

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 SHEBOYGAN COUNTY : Case 171  
 : No. 48018  
 : MA-7480  
 and :  
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 SHEBOYGAN COUNTY SUPPORTIVE SERVICES :  
 LOCAL 110, AFSCME, AFL-CIO :  
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Appearances:

Ms. Louella Conway, Personnel Director for Sheboygan County, on behalf of  
 the County.  
Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME,

AFL-CIO

ARBITRATION AWARD

According to the terms of the 1989-91 collective bargaining agreement between Sheboygan County (hereafter County) and Sheboygan County Supportive Services Local 110, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving the County's having issued Holly Sixel a written warning on April 27, 1992. The undersigned was designated arbitrator. Hearing was held at Sheboygan, Wisconsin on January 5, 1993. No stenographic transcript of the proceedings was made. The parties filed their written briefs by March 16, 1993, which were thereafter exchanged by the undersigned. The parties waived their right to file reply briefs herein.

ISSUES:

The parties stipulated that the following issues shall be determined herein:

- (1) Did the Employer violate the collective bargaining agreement when it gave Holly Sixel a written warning on April 27, 1992?
- (2) If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

On the grievance, the Union asserted that the following contractual provisions were involved:

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer.

. . .

ARTICLE 4

DISCRIMINATION

The parties to this Agreement agree that they shall not discriminate against any person because of sex, race, creed, color, sexual preference, marital status, handicap and age and such persons shall receive the full protection of this Agreement.

ARTICLE 10

REST PERIOD

A ten (10) minute rest period shall be available to each employee twice daily during the full day's shift.

STIPULATION OF THE PARTIES:

The parties stipulated that there is no problem regarding timeliness involved in this case.

FACTS:

The Union called no witnesses to testify and it submitted no documents in this case. Therefore, the evidence of the County's witnesses on direct and cross-examination and the documentary evidence proffered by the County and admitted into the record in this case comprise the entire record.

Holly Sixel is a clerical/data processing employe employed in the Land Conservation Department (hereafter LCD). The Department is run by Department Head Patrick Miles and Engineering Supervisor Eric Fehlhaber. Miles has three employes (including Grievant Sixel) who report to him and Fehlhaber has four employes (including Engineer David Clappes) who report to him. Fehlhaber is often out of the office inspecting agricultural facilities for pollution control purposes. Miles works in the Land Conservation office and is not involved in field work. Clappes' work area is in a separate room called the drawing room which is adjacent to the LCD office area where Sixel's desk is located.

It is undisputed that for the two weeks prior to April 27, 1992, Grievant Sixel and her Land Conservation Department co-worker, David Clappes, were observed by Department Head Patrick Miles engaging in a great deal of visiting and socializing during working hours, in passing notes to each other, walking to the water fountain together, and taking their breaks and lunch hours together every day. Miles (Sixel's immediate supervisor) stated that during this period of time, he personally observed Sixel leave her desk and go to the adjacent drawing room, where Clappes normally works, and engage in lengthy conversations with Clappes. Miles stated that the behavior was constant and that it was disrupting the work place. Miles stated that at one point, he stood in the doorway of the drawing room for several minutes staring at Sixel and Clappes while they conversed, in the hopes that they would stop their behavior. Sixel and Clappes however did not take Miles' hint. Clappes also sent roses to Sixel's son while he was in the hospital, but he signed the card as being from the Land Conservation Department. It is undisputed that Clappes purchased and sent the roses.

Despite his personal observations of the situation, Miles did not speak to Sixel or Clappes about their behavior. Rather, after having observed Sixel and Clappes' behavior for approximately two weeks, Miles consulted with Engineering Supervisor Fehlhaber (Clappes' immediate supervisor) about what should be done regarding the behavior. Fehlhaber had either not been in the office during the period that Miles had observed the behavior or he had not personally observed any of the behavior. Fehlhaber wanted time to observe the situation before he and Miles took any action.

Fehlhaber testified that on April 23 and 24th he observed Sixel go into the drawing room and speak to Clappes many times each day, that Sixel and Clappes engaged in many conversations, laughing and talking. Fehlhaber characterized the behavior as very disruptive. Fehlhaber also observed Sixel and Clappes passing notes to each other after which Fehlhaber observed Sixel go into the drawing room and speak to Clappes for 10 minutes.

Fehlhaber also stated that he and Miles had previously issued Clappes and another employe, Peter Watry, written warnings on September 4, and 3, 1991 (respectively) for engaging in excessive socializing. Watry's warning involved disturbing employes, ringing the Departmental service bell, unauthorized travel, swearing at work and excessive socializing at work between Clappes and Watry. Clappes' warning was for excessive socializing only. Neither of these written warnings was appealed or grieved. 1/ At staff meetings on April 18 and September 6, 1991 (both before and after Watry and Clappes received these written warnings), Fehlhaber and Miles reviewed Departmental rules and policies regarding socializing, tardiness and breaks. Sixel and Clappes were apparently present at both of these staff meetings.

Although both Miles and Fehlhaber believed more severe discipline was warranted for Sixel and Clappes' behavior, they decided to issue both Clappes and Sixel written warnings for excessive socializing on April 27, 1992. The written warning Sixel received read as follows:

STATEMENT OF INCIDENT Holly has been talking excessively (socializing) with David Clappes. This is more than just passing each other and exchanging words. During the last two weeks it has become common for Holly to spend a half hour at a time talking with Dave. On these dates I observed this activity taking place. April 15 afternoon, April 21 afternoon, April 22 morning and afternoon, April 23 early morning and afternoon, and April 24 afternoon. April 21, I and my LCD Engineering Supervisor were at the County Board Meeting and Reception. I (sic) was brought to my attention that Holly spent much time socializing with Dave. I again left the office on April 24 morning when I was informed that an SCS agency employee had to wait 15 minutes until Holly decided to return to her workstation from talking with Dave. I have observed Holly and Dave passing notes. This behavior has become

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1/ The record showed that Clappes did not become a member of the bargaining unit until after September, 1991. The Union objected to the admission of these written warnings into the record. I find that these warnings are relevant to this case in that they indicate that the County had issued written warnings for excessive socialization prior to issuing Sixel and Clappes written warnings for the same offense on April 27, 1992.

such a common occurrence (sic) in the last two weeks that it is adversely affecting my staff's morale and work production. The situation has become an obstruction in the office environment. Again, it has been brought to my attention that whenever I am out of the office this behavior accelerates. With this behavior proper discipline and respect for other staff cannot be maintained.

Miles and Fehlhaber met with both Sixel and Clappes at the same time when each employe was issued her/his written warning. At this time, they gave Sixel and Clappes an opportunity to explain their behavior. Sixel and Clappes did not admit or deny anything nor did they explain their conduct. Both Sixel and Clappes filed grievances over the issuance of these written warnings. Clappes later withdrew his grievance.

The record showed that the County does not have a specific work rule barring excessive socialization among employes. LCD employes do not normally convey work assignments to each other by passing notes.

POSITIONS OF THE PARTIES:

County:

The County argued that because the Union offered no evidence herein, it essentially admitted the veracity of the evidence of wrongdoing proffered by Miles and Fehlhaber. Therefore, the County urged, an appropriate inference should be drawn that had the Union offered any documents or witnesses, that evidence or testimony would have been unfavorable to the Union's case.

The County also contended that it gave both Clappes and Sixel the same level of discipline (a written warning) for their actions herein; that the County had previously disciplined Clappes and another employe for the same type of activity by issuing them written warnings. In the County's view, the fact that Clappes was not at that time, technically a member of the Union's bargaining unit, should not require the undersigned to disregard this pattern of discipline. The County noted that Clappes' position had been the subject of accretion proceedings and at the time of his first written warning all that remained was the establishment of wage placement. In addition, the County observed, a grievance had been filed on Clappes' behalf regarding this first written warning but that the Union later decided to withdraw it. In these circumstances, the County urged that its evidence of a past pattern or practice of discipline for similar activity by employes must be considered.

The County urged that the Union's agreement to drop Clappes' grievance regarding the same incident(s) Sixel was involved in, provided evidence that the Union believed a written warning was appropriate discipline for the activity involved. Furthermore, the County asserted that the facts showed that the County had been fair, appropriate and consistent in its discipline both here and in the past. The County noted that both Miles and Fehlhaber observed the offensive and disruptive conduct by Sixel on several occasions and that they carefully considered the employes' work records and the County's past practice prior to issuing identical discipline to the involved employes.

There was no evidence, the County urged, that it had been arbitrary or capricious in issuing these warnings, that the punishment given had been excessive or that the County had abused its discretion in issuing Sixel (and Clappes) written warnings. In these circumstances, the County urged that the grievance be denied and dismissed.

Union:

The Union asserted that the County did not have "proper cause" to discipline Holly Sixel. The Union noted that it is the County's burden to prove that it possessed such proper cause to issue Sixel a written warning on April 27th and the Union contended that the County failed to meet this burden of proof. In this regard, the Union urged that the County has merely proved that Sixel and Clappes talked to each other during working hours. Because the County has no rule against talking and because the County failed to prove that Sixel and Clappes were actually talking about non-work matters, the Union urged that the grievance must be sustained.

The Union asserted that the real reason that Sixel was disciplined was because Sixel was a married female and Clappes was a male and rumors were circulating regarding their behavior. The Union likened the County's actions herein to those of nuns in a co-educational parochial school who try to keep the boys separated from the girls.

The Union noted, in addition, that although Supervisor Miles observed Sixel and Clappes' behavior for two weeks, he never told Sixel that she had failed to get her work done or do her job. Indeed, the Union observed, Miles never even spoke to Sixel about his observations. This, the Union urged amounted to condonation. Furthermore, the Union asserted, much of what Miles testified to was not actually observed by him but it had been reported to him by others (such as, a County employe kept waiting by Sixel's conversations with Clappes on April 24, 1992). The Union asked why this employe or other employes were not called to testify at the hearing.

Finally, the Union contested the County's attempt to prove a past practice of issuing written warnings in allegedly similar circumstances. In this regard, the Union contended that the prior incident (involving Watry) had not been similar to the circumstances in this case and that in any event, the prior written warning issued to Clappes had been issued when his position was outside the collective bargaining unit.

In conclusion, the Union urged that Ms. Sixel's record be expunged of any and all references to this written warning and that the grievance be sustained in its entirety.

DISCUSSION:

It is significant that the Union called no witnesses to testify in this case. Therefore, as the County properly pointed out, the testimony of the County's witnesses stands uncontradicted and an inference properly lies that testimony, had it been offered, would have been unfavorable to the Union's case.

The Union is correct in its assertion that the County had a burden in this case to prove that Sixel had engaged in excessive and disruptive socialization regarding personal matters on work time. The County's burden of proof herein is one of a preponderance of the evidence, not that of beyond a reasonable doubt, as the Union has implied. I believe the County proved, by Miles and Fehlhaber's testimony, that Sixel's behavior had in fact disrupted the Land Conservation Department and that it reasonably appeared to be non-work related. It was up to the Union to present evidence to dispute and disprove the reasonable inference that Sixel had been socializing with Clappes, not communicating on work-related topics; however, the Union failed to present any evidence on this point. In these circumstances, the County's uncontradicted evidence supported the reasonable inference therefrom that Sixel had in fact engaged in disruptive socialization on work time.

The fact that the County did not present further corroborating witnesses does not require a conclusion that Miles and Fehlhaber's testimony was somehow unreliable. The Union's cross-examination failed to undermine the credibility of these witnesses and their testimony stands undisputed. Furthermore, the fact that Miles did not speak to Sixel about her conduct or warn her that she had failed to get her work done or to do her job, does not mean that the County acted arbitrarily, capriciously or abused its discretion in issuing the April 27th written warning to Sixel for her conduct. Rather, the record demonstrated that it took Miles and Fehlhaber several weeks to coordinate and complete their investigation of Sixel and Clappes' conduct, due in part to Fehlhaber's work schedule. Only after both Miles and Fehlhaber had both observed Sixel and Clappes' and after they had discussed the conduct and the appropriate penalty to be assessed against both employees did Miles and Fehlhaber act. This approach supports a conclusion that these supervisors were treating Sixel and Clappes fairly. 2/

Finally, the Union argued that prior written warnings given to Watry and Clappes regarding a different set of circumstances should be disregarded. I agree with the Union that these prior warnings did not affect members of the Union's bargaining unit and that in any event, the County failed to prove that these warnings constituted a true past practice. However, having reached this conclusion, does not mean that the prior warnings are not otherwise relevant to this case. Indeed, I find that the circumstances here and those in the prior cases were similar, although not identical. Also, the prior written warnings given to Clappes and Watry generally tend to support a conclusion that the County acted fairly in this case, by issuing the same level of discipline it had previously been issued to Clappes and Watry to Sixel and Clappes for having also engaged in disruptive socialization at work.

Based upon the relevant evidence and argument herein, there is no basis to disturb the Employer's decision to issue this relatively low level of discipline to Sixel for the disruptive behavior she displayed at work and I issue the following

AWARD

The Employer did not violate the collective bargaining agreement when it gave Holly Sixel a written warning on April 27, 1992.

The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this \_\_\_\_\_ day of April, 1993.

By \_\_\_\_\_  
Sharon A. Gallagher, Arbitrator

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2/ The Union failed to offer any independent evidence that Miles and Fehlhaber's actions herein amounted to condonation. In addition, the fact that the County never took the position that either Sixel or Clappes failed to complete their work or do their jobs, tends to support a conclusion that the County acted fairly.

