BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO, and its affiliated LOCAL 366	Case 238 No. 44170 MA-6191
and	
MILWAUKEE METROPOLITAN SEWERAGE DISTRICT	

Appearances:
Podell, Ugent & Cross, S.C., Attorneys at Law, by Mr. Jeffrey P. Sweetland, appearing on behalf of the Union.
Mr. Patrick Halligan, Senior Staff Attorney, appearing on behalf of the Distri

ARBITRATION AWARD

Milwaukee District Council 48, AFSCME, AFL-CIO, and its affiliated Local 366, hereinafter referred to as the Union, and Milwaukee Metropolitan Sewerage District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held in Milwaukee, Wisconsin on September 25 and October 24, 1990. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on December 27, 1990.

BACKGROUND

The grievant was employed by the District as an Operator in the Dryer House at the Jones Island Wastewater Treatment Plant and worked the third shift, 10:30 p.m. to 6:30 a.m. on February 10 and 11, 1990. The grievant's station was on the rear end of the Dryer House with responsibility for the Dryer House and Sledge Storage and his duties were to make rounds to check that everything was running in a satisfactory manner. The grievant also carried a beeper so that he could be contacted about problems should any arise. Although the shift does not formally end until 6:30 a.m., employes generally report to work a half an hour or more early. The District requires an on-coming operator to relieve the off-going operator on the job by being told of the status of the equipment and receiving the beeper. Once this occurs, the off-going operator is free to leave even if it is before the formal end of the shift.

On February 11, 1990, the grievant was observed by the on-coming Supervisor in the locker room at approximately 6:00 a.m. in his street clothes when at about this time, the grievant's relief came in to change into his work clothes and the end of shift relief took place in the locker room rather than at the work station. The grievant alleged that at about 6:00 a.m., he discovered he didn't have his keys, so he left his work area at 6:10 a.m. and went to the locker room where he found his keys and as his relief then came into the locker room, they exchanged information while changing clothes and the grievant was relieved in the locker room when he gave the on-coming operator his beeper.

On February 15, 1990, an investigative hearing was held and on February 22, 1990, the grievant was discharged. The basis for the discharge was his leaving his work area without permission and before the arrival and relief of the on-coming operator as well as his past disciplinary record which included a five day suspension for this same offense in December, 1986 and three separate ten day suspensions since then. The grievant filed the instant grievance over his discharge.

ISSUE

Whether the grievant, Donald Kosper, was terminated for proper cause for purposes of the Collective Bargaining Agreement. And if not, what remedy is appropriate?

PERTINENT CONTRACTUAL PROVISIONS

PART II

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C. MANAGEMENT RIGHTS.

1. Except as otherwise specifically provided herein, the management of the plant and direction of the work force, including but not limited to the right of hire, the right to discipline or discharge for proper cause, the right to decide employee qualifications, the right to lay off for lack of work or other reasons, the right to discontinue jobs, the right to make reasonable work rules and regulations governing conduct and safety, the right to determine the methods, processes and means of operation are vested exclusively in the employer. The employer in exercising these functions will not discriminate against any employee because of his or her membership in the Union.

PART III

A. GRIEVANCE AND ARBITRATION PROCEDURE.

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3. Just Cause. Any employee in the bargaining unit who is reduced in status, suspended, removed, or discharged, shall have the right to file a grievance as to the just cause of such disciplinary action.

DISTRICT'S POSITION

The District contends that it was just and proper to fire the grievant based on his entire work record and the last incident which was the "last straw." It submits that the grievant's misconduct was both serious and chronic. It claims that the grievant's record of absenteeism and tardiness is extreme and consists of violations of known work rules. It maintains that this misconduct is serious misbehavior in a rotating shift shop. The District asserts that the evidence establishes that the grievant did not catch or observe spills he should have and in one instance, damage was done by way of deliberate disruptive behavior. It argues that the grievant's early departure from his assigned work area was the "last straw." It alleges that it is fair to infer that the grievant did this habitually. The District maintains that the grievant's record of progressive discipline establishes that the grievant engaged in chronic misbehavior and failed to heed warnings to correct his conduct. It contends that the grievant is unwilling or unable to function reliably on a rotating shift.

The District claims that no other employe's record is as poor as the grievant's chronic absenteeism, damage and disregard of work rules as well as the frequency of such faults. The District insists that the record fails to show that there were other workers in similar circumstances to the grievant, so no comparisons with the grievant can be given weight. It asserts that it applied prevailing shop norms to the grievant as is done in comparable cases and fired him because he repeatedly failed to follow known work rules and after progressive discipline failed to persuade the grievant to follow the rules, to attend regularly and to perform reasonably. It asks that the grievance be denied.

UNION'S POSITION

The Union contends that the grievant's discharge was without just cause. It submits that it was a common practice at Jones Island for employes to change shifts in the locker room. It points out that the first shift supervisor and the Operation's Manager acknowledged that other employes besides the grievant changed shifts in the locker room. It notes that the grievant as well as steward Rufus Thomas testified that this was a common practice and Thomas was told by the first shift supervisor that supervisors were aware of this practice. The Union asserts that the grievant is the only employe who had ever been disciplined for doing a shift change in the locker room and the grievant's relief received no discipline for his part in the conduct on February 11, 1990. The Union argues that lax enforcement and regular condonation lead employes to believe the conduct was sanctioned by the District. It insists that by the knowledge of prior violations, the supervisors have waived the right to discipline the grievant because selecting him for discipline for engaging in the commonly accepted practice is improper due to a lack of notice that his action could lead to discipline.

The Union contends that other employes who were out of their work areas without permission and under more blatant circumstances than the grievant received far less discipline. It cites the cases of Scott Lessman, who was out of his area and in another area riding a bicycle, and Stanley Kates, who left Jones Island altogether during his shift, and yet their respective disciplines were a letter of reprimand and a one day suspension.

The Union submits that the District's reliance on the grievant's work record to support his discharge consists of anecdotal testimony concerning unrecorded events that resulted in no discipline. It asserts that the infractions established by District exhibits 1-9 are the only past record of the grievant, most of which are 2 1/2 years old. It claims that other employes with a worse record than the grievant have not been discharged. It points out that Carsten Wordell has been subject to 24 disciplinary actions including two major violations; sleeping and personal use of a District vehicle, yet the last discipline on April 11, 1990 was for poor performance and was a written warning. It further points to the case of Eric Tellman who was given a reprieve from discharge in June, 1990 subject to good behavior. It notes that such leniency was not extended to the grievant. It concludes that the grievance should be upheld and the grievant reinstated with full back pay.

DISCUSSION

In determining whether proper cause existed for the discharge of the grievant, a number of factors must be considered. Arbitrator Carroll Daugherty's criteria of seven questions have often been quoted in seeking the answer to whether proper cause existed and are as follows:

> 1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
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> 2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
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> 3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
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> 4. Was the company's investigation conducted fairly and objectively?
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> 5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
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> 6. Has the company applied its rules, order and penalties even-handedly and without discrimination to all employees?
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> 7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company? 1/

1/ Enterprise Wire Company, 46 LA 359 (1966).

With respect to the first question, the answer is yes. The District's general rules, number 2, states: "Employees must remain in their designated work areas during their scheduled work hours unless prior permission to leave is granted by the supervisor." Additionally, on December 10, 1986, the grievant was suspended for five (5) days after being found in the Filter House Locker Room one hour before quitting time. Thus, the grievant was aware of the work rule and the possible consequences for violating it.

The answer to the second question is also yes. It is axiomatic that employes can't just leave work anytime that want without getting permission to do so. The grievant's job was to make rounds to check that equipment was properly operating, to check out reports of malfunctioning equipment and to take action should it be necessary to protect equipment or a cessation of plant operations. The absence of the grievant could affect the orderly, efficient and safe operation of the plant, thus the rule requiring the employe to remain in the work area unless permission to leave is granted by supervision is reasonable.

Question 3 must also be answered in the affirmative. The first shift supervisor, Ronald Czarneski, testified that he observed the grievant in the locker room about 6:00 a.m. on February 11, 1990 and that his relief was just coming into the locker room to change clothes. 2/ The grievant testified that he discovered that his keys were not in his pocket and went to the locker room to look for them at approximately 6:10 a.m. 3/ He found his keys in his locker door and then his relief walked in. 4/ There was no testimony that the grievant had gotten permission to leave his work area to go to the locker room. The District held an investigatory hearing with respect to this incident and the grievant made no argument that he had permission to leave his work area and the only explanation for leaving his work area was to look for his keys. 5/ Clearly, the record established that the District made the appropriate effort to discover the facts related to the work rule violation and whether the grievant had any legitimate excuse for not being in his work area as required by the District's work rules.

With respect to question 4, the District conducted an investigatory hearing attended by the grievant and his union representatives and no evidence was presented that this investigation was not conducted fairly or objectively and the answer to question 4 is also yes.

As to question 5, Richard Birner, the Operation's Manager of the Jones Island Facility, made the decision to terminate the grievant based on the undisputed fact that the grievant was out of his work area without a supervisor's permission. 6/ Birner did not accept the lost keys as an acceptable excuse for the grievant's behavior. Birner did obtain substantial proof that grievant left his work area without permission, so the answer to 5 is yes.

Concerning question 6, the Union has asserted that the District has condoned the practice of employes leaving their work station to go to the locker room and conduct shift changes there. Certainly, an employer's condonation of employes' violations of a work rule is a mitigating factor and may cause the employer to waive its right to discipline an employe for a work rule violation absent notice that the rule will be enforced forthwith. The Union points to the testimony of Rufus Thomas, the Chief Steward, who testified that in 1985 he worked in the Dryer House as a Mill Operator for about four weeks and it was common practice to go to the locker room to change shifts. 7/ He also testified that he had a conversation on August 18, at a party for John Porte, with Mr. Czarneski who told Thomas that he was aware that people were changing shifts in the locker room. 8/ Mr. Thomas also indicated that he knew of no one who had been disciplined for doing a shift change in the locker room and as Chief Steward, he would have received notice of any such discipline. 9/ Mr. Czarneski testified that he had no positive proof that employes were showering before they got relieved but heard someone mentioning it and might have mentioned to Mr. Thomas that the Supervisors know guys are showering

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2/ Tr-14-15.

3/ Tr-63.

4/ Tr-63, 64.

5/ Tr-44, Ex-11.

6/ Tr-50, 53.

7/ Tr-75.

8/ Tr-76.

9/ Tr-76-77.

before they get relieved. 10/ Mr. Czarneski could not substantiate that employes were doing this and couldn't recall taking any action when he heard the comment. 11/ Mr. Czarneski testified he warned a person named Olejnaczak who was out of work area and gave another a one day suspension several years ago for being out of his work area. 12/ As previously noted, the grievant was suspended for five days in 1986 for being out of his work area. 13/ The conversation between Thomas and Czarneski on August 18, does not prove anything. An inference could be drawn that Czarneski was telling the Chief Steward that he heard the people were showering early, and if true and they were caught, discipline would follow. An inference might also be drawn that the Supervisors knew of early showering and had let it go. Neither inference was clearly established and thus this conversation is of little value in determining condonation by the District, thus it has been given no weight. The evidence failed to establish that supervisors observed or knew for certain that employes were leaving their work places early on specific dates to go to the locker room and change shifts when their relief arrived but failed to take action against these individuals despite the knowledge of their conduct. On the other hand, the action taken by the District indicates no condonation. The grievant has been disciplined for this conduct in 1986, Stanley Kates was suspended for it in 1988, Lessman was warned for it in 1990, and so has at least one other employe which establishes that there has been no condonation. 14/ The Union has asserted that the grievant's relief was not disciplined in this case but the evidence failed to show that the relief had left his work area without permission. The evidence indicates that the relief came in, changed clothes, relieved the grievant and went to his work place so the facts are not comparable and do not establish any condonation. Finally, question 6 relates to disparate treatment of employes who engage in the same misconduct. This requires like treatment under like circumstances including the nature of the offense, the degree of fault and the mitigating and aggravating factors. 15/ The Union has pointed out a number of other employes who allegedly committed more serious offenses but were not discharged. In the case of Scott Lessman, he left his work area on January 1, 1990 and was observed riding a bicycle out of his area and was given a written warning on January 13, 1990. 16/ It appears that the only prior discipline Lessman had received was a verbal warning in July, 1989, for poor job performance. 17/ While the offenses here are similar and Lessman's violation more flagrant, the respective disciplinary records of the grievant and Lessman account for the difference in treatment and thus their situations have a reasonable basis for a difference in discipline.

Stanley Kates left his work area on April 6, 1988 and was suspended for one day. 18/ Kates' record included a prior written warning, so again it appears that although his absence may have been more flagrant, the discipline was in line with the principles of progressive discipline and was not comparable with the grievant's disciplinary record, thereby providing a reasonable basis for distinguishing treatment.

The case of Carsten Wordell indicates a record of past discipline for a number of infractions including seven (7) written warnings in 1982, three (3) written warnings in 1983, four (4) written warnings in 1984, two (2) written warnings and a one (1) day suspension in 1985, two (2) oral warnings and a one day suspension in 1986, a four (4) day suspension in 1987 and no record of discipline in 1988. 19/ Wordell was given two (2) five day suspensions in 1989 for poor job performance and personal use of a District vehicle. 20/ It does not appear that Wordell does any shift work and was not disciplined for being out of his work area without permission, so the circumstances underlying his discipline is unlike the grievant's and is not comparable.

10/ Tr-23, 24.

11/ Tr-24.

12/ Tr-25.

13/ Ex-6.

14/ U. Exs. 6, 3, 4 Tr-25.

15/ Alan Wood Steel Company, 21 LA 843 (Short, 1954)

16/ U. Ex-4.

17/ U. Ex-5.

18/ U. Ex - 3.

19/ U. Ex-8.

20/ U. Ex-7.

Similarly, Dennis O'Donoghue was given a written warning for threatening the Electric Shop Foreman. 21/ The facts of this discipline are distinguishable from the instant case and this appears to be the first discipline meted out to O'Donoghue, so the discipline is not comparable.

The disciplinary record of Eric Tillman is somewhat comparable to the grievant's; however, it also appears that the District determined to discharge Tillman but held it in abeyance on the condition Tillman enter the Employee Assistant Program. 22/ It thus appears that perhaps alcohol or drug abuse was involved in Tillman's case and the District only rescinded the discharge because of this factor. 23/ This factor is not present in the instant case and therefore the Tillman matter is distinguishable from the grievant's case.

Having found that none of the cases cited are comparable to the grievant's case on either the underlying offense or disciplinary record, it is concluded that the answer to question 6 is yes.

With regard to question 7, the inquiry involves the offense committed as well as the grievant's past disciplinary record. The grievant's disciplinary record is as follows:

10- 5-84	Written warning for horseplay.
12-12-84	One day suspension for unsafe operation of equipment.
5-21-86	Written warning for abuse of sick leave.
10- 7-86	One day suspension for watching TV on the job.
11-21-86	Written warning for poor job performance.
12-10-86	Five day suspension for being out of work area without permission.
6- 9-87	Ten day suspension for absence without leave.
7-22-88	Ten day suspension for Excessive Absenteeism.

21/ U. Ex-9.

22/ U. Ex-10.

23/ U. Ex-11 indicates that Tillman had been taken to a hospital for taking an overdose of tranquilizers so it appears that Tillman may have a problem with drugs or alcohol or both.

3-16-89 Ten day suspension for poor job performance. 24/

The February 11, 1990 incident taken alone is not a serious offense as it has resulted in a written warning for Scott Lessman and a five day suspension for the grievant. The evidence established that the grievant was out of his work area without permission and this was the same offense for which he previously had been suspended for five days. Since that five day suspension the grievant has been given three additional suspensions for ten (10) days each. Given the grievant's record, the discharge is reasonably related to the seriousness of the offense. Therefore, question 7 is also answered yes. Inasmuch as all seven questions listed above are answered yes, it is concluded that the District had proper cause to discharge the grievant.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The grievant, Donald Kosper, was terminated for proper cause for purposes of the collective bargaining agreement, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 31st day of January, 1991.

By _____
Lionel L. Crowley, Arbitrator

24/ Exs. 1, 2, 3, 4, 5, 6, 7, 8, 9.