BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MONROE WATER UTILITY EMPLOYEES LOCAL UNION and DISTRICT COUNCIL 40, AFSCME, AFL-CIO	Case 26 No. 47831 MA-7401
and	
THE CITY OF MONROE (WATER UTILITY)	

Appearances:

Lawton & Cates, S.C., by Mr. Bruce F. Ehlke, on behalf of the Union.

Brennan, Steil, Basting & MacDougall, S.C., by Mr. Howard Goldberg, on behalf of the Utility.

ARBITRATION AWARD

The above-entitled parties, herein the "Union" and "Utility", are privy to a collective bargaining agreement providing for final and binding arbitration. Hearing was held in Monroe, Wisconsin, on January 18, 19, and February 16, 1993. The hearing was transcribed and the parties filed briefs and reply briefs which were received by July 2, 1993. In addition, the Utility has filed a separate Motion to Dismiss asserting that the Union's brief seeks to improperly raise certain issues contrary to an agreement between the parties regarding the scope of the issues before me.

Based upon the entire record, I issue the following Award.

ISSUE:

The parties in May, 1992, entered into a Settlement Agreement which, inter alia, provided:

> 1. The Utility agrees to submit the discipline/discharge of Jack Morris to a grievance arbitrator pursuant to the parties' contract. The issue to be decided by the arbitrator is:
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> > Was the discipline and/or discharge imposed appropriate for the alleged misconduct as measured by the just cause standard? If not,

what is the appropriate remedy?

2. The following evidence is restricted:

a. The lack of a hearing by the Utility Board prior to the imposition of the discipline and/or discharge is not probative.

b. The lack of notice in a written form, of alleged misconduct, is not probative.

. . .

DISCUSSION:

Before turning to the specific instances of alleged misconduct giving rise to Morris' suspension and discharge in April, 1991, it is first necessary to discuss the wider context surrounding the instant proceeding.

Morris' suspension and discharge were also the subject of a separate prohibited practices' complaint filed with the Wisconsin Employment Relations Commission alleging, inter alia, that the Utility suspended and fired him because of his concerted, protected activities. Hearing Examiner Raleigh Jones on October 12, 1992, dismissed this part of the complaint, finding that Morris' suspension and discharge were not motivated by any union animus. 1/

On appeal, the Commission on April 28, 1993, issued an Order Affirming in Part and Reversing in Part Examiner's Findings of Fact, Conclusions of Law, and Order wherein, inter alia, it reversed Examiner Jones and found that Morris was suspended and discharged because of his concerted, protected activities. 2/ The Commission's decision apparently has been appealed to the Circuit Court for Green County.

The parties in this proceeding have stipulated that all of the findings of fact made by Examiner Jones in the prohibited practices case are res judicata here. 3/ Given the exhaustive

1/ Monroe Water Department and Dale R. Neidl, Dec. No. 27015-A (Jones, 10/92).

2/ Monroe Water Department and Dale R. Neidl, Dec. No. 27015-B (1993).

3/ They disagree, however, as to whether I should take note of the Commission's subsequent modification of those findings of

detail and analysis contained in Examiner Jones' fifty (50) page decision and the Commission's subsequent 25-page decision, it is unnecessary here to repeat all of the facts spelled out therein. Hence, the most salient facts surrounding Morris' suspension and discharge are summarized below.

Furthermore, the question of alleged union animus is not before me and it need not be discussed herein, as that question is being litigated in the prohibited practices' proceeding. Moreover, the ultimate disposition of that case has no bearing on the just cause issue herein since the two are unrelated and are to be resolved independently of each other.

As for the merits, the Union maintains that the Utility lacked just cause to suspend and terminate Morris because he was not guilty of the charges levied against him and because, even if he were, termination is too harsh a penalty given the absence of any prior notice or instruction as to what should be done in certain situations. As a remedy, the Union requests a traditional make-whole remedy which includes Morris' reinstatement and a back pay award.

The Utility, in turn, mainly claims that the grievance should be denied because there was no just cause standard in effect at the time of Morris' suspension and discharge and that, as a result, his termination was proper under the common law. Alternatively, the Utility argues that it did have just cause under a contractual just cause provision because it has satisfied all of the seven "tests" enumerated in Enterprise Wire Co., 46 LA, 359 (Daugherty, 1966). It thus maintains that Morris was insubordinate and disruptive in response to management efforts aimed at bringing about greater supervision; that Morris chose to ignore forewarnings to the effect he would be fired if he did not follow the rules; that the rules were reasonably related to the Utility's business; that the discipline meted out here followed a fair inquiry and was fully warranted given Morris' substantial and compelling evidence of guilt; that it has acted even-handedly; and that the discipline here was reasonable. The Utility has also filed a Motion To Dismiss the grievance with prejudice on the ground that the Union seeks to argue matters which are outside of the parties' stipulation as to what is properly before me.

