the directive to be honest and forthcoming that was set forth in the beginning of the investigatory meeting." Un. Ex. 3, p. 3. Your Arbitrator previously concluded Grievant Sutkowski's explanation that he could not recall calling manager Spaeth a "fucker" to be implausible. Therefore, I am compelled to hold the false and/or misleading information charge is sustained.

The Union next argued that Grievant could not be disciplined for using the profanity when he was acting in a steward capacity. I disagree. The setting and circumstances where Grievant Sutkowski expressed the expletive are undercut by the

fact Sutkowski was not in a private office where he was engaged in a grievance meeting with Spaeth. In addition, the profanity was not expressed in discussions at the bargaining table. Grievant uttered the word in the break room area at the Humbug work site. Other employees were present at the time Grievant called his manager a "fucker." Grievant's use of the profanity was not "shoptalk." Sutkowski directed the word at his manager in the form of an insult. It is one thing to engage in shoptalk with a coworker, and a different level of conduct when the profanity is a verbal attack aimed at a supervisor. Simply put, verbally abusing a supervisor while in the work place in the presence of coworkers is not protected activity.

The grievance of David Sutkowski is denied and dismissed in its entirety.

AWARD

Having reviewed all of the evidence and argument, I conclude the Employer did not violate Article 10, Union Rights; Article 20, Discipline and Discharge, Section 5; or Article 21, Grievance and Arbitration Procedure, Section 7, when management denied Grievant Atwood's request for Union representation on December 30, 2004.

The Arbitrator further concludes the Employer had just cause to discipline Grievant Sutkowski in the form of a one-step, one-month pay reduction based on the reasons stated in the Notice of Personnel Action dated March 3, 2005.

The grievances are denied and dismissed in their entirety.

Respectfully submitted,



Gary L. Axon
Arbitrator

Dated: June 19, 2006