BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| WAUPACA CITY EMPLOYEES UNION LOCAL 1756-B, AFSCME, AFL-CIO | Case 18 No. 50081 |
| and | MA-8142 |
| CITY OF WAUPACA | |

Appearances:
Mr. Sam Froiland, Representative, appearing on behalf of the Union.
Di Renzo and Bomier, Attorneys at Law, by Mr. Howard T. Healy, appearing on beh

ARBITRATION AWARD

Pursuant to a request by Waupaca City Employees Union Local 1756-B, AFSCME, AFL-CIO, herein the Union, and the subsequent concurrence by City of Waupaca, herein the City, the undersigned was assigned as Arbitrator by the Wisconsin Employment Relations Commission on February 14, 1994, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on April 14, 1994 at Waupaca, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on May 3, 1994.

After considering the entire record, I issue the following decision and Award.

ISSUE:

The parties stipulated to the following issues:

1. Did the City have just cause to suspend the grievant for the balance of her shift on September 25, 1993?

2. If not, what is the remedy?

PERTINENT CONTRACTUAL PROVISION:

ARTICLE 2 - MANAGEMENT FUNCTIONS

> The Employer has the sole right to operate the City and all management rights repose in it, subject to the provisions of this contract and applicable law. These rights include, but are not limited to the following:
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> . . .
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> B. To establish reasonable work rules and priorities of work;
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> . . .
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> D. To suspend, demote, discharge and take other disciplinary action against employees for just cause;
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> . . .

CITY POLICY MANUAL:

> The following violations of the City's rules of employment and standards of conduct and deportment are classed as Group II offenses and require the disciplinary procedures specified below:
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> . . .
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> (c) Reporting to, or remaining at work in a condition which precludes the proper performance of duty, or which interferes with or endangers other City employees or persons, or which endangers or restricts the City's obligations to maintain operations and provide services;
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> . . .

DISCUSSION:

At issue is whether the grievant was suspended for just cause under the terms of the parties' collective bargaining agreement.

On September 25, 1993, at approximately 10:00 a.m. Clerk-Dispatcher Paula LaSage, hereinafter the grievant, was suspended from the balance of her shift at the Waupaca Police Department by her supervisor, Sergeant Dennis Edwards. Sergeant Edwards' written statement indicates that upon questioning the grievant about whether or not she had been drinking:

> She told me that she was at Weasel's last night and I didn't give her a chance to finish where else she had been. I told her that I could smell alcohol on her breath and that I wanted her to punch out for the day and go home.

Earlier that morning Officer Steve Fabricius found the grievant "was still under the influence of intoxicants" based upon her "unprofessional" manner of communicating on the police radio ("her reply was 'Oky doky' instead of the proper way of 10-4") and his observation that there was a "strong odor of intoxicants on her breath." Officer Fabricius also observed that the grievant was "more talkative" and "louder" than normal and seemed "giddy."

After being sent home, the grievant went to the Riverside Medical Center Clinical Laboratory. According to the grievant's medical records, she had a blood alcohol level of .035% at 10:55 a.m.

The grievant was at Weasel's bar from 7:30 p.m. to about 12:00 a.m. the night before where she had "a number of drinks" but did not take a drink after 11:55 p.m.

She reported for work at 7:00 a.m. on the 25th. She took a limited amount of cough syrup that morning which had alcohol in it. She was also on arthritis medication which contained no alcohol.

The grievant denies that she was "under the influence." In support thereof, the grievant offered the testimony of Russell Montgomery, a Park and Recreation employe, and Captain Brent Feltheim from the Police Department who both stated that the grievant did not smell of alcohol or act unusual on the date in question. However, the record indicates both witnesses spoke with the grievant only briefly, and from some distance away (Montgomery from the counter, and Feltheim from a distance of at least five or six feet). The City presented better evidence, in the opinion of the Arbitrator, that the grievant was under the influence of alcohol. In this regard, the Arbitrator notes that the City offered the testimony of two experts, Officer Fabricius who has made over one hundred arrests for OWI (Operating While Intoxicated) and Sergeant Edwards, with similar experience. Both witnesses persuasively testified that the grievant smelled of alcohol and acted in an unusual manner. 1/ In addition, it is undisputed that at 10:55 a.m. the grievant had a blood alcohol level of .035%. Since, on average a person burns up alcohol at the rate of .015% per hour 2/ the Arbitrator finds it reasonable to conclude that the grievant had a blood alcohol level in excess of .04% when she reported to work and when observed by Officer Febricius at approximately 7:45 a.m. According to Sec. 888.235(1)2.(d), Stats.

> (d) The fact that the analysis shows that there was 0.04% or more by weight of alcohol in the person's blood or 0.04 grams or more of alcohol in 210 liters of

1/ In contrast to the two witnesses relied upon by the grievant, Officer Febricius observed the grievant for a lengthy period of time and at close distance. Sergeant Edwards also observed the grievant for a relatively lengthy period of time as compared to the two Union witnesses.

2/ Unrebutted testimony of Officer Fabricius.

> the person's breath is prima facie evidence that he or she was under the influence of an intoxicant with respect to operation of a commercial motor vehicle and is prima facie evidence that he or she had an alcohol concentration of 0.04 or more. (emphasis added)

Based on all of the foregoing, the Arbitrator finds that the grievant is guilty of the actions complained of. As such, she committed a violation of the City rules noted above. A question remains as to the appropriateness of the punishment.

The record is undisputed that the duties of dispatcher involved computer operation, dispatch, answering the telephone, and providing information to the members of the public who come into the police station for information or other services. The record is also clear that the grievant worked in a public safety position and that she was the communication link between emergency vehicles and the officers in the field. Given the nature of the grievant's work, it is even more important than usual 3/ "not to allow an employee to work who was under the influence or impaired by alcohol," as argued by the City.

The Union maintains that the City did not conduct a fair and objective investigation. In particular, the Union complains that the City "acted without allowing the Grievant any opportunity to respond to the allegations or to communicate any explanation whatsoever." Failure to allow the grievant to present her side of the matter before taking action to suspend her could be grounds for reversing the discipline. However, in the instant case, the record indicates that the grievant was under the influence on the date in question and there is nothing the grievant could have said during an investigation which would have changed that fact. Even the Union concedes that "Where immediate action is required, however, the best course is to suspend the employe pending investigation with the understanding that he will be restored to his job and paid for time lost if he is found not quilty."

The Union also argues that it was inappropriate for the City to rely on the grievant's own medical tests to support its position. However, the Union offers no case law in support thereof. In addition, based on the testimony of Officer Fabricius and Sergeant Edwards, the record evidence supports a finding that the grievant was guilty of the conduct complained of independent of her own medical records. Therefore, the Arbitrator rejects this argument of the Union.

Finally, there is nothing in the grievant's employment history that would mitigate the penalty imposed herein. In addition, the Arbitrator points out that the City imposed a suspension of less than a day instead of more severe discipline.

In view of the foregoing, the Arbitrator concludes that the answer to the issue, as stipulated to by the parties, is YES, the grievant was suspended for just cause under the terms of the agreement.

Based on all of the above, and the record as a whole, it is my

AWARD

That the grievance of Paula LaSage is hereby denied and this matter is dismissed.

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3/ Arbitrators generally will uphold some form of discipline for employes who report to work under the influence or who are caught drinking while on the job.

Dated at Madison, Wisconsin this 22nd day of June, 1994.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator