BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF RACINE	Case 396 No. 47954 MA-7447
and	
LOCAL 67, AFSCME, AFL-CIO	

Appearances:
Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CI
Mr. Guadalupe G. Villarreal, Assistant City Attorney, on behalf of the City.

ARBITRATION AWARD

According to the terms of the 1992-94 collective bargaining agreement between the City of Racine (hereafter City) and Local 67, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as mediator and then to act as impartial arbitrator (pursuant to Article III of the labor agreement) of a dispute between them involving a one-day suspension received by Roger Johnson. The undersigned was designated mediator/arbitrator. Mediation was held at Racine, Wisconsin on October 7, 1992 and, the parties having failed to settle the instant case, an arbitration hearing was scheduled for January 19, 1993. The hearing was then postponed to February 9, 1993 and it was held on that date in Racine, Wisconsin. No stenographic transcript of the proceedings was made. The parties submitted their briefs to the undersigned by April 9, 1993. The parties waived their right to file reply briefs at the February 9th hearing.

Issues:

The parties were unable to stipulate to the issues to be determined herein although they did stipulate that the undersigned could frame the issues. The City suggested the following issues:

1) Did the Employer violate the collective bargaining agreement by imposing a one-day suspension against the Grievant for the incident of July 2, 1992?

2) If so, what is the appropriate remedy?

The Union suggested the following issues:

1) Was the suspension of Roger Johnson on July 7, 1992 for just cause?
2) If so, what is the appropriate remedy?

Based upon the relevant evidence and argument, and the parties' stipulation, I find that the Union's issues were appropriately phrased and they shall be determined herein.

RELEVANT CONTRACT AND WORK RULES PROVISIONS:

ARTICLE III
Grievance Procedure

E. Management Rights. The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

1. To direct all operations of City government.
2. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge and take other disciplinary action against employees, for just cause.

. . .

WORK RULES:

. . .

E. Backing Up Vehicles and Equipment

1. Employees shall exercise extreme care when backing up any vehicle or equipment. If at all possible, another employee shall direct the driver from behind the vehicle in clear view of the driver. (See Safety Manual for applicable rules).

. . .

L. Vehicular and Property Damage Accidents

I. Employees who are involved in any vehicular or property damage accident shall adhere to the following procedure:
   a) do not move vehicle
   b) call the department supervisor for which you work informing them that an accident has occurred and the location of same. The department will then immediately notify the Police Department and will also notify the Safety Officer as soon as reasonably possible.
   c) wait at the scene until the Police Department investigates the accident and releases the employee(s).
   d) do not make any statement other than describing exactly what happened to the investigating officer.

e) fill out any and all accident reports as may be necessary. The departmental office shall provide the necessary forms and assistance in completing them.

f) if the total combined damage to all vehicles and property involved is estimated to be over $200.00 or if personal injury is involved, the employee must complete a State of Wisconsin Report form.

BACKGROUND:

Roger Johnson has been employed by the City in the Parks Department for an unknown period of time. On June 7, 1991, Johnson received a written reprimand for having backed his vehicle into an overhead door system, damaging the door track system beyond repair. On February 12, 1992, Johnson received an oral reprimand (documented in writing) for exceeding his fifteen minute morning break time. Johnson did not grieve either of these disciplinary actions. 1/ The record fu an employe's file pursuant to Article III, Section K. When mediation has resulted in settlements, which may have included the removal of discipline for property or vehicular damage from the employe's personnel file, such settlements have regularly been made non-precedential.

FACTS:

On July 2, 1992, Johnson and his partner William King, were assigned to use truck number 55, a pickup truck with a regular solid metal tailgate.

1/ At the hearing, the Union objected to the receipt of evidence relating to Johnson's prior disciplinary record based upon Article III, Section K, Management and Union Recognition. That Section reads in relevant part as follows:

> K. Discipline. The Union shall be furnished with a copy of any written notice or reprimand, suspension or discharge. The City agrees that it will attempt at all times to use the disciplinary process as a means to correct shortcomings on the part of City employees in terms of their overall work performance. Discipline, therefore, is intended to initiate a corrective action on the part of the employee. A written reprimand sustained in the Grievance Procedure or not contested shall be considered a valid warning. The Union agrees upon receipt of the reprimand notice to review the situation with the employee in an attempt to correct the problem. When an employee's record is cleared of minor infringements for a year, all previous records of minor infringements shall be removed from his personnel file.

The Union argued that the June, 1991 accident that Johnson had had was a "minor infringement" and because it was more than one year old on July 2, 1992, it should not only be expunged from Johnson's record but also disregarded in this proceeding on the issue whether Johnson's one-day suspension had constituted "progressive discipline". For the reasons more fully stated in the Discussion section, I have rejected the Union's arguments on these points. Therefore, the evidence of Johnson's prior disciplinary record is relevant and it has been fully considered herein.

Johnson was driving on July 2, 1992 when he and King pulled into Horlick Field to use the restroom during their regular morning (9:00 a.m.) break. At this time, Parks Superintendent James Richards and Athletic Field Maintenance Supervisor Ron Hibbard were also present at Horlick Field and they saw Johnson and King arrive in truck number 55 which had its tailgate open (down). Johnson parked truck 55 near another Parks Department truck, number 25. Truck number 25 was also a pick-up truck but it had an oversized wire mesh ramp attached to the rear where a tailgate would normally have been attached, which ramp was in the closed (upright) position during all times relevant herein.

Johnson and King returned to truck 55 and Johnson resumed driving. At this time, Richards saw Johnson back up truck 55 hitting the mesh ramp of truck 25 with the open tailgate of truck 55. Richards called out to Johnson to stop. Notably, King was not spotting (directing Johnson's backing up) for Johnson. Johnson had hit truck 25 while proceeding at approximately two or three miles per hour, striking the closed mesh tailgate of truck 25 with the left rear corner of truck 55's open solid metal tailgate. Johnson apparently heard Richards' call to stop and saw Richards observing him. Johnson got out of truck 55, took a look at the rear of trucks 25 and 55, looked at Richards, shrugged his shoulders and got back into truck 55 and drove away at a normal speed. When Johnson got out to look at the trucks, King lowered his head and he shook his head from side to side Richards said nothing to Johnson at the time of this incident. Neither Johnson nor King spoke to Richards or to their immediate supervisor, Ron Hibbard, about the incident; neither of them called the police or turned in an accident report.

Superintendent Richards (the only witness who testified herein) stated that the left tailgate pin on truck 55 was damaged very slightly during this incident; that this pin was a one inch steel pin which was bent about 1/4 inch. Richards also stated that the wire mesh ramp was bowed inward about two inches in a six inch (in diameter) circular area. Richards stated that the City expended no funds or time to fix the pin on truck 55 and that a City employe spent about 30 minutes labor to pound out the dent in truck 25's ramp at no cost to the City beyond labor.

Richards spoke to Supervisor Hubbard later on, on July 2, 1992 about the damage done to trucks 25 and 55. On July 7th, after having checked with Personnel and having reviewed Johnson's personnel file, 2/ Richards issued the following one-day suspension to Johnson:

> On July 2, 1992 Mr. Johnson was backing up Park 55 with Mr. Bill King in the truck with him. This is a violation of Work Rule E, Section 1. Mr. King should have been out of the truck directing Mr. Johnson.
>
> Walter Rhone, Craig Trott, and Jim Richards witnessed Mr. Johnson back Park 55 into Park 25. This incident occurred at Horlick Field, just east of the carpenter shop at about 9:00 a.m. Wally Craig, and I all yelled to stop Roger. If we hadn't the damage to Park 25 would have been more extensive.
>
> Roger had a similar incident a year ago doing

2/ Richards stated that he considered the June, 1991 accident, which Johnson had had in issuing Johnson the one-day suspension in issue here. Richards stated that he considered the oral warning Johnson had received on February, 1992 to be a minor incident.

extensive damage to a Park Department garage door. He received a written reprimand at that time.

Mr. Roger Johnson will be off work July 9, 1992 without pay.

Richards also issued an oral reprimand to William King after having reviewed King's personnel file, for failing to "spot" properly for Johnson while Johnson backed up on July 2nd. King did not grieve this oral reprimand.

Due to the July 4th holiday, Richards gave Johnson his one-day suspension and reviewed it with him on July 7, 1992. Richards first spoke to Johnson about the July 2nd incident when he gave him the one-day suspension document on July 7th. The Union timely filed the instant grievance.

POSITIONS OF THE OF THE PARTIES:

Employer

The City argued that the evidence showed that on July 2, 1992, the Grievant drove his vehicle in such a way as to cause damage to City trucks 25 and 55 and that the Grievant then removed truck 55 from the scene of the accident without following the procedures laid down in Work Rule L. Given the fact that the Union proffered no testimonial or documentary evidence in this case, the City urged that the uncontested facts demonstrated that Johnson violated the City's Work Rules, that his actions caused damage to City vehicles and that the discipline was therefore appropriate.

The City denied that it had been tardy in imposing the one-day suspension on Johnson because the three-day holiday weekend had immediately followed the July 2nd incident. The City also observed that its consideration of Johnson's previous accident in June of 1991 was appropriate under its progressive disciplinary policy. The City asserted that it had proven practices and policies which showed that the City does not consider records of accidents (like the one Johnson had in June, 1991) to be "minor infringements" under Article III and that the City has not removed references to such accidents where, as here, the discipline was not grieved.

In all of the circumstances of this case, the City contended that the discipline imposed was reasonable, that the City properly considered Johnson's previous driving record and that, therefore, the grievance should be denied and dismissed in its entirety.

Union:

The Union urged that the City lacked "just cause" to suspend Roger Johnson for one day based upon the events of July 2, 1992. In this regard, the Union asserted that no accident occurred on July 2nd. The Union observed that Parks Superintendent Richards witnessed Johnson's truck "tap" truck 25, yet Richards failed to instruct Johnson to file an accident report or to otherwise report the incident. On this point, in addition, the Union argued, the City's overdue citation of a violation of Work Rule L at the instant hearing should be disregarded.

The Union further noted that contrary to his usual practice, Superintendent Richards did not take any pictures of the damage to trucks 25 and 55 for admission here, that Richards also admitted that there had been no City repair work orders generated by this "accident" and that there was no monetary cost to the City for the "repairs". Thus, the Union asserted that even the City's managers did not act in such a way as to demonstrate that they believed a real accident had occurred on July 2nd.

The Union urged that only the July 2nd incident should be considered in this case because Johnson's work record should have been purged of the "minor infringements" which had occurred more than one year before July 2nd, pursuant to Article III of the labor agreement. In all the circumstances of this case, the Union argued that the City lacked just cause to discipline Johnson for the incident of July 2nd which could not reasonably be construed as an accident. The Union therefore urged that the grievance be sustained, that Johnson be made whole and that his work record be expunged of any and all references to the July 2nd incident.

DISCUSSION:

First, I disagree with the Union's assertion that Johnson did not have an

accident on July 2nd. The undisputed record evidence in this case shows that Johnson's driving caused vehicular damage on July 2nd and the City had to employ one of its employes to repair that damage. The fact that the City did not have to expend funds to pay an outside entity for the resultant repairs does not mean that no accident occurred and that no damage was done.

Secondly, I do not find it significant that Superintendent Richards did not take pictures of the damaged vehicles, that he did not instruct Johnson to follow Work Rule L and that Richards did not speak to Johnson until Richards issued Johnson's suspension on July 7th. 3/ Like any employe, Johnson was responsible for his own actions while at work and the Union cannot shift the responsibility to follow valid work rules from employes to managers in this fashion. The fact that Richards apparently broke with his own practice by not taking pictures of the damaged vehicles here does not rise to the level of arbitrary conduct where, as here, the Union failed to undermine Richards' credibility and it failed to dispute Richard's testimony in any way. The evidence thus demonstrates that Johnson had an accident on July 2, 1992.

Arbitrators are loathe to disturb an employer's decision to discipline an employe who has admittedly 4/ engaged in conduct violative of the employer's otherwise valid work rules, absent proof that the discipline was excessive or unreasonable or that the employer's decision was motivated by arbitrary, capricious or discriminatory factors. Given the undisputed facts on the record here, the central question is whether the City's one-day suspension of Johnson for the events of July 2nd was excessive, unreasonable or otherwise arbitrary.

In approaching this issue, I must rule upon the fairness of the City's reference to and reliance upon Johnson's June, 1991 accident to justify the level of discipline used in the instant case. On this point, I note that the City's evidence was uncontested that vehicular accidents have not been considered "minor infringements" within the meaning of Article III of the labor agreement and that in any event, when a disciplinary action (such as the one regarding Johnson's June, 1991 accident) is not grieved, it stays in the employe's personnel file. Based upon the record evidence in this case, I conclude that it was reasonable and appropriate for the City to consider and rely upon the written warning it gave Johnson for his June, 1991 accident as the first step in the progressive disciplinary process for the similar incident of July 2, 1992. Therefore, the City's decision to issue Johnson a one-day suspension was not, on its face, excessive or unreasonable given Johnson's prior work record.

I note that the suspension was originally based upon Johnson's violation of Work Rule E (1): failing to use great care in backing a City vehicle. The record clearly shows that Johnson violated this Work Rule. In addition, the written document issued along with Johnson's suspension accurately described the accident that occurred on July 2nd, and Johnson's part therein. The document also referenced Johnson's June, 1991 written warning as a reason for his being issued a one-day suspension. Thus, as originally issued, the one-day

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3/ The record demonstrated that Richards' waiting until July 7th to issue Johnson the suspension was based upon his having asked the Personnel Department to review his decision before its issuance and upon the fact that the July 4th Holiday was celebrated.

4/ It is significant that the Union did not offer any evidence to dispute that Johnson had the July 2nd accident which Richards described and which clearly caused damage to trucks 25 and 55.

suspension appeared to be reasonably based upon clear and uncontested facts and considerations. The fact that the City chose to argue at the instant hearing that Johnson also broke Work Rule L by his July 2nd conduct (although probably technically correct), does not add to or detract from the basic fairness of the City's original actions in issuing Johnson the one-day suspension at issue here. 5/

Based upon the relevant evidence and argument herein, I therefore issue the following

AWARD

The suspension of Roger Johnson was for just. The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 14th day of May, 1993.

By _____
Sharon A. Gallagher, Arbitrator

5/ I have not considered the City's arguments regarding Work Rule L in reaching my decision in this case.