

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration : Case 20
of a Dispute Between : No. 47887
: MA-7418
CITY OF LADYSMITH :
: Case 21
and : No. 47888
: MA-7419
LABOR ASSOCIATION OF WISCONSIN, INC. :
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Appearances:

Mr. Dennis A. Pedersen, Labor Consultant, and Mr. Thomas A. Bauer, Labor Consultant, representing the Association.
Mr. William R. Sample, Consultant, Labor Relations Consultants, Inc., representing the City.

ARBITRATION AWARD

The Labor Association of Wisconsin, Inc., herein the Association, pursuant to the terms of its collective bargaining agreement with the City of Ladysmith, herein the City, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and decide a dispute between the parties. The City concurred with said request, and the undersigned was designated as the arbitrator. The parties waived a hearing in the matter and, instead, agreed that the arbitrator would rely on the transcript and exhibits from the hearing before the Police and Fire Commission of the City of Ladysmith. The parties completed the filing of briefs on May 4, 1993.

Issues:

Did the City have just cause to suspend Fred Hennekens without pay for the period of April 3, 1992 through June 27, 1992 (51 work days)?

Did the City have just cause to suspend Jeffrey Peavey without pay for the period of April 1, 1992 through May 12, 1992 (25 working days)?

If not, what is the appropriate remedy?

Relevant Contractual Provisions:

ARTICLE IX - HOURS

Section 1 - Work Day and Work Week Defined:
The normal work day shall consist of ten (10)

consecutive hours. The normal work week shall consist of forty (40) hours consistent with the provisions of Section 2 of this Article.

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ARTICLE XVI - LUNCH PERIOD/COFFEE BREAKS

Section 1 - Lunch Period: Employees shall be entitled to take time from their normal duties, not to exceed one (1) hour, to eat a meal. Employees shall continue to receive their regular hourly rate of pay while on such meal break, however, while on such meal break an employee shall be on duty and subject to call. Meal breaks not taken for whatever reason shall not accumulate for use at any other time.

Section 2 - Coffee Breaks: Employees shall be allowed to take two (2) twenty (20) minute coffee breaks during each shift. While on such breaks, the employee shall be on duty and subject to call. Coffee breaks not taken for whatever reason shall not accumulate for use at any other time.

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ARTICLE XXXII - DISCIPLINE AND DISCHARGE

Employees may be suspended, demoted, discharged or otherwise disciplined for just cause; provided however, that this just cause standard shall not be applied to probationary employees. Disciplinary action involving suspension, demotion, or discharge shall be by written notice to the affected employee with a copy to the Association.

Position of the Association:

The City lacked just cause to suspend the grievants. Even if some form of discipline was warranted, the suspensions were excessive.

Position of the City:

Based on the actions of the grievants, the City had just cause to suspend them.

Background:

The Rusk County Sheriff's Department operates a dispatch center in the same building in which the City's Police Department is located. The dispatch center is equipped with a recording system which records three incoming lines and two emergency 911 lines.

Each of the City's police officers has been issued a deputy card by the Rusk County Sheriff, so the officers have authority outside the City limits.

Several years prior to November of 1991, the officers were advised by Norm Rozak, the City's Police Chief, at all times relevant herein, that card playing was not allowed while the officers were on duty. Both Fredrick Hennekens and Jeffrey Peavey were employed by the City's Police Department at that time. Both individuals had been so employed for about ten years in late 1991.

On or about February 8, 1991, 1/ Rozak issued an announcement to the media and the police officers that the City was discontinuing its practice of unlocking motor vehicles except in emergency situations. The announcement also named three businesses which could be called for that service: Bill Stearns Motors, Ladysmith Standard, and Bernard Hahn (a locksmith).

On or about October 21, Rozak issued a memorandum to all employees which included the following statement: "also - If you are just hanging around the dispatch center - Don't do that! Let them people do their work."

On November 1 a severe snowstorm, variously described as a blizzard and a whiteout, struck the City. On that date Hennekens worked from 5:00 p.m. to 3:00 a.m. and Peavey worked from 9:00 p.m. to 7:00 a.m. Both shifts ended on November 2.

At approximately 8:47 p.m. on November 1, Kelvin Zahurones, the dispatcher, received a phone call from a woman about her brother who was at a bar, the Flambeau Land Inn, and who had been drinking all day. The woman asked if there was any way she could have him stopped from driving the 16 miles to his house. Zahurones advised Hennekens, who was in the dispatch center, of the call, including the name of the brother. Hennekens did not respond to the call. The Flambeau Land Inn is located about four blocks from the Police Department.

At about 9:45 p.m. on November 1 Zahurones received a call

1/ Unless otherwise specified, all other dates refer to 1991.

about a car which was running and the doors were locked with the car keys inside. The caller asked if an officer could open the door. Zahurones testified he relayed that information to Hennekens and Peavey who were in the dispatch center area. Hennekens and Peavey stated that the dispatcher, whom Hennekens thought was Gloria Brunner rather than Zahurones, only asked who does lockouts for the City and gave no other information about the circumstances of the call. Zahurones said one of the officers responded that it wasn't their policy to open car doors and the person should call Ladysmith Standard or the locksmith. Peavey and Hennekens testified that Hennekens answered the dispatcher's question with Bernie Hahn and Ladysmith Standard.

Peavey and Hennekens recall being informed of only one call concerning the locked vehicle. The transcription of the tape of the calls shows that Zahurones received a second call about the car at 10:59 p.m. advising him that the locksmith wouldn't come and Ladysmith Standard came but left before getting the door unlocked and asking if the officers had a slim jim tool to unlock the door. Zahurones told the caller that the City wasn't allowed to open vehicles. Zahurones testified that he did tell Hennekens and Peavey about the second call and they told him to tell the caller that there was no way for them to get in the car if the locksmith couldn't open the lock. Neither Hennekens nor Peavey recall being told of the second call. There were two additional calls received by Zahurones at 11:05 and 11:08 p.m. concerning the locked car, but he didn't inform the officers of those calls.

At about 11:30 p.m. an off-duty Rusk County deputy sheriff, Dean Hon, came to the dispatch center and asked the officers (Hennekens, Peavey and two Rusk County deputy sheriffs) if anyone had a slim jim which he could use. Hon said the four individuals were playing cards when he arrived. Hennekens said Hon could use the slim jim in his squad car. Hon got the slim jim and used it to open the locked car which was the subject of the earlier calls to the dispatch center noted above. While there is conflicting testimony as to whether a card game was being played when Hon arrived at the dispatch center, all the witnesses agree that said four individuals played cards for a period of time during the evening on November 1.

On November 4, at the request of the Rusk County Sheriff, Rozak met with him and listened to Hon relate his story of going to the dispatch center to get a slim jim to unlock a car when no on-duty officers would respond and of observing two City officers playing cards with two Sheriff's deputies. The Chief Deputy of the Sheriff's Department obtained a written complaint from the person whose locked car was the subject of the calls to the dispatch center on November 1 and a written statement from Hon. On November 5, the Chief Deputy received a written statement as

requested from Zahurones concerning November 1. Copies of those statements were given to Rozak.

On November 6, Rozak advised Hennekens and Peavey that a citizen's complaint had been filed, gave each of them copies of the complaint and their daily log from November 1, and requested a report from each concerning their activities while working on November 1.

On November 8, Rozak received a written response from Hennekens concerning November 1, wherein he stated that he played several games of cards in the dispatch center while on lunch break and that the lockout caller was given names to call for help.

On November 11, Rozak received a written response from Peavey wherein he stated he did play cards in the dispatch center and that the caller about the locked car was given names to call.

On November 13, Rozak interviewed Zahurones.

In a memo dated November 18, Rozak advised Hennekens that he believed Hennekens' conduct on November 1 may have violated certain departmental rules and that an independent investigator had been assigned to conduct a complete investigation into the incident. A similar memo also dated November 18 was given to Peavey. Rozak had contacted the City of Marshfield Police Department and in response to his request for an officer to conduct the investigation, Lieutenant Randy Laessig was assigned.

Laessig prepared written statements of his interviews with the citizen whose car was locked, Hon, Zahurones, Gloria Brunner (a jailer/dispatcher with the Rusk County Sheriff's Department), Mark Warner (a Rusk County deputy sheriff), David Kaminski (a Rusk County deputy sheriff), a friend of the car owner who made one of the calls on November 1, the person who called about an intoxicated person at the Flambeau Land Bar, Peavey, and Hennekens. Laessig gave Rozak a written summary, dated November 22, of his investigation.

The Police and Fire Commission (herein PFC) met on December 12 and December 30 to consider charges filed against Hennekens and Peavey by Rozak.

The following is a summary of the charges against both Hennekens and Peavey:

1. Failing to respond to a call for assistance concerning a locked car.
2. Playing cards while on duty.

3. Staying in the dispatch center for an extended period of time.
4. Filing reports and documents which were inaccurate and incomplete, with several examples listed.

In addition to the above charges, Hennekens was also charged with failing to respond to the report of an intoxicated individual.

Each officer has been provided with a copy of the City's Police Department Police and Procedures Manual. Said manual contains the following:

Rule #26 - "Request for Assistance" -

When any person applies for assistance or advise (sic), or makes complaints or reports, either by telephone or in person, all pertinent information will be obtained in an official courteous manner, and will be promptly acted upon, consistent with established departmental procedures.

Section 1-3-27 "Negligent Conduct"

Rule - Sleeping, idling, or loafing while on duty will be considered neglect of duty, and subject the negligent officer to disciplinary action.

Section 1-3-7 "Compliance with orders and directives"

Employees shall comply with all lawful orders or directives published by this department and shall obey all lawful orders of their superiors or persons in charge.

Rule 36 "Required Reports"

Members shall submit all required reports on time and in accordance with established departmental procedures. Reports submitted by members shall be truthful and complete, and no member shall knowingly enter or cause to be entered any inaccurate, false, or improper information.

On January 6, 1992, Hennekens and Peavey each received a written statement of the respective charges filed against him.

The Police and Fire Commission held hearing in the matter on January 20, February 17, March 27 and March 28, 1992. On March 28, 1992, following the close of the hearing, the Police and Fire Commission issued its decision sustaining charges 1, 2, 3, 4, 5c, 5d, 5e, 5f, 5g, 5h and 5, against Hennekens and charges 1, 2, 3, 4a, 4d, 4e, 4f, 4g, 4h, 4i, 4j, 4k, 4l, 4m and 4n against Peavey. The only charges which the PFC dismissed referred to some of the several alleged inconsistencies in the reports filed by the two officers. Hennekens was suspended without pay for ninety (90) days beginning April 1, 1992. Peavey was suspended without pay for forty-five (45) days beginning April 1, 1992. Hennekens lost fifty-one (51) working shifts and Peavey lost twenty-five (25) working shifts.

Hennekens and Peavey both filed grievances contesting their suspensions, which grievances became the basis for the instant case.

Discussion:

One of the justifications offered by Hennekens for not responding to the calls concerning the intoxicated person and the locked car is that Zahurones, the dispatcher, never either requested nor dispatched him to respond to the calls. Further, Hennekens contends that if Zahurones had given him all the information which he received in the phone calls, then he would have responded to those calls. Neither of those arguments is persuasive. With respect to the person who was intoxicated, Hennekens knew the identity of the intoxicated individual and the reason for the caller's concern. It is true that Hennekens did not know when the intoxicated person would leave the tavern. However, the tavern was within walking distance from the station, even in the blizzard conditions existing that evening. Additionally, Hennekens was neither busy responding to other calls nor out on patrol. If Hennekens did not feel he had enough information, he could have requested Zahurones to try to get more information.

It is concluded that Hennekens' failure to respond to the call about an intoxicated person at the Flambeau Land Inn on November 1 was inappropriate behavior.

The undersigned is persuaded that Zahurones informed Hennekens and Peavey of the first two calls he received concerning the locked car even though Hennekens and Peavey only recall one

call. Hennekens and Peavey also deny being told any of the circumstances concerning the call about a locked vehicle. However, the undersigned concludes that Zahurones did inform Hennekens and Peavey that the request for help in unlocking a vehicle involved a car with the motor running, as he stated. The statements of Deputies Kaminski and Warner support such a conclusion.

While there is a question of whether the locked car constituted an emergency, Hennekens and Peavey made no effort to gain additional information concerning the situation to assist in making such a judgment. Neither did they go to the scene. The officers were not busy responding to other calls. Rather, it appears they were playing cribbage. Even if the officers considered the time they spent playing cards to be their lunch hour, Article XVI specifies that employees are on duty and subject to call during their meal breaks. In addition, when the officers learned from the second phone call that the caller had been unable to get help from the other suggested sources, it would have been prudent for them to reconsider their decision to not assist in unlocking the car.

It is concluded that the behavior of both Hennekens and Peavey was improper with respect to the locked car situation.

The fact that the department's policy appears to allow officers to remain in the Police Department office rather than going on patrol during severe snowstorms does not excuse the officers from responding to calls or performing other tasks during such snowstorms. Hennekens and Peavey do not assert that they were unaware of the Chief's policy prohibiting card playing while on duty. Neither is there a conflict between the Chief's memo advising the employees not to hang around the dispatch center and the snowstorm policy allowing the employees to stay in the office rather than going on patrol. Certainly the officers should have been able to find work to do in the Police Department offices rather than playing cards in the dispatch center. It is true that the officers never denied playing cards while on duty on November 1. Conversely, neither Hennekens nor Peavey noted either any lunch breaks or any card playing on their daily activity reports for their shifts beginning on November 1. Clearly, they did not plan to admit to playing cards prior to being confronted with the information that the Chief was aware the card playing had occurred. The card playing constituted negligent conduct. Thus, the conduct of Hennekens and Peavey on November 1 was inappropriate with respect to playing cards while on duty, hanging around in the dispatch center and filing inaccurate daily activity sheets.

The reports filed by Hennekens and Peavey contain numerous

statements which often either are incomplete or are not consistent with the statements of other individuals. While it is difficult to establish that the inconsistencies were intentional, it also is difficult to accept the argument that the inconsistencies were a result of a poor recollection of the order of events and the times. The officers were advised by the Chief on November 6, less than a week after the snowstorm, that a citizen complaint had been filed and that the Chief wanted a report from each officer concerning his activities while at work on November 1. Since the snowstorm on November 1 was sufficiently unusual as to justify the officers not going on patrol, one could anticipate they would have had a more accurate recollection than they exhibited.

One other aspect of the defense raised by Hennekens and Peavey is of a troublesome nature. That aspect is Hennekens' assertion that he was never specifically either requested, or dispatched, to respond to the call concerning an intoxicated person and the testimony of both Hennekens and Peavey that they were not dispatched to respond to the call about a locked car and, further, that if the dispatcher had given all of the information, or, if the lockout had been of an emergency nature, they would have responded.

The undersigned has difficulty accepting the concept that the dispatcher decides when an officer is to respond to a situation rather than the officer. Rather, it would seem that the dispatcher is responsible for providing information to the officer so the officer can decide if a response is necessary. For an officer to justify a lack of response because the officer was not specifically dispatched is an unacceptable claim.

It is concluded that the City had just cause to discipline both Hennekens and Peavey. Therefore, it is necessary to now decide whether the suspensions given to those employees were appropriate.

The contract does not contain a progressive discipline procedure. Neither are there any instances of prior discipline of bargaining unit members in the record for comparison with the discipline applied in the instant case to consider whether the grievants herein were treated in a manner consistent with the treatment of other employees.

Standing alone, the suspensions were of lengths which the undersigned considers to be close to being punitive, rather than corrective, in nature. However, the mere fact that the lengths of the suspensions may have been longer than what others may have imposed for the same conduct is not a sufficient basis to alter those lengths. The City exercised its responsibility to take disciplinary action when it believed such was necessary and

considered the actions of the officers to be sufficiently improper as to justify a substantial penalty in this case. Clearly, the City intended to make a statement to its employees through these suspensions and has set a standard for measuring future disciplinary actions.

The undersigned is not persuaded to agree with the Association's contention that the City violated the due process rights of the grievants. It does not appear that the City unreasonably delayed the investigation and consideration of the matter. Certainly, the City was not familiar with the process. Further, the record is clear that the Police and Fire Commission allowed the Association adequate opportunity to defend the officers and to present witnesses and evidence on their behalf. Moreover, if the undersigned had concluded that the officers did not deserve to be suspended, he had the authority to overturn or reduce the suspensions.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the City had just cause to suspend Fred Hennekens without pay for the period of April 3, 1992 through June 27, 1992 (51 work days); that the City had just cause to suspend Jeffrey Peavey without pay for the period of April 1, 1992 through May 12, 1992 (25 working days); and, that the grievances are denied.

Dated at Madison, Wisconsin, this 26th day of July, 1993.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator