BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TEAMSTERS LOCAL UNION NO. 695	Case 18 No. 46573 MA-7009
and	
CITY OF STOUGHTON	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Ms. Marian
Melli, Walker, Pease and Ruhly, S.C., by Mr. Thomas R. Crone, appearing on beh

ARBITRATION AWARD

The Employer and Union above are parties to a 1990-91 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the discharge grievance of Jon Onsrud.

The undersigned was appointed and held a hearing on February 6 and 19, 1992 in Stoughton, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on April 3, 1992.

ISSUES:

The Union proposes the following:

1. Did the City suspend and then terminate the grievant, Jon Onsrud, without just cause?

2. If so, what is the appropriate remedy?

The Employer proposes the following:

1. Is the grievant's discharge properly before the Arbitrator?

2. Did the Employer have just cause to suspend the grievant?

3. If not, what is the proper remedy?

4. In the alternative, if it is determined that the issue of termination is properly before the Arbitrator, did the Employer have just cause to terminate the grievant?

5. If not, what is the proper remedy?

RELEVANT CONTRACTUAL PROVISIONS:

. . .

ARTICLE 3 - MANAGEMENT RIGHTS

> Section 1. Teamsters Union Local No. 695 recognizes the prerogatives of the City of Stoughton to operate and manage its affairs in all respects in accordance with its responsibility and powers of authority which the City has not officially abridged, delegated or modified by this Agreement and such powers or authority are retained by the City. These management rights include, but are not limited to the following: the rights to plan, direct and control the operation of the work force, determine the size and composition of the work force, to hire, to layoff, to discipline or discharge for just cause, to subcontract in its discretion, to establish and enforce reasonable rules of conduct, to introduce new or improved methods of operation, to determine and uniformly enforce minimum standards of performance subject to the provisions of this Agreement.
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> . . .

DISCUSSION:

Grievant Jon Onsrud was hired as a Wastewater Treatment Plant Operator in 1981, and was discharged by the City in November, 1991 following a hearing before the City's personnel committee. The discharge was the result of an indefinite suspension pending discharge ordered by the grievant's supervisor, Jon Lynch, on October 28. That letter, which adequately states the basis for the suspension as well as the subsequent discharge, states in pertinent part as follows:

> As stated in the letter you received from me dated October 11, 1991: "any further disregard or failure to fully complete your duties will result in immediate suspension of termination:. You have been verbally warned at least twice about your failure to properly complete work orders. In addition, my letter of the above date warned you regarding failure to complete work orders.
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> On October 28, you started two separate work orders and failed to complete the necessary paper work that is required on all work orders. You have previously stated during our October 1, 1991 meeting with Mr. Kardasz, that your memory problems were not physical or mental, but rather your disregard for the work and the work order system.
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> You have also had continued memory problems with other tasks despite your doctor's indication that you are fully capable of doing the work required of you. An example here is the Johnson Control work referred to in my letter of October 1st when you could not recall what that company did or when they were at the plant.
>
> You have been previously suspended once for problems of this sort. We have tried to simplify your duties by lowering you from a Operator 3 to an Operator 4, but this proved to be unsuccessful. Therefore, you are hereby suspended, without pay, while this matter is

> turned over to the Personnel Committee for further action on my recommendation for additional suspension or termination.

It is undisputed that when the grievant was hired in 1981, the City was made aware that the grievant had been in a serious automobile accident in 1973, as a result of which he had suffered permanent injuries. Among these injuries were sporadic losses of memory and occasional seizures, controllable by medication. A notation on the grievant's interview form, in fact, refers to his having memory problems. It is also apparent that the memory losses in particular led to supervisor Lynch's dissatisfaction with the grievant, but the parties ascribe different meanings to the circumstances of each of a number of incidents which led to the grievant's discharge.

Some 300 pages of transcript are replete with disputed facts surrounding these incidents. As I find that the point-by-point series of arguments over a number of these incidents obscures rather than clarifies what is really at issue here, I will refer to the particular incidents only as necessary. Any discussion of the grievant's work history, however, should begin with the Employer's listing of his alleged offenses over the years. This contract contains no language excluding old incidents from consideration in setting the penalty for later offense, and the City argues that the grievant's previous formal disciplinary actions include incidents of tardiness resulting in written warnings on four occasions [dated 1982, 1986, 1987 and 1989], one incident of failure to report in 1987, resulting in a written warning, and two more serious incidents in 1987 and 1989.

The first of these was characterized by the Employer as insubordination. It is undisputed that in 1987, shortly after the promotion of John Lynch to be plant supervisor, the grievant was ordered to sign the "discharge monitoring report" required by the State Department of Natural Resources. It appears from the record that the grievant was selected for this duty largely because his record of absenteeism was lower than the plant's other two operators who carried a license which was thought to allow them to file such reports. The grievant protested that he was not qualified to sign discharge monitoring reports, and refused to sign one. He was suspended. Subsequently, however, the Department of Natural Resources ruled that the grievant was not in fact qualified to sign discharge monitoring reports or to serve as operator in charge. Since supervisor Lynch was not qualified either, nor was any other plant operator in the City's employe, the City in April of that year hired an outside firm to serve as "operator in charge". Nevertheless, the City maintained the grievant's suspension on his record, and Lynch admitted considering it in his decision to discharge.

The City characterizes a January 10, 1989 incident as one of reporting to work under the influence of alcohol. It appears from the record, taken as a whole, that the grievant was susceptible to alcohol, and was referred to his doctor as a result of a seizure which may have resulted partly from use of alcohol and partly from insufficient dosage of his anti-seizure medication. He was given medical advice to abstain from using alcohol, as well as an adjustment in his medication, and there is no evidence in the record that he subsequently failed to follow this advice. Nevertheless, the grievant on two other occasions had seizures while at work, and during this period he was also demoted, an action which reflected his doctor's advice that his exposure to certain types of machinery be limited. These events and his memory lapses were apparently considered in the context of the decision to suspend and then discharge him. The actual cause for the discharge, however, was the grievant's refusal or inability -- which of the two applies is the core of the case -- to document his work activities in a manner satisfactory to supervision, after a 1990 change in operational methods.

An immediate issue is whether this matter properly includes the grievant's discharge, or only his pre-discharge suspension. The City argues that the suspension was grieved, the discharge was not, and that therefore the discharge is not properly before this Arbitrator. I find the Union's argument on this more persuasive. When the grievant was given his pre-discharge suspension, it was clear to all concerned that this represented a recommendation to discharge by his immediate supervisor, which was subsequently ratified [by a two to one vote] by the City's personnel committee. If the suspension was without just cause, clearly the discharge could not be with just cause; but beyond that, the discharge was so obviously a direct result of the suspension that I find that to require the Union to have filed a separate grievance over the discharge would be the kind of overly technical approach to the requirements of grievance procedures that has been in the past condemned as converting such procedures into "a trap for the unwary". The City was on notice throughout the grievance process that the Union fully intended to protest the discharge as well as the suspension, the two acts are interrelated, no new facts or incidents occurred between the one and the other which would justify the distinction the City wishes to draw, and I find that it would be unjust to require the Union to file a separate grievance.

The grievant did not grieve any of the incidents of warning, or his suspension for alleged insubordination in 1987. The City argues that in accordance with general arbitral practice, the Union should be precluded here from challenging the underlying justice of any of those instances of prior discipline. Spread out over nearly a decade, however, four incidents of tardiness would be thin stuff. The instance of refusal to sign discharge monitoring reports may have exposed the grievant to the "work now, grieve later" principle, since he could have signed the reports under protest; yet the impact of that incident is diluted both by other employes' reluctance or refusal to sign the same reports [for which they were not disciplined] and by the DNR's subsequent ruling that the grievant was, fundamentally, right in his assertion that he was unqualified. All of the remaining incidents relied on by the Employer, including the "reporting to work under the influence of alcohol" allegation in 1989, however, raise in my estimation questions as to the grievant's disability and the City's obligation towards it.

This poses a particular difficulty, for neither party [perhaps reserving their arguments for another forum] has stressed arguments related to this question. In view of this mutual reluctance, and of my role as Arbitrator facing a contractual claim, I do not rely on any statutory standards in deciding this matter. Yet it is impossible to determine whether there is "just cause" for the grievant's suspension and then discharge, without entering some way into an analysis of the facts using some of the same principles that have led to the establishment of handicap discrimination statutes. Other arbitrators before me have found that it is not "just cause" to discharge or discipline an employe for what amounts to a handicap, where the employer concerned could have reasonably accommodated the employe. 1/ Thus the question of whether or not the grievant's inabilities constituted something which the Employer could reasonably accommodate are, whether separately addressed by statute or not, unavoidable in this "just cause" claim.

1/ See, for instance, City of Fenton, 76 LA 355 (Arbitrator George T. Roumell, Jr.), American Smelting & Refining Co., 59 LA 723 (Arbitrator William E. Rentfro); also "Arbitration of Discrimination Grievances", Arbitrator William P. Murphy, in Proceedings, 33rd Annual Meeting of the National Academy of Arbitrators, p. 285, 294, (BNA Books, 1981).

The parties' competing attempts to characterize, on the one hand, the grievant as repeatedly insubordinate because he did not complete reports on time or completely; and on the other hand as discriminated against because other employes who did not complete reports were not disciplined, are somewhat beside the point. A review of the record as a whole convinces me that it would be tedious and unnecessary to venture through the pile of work orders in the record page by page, assigning relative responsibility and probative weight to each. The record as a whole convinces me, rather, that the Employer has established that the grievant did not file these reports as often as he might have, as timely as he might have or as completely as he might have. The record, however, also convinces me that the reports themselves were designed in such a way as inadvertently to catch the grievant on his weakest points; that the City had some duty to think beyond the explicit requirements given the grievant to what was really needed to resolve the underlying problems; and that the City failed that requirement.

While the Union vigorously disputed the grievant's responsibility for a number of the job reports, and demonstrated that other employes had failed to file the reports in an adequate manner on a number of occasions without discipline, it is clear that the grievant's failures in this respect substantially outstripped those of other employes. If this were a matter entirely of volition, as the Employer would have it, the matter might end there. Repeated refusal or failure to perform even a mundane task is an irritant which no employer need tolerate indefinitely, and certainly the grievant was warned about filing the reports more than once prior to discharge. But in this instance the case is not so simple.

The basic work of the employes in the sewage treatment plant involves the periodic maintenance and inspection of a substantial variety of pieces of equipment. In the main, the grievant has proved adequate at this work for many years. In certain respects, notably absenteeism, there is evidence in the record that he has been actually superior to his colleagues. But in the matter of record-keeping, the system prepared by supervisor Lynch ran head-on into the grievant's particular disabilities. Paring away the parties' disputes over the particular application of this system, its general outlines are as follows: In early 1990, Lynch decided that the plant's record-keeping was not sufficient. He designed for the use of employes and himself a system intended to remedy that deficiency. The system involved a series of work orders, kept partly on paper and partly on computer. Each work order generated a paper document specifying the particular function to be performed, which might include a number of subfunctions. Any operator who had finished his previous job assignment was to pick up a new work order, proceed to do all of the tasks listed, and then sign the report, date it and note in the spaces provided the amount of time which each stage took. Certainly, all of these functions constituted results any employer might reasonably expect to have in hand. Also certainly, the grievant failed to perform these functions on a number of occasions, and this substantially exceeded the number of occasions on which other employes either failed to fill out the forms or filled them out incompletely or inaccurately. The City has also established that on at least one occasion another employe proceeded to repeat a job which the grievant had already completed, simply because the grievant failed to fill out the form showing that that particular piece of maintenance had already been done.

Prior to the adoption of the 1990 record-keeping system, there is relatively little evidence of incomplete work or unsatisfactory work by the grievant. Indeed it is notable that the City insisted upon the appointment of Onsrud, rather than either of two other experienced operators, as "operator in charge" in 1987. The grievant's problems with memory were well-known to the City, and an October 4, 1991 letter from the grievant's physician reminded the City, in the context of a recent warning given the grievant:

> Mr. Onsrud has forwarded your letter to him of October 1, 1991 regarding difficulties perceived in his performance as a Wastewater Operator 4.
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> Mr. Onsrud had a severe head injury a number of years ago. As a result, he has had some difficulties with coordination, memory, and a chronic seizure problem. This has been stable for many years. It is my understanding that he has been employed at the Wastewater Utility for the past ten years. In the past, it has been my perception that his performance has been satisfactory with the exception that when he had a problem with alcohol, he was less responsible, and he also had a problem with seizure control. In the past year or so, it is my impression that this situation has resolved itself. His medications are at satisfactory levels and have been controlling his seizures. To my knowledge, he has not had any seizures for the past several years.
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> On that basis of the information that I have available at this time, I believe that he is physically and mentally able to perform the duties that he has been performing for the past ten years. There has been no change in his medical or neurologic status.

Inherent in traditional concepts of industrial justice is the fundamental principle that an employer should not discharge an employe if some lesser action would be likely to resolve the problem. For the most part this constitutes the theory of progressive discipline. But in certain situations it may be necessary for the employer to think more broadly than the disciplinary "track" as to what the cause of the problem really is. Poor performance related to a disability is one such situation. I find that certain features of the record-keeping system, as it was adopted, constitute a failure to think through what was required in order to get the grievant to keep adequate records. For instance, the name was not on the form when it was picked up - indeed, no specific assignment was made to a specific employe, which right off the bat made it difficult to determine who was responsible for what piece of uncompleted work. And the employes were told to complete the form when they finished the job, not item by item during the work; even when Lynch realized that the grievant was likely to forget by then, he merely told the grievant to fill out the form by the end of each day. Significantly, there is no evidence that the City designed the record-keeping system with the grievant's known memory problems in mind. Nor is there any evidence that when the grievant failed to turn in properly completed reports as often as other employes' (imperfect) rate, the City considered redesigning the system to accommodate him. Simultaneously, there is no showing that this would have been an onerous undertaking. The plant is not large, and the grievant is one of only a small number of operators.

This is sufficiently far from being a reasonable accommodation to the grievant's disability that I must overturn the Employer's action even though the grievant's resentment at being required to file these forms also contributed to the situation. And I credit the City's witnesses as to the nature and (largely) the expression of that resentment. The City's witnesses gave convincing testimony that the grievant had on at least two occasions expressed reluctance to fill out the work orders, had denied that his failures to do so had a medical cause, and had annoyed Lynch unnecessarily by sometimes filling out the forms with the time expressed to a fraction of a second from

his stopwatch. In short, the grievant did not help the situation.

A duty to cooperate to the best of his ability does attach to the grievant. His defensiveness, such that he denied having the memory problems which everyone had reason to know were at the heart of his record-keeping failures, justifies some level of penalty: I cannot condone the grievant's conduct, and it is plain from his attitude that some degree of penalty must be allowed to stand, if it is to "sink in" that he has, at the minimum, the responsibility to do the best he can, to cooperate with management, and not to make matters worse by treating management's concerns lightly or evasively.

But the fundamental duty here lies with the City, since the grievant's disability has been well known to it for so long, and since his work performance has in the main been satisfactory.

The burden on employers dealing with employes who have disabilities peculiar to them is a difficult one. But it is widely understood, and in many cases can be dealt with successfully by careful design of the work environment and intelligent application of management principles. The burden of demonstrating that such an attempt has been made and has failed is also on the Employer, for all of the reasons which classically apply in "just cause" cases generally. In this case I am not satisfied that this burden has been carried successfully to date. The grievant's portion of responsibility, and his prior record, are sufficiently serious to warrant a three-day suspension; but no more.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That this matter properly includes both the suspension and the discharge of the grievant.

2. That the City had just cause for neither the suspension, beyond three days, nor the discharge of the grievant.

3. That as remedy, the City shall, forthwith upon receipt of a copy of this Award, reinstate the grievant to his former position or a substantially equivalent position, with his full seniority; shall pay to the grievant a sum of money equal to wages and benefits he lost by reason of his suspension and discharge, less three days' suspension; and shall correct its records accordingly.

4. That the undersigned retains jurisdiction in this matter for at least 60 days from the date below, in the event of a dispute concerning the application of this Award.

Dated at Madison, Wisconsin this 1st day of July, 1992.

By _____
Christopher Honeyman, Arbitrator