Turning first to the standard of review, I find that the just cause standard herein is the same one routinely found in collective bargaining agreements, rather than the "common law" standard advocated by the Utility on the ground that there was no collective bargaining agreement in effect at the time of Morris' suspension and discharge. Thus, the record establishes that the

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fact with the Union asserting, and the Utility denying, that they should be so considered.

parties herein submitted their collective bargaining dispute over an initial contract to interest-arbitration in 1991 and that the arbitrator ultimately adopted the Union's final offer, along with its proposal that the just cause standard provided for therein covered Morris' suspension and discharge. Furthermore, the parties subsequently agreed that but for certain caveats, Morris' discharge should be reviewed under the just cause standard. Absent any evidence establishing a contrary intent, it therefore is reasonable to assume that the just cause standard referenced by the parties means the contractual just cause standard which is the grist of bargaining agreements, rather than the common law standard which is hardly ever applied in a collective bargaining context.

As for the Utility's Motion to Dismiss, both parties have stipulated that I am not to rule on whether the Utility's lack of written notice to Morris and lack of hearing by the Utility Board prior to disciplining Morris were proper. Hence, I have not considered any of the Union's arguments claiming otherwise, as those two issues are outside the scope of the parties' submission agreement governing this proceeding. Since that is all that must be done here, it is unnecessary to grant the Utility's Motion to Dismiss and deny the grievance solely because of this misunderstanding.

Turning now to the facts, the record establishes that Morris was employed by the Utility since 1985, during which time he was never disciplined.

On March 1, 1990, Dale R. Neidl - formerly the head of the Water Utility in Plymouth, Wisconsin - became General Executive Officer of the Utility. Thereafter, Neidl and Morris developed a stormy relationship which culminated in Neidl's April, 1991 recommendation to the Utility Board that Morris be terminated and the Board's ensuing April 18, 1991, decision to terminate him.

Neidl testified here that he decided that Morris should be terminated because of the following incidents, which are treated seriatim.

1. Morris' Alleged Disruptive Behavior

Neidl on May 7, 1990, wrote in his diary that Morris was "very disruptive to the rest of the work force" and that "If his attitude continues, I highly recommend suspension without pay. . ." However, Neidl was unable here to give any examples supporting this allegation. Accordingly, it must be concluded that this allegation has no basis in fact and thus cannot be used as a basis for any discipline. Furthermore, this baseless assertion, made shortly after Neidl had been on the job for only two months, shows that Neidl early on began to look for grounds to discipline Morris.

2. The Eyeglass Incident

Before Neidl took over, the Utility had no rule requiring employes to wear safety glasses when performing welding duties. In June, 1990, Morris and co-worker Michael L. Kennison were using a cutting torch when some sparks flew and damaged Morris' regular eyewear. Morris - who never before used a cutting torch on the job - subsequently asked office secretaries whether he could be reimbursed for the damage, but Neidl turned that request down and warned Morris that he henceforth had to wear safety glasses when using a torch.

The Utility, like any other employer, certainly has the inherent management right to promulgate reasonable safety rules regarding the need to wear safety glasses. But, it did not have just cause to discipline Morris over his failure to do so when, as here, there was no pre-existing rule to that effect and when one of the procedural requirements of the just cause standard requires that employes be given advance forewarning that certain conduct is prohibited. 4/

By the same token, there is no basis for Neidl's June 8, 1991, diary entry to the effect that Morris in this incident exhibited a "bad attitude which I feel is detrimental to the operation of the Dept." As a result, the Utility lacked just cause to discipline Morris over this incident.

3. Pulling Seniority on Other Employes

Prior to Neidl's arrival, senior employes sometimes made new employes wait a full year before having them work on their own. That is how Morris was treated when he was hired and that is how Morris treated new hire Kennison when he was hired by the Utility. As a result, Kennison was only assigned menial tasks such as holding a flashlight when, in fact, he was qualified to perform many other duties had he been given the opportunity to do so.

Kennison complained to Neidl over his situation in August, 1990, and Neidl, in turn, assembled all of the Utility's employes in August, 1990 to tell them that that would no longer be tolerated; that he did not want any of the more senior employes "pulling seniority" on newer employes; and that the older employes were to teach younger employes all facets of the Utility's operations. Neidl never spoke directly to Morris about this problem, but he did make an August 7, 1990 diary entry to the effect that Morris "continues to disrupt the labor force with statements of seniority in areas with fellow employees. . ."

4/ See for example Whirlpool Corporation, 58 LA 421, (Daugherty, 1971); Enterprise Wire Co., supra.

Again, the Utility has the inherent managerial right to assign work duties as it sees fit and to have newer employes perform regular duties as soon as they are qualified to do so. But, that is a separate question of whether the Utility had just cause to discipline Morris when the past practice at the Utility ran the other way and when Neidl never warned Morris ahead of time that he could be disciplined for following that practice since, as stated above, one of the procedural safeguards of the just cause standard under such cases as Whirlpool, supra, requires advance forewarning. It therefore follows that the Utility lacked just cause to discipline Morris over this incident.

Neidl's August 7, 1990, diary entry is also noteworthy because Neidl there wrote that if Morris' "attitude does not change, I feel he must be dismissed from the Water Dept." This determination to get rid of Morris is but further evidence of Neidl's ongoing effort to magnify every conceivable incident so that it could be used to ultimately justify Morris' discharge.

4. The Health Insurance Incident

Like other Utility employes, Morris was covered by the Utility's health insurance plan which experienced a new plan administrator on August 1, 1990. Morris that day asked Neidl a question about the plan because he was seeking a doctor that afternoon, but Neidl did not know the answer. Morris then asked Neidl whether he could contact City Hall to get the information, and Neidl agreed he could do so. Morris that day tried to get the information at City Hall, but was unable to do so. A few days later, Morris received written information from a secretary at City Hall and gave it to Neidl who became very angry with Morris for "going over my [i.e. Neidl's] head."

Absent any express rule prohibiting Morris from doing what he did, it must be concluded that the Utility lacked just cause to discipline Morris over this incident, as Morris only did what any other employe would do in this situation - he had a legitimate question about his insurance coverage; he tried to get an answer; and he shared that subsequent answer with Neidl after it was received.

5. Morris' Telephone Call to Plymouth

Neidl was married at the time of his March, 1990, arrival on the scene, but his wife remained in Plymouth, Wisconsin. Thereafter, Neidl frequently was seen in Monroe accompanied by Carol Weiler, who was not his wife, with their picture appearing on the front page of the local newspaper. In addition, Neidl's car was sometimes seen by Weiler's house and her car was seen by Neidl's apartment which was provided by the Utility and which is located next to the main Utility plant. All this is why former Utility employe Kenneth Indergand testified without contradiction that it was common knowledge in Monroe that Neidl was seeing

Weiler.

Neidl's relationship with Weiler came up in an October 8, 1991, telephone call Morris made to fellow union member Dan Fry in Plymouth who had formerly worked under Neidl when Neidl headed that city's water utility. 5/ Morris - by then the head of the local Union - telephoned because he wanted to find out how the union in Plymouth had dealt with Neidl - a reasonable thing to do given Neidl's strained relationship with the employes here. Dan Fry was not in, so Morris spoke to his wife. During this telephone call, she asked Morris whether Neidl had a girlfriend in Monroe and claimed that Neidl also had seen someone other than his wife when he lived in Plymouth. Morris replied that Neidl was seeing another woman, but said that he did not know whether Neidl was having an affair with her. Ms. Fry also related how her husband had a lot of problems with Neidl when he was in Plymouth.

On the next evening, Morris again telephoned Fry's house and spoke directly with Dan Fry, at which time Morris told him that the Utility employes were having a tough time with Neidl. Fry replied that the union in Plymouth had the same problem and that it responded by filing grievances against Neidl. Subsequent to this telephone call, Morris shared this information with some other Utility employes and urged that they band together and complain about Neidl to the Utility Board. All refused to do so.

A few weeks later, someone apparently telephoned Neidl's father-in-law in Plymouth and said that Neidl was seeing another woman in Monroe. 6/ His father-in-law then related that fact to Neidl's wife.

Neidl's wife subsequently told Neidl what she had heard and she came to visit Neidl in Monroe in November, 1991, only to subsequently move back to Plymouth about a month later. Neidl suspected that Morris was the one who had called Plymouth, but the record is unclear as to whether Neidl knew that as a fact. In any event, Neidl assembled the Utility's employes on or about January 2 or 7, 1991, and there complained about the telephone call without mentioning Morris' name and said that it constituted an invasion of privacy and a tort. On March 25, 1991, Neidl told Morris in a private meeting, "You know and I know who made the phone calls to Plymouth." On March 26, 1991, Morris personally confirmed to Neidl that he had made a telephone call to Plymouth

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5/ The telephone call followed Morris' earlier conversation at a union convention with union staff representative Helen Isferding who suggested that he contact Plymouth employes to see how they dealt with Neidl.

