BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 39, A.F. of L. - C.I.O. and Canadian Labour Council of Madison, Wisconsin	Case 64 No. 49206 A-5067
and	
MADISON GAS AND ELECTRIC COMPANY, of Madison, Wisconsin	

Appearances:

Mr. Richard Thal, Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of Office and Professional Employees International Union Local 39, A.F. of L. - C.I.O. and Canadian Labour Council of Madison, Wisconsin, referred to below as the Union.

Ms. Kristine A. Euclide, Stafford, Rosenbaum, Rieser & Hansen, Attorneys at Law, 3 South Pinckney Street, Suite 1000, P.O. Box 1784, Madison, Wisconsin 53701-1784, appearing on behalf of Madison Gas and Electric Company, of Madison, Wisconsin, referred to below as the Employer.

ARBITRATION AWARD

The procedural background of this case is summarized in a motion decision issued on July 23, 1993. Hearing continued on October 1, 1993, in Madison, Wisconsin. A transcript of that, and the July 8, 1993, hearing was prepared and submitted to the Commission by October 18, 1993. The parties filed briefs, reply briefs and supplemental argument by December 17, 1993.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the Employer improperly discharge the Grievant on January 7, 1993?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I

. . . .

Section 3

A. **New Employees -- Right to Discharge.** Any time within a period of nine months after date of employment, if new employees are found unsuited for their work, of which the Employer shall be the judge, the Employer shall have the right to discharge them, notwithstanding any other provisions of this Agreement . . .

Section 5

A. **Promotion and Demotion** . . . Subject to Article IV, Section 1, the right to . . . discipline and discharge employees is reserved by and shall be vested exclusively in the Employer . . .

B. **Seniority Rights.** Consistent with the foregoing, the Employer agrees to recognize seniority rights in each department . . .

C. **Seniority in Case of Layoffs** . . .

D. **Layoffs** . . .

F. **Leaves of Absence** . . . If employees remain away for more than six months, or if they accept employment elsewhere during their scheduled working hours without sanction of the Employer, such action shall be cause for dismissal . . .

ARTICLE III
Section 1

A. **Sick Leave Benefits Provided--Eligibility For.**

. . .

H. **Accumulated Sick Leave--Canceled Upon Leaving Company.** In case an employee resigns or is dismissed for cause, any accumulated sick leave credits will be canceled.

ARTICLE IV
Section 1

A. **Grievance Procedure.** The Employer agrees, unless otherwise provided for by this Agreement, should the Union or any employee covered by this Agreement

> believe any of the provisions of this Agreement have been violated, then the said party may take the matter up with the Employer in the following manner . . .

BACKGROUND

The grievance, dated February 5, 1993, alleges "(t)he Company unjustly discharged the grievant on January 7, 1993."

John Harrington is the Manager of the Employer's Data Center. This is the Employer's corporate computing center and handles corporate software applications including payroll, general ledger, shareholder information, customer inquiries and billing. Through October of 1992, the Data Center was staffed on a twenty four hour per day, five day per week basis. The Employer automated certain computer operations in October and November of 1992 to permit unattended computer operation during third shift and weekend hours.

The Employer hired the Grievant in July of 1989. He worked as a Computer Operator in the Data Center.

Harrington, in a memo dated January 14, 1993, summarized the Employer's view of the basis for the termination thus:

> This memorandum documents the circumstances leading up to and culminating in the termination . . . This decision was based largely on oral representations made by (the Grievant) to me. The content of these representations was discussed with Mr. Spach and necessitated quick action to ensure ongoing operations were not affected.
>
> On the evening of January 6, 1993, I was in the I/O Control area working on a user problem. (The Grievant) . . . and Benson were both on duty when I first arrived, and Mr. Benson left shortly after 9:00 p.m. at the end of his shift.
>
> (The Grievant) approached me soon thereafter and he appeared quite agitated. He wanted to know when he was going to become a part-time operator. I responded that I didn't know what he was talking about, that I had had no discussions with Mr. Spach regarding this, and that I had never considered that option. He stated that Mr. Spach had told him that maybe he should become a part-time operator.
>
> I told him that I was sure that he had misunderstood what Mr. Spach had said or taken it out of context. I asked him to walk me through the conversation. The evening before, (the Grievant) had punched out 25 minutes before the end of his shift. When Mr. Spach asked him about this the next day, he said that he had nothing else to do so he left. Mr. Spach pointed out that he was supposed to stay until the end of his shift and that if there isn't enough work to keep him to the end of his shift perhaps we should look at making him a part-time operator.

I told (the Grievant) that this was obviously a veiled threat and that it was intended to convey to him the importance of staying until the end of his shift.

(The Grievant) then told me that Mr. Spach had been "riding him" for quite a while about his work and that he was out to "get" him.

(The Grievant) then told me that he had been leaving, before the end of his shift, when he felt that there was no longer any work for him to do. He further told me that this was done with the approval of his supervisor. I expressed extreme disbelief at this statement. I pointed out to him that if he left early he wouldn't have been paid. He responded that he was aware of that and that he did not punch out when he left. He said that Mr. Spach would punch him out when he came in the next morning. He said that the not punching out was also at the direction of Mr. Spach.

He further told me that he was able to get done early because he rearranged the nightly run schedule. He said that nobody, except for him, knew what jobs could run together and that he changed the job mix on a regular basis to get done sooner.

I asked him how long this had been going on, to which he replied for a number of months. I told him that this was an incredible story and that I would have to bring it to Mr. Spach's attention. I further told him that regardless of what anyone else tells him, he is to stay until the end of his shift and he is to punch out at all times. I also told him that it has been a long-standing and documented requirement within the Data Center that the run schedule be followed as documented. Operators were prohibited from making changes, although we would be happy to listen to their suggestions.

Shortly after this conversation, I left for the evening.

The next day, I met with Mr. Spach and relayed this conversation to him. He stated that he has never

punched in for any employee nor would he do so. He also stated that he has never told any shift worker they could leave when they felt they had nothing else to do.

He did say that on some occasions he has allowed (the Grievant) to leave early. These were always prearranged, and Mr. Spach felt it was always clear that there would be no pay for time not worked. Most recently, Mr. Spach allowed (the Grievant) to leave three hours early on New Year's Eve. (The Grievant) did punch out on that occasion. Mr. Spach also recalled one time when (the Grievant) came to work not feeling very well. Mr. Spach asked him if he wanted to go home, and when (the Grievant) said that he could work, Mr. Spach told him to only work as long as he felt well enough to. Once again, it was Mr. Spach's belief that if (the Grievant) left early, he would punch out.

Mr. Spach told me there has been an ongoing problem with getting (the Grievant) to punch in and out. When (the Grievant) is confronted with not having punched out, his typical response has been to say that he forgot. There have been 18 occurrences during the past six months where (the Grievant) did not punch out.

Regarding the changes to the nightly run schedule, Mr. Spach told me this has been a point of contention for some time. He has told all the operators that the run schedule is to be followed. (The Grievant) alone has had numerous problems adhering to that policy.

A number of problems have resulted from these actions that required corrective action by other staff members. In some cases, jobs were not even run. Once again, when confronted with this, (the Grievant) is quick to respond that he forgot or that he misunderstood.

Mr. Spach has had numerous problems getting (the Grievant) to change his unacceptable behavior. He has documentation that shows when he talked to (the Grievant) and what it was regarding.

As a result of (the Grievant's) statements and the supporting documentation of Mr. Spach, I decided that (the Grievant) posed a significant risk to ongoing operations. This risk arises from three specific areas of concern.

(The Grievant) knowingly accepted money for work not performed by leaving work before the end of his shift. In a calculated move, he chose not to punch out to ensure that he would receive pay for work that was not performed. I find no shred of truth to his protestations that this was done at the behest of his supervisor.

(The Grievant), through his actions, has been clearly insubordinate . . .

> (The Grievant) has demonstrated an overall lack of competence to perform his job duties . . .

This memo sketches the essential lines of factual dispute explored at hearing. Before giving an overview of disputed testimony, I will set forth what I view as undisputed fact.

The Grievant had, prior to his termination, no history of formal discipline. From July until August 31, 1992, the Grievant worked the second shift, which runs from 3:00 through 11:00 p.m. He volunteered to work the third shift, which runs from 9:00 p.m. through 5:00 a.m., and was scheduled to work those hours from August 31 through October 23, 1992, with the following exceptions: (1) On September 24 and 25 he was scheduled to work from 2:00 through 10:00 p.m.; (2) On October 9, he was scheduled to work from 7:00 p.m. through 3:00 a.m.; and (3) From October 19 through October 22, he was scheduled to work from 2:00 through 10:00 p.m. At the time of his termination, his regular scheduled hours ran from 4:00 p.m. through 12:00 a.m. From October 23 through his termination, the Grievant worked the second shift, starting either at 3:00 or 4:00 p.m.

While working the third shift, the Grievant left before the end of his shift, without punching out, on the following dates: September 4, 11, 14, 15, 18, 21, 22; and October 5, 7, 8 and 23. 1/ After returning to the second shift, the Grievant did not punch out, or punched out early, on the following dates: November 10, 20; December 9, 15, 21, 28, 31; and January 5. On October 17 and October 24, 1992, the Employer performed a disk installation as part of its ongoing automation effort. The Grievant's immediate supervisor, throughout this period, was Rick Spach. Harrington was Spach's immediate supervisor.

Spach maintained his own copies of at least some of the Grievant's time cards. The Employer's payroll department maintains time cards of all of its roughly three hundred and sixty hourly employes, but does not store those time cards by employe. In late February of 1993, the Employer supplied the Union with copies of Spach's time cards for the Grievant. In late April of 1993, the Employer supplied the Union with copies of time cards taken from Payroll Department records. The dates on which the Grievant did not punch out, noted above, were recorded thus on the two sets of time cards:

1/ These dates do not include days for which the Grievant did not report to work due to illness.

DATE	SPACH'S CARD	PAYROLL CARD
9/4/92	Handwritten 6:00AM Not initialled	Handwritten 5:00AM Initialled RS
9/11/92	Handwritten 6:00 Initialled RS	Handwritten 6:00 Initialled RS
9/14/92	Handwritten 5:00AM Not initialled	Handwritten 5:00AM Not initialled
9/15/92	Handwritten 5:00AM Not initialled	Handwritten 5:00AM Not initialled
9/18/92	Handwritten 5:00AM Not initialled	Handwritten 5:00AM Initialled RS
9/21&22/92	No entry	Handwritten 5:00AM Initialled RS
10/5&7&8/92	No entry	No entry
10/23/92	Handwritten 5:00AM Initialled RS	Handwritten 5:00AM Initialled RS
11/10/92	No entry	Handwritten12:00PM Initialled RS
11/20/92	No entry	No time card
12/9/92	No entry	Handwritten 12:00 Initialled RS
12/15/92	Handwritten Tu.4:00-12:00P.M Not initialled	Handwritten Tu.4:00-12:00P.M Not initialled
12/21/92	No time card	No entry
12/28/92	No entry	Handwritten 11:15 Initialled RS
12/31/92	Punched 9:04P	Punched 9:04P
1/5/93	Punched 11:35P	No time card

The time cards supplied the Union in February, 1993, were the time cards used in the Grievant's Unemployment Compensation (UC) hearing. 2/ The Employer does not require supervisors to initial time cards, and the Payroll Department may process time cards with no initials or with an employe's initials.

While working the third shift, the Grievant would administer and oversee batch operations performed by the computer for roughly the first five to six

2/ Certain exceptions can be noted. The Unemployment Compensation exhibits include a time card reflecting the 12/21/92 work day, and do not include a time card reflecting the 9/11/92 work day.

hours of his shift. He would spend the rest of the shift monitoring the computer to assure it was available to all users at 7:00 a.m.

On January 6, 1993, the Grievant approached Harrington and discussed his leaving work without punching out. He claimed Spach authorized this, making it possible for him to leave work early without losing pay. Harrington determined, after the conversation, to discuss the matter with Spach, and to present the problem to his supervisor, James Bidlingmaier. In the morning of January 7, 1993, Harrington looked for Spach. Spach was not yet in, so Harrington went to Bidlingmaier and presented his view of the prior night's events. Bidlingmaier asked Harrington for a recommendation, and Harrington responded that if Spach denied the Grievant's allegations, he would recommend discharging the Grievant. Bidlingmaier directed Harrington to talk with Spach. Harrington found Spach, who denied authorizing the Grievant to leave work early.

In mid-morning of January 7, Bidlingmaier and Harrington met with Gary Wolter, the Employer's Vice President of Administration and Corporate Secretary. John McGuire, from the Personnel Department, also attended this meeting. It was determined that Harrington would check time cards and McGuire would determine if any relevant past disciplinary incidents existed.

McGuire produced two prior incidents viewed by the Employer as relevant to the Grievant's discipline. The first involved David Witthun, and is summarized in a letter to Witthun from McGuire, dated July 24, 1985, which reads thus:

. . .

> You freely admitted to absenting yourself on several occasions during scheduled work hours to play softball. You would leave your workstation without punching out or back in following participation at the games.
>
> This letter confirms that your employment with Madison Gas and Electric Company was terminated following your scheduled work shift . . . You were discharged for misconduct and for willful violation of Company work rules.

. . .

The second involved Michael Meier, and is summarized in a letter to Meier from Robert Domek, then Director of Personnel. The letter, dated December 27, 1988, reads thus:

> On December 19, 1988, Tom Brice and I questioned you about numerous occasions from August 29, 1988, to the present in which you had been paid overtime at time and one-half. We provided you with records of your reentry into the General Office Facility (GOF) or entry to the Dispatch area and requested your explanation of this activity. At the conclusion of the meeting, we advised you that you were on indefinite suspension without pay, and we would contact you on December 21, 1988. On December 21, 1988, Tom Brice, Nancy Wold, you, and I met, and you provided us with written answers, to the best of your ability, explaining your absences from the GOF building. The reasons for absence appeared to be mostly personal in nature and certainly questionable.

> On that basis, we can only conclude that you billed us on an overtime basis, and were paid, for full periods of time in which you were not working or even in attendance. Such activity is considered a form of theft and will not be tolerated.
>
> We have reviewed your employment record and find that in June of 1981 you were suspended for three days, without pay, for falsifying your absence to play baseball and were given a warning letter in 1986 for falsifying electric outage call-backs.
>
> We now face an intolerable situation in which you have falsified your overtime pay records and, therefore, terminate your employment . . .

Another meeting was held in the afternoon of January 7, and it was determined that the Grievant would be discharged. Shortly after the start of the Grievant's shift on January 7, Harrington and McGuire met him, and informed him of his discharge.

In a letter to McGuire dated January 11, 1993, William Ladwig, the Union's Chief Steward, requested "all documentation associated with the termination . . . (t)his would include any performance reviews, evidence, statements, etc., that the Company may use to substantiate this termination." The Employer did offer the Union certain information, but the Union viewed the information it received as insufficient. On February 9, 1993, the Union requested from the Employer the Grievant's time cards for the fifty two weeks preceding his termination. As touched upon above, the Employer supplied the Union with Spach's time cards on February 24, 1993. Those cards did not cover the full fifty two week period preceding the termination. A series of grievance meetings were conducted in February of 1993. The parties' dispute on what information was necessary to the Union's investigation continued throughout March and April, 1993. As touched upon above, the Employer supplied the Union with time cards from its Payroll Department on April 24, 1993. Those time cards were not sorted by date, and did not cover the entire fifty-two week period preceding the termination. Each party continued to make various information requests of the other throughout April and May of 1993.

On June 10, 1993, the Grievant submitted to a polygraph examination. The Polygraphist stated his conclusions thus:

> PURPOSE OF THE EXAMINATION: To determine if (the Grievant) was truthful when he stated that as an employee at Madison Gas and Electric he was verbally authorized by Rick Spach to leave work early, and that Spach would complete (the Grievant's) time out section on his time card.
>
> . . .
>
> Based upon the results of the polygraph examination administered to (the Grievant) on June 10, 1993, it is concluded that the examination results do support (the Grievant) when he stated that Rick Spach verbally authorized him to leave work early, and that he (the Grievant) was told by Spach to leave a noted with the time he left and Spach would complete the time out on

his time card.

The following relevant questions were utilized during (the Grievant's) June 10, 1993, polygraph examination:

> Did Spach verbally authorize you to leave work early?
>
> Answer: Yes.
>
> Did Spach verbally tell you he would complete the time out section on your time card?
>
> Answer: Yes.
>
> Did Spach verbally tell you to leave him a note with the time you left work?
>
> Answer: Yes.

The opinion of (the Grievant's) truthful responses to the above question(s) is based upon a numerical evaluation of the polygrams. In utilizing a numerical system to score the polygrams, specific numbers of a plus (+) or minus (-) factor are affixed to physiological responses. The plus numbers indicate truthful and the minus indicate not truthful. The sum total of the plus and minus numbers is the determining factor; that is, it (sic) the total sum score is +5 or greater, the opinion is truthful. If the sum total is -5 or greater, the opinion is not truthful. Any numerical score from +4 to zero or -4 to zero renders an inconclusive opinion. The overall numerical score of (the Grievant's) polygraph examination was +18.

. . .

Spach left employment with the Employer sometime after the Grievant's discharge. While the Grievant worked the third shift, Spach could monitor the Grievant's on-line job performance from a computer terminal in Spach's home.

The remaining background will be set forth as an overview of witness testimony.

John Harrington

Harrington testified that it was unusual for him to work second shift hours, but on the evening of January 6, 1993, he was working in the Data Center with the Grievant and another Computer Operator. When the other Computer Operator left, the Grievant approached Harrington "and in a very agitated manner asked me, 'So when am I going to become a part-time operator?'" 3/ Harrington's testimony parallels his January 14 statement, but he did testify that the January 6 conversation also covered Harrington's view that the Grievant had, in effect, stolen money from the Employer. Harrington noted that

3/ Transcript, first day of hearing, (TrI) at 39.

the Grievant initially responded he acted on Spach's authorization, with Spach agreeing to punch out for him. Harrington stated he then asked the Grievant to put himself in the Employer's position and consider what it means to pay for time not worked. According to Harrington, the Grievant acknowledged that his conduct, viewed in that light, was improper. Harrington stated he informed the Grievant he would speak to Spach, and that he could not see why Spach would authorize pay for time not worked. He noted the Grievant could not offer any explanation. Harrington stated he perceived the Grievant to be boastful at the start of the conversation, but "very much . . . down" 4/ by its end.

Harrington assessed the conversation thus:

> Since then I've given it lots of thought, and I believe he intended only to broach the issue of part-time operator. Then in trying to convey to me his worth to the organization, he slipped. He went too far and put himself in the position of saying, "I can get all this work done and I can leave early because I'm doing such a good job," without thinking through to the logical conclusion. 5/

Harrington stated he considered terminating the Grievant on the spot, but decided he had to investigate further and involve his own supervisors.

Harrington also testified that he viewed Spach as more credible than the Grievant. He noted that the Employer had, at one time, printed duplicate 1099 forms which were sent to shareholders. He testified that the Grievant was the sole operator at the computer when the commands causing the duplicates to be run were entered. Harrington stated that the Employer, in its attempt to create procedures to avoid a reoccurrence of the mistake, asked the Grievant why he entered the wrong commands. The Grievant denied doing so, according to Harrington. Beyond this, Harrington noted that the Grievant, knowing the Employer's computers were not to be used for personal business, left game disks in computers.

When Spach approached him on January 7, Spach was upset with the Grievant, and was carrying a piece of paper noting his ongoing difficulties with him. Harrington noted Spach offered to rewrite these notes. Spach did so, supplying Harrington with a handwritten summary which eventually became an exhibit at the UC hearing. That handwritten summary reads thus:

> Nov. 6, 1992
> Friday Nov. 6 (the Grievant) ran IR234JDA out of order. The job abended, (sic) He resubmitted the job but forgot to rerun it. I talked to (the Grievant) on Monday Nov. 9 & indicated to him the importance of running jobs in the order they are run on the run sheet.

4/ TrI at 43.

5/ TrI at 43.

Nov. 19, 1992
Left without releasing the jobs that are to run unattended. I saw this from home & released the jobs. (The Grievant) said he just forgot to release the jobs. Also talked to him about remembering to punch in & out.

Dec. 22, 1992 -
Talked to him again about not punching in & out

Dec. 29, 1992
Talked to (the Grievant) again out punching in & out. Also told him if he leaves early to leave me a note or audix message.
Jan 5-1993 Left early did leave me a message

Jan 6, 1993-Duplicate bills . . .

There was a jam at 22:56 tonight while the Utility Bills were printing. This indicated on the MVS console that duplicate bills may have been printed. You did nothing about this except to start the printer, printing again. There were 7 duplicate bills printed and would have been mailed out to the customers. I came in at 12:10 AM (1-7-93) and verified this and removed the bills. As of this date, everytime (sic) you have a jam, of any kind, I want you to write an "IR", stating the time it happened, what form it was, and what you did about it. I want these "IR's" put on my desk.

Harrington discovered the original notes while cleaning out Spach's desk. The original, handwritten, notes read thus:

Nov. 6-92
Ran IR234JDA- out of Order-Abended (sic)-resubmitted but never ran job again.
Visit from Police on Apt. Problems. 5:45 P.M.
Didn't follow my instructions on the Order to run CPR-AP-JAW jobs.

11-19-Left without releasing ID209JDA thru IU206JDA
11-23-Talked to (the Grievant) about remembering to punch in & out.
12-15 Didn't punch in or out
12-16-Called in Sick
12-17 went home Sick
12-22-Talked to (the Grievant) about punching in an out
12-29-
Didn't punch out, didn't log off, intervention bills
11:36=I think he left early
Talked to (the Grievant) Again.
(New Hours 5:00-100 P.M. if things don't change)
4:00 P.M claims he got sick and went home at 11:15 P.M. told him he has to punch out, and leave me a note so we know why he left.

> Instructed him to print spec. forms before 9:00 P.M.
> 1-5-93-Punched out at 11:35-didn't leave me a message. I asked him to leave a note when & why he leaves early.
> 1-6-93-700-jam duplicate bills would have been mailed. didn't print forms before 9:00 P.M.

The original notes were mailed to the Union on June 24, 1993.

Harrington noted that when he summoned the Grievant to the Personnel Department on January 7, the Grievant responded that he was expecting the summons. Harrington noted the Grievant continued to maintain that Spach had approved his leaving early.

At a February 15, 1993, grievance meeting the Grievant altered his account, according to Harrington. Harrington testified that the Grievant stated Harrington was aware of Spach's authorization; that the Grievant never told Harrington he ran operations out of sequence; and that he had not left early as often as the Employer alleged.

The Grievant's Testimony

The Grievant noted that he received solid evaluations in 1990, 1991 and 1992. In 1990, Spach noted that the Grievant "has done a very good job over the last year." On the Grievant's 1991 "Personnel Action Notification", Spach noted the Grievant "performs all the tasks required . . . without any problem." In 1992, Spach noted the Grievant "continues to do a good job on all tasks". The Grievant denied Spach ever counseled him about not punching out, and stated that the only time Spach ever raised a problem with him was when he had forgotten to punch in. He specifically denied ever adjusting the priority order of the jobs he was responsible for running. The Grievant noted he did run compatible batch jobs concurrently, with Spach's knowledge.

The Grievant acknowledged that some of the problems noted in Spach's notes may have occurred, but denied that Spach ever counseled him on any of the dates listed in the notes. He acknowledged that he left work early on January 5, but stated he left Spach "a note as instructed by that current procedure that was in place." 6/

That procedure was created, the Grievant noted, during the second or third week of his third shift work. He stated Spach initiated the arrangement, and he described the arrangement thus:

> He told me that when all my work was completed, that I could leave; but when I do leave, leave him a note at what time I did leave, put my name on it, put it in an envelope and seal it up and don't punch out, "I'll take care of that." 7/

6/ TrI at 138.

7/ TrI at 145.

The Grievant noted he was not sure what Spach meant at the time, but assumed he would be paid for the entire shift. His paychecks ultimately confirmed his assumption.

On January 5, Spach told the Grievant he could not leave early, even if he left a note. Spach told him, the Grievant stated, that the Union would not permit his leaving early. This left the Grievant confused, because he had followed the regular procedure. That procedure varied from that Spach required for leaving early on the third shift. On the second shift, the Grievant was to punch out, leaving Spach a note. On January 6, the Grievant approached Harrington to determine whether Spach's procedure for leaving early or the Union's objection to that procedure was the governing rule.

The Grievant acknowledged he was mad at Spach on January 6. He stated another Computer Operator was present during his conversation with Harrington. He described the conversation which followed his questioning Harrington on the governing procedure thus:

> Well, at first he was pretty calm about it. I had asked him why Spach was coming down on me about punching in and out, and I explained to him what was going on with the third shift, he told me to accept the gravy of the company and basically keep my mouth shut about it because somebody was coming down on Rick for letting me leave early . . . 8/ We talked a little bit about the union. Mr. Harrington had given me his feelings on what he thought the union was, and he viewed it as being an adversary of the company. He described a situation down in the customer area that he was apparently unpleased about, about how the union was changing the customer area around; and that was basically the end of that discussion. 9/

He left the conversation not fearing discipline, and believing the early leave arrangement was a recognition of his work.

None of the arrangement was in writing, and the Grievant did not keep a copy of the notes he left Spach. He did, however, have a copy of a note Spach left for him. That undated note reads thus:

> You better start stay until 5:00 AM each night.
>
> John H. said he might be coming in tomorrow morning around 4:30 AM.
> Friday Night you'll have to work 9:00 P.M until 5:00 AM. The schedule will be different Friday night due to the disk installation on Saturday.

The Grievant stated he received the note in mid-October, at the time of the disk installation. The Grievant noted that he believed, at the time he

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8/ TrI at 148.

9/ TrI at 149.

received the note, that Harrington was aware of his arrangement with Spach. He believed Spach knew he was being paid for time he was not working.

The Grievant specifically denied running the job which created duplicate 1099 forms. He stated he did not view his accepting payment for hours not worked as improper because Spach had approved it. He did note he did not disagree with Harrington's explanation that it was, from the Employer's perspective, unreasonable to pay someone for hours not worked. He also acknowledged Harrington told him to stay until the end of his shift "(n)o matter what anybody else says." 10/

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Employer's Initial Brief

The Employer phrases the issues thus:

> Did Madison Gas and Electric Company violate the collective bargaining agreement when it terminated Russell Smith's employment on January 7, 1993?
>
> If so, what is the appropriate remedy?

After a review of the facts, the Employer contends that "(t)he Labor Agreement grants MGE broad management rights." More specifically, the Employer notes that Article I vests the right to discharge exclusively with it, and that no other provision defines or limits this right. While noting that arbitral precedent will support a conclusion that this right is unfettered, the Employer concedes that because the labor agreement makes discharges grievable, "its decision to terminate an employee must not be arbitrary or capricious, in light of all the circumstances." This is not, the Employer stresses, a just cause standard. The Employer argues that applying such a standard requires rewriting the contract. The Employer concludes that the applicable standard is whether it has proven "that its actions were not arbitrary and capricious."

10/ TrI at 169.

The Employer's next major line of argument is that the evidence shows the Grievant knowingly accepted pay for time not worked. As preface to this argument, the Employer notes it bears the burden of proof on this point, and asserts that "either a 'preponderance' or a 'clear and convincing evidence' standard should be applied in this case." The Employer contends it has met any such standard since the Grievant "admits to theft," which "is more than sufficient to establish his wrongful act."

Summary termination is, the Employer argues, a proper response to theft. The Grievant's position of responsibility only underscores this point, according to the Employer. Beyond this, the Employer argues that it conducted a reasonable investigation, and acted in accordance with past practice in similar cases. It necessarily follows, the Employer concludes, that its response was reasonable, not arbitrary or capricious.

Having met its burden, the Employer asserts that "the burden shifts to the (Grievant) to prove mitigating factors which may reduce his penalty." No such proof has been established, according to the Employer. The Union has been unable, the Employer contends, to show that Spach authorized the Grievant's conduct or that any such authorization would mitigate that conduct. More specifically, the Employer argues that the Grievant's past conduct establishes that his testimony is inconsistent and unreliable, while "Spach's credibility is intact." No evidence, including the polygraph examination, can undercut this argument, according to the Employer. The polygraph results are, the Employer asserts, inherently unreliable and tainted by the fact that the Grievant "was asked a series of questions, any one of which, standing alone, could have been answered truthfully by (the Grievant) regardless of whether he and Spach had agreed to the arrangement (the Grievant) claims." Even if the Union had proven the arrangement, the Employer argues that "Spach's involvement in the theft . . . would not save (the Grievant) from termination."

Other defenses raised by the Union are, the Employer asserts, irrelevant. The contention that it has variously stated the basis for the termination is contrived, the Employer asserts. That its investigation was adequate is established, the Employer contends, by its need to seek information from the Union on the Grievant's claims, and by the Union's failure to meaningfully respond. The Employer asserts that the Union's receipt of two sets of time cards shows nothing more sinister than Spach's accounting system and Domek's use of that system to avoid wading into vast unsorted payroll documents. Any differences between the sets of documents are, the Employer contends, meaningless. That there are two sets of Spach's notes concerning his "counseling" of the Grievant reveals, the Employer argues, that the document entered at the UC hearing was Spach's summary, while the document discovered by Harrington was the original. Any differences are, the Employer concludes, meaningless. The Employer also contends that it responded promptly to Union requests for information, balking only when the requests became too burdensome or posed privacy issues. Its response is, the Employer concludes, irrelevant to whether discharge was warranted. The Employer then dismisses "vague allegations" of the Grievant regarding "a coverup by Harrington and Spach." These "unsupported accusations," according to the Employer, "merely serve to further undercut (the Grievant's) credibility."

The Employer's final major line of argument is that the ruling of the UC ALJ is admissible. Sec. 108.101(1), Stats., is inapplicable to an arbitration hearing, according to the Employer, and the ALJ's decision is relevant to an assessment of credibility.

The Employer concludes that the "grievance should be denied."

The Union's Initial Brief

After a review of the facts, the Union asserts that three threshold points must be addressed. The first is the standard governing the discharge. The Union contends that "the parties' contract requires that the Employer must have just cause to discharge a bargaining unit employee even though the contract does not include an explicit 'just cause' provision." The Union contends that "just cause . . . is generally inferred from seniority, grievance, arbitration and other provisions which reflect the contracting parties' tacit acceptance of the employees' right to contractual job security protection." Such an inference is particularly apt here, the Union contends, in light of Articles 1 and 3, which use the term "cause."

The second point to be addressed is a fundamental issue of credibility. Noting that Spach did not testify, the Union argues that "the only direct evidence on the arrangement between Spach and Smith was offered by Smith." Arguing that fact "may not be grounded on uncorroborated hearsay," the Union concludes that "the Arbitrator must credit (the Grievant's) testimony on the existence of the leave work early arrangement." Beyond this, the Union argues that the Employer's failure to call Spach gives rise to the inference that his testimony "would adversely affect the party which failed to call the witness." This inference is, the Union adds, "especially strong in light of MG&E's previous failure to call Spach at a(n) . . . unemployment compensation hearing." The Union asserts that the issue of the Employer's credibility is "undermined further by the fact that MG&E tampered with and falsified copies of (the Grievant's) time cards and then allowed the falsified documents to be included in the record as authentic in an unemployment compensation hearing." That Spach's initials appeared on one set of documents but not the other indicates, according to the Union, that "someone at MG&E" felt that the initials demonstrated Spach's approval of the Grievant's leaving work early. The polygraph results confirm, the Union adds, that the Grievant's account must be credited.

The final threshold point raised by the Union is that the decision of the UC ALJ is inadmissible under Sec. 108.101, Stats. Contending this case is "an action in equity which does not arise under unemployment compensation laws," the Union concludes the decision "is clearly inadmissible."

Turning to the merits, the Union asserts that "the only credible evidence presented at the hearing demonstrates that . . . (the Grievant) had his supervisor's authority to leave early, and he received pay with his supervisor's approval." With this as background, the Union argues that "the fundamental issue in this case is whether MG&E had just cause to discharge" the Grievant in light of this approval. The appropriate standard, the Union argues, is the seven standard analysis of Arbitrator Caroll Daugherty.

Regarding the first standard, the Union asserts that the Employer knew of the Grievant's leaving early, and failed to warn him of the disciplinary consequences. Spach's time cards, and the Employer's own absence records demonstrate the Employer's knowledge of the Grievant's conduct, and highlight the Employer's failure to warn the Grievant of the consequences of his conduct, according to the Union.

Regarding the second standard, the Union acknowledges that it "is beyond dispute that an employee needs authorization to leave work before the end of his or her shift," but argues "when a reasonable rule is unreasonably applied is the same as if the rule were unreasonable on its face." Because the Grievant was authorized to leave early, the Union concludes that the discharge constitutes an unreasonable application of a reasonable rule.

Acknowledging that the Employer had no reason to investigate the Grievant's absences until the Grievant approached Harrington, the Union asserts

that once the Employer became aware of the problem, it failed to make a reasonable effort to determine if the Grievant was authorized to leave early. The Union asserts that Harrington never believed the Grievant's account and openly noted his disbelief to Spach who responded with what he knew Harrington wanted to hear. The Employer's investigation lasted less than one day, the Union contends, and failed to take into account any possibility that the Grievant could account for his leaving early.

Beyond this, the Union argues that the Employer never sought to objectively investigate the incident. The evidence demonstrates, according to the Union, that "(r)ather than perform this investigation, MG&E presumed (the Grievant) to be "guilty" without conducting a fair and objective investigation.

Contending that "a charge of theft or time card theft is such a serious charge," the Union asserts that "such a charge requires clear and direct evidence of theft, including the existence of the intent to steal." Citing precedent calling for proof beyond a reasonable doubt, the Union asserts that the Employer "has not met its burden of proof." That the Grievant voluntarily approached Harrington indicates that the Grievant did not believe he was doing anything wrong. The Union concludes the Employer has failed to produce credible or substantial evidence that the Grievant was guilty as charged.

The Union then contends that the Employer has not applied its rules even-handedly. Regarding the Meier incident, the Union contends that "the company conducted a complete investigation and confirmed that the employee was guilty as charged before discharging the employee." Regarding the Witthun incident, the Union contends that the Employer conducted a complete investigation and fully assessed credible evidence before imposing discipline. In neither case, according to the Union, was there any issue regarding supervisory approval of the absences.

The Union then notes that the Employer's discharge of the Grievant was an excessive penalty. Noting that the Grievant had not received prior discipline and that his evaluations were solid, the Union argues that "if any discipline is warranted (and the Union believes it is not), termination is certainly not warranted."

The Union concludes that the grievance must be sustained and that "(t)he Arbitrator should . . . reinstate (the Grievant) and make him whole for all losses suffered due to MG&E's contractual violation."

The Employer's Reply Brief

The Employer notes that it has conceded a "cause" standard may be applied to the discharge, but does not concede "the leap that the Union makes from 'cause' to 'just cause.'" Under the cause standard, the Employer urges that the determination required is whether it acted in an arbitrary and capricious manner. Any other conclusion would, the Employer asserts, rewrite the parties' labor agreement.

The Employer then asserts that the Union's credibility analysis should be rejected. More specifically, the Employer argues that the Grievant's testimony should not be credited because the Grievant's testimony is internally inconsistent and irreconcilable to the time cards; the Grievant's testimony, even if taken to be the only direct evidence on the point, is untrustworthy; Harrington's testimony on the "arrangement" between Spach and the Grievant is not hearsay; Spach, unlike the Grievant, has "an unblemished record for truthfulness"; the note from Spach to the Grievant reveals no more than a change in schedule due to a disk installation; and even if the note manifested Spach's desire to suspend the agreement, the Grievant violated that suspension

within days of receiving the note and continued violating the suspension in spite of Spach's never reinstating the agreement.

Beyond this, the Employer asserts that the inference sought by the Union based on Spach's failure to testify is improper. The Union's statement of the rule is a paraphrase, according to the Employer, which ignores that the inference is available only if the witness is, unlike Spach, available to the party against whom the inference is sought. Beyond this, the Employer notes that Spach was available for the first day of hearing. Contending that Spach's testimony is more relevant to the Union's defense than to its case, the Employer argues that an adverse inference could more properly be taken against the Union for not calling Spach to testify.

The Employer then contends that the Union's assertion that the Employer tampered with evidence is unfounded, and "illustrates just how far the Union is willing to go to prevail in this grievance." The Employer also questions the Union's mischaracterization of evidence showing that the Grievant was warned about the consequences of his behavior, and questions the Union's assessment of the Grievant's work record.

Even if the Daugherty standard was appropriate, the Employer argues that it has demonstrated just cause for the termination. Initially, the Employer contends that the Grievant knew or should have known his conduct was improper. The Employer contends that there "is no credible evidence that Spach authorized (the Grievant) to leave early and still get paid." Beyond this, the Employer contends that Spach's initialling of the time cards cannot be bootstrapped into

an approval of the Grievant's conduct. The Employer concludes that the Grievant's conduct is sufficiently egregious that no prior notice of its impropriety can persuasively be required.

Regarding the second standard, the Employer asserts that the requirement that the Grievant man his post and accept pay only for time worked is reasonably related to its business and to the performance it can reasonably expect of an employe. Neither the rule nor its application is unreasonable here, according to the Employer, since whatever authorization the Grievant may have thought he had did not translate into authorization to receive pay for hours not worked.

Nor can the propriety of its investigation be questioned under a Daugherty analysis, the Employer contends. A review of the evidence demonstrates, the Employer argues, that its "investigation went beyond anything that might be required by a "just cause" standard when one considers the nature of the admitted offense."

The Employer then contends that it has proven that the Grievant accepted pay for hours not worked. The Grievant's own testimony is sufficient to establish this fact, the Employer contends. The Employer also challenges the propriety of a beyond a reasonable doubt standard.

The sanction of discharge was, the Employer contends, consistent with its actions toward Meier and Witthun. That neither case involved the advance approval of an absence is, according to the Employer, irrelevant in any case since no such approval could justify dishonesty.

Regarding the final Daugherty standard, the Employer argues that discharge "is an appropriate management response to theft." The Employer contends that the sanction should not be tampered with absent a compelling reason. No such reason is present in this case, according to the Employer, since the Grievant's work record is less than excellent and the Employer should not be forced "to retain an employee that MGE simply can no longer trust."

In the event the grievance is sustained, the Employer contends that fashioning a remedy will be "very difficult" and will require further hearing.

The Union's Reply Brief

The Union challenges the Employer's contention that this case sets a "two wrongs don't make a right" theme, because the Grievant "did not believe that following Spach's instructions was wrong." After an examination of specific facts which the Union contends have not been proven by the Employer, the Union contends that the Employer's "arbitrary and capricious" standard would alter the parties' agreement. Arbitral authority and a fair reading of the contract as a whole require, the Union asserts, the application of a just cause standard.

The Union contends that only the Grievant's testimony can be credited regarding Spach's authorization of an early quit. As the Union puts it:

> There is no credible evidence of falsehoods on (the Grievant's) part and given MG&E's failure to call Spach, the arbitrator may draw the inference that Spach's testimony would have been adverse to MG&E's position that Spach did not authorize (the Grievant's) conduct.

Beyond this, the Union reasserts that Sec. 108.101(1), Stats., makes any conclusion of the UC ALJ inadmissible.

The weakness of the proof regarding the Employer's contention that Spach could not authorize the Grievant's dishonesty is, the Union asserts, manifested by the inapplicability of the precedent cited by the Employer for the contention.

More specifically, the Union argues that the Grievant never received notice that he would be disciplined for following Spach's instructions. Spach's notes indicating problems with the Grievant's work are inherently suspect, according to the Union, as exemplified by the Employer's failure to discipline the Grievant for work related problems. That Harrington investigated the possibility of an agreement between Spach and the Grievant belies, the Union asserts, any contention that the Grievant's conduct was so outrageous it warranted immediate discharge.

Beyond this, the Union contends that the Grievant was authorized to leave work early, and thus his actions cannot be considered "the equivalent of falsification of time cards or theft."

The Employer failed to make a reasonable effort to discover whether Spach authorized the Grievant's conduct, according to the Union. The Union again questions why Spach did not testify, and asserts that "it is not coincidental that shortly after (the Grievant) informed Harrington of the third shift arrangement . . . Spach quit." However the record is viewed, the Union contends that the Employer failed to adequately investigate the Grievant's account.

The Union specifically notes that Harrington's investigation was neither fair nor objective, but presumed the Grievant's guilt.

The Union then argues that a beyond a reasonable doubt standard is widely accepted by arbitrators. Acknowledging, however, that arbitral precedent varies considerably on the point, the Union contends that "(u)nder any standard, MG&E has not met its burden of proof that (the Grievant) committed a 'wrong' for which he should be discharged." Noting that the Employer relies heavily on the Grievant's admission, the Union argues that the Grievant "never admitted that he knowingly committed conduct which he perceived to be wrong when the conduct occurred." The precedent cited by the Employer to justify a discharge based on an employe admission is, the Union contends, "not analogous since they involve admission of wrongdoing."

The Union concludes that it "does not disagree" that "an employer should not have to tolerate theft from its employees." The present case does not, the Union contends, pose this issue. Rather, the Union characterizes this case thus:

> If Spach (and not the Grievant) had informed Harrington about the third shift arrangement which allowed Smith to leave work early, it is inconceivable that MG&E would have terminated (the Grievant). This case is no different than that hypothetical.

The Union concludes the grievance must be sustained.

Further Argument

In a letter filed after receipt of the Employer's reply brief, the Union noted its disagreement to the Employer's assertion that "the entire remedy issue should be addressed separately by the arbitrator." The Union stated "(t)he purpose of retaining jurisdiction concerning the issue of remedy is to allow the parties to agree upon an appropriate back pay amount -- or submit evidence to the arbitrator -- only if there is a make whole award." A retention of jurisdiction does not, the Union asserted, strip "the arbitrator of his otherwise broad remedial authority."

The Employer responded that "it was our understanding that only liability issues were being addressed," and that based on this understanding it "did not address remedial issues during the initial hearings." The Employer concluded that "it would not be proper for the arbitrator to address the issue of remedy at this time," and that if a remedy was found appropriate, further hearing would have to be directed.

DISCUSSION

I have adopted the Union's statement of the issues. The parties' conflicting statements of the issues preface their dispute on the standard governing the discharge, which is addressed below.

The parties pose a series of threshold points. The most vigorously argued is the standard governing discharge. The Employer acknowledges that it must meet a "cause" standard, but contends the standard is less rigorous than "just cause." The agreement does not specify a standard for discharge. This indicates the Employer has reserved greater discretion over discharge than if the agreement was not silent on the point. Viewed with other contract provisions, however, that greater discretion is a more technical point than the Employer asserts.

Article I, Section 5, vests the right to discharge "exclusively in the Employer," but makes the right subject to the grievance procedure. The Employer's contention that this is the sole limit on its discretion is not, however, persuasive. Article I, Section 3, states that for the first nine months of employment the right to discharge is independent of "any other provisions of this Agreement." It follows from this that an employe who has completed the nine month period cannot be discharged "notwithstanding any other provisions of this Agreement." Article I, Section 5, F, and Article III, Section 1, H, refer to "cause for dismissal." Neither governs discharge, but it is unpersuasive to conclude an employe makes a lesser claim to continued employment than to accrued sick leave or to return from a leave. The Union's claim for a cause standard is, then, well rooted in the agreement.

Beyond this, the Employer's attempt to distinguish "cause" from "just cause" is tenuous. In City of Wauwatosa et al., Dec. No. 19310-B, 19311-B, 19312-B (Crowley, 11/82), the Examiner did refuse to read "cause" as "just cause." In that case, however, the term "cause" was placed in a provision establishing a probationary period, and the parties' bargaining history indicated "a just cause standard was not agreed to by the parties for the discharge of probationary employes." 11/ In this case, "cause" is stated outside of the probation period provision, and there is no bargaining history indicating the parties did not agree to a cause standard.

Against this background, the "cause" standard cannot be equated with "arbitrary and capricious." Arbitral practice underscores this point: "The term 'just cause' is generally held to be synonymous with 'cause'. . . " 12/ That the contract does not specifically link cause to discharge entitles the Employer to claim somewhat broader discretion than if the contract did so. This is, on these facts, a technical point.

The Union contends that "cause" is defined in Arbitrator Daugherty's seven standards. 13/ Absent the agreement of the parties, I do not agree. The cause standard in this case is rooted on an inference, but the inference flows directly from agreement provisions and is necessary to construe the agreement as a whole. The inference sought by the Union rests less on agreement provisions than on the assumption that the seven tests are so persuasive they should be applied whether or not the parties have agreed to them. The standards are, however, given meaning by the parties' agreement.

In the absence of that agreement, their application is problematic. The seven standards include twenty-one explanatory notes, and extend for roughly three pages. The clarity thus gained is debatable. Beyond this, the standards conflict with the arguments posed here. For example, the Union asserts a "beyond a reasonable doubt" standard that contradicts Note 1 of Standard 5, which states "(i)t is not required that the evidence be conclusive or "beyond all reasonable doubt." 14/ More significantly, the seven standards are procedural, and arguably conflict with the parties' substantive arguments. For example, polygraph evidence has been admitted here, and that evidence is not relevant to the application of any of the standards. None of the standards expressly call for evidence of innocence or guilt beyond the Employer's

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11/ Dec. No. 19310-B, 19311-B, 19312-B at 10.

12/ Management Rights, Hill & Sinicropi, (BNA, 1985) at 99.

13/ Enterprise Wire Co., 46 LA 359 (Daugherty, 1966).

14/ 46 LA at 364.

investigation. On this point, the seven standards are, in my experience, honored in the breach. Parties do not employ the standards to avoid hearing the merits of a grievance. This is not to say the standards lack persuasive force. Rather, their persuasiveness is rooted in and defined by the parties' agreement to apply them. In this case, there is no such agreement.

Where the agreement does not specify the standards governing discharge and where the parties have not otherwise stipulated to them, a cause analysis must address two elements. First, the Employer must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Employer must establish that the discipline imposed for the conduct reasonably reflects that interest.

Having stated the standard, I will abandon it. The Employer contends the discharge stands under a seven standard review. This contention poses both parties' arguments, and is useful for structuring a discussion of those arguments. Accordingly, discussion of the merits of the grievance tracks the Daugherty standards. The discussion above underscores that this is done as a convenience, not as a contract requirement.

The next threshold points are intertwined, posing the appropriate burden of proof and whether an adverse inference may be drawn from the absence of Spach's testimony. The points are intertwined because the Union argues the Employer had the burden to prove the Grievant's absences were not excused, and cannot meet this burden without Spach's testimony.

That the Employer had the burden to prove cause for the discharge is not disputed. It does not follow from this, however, that the Employer alone has the burden on the authorization issue. To clarify this point it is necessary to distinguish two elements to the burden of proof -- the burden of persuasion and the burden of going forward with evidence.

Generally, the burden of going forward with evidence refers to a party's responsibility to develop an adequate record, or put another way, a party's liability to an adverse ruling for failing to present evidence. The burden of persuasion refers to the perspective of the decision maker reviewing a completed record. The burden of persuasion is significant only if each party has sustained their burden to come forward with evidence, and doubt remains on the issue to be resolved. In such a case, the doubt is resolved against the party with the burden of persuasion. The nature of this doubt, that is the degree of proof required to carry the burden of persuasion, has been argued at length here

and in arbitral precedent. Rather than belabor that discussion, I will note that Arbitrator Malamud's resolution of the point in a case cited by both parties persuasively defines the burden as "clear and convincing" proof. 15/

The inference sought by the Union regarding Spach's testimony is not persuasive on this record. The inference sought by the Union should not be granted lightly. Arbitration is, at least in theory, designed to be an informal and inexpensive form of litigation. That the parties may choose to litigate a matter in a less than complete manner is, ultimately, their choice. The costs and formality of the procedure should be increased only for compelling reason. In this case the compelling reason asserted by the Union is that the Employer's case cannot stand without Spach's testimony, and the burden to produce that testimony must fall on the Employer. That he was available at the first day of hearing but could not testify due to time restrictions not traceable to either party weakens the argument somewhat.

More significantly, the burden to produce his testimony cannot be viewed as the Employer's alone. The discharge decision was Harrington's and his supervisors'. Spach was involved only to provide corroborative information. That corroborative information is significant, and the record is weaker without it. However, this weakness affects not only the Employer. Spach's authorization is as essential to the Union's defense to the discharge as it is to the discharge. Thus, it cannot be said that the absence of his testimony impacts only the Employer. Beyond this, the burden to produce evidence should be placed on the party with the best access to the evidence. In this case, Spach was not an employe of the Employer at the time of hearing. He was equally available to either party. Nor can it be assumed Spach's and the Employer's interests are identical. At hearing, the parties explored the possibility that Spach's departure and the Grievant's were linked. Whether a link exists remains in doubt, but it cannot be assumed Spach's interests and the Employer's are so linked that only the Employer should be expected to call him. On this record, granting a continuance to get his testimony would be a more reasonable alternative than the inference the Union seeks. Neither party sought a continuance, and the record must be treated as complete without his testimony.

The final prefatory issue concerns the decision of the UC ALJ. The parties question the interpretation of Sec. 108.101, Stats., but the decision is irrelevant however that statute is interpreted. Even if the Employer's view of the statute is accurate, the decision is admissible only if it can withstand a basic relevance determination. Secs. 904.01 and 904.03, Stats., define a basic relevance determination. These sections, although not strictly applicable in arbitration, codify the thought process which underlies an evidentiary ruling, formal or not. How the conclusion of the UC ALJ viewing a different record than this one can have "any tendency to make the existence of any fact that is of consequence" to this grievance "more probable or less probable than it would be without the evidence" is not immediately apparent. The evidence underlying that conclusion has such a tendency, but the conclusion does not. Even if the decision passed the test of Sec. 904.01, Stats., it cannot withstand the balance required by Sec. 904.03, Stats. The probative value of the decision, even if offered only for credibility purposes, is substantially outweighed by its invitation of litigation of unnecessary issues. The Grievant was unrepresented before the ALJ, and the hearing lasted less than one day. Evidence has been introduced in this proceeding which was not introduced before the ALJ. What impact the difference in the records would

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15/ Milwaukee County War Memorial Center, Inc., 93-1 ARB Sec. 3121 (Malamud, 1992).

have on the ALJ poses an unresolvable and unnecessary issue. The decision is, then, irrelevant.

This poses the merits of the grievance. The seven Daugherty standards, which have been cited by each party, are not repeated here.

I.

The Employer has contended the discharge is based on the Grievant's acceptance of pay for time not worked, which the Employer characterizes as theft. This is the sole basis which will be addressed under the seven standards. Any contention that the Grievant's work performance warrants discharge does not withstand scrutiny. He had no history of discipline and had received satisfactory or better evaluations. He may have been counseled by Spach for his work performance in the fall and winter of 1992, but any such counseling falls short of the "forewarning or foreknowledge" underlying this standard. There is, however, no dispute that time card theft is a level of misconduct for which no prior warning is necessary.

II.

There is no dispute that the Employer could properly expect the Grievant, as an hourly employe, to punch in and out and to accept pay only for hours worked. Nor is there any dispute that the Employer's paying only for hours worked is reasonably related to the orderly operation of its business. The dispute is whether the Grievant was authorized to leave early and whether such authorization mitigates the discharge.

III.

The Employer did "make an effort to discover" whether the Grievant had accepted pay for hours not worked. Harrington considered summary termination on January 6, 1993, but delayed acting on that consideration until he had reviewed the situation with his supervisors, the Personnel Department and Spach. The discharge decision was made in the afternoon of January 7, after Spach had denied any arrangement with the Grievant, and after a review of personnel records and other evidence. The Union questions less that an effort was made than the sufficiency of the effort. That issue falls under the fourth standard.

IV.

This and the following standard highlight the tension between the Daugherty standards as stated and as applied. If the sole function of arbitration is to review the investigative procedures of management, then the significance of the employer objectivity called for in this standard is heightened. If, however, arbitration serves as a substantive review of the

discharge decision, the need for employer objectivity is lessened because the arbitration forum serves as an objective check on the exercise of management discretion. As touched upon above, the latter approach applies here.

The Union argues forcefully that the Employer rushed to judgement without an adequate investigation and that the investigators were more interested in confirming their own conclusions than in verifying the Grievant's account. It would appear Harrington was less concerned with the validity of the Grievant's account than with his conclusion that the Grievant was untrustworthy and should not be allowed in the Data Center. For example, his testimony at the UC hearing would indicate he did not approach Spach in a disinterested search for truth. 16/ Beyond this, it appears at least some, if not all, of his research into time cards occurred after January 7, 1992.

These concerns are troublesome, but not controlling here. The Grievant worked with little, if any, supervision on both the second and third shift. The Data Center does serve as the repository for confidential information. Thus, the Employer did have a reasonable basis to conclude that its action should be prompt. Beyond this, Harrington had, by the time the discharge decision had been made, involved two levels of supervision above him as well as the Personnel Department. As an abstract consideration, the objectivity of each level of review can be doubted. However, the discharge decision was dispersed and as the responsibility to assess the situation widened, the likelihood that Harrington's conclusion could be rammed through without question lessened. At each level of review, an attempt was made to verify the factual basis of Harrington's conclusion. The review was sufficiently objective to withstand scrutiny.

V.

With this standard, the tension between the Daugherty standards as stated as applied becomes most apparent. There is no doubt the Employer had substantial evidence that the Grievant was guilty as charged. Crediting Harrington's account, as the Employer did, the Grievant had, on January 6, acknowledged he received pay for hours not worked. Spach had, by the morning of January 7, denied the arrangement the Grievant claimed. The Employer could, with this information, have reasonably concluded the Grievant had accepted pay for time not worked, without authorization.

This conclusion, however, only prefaces the most difficult issue posed by this grievance, which is whether the Grievant's account of his actions or the Employer's is to be credited. The evidence and argument submitted by the parties make it apparent the evidence adduced at hearing must be weighed with the evidence the Employer acted on.

Viewed as a whole, the record will not support a conclusion that Spach authorized the Grievant to leave early and accept pay for time not worked. The Grievant was too intelligent and articulate a witness to raise any doubt that he was aware that in the absence of this authorization accepting money for time not worked was improper. In describing his duties before going on the third shift, he noted that one of his duties was to monitor the computer. 17/ This was the duty he abandoned when leaving early on the third shift. He was aware, then, that work remained for him even if the batch processing was complete.

16/ See TrUC at 20. Harrington approached Spach saying "I heard this unbelievable story . . . "

17/ TrI at 138.

This focuses the issue squarely on Spach's authorization of the absences. That Spach did not testify does not mean the Grievant's account of the authorization is credible. Rather, it highlights the significance of that account. The Grievant's account does not, however, stand on its own. It is internally inconsistent and irreconcilable to other evidence.

The Grievant's account of the January 6 conversation is internally inconsistent. The Grievant's account of Spach's conduct, without regard to other testimony, is difficult to follow. Under the Grievant's account, Spach initiated the early leave arrangement 18/, and did so to reward the Grievant for work well done. 19/ Beyond this, the Grievant denied that, prior to January 5, Spach ever discussed any problems with his work, including his punching out early. 20/ With this as background, it is hard to understand the events of January 5. Fully crediting the Grievant's account, without regard to other testimony, offers no clue to why Spach became mad at him. He had done nothing to upset the arrangement. More significantly, the Grievant testified on direct examination that Harrington was aware of the arrangement and told the Grievant to accept the gravy offered him. Prior to this statement, and again on cross examination, the Grievant stated Harrington's explanation of the impropriety of accepting pay for hours not worked moved him to see the error of his ways. 21/ The two accounts cannot be reconciled internally, without regard to other testimony. The Harrington who told the Grievant to recognize gravy when it was served would not be the same Harrington who insisted accepting pay for hours not worked is theft.

Inconsistencies also appear between the Grievant's account at the UC hearing and at the arbitration hearing. At the UC hearing the Grievant stated that he approached Spach at the start of his third shift work and asked what he should do if his work was completed. The timing and the initiation of the conversation varies from his account at the arbitration hearing. 22/ At the UC hearing, the Grievant denied acknowledging to Harrington the error of his ways, 23/ and asserted Spach and Harrington were trying to cover up Spach's performing Union work. 24/ The Grievant did touch on the Union work issue at the arbitration hearing on cross-examination, but it is difficult to meaningfully fit this point into his overall testimony. 25/

The internal inconsistencies of the Grievant's testimony are magnified by the difficulty of reconciling that testimony with other evidence. It is undisputed that Spach was upset with the Grievant for punching out early on January 5, yet the Grievant's testimony cannot account for why. The Grievant

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18/ TrI at 144.

19/ TrI at 168.

20/ TrI 133-138.

21/ Cf. TrI at 143 and TrI at 171 to TrI at 148.

22/ Cf. TrUC at 30 to TrI at 144.

23/ TrUC at 31.

24/ TrUC at 32-33.

25/ TrI at 194.

acknowledges Spach made a statement to the effect that he might be made a part-time operator, 26/ yet his testimony does not admit any work related difficulty this statement could relate to. If his testimony at the arbitration hearing is credited, the arrangement with Spach started the second or third week of his third shift work. His time cards show, however, that he left early on Friday of his first two weeks of third shift work. His account leaves one or both of those instances unauthorized. Beyond this, the Union has pointed to the undated note as confirmation of the arrangement. The Grievant testified he received the note sometime around the second week of October, prior to the disk installation. It had to have been issued prior to October 23, the last night of his third shift work. If the first sentence of the note is taken to be a cautionary note regarding not leaving before the end of the shift, it is impossible to account for his leaving early on October 23. Nor can this interpretation of the note be reconciled with his continuing failure to punch out on the second shift after October 23. His testimony does not put the arrangement in question until January 5. Thus, crediting his testimony is irreconcilable to reading the note as confirmation of the arrangement. Beyond this, crediting his testimony that Spach's second shift procedure required him to leave a note after punching out leaves unexplained a series of instances in which he failed to punch out in November and December of 1992.

Crediting the Employer's view of the evidence poses none of these problems. Bidlingmaier and Harrington each stated Spach had mentioned problems with the Grievant prior to January 5. Spach's notes document such problems. This can account for his anger with the Grievant on January 5, and his statement to the Grievant regarding part-time status.

The Union has forcefully argued the credibility of the Employer's evidence must be questioned. None of the weaknesses highlighted by the Union can, however, make up for the weakness in the Grievant's testimony. The discrepancies in the time cards does not undercut the credibility of the Employer's witnesses. Both sets of cards include at least one set of Spach's initials and both document a failure to punch out. Either serves as a basis to infer Spach approved the absences. If one set was doctored, the alterations are so ineffectual it is unpersuasive to infer tampering occurred. That the Union received an Employer record which shows the Grievant only failed to punch one time in 1992 restates the problem posed here. In the absence of the events of January 5 and 6, there is no reason to believe the Grievant would have been caught. The difficulty with these documents is that each is as readily explained by the inference that Spach assumed the Grievant was at work as by the inference that Spach authorized his absence. This highlights the significance of the Grievant's testimony.

The polygraph results are troublesome, but inconclusive. Putting aside questions of what the Grievant consciously or physiologically views as a truthful response, each of the questions asked could have been answered truthfully without addressing any significant issue posed here. It is undisputed Spach authorized the Grievant's leaving early on occasions other than those in dispute here, did complete the time out section of the time card, and did communicate with the Grievant with notes. The difficulty of the points at issue here is underscored by the reluctance of the polygraphist to ask the Grievant if he was aware he was stealing. The polygraphist declined to pose the question due to the passage of time and the possibility that others had, after the fact, impressed upon the Grievant that his actions were wrong. Whether the Grievant could have, after the fact, convinced himself of the innocence of his actions would seem no less a possibility. In any event, the

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26/ TrI at 176-177.

polygraph results only highlight the difficulty posed here. Why is the Grievant's account, if truthful, inconsistent and difficult to reconcile with other evidence?

In sum, the evidence at hearing does not contradict the conclusions reached by the Employer. To assume, even by the adverse inference the Union seeks, that Spach authorized the Grievant's conduct demands that the Grievant credibly affirm that arrangement. His testimony does not, however, do so.

VI.

The conclusion that Spach did not authorize the Grievant's conduct undercuts much of the assertion that he has been treated unlike Witthun and Meier. The Employer discharged both for accepting pay for hours not worked. Witthun worked in the same work unit as the Grievant, and attempted to receive pay for time not worked. Meier, however, did receive a prior suspension for claiming sick leave when he was not sick. The Union forcefully argues this is a form of theft, and analogous to the Grievant's conduct. The force of the argument must be granted. However, sick leave is a benefit earned by hours worked. Meier thus abused a benefit he had earned by his hours of work. Unlike Meier, the Grievant claimed pay for hours never worked. The Employer's distinction between the cases cannot be dismissed as unreasonable. It cannot be said the discharge of the Grievant manifests disparate treatment.

VII.

In this case, the fundamental issue is whether the Grievant was authorized to leave early. The conclusion that he was not dictates the severity of the sanction. The Employer's treatment of the conduct as a form of theft is defensible. The Grievant occupied a position subject to little or no supervision in a work area in which trust is a significant consideration. His work record was not of such length or of such distinction that his breach of that trust can be mitigated.

AWARD

The Employer did not improperly discharge the Grievant on January 7, 1993.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 18th day of February, 1994.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator