

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS, CHAUFFERUS, WAREHOUSEMEN
and HELPERS,
LOCAL UNION #328

and

CITY OF MARINETTE (WATER UTILITY)

Case 60
No. 44650
MA-6374

Appearances:

Mr. Howard Smale, President, Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union #328, P.O. Box 605, Escanaba, Michigan 54829, appearing on behalf of the Union.

Law Offices of Morrison & Coggins, S.C., P.O. Box 406, Marinette, Wisconsin 54143, by Mr. James A. Morrison, appearing on behalf of the City of Marinette.

ARBITRATION AWARD

Pursuant to the collective bargaining agreement between the parties Teamsters Local #328 (hereinafter referred to as the Union) and the Marinette Water Utility (hereinafter referred to as either the City or the Employer) jointly requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the discipline of Ronald H. Vanlerberghe. The undersigned was so designated. A hearing was held in Marinette, Wisconsin, on March 20, 1991, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. No stenographic record was made of the hearing. The parties submitted post hearing briefs, the last of which was received by the undersigned on April 30, 1991, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the contract language and the record as a whole, the undersigned makes the following Arbitration Award.

ISSUE

The parties stipulated that the following issue was to be determined herein:

Was the discipline of Ron Vanlerberghe warranted? If not, what is the appropriate remedy?

The parties further stipulated that if the Grievant's conduct was not a dischargeable offense, the remedy should be a letter in his file and reimbursement for time lost. Furthermore, that if the Grievant's conduct was not disciplineable, the remedy should be a complete make whole remedy with reimbursement for lost time and benefits, and an expungement of a file.

PERTINENT CONTRACT LANGUAGE

ARTICLE 14

DISCIPLINE

SECTION 1. No employee may be discharged or disciplined without just cause. The presently existing work rules providing for certain areas of employee discipline are not exclusive and an employee may be disciplined for violation of other contract provisions and for other standards and norms of conduct besides those set forth in the work rules and/or contract.

SECTION 2. All present and new employees shall be given a copy of the work rules and shall receipt for the same; such signed receipt shall be a conclusive indication that the employee has knowledge of the work rules.

SECTION 3. All employees shall be treated the same in the application of disciplinary matters and discipline shall be imposed for insuring an efficient and safe operation for the Employer and to preserve the rights of the employees and the Employer. No employee shall be disciplined except for just cause.

RELEVANT WORK RULES

MARINETTE WATER UTILITY WORK RULES

- A. An employee is subject to immediate discharge for any of the following:
1. Drinking intoxicants or using non-prescribed controlled substances during an employee's scheduled working hours or reporting to work under the influence of an intoxicant or controlled substance. In the case of confirmed alcoholism and/or other drug addiction, the Utility shall grant appropriate medical leave as required by State and Federal Law.
 2. Failure to report for work when scheduled without absence authorized under the Contract.
 3. Stealing or wilfully damaging company property; wilful damage shall include gross neglect.
 4. Neglect of duty or other just cause endangering the health or safety of Utility employees or the public and/or the proper operation of the Utility.
- B. The following progressive discipline shall apply in matters of violation of the Work Rules other than those offenses resulting in immediate discharge:
1. An employee shall receive a written warning on the first offense. On the second infraction of that or any other Work Rule, the employee shall receive a three day suspension. On the third violation of that or any

other Work Rule, the employee shall be discharged.

The Utility may, in the interest of the Utility, waive specific discipline as to a given employee and in that case the employee shall be so notified of the fact of that waiver. In such case, the omitted discipline shall be deemed to have been imposed for the purpose of the progressive disciplinary scheme. Failure to discipline in one case shall not preclude the discipline of that or another employee under the same or similar offense under other circumstances.

2. For the purpose of discipline and except in the case of an employee, placed on pro-bation, all infractions shall be considered current for a period of 270 days.

C. 1. In the case of job performance difficulties, an employee shall first receive verbal or written warnings from the Supervisor and then shall be given a reasonable program for improvement, including specific plans for job improvement for the specific time-table.

2. Failure of any employee to meet minimum competency standards established by Federal or State law or regulation or by the Utility shall result in the following:

(a) A program for improvement and compliance within a reasonable time frame;

(b) An opportunity to transfer to any other available position consistent with the seniority and other contract requirements.

3. Any employee who fails to meet the standards set forth in 1 or 2 above may be discharged.

...

E. Suspension under these Work Rules shall be for not less than three (3) nor more than thirty (30) working days, severity of the offense.

...

BACKGROUND FACTS

The Utility provides the municipal water supply for Marinette, Wisconsin. The Union is the exclusive bargaining representative for non-supervisory production employees of the Utility. The grievant, Ron Vanlerberghe, has been employed by the Utility for twenty one and one-half years. He is presently classified as a Plant Operator.

The Utility operates a surface water plant which draws water from Green Bay in Lake Michigan. The water flows into the plant where it is mixed with chlorine and placed in holding tanks. Alum is added to the water in these tanks, to encapsulate dirt and impurities. The water in these flocculator tanks is stirred by paddles powered by motors in the flocculator pit, a room below floor level located next to the tank.

From the holding tanks the water flows into settlement basins, where the alum and dirt

settle to the bottom. From the settlement basins, the water is skimmed off the top and flows into a tank where it is filtered, removing remaining impurities including the chlorine. After being filtered it is rechlorinated when it flows into the clear well for storage. From the clear well it is distributed through pipes to the City.

The water plant is overseen on the third shift by a plant operator. Among the duties of the plant operator are to perform an initial walk-around check of the plant when they come on duty, and to measure the chlorine levels in the water supply at least every two hours. Water is tested in the Utility's laboratory every two hours to ensure proper purity. Two samples are drawn from inside the plant, at the initial intake and at the filter, and one sample is drawn from the clear well. These tests are conducted by the plant operator, and the results are noted in a log maintained in the lab. The Utility maintains a standard of 0.8 parts per million of chlorine in the clear well. Should chlorine levels drop below 0.8 PPM, the operator is required to make adjustments to the chlorine feed.

On the night of July 3, 1990, the Grievant was the third shift plant operator. Once a week the third shift operator drains excess sludge from the settling basins. The sludge drains through a pipe to a sump pit outside the building. If the basins are drained too quickly, the sump pit will backup with sludge causing back pressure which, in turn, can cause sludge to flood up through the two drains in the pit containing the flocculator motors. Two metal plugs are provided for screwing into these floor drains to prevent such flooding during the draining of the settling basins. Up until the date of this instance, these plugs were used only sporadically by operators.

The flooding of the sump pit outside will trigger an alarm light and bell on the control panel inside the plant. Once activated, these alarms must be manually reset.

On July 3rd the Grievant reported for work and performed his walk-around inspection of the facility. In the course of the inspection, he checked the flocculator pit and noted nothing out of the ordinary. At 11:00 p.m., he opened the valve on the first settling basin to drain it. At midnight he took readings in the control room and drew water samples to test for chlorine levels. He closed the valve on Basin #1, and opened the valve on Basin #2. Just prior to 1:00 a.m., the Grievant dropped the water level on the filter, and washed it. He then shut off the sewer valve to Basin #2. At 2:00 a.m., the Grievant switched from the daytime pump, which has a capacity of 2,000 gallons of water per minute, to the smaller 1,000 gallon per minute pump used during periods of low demand. Normal procedure calls for reducing the chlorine feed by 50% when the water flow is reduced. The Grievant did so, reducing the feed from 30 pounds to 15 pounds. The water sample from the clear well drawn at 2:00 a.m. showed a chlorine level of .36 parts per million. By the time of the 4:00 a.m. sample, the chlorine level had dropped to 0.27 parts per million in the clear well. The Grievant increased the chlorine to 18 pounds. By 6:00 a.m., the chlorine in the clear well remained at 0.27 parts per million, and the Grievant again increased the chlorine feed to 20 pounds.

Just prior to the end of his shift, at 7:00 a.m., the Grievant took five minutes or so to wash his truck. It was common practice for employees on the graveyard shift to perform such personal chores, so long as their work duties were accomplished.

The operator on the shift following the Grievant adjusted the chlorine feed to 25 pounds at 8:00 a.m. when the clear well was reading 0.36 parts per million. By 10:00 a.m. the reading had increased to 0.80 parts per million.

Nothing was noted amiss in the flocculator pit during the shift following the Grievant's. However, the second shift operator found the floor of the flocculator pit covered with alum sludge indicating that the pit had been flooded to a depth of about two feet. Neither of the drain plugs was in place. On the following day, July 5th, the flocculator motor in the pit shorted out because of sludge in the wiring. It was repaired at a cost of \$69.00 plus lost time.

Peter Conine, the Deputy Administrator of the Utility, called the Grievant on the 5th, and asked him if anything unusual had happened on his shift. The Grievant replied that nothing had.

Conine informed him that he was suspended with pay pending an investigation. On July 9, the Grievant received the following letter from Nancy Mann, Administrator of Utilities:

Ron:

During your third shift starting at 10:30 P.M., July 3, 1990, and ending at 6:30 A.M., July 4th, several most serious incidents took place.

The floc pit flooded causing the motor on the new flocculator drive to become flooded and then become inoperable. The responsibility to monitor the pit is that of the operator on duty.

The chlorine residual in the clearwell was allowed to drop to dangerously low levels without proper corrective action. The residuals were so low as to cause concern for the quality of water in the distribution system.

There is also evidence that you spent time washing your vehicle during your shift using time that should have been spent on operational duties.

Your neglect of duty regarding the proper operation of the Utility is so serious that you are receiving a three day suspension without pay starting July 11, 1990.

Nancy Mann
Administrator of Utilities

The instant grievance was thereafter filed. It was not resolved in the lower steps of the grievance procedure and was referred for resolution to arbitration. Additional facts as necessary will be set forth below.

POSITIONS OF THE PARTIES

Position of the Employer

The Employer takes the position that the Grievant's suspension was for just and proper cause, and was supported by two specific instances of misconduct.

The Utility notes that there was no problem in the flocculator pit before Mr. Vanlerberghe's shift. Several hours after the conclusion of his shift, it was found that the pit had been flooded. The pit has been known to flood during the draining of settling basins, when operators fail to place the plugs in the floor drains. The Grievant admitted that he did not place the plugs in the floor. The damage to the flocculator drive motor could have been avoided, had the Grievant take a routine precaution.

Far more serious is the Grievant's inattention to the chlorine levels on July 3rd. It was well known that draining the settling basins could cause a precipitous drop in chlorine levels. Levels also drop when the filters are washed. The log book which the Grievant was required to read before coming on duty specifically warned of dramatic decreases in chlorine in the clear well when the basins were drained. Despite this knowledge, and despite the fact that his own readings showed a 0.27 parts per million chlorine level at 2:00 a.m., the Grievant by his own admission did not adjust the chlorine upwards until 4:00 a.m. At that point he made a very minor adjustment to the flow. Rather than testing on a more regular basis in the face of this problem, the Grievant did not conduct another test until 6:00 a.m. when the level remained at 0.27 PPM, and he made another minor adjustment of two pounds in the chlorine flow.

Granting that there is some skill in determining how much of an increase in chlorine flow is needed to redress the problem of a dramatic drop in chlorine levels, the Grievant failed to take the most routine and sensible precaution of additional sampling to see whether his very conservative increases were adequate to meet the problem. Instead, he performed at the very minimal level required by the job and allowed the chlorine to remain at a concentration that even he admitted was dangerous to public safety. As an experienced operator he should have understood the need for more frequent testing and larger adjustments to the chlorine flow. His failure to take these steps constitutes a serious neglect of duty.

For all of the foregoing reasons, the Utility asks that the suspension be upheld.

Position of the Union

The Union takes the position that the Employer has utterly failed to prove its case. No evidence was introduced to draw the Grievant's work record into question. No evidence shows that specific guidelines were ever provided to employees on how to deal with the emerging problem of chlorine drops in chlorine levels. Finally, no evidence was introduced to show how or why sludge backed up into the flocculator pit.

The Union notes that there is no way to tell when the flocculator pit was flooded, since the employee who worked the shift after the Grievant did not report such flooding and was unavailable to testify at the hearing. The testimony of the Utility's Supervisors at the hearing was that they believed the flooding had been caused by draining the settling basins too quickly, thus causing a backup in the sump pit. It is undisputed that such a backup would cause the alarms to trigger inside the plant. It is ridiculous to assume that the Grievant would have heard such an alarm, failed to investigate its cause, reset the alarm, and then engage in an obvious lie by denying that there had been any problem on his shift. Several theories were presented on how the pit might flood without triggering the alarm, and the Union urges that these are far more likely than the ridiculous scenario posed by the Employer. If the pit flooded without the alarm sounding, the Grievant would have had no way to be aware of and respond to the problem. Thus discipline would be inappropriate.

Turning to the problem of chlorine levels in the clear well, the Union notes that this was a new problem, caused by the introduction of a practice of draining both settling basins on one shift - a practice that has since been abandoned. Even if the Grievant's course of action was not the most appropriate in bringing the chlorine levels back to within norms, the Union argues that this does not pose a question of discipline for the Employer. Rather, the Employer should provide clear directions to employees on the steps to take and the procedures to follow in the event of a sudden and dramatic decline in chlorine levels.

With respect to the final allegation that the Grievant washed his personal vehicle on the Employer's time, the Union concedes this point and notes that the Grievant readily admitted this. However, even the Employer's witnesses admitted that it was standard practice for operators to wash their vehicles during their spare time on shifts when their supervisors weren't around.

For all of the foregoing reasons, the Union asks that the grievance be sustained and the employee made whole.

DISCUSSION

The discipline against the Grievant stands on three charges:

1. That he neglected his duty in allowing the flocculator pit to flood on July 3rd;
2. that he neglected his duty in allowing chlorine levels in the clear well, and thus the water supply, to drop well below

normal without taking necessary corrective action; and

3. that he washed his personal vehicle on company time.

The third of these allegations is not even argued in the Employer's brief, and given the testimony by Employer and Union witnesses that the Utility commonly tolerated third shift employees washing their personal vehicles on Utility time, cannot be sustained as a grounds for discipline. The other two allegations are addressed in turn.

The Flooding of the Flocculator Pit

While the Union argues that there is no proof that the flocculator pit flooded during the Grievant's shift, the residue found in the pit two shifts later was alum sludge from the settling basins. The basins are drained only once a week, and this procedure was performed on the Grievant's shift. This makes it highly likely that the flooding did, in fact, occur when the Grievant was on duty.

The Grievant was disciplined for neglect of duty in allowing the flocculator pit to be flooded. It is, however, undisputed that the pit had been flooded on numerous prior occasions and that no employee had ever been disciplined for allowing this to happen. The only difference between this incident and the prior incidents was that in the past the pit had always flooded up to the ceiling level, rather than only to a depth of two feet. Similarly, the Employer's witnesses conceded that the floor plugs were not used very much prior to this incident. Apparently, many operators relied on the alarm system to warn them of potential flooding.

In light of the lack of discipline in prior instances of flooding, if the Employer is to show a disciplineable neglect of duty it must be that the operator was aware of the flooding and did nothing to halt it or to clean the pit after the flooding. In order for this to be the case, the Grievant must have heard the alarm and manually reset it without checking on the cause of the alarm. Indeed, this is what Peter Conine, the Deputy Administrator, stated he believed had happened. The undersigned must agree with the Union that this is extremely implausible. There is simply no reason to believe that the Grievant would have ignored a high level alarm from the sump pit. As noted, the Employer had no history of disciplining employees who had previously experienced flooding on their shifts and thus the Grievant had no motive to conceal the problem if it had occurred and he was aware of it. The presence of sludge in the flocculator pit was bound to alert management to the flooding, and the Grievant could have done nothing but harm himself by failing to address the problem.

From the record, there are at least two other means by which flooding could have occurred in the flocculator pit without sounding the alarm and alerting the Grievant. The sewer pipe leading to the sump pit outside the building is capped by a heavy metal flapper, which opens as the sludge moves through the pipe. Both Conine and Sheldon Shultz, another operator, indicated that if the flapper valve stuck sludge could back up into the pit without sounding the alarm. This is because the alarm is triggered by high water levels in the sump pit itself, and would not register a backup in the sewer pipe. Shultz testified that the flapper valve has been known to stick in the past and that he has witnessed flooding in the flocculator pit with no alarm sounding. The Grievant opined that flooding could be caused by a slow leak in the sewer valve, and that this could occur even when the basins were not being drained. In either event, it is possible for sludge to accumulate to a level where it would back into the flocculator pit without sounding the alarm and notifying the operator. Absent such an alarm, the operator would have no occasion to check the flocculator pit for flooding.

The flooding of the flocculator pit was most likely caused by the Grievant's failure to use the floor plugs when draining the settling basins. This was a common practice among employees, and was known to management. While the Utility has every right to establish reasonable rules and procedures, and to use discipline to enforce them, employees must be given reasonable notice that failure to follow a given procedure will result in discipline. In this case, the Employer's acceptance of the practice of draining the settling basins without using the floor plugs in the

flocculator pit denied the Grievant any such notice. Thus, the undersigned concludes that the flooding of the flocculator pit did not provide just cause for disciplining the Grievant on July 3rd.

Failure to Maintain Chlorine Levels

The most serious allegation against the Grievant is that he neglected his duty in failing to properly correct for the dramatic drop in chlorine levels in the early morning hours of July 4th, thereby endangering the public safety. Although no one could explain the reason for the phenomenon, all of the witnesses agreed that the cause of the drop in chlorine levels was the newly introduced practice of draining both settling basins on the same shift. This procedure had been followed only three times before, and each time it resulted in drastically reduced chlorine levels in the clear well. While this linkage had been noted there was no standard procedure in place for responding to the drop in chlorine levels. In each prior instance, the operator responded by adjusting the chlorine flow upwards according to his best judgement.

The undersigned is not persuaded that the chlorine drop on the morning of July 4th presents a disciplineable act of negligence by the Grievant. The Grievant monitored the chlorine levels and adjusted the chlorine flow upwards. That he did not increase the flow more rapidly may have been a mistake, but given the newness of the phenomenon and the lack of any Utility procedures or clear professional standards to guide his actions, the ineffectiveness of his response cannot be characterized as a neglect of duty.

The Utility has a far more compelling argument when it criticizes the Grievant for failing to test clear well water more frequently than the minimally required every two hours. Common sense would suggest more frequent testing in the face of these seriously low chlorine readings, and the Grievant acknowledges that in retrospect it would have been better procedure to increase the frequency of sampling. In partial explanation of his decision to sample only every two hours, the Grievant did note that the smaller pump used after 2:00 a.m. greatly increases the time needed for any discernable change in chlorine levels after a small modification in chlorine flow is made.

The City did not put in place any standards or procedures governing the rapidity with which the chlorine flow was increased or the frequency with which the well was tested when basins were being drained. Instead, the Utility relied on the professional judgement of its plant operators. The Grievant's judgement in responding to the drop in chlorine levels on July 3, 1990 was flawed. There is no evidence, however, that the Grievant knew that his actions would be ineffective in raising the chlorine to acceptable levels. With hindsight, it is clear that the Grievant used poor judgement and the Utility could legitimately respond to this mistake by counseling the Grievant in proper procedures, assuming such procedures exist. They did not on the night of July 3rd, and the Grievant was left to use his best professional judgement in a situation he had never faced before. The fact that he executed his duties imperfectly cannot be equated with neglect of duty. At most it can be characterized as a job performance difficulty, warranting a warning and a program of improvement under Section C. 1. of the Utility's Work Rules.

Remedy

As the foregoing makes clear, the suspension cannot be sustained. Washing personal vehicles on company time and the failure to use drain plugs in the floor drains of the flocculator pits while draining the settling basins were both widespread practices known to the Employer. While the Employer has the right to use discipline in order to regulate such practices, it may not do so without first giving the employees reasonable notice and an opportunity to conform their conduct to the rules. As for the failure to respond effectively to the drop in chlorine levels, the evidence establishes at most an unfamiliarity with the problem and the use of poor professional judgement, rather than any disciplineable neglect of duty. The work rules allow for a reprimand and a plan of improvement in cases of job performance problems. The Utility may, if it chooses, place such a reprimand in the Grievant's personnel file with an effective date of July 9, 1990. Any such reprimand must be clear in noting that the reason for the reprimand is unrelated to any misconduct.

On the basis of the foregoing, and the record as a whole, the undersigned makes and issues the following

AWARD

The discipline of Ron Vanlerberghe was not warranted. The appropriate remedy is to make the Grievant whole by repaying him any lost wages and benefits for the period of his three day suspension in July, 1990. The Employer may, at its option, place a letter in the Grievant's personnel file documenting a performance problem on July 3, 1990 and outlining a program for improvement. The effective date for such a letter shall be July 9, 1990 and the body of the letter must clearly state that there was no misconduct in connection with the drop in chlorine levels on July 3.

Dated at Racine, Wisconsin this 4th day of June, 1991.

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Arbitrator