

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:	
of a Dispute Between	:	
	:	Case 189
CITY OF OSHKOSH	:	No. 48009
	:	MA-7473
and	:	
	:	
OSHKOSH CITY EMPLOYE UNION	:	
LOCAL 796, AFSCME, AFL-CIO	:	
	:	

Appearances:

Mr. Warren P. Kraft, City Attorney, City of Oshkosh, 215 Church Avenue, P.O. Box 1130, Oshkosh, Wisconsin 54902-1130, appearing on behalf of the City.

Mr. Gregory N. Spring, Staff Representative, Wisconsin Counsel 40, AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901, appearing on behalf of the Union.

ARBITRATION AWARD

The City of Oshkosh, hereinafter referred to as the City, and the Oshkosh City Employee Union, Local 796, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the discharge of an employe. Hearing on the matter was held in Oshkosh, Wisconsin on January 12, 1993. Post-hearing arguments and reply briefs were filed by April 12, 1993. Full consideration has been given to the evidence, testimony, and arguments presented in rendering this award.

ISSUE

During the course of the hearing the parties were unable to agree on the framing of the issue and agreed to leave framing of the issue to the undersigned. The undersigned frames the issue as follow:

"Did the City have just cause to terminate the grievant's employment on July 15, 1993?"

"If not, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

. . .

Article VIII

Suspension - Demotion - Discharge

. . .

Dismissal: No employee shall be discharged except for cause. An employee who is dismissed, except probationary and temporary employees, shall be given a written notice of the reasons for the action and a copy of the notice shall be made a part of the employees personal history record, and a copy sent to the Union. An employee who has been discharged may use the grievance procedure by giving written notice to his steward and his department head within five working days after dismissal. Such appeal will go directly to the appropriate step of the grievance procedure.

BACKGROUND

The City, amongst its various governmental functions, operates a transit system. The transit system is referred to by the parties as an exact fare system. Rider fare is fifty cents (\$0.50) per ride and riders are to deposit the exact fare into a fare box located at the front of the bus. The fare box will not take one dollar bills. Transit drivers have been directed by the City not to make change for riders. In those instances where a rider does not have the exact amount, usually presenting the transit driver with a dollar bill, the transit driver is directed to give the rider a refund slip, identifying the amount in excess of the exact fare. The rider can then obtain a refund at the City's Transit Office. In other instances two (2) riders may present a dollar bill to the transit driver to pay for two (2) fares. The transit driver is to identify on a log sheet (referred to by the parties as a tally sheet) when he received a dollar bill and is to turn in all dollar bills into a tube box located in the City's Transit Garage at the end of his shift of work.

On January 20, 1992 the City hired Rex Cass as Transit Coordinator. Cass did an internal audit on the receipt of monies by employes and came to the conclusion two transit drivers were not turning in sufficient dollar bills. Cass brought this matter to the attention of the City's Transportation Director Mark

Huddleston. Huddleston determined to investigate the matter by having his sixteen (16) year old son and a friend of his son's ride both of the suspected transit driver's buses on July 2, 1992, giving each transit driver a specified dollar bill to pay for the bus rides of both of which Huddleston had written down the serial numbers. At 12:30 p.m. Huddleston's son and friend rode the bus route of Michael McKone. At the end of the work day Huddleston observed that one of the two suspected drivers, Michael McKone, hereinafter referred to as the grievant, did not turn in the specified dollar bill and had not marked down on his tally sheet he had received a dollar bill at the time Huddleston's son and son's friend had ridden the bus.

Huddleston then contacted the Oshkosh Police Department for assistance. The Police Department assigned two female employes to ride the grievant's bus from downtown Oshkosh to an outlying discount store and to make a return trip on the grievant's bus back to downtown on Friday, July 10, 1992. Each time the female employes got on the grievant's bus the transit driver was given a specific dollar bill to pay for the fares of both riders. At the end of his assigned shift the grievant did not turn in any dollar bills nor did he identify on his tally sheet he had received any dollar bills.

On the grievant's next work day (Monday, July 13, 1992) he was directed to meet with Huddleston. The grievant was questioned about why he failed to turn in the two dollar bills (\$2.00) he received on his previous work day. The grievant offered no explanation as to why he failed to do so but did state he had failed to turn in three dollars (\$3.00) from the previous Thursday and turned in those dollars. Thereafter the grievant was terminated, the grievant filed the instant grievance and the matter was processed to arbitration in accordance with the parties' grievance procedure.

At the hearing two transit drivers, Leyard Moem and Larry Gauger testified that there was no set policy on how drivers were suppose to handle dollar bills and that it was not unusual for a driver to forget to turn in any dollar bills at the end of his shift and to turn them in the next day. The City did not dispute that when this occurred employes were not disciplined. Also, Moem testified that there could of been an instance where a transit driver failed to turn in monies at all.

Also at the hearing Huddleston's son acknowledged he had only seen the grievant on the one occasion, when he handed him the dollar bill, and had asked his father prior to the hearing if the grievant wore glasses. Tina Denil, the City's Police Department employe who handed the grievant the two (2) marked one dollar bills (\$2.00), acknowledged she discussed the physical

characteristics of the grievant with the other Police Department employe, Lisa Konrad, prior to the hearing. Konrad acknowledged she could not positively identify the grievant at the unemployment hearing concerning this matter and could not positively identify the grievant at the hearing.

The record demonstrates that the grievant has received good performance evaluations and has received acknowledgement of thank you's from riders of his bus route. The record also demonstrates the grievant received a one (1) day suspension on July 7, 1992 for his failure to maintain adequate punch passes. The record further demonstrates that on the dates and times at question herein the grievant logged in receipt of transfers and passes.

CITY'S POSITION

The City argues that discharge is the "capital punishment" of the employer-employee relationship and is triggered by a major breach of the employee's duty to the employer. The City contends such a situation has occurred herein. The City also contends the Union's argument that it has failed to prove beyond a reasonable doubt that the grievant actually stole money ignores the fact that the grievant was aware monies were missing, failed to offer any rationale as to why it was missing, and failed to report any discrepancies.

The City points out that substitute drivers working the grievant's route averaged \$2.09 per day. Immediately following the grievant's discharge the substitute driver turned in \$5.00 per day. The City also points out the grievant's average was \$0.28 per day.

The City also asserts the Union's witnesses, Moem and Gauger, testified that when they failed to turn in money at the end of their shift they did so the next work day. The City points out the grievant failed to follow even this procedure.

The City concludes that bus fares deposited with the grievant on July 2 and July 10, 1992 were not turned into the City. Give the seriousness of such an offense and the grievant's failure to explain the discrepancies, the City contends it had no choice but to terminate the grievant's employment.

UNION'S POSITION

The Union argues that in a discharge case the burden of proof is on the employer to demonstrate beyond a reasonable doubt the guilt or wrong doing of an employe. The Union asserts the City has failed to meet the burden of proof and therefore did not have just cause to discharge the grievant.

The Union asserts there is even a question as to whether the grievant ever received a dollar bill from Huddleston's son. The Union points out Huddleston's son could not remember the date or day of the week the incident allegedly took place, that he had ridden two buses that date and passed two marked bills to two different drivers, and had questioned his father just prior to the hearing in the instant matter as to whether the grievant wore glasses. The Union asserts the City has failed to prove beyond a reasonable doubt the grievant received the missing dollar bill. Here the Union points out Huddleston's son may not have given a marked dollar bill to the grievant, gave a marked dollar bill to the grievant and the grievant turned it in with the other driver failing to turn in the marked dollar bill, or gave a marked dollar bill to the grievant and the grievant turned in a different dollar bill. The Union also stresses that the grievant did turn in a dollar bill on July 2, 1992. If the grievant failed to log in the proper time he received it, Huddleston's son was in error as to what time he gave the dollar bill to the grievant or the grievant turned in a different dollar bill are possibilities. Particularly given the fact that Huddleston's son had no record of the event and recalled only that it occurred sometime in July.

The Union also points out that there are sufficient doubts as to whether Denil or Konrad could identify the grievant. Konrad could not identify the grievant at the unemployment compensation hearing. Denil, who testified that she did not discuss the case with Konrad, was told by Konrad the day before the arbitration hearing that Konrad wore glasses. The Union contends the fact that the grievant failed to turn in the two dollars (\$2.00) he received from Denil on July 10, 1992 is irrelevant because he simply failed to turn in the money until July 13, 1992 when he turned in \$3.00.

The Union also asserts the City's general claim that the grievant was stealing money based upon the fact the grievant turned in less money than substitute drivers is merely circumstantial. The Union argues that circumstantial evidence does not eliminate the requirement that there be clear and convincing proof that the offense charged was committed. The Union stresses mere suspicion is not enough to establish wrongdoing.

The Union stresses it was uncontested by the City that the grievant drove one of the more hectic bus routes. That it was not unusual for a driver to forget to turn in dollar bills on the date they were received. Further, that the system management had for the collection of dollar bills was unworkable, time consuming, and disruptive which allowed each driver to devise their own method. Furthermore, within one week after the grievant's discharge the

City changed its method for the collection of dollar bills by placing locked boxes on each City bus for direct deposit of dollar bills by transit riders.

The Union concludes the City did not have just cause to terminate the grievant. The Union request the grievance be sustained.

CITY'S REPLY BRIEF

The City argues in its reply brief that the grievant never denied he was the driver in question on the particular route on the particular days when the events took place. Thus the grievant received three dollar bills (\$3.00) on two (2) separate days. The City also argues it has clearly proven marked bills were presented to the grievant, they were not turned in, and the grievant failed to report it and failed to offer any plausible explanation as to why he failed to report the discrepancies. The City emphasizes that the grievant's misappropriation of public funds violated a trust. Other driver's have found ways to properly account for funds they received. Substitute drivers have turned in greater amounts than the grievant. The City asserts the grievant did not turn in money at the end of the workday like his co-worker's do. The City contends that it has a lawful and fiduciary responsibility concerning taxpayers' money and that the grievant failed in this responsibility. The City concludes that the grievant's failure to turn in the money presented as bus fares and his failure to adequately account for, or explain, its disappearance can lead to only one conclusion, the funds were misappropriated and discharge is the appropriate discipline. The City would have the undersigned deny the grievance.

DISCUSSION

As the Union has pointed out, the City has the burden of demonstrating it had just cause to terminate the grievant's employment. The record demonstrates that when the City suspected there was a problem with the amount of dollar bills the grievant was submitting after completing his bus routes it investigated the matter. In the words of Huddleston's son, it set up a "sting" operation. Two young boys were directed to give the bus drivers of two specific routes a specific dollar bill. There is no evidence in the record which would lead to the conclusion that Huddleston's son gave the wrong dollar bill to the wrong transit driver. Huddleston's son knew which bus route and at what time to take the bus and knew specifically which dollar bill to give to the transit driver. The fact Huddleston's son may of needed assistance from his father in remembering what the grievant looked like does not lead to a conclusion that Huddleston's son may have erred as to which driver he gave the marked dollar bill to. What

is questionable is the fact the grievant did not mark on his tally sheet the receipt of the dollar bill. This was not a situation where he had to make change or where he had to write out a receipt/refund slip, rationales given by witnesses for the Union as to why a driver may have forgotten to log in the receipt of a dollar bill. The grievant received a dollar bill as payment for two (2) fares. The grievant was in receipt of a dollar bill which was to be marked on his tally sheet, he did not have to make change nor did he have to write out a receipt/refund slip. There is not a reasonable explanation in the record as to why the grievant failed to mark down the receipt of the dollar bill at the time he received it, at approximately 12:30 p.m. on July 2, 1992. Particularly when the grievant did mark on his tally sheet that he received transfers and passes at that time.

The record also demonstrates the City did not rely on the record of the grievant's tally sheets for turning in dollar bills and the experience with Huddleston's son. The City had two employees from the Police Department ride the grievant's bus from downtown Oshkosh to a discount store and then to return on the grievant's bus to downtown Oshkosh. On each trip the grievant was given a marked dollar bill. The grievant did not mark down on his tally sheet the receipt of any dollar bills nor did he turn in any at the end of the work day. Here again, this was not a situation where the grievant had to make change or to write out a receipt/refund slip. The grievant received a dollar bill as payment for two (2) fares twice. There is no rational explanation in the record why the grievant in such a situation failed to write down receipt of the dollar bill or why he failed to turn it in at the end of the work day or at a minimum the beginning of the next work day. Here again, the grievant had marked down he received transfers and passes. The fact that Denil and Konrad had problems remembering what the grievant looked like is irrelevant unless the Union had demonstrated there was a possibility that the grievant wasn't driving the bus at the times and on the date in question. The record demonstrates the grievant was the transit driver of the bus on the dates in question and at the times in question.

The undersigned finds there is no reasonable doubt that on at least three (3) occasions the grievant was given a dollar bill as payment for two (2) fares. Further, that the grievant did not properly log the receipt of such funds and, at a minimum, did not turn in two (2) if not all three (3) dollar bills he received on the dates and times in question. Given the above and the fact the grievant's record for turning in dollar bills was questionable the undersigned concludes the City had just cause to terminate the grievant's employment. The fact that the City has placed lock boxes on each bus for the receipt of dollar bills since the instant matter arose is irrelevant. Clearly, the grievant had failed to turn in funds entrusted in his care and had failed to

properly log the receipt of such funds.

Based upon the above and foregoing, and the testimony, evidence and arguments presented, the undersigned finds the City had just cause to terminate the grievant's employment. The grievance is therefore denied.

AWARD

The City had just cause to terminate the grievant's employment on July 15, 1993. The grievance is denied.

Dated at Madison, Wisconsin this 9th day of July, 1993.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator