

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 CITY OF LAKE MILLS : Case 27  
 : No. 44428  
 and : MA-6300  
 :  
 JEFFERSON COUNTY EMPLOYEES, :  
 LOCAL 655-C, AMERICAN FEDERATION OF :  
 STATE, COUNTY AND MUNICIPAL :  
 EMPLOYEES, AFL-CIO :  
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Appearances:

Ms. Jean Stolzmark, Acting City Administrator, on behalf of the City.  
Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME,  
 AFL-CIO, on behalf of the Union.

ARBITRATION AWARD

The above-captioned parties, hereinafter the City and the Union, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to said agreement, the parties requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear the instant dispute. The undersigned was designated by the Commission. Hearing was held on October 16, 1990 in Lake Mills, Wisconsin. No stenographic transcript was made. The parties concluded their briefing schedule on November 19, 1990. Based upon the record herein, and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

Although the parties did not agree to the framing of the issue at hearing, the undersigned frames it as follows:

Did the City violate the collective bargaining agreement when it suspended Louis Mierendorf for three days? If not, was the penalty appropriate?

PERTINENT CONTRACTUAL LANGUAGE:

ARTICLE II - MANAGEMENT RIGHTS

2.01 The management of all City business and direction of the working forces is vested exclusively in the Employer including, but not limited to: the right to hire, suspend, promote or demote, discipline or discharge for proper cause, to lay off, to transfer because of lack of work or other legitimate reasons, to contract out work for economic reasons, to determine the type, kind and quality of service and work, to plan and schedule any training programs, to create, promulgate and enforce work rules and amend same from time to time, to determine what constitutes good and efficient public service, and all other functions of management and direction not expressly limited by the terms of this Agreement. The Employer has the right to assign any employee to any work which he is capable of doing.

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ARTICLE V - DISCIPLINARY PROCEDURE

5.01 It is understood that the exercise of proper reasonable disciplinary measures belong to management, and it, therefore, is agreed that the Employer may in his discretion suspend or discharge employees without additional warning or notice when objectionable infractions or offenses have been committed by an employee. Written justification for disciplinary action shall be filed with the employee's personnel file and shall be available to the bargaining unit.

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ARTICLE X - HOURS OF WORK, WAGES & JOB CLASSIFICATION

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10.05 Utility employees who are on stand-by shall receive one (1) hour of straight-time pay for each three (3) hours of stand-by time. The weekend period, Saturday, 7:00 a.m. to Monday, 7:00 a.m., shall constitute sixteen (16) hours of stand-by pay time. Employees on stand-by shall make the routine inspections in accordance with the existing practice without additional pay for such inspections -- two (2) inspection tours daily, each Saturday and Sunday.

10.06 Employees who are called out to work during their off duty hours shall receive no less than two (2) hours for each call-out at their time and one-half (1 1/2) rate. This call-out provision shall also apply to employees on stand-by:

- (a) Each call-out covers all work during the two (2) hour period for which they are being paid.
- (b) If any employee chooses to return home before the end of a two (2) hour period and receives another call-out within that same two (2) hour period, that does not constitute another call. If an (sic) subsequent call-out runs beyond the original two (2) hour call-out period, the employee will be paid at time and one-half (1-1/2) for all time worked in excess of the original two (2) hour call-out period.
- (c) No employee is to file for more than one call-out charge in a two (2) hour period.

10.07 Any employee who is not on stand-by who is assigned to inspect the disposal plant operation on Saturday, Sunday, or a holiday shall receive a minimum of two (2) hours at time and one-half (1-1/2) for each day.

10.08 Employees required to work outside of their regular established schedule of hours shall receive time and one-half (1-1/2) pay for all time so worked. Overtime among those employees qualified to perform the required overtime work.

FACTS:

The Grievant, Louis Mierendorf has been employed by the City as a Lineman I in the City's electric utility for approximately five years. It is the responsibility of the four linemen to ensure that the City is supplied with adequate electricity at all times. Linemen work directly with electric power and are needed to restore electricity in the event of a power failure. It is undisputed that interruptions in electric and water occur periodically and these interruptions are often emergencies which require immediate restoration by the City's employees. The linemen testified that they understand that frequent and immediate response to all such emergencies is required as a necessary part of the job.

The collective bargaining agreement between the City and the Union contains certain provisions for stand-by pay and call-out pay covering certain instances when employees are expected to remain on-call or on stand-by. It also provides for pay when an employee is actually called out to make the emergency repair. The City has established a stand-by schedule for week-ends, requiring certain employees who are placed on stand-by to carry a pager and to come in to perform certain pump checks at the water department. The City then pays stand-by pay for the employee carrying the pager, pursuant to the collective bargaining agreement.

The City has not, however, established a stand-by system for holidays which do not fall on a week-end. The police department receives the report of failed services. The police officer on duty then goes right down the list of electric linemen, if the problem is electrical, to try to reach one of the four linemen to have them report in to make the repair. The four linemen understand that they are expected to report for emergencies when contacted by a police department employe. Both Mierendorf and Electric Lineman - Foreman Chris Evenson have pagers so that the police may page them if no one can be reached by phone. Police Chief Jeffrey Lindskoog testified that the police employe receiving the report often has experienced difficulty in reaching anyone to respond to the outages on holidays when no one is on stand-by duty.

The Grievant, Louis Mierendorf, was on vacation for the week of July 2, 1990. His paycheck record indicates that he received holiday pay, however, for July 4, 1990. On July 4, 1990, the City experienced several power outages at different times in different locations. The Police Department was notified. Chief Lindskoog went down the lineman list attempting to find someone to respond to the outages. According to Lindskoog, he initially tried to reach Evenson at home, but received no answer. He then called Mierendorf. When Mierendorf came to the phone, Lindskoog "asked him if he knew who was on-call." Mierendorf replied, "no," that "he was on vacation and didn't know." Lindskoog indicated that he had a power problem in town and needed to reach the "on-call." Mierendorf repeated that he's been on vacation for a week and didn't know what arrangements had been made. When Lindskoog asked Mierendorf if had any suggestions, Mierendorf said "no." Lindskoog then said he'd see if he could find someone else.

Mierendorf confirms much of Lindskoog's testimony. He said that when Lindskoog asked "who is on stand-by" Mierendorf responded that he had no idea because he'd been on vacation so he did not know what had been worked out among the guys. Lindskoog inquired as to "what's the procedure for when a holiday falls in the middle of the week." Mierendorf claims that he reiterated that he'd been on vacation and had no idea what the guys had worked out and that Lindskoog "would have to have to get a hold of Chris (Evenson)." Lindskoog said "O.K.", then hung up. According to Mierendorf, Lindskoog did not tell him the nature of the problem during this phone conversation.

Lindskoog eventually paged Evenson who responded to the pager and then reached Apprentice Lineman Mike Reindl by radio. Reindl was actually called out twice on that date. Both Evenson and Reindl testified that they have often been called to respond to emergencies on holidays and assume that these responses are part of the job. Reindl testified that Mierendorf had called out Reindl to assist in emergencies although Reindl was on vacation at the time.

On July 6, Mierendorf received a letter from then City Manager Michael G. Lewis suspending him for three days for refusing to respond to a call-out for the second time. Mierendorf denied ever refusing to respond to a call-out. The three-day suspension is the subject of the instant grievance.

#### POSITIONS OF THE PARTIES:

##### City:

The City, pointing to Joint 4, the Grievant's time sheet, alleges that all employes were off on holiday pay, the same as the Grievant, for exactly the same reason on the day of the dispute. The City avers that all of the employes understand and are aware of the City's expectations that they respond to emergency call-outs during periods of time when they are off-duty, including holidays. Noting that no employe is routinely assigned to stand-by on holidays, the City maintains that upon receipt of a call from the police, employes are aware that there is a problem and proceed accordingly.

The City stresses that Mierendorf has received previous verbal warnings about maintaining a positive working attitude and a positive relationship with other employes. Disputing that any employe was ever assigned to standby on a holiday, the City argues that no such assignment existed and that Mierendorf was aware when he received the call from the police department that such a call would require the services of a trained lineman. According to the City, Mierendorf although at home and able to answer the phone, chose not to offer his assistance placing the City in a compromising position.

The City requests the Arbitrator to uphold the discipline imposed - the three-day suspension - in light of Mierendorf's previous verbal warnings.

##### Union:

The Union characterizes the incident as one where Lindskoog called

Mierendorf and only asked if Mierendorf knew who was on "stand-by" that day. When Mierendorf responded that he was on vacation and did not know, Lindskoog responded that he would attempt to find someone else.

The Union maintains that no rules exist which demonstrate that an employe who is not on stand-by is required to respond to call-outs. The Union further avers that the City has not established that Mierendorf failed to follow an order inasmuch as testimony from both Lindskoog and Mierendorf shows that no direct order was ever given. The Union contends that even if such a rule exists or could be implied, it is unreasonable under the circumstances. According to the Union, the purpose of vacation is to provide a period of time in which the employe is relieved of job stress.

The Union further asserts that the City Manager made no attempt to offer Mierendorf an opportunity to rebut the charge against him. It claims that what little investigation was made by the City was tainted and inadequate.

The Union notes that the City has not previously required employes on vacation to respond to call-outs. It also stresses that the penalty was not reasonably related to the employe's proven offense. Because the City has failed to meet its burden to show that Mierendorf violated a work rule or order, the grievance should be sustained.

#### DISCUSSION:

From the testimony adduced at hearing by Mierendorf's co-workers, it is evident that all four linemen understand that they are to respond to emergencies on holidays even when on vacation. Mike Reindl testified that he had been called out to respond to an electrical outage by the Grievant himself when Reindl was on vacation.

Crediting Police Chief Lindskoog's testimony over that of Mierendorf where discrepancies occurred in their testimony, the undersigned discounts Mierendorf's contention that he was actually unaware of the purpose of Lindskoog's call. Mierendorf's disclaimer is disingenuous in view of Lindskoog's communication that there was a power problem. Furthermore, in view of co-worker testimony that the linemen understand that they are to report when contacted by a police department employe, Mierendorf's attempt to shift this responsibility to respond to someone else is sufficiently serious as to warrant some form of discipline. Mierendorf as a long-term employe understood or should have understood the system and what was expected of him so that it was unnecessary for Lindskoog to have utilized "magic words" in his conversation with Mierendorf to constitute some type of direct order.

Mierendorf's claim that he did not believe that he had to respond because he was on vacation is unsubstantiated especially in light of Reindl's testimony. Evidence of a City policy exempting employes on vacation status from responding to call-ins has not been substantiated. Therefore, Mierendorf's excuse for refusing to respond does not suffice to exempt him from discipline.

The Union argues that the City's policy of requiring employes to report in while on vacation is unreasonable. While the Union has established some very real employe concerns regarding employe call-outs during vacation periods which perhaps should be weighed and evaluated against the City's need to respond to emergency power outages, these concerns can best be addressed at the bargaining table during the bargaining process. The evidence adduced at hearing was simply insufficient to establish the unreasonableness of the City's expectations in this respect.

Finally, the question of the severity of discipline remains. Generally, the severity of a penalty is premised upon progressive discipline usually resulting in verbal and/or written warnings then followed by a suspension. Inasmuch as Mierendorf had received at least one written warning as to improper performance in the past, a suspension is warranted. In his letter of July 6, 1990, City Manager Lewis mentions that this instance is the second time that Mierendorf refused to respond to a call-out. The City, however, presented no evidence to support this contention which Mierendorf adamantly denies. Inasmuch as this claim that the behavior was of a repeating nature influenced the City's decision as to the severity of the discipline imposed, it is appropriate under the circumstances for the arbitrator to consider the severity of the penalty when she normally would not substitute her judgment for that of the City. The City has not proved that Mierendorf's infraction was of a repeating nature. Therefore, a one-day suspension is more appropriate under the circumstances than the three-day suspension previously imposed.

Accordingly, it is my decision and

#### AWARD

That the City had cause to suspend and did not violate the collective bargaining agreement when it did suspend the Grievant, Louis Mierendorf.

That the appropriate penalty is, however, a one-day suspension.

That the City is ordered to make Mierendorf whole for two days loss of pay and benefits and to modify his personnel file accordingly.

Dated at Madison, Wisconsin this 30th day of January, 1991.

By \_\_\_\_\_  
Mary Jo Schiavoni, Arbitrator