6/ Morris denies making this telephone call and there is no evidence that he did so.

where he discussed Neidl's relationship with Weiler and he at that time apologized for doing so.

As grounds for disciplining Morris over this incident, the Utility argues that "any employer would certainly have the right to properly expect that an employe would not gossip about his employer's private life to outsiders as well as his co-workers" because any "reasonable employer is entitled to expect the loyalty of his employes."

But this situation has little, if anything, to do with loyalty. It instead arose over Morris' legitimate desire to contact other union members in Plymouth in order to learn how the union there dealt with Neidl. That is why Morris first raised this subject with union representative Isferding at a union convention and why he made repeated telephone calls to Plymouth where Ms. Fry first raised the issue of Neidl's social life.

In addition, it must be remembered that Neidl is the one primarily responsible for any such discussion, as he was the one who chose to openly see Weiler - even to the point of having their picture appear together on the front page of the local newspaper. This, then, was not baseless "gossip" - it was the truth. Having therefore chosen to publicly display his relationship in this fashion, Neidl has no one but himself to blame when tongues wagged.

It is true that Neidl's feelings were hurt when his wife subsequently confronted him with this fact - just as it no doubt is true that Neidl's wife was hurt when she became aware of this situation via a source other than Morris. But that, again, was Neidl's own doing since he was the one who precipitated this situation in the first place by openly seeing Weiler.

Furthermore, it is a well-recognized principle of arbitral law that but for certain exceptions, employers lack the power to discipline or otherwise regulate an employe's off-duty conduct. See Elkouri and Elkouri, How Arbitration Works, (BNA Books, Fourth Edition, 1985), pp. 656-658. Absent any express written rule prohibiting it, 7/ Morris therefore was free when he was off duty to discuss Neidl's social life, just as he was free to discuss anyone else's social life.

Hence, the Utility lacked just cause to discipline Morris

7/ This is not to say that the Utility cannot promulgate such a rule if it so chooses - a matter which need not be decided here. It suffices to say that no such pre-existing rule was in effect at the time of Morris' call, thereby preventing Morris from receiving the advanced forewarning required of the just cause standard. See Whirlpool Corp., supra.

over this incident when he merely told the truth to others about Neidl's activities and when Neidl himself publicized those very same activities - at least within the Monroe community. For just as Morris was free to mail the newspaper with Weiler and Neidl's picture to Plymouth, he was similarly free to openly discuss any subject matters therein which were in the public domain. 8/

6. The Remodelling Incident

On February 7, 1991, the Utility's offices were being remodeled without any blueprints of what went where. Roger W. Blum, an electrical contractor, was responsible for the electrical wiring. On or about February 8, 1991, Morris suggested to Neidl that an electrical switch be located at a certain spot in the meter room where Morris worked, and Neidl accepted that suggestion. On the next day, Morris suggested to Neidl that another switch be moved up on the meter room wall so that water would not splash on it. Neidl rejected that suggestion and walked away. Morris then made another suggestion about a different matter regarding the meter room to Blum, who became angry with Morris and who then asked whether Morris wanted to do the work himself. Neidl overheard this exchange from another room and walked over to where Morris and Blum were standing, told Morris to stop interfering with Blum, and that this was Morris' "last warning" because he could be fired over any further insubordination. Neidl that day wrote in his diary that Morris had been engaged in a "shouting match" with Blum - a point disputed by Morris who said here that he never raised his voice.

More importantly, Blum testified that this encounter was not really a big deal and that he, Blum also blamed himself for what happened saying, "neither one of us blew up that badly. I mean, it was just - it was pshhhh, and it was over, you know." I credit Blum's testimony and therefore find that Morris did not engage in any misconduct over this incident. Hence, the Utility lacked just

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8/ Examiner Jones made several findings of fact regarding this incident and discussed them in his accompanying Memorandum in determining whether Morris was disciplined because of his concerted, protected activities. That is why he zeroed in on Neidl's motives on this question and why he found that Morris' telephone call "poisoned the feelings Neidl had for Morris." The lack of union animus, however, is a separate question of whether Morris deserved to be disciplined over it under a contractual just cause standard - an issue Examiner Jones did not address. Moreover, while the telephone call may have "poisoned" Neidl's relationship with Morris, it is also true that they were already "poisoned" by May 7, 1990, when Neidl first exhibited his strong dislike for Morris and his fixed determination to discipline him over imagined problems.

cause to discipline Morris over it.

7. The Mixed Water Meter Complaints

The Utility for about eight (8) years had a practice of combining water meter equipment manufactured by Badger Meter with other equipment manufactured by Rockwell International. There was no rule prohibiting this mixed use before Neidl took over.

There is a testimonial conflict as to whether Neidl and Badger Meter salesman Philip Kosak in March, 1991, told Morris that he could no longer mix the brands in this fashion with Neidl and Kosak contending, and Morris denying, that they did. At this point, it is impossible to determine whose testimony should be credited. It nevertheless appears that Morris honestly believed that this was not a problem until Neidl raised it with all of the employes on March 25, 1991.

Neidl and Kosak also testified that mixing the brands in this fashion causes inaccurate readings and that is why the Utility changed about fifty (50) meters so that they would be lined up with the same manufacturers. The record, however, fails to establish that this has been a problem in the past.

Nevertheless, the Utility has the unfettered management right to use whatever equipment it sees fit and to insist that employes follow its directions - even if they disagree with them. This is why it was entirely appropriate for Neidl on March 25, 1991, to call together the Utility's field employes and direct them to no longer mix brands.

At the end of that meeting, Neidl directed Morris to come to his office where he told Morris that he was responsible for this situation because he was in charge of meters and that, at a minimum, Morris could expect to receive a suspension.

In fact, though, the Utility has failed to meet its burden of proving that Morris was forewarned before March 25, 1991, that the meter equipment should not be interchanged in this fashion, as the record on this point is murky. Since such forewarning is required under the just cause standard, 9/ the Utility lacked just cause to discipline Morris over this issue.

8. Morris' Suspension and Discharge 10/

9/ See Whirlpool Corporation, supra.

10/ While not probative of the issues before me, this chronology leading up to Morris' discharge is recounted here so that a full picture can be presented regarding this matter.

By letter dated April 1, 1991, Neidl informed Morris that he was being suspended for three (3) working days because of actions dating back to February 8, 1991, and several other occasions. Morris was then directed to report to Neidl's office on Monday, April 8, 1991, "to discuss your future with the City of Monroe Water Utility." On April 2, 1991, Morris met with Neidl in Neidl's office where Neidl reiterated that Morris would be suspended for three (3) days. Morris - who believed that the February 8, 1991, reference in the prior day's letter referred to his encounter with Blum - replied that he would not fight the suspension but that he did not know what the Union would do regarding it.

On April 8, 1991, Neidl met with Morris and said that Morris' suspension would be continued indefinitely and that he, Neidl, would recommend Morris' discharge to the Utility Board which was to meet on the matter the next day. By letter dated the next day, Neidl told Morris to report to his office on April 17, 1991, "to review decisions of the Water Board and the actions you have taken against the Water Department and its staff."

On the evening of April 9, 1991, the Utility's Board met to decide whether Morris, who was present, should be terminated. Morris at that time complained that he was not given any time to study the list of written charges Neidl drew up against him and it was agreed that the matter would be held over until Neidl discussed them with Morris. Neidl subsequently did so when he met with Morris on April 17, 1991. On April 18, 1991, the Utility Board voted to terminate Morris, and Neidl informed Morris of that fact on the next day when he met with Morris at the Water Department.

Conclusion

The Utility concludes by claiming that the employer-employe relationship here "became a test of wills" and that "Either Neidl had the authority and ability to supervise or he did not."

But that, in fact, is not what this case is really about. Rather, it turns upon whether the Utility - as part of its inherent management right to manage its business affairs - had sufficient grounds to suspend and terminate Morris under the circumstances described above and within the framework of a contractual just cause standard. That is why this case turns on Morris' conduct and not the ill-will between Neidl and Morris, as the latter is a side issue unrelated to whether the just cause standard has been met.

And once we focus on Morris' conduct, we see for the reasons stated above that the Utility lacked just cause to suspend or terminate Morris over any of the charges levied against him.

The Utility therefore, shall immediately offer Morris reinstatement to his former or substantially equivalent position and it shall make him whole by paying to him a sum of money, including all benefits, that he otherwise would have earned from the time of his suspension and termination to the time of his

reinstatement and/or rejection of employment, less any money that he received or could have earned during that time.

Pursuant to the agreement of the parties, I shall retain my jurisdiction for at least sixty (60) days to resolve any questions arising over application of this Award, including the question of mitigation.

In light of the above, it is my

AWARD

1. That the Utility lacked just cause to suspend or terminate grievant Jack Morris.

2. That as a remedy, the Utility shall take the remedial action stated above.

3. That I will retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 12th day of August, 1993.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator