BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
VERNON COUNTY COURTHOUSE AND SOCIAL SERVICES, LOCAL 2918, AFSCME, AFL-CIO	
and	Case 78 No. 42776 MA-5801
VERNON COUNTY	

Appearances:
Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route No. 1, Sparta, Wisconsin, on behalf of the Union.
Klos, Flynn & Papenfuss - Chartered, Attorneys at Law, 318 Main Street, P.O. Box 487, LaCrosse, Wisconsin, by Mr. Jerome J. Klos, on behalf of the County.

ARBITRATION AWARD

Vernon County Courthouse and Social Services Local 2918, AFSCME, AFL-CIO, hereafter the Union, and Vernon County, hereafter the County, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance involving the meaning and interpretation of the terms of the agreement relating to discipline. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Viroqua, Wisconsin, on November 3, 1989, at which time the parties jointly waived the contractual provision relating to the rendering of a decision within twenty (20) days thereof. The hearing was not stenographically transcribed. Briefs were received from the County and the Union on November 30, 1989 and February 6, 1990, respectively. The parties waived reply briefs.

ISSUE

Did the Employer violate the collective bargaining agreement by suspending the grievant without pay for a two week period commencing March 8, 1989? If so, what is the remedy?"

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE II
ADMINISTRATION

> 2.01 Except as otherwise provided in this Agreement, the COUNTY retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline employees for just cause; the right to decide the work to be done and allocation of work; to determine the services to be rendered, the materials and equipment to be used, the size of the work force, and the allocation and assignment of work and workers; to schedule when work shall be performed; to contract for work, services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; and, to adopt and enforce reasonable rules and regulations.

BACKGROUND

Paul Nundahl, the grievant, is a part-time custodian employed by the County since 1979 and currently assigned to the County's Erlandson Building. This grievance concerns a two-week suspension without pay which the County imposed for alleged poor work performance.

Nundahl's job performance has been less than stellar. On November 24, 1987, he received a written warning for poor work quality and failure to follow instructions. On December 8, 1987, he received a written warning for improperly burning trash. On March 9, 1988, he received a written warning and a three-day suspension, again for poor work quality.

On or about September 6, 1988, the County Building and Facilities Committee received a letter from a Vernon County taxpayer, Mrs. Maryanne McClurg, decrying the exterior and interior condition of the Erlandson Building. The Committee considered this correspondence at its meeting of

September 22, 1988, and, with Nundahl present, decided to issue a one-week suspension without pay. The Committee also informed Nundahl that it would review his job performance with him in a month. As stated in a September 22, 1988 letter to Nundahl from County Personnel Coordinator Madeline Everhart:

> Following our meeting this morning 22 September 1988, it was the Committee's decision that due to your poor work performance, you are hereby suspended from work without pay for one week. This will be effective beginning September 26.
>
> In a months time the committee will meet with you again to review job performance.

On February 22, 1989, Nundahl's supervisor, Russell Taylor, presented to him two Employee Violation Reports, which Taylor had written the previous day. One report stated the date of violation as February 15, 1989, and read as follows:

> SUPERVISORS STATEMENT
>
> It was reported that Paul had not cleaned the basement or emptyed (sic) the waste baskets since the last visit of the WIC Program. When asked to clean gave the WIC people the equipment to clean up and walked away. (See attached sheet)

The attached sheet, dated by Taylor Feb. 15, 1989 and signed by Nundahl February 22, 1989, read as follows:

> It was reported that Paul had not dusted the floor, or emptyed the waste basket in the basement of the Erlandson Building since the last visit of the WIC Program.
>
> It was also stated that he, when asked to clean and empty the baskets, gave the equipment to the WIC girls and walked off.
>
> I checked and there is dirt swept in a pile and the dust mops are sitting beside it.
>
> On Feb. 20, 1989 I received another call that the rooms on 2nd floor have not been cleaned for a long time. Also that the waste baskets are not being emptyed at regular intervals.
>
> In checking on the 20th I found dirt ground into dust under some desks, and dust and dirt that has accumulated in other.
>
> The dirt in the basement is still there on the 21st.

This report bears a check mark indicating that it is a third written warning.

The other violation report, which states the date of violation as 20th Feb., reads as follows:

> SUPERVISORS STATEMENT
>
> The floors in some of the offices on third floor have not been cleaned for quite some time. The dirt on the floor has been ground into dust and other rooms have dust and dirt under the desks.
>
> There is a pile of dirt in the basement that has been there for a week or more. I first saw it on the 15th of Feb. (See attached sheet)

As there is no sheet attached specifically to this second report, the reference to same is apparently to that quoted above.

The second violation report also bears a mark indicating that this is a third written warning. However, in the box for Decision, Taylor wrote as follows:

> The building and Grounds committee is referring this matter to Personnel Committee with the recommendation to suspend Paul for two weeks without pay.

Taylor, who could not recall precisely how he came to be aware of this information, testified that this paragraph was written after Nundahl had signed for receipt of the report on February 22, 1989; Nundahl testified that it was

already on the copy which he received.

Subsequent to the Building Committee's initial decision to refer this matter to the Personnel Committee (which decision may have been made at a meeting of February 23, 1989), the Building Committee learned that it had the power to impose such discipline on its own authority. Thereafter, on March 2, 1989, the Committee decided to impose the two-week unpaid suspension, effective March 8, 1989. Nundahl, who was neither invited to, nor present, at this meeting, was informed of this action by letter dated March 6, 1989.

On March 16, 1989, Nundahl grieved, contending as follows:

> The County violated Article 2.01 of the agreement between the parties by not following through on a work policy of review meetings of the employee's job performance, with the employee present at the meeting, as established 9/22/88.

By letter dated May 10, 1989, Personnel Committee Chair John Parkyn informed Union Representative Dan Pfeifer that said committee had voted unanimously to deny Nundahl's grievance.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

> For a number of reasons relating both to procedure as well as the substantive merits, the County's suspension of the grievant was improper.
>
> At the time of his one-week suspension in September, 1988, the Buildings and Facilities Committee informed the grievant that it would meet with him the next month to review his job performance. Such promised meeting was never held, thus making it reasonable for the grievant to assume that his work performance was satisfactory.
>
> The grievant was also denied appropriate due process, in that no County official ever discussed with him the issues raised in the written warning of Feb. 21, 1989. The employer must make an appropriate investigation, and an employe must be able to respond to allegations, prior to the discipline being issued. By failing to discuss with the grievant the allegations prior to issuing the discipline, the County further acted without just cause.
>
> A further procedural issue relates to double jeopardy, in that the employe discipline document which the grievant signed for bore the notation that such discipline was a third written warning, which was subsequently changed to the recommendation for a two-week suspension. The written warning signed by the grievant on February 22, 1989, coupled with the suspension effective March 8, 1989, constitute double jeopardy and should be reversed.
>
> Regarding the merits of the punishment, it is inappropriate for the County to discipline the grievant for allegedly failing to complete assigned tasks satisfactorily when it was the County which, by failing to provide adequate staff, was responsible for such situation. Where the Erlandson Building formerly had two custodial employes each working 30 hours per week, now the grievant is the sole such employe, working 32.5 hours per week; this is in contrast to the Courthouse, where there are two full-time employes performing such duties. Having substantially reduced the number of work hours available for the Erlandson Building, the County cannot now discipline the grievant for allegedly failing to meet performance standards which the County has made unattainable.
>
> Accordingly, the County did not have just cause to issue the two-week unpaid suspension. This grievance should be sustained.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

> The sole issue is whether an isolated promise for the Building Committee to review job performance in a month, if broken, can negate a suspension without pay

that is in every other way justified. It does not.

Pursuant to contract, the County has a very extensive administrative rights power, which is not contradicted by any policy or past practice. Moreover, the promised review did in fact occur, through on-going review by a delegated Committee member and the department head. That there was no formal, full Committee review is consistent with the County's practice of only holding full Committee meetings when necessary.

Failure to dismiss this grievance would make a mockery of the strong administrative rights provision which the County bargained for in the labor agreement.

Neither party filed a reply brief.

DISCUSSION

The County contends that "the sole issue" in this matter is whether the County, having broken its "isolated promise" to meet with an employe to review his job performance, can nonetheless impose a two-week unpaid suspension "that is in every other way justified." The Union has challenged the grievant's two-week discipline on numerous bases. Taken individually and separately, no one basis is sufficient to sustain the grievance. However, taken in the aggregate, I am convinced that the County lacked just cause to impose the two-week unpaid suspension.

The initial statement of the grievance was that the County's failure to meet with Nundahl -- as it had promised to do within one month of his September, 1988 suspension -- constituted a violation of contract Article 2.01. In effect, the Union argued that, having not heard to the contrary from the County within the stated time period, Nundahl could reasonably assume that his work performance was satisfactory. However, as the instant discipline was imposed for Nundahl's work performance in February, 1989, his work performance in September-October, 1988 is not at issue. Indeed, even if Nundahl's performance during that time was satisfactory, and so confirmed by the County in the promised meeting, the County would still retain the right to discipline for subsequent unsatisfactory performance. Thus, in and of itself, the County's failure to meet with Nundahl as promised was neither a violation of the contract nor is it sufficient to overturn the discipline. However, the County's failure here does, in hindsight, portend further procedural problems, as discussed below.

The County bases its case on the two Employe Violation Reports which Nundahl's supervisor, Russell Taylor, prepared to detail incidents which occurred on February 15 and February 21, 1989. Close review of these documents, however, reveals significant procedural and due process deficiencies.

As Taylor testified at hearing, while the events occurred on two separate days, and were recounted in two separate reports, the reports themselves were written on the same day (February 21), and provided to Nundahl and forwarded to the Buildings and Grounds Committee in tandem (on February 22 and February 23, respectively). Moreover, while Russell thus perceived deficiencies in Nundahl's performance as early as February 15, he could not recall bringing these concerns to Nundahl's attention prior to the delivery of the two notices on February 22. While I do not believe that Russell intentionally meant Nundahl harm by this process, his failure to share the initial report in a timely manner did prevent Nundahl from being aware of apparent problems in his performance, and taking appropriate remedial actions. There is no doubt in my mind that a major factor in the County's decision to impose the two-week suspension was the fact that there were two separate and distinct violation reports on the same topic within a short period of time. A single document, with a narrative that made clear that certain problems were observed on both February 15 and 21 but not brought to the employe's attention until the later date, would have been acceptable. But that is not what was done here.

A further procedural flaw which implicates due process concerns involves the upgrading of the discipline from the third written warning, as the reports initially established, to the two-week suspension as ultimately issued. Taylor testified that the reference to the suspension was not on the page when signed by Nundahl. Had Nundahl been aware of the likelihood of a suspension, rather than a warning, he could have sought to appear at the Committee meeting and present his side of the story. As it was, the Committee neither invited Nundahl to its meeting, nor sought his version of the incidents until after the discipline was imposed. In establishing just cause to impose discipline, especially discipline as serious as a two-week suspension, proper procedure is generally to hear from the affected employe prior to the imposition of the discipline, unless circumstances involving health or safety are involved. No such circumstances were here present. This matter also assumes greater significance in light of the Committee's failure to meet with Nundahl the previous October. That is, Nundahl had been promised a meeting in October, 1988, to review his job performance; he could reasonably have assumed that the

County's failure to abide by that agreement must have meant that his performance at that time was acceptable. For the same Committee that broke its commitment to meet with Nundahl in October, 1988 to suspend him in March, 1989, without hearing from him, is contrary to my sense of how just cause is established.

A further flaw in the County's case is the reports' reliance on hearsay. One of the programs located in the Erlandson Building is the Women, Infant and Children (WIC) program. In his report on the February 15 incident, and again in a longer, attached narrative, Taylor wrote that, rather than clean the area as the program personnel requested, "it was stated that" Nundahl "gave the equipment to the WIC girls and walked off." This, even more than the basic complaint about poor job performance, is a serious charge, and, if true, would no doubt justify discipline. And I have no doubt that Taylor accurately and honestly reported what he had been told. However, as Taylor's phrasing establishes, this is hearsay, and the record does not indicate that the Committee itself independently verified from the WIC personnel that the event had indeed happened. Certainly, no one from the WIC program testified at hearing, thus depriving Nundahl of the opportunity to confront and cross-examine his accusers, and depriving me of the opportunity to assess credibility.

Finally, there is the upgrading of the discipline from the written warning to the two-week suspension. Here, unfortunately, the record is clouded by conflicting testimony; Taylor testified that the reference to the suspension recommendation was written later than February 22 (the date Nundahl received his copy of the report), and was not included on the copy which Nundahl signed; Nundahl testified that he thought to the contrary. Based on my perception of the witnesses, the implausibility that Taylor would have known about the imminent suspension at this time, and the fact that the record evidence copy is from the files of the Employer rather than the Union, I credit Taylor's testimony as being more accurate and conclude that Nundahl was not made aware of the recommendation for suspension until he was notified on March 6 that such suspension had been decided by the Committee on March 2.

That is, Nundahl received two violation reports on February 22, 1989, both reflecting discipline consisting of a third written warning; 12 days later, he learned that one of the written warnings had been changed to a two-week unpaid suspension. While this technically might not constitute double jeopardy as that phrased is used in criminal proceedings, it does represent two levels of punishment for the same offense.

In evaluating this grievance, I find that there is no one fact or factor which is dispositive. Rather, it is the accumulation of elements which is determinative: the County's failure to keep its commitment for a meeting in October, 1988; the heavy reliance on hearsay in the violation report of February 15; the failure to provide Nundahl with timely notice of the February 15 violation; the preparation of two separate violation reports which detailed, in part, some of the same events; the after-the-fact decision to change the written warning as issued by the line supervisor to the two-week suspension; and the County's failure to meet with Nundahl prior to the issuance of the suspension, or even notify him that such discipline was being contemplated. Because I find, on the basis of these considerations, that the County did not have just cause to discipline Nundahl as it did, I do not reach or address the Union argument about inadequate staff levels.

That I find the two-week suspension to be without just cause does not, however, mean that I am absolving Nundahl of all offenses. Based on Taylor's personal observation, over several days, Nundahl's work performance was unsatisfactory. Had the discipline been a third written warning, I would have upheld such discipline as being for good cause.

Accordingly, on the basis of the collective bargaining agreement, the record evidence, and the arguments of the parties, it is my

AWARD

That this grievance is sustained. The County shall make the grievant whole for wages and any other benefits lost by virtue of his two-week suspension in March, 1989. The County shall also eliminate any reference in its files to such suspension, but shall maintain a record of the third written warning which Nundahl received on February 22, 1989.

Dated at Madison, Wisconsin this 5th day of April, 1990.

By _____
Stuart Levitan, Arbitrator