Scarborough (Borough) and I.A.F.F., Local 626

Ontario Grievance Arbitration
O.B. Shime

April 5, 1972

J.T. Sanderson, for the Corporation.
J. Sack, for the Association.

AWARD

O.B. SHIME, Arbitrator:-

¶ 1 This grievance concerns the temporary demotion of A.T. Cousins, a Captain with the Scarborough Fire Department. Captain Cousins, a "family man", 42 years of age, has been employed by the department for 16 years and has an exemplary record. Captain Cousins' reputation throughout the department as being fastidious in both dress and appearance, has earned him the name of "Mr. Clean".

¶ 2 The sequence of events which led to Captain Cousins' demotion follows: During 1970 an alleged order required the men to shave their sideburns. At first, the men in the department generally complied; subsequently some grew sideburns of different lengths. I am satisfied that there were departures from the standards that had been verbally set and these were known to members of supervision including supervisory personnel other than Captain Cousins at Number Three Fire Hall. No one was disciplined for infringing the alleged rule.

¶ 3 In March of 1971, some men at Number Three Fire Hall let their sideburns grow parallel to the top of the ear lobe or what has been described as the top of the ear hole. Captain Cousins was on vacation for the period March 15 to March 29 and permitted his sideburns to grow parallel to the top of his ear lobe. From pictures filed at the hearing I find that the sideburns were neither wide nor bushy but were neat and tidy.

¶ 4 Subsequent to his return and after being at work for a few days, Captain Cousins was approached by Acting District Chief France, who ordered him to remove his sideburns or action would be taken. Captain Cousins indicated that he would lodge a grievance. He also consulted his union and removed the sideburn as requested (after having his picture taken). He then proceeded to grieve and he also arranged to meet with Fire Chief Forgie on April 19, 1971.

¶ 5 A meeting was held between the two men on April 19, 1971, but there is considerable conflict about what occurred at that meeting. However, I am satisfied that a heated discussion did take place.

¶ 6 On April 22, 1971, Captain Cousins was called by Deputy Chief Wretham and asked to come to see the Fire Chief. He attended at the Fire Chief's office on April 23, 1971. At that meeting Captain Cousins was told that he was suspended for thirty (30) days and that he would be immediately transferred to a different fire hall. He was then reduced in rank and assigned to switchboard duty for one month.

¶ 7 On April 26, the Scarborough Professional Fire Fighters' Association (hereinafter referred to as the "Association"), wrote to Chief Forgie stating that it had been informed by Captain Cousins of "certain unspecified charges … lodged against him". It also advised that it was the Association's understanding that a penalty had been imposed against Captain Cousins and that it would be processing the matter through the grievance procedure under the collective agreement. The Association requested a copy of the specific charges and a confirmation of the penalties.

¶ 8 On April 28, 1971, Chief Forgie by letter advised the Association as follows:

> April 28, 1971
>
> Mr. R. Merriman,
> President,
> Scarborough Professional Fire Fighters'
> Association
> Local No. 626.
>
> SUBJECT: CAPTAIN A.T. COUSINS
>
> Dear Sir:
>
> As per your request of April 26, 1971, the following is confirmation of —
>
> (1) the charges laid on April 22, 1971, by Chief Forgie against Captain A.T. Cousins and
>
> (2) the resultant penalties imposed:
>
> 1. Captain Cousins is charged with insubordination and conduct unbecoming an officer in that he did knowingly and admittedly violate —
>
> (a) Article 12 — DUTIES AND RESPONSIBILITIES OF A CAPTAIN —
>
> "Required to uphold and enforce rules and regulations of the Department and all orders received by him."
>
> (b) Article 5 — DUTIES AND RESPONSIBILITIES OF A CAPTAIN
>
> "Conduct a dress and duty clothing and personal inspection and note any deficiencies, including shoes and hair cuts."
>
> 2. For the neglect of duty and abandoning his role as an officer of the Fire Department, he has been reduced in rank from Captain to First Class Fire Fighter for a period of thirty (30) calendar days, commencing April 25, 1971, and terminating at the conclusion of the 24th day of May, 1971.
>
> Yours very truly,
>
> D.J. Forgie,
> FIRE CHIEF.

¶ 9 The matter then proceeded through the grievance procedure. By letter to Chief Forgie dated May 17, 1971, the Association grieved on the basis that Captain Cousins

"has been disciplined and unfairly dealt with as the charges specified and confirmed are not provided for in the 1970-71 collective agreement or the Rules and Regulations which form part of said agreement." By a separate letter dated May 17 the Association also advised that there was a grievance by Captain Cousins concerning "The order to shave his sideburns…" on the basis "that it is not provided for in the 1970-71 collective agreement or Departmental Rules and Regulations forming a part of the agreement and that it is not a reasonable order…".

¶ 10 On May 3, 1971, the Fire Chief responded to the Association's letters of May 17, 1971 in two separate letters. One dealt with the matter of "insubordination" and conduct becoming an officer and the other letter dealt with the order to "shave his sideburns".

¶ 11 The matters ultimately proceeded to arbitration pursuant to the *Fire Department Act* and in accordance with Article 16.01 of the collective agreement. No objection was taken to the Board's jurisdiction to entertain these matters.

¶ 12 Initially, I am of the view that there are two grievances before me for determination. This is confirmed by the separate letters of the Association of May 17, 1971, and the separate responses by the Fire Chief of May 31, 1971. The first grievance pertains to the order to Captain Cousins to shave his sideburns; the second grievance concerns the duties and responsibilities of a Captain and the violation of Articles 5 and 12.

¶ 13 The relevant provisions of the collective agreement are as follows:

> Article 3.01 — Management Rights
>
> The Association agrees that the Corporation of the Borough of Scarborough has the exclusive right to manage the offices and departments, direct the working force and to hire, promote, lay off, demote, transfer, suspend or discharge fire fighters. The Corporation of the Borough of Scarborough agrees that these functions shall be exercised in a manner consistent with the general purpose and intent of the Agreement and subject always to the right of a fire fighter to lodge a grievance as set forth herein.
>
> Article 15.01 — Departmental Rules
>
> Such Departmental Rules as may be mutually agreed upon by the parties hereto, shall be deemed to constitute a part of this Agreement, and shall be observed by all fire fighters. A copy of the Rules shall be supplied to the Fire Chief and Council and posted in the Fire Halls.

¶ 14 I propose to deal first with the grievance concerning the order to Captain Cousins to shave his sideburns. While some suggestion was made that the union discussed the matter of sideburns at a meeting and didn't pursue the issue because they were in contract negotiations at that time, I am unable to find that the issue of sideburns was part of a "mutually agreed" rule as contemplated by Article 15.01. Certainly, if it was agreed upon it was never posted in the fire halls in accordance with Article 15.01 and further no attempt was made by Fire Chief Forgie to rely on Article 15.01 in his letter of May 31,

1971. Both these factors tend to confirm that no rule respecting sideburns was promulgated under Article 15.01.

¶ 15 In his letter the Chief relied on Articles 3.01, 12.01 and 14.01. There is nothing in Article 12.01 to support the Corporation's position and I next turn to Article 14.01 as being the source of the Corporation's authority for issuing the order. Article 14.01 requires fire fighters to "…conform to and obey all the by-laws and regulations in force from time to time, which are applicable to such fire fighters." No by-laws or regulations of the municipality were produced which dealt with the issues at hand. However, there was produced a Training Manual of the Scarborough Fire Department. On the cover and beneath the words "Training Manual" there are the words "Rules and Regulations". I accept that document for what it is — a Training Manual, designed to assist in the training and providing of necessary information to employees of the fire department. It contains, *inter alia*, references to matters such as Recognition of Arson Fires, Properties Flammable Liquids, Gases and Solids, suggested Safety Procedures, Natural Gas Installation, as well as indicating the duties and responsibilities of various classes of employees in the fire department. The manual also suggests that there are extrinsic to that document other Rules, Regulations, Ordinances and Orders of the fire department. While the Training Manual appears to be an important document and of great necessity to the fire department it appears to have predated the alleged rule with respect to sideburns and I find that it was not written for the purpose of dealing with the issue at hand. In addition, it would be torturing the plain meaning of the articles relied upon, and particularly Training Manual, Article 5, requiring personnel inspection and the noting of hair cuts, to find that they contemplated the specific rule respecting sideburns which is relied upon. Accordingly, I am not prepared to give any weight to the Training Manual as being relevant in these proceedings.

¶ 16 I now turn to Article 3.01 which was claimed by the Fire Chief as being the source of his authority. I am of the opinion that Article 3.01 which gives the Corporation the right to "direct the working force" is sufficient to give the Corporation the right to make rules with respect to the working force. However, reading Article 15.01 with Article 3.01 suggests that the Corporation's unilateral right to make rules is cut down by Article 15.01 which requires rules to be "mutually agreed upon by the parties". I find that the alleged rule was not "mutually agreed upon" pursuant to the collective agreement.

¶ 17 However, for the purpose of this matter I am prepared to assume that the Corporation has the unilateral right to make rules. In so doing I accept the classic statement concerning the relationship between company rules and the collective agreement as set out in *Re Lumber and Sawmill Workers Union, Local 2537 and KVP Co. Ltd.*, 16 L.A.C. 73 (J.B. Robinson C.C.J.). In that case the Board set out certain requirements concerning rules, the relevant portions of which are as follows:

> 1— Characteristics of Such Rule
>
> A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> 1. It must not be inconsistent with the collective agreement.
>
> 2. It must not be unreasonable.
>
> . . .

6. Such rule should have been consistently enforced by the company from the time it was introduced.

¶ 18 Apart from the first requisite that the rule may be inconsistent with the collective agreement as not being mutually agreed upon, I find that the only matters in issue are whether it has been consistently enforced from the time it was introduced and whether the rule is unreasonable.

¶ 19 I find on the evidence that the rule was not consistently enforced by the Corporation. For example, Captain Cousins testified that there were others in the hall where he was stationed who grew sideburns to the bottom of the ear. District Chief Brown and acting District Chief France were also stationed at the hall. Presumably they saw these others, yet no disciplinary action was taken by them. Captain Cousins also testified that at the time he was ordered to shave his sideburns he "didn't anticipate anything would be done because so many men were on the job growing them at that time". This was corroborated by Mr. Merriman. The Corporation's evidence indicated that men did grow their sideburns below the required line but from time to time men were reminded and they did shave their sideburns only to permit them to grow again until they were corrected. I am satisfied from the evidence that many men did grow sideburns below the required length.

¶ 20 I am also satisfied that the men exercised a form of self-discipline as to the length of their sideburns and further that this alleged rule was not rigidly enforced — but in some cases there were officers who may have been more zealous than others in attempting to enforce the rule. The evidence indicates that on many occasions fire fighters appeared and remained on duty with sideburns of varying lengths and that on numerous occasions the length of the sideburns exceeded the length required by the rule.

¶ 21 I infer from the evidence that as the general community hair styles changed that many officers became more tolerant of the sideburns and were embarrassed to enforce the rule in a rigid or consistent manner. That is indicated by the uncontradicted testimony of Captain Cousins with respect to his conversation with A.D.C. France at the time he was asked to shave his sideburns.

¶ 22 I next turn to what I consider to be the very crux of the issue raised by this grievance, and it is the reasonableness of the rule which turns on the extent that an employer may impose a position with respect to appearance or standards of dress on an employee. The issue was squarely put by Captain Cousins when he testified that he challenged the rule because of his "ideals" and because he "felt it was an infringement of his human rights".

¶ 23 Initially, I am of the view that the gist of the employment relationship in its unsophisticated form is that the employee is expected to perform a day's work and the employer is required to give him a day's pay for that work. The nature of the industry, the type of employer and the collective agreement may impose certain other expectations and requirements. But, *prima facie*, as long as the employee performs the job or the work for which he has been hired the employer has no authority to impose his personal views of appearance or dress upon the employee. There is no absolute right in an employer to create an employee in his own image.

¶ 24 There are exceptions to that general proposition. The first exception concerns the matter of health and safety. An employer may require employees with long hair to wear hair nets when working beside dangerous machinery or an employer may require employees to wear protective clothing under certain hazardous conditions. While some slight reference was made in the evidence that sideburn length was relevant to safety purposes, that point was not relied upon by Chief Forgie in his correspondence concerning the grievance nor indeed was it strenuously argued by the Corporation at the hearing and quite properly so. I am unable to find on the balance of probabilities that the length of sideburns is relevant to the question of health or safety.

¶ 25 The second exception involves the legitimate business interest of the employer. In that situation since an employer may be infringing on the basic individuals rights and liberties of the employee and may also be jeopardizing his employment, his work record and his compensation, then I am of the view that an employee should only be subjected to the imposition of such standards not on speculation, but on the basis of legitimate and cogent business reasons which objectively demonstrate that an employee's dress or appearance are affecting his work performance or are adversely affecting the employer's business. I do not think a few complaints are sufficient. As a legal matter testimony concerning complaints where the employee or his representative is unable to cross-examine the complainers is, if admissible, of little weight. A Board of Arbitration should not place great reliance on a store manager or other person who simply states that he has received complaints. If there is a real problem, objective evidence, e.g., financial records, demonstrating a loss of business or a probable loss of business resulting from the dress or appearance, should be adduced.

¶ 26 But there were no complaints in this case. The Corporation will not suffer a loss of business because its fire fighters have longer sideburns. Certainly the length of sideburns at an actual fire where firemen dressed in fire fighting attire including masks are performing their most essential service would probably not be noticed. What possible value is there in a rule requiring sideburns halfway down the ear?

¶ 27 The position taken by the Fire Department's letter of May 31 in the last paragraph asserts the basic position, and I repeat the words of the Fire Chief, which are as follows:

> I, therefore, reaffirm that the direction regarding length of hair was a necessary direction and in the best interest of the Fire Fighting Force. The general appearance of the fire fighters to the taxpayer and general public is extremely important as dress and personal grooming reflects well-disciplined, well-trained, capable people, employees of the Borough of Scarborough, who provide a fire protection function equally as good as their appearance projects.

In my view the position of the fire department comes to the problem of "image".

¶ 28 "Image" is an intangible concept about which there is much debate; it is an elusive matter held in high repute by some and looked at with considerable cynicism by others. The matter of image is a legitimate business interest under which a company may act, but again a Board of Arbitration should not act on a simple subjective view of what an employer conceives to be his image, because the matter of image is no longer a question of individual opinion. Modern social science has enabled the measurement of image by objective evidence, and as I have indicated it would be preferable if parties

would submit such evidence at an arbitration. For example, in *Pacific Gas & Electrical Company and International Brotherhood of Electrical Workers*, 70-2 ARB §704, the union presented an extract from the Bureau of National Affairs on December 11, 1969, issue of Bulletin to Management in which a survey was taken among 150 executives from various companies concerning the attitudes of companies to beards, mustaches, sideburns and long hair. The company countered by introducing a survey of customer attitudes among west coast patrons of a major oil company concerning their attitudes to those matters. I cite this only to indicate that there is evidence available apart from subjective opinion to assist Boards of Arbitration.

¶ 29 One need only recall that a very short while ago, the wearing of coloured shirts for men, mini skirts and pant suits for women either bordered on controversy or was a controversial issue in many instances between employers and employees. For the most part such apparel is now acceptable. Many people held different opinions. Certainly in such an evolving and fluctuating situation employees' jobs or compensation should not be placed in jeopardy because of the subjective opinion of the employer; but, neither should an employee's rights nor an employer's legitimate business interests be affirmed or denied by a Board of Arbitration by requiring arbitrators to act on their personal opinions.

¶ 30 After considering all these factors and the evidence at the hearing, I am satisfied that there is no legitimate business purpose, and I use that phrase to include the public operation and activity of the Corporation, in regimenting the length of sideburns in the manner that it was done. Nor indeed, was there any evidence apart from what appears to be personal views of individuals on the length of the sideburns which indicated that the alleged rule had any redeeming "business purpose". The matter comes simply to this: it is a clear case of persons asserting their opinion over others because they hold a position of employment authority. That is a situation that is not peculiar to the facts of this case but seems to be a recurring issue that in future will undoubtedly face Boards of Arbitration. I do not think that Captain Cousins or other fire fighters, for that matter, should be, as grown men with responsible positions and providing an important public service, subjected to the indignity of measuring their sideburns and then shaving them at the whim and personal opinion of others in authority. Needless to say I find the alleged rule in all the circumstances of this case to be unreasonable, and in so doing I also accept the views of G.J. Brandt in his careful and well-reasoned award in *Dominion Stores Limited and International Union of District 50, Allied and Technical Workers*, dated March 1, 1972.

¶ 31 The result of this grievance, however, is that the alleged rule which limits the length of the sideburns is not within the proper purview of the collective agreement, and I declare that the collective agreement in that regard has been improperly administered or applied, resulting in a violation of the agreement by the Corporation. The grievance therefore succeeds.

PART II

¶ 32 I now turn to the second issue raised by the grievance concerning insubordination and conduct unbecoming an officer. The letters of April 28 and May 17 set forth the

Corporation's position and it is interesting to note that the charges or discipline were laid by Chief Forgie on April 22 following his meeting with Captain Cousins and arose as a result of that meeting.

¶ 33 Two matters of importance are raised by the letters and the evidence of Chief Forgie at the hearing. First, there is the matter of a complaint procedure outside the collective agreement and the second involves the nature of the grievance procedure.

¶ 34 In his letters of May 31, 1971, Chief Forgie stated that Captain Cousins did not "subscribe to provisions in the Rules and Regulations for making a complaint to a superior officer, … " and further under the Training Manual there was "a medium for making a complaint; it requires that he address a detailed report to the Chief of the Fire Department alleging unfair treatment. THIS HE DID NOT DO." Further in his evidence Chief Forgie again stressed that factor.

¶ 35 It appears that the failure of Captain Cousins to use the Training Manual procedure was a source of friction between Chief Forgie and Captain Cousins and improperly so. Whatever may have been the procedure for taking up complaints in the past that procedure is now superseded by the collective agreement. "The collective agreement tells the employer on what terms he must … conduct his master and servant relationships." *Le Syndicat Catholique des Employés de Magasins de Québec Inc. v. La Campagnie Paquet Ltée.*, [1959] 18 D.L.R. (2d) 346 (S.C.C.). That being the case the appropriate and proper manner for taking up a procedure is in the collective agreement and I find that the discussion of April 22, 1971, was pursuant to Stage 2 of the grievance procedure.

¶ 36 A grievance procedure is designed to encourage a dialogue between the employer and the employees or between the employer and members of the trade union representing the employees. Indeed, one does not expect that the meetings at a grievance procedure will be conducted with the decorum of a tea party— it is expected that complaints and grievances will be thrashed out and it is hoped that problems will be mutually resolved to the reasonable satisfaction of all concerned. Often the meetings will generate more heat than light. But that too is intended. A grievance procedure may also serve a useful function by allowing the parties to ventilate. Often if they are unburdened it is helpful to the enterprise. The grievance procedure is designed both to enable the parties to reach reasonable solutions, but also to provide an outlet for festering discontent.

¶ 37 The generally accepted view of conversations made during the grievance procedure is that they are privileged in the sense that the parties conduct those conversations on a without prejudice basis. See, e.g., *Re United Mine Workers, District 50, and Caldwell Linen Mills Ltd.*, 10 L.A.C. 356 (W. Little D.C.J.), and there is a presumption that except in unusual circumstances conversations in the course of the grievance procedure, including admissions of liability, are not to be admitted into evidence unless there is some indication that the parties have waived the privilege which attaches. If the grievance procedure becomes the source or springboard for further disciplinary measures arising out of the conversations, and the conduct of the parties involved, it will not be used and that should not be permitted within any scheme of labour relations.

¶ 38 On that basis, if I were to accept Chief Forgie's evidence about what occurred during the grievance procedure, I would be compelled to completely discount any admissions made by Captain Cousins in the course of those conversations and since that is the only source of evidence, then the position of the Corporation is unsupportable.

¶ 39 Alternatively, and even if I were to consider the evidence, I find that Captain Cousins did not violate Article 5 or Article 12 as alleged. I am unable to find that the act of Captain Cousins in growing his sideburns constituted a violation of the rule as suggested, i.e., that the act constituted insubordination in an industrial sense. The purpose of the rule requiring persons not to resort to self-help and to resort to the grievance procedure is stated in *Ford Motor Co.*, 3 L.A. 779, appvd. *Lake Ontario Steel Co. Ltd.*, 19 L.A.C. 103 at 107 (P.C. Weiler) as follows:

> But an industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And someone must have the authority to direct the manner in which it is to go until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility must be accompanied by authority. It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision.

Thus, the rule is intended to give management the final word in the ongoing production situation to permit production to continue. Clearly, that is not the situation in this case. There was nothing done by Captain Cousins which impeded the activities of the fire department. Rather, when he was asked to shave his sideburns he supported the alleged rule by complying with the order in a non-belligerent manner. He was not insubordinate and his conduct was not unbecoming an officer.

¶ 40 Further, and on the basis of all the evidence presented to me, I am not prepared to accept the reasons put forth by the Corporation for disciplining Captain Cousins. The evidence is equally consistent with the view that Captain Cousins was disciplined for failing to use the complaint procedure rather than the grievance procedure and for the way in which he conducted himself at the meeting with Chief Forgie. As I am unable to resolve some of the contradictions in evidence about what occurred at the meeting, I wish to indicate that I am deciding this issue on the basis of onus and I find that the Corporation on the balance of probabilities has not satisfied the onus of demonstrating that the reasons for the discipline were as alleged.

¶ 41 Alternatively, I find that there are two legal principles which were violated in meting out the discipline. First, it was discriminatory within the meaning of *Re Textile Workers of America and Long Sault Yarns* 1969, 19 L.A.C. 257 (subsequently approved by the High Court of Ontario and by the Ontario Court of Appeal but without reasons) in that Captain Cousins was not disciplined on the same basis as other firemen, including other fire captains who let their sideburns grow. Second, in the circumstances of this case, disciplinary demotion was not a proper form of discipline for the reasons which are amply set forth in *Re Int'l Ass'n of Machinists and Gabriel of Canada Ltd.* 1968, 18 L.A.C. 22 (I. Christie). This is not one of those cases where the exception applies, *Re International Chemical Workers Union, Local 721 and Brockville Chemical Industries Limited*, (1971) (O.B. Shime) unreported.

¶ 42 In the result, therefore, the grievance is allowed and the Corporation is ordered to compensate Captain Cousins for any loss of compensation which arose as the result of the discipline. Further, any disciplinary notation against Captain Cousins is ordered to be expunged from his record and I will remain seized of this matter should there be any problem with respect to the enforcement of this award.

¶ 43 In conclusion, I wish to thank both counsel for their thoughtful presentation of the matters in issue.