

BEFORE THE ARBITRATOR

- - - - -  
In the Matter of the Arbitration :  
of a Dispute Between :  
PRICE COUNTY PUBLIC EMPLOYEES :  
LOCAL 1405-A, AFSCME, AFL-CIO :  
and : Case 13  
CITY OF PARK FALLS (DEPARTMENT : No. 42252  
OF PUBLIC WORKS) : MA-5630  
- - - - -

Appearances:  
Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Price County Police Employees Local 1405-A, AFSCME, AFL-CIO.  
Slaby, Deda and Marshall, Attorneys at Law, by Mr. David Deda, on behalf of the City of Park Falls.

ARBITRATION AWARD

Price County Public Employees Local No. 1405-A, AFSCME, AFL-CIO, herein-after the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Park Falls, hereinafter the Employer, in accordance with the grievance arbitration procedures contained in the parties' labor agreement. The Employer subsequently concurred in the request and the undersigned was appointed to arbitrate in the dispute. A hearing was held before the undersigned on August 25, 1989 in Park Falls, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted oral argument at hearing. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties stipulated to the following statement of the issue:  
  
Was there just cause for the discipline imposed on the Grievant, Don Meier?

CONTRACT PROVISIONS

The following provision of the parties' 1988-89 Agreement is cited:

ARTICLE I - RECOGNITION

. . . .

Section 4. Management Rights: The parties to this Agreement recognize that they are engaged in a common endeavor in which each of them has separate and distinct responsibilities which both of them are obligated to meet in a manner consistent with their mutual over-riding responsibility to the community as a whole. The Union recognizes and respects the obligation of management to provide for the best interest and general welfare of the community. The Employer retains the sole right to manage its government and business, including the rights to decide the number and location of employees, the machines and equipment used, the projects to be worked on, the methods of work, the schedules of projects, the designing and engineering of projects, and the scheduling of emergency and overtime work hours; to maintain order and efficiency in its operations; to hire, layoff, promote, assign, transfer, discipline,

discharge employees for just cause, subject only to such restrictions governing grievance and arbitration as expressly provided in this Agreement.

#### BACKGROUND

The City maintains and operates a Streets and Water Department and the Union represents the employees in the bargaining unit in that Department. Dennis Wartgow is the Superintendent and at the time in question David Zoesch was the Assistant Superintendent. The Superintendent position is a supervisory position and not in the bargaining unit; however, the Assistant Superintendent position is a bargaining unit position. In Wartgow's absence Zoesch is the Acting Superintendent. The grievant, Donald Meier, has been employed in the Department since 1975.

On Friday, March 3, 1989, it was snowing and at approximately 2:00 p.m. Wartgow called the Streets crew together and informed them that they would have to report to work later on for snow removal, with two of them to report at midnight and the rest to report at 2:00 a.m. on Saturday, March 4th, and that these were overtime hours. Consistent with the usual procedure, Wartgow also hung a list on the employees' mailboxes in the breakroom listing the times to report and the assignments. Wartgow left before the usual quitting time, 4:00 p.m., and sometime around 4:00 p.m. the Grievant informed Zoesch that he would not come in for work at 2:00 a.m. Zoesch subsequently called Wartgow from home and advised him that the Grievant had told him (Zoesch) that he would not come in to work on Saturday. Zoesch mentioned to Wartgow that the Grievant was upset by the work assignments on the list. Wartgow advised Zoesch to give the Grievant the benefit of the doubt and wait to see if he reported. Wartgow did not attempt to contact the Grievant to discuss this with him at that time.

The Grievant did not report to work at 2:00 a.m. on Saturday, March 4, 1989. The Superintendent, Wartgow, described the storm that fell on March 3rd and 4th as the worst snowstorm to hit the City in five or six years.

On the following Monday morning, when the Grievant reported for work, Wartgow asked him why he had not come to work at 2:00 a.m. on Saturday, to which the Grievant replied, "I didn't want to and there is nothing in the contract that says I have to." Wartgow then advised the Grievant that he was suspended without pay until he had a chance to investigate and find out what to do. On Tuesday afternoon at 3:00 p.m. Wartgow, Zoesch, Foley, the Grievant and the City Clerk met to discuss the matter. The Grievant was again asked at that meeting why he did not come to work on Saturday, March 4th, and his answer remained the same as the one he gave to Wartgow on Monday morning.

The Grievant was given a 20-day suspension without pay and a grievance was filed on the suspension. The parties attempted to resolve the matter, but were unable to do so and proceeded to arbitration before the undersigned.

#### POSITIONS OF THE PARTIES

##### CITY:

The City takes the position that it had just cause to suspend the grievant for 20 days without pay for his refusal to work the overtime hours for emergency snow removal on March 4, 1989. The City asserts that Article I, Section 4, Management Rights, of the parties' Agreement expressly gives management the right to schedule emergency and overtime work hours, which it did in this case. When asked why he did not report, the Grievant's only response was "I didn't want to and there's nothing in the contract that says I have to." Regarding the Grievant's unhappiness with his work assignment on that date, the Grievant has been aware since September of 1988 of what his work assignment would be via the September 8, 1988 letter to him from Wartgow, which among other things, advised him he would be assigned "the duties of a common laborer, truck driver and other jobs as necessary on a daily basis." On the day in question the City was in the midst of the worst snow storm to hit in five to six years and the Grievant's refusal to report caused the other employees to have to work two to four hours longer and put them and the citizens in jeopardy. There were times in the past when a whole crew was not needed and employees were given the option of passing on the overtime and letting a less senior employee take it; however, there has never been a refusal to work where a whole crew was needed, as in this case. Here the Grievant acknowledged that he knew he was supposed to report to work at 2:00 a.m. on Saturday and there was no need for the Superintendent to call him and tell him again. According to the City, this is the type of severe offense that does not require progressive discipline and the Grievant is fortunate that he was not terminated.

##### UNION:

The Union takes the position that there was not just cause for the discipline. The Union asserts that the contract is silent regarding compulsory overtime and there is no past practice of compulsory overtime in the unit. There is evidence that in the past some employees have not been required to work in an emergency and have not been disciplined for not working. In this case, this was the first incident of alleged insubordination by the Grievant and the

City did not follow the principle of progressive discipline. According to the Union, the Grievant's refusal to work did not have a great impact on the City.

Further there was no direct order from management to come into work, rather, the Grievant was told to report by a fellow unit employe, i.e., Zoesch. When told of the Grievant's response that he would not come into work, the Superintendent did not follow up and call the Grievant. The Union feels that this is in fact a case of "absenteeism," and that being absent does not warrant such a severe penalty as was imposed in this case.

#### DISCUSSION

The basic facts are not in dispute in this case, with the exception that the Grievant claims he was not at the meeting on Friday afternoon at 2:00 p.m. when the Superintendent, Wartgow, informed the employees that they were to come in at 2:00 a.m. on Saturday. There is, however, no assertion from the Grievant that he did not know that the order that he was to come in at 2:00 a.m. was Wartgow's, rather than Zoesch's. Further, Wartgow hung the list of the reporting times and work assignments on the mailboxes in the breakroom, as was the practice, and there is no assertion that the Grievant did not see that list. In fact, it appears that it was the work assignment on that list, assigning the Grievant to driving a truck, that upset the Grievant and which was the basis for his refusal to come in to work. Therefore, the Grievant was aware that it was his supervisor's order that he was disobeying in refusing to come into work at 2:00 a.m. on Saturday, March 4th.

The only excuse given by the Grievant was that he did not want to come in to work and that the labor agreement did not require that he come into work on overtime. At the hearing he indicated that he also had a sore back that day, but admitted that that was the first time he had mentioned it to anyone. The Grievant also testified that he interpreted the Agreement, at Article IX, Work Day, Work Week Overtime Pay, Section 1, subsection (a), 1/ as providing that he only had to work the stated hours Monday through Friday, and that, therefore, he could not be required to work overtime against his wishes. The Union asserts that there has been no history of compulsory overtime and, in that regard, the Grievant testified that he was aware of times in the past when others did not appear for work outside the normal work day and they were not disciplined. The undersigned would only note that both the Union and the Grievant ignore Article I, Section 4, Management Rights, in the Agreement which provides that "the Employer retains the sole right to manage its government and business including the rights to decide the number and location of employees, the machines and equipment used, . . . and the scheduling of emergency and overtime work hours; . . . " Wartgow also testified that in the past, when the entire crew was not needed, the more senior employees were permitted to pass on the offered overtime resulting in less senior employees getting the overtime assignments, but that no one had ever refused to come in when the whole crew was needed and was ordered to report, as in this case. The Grievant could have grieved the assignment if he felt his rights were violated; however, rather than performing the work as ordered and then filing a grievance, he decided to engage in "self help" by not reporting to work as directed. The Union's assertion that such conduct did not constitute insubordination since the Grievant did not receive a direct order from Wartgow to report to work, is not persuasive. Even if the Grievant was not present when Wartgow informed the employees that they would have to report at midnight or 2:00 a.m. for plowing, he was advised of that fact both through the assignments that were posted in the breakroom and through Zoesch. Although Zoesch was not technically his supervisor, the Grievant was aware that Zoesch was relaying Wartgow's orders when he advised the Grievant that he was to report at 2:00 a.m. Also, the fact that Wartgow, when advised by Zoesch that the Grievant had indicated he would not come in, did not call the Grievant at home to make sure he was going to report, does not change the fact that the Grievant was aware that he was suppose to report to work at 2:00 a.m. when he left work, and that he refused to do so because he was unhappy with his assignment as truck driver. The testimony also indicates that when the Grievant reported to work on Monday morning he did not offer any excuse or reason for why he did not report to work at 2:00 a.m. on Saturday when asked by Wartgow. Rather, the Grievant's own testimony was that he told Wartgow he did not come in because he "didn't want to" and that "nothing in the contract says I have to."

---

1/ That provision provides as follows:

#### ARTICLE IX - WORK DAY, WORK WEEK, OVERTIME PAY

Section 1. All employees covered by the terms of this Agreement shall work the following schedule of hours:

a)The workday shall consist of eight (8) hours each day for five (5) consecutive days each week, Monday through Friday, for a total of forty (40) hours each week.

1. The Hours of work shall be from 7:30 a.m. to 12:00 noon, and from 12:30 to 4:00 p.m., Monday through Friday.

Under the circumstances in this case, based on the Grievant's conduct and the lack of any reasonable excuse for that conduct, it is concluded that, as severe as that discipline was, the Employer had just cause for the discipline imposed on the Grievant.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 14th day of November, 1989.

By \_\_\_\_\_  
David E. Shaw, Arbitrator