BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF WAUKESHA,

and

LOCAL 97, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO
(Building Inspectors Unit)

Grievance #27
dated 11-16-89
Daniel Biernacki, Grievant

Case 94
No. 46393
MA-6969

Appearances:

Mr. James Ward, Congdon, Ward & Walden, S.C., Attorneys at Law, 707 West Moreland Boulevard, Waukesha, WI 53187, appearing on behalf of the City.

Mr. Victor Musial, Council 40 Staff Representative, N114 W15928 Sylvan Circle, #208, Germantown, WI 53022, appearing on behalf of the Union.

ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievance under the grievance arbitration provisions of their 1988-90 collective bargaining agreement (herein Agreement). The Commission issued the requested designation on November 22, 1991.

The parties presented their evidence and preliminary arguments to the Arbitrator at a hearing held at Waukesha City Hall on February 5 and 6, 1992. The hearing was transcribed. Briefing was completed on May 6, 1992, marking the close of the record.

STIPULATED ISSUE

At the hearing, the parties authorized the Arbitrator to decide the followings issue:

> What shall be the disposition of the grievance dated November 16, 1989?

PORTIONS OF THE AGREEMENT

ARTICLE I - RECOGNITION

1.01 The City recognizes the Union as representative for Carpentry/Masonry Inspector, Electrical, Housing, and Heating/Plumbing Inspectors for the purpose of collective bargaining on questions of wages, hours and conditions of employment.

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 The City reserves unto itself, through its duly authorized representatives and its legislative body, and the Union recognizes, in consideration of the recognition of the Union as bargaining agent, that the City retain [sic] unto itself the prerogative of the City to operate and manage its affairs in all respects in accordance with its responsibilities, all applicable laws, ordinances, regulations, and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number of departments, the kind and number of services to be performed, the right to determine the number of positions and classifications, the right to direct the activities of the inspectors, the right to discharge, to reclassify, to transfer and assign, the right to suspend, to take disciplinary action, and to release employees because of lack of work or lack of funds, to subcontract work (However the City agrees to bargain over the impact of such subcontracting). The City further reserves the right to make reasonable rules and regulations relative to personnel policy procedures and practices relating to working conditions, and reserves total discretion with respect to the functions or mission of the employees, the organization, the technology of performing the work and the budget. These rights reserved to the City shall not be modified or abridged except as specifically provided in this Agreement.

ARTICLE 5 - COOPERATION

5.01 Cooperation. The employer and the Union agree that they will cooperate in every way possible to promote harmony, efficiency and safety among all employees. The City agrees to comply with all applicable State and/or Federal safety regulations.

5.02 Non-Discrimination. The parties agree that none will discriminate against any employee or applicant for employment because of race, color, creed, religion, sex, national origin, handicap, age or membership or nonmembership in the Union.

. . .

ARTICLE 6 - GRIEVANCE PROCEDURE

6.01 Definition and Procedure. A grievance shall be defined as the complaint of the Union or employees over the interpretation of any term in this Agreement….

. . .

6.03 No Reprisals. Any employee may present a grievance for adjustment without fear of penalty to the party presenting an alleged grievance.

ARTICLE 7 -… LAY-OFF…

7.04 Seniority. The Employer agrees to recognize seniority and it shall apply in promotions, demotions, transfers, layoffs and recall from layoffs.

7.05 Order of Layoff. If it becomes necessary to reduce the number of employees of the Department, such layoff shall be accomplished by first laying off the probationary employees, then employees with the least seniority will be laid off, providing the more senior employee is capable and qualified to perform the available work.

7.06 In all matters involving layoffs and recall from layoffs, length of service within the Department covered by this Agreement shall be given primary consideration. Skill and ability will be taken into consideration only where the senior employee is not capable or qualified to perform the available work.

7.07 Employees laid off in a reduction of force shall have their seniority status continued for a period equal to their seniority at the time of layoff, but in no case shall this period be greater than three (3) years.

> 7.08 Notice. Employees shall be given a minimum of two (2) calendar weeks notice prior to a layoff if the layoff is to be for thirty (30) days or more; except that this provision will not apply to disciplinary layoff.

BACKGROUND

The City provides new construction and remodeling inspection services through its Building Inspection Department. The Union represents the non-supervisory inspection personnel employed in that Department.

The grievance referred to in the STIPULATED ISSUE, above, was filed on November 16, 1989, by Daniel Biernacki, who was employed by the City in the Electrical Inspector classification. In his "Statement of Grievance," Biemacki asserts the following:

> List applicable violation: Unjust and harsh disciplinary action on work performance resulting in 3 day suspension without pay. I was refused representation. This is a violation of Articles unjust cause, 5.01, 5.02, 6.03 and any other Articles which may apply.
>
> Adjustment required: Remove suspension letter and any other letters, or documents which may apply from all files. Also to reimburse Biernacki (in whole) for lost pay due to suspension.

The suspension letter referred to in the grievance was issued by Grievant's immediate supervisor, Building Director Raymond Holzman, on November 9, 1989. It reads as follows:

> I have spoken with you several times (October 17, November 1, November 3 and November 6) during the past month about your job performance and public relations. However, these problems continue and are escalating. Since then, the following has occurred:
>
> On October 23, 1989, 1 wrote you a disciplinary letter detailing the prior problems. To correct one of them, I directed you to make an inspection at 1:00 P.M. I had Doris contact the person involved and tell them you would be there at 1:00 P.M. The contractor had called three times and when he finally reached you, you told him you did not know when you would make the inspection. You left the office at 1:05 P.M. thereby disregarding a direct order. As a result of the missed A.M. inspections, I directed you to be in the field at 8:15 A.M. which you have ignored for the most part. This directive was

> to assure the completion of your daily inspections. On November 3, 1989, you again missed an A.M. inspection at 315 McCall Street. The home owner who you were supposed to meet called at 12:07 P.M. wondering when you were coming to make the inspection. When I asked you why you missed the inspection, your reply was that you "missed it" and I was trying to "get something on you". There were only two other A.M. inspections on that day.
>
> On November 7, 1989, I met with you to discuss your refusal to follow direct orders and the general deterioration of your work performance of late. You offered no explanation for your laxness.
>
> I can not tolerate this decline in you [sic] job performance as it reflects poorly on the City and is damaging public relations. Therefore, I am suspending you for three (3) days without pay on November 13, 14, and 15. Do not report for work on those days but return to work on November 16 at your regular scheduled starting time.
>
> If this situation does not improve, you will subject yourself to further disciplinary action up to and including termination.

After the grievance was heard and denied by Holzman at Step 1, the City Personnel Committee's Step 2 Hearing Answer denied the grievance, in pertinent part, as follows:

> On behalf of Management, Director of Building Inspection, Raymond Holzman stated that the content of his letter dated November 9, 1989 reflected what had transpired over a period of two months. Mr. Holzman had asked Mr. Biernacki for explanations regarding his failure to make inspections as scheduled and disregarding his direct orders, but was never offered any. Mr. Holzman stated that he talked with Mr. Biernacki several times regarding his job performance and poor public relations, prior to issuing this suspension.
>
> The Union argued that the three (3) days suspension was not justified since the inspections were done. They argued that all inspectors have missed inspections in the past.
>
> The Personnel Committee does not find a violation of the 1988-90 Labor Agreement, specifically, Articles 5.01, 5.02, and 6.03. The Committee was not presented with any facts or evidence to support

> the contention that other (unidentified) articles of the Agreement were violated, nor did the Union present any facts to show that the city must meet a "just cause" disciplinary standard in the Labor Agreement. The Personnel Committee finds that the employee's unsatisfactory conduct and performance, as established by several incidents over a period of time, justifies the action of his supervisor to suspend him from work for three (3) days without pay. The grievance is denied.

POSITION OF THE EMPLOYER

The Arbitrator should dismiss the grievance and order none of the relief requested therein, because the Grievant was suspended for cause.

Article 2.01 gives the City the right to suspend and to take disciplinary action against employes. Holzman's suspension letter cites Grievant for problems with his job performance and public relations. Problems related to job performance were failures to timely do his electrical inspections and carrying them over from day to day and failing to contact the public and contractors when he was going to be late. Job performance problems also involved continual insubordination and lack of cooperation in his relationship with Holzman. Prior warnings and a prior suspension with pay did not improve the situation.

In its reply brief, the City responds to Union arguments as follows. Holzman convened the November 7 meeting to talk to Grievant about Grievant's job performance. The City denied a separate grievance concerning that meeting, stating "(t)he supervisor must be able to determine how the work scheduled is being accomplished, if there are problems, and if necessary, what adjustments may be necessary." That grievance denial was not appealed to arbitration.

The Union's contentions regarding the swimming pool incident at 1807 Manor Court fails to note that the building code citation in that case was eventually dismissed. Grievant, not the City, was engaged in "witch hunt" activity when he took the time to observe and record the alleged tardiness of a fellow employe while carrying over his work from one day to the next and not timely and properly doing his own work. The probable cause finding cited by the Union is if no significance since, all of the Grievant's discrimination claims have been dismissed.

For those reasons, the record shows that the City had cause for suspending Grievant for three days without pay as it did.

POSITION OF THE UNION

The evidence shows that the three-day suspension imposed in this case was unjustified and without just cause. While not expressed in the language of the Agreement, a just cause standard is

inherent and implied in the Article 2 - Management Rights references to City rights to discharge, suspend and take disciplinary action.

The suspension letter assertion that Grievant disobeyed a direct order on October 23, 1989 was not supported by testimony, only by submission of Holzman's October 23, 1989 letter to Grievant, Exhibit 6. The City also offered little or no evidence to substantiate the further suspension letter assertion that he had been told and then failed to be "in the field at 8:15 AM." Finally, the suspension letter cites Grievant for failing to explain his alleged "laxness." In that regard, however, the evidence shows that Grievant was denied his statutory rights to have a Union representative present, upon Grievant's request, during what turned out to be and what Grievant reasonably believed was an investigatory interview meeting.

The City's arbitration hearing presentation inappropriately focused on an alleged September, 1989 incident regarding a pool inspection at 1807 Manor Court. Grievant's testimony about that situation must be credited rather than the City's hearsay statements by the homeowner and contractor. While Holzman was critical of Grievant's request that a citation be issued to the oft-cited contractor involved, Holzman ultimately issued the requested citation on May 1, 1990. Thus, the evidence shows that Grievant was not derelict in the performance of his duties, but rather was perhaps too conscientious.

The City's reliance on its November 9, 1989, letter to Grievant (Exhibit 3) is improper because, as the Union's evidence shows, the City was improperly singling out Grievant for criticism as to "on-time performance" while taking no disciplinary action at all regarding another inspector whom Union Exhibit 7 shows had quite a larger problem in that regard than Grievant. The City's disparate treatment in that regard and State DILHR's finding of probable cause that the City had committed statutory discrimination against Biernacki show a pattern of City treatment of Grievant more harshly than other similarly-situated individuals.

The City has failed to meet its burden of proof in this case. Accordingly, the Arbitrator should grant the grievance and order the relief requested therein with interest on the backpay.

DISCUSSION

The City agreed at the hearing that it was raising no threshold arbitrability issues. Accordingly, to answer the STIPULATED ISSUE, the Arbitrator needs to focus exclusively on the merits of the claims set forth in the grievance as filed on November 16, 1989.

The grievance clearly asserts that the three-day suspension violated the Agreement. The merits of that claim must obviously be addressed in this award.

In addition, the grievance asserts "I was refused representation." The record establishes that that assertion relates to Holzman's refusal of Grievant's requests for Union representation

during a November 7, 1989 meeting during which Holzman questioned Grievant about some of the incidents of substandard job performance later cited in the above-quoted suspension letter of November 9, 1989. The City has persuasively shown, however, that those same refusals of requests by Grievant for Union representation at that meeting were the sole and specific subject of a separate grievance (#22) which was filed by Grievant on November 11, 1989, denied at Step 1 on April 19, 1989, denied at Step 2 on July 5, 1991, and not thereafter appealed to arbitration within the Agreement time limits. For those reasons, the Arbitrator finds that any claim that the November 7, 1989 refusals of requested Union representation constituted an independent violation of the Agreement has been fully and finally resolved on the basis of the City's unappealed July 5, 1991 denial.

Having said that, and without determining the merits of a possible claim of violation of Grievant's statutory rights to union representation at the November 7 meeting, the Arbitrator finds it appropriate to preclude the City from relying in any way on Grievant's responses to questions put to him by Holzman during that November 7 meeting. That is the only extent to which the Arbitrator would find it appropriate to affect the merits of the three-day suspension assuming, without deciding, that the November 7 meeting was an investigatory interview as to which statutory representation rights would attach. The circumstances of this case do not warrant the Union's further apparent request that the City be precluded from relying on other evidence to support the allegations of misconduct contained in the suspension stated in the suspension letter. Based on the record as a whole and especially because Grievant was operating at that time under the mistaken impression that the Local membership had generally directed its officers not to share information with employer representatives, there is no reasonable basis on which to conclude that the Grievant would have been forthcoming with information, explanations or solutions had his requests for representation on November 7 been granted. Nevertheless, to avoid any possible prejudice to Grievant arising out of that meeting, the Arbitrator is precluding the City from relying on the information or explanations that he provided or failed to provide in response to questions presented to him by Holzman on November 7, 1989. It should be noted that the statutory right to representation is not an absolute right to have the meeting go forward with a representative present. It is only a right to have a representative present if the Employer insists on proceeding with the investigatory interview. See generally, Waukesha County, Dec. No. 14662-A (1978). The statute permits the employer to proceed with its disciplinary decision-making without benefit of input from the affected employe, Id. By precluding the City from relying in any way on the November 7 meeting, the Arbitrator seeks to put the Employer and Grievant into the position they would have been in had Holzman discontinued the interview with Grievant when Grievant requested Union representation.

The Arbitrator now turns his attention to whether the City violated the Agreement by issuing Grievant the three-day suspension.

Agreement Section 2.01 reserves to the City the rights to "discharge … suspend … [and] take disciplinary action" regarding employes. It also provides that those rights "shall not be

modified or abridged except as specifically provided in this Agreement."

Section 5.01 does not specifically modify or abridge those rights, but both Secs. 5.02 and 6.03 do, as regards discrimination for the reasons described in Sec. 5.02 and as regards reprisals for presenting alleged grievances for adjustment by the City's representatives, respectively. In addition, the Arbitrator is satisfied that Sections 7.057.07 specifically modify the Section 2.01 rights noted above, as well. If the City were free to discharge, suspend or otherwise discipline employes for any reason or for no reason at all, then the provisions for seniority-based layoff and recall would be rendered meaningless.

Thus, while the City's above-noted Sec 2.01 rights to administer discipline are not expressly made subject to "cause" or "just cause," the other Sections noted above specifically modify/abridge those rights such that the City is not free to discipline employes for any reason or for no reason at all. Whether those Sections mean that the City's exercise of disciplinary action is limited by a conventional "just cause" standard or by a standard prohibiting arbitrary, capricious or bad faith exercise of those rights or by some other standard need not be determined in order to provide an answer to the STIPULATED ISSUE in this case. For, even if the applicable standard were "just cause," the Arbitrator is satisfied that the three-day suspension imposed herein would meet that standard. Accordingly, the Arbitrator need not and does not determine herein precisely to what extent the Agreement limits the City's rights to administer employe discipline. The fact that the Arbitrator's analyses the case as if a just cause standard were applicable is not intended to constitute a determination that that is the standard established by the Agreement.

The suspension letter generally cites Grievant for a "decline" in his "job performance" which "reflects poorly on the City and is damaging public relations." The precipitating incidents cited in that letter are Grievant's allegedly:

> --telling a contractor that he did not know when he would make an inspection Holzman had directed him to make at 1:00 PM on a date not specified in the suspension letter.
>
> --leaving the office at 1:05 PM on that date in violation of a direct order from Holzman that he make that inspection at 1:00 PM.
>
> --ignoring, for the most part, Holzman's directive that Grievant be in the field at 8:15 AM to assure completion of his daily inspections.
>
> --failing to complete a November 3, 1989 inspection at 315 McCall Street during the AM on that date despite having only two other inspections specifically scheduled for the AM on that day.

> --offering no explanation for his laxness on November 7, 1989 when Holzman asked Grievant about his refusal to follow direct orders and the general deterioration of his work performance of late.

The propriety of the City's taking any disciplinary action against Grievant on November 9, 1989 rests on whether those precipitating incidents occurred and constituted misconduct on Grievant's part.

The suspension letter also makes reference to incidents previous to those noted above which led to prior counseling, warnings or formal City disciplinary action. To the extent that the City took disciplinary action on account of such prior incidents and those disciplinary actions were not successfully challenged in subsequent grievance processing, those prior incidents can properly be considered in determining whether the City violated the Agreement by imposing a three-day suspension on account of the precipitating incidents. However, those prior incidents cannot justify the imposition of a second, additional penalty for the same alleged misconduct that was involved in those prior incidents themselves.

With regard to the first of the precipitating incidents listed above, the record establishes that Grievant did tell a contractor that he did not know when he would make an inspection Holzman had directed him to make at 1:00 PM. Holzman testified that he personally overheard Grievant's end of the telephone conversation involved. Grievant, in his testimony, did not take issue with Holzman's testimony on the point or with the related assertions contained in the suspension letter which Holzman testified were true and accurate.

With regard to the second precipitating incident listed above, Holzman testified that his letter accurately stated that Grievant left the office at 1:05 PM on that date in violation of a direct order from Holzman that he make that inspection at 1:00 PM. Grievant's only explanation in his arbitration testimony was that he was given the order at 12:50 PM, but that does not explain why he did not comply with the order involved by leaving the office when he received that direct order.

With regard to the third of the precipitating incidents, Holzman testified that he personally observed Grievant reading magazines in the office on various early mornings after Holzman had issued Grievant a written directive that he go to the field at 8:15 AM. Holzman also testified that he spoke to Grievant on three occasions thereafter reminding him of and re-supplying him with copies of the original October 19, 1989 memorandum. Holzman further testified that if Grievant complied at all it was only for a couple of days before falling back into his previous habit of noncompliance. In his testimony, Grievant did not deny Holzman's assertions in those regards.

Holzman testified that Grievant failed to complete a November 3, 1989 inspection scheduled for 10:30 AM at 315 McCall Street despite having only two other scheduled AM inspections on that day. The City also produced a telephone message received by an office

secretary at 12:07 PM asking that Grievant call the homeowner to explain ". . . why you were not at the 10:30 appointment this A.M." Grievant, in his testimony, admitted that he had overlooked the McCall Street inspection. He noted, however, that he called the homeowner upon Grievant's return to the office at 12:30 PM, apologized, and arranged to complete the inspection that same afternoon and that the homeowner involved told Grievant that he was going to be home all day such that the oversight caused the homeowner no concern or inconvenience. Crediting Grievant's testimony about his conversation with the homeowner and assuming that Grievant was attending to other inspections throughout that AM, the fact remains that Grievant failed to comply with Holzman's directions that time-sensitive inspections be given priority over others not scheduled for a particular time or portion of a day. He had been specifically reprimanded in Holzman's October 23, 1989 for missing AM inspections and warned that if such problems continued, the necessary disciplinary action would be taken.

Grievant also testified that Holzman was unfairly singling him out for criticism for missing a scheduled inspection whereas Holzman has known that another inspector has repeatedly been late for numerous inspections and has taken no disciplinary action against that other inspector. Grievant testified that he kept records showing that that inspector had been 35 minutes late on October 2, 1989, five minutes late on October 31, 1989 and between three and 45 minutes on 89 occasions from November 6, 1989 through October 1, 1990. The Arbitrator finds Grievant's evidence and claim of disparate treatment unpersuasive. The time periods by which Grievant claims the other inspector was frequently late were not nearly as long as the time it took Grievant to get back to the McCall homeowner; nor is there a contention or showing that the other inspector ever failed to carry out a scheduled AM inspection in the AM of the day on which it is scheduled or that the homeowner or contractor involved ever found it necessary to call the office to inquire why the inspection had not been completed as scheduled. Neither the Union's showing that probable cause was found in support of one of Grievant's discrimination complaints against the City and Holzman, nor the City's showing that probable cause was not found with regard to another as to which Grievant's appeal is still apparently pending, constitutes a reliable basis on which to conclude that the discrimination alleged in those complaints did or did not occur. The evidence received into the record in this arbitration is not sufficient to support a contention that the instant suspension was imposed because of any of the considerations listed in Agreement 5.02 or 6.03.

With regard to the final precipitating incident, above, the Arbitrator, for reasons noted above, is precluding the City from relying in any way in this proceeding on what Grievant said or did not say in response to Holzman's questions on November 7, 1989. The Arbitrator has, however, considered the extent to which Grievant, in his arbitration testimony, responded to the City's arbitration evidence concerning the various precipitating incidents, as is noted regarding each of them, above.

On the basis of all of the foregoing, the Arbitrator concludes that the City has demonstrated that it had just cause for the imposition of discipline for the precipitating incidents

noted above but not including Grievant's alleged failure on November 7,1989 to "explain his laxness."

Parenthetically, as the Union has aptly argued, undue attention was paid at the hearing to issues associated with the Manor Ct. swimming pool. None of the evidence presented regarding that situation has been given weight in this award.

Holzman testified that he chose a three-day suspension without pay as the disciplinary penalty in this case in order to be progressive following the one-day suspension with pay previously imposed on Grievant for being insubordinate toward Holzman, and in an effort to make Grievant "sit down and realize that as many times as we've talked to him, that he wasn't improving. The reason that we sat down and talked to him is that to show him where we were having problems with his performance so that he could make the necessary corrections."

The fact that Grievant and Holzman had a strained working relationship at the time the instant suspension was imposed, coupled with the fact that Grievant had served as Union steward for a time and had filed and processed numerous grievances and multiple discrimination claims of his own against Holzman and the City, lead the Arbitrator to give Holzman's judgment as to the appropriate penalty relatively little weight.

However, when the Arbitrator independently assesses the appropriate disciplinary penalty in all of the circumstances, he concludes that a three-day suspension is neither unjust nor harsh. Grievant's employment record at the time of the instant suspension included a one-day suspension with pay for insubordination imposed/announced on March 2, 1989 but not served until October 18, 1989 due to Grievant's 5-plus-month absence on sick leave. Grievant's record also included an October 23, 1989 written warning citing Grievant for unexplained failures to fulfill scheduled time commitments for inspections; unacceptable attitude toward contractors (generating complaints); and an attitude that was creating problems in the office and in the field. Both of those disciplinary actions were grieved and processed through Steps 1 and 2 but not appealed to arbitration, such that their factual and contractual validity is not subject to challenge in this arbitration. The record also establishes to the Arbitrator's satisfaction that on numerous additional occasions Holzman brought to Grievant's attention various relevant aspects of his work performance that were not meeting the City's expectations. In sum, the precipitating incidents noted above (not including the alleged non-explanation on November 7) represented repetition of Grievant's failures to conform his job performance to reasonable standards as to which he was put on fair notice and for the violation of which he had been previously disciplined. In all of the circumstances, and particularly in the context of a previously served one-day suspension with pay, a suspension without pay of three days was reasonable.

Accordingly, the Arbitrator concludes that the City's three-day suspension of Grievant did not violate Art. 5.01, 5.02, 6.03 or any other Articles of the Agreement. That suspension was within the rights reserved to the City in Sec. 2.01. Moreover, the suspension action was taken for

just cause, if that is the standard which is required by the Agreement.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUE noted above that:

> The grievance dated November 16, 1989 is denied in all respects.

Dated at Shorewood, Wisconsin
this 16th day of July, 1992 by Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator