BEFORE THE ARBITRATOR

In the Matter of the Arbitration of Four Disputes Between	Case 19 No. 52097 MA-8837	Case 21 No. 52099 MA-8839
THE VILLAGE OF STURTEVANT	Case 20 No. 52098 MA-8838	Case 22 No. 52100 MA-8840
and		
TEAMSTERS, CHAUFFEURS AND HELPERS LOCAL NO. 43		

Appearances:

Mr. William R. Halsey, Esq., Long & Halsey Associates, 8338 Corporate Drive, Suite 500, Racine, Wisconsin 53406, appeared on behalf of the Village.

Ms. Renata Krawczyk, Esq., Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

ARBITRATION AWARD

On January 13, 1995, the Wisconsin Employment Relations Commission received a series of four requests from Teamsters Local Union No. 43 to appoint an arbitrator to hear and decide four grievances pending between the Union and the Village of Sturtevant. Following jurisdictional concurrence from the Village, the Commission, on February 24, 1995, appointed William C. Houlihan, a member of its staff, to hear and decide the disputes. An evidentiary hearing was conducted on April 13, 1995, in Sturtevant, Wisconsin. The proceedings were not transcribed. Post-hearing briefs were submitted and exchanged by May 30, 1995.

These four arbitrations all involve employe Ronald Bronner. The first dispute addresses Mr. Bronner's right to be acting leadman during the absence of the permanent leadman. The second dispute involves an oral warning issued to Mr. Bronner. The third dispute addresses a written warning issued to Mr. Bronner. The fourth issue concerns the employer's discharge of Mr. Bronner.

BACKGROUND AND FACTS

The City and the Union are signatories to a collective bargaining agreement, relevant portions of which are set forth below. Ronald E. Bronner, the grievant, had been employed by the Village for a 12 year period as of the date of his discharge. Mr. Bronner worked in the Water/Sewer department and also worked in the Street department, as needed. Included among his duties were the tasks of installation and reading meters, repairing water and sewer mains, cleaning meters, sewers and lift stations. Mr. Bronner drove and operated a water jet truck, a

truck used to flush out sewers. When assigned to the Street department, Mr. Bronner did street resurfacing and repair, mowed Village parks, participated in the removal of snow. He also operated front end loaders and backhoes. Mr. Bronner was certified by the Department of Natural Resources in distribution of water.

ISSUE 1

In March, 1994, the Village's Supervisor of Public Works left. From the time of the vacancy until the vacant position was filled, John Johnson, a Village trustee and chairman of the public works committee, supervised the department. During this time period, Serafin Ortega was the leadman. Under Article 3 of the parties' collective bargaining agreement, the leadman position is paid a wage premium (26 cents in 1993, 28 cents in 1994). The record indicates that sometime in July of 1994 Mr. Ortega missed work for medical reasons. In his absence, Mr. Johnson, on July 15, 1994, selected Donnie Berry, a bargaining unit member, as the acting leadman. Johnson regarded the assignment as temporary, and it was not posted.

Mr. Johnson testified that he selected Berry because he felt Berry would do the best job. Johnson indicated that he did not discuss the position with any other employe. On July 21, 1994, Ronald Bronner, who was more senior than Berry, filed a grievance claiming seniority rights to the leadman position. The record establishes that Mr. Bronner had previously worked as a leadman. The grievance was denied on the basis that the assignment was temporary.

Mr. Bronner was away from work between September 13 and October 21, 1994, on a Worker's Compensation leave. Mr. Bronner returned to work on October 21, 1994, a Friday.

ISSUE 2

Sometime in early to mid-October, the Village received a phone call from a Village resident complaining about high water rates and requesting a re-reading of their meter. According to Patrick J. Gagas, newly-hired Supervisor of Public Works, he sent Berry to check into the situation. 1/ What Berry discovered was that a cubic centimeter generator had been installed. His testimony was that he was shocked to find such a meter insofar as the Village does not handle cubic centimeter meters but rather uses only gallon generators. Berry returned to the Village offices and reviewed records to confirm his memory that both he and Bronner had installed the meter two years previously. Berry was at a loss as to why a different meter had been installed but speculated that the homeowner, who worked for the Racine gas company which handled both types of meters, may have switched meters in an effort to save money. The customer was given a $38.60 credit for prior overcharges. Both Berry and Bronner testified that the only generators stocked by the Village were gallon generators. Both men indicated that they would not think to check generators to see if they were gallon or cubic centimeter for that reason. Another employe,

---

1/ Gagas testified that he sent Berry and Bronner to check the meter; however, the timing of Mr. Bronner's return from Worker's Compensation leave seems to preclude him from having been sent.

Rex Parsons, ordered meters and other parts. Bronner testified that the two kinds of meters look strikingly alike and that the difference is not obvious with a cursory examination.

Mr. Gagas gave both men an oral warning for the improper installation of the meters. Berry accepted responsibility and did not grieve the warning. Bronner did file a grievance. Mr. Bronner's warning was issued on October 26, 1994. The written codification of the oral warning was prepared sometime between 6:30 and 7:00 a.m., the time on the warning indicated 8:45 a.m., but was issued sometime thereafter for reasons to be set forth below.

ISSUE 3

Just before 9:00 a.m. on October 26, Carolyn Milkie, newly-elected Village President, drove past a restaurant, and observed a Village truck parked in its lot. Upon her arrival at Village Hall, she asked Gagas if he knew why the truck was there. Gagas knew the truck to be one operated by Bronner, and was also aware of the fact that the normal employe morning break is 8:30 to 8:45 a.m.

Mr. Gagas testified that he left the shop at exactly 8:30 a.m., and that at that time the Jett truck (Bronner's truck) was gone. He testified that at that time Bronner was not with the other men. He did not see Bronner leave, and assumed that he was on break. Gagas further testified that he had previously made it clear to all employes, within the preceding 3 to 4 weeks, that the break was limited to 15 minutes. He also put a memo on the bulletin board to that effect, feeling that breaks had previously been abused. Gagas testified that Bronner was present for his directive to shorten the breaks.

Bronner testified that he was filling the Jett truck with water and was not done at 8:30. When he finished, at approximately 8:40, he took a break until approximately 8:55. Bronner testified that he was alone in the restaurant having arrived later than his co-workers. He further indicated that he had told the Employer and the Village personnel committee of this fact during the course of the grievance procedure.

Later that day, Bronner was given a written warning for taking too long a break.

ISSUE 4

Traditionally, the job of cleaning sewers and inspecting and cleaning manholes had been performed by two men in the Village of Sturtevant. Upon his arrival, Mr. Gagas determined that it was a one-man job, and proceeded accordingly. Bronner disagreed with Gagas' assessment. On November 14, Bronner was sent alone to clean an area of the Village. Bronner testified that he checked the manholes which fell mid-block, and if the flow was good, proceeded to the next manhole. His testimony was that he did not check the manholes at the ends of the blocks. Where Bronner determined that the water flow was slow, he hooked up the Jetter and blew water into the

system, forcing the residue up and back into the middle manhole. If there occurred a water buildup he regarded it as a problem requiring a cleaning. If not, he saw no need to open manholes at either end of the system. Where there was a need for cleaning, he believed he needed a partner before descending into the manhole. At the conclusion of the day Bronner submitted his written record of cleaning. His record indicates that a substantial area had either not required cleaning or had been cleaned. It was Bronner's testimony that Gagas told him to go and clean the sewers and that he did so. Bronner testified that his approach to cleaning was that historically employed by the Village.

A manhole located at 3041 - 95th Street had been plagued by periodic backups. In early October, Donnie Berry met with the owner of the home whose lateral flowed into that manhole and advised her that if there was another backup, the Village would not send employes to clean it without billing the owner. Berry testified that Gagas had told him that the Village would no longer clean the manhole (or at least the lateral); that it was the homeowner's responsibility. Gagas denies that that is what he advised Berry.

On November 16, the Village received a phone call from the resident of 3041 - 95th Street, complaining of a sewer backup. When Gagas inspected that manhole, he found waste that created a backup, which, in his opinion, should have been cleaned. His observation at this site triggered an inspection of Bronner's work. The site was a part of the area just inspected and cleaned by Bronner.

Gagas, Berry and Jeffrey Seitz, an engineer periodically retained by the Village examined the area assigned to Bronner for inspection and cleaning. On November 14, Bronner had been directed to clean Section 2 of the Village. This consists of a geographic portion of the Village encompassing 12 areas (street portions) with 8,046 feet of sewer line and 30 manholes. What the inspectors discovered was that 22 manhole covers had not been pulled. As noted, the 95th Street manhole was in need of a cleaning. The inspectors did not open most of the manholes. They did physically inspect a few, and discovered that the flow in some was adequate, and in others it was not. Gagas concluded that Bronner had not cleaned the area assigned.

On November 16, Bronner was directed to begin cleaning Section 1. Section 1, similar to Section 2, is composed of 8 areas, 7,801 feet, with 29 manholes. Bronner began work on the 16th, and believing that he had approximately 45 minutes of downtime, left the designated work site to attend to a broken fire hydrant. The fire hydrant had broken down and somehow, for reasons not attributable to Bronner, wrong parts had been shipped. Gagas had arranged to have a representative come out but had told neither Berry nor Bronner of that fact. Gagas did indicate that he told either Berry or Bronner that a serviceman had been called. Bronner testified that he was never told. Gagas acknowledged that he never told either man not to involve himself with the hydrant. Bronner had previously worked on the hydrant on two occasions. He went out on this occasion in order to continue his work.

On the 16th, Gagas determined to call Bronner and his Union representative in to confront the man about his work on the 14th. When he initially called for Bronner, Bronner could not be found. According to Gagas, the meeting, which subsequently occurred, involving himself, Bronner and the Union business agent, included the following conversation:

> GAGAS: Did you clean the whole area and remove every manhole?
>
> BRONNER: Yes.
>
> GAGAS: Why did you go to the fire hydrant?
>
> BRONNER: Sorry.

Bronner denied that he told Gagas he had cleaned all of Section 2 and opened every manhole. Rather, Bronner claims that he indicated to Gagas that he had logged his work.

Berry testified that one man, working alone, is capable of cleaning somewhere between 1,000 and 1,200 feet of sewer line per day. As a part of his job, Bronner maintained a log of the work he performed. His log for November 14 showed certain areas cleaned, other areas designated as "no trouble" or "look good". A significant number of the areas are not referred to at all.

On November 16, 1994, Bronner was discharged by the following memo. It is addressed to Ronald Bronner:

> After closely examining all the areas of Sanitary manholes and sewer cleaning operations which you participated in on Monday, November 14, 1994. And the fact that after closely inspecting these areas which you stated that you cleaned and finding out that your job assignment was not completed as expected. I have no choice but to terminate your employment immediately from Village of Sturtevant Water and Sewer Department.
>
> As stated on the attached sheet. You will see the reason for termination plus the incident which occurred on Wednesday, November 16, 1994 at 1:45 p.m. which intails (sic) you leaving an assigned job and you stating to me that you went to check on a fire hydrant at the South Water Tower. I gave you a job assignment and you took it into your own to do whatever you decide.

Patrick J. Gagas /s/
Patrick J. Gagas
Supervisor of Public Works

It appears that the discharge letter was accompanied by two attachments, the first of which indicated "unsatisfactory work performance by Ron"; "work and projects not being completed in a timely fashion"; "overlapping time schedule of completion of jobs and projects". The second document, also dated November 16, 1994, states the following:

> On Monday evening, November 14, 1994, Ron stated in front of his Union rep., myself and the Village attorney that on Monday he spent eight (8) hours cleaning Sanitary sewer and manholes from 98th Street to 91st Street North and South from Chandler to Mount Pleasant. On Tuesday, November 15, 1994, I went out and inspected some of his work and discovered at (22) different locations the manhole covers were never removed. And at 3041 - 95th Street, the manhole was never cleaned. In fact, there is waste backing up into the homeowner's sewer from the manhole connection. Ron stated to me that (3) times on Tuesday that he cleaned these areas. I feel that he lied to me on what he did on Monday, November 14, 1994.

ISSUES

The parties stipulated as to all four issues. Those stipulations include:

1) Was the grievant wrongfully denied the position of Acting Leadperson? If so, what is the appropriate remedy?

2) Was there cause for an oral reprimand for the grievant? If not, what is the appropriate remedy?

3) Was there cause for a written warning to be issued to the grievant? If not, what is the appropriate remedy?

4) Was there cause for the discharge of the grievant? If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 3. WAGES

The Employer will pay the following basic hourly wages:

		1/1/93	1-1-94
A.	Designated Leadman	$14.66	$15.10
B.	Full-time employees after probationary period	$14.40	$14.82
C.	Probationary full-time employees	$11.76	$12.10

Part-time, casual and seasonal employees:

Light duty work	$ 5.16	$ 5.32
Heavy duty work	$ 8.02	$ 8.26

. . .

ARTICLE 9. SENIORITY

Seniority standing shall be granted to all employees except part-time casual and seasonal employees. The standing is to be determined on the basis of actual length of continuous service from the latest date of permanent full-time employment with the Employer.

An employee shall be probationary for the first sixty (60) calendar days of employment.

Upon completion of such sixty (60) calendar days of employment he shall be entered on the seniority list as of his date of hire. A probationary employe has no seniority rights and retention as an employe is entirely within the discretion of the Village. If the Village believes that an additional probationary period is necessary, such period may be extended as agreed to in writing by the employee, the Village and the Union.

During such probationary period, an employee may be discharged

by Employer without the same causing a breach of this Agreement or constituting a grievance. All new full-time employees shall be placed on the full-time seniority list after completing the probationary period. All new full-time, part-time employees shall be placed on a separate full-time, part-time seniority list after completing the probationary period.

In all personnel actions involving classifications of employees covered by this Agreement, lay off, transfers, recall or laid off employees and promotion, Employer will take into account the following Factors:

A. Seniority

B. Qualifications and ability to perform the work required

Seniority shall be the governing factor, except when the employee with the greater seniority does not have the ability or physical qualifications to perform the available job in a satisfactory manner.

. . .

ARTICLE 15. DISCHARGE AND DISCIPLINE

Employer may discharge or otherwise discipline any non-probationary employee for failure to abide by any reasonable rules and regulations promulgated by the Employer as hereinbefore provided for, any breach of this Agreement by any employee or for any other just cause, provided however, that in the case of any default of or infraction by an employee, he shall be given at least one (1) warning notice of such default or infraction. No employee shall be discharged for a further particular default or infraction unless he shall theretofore have been given one (1) warning notice with respect to a prior default or infraction.

All warning notices shall be in writing and signed by the supervisor designated as the employee's supervisor by Employer, and shall be delivered personally by the supervisor to the employee and the employee shall in acknowledgement of receipt thereof, sign his name thereto; a copy thereof, shall be sent to the Union and Steward.

> All suspensions, discharges or other disciplinary action shall be evidenced in writing and shall be delivered personally by the designated supervisor to the employee and a copy thereof shall be sent to the Union.
>
> A prior warning notice shall not remain in effect for a period of more than twelve (12) months from the date thereof.
>
> Notwithstanding the foregoing, any employee shall be discharged without prior warning notice in the event of his job-connected dishonesty, use of intoxicants or drugs in any form during working hours, recklessness resulting in serious accident while on the job or the transportation of unauthorized passengers in village vehicles while on the job.

. . .

POSITIONS OF THE PARTIES

Village

ISSUE 1

The Village contends that the labor agreement is silent as to the issue of temporary assignments. There is no mention in the seniority section limiting the rights of management in temporary assignments. Neither was there evidence submitted that the issue of temporary assignments has been bargained between the parties or that a practice of using seniority in these situations exists. In the absence of such controlling language, the exercise of a temporary assignment is a proper function of management under its general management rights clause.

ISSUE 2

The Village acknowledges that the imposition of discipline some two years following the improper installation of a water meter is normally unacceptable. However, it notes that in this matter, the discipline was taken as soon as the Village became aware of the problem. The matter was prompted by a homeowner call questioning his bill. Following that call, the Village immediately checked the equipment, determined that the wrong meter had been installed and that the homeowner had been overcharged. Berry acknowledged that both he and Bronner were responsible for the mistake, both were disciplined, and Berry accepted discipline for his own behavior. A verbal warning is a very modest discipline and the Employer contends it is hard to imagine how this discipline is unwarranted.

ISSUE 3

The Employer notes that notwithstanding the fact that both occurred on October 26, the written warning arose out of a matter entirely independent of the subject matter which led to the prior verbal warning. The Employer contends that the facts support a finding that he took an extended break. The Employer contends that the grievant offered no explanation for taking an extended break notwithstanding the fact that Gagas had previously indicated that he had told all workers to limit their breaks to 15 minutes.

ISSUE 4

The Village acknowledges that the Grievant was not discharged in the typical progressive discipline manner. However, the behavior leading to the discharge is regarded as serious enough to warrant discharge on its own. Gagas testified that he believed that the grievant engaged in job-connected dishonesty. Ultimately, the Village contends, the fact is that Bronner did not clean the areas that he was assigned. He thereafter told his boss that he had, in fact, cleaned those areas when he had not. It was only through Gagas' personal and directed inspections of the areas that the determination was made that the work had not been done. The Employer contends that the grievants' co-workers testified that work performed by the grievant was not completed as the practice in the department dictated. Co-workers further testified it was physically impossible to have adequately inspected and cleaned the area claimed to have been done by the grievant in the time spent in the area.

The grievant testified that he felt he was being retaliated against for filing a Worker's Compensation claim, however, there was no evidence in the record to support that self-serving claim. The employer contends that there is no dispute that the work assigned was not completed in the expected and proper fashion. The only issue is as to the appropriate penalty. Gagas testified that he viewed this as a situation where the grievant first failed to carry out a job assignment, and then lied about the work. The employer notes that the grievant was not working at his assignment when the union and the management were to meet on the problem of his sewer cleaning. No one knew where he was. He claimed he was checking on a fire hydrant. The record shows that he was not asked to do this, it was not his responsibility, it is another example of his refusal to follow reasonable expectations for job performance.

What really occurred here is a situation where a new supervisor expected a full days' work from the grievant. The grievant did not like the fact that Gagas changed some work methods and procedures. The employer contends that it had a right to demand the work to be done as it was assigned. The grievant apparently was not used to this and refused to comply.

Union

ISSUE 1

The Union contends that the Village violated the collective bargaining agreement when it failed to place Bronner in the position of a fill-in leadperson. The Union points to the language of the collective bargaining agreement and characterizes it as very clear. The provision provides: "In all personnel actions involving classifications of employes covered by this agreement,. . . employer will take into account the following factors: A. seniority. B. qualifications and ability to perform the work required. Seniority will be the governing factor, except when the employe with the greater seniority does not have the ability or physical qualifications to perform the available job

in a satisfactory manner." There is no dispute that Ronald Bronner has more seniority than Donnie Berry. There is also no dispute that Bronner has, in the past, performed the duties of a leadperson. The leadman position is a classification in the collective bargaining agreement, contends the Union. In support of this, it points to the wage schedule. The leadperson classification is paid at a higher hourly wage than are other classifications. The language deals with "any personnel action involving classification of employes covered by the Agreement, and is therefore not limited to promotions."

There are benefits to being a leadperson, including pay, guaranteed two-hour call back time, and the status which attends to the position. The parties have bargained a seniority clause, which has been violated.

ISSUE 2

The Village violated the parties' collective bargaining agreement as well as the grievant's rights to due process when it disciplined him for conduct which took place two years prior to the date that the discipline was issued. The Union points to a host of published arbitration awards, each of which stands for the premise that in order for justice to be swift, discipline must be swift. The Union contends that these awards argue variously that discipline must be meted out in a timely fashion, be done promptly, be invoked shortly after the disciplinable behavior, in order to avoid stale evidence, and forgetful witnesses.

In the case at hand, the Village is alleged to have been aware of the two-year old problem as early as the summer of 1994. In spite of that fact, Bronner was not disciplined until October 26, 1994. The Union points out that Bronner had nothing whatsoever to do with ordering the wrong parts. It notes that the Village of Sturtevant uses only generators that measure in gallons. There was no reason for the grievant to inspect the meter to ensure that it was a gallon meter rather than some other kind. The Union points to Bronner's uncontradicted testimony that the pieces of equipment are virtually identical. It concludes that it was not the grievant's fault that another Village employe ordered what turned out to be the wrong equipment.

The Union notes that the Village never checked to see if there was a possibility that this homeowner had substituted meters in order to receive a monetary credit from the Village. The Union makes further due process claims, essentially contending that a delay of two and one half-years violates Bronner's right to notice and an opportunity to be heard. The Union contends that the Village delayed discipline from the summer of 1994 until October for reasons never explained. It then points to the fact that his discipline was invoked immediately upon his return from a Worker's Compensation leave.

ISSUE 3

The Village has failed to meet its required burden of proof with respect to the second

disciplinary action, a written warning, which was issued to the grievant. On October 26, 1994, the same day that the grievant received a written verbal warning, he was also given a written warning. This discipline was based on the fact that Village trustee Milkie was passing by a restaurant a few minutes before nine o'clock on the morning of October 26, noticed a water truck parked in front of the restaurant, and reported this to the Village. Common practice in the Water Department was for employes to take their break between eight-thirty and eight forty-five a.m. The uncontradicted evidence in the record was that Bronner began his October 26 break at approximately eight forty, and concluded it at approximately eight fifty-five. Gagas testified that Bronner was not among the men assembled at eight-thirty and he did not know where Bronner was at the time. Bronner, on the other hand, indicated that he was filling a water truck, and thus was unable to begin his break at its normal starting time. There was no evidence submitted to contradict Bronner's assertion that he began his break at approximately eight-forty, concluded it at eight fifty-five, and the Village has therefore failed to meet its burden of proof.

ISSUE 4

The Village did not have just and sufficient cause to discharge the grievant. The Village failed to comply with contractual requirements in its termination of the grievant. The warning letter language found in the contract between the Village and Teamsters Local 43 is standard Teamster warning language in use throughout Wisconsin and throughout the country. Numerous arbitrators commenting on this language have been unanimous that where the proper written notice has not been given, the discharge must be reversed. (Cites omitted). This is true even though the warning letter may be a technical, procedural requirement and even if the employe really deserves discharge.

In the case at hand, Bronner was terminated for allegedly not cleaning sewers on November 14, 1994. When the Village questioned Bronner with respect to whether or not he had cleaned these sewers, he responded he had. Examination of Bronner's log indicates that there were numerous areas where he never reported having cleaned. It further indicates that there were areas where he regarded the flow as "okay" and "look good" and that were not cleaned. The log further shows areas of buildup which he took care of. The Union notes that no one bothered to check the inside of the manholes to determine whether or not they were clean. The Union goes on to note that there are areas where subsequent inspections showed that there were no problems.

The Union contends that progressive discipline is required in cases of alleged poor work performance. The Union cites arbitral authority in its contention that in incompetency cases, the Village must establish: 1.) the issuance of rules of or standards of performance that are commonly known in the shop and which, if violated, will subject the employes to discipline or dismissal; 2.) discipline or dismissal occurs in a progressively severe manner. The Union contends that warnings of unsatisfactory work performance and the consequences thereof are necessary prerequisites of just cause. The Union contends that there are no standards by which sewer cleaning must be performed. The Union points out that the grievant had performed sewer cleaning

in the same manner for more than 12 years; and had never been counseled, let alone disciplined, regarding his work skills. The Union points to arbitral authority for the premise that it is a matter of common sense that when an employe's performance falls below par, he should be counseled, warned, reprimanded and even suspended before discharge. In this case, no effort was made by the Village to rehabilitate the grievant for what it purportedly found to constitute poor work performance.

DISCUSSION

ISSUE 1

Article 9 of the parties' collective bargaining agreement provides that: "In all personnel actions involving classifications of employees. . ." the Employer will consider the enumerated factors. In essence, the employer argues that this clause is not applicable because of the short-term nature of the assignment. The Union contends that the clause controls given its expansive scope. I agree with the Union. The language is all-inclusive. It is difficult to imagine how more inclusive language could be written. The language contains no distinction between temporary and permanent assignments. I believe the common use of the terms would include the appointment to a leadman status, even if temporary. The action of elevating one employe to a position where he directs the work of his co-workers and is paid to do so, falls within the common use of the term "personnel action". Article 3 sets the designated leadman pay rate as a separate entry. While I do not believe that leadman status necessarily constitutes a classification in all instances, I do believe that Article 3 of the parties' collective bargaining agreement treats it as precisely that.

There is no indication that Bronner lacked the ability to be a leadman. Johnson selected Berry because he believed Berry would do the best job. I believe Article 9 assures the senior employe the opportunity for the assignment absent the inability or physical qualifications to do the job.

AWARD

The grievance is sustained.

REMEDY

The employer is directed to reimburse Mr. Bronner for the difference between what he earned and what he would have earned as the leadman for the period in which Mr. Berry served as leadman.

ISSUE 2

The oral warning issued for the installation of an improper water meter is problematic for

two reasons. The first is that the event for which discipline has been issued was two years old. The Union makes a credible argument when it contends that memories fade after two years. As a practical matter, Bronner had no independent recollection of the event for which he was disciplined. On its face, the installation of a water meter, particularly under the circumstances described here, would not be a particularly memorable event. The second concern is that it seems to me that the purpose of discipline is to point out and correct inappropriate behavior. Here, it is not clear to me what that is or what purpose this discipline serves. Bronner did not order the generator, someone else did. Either the orderer or the supplier made an error. Bronner testified without contradiction that the units are difficult to distinguish, that he had never been told to check for the appropriate type unit, or that there was any reason to do so. Both Bronner and Berry testified that the Village used only gallon meters. Berry testified that he was "shocked" to find a cubic foot meter installed. The unit that was installed apparently worked, or at least appeared to work, for a period of two years.

Berry speculated that the homeowner may have switched units, a possibility the Village never explored.

The employer contends that the discipline issued is modest. I agree with the employer. An oral reprimand is not the end of the earth. However, under all of the circumstances surrounding this event, I am not sure that Bronner did anything disciplinable. It appears to me that he is being held to an absolute standard. The fact that Mr. Berry accepted his reprimand is not determinative of this dispute. Berry testified that he accepted responsibility even though he did not know how the wrong generator got installed.

AWARD

The grievance is sustained.

REMEDY

The Employer is directed to remove reference to this warning from Mr. Bronner's file.

ISSUE 3

Mr. Bronner was given a written warning for taking too long a break. He contends he took only 15 minutes. Neither Gagas nor Milkie could testify as to what time Bronner began his break. Milkie observed that he was still in the restaurant just before nine a.m. Gagas knew that Bronner was not with his co-workers at eight-thirty, and assumed that he already was on break. Had he taken his break at eight-thirty, it seems to me that co-workers, who would have taken their breaks coincidentally, could have shed light on what time Bronner began his break. Those co-workers were either not called upon to testify, or, in the case of Mr. Berry, were not asked.

I do not believe that the Village demonstrated that Bronner took more than a 15 minute break. There was also a dispute as to whether or not Bronner was present when Gagas directed the work crew to keep breaks to 15 minutes. Given the foregoing conclusion, there is no need for me to address that matter.

AWARD

The grievance is sustained.

REMEDY

The Employer is directed to remove reference to the written warning from Mr. Bronner's file.

ISSUE 4

I believe that the facts established in this hearing show that Bronner did a poor job of inspecting and cleaning the area to which he was assigned. The employer's subsequent inspection does demonstrate that a good deal of the area was either not cleaned or given cursory treatment.

The context of this discovery was that Gagas, a new supervisor, had converted the inspection and cleaning process from a two-man job to a one-man job, over Bronner's objection. It is fair summary of the testimony of a number of witnesses that Gagas disliked Bronner, and I assume the feeling was mutual. Gagas had disciplined Bronner two times on October 26, only five work days following his return from a Worker's Compensation leave. Bronner testified that his approach to the work was that which had traditionally been used by Village employes, or at least by him, for years. His testimony, at least with respect to himself, was without contradiction. The evidence was that the work assigned on November 14 was approximately 7 to eight days of work for one man working alone. Bronner purportedly did it in one day. It seems to me that this alone should have flagged to management that there was a problem. If the expectation was that the cleaning take seven days, and Bronner reportedly did it in one, someone should have begun asking serious questions even before an inspection commenced.

It seems to me that an appropriate management reaction would have been to confront Bronner, ask if he had done the job and done it the way it was intended. A subsequent inspection would be entirely appropriate. It is appropriate to point out to Bronner what he failed to do and what, in the opinion of the employer, he did unsatisfactorily. I believe the contract contemplates and mandates this type of action. Gagas said he did confront Bronner, and that Bronner lied. Following that, and following his inspection, he determined to discharge Bronner. I regard the discharge of a 12-year employe for a single incident of poor work performance to be extreme. It violates the contract, particularly if Bronner's method of inspection and cleaning had been

condoned in the past, and the change was the product of a new supervisor. The employer did an inspection of the work site. However, it seems to me the inspection was more calculated at building a case against Mr. Bronner than it was designed to evaluate the work effort and effectiveness of Bronner.

The Village adds the offense of dishonesty (lying) to support the discharge without prior warning. I do not find this to be compelling. Gagas and Bronner disagree with respect to the question-and-answer exchange which occurred during the pre-termination meeting. There is no indication that Bronner did not spend November 14 working in the area assigned. Work was performed. 8,000 feet were assigned. If a reasonable day's work consists of 1,000 to 1,200 feet inspected and cleaned, it is hardly surprising that substantial portions of the area were left uncleaned. Bronner maintained and submitted a log of work he performed. Testimony indicates that the log was not examined until after the discharge. The log is the actual record of work performed. It strikes me as odd that the employer would not examine the written log of work prior to discharge, where the basis of discharge is the concern that the employe had not done his job and had lied. The log constitutes the only written record of the employe's claim as to what work was performed.

The employer points to the November 16 unavailability of Bronner in support of its decision to discharge. His explanation as to his whereabouts seems appropriate. The pump was broken. Bronner had worked on it before, had some free time, and went to work on it again. Bronner testified, without contradiction, that no one ever told him not to do this. Gagas testified that in October on an uncertain date, he advised employes to use their spare time to check the inventory. It is not clear that Bronner was even at work during that time frame. Gagas could not testify that he had advised Bronner that someone else was coming to fix the pump.

Two things strike me as evident. The first, is that there existed little or no communication between Gagas and Bronner. There was a remarkable lack of communication, given the small size of the department. There is no indication that this failure to communicate was any more attributable to Bronner than it was to Gagas. The second thing that strikes me about this dispute is that Mr. Gagas has a disciplinary trigger finger, at least with regard to Bronner. My observation is that he was all too eager to invoke discipline without efforts to identify and remedy problems, provide notice of what his expectations were, or fully understand the facts underlying the matters over which he disciplined.

Reduced to its basics, this collective bargaining agreement requires at least one notice prior to discharge. That notice was not given. 2/ At an absolute minimum, the contract requires that

---

2/ Evidence was submitted relative to suspensions which occurred in 1985 and 1986. Neither of these relate to the type of conduct brought forward in this proceeding, and neither

there be notice to the employe before more serious discipline can be invoked. I believe the evidence supports a finding that Bronner did a poor job inspecting and cleaning the sewer lines. This employer has tried to convert a performance case into a dishonesty case by asking the employe if the job was done. When the employe said yes, the employer characterized his answer as dishonest, and discharged him.

---

constitute an appropriate warning or progressive discipline.

AWARD

The grievance is sustained.

REMEDY

The employer is directed to reinstate Mr. Bronner with back pay and to make him whole for the loss of benefits and/or seniority that he suffered as a consequence of his discharge. The employer is directed to expunge his personnel file of reference to this discharge. The employer is entitled to use interim earnings, including Unemployment Compensation, if any, as an offset, provided the Unemployment Compensation account is restored so as to provide insurance should Mr. Bronner become unemployed before his benefits are reestablished. The employer is free to treat this award as a warning letter to Mr. Bronner with respect to the inspection and cleaning of sewers, provided it provides Bronner with instruction as to what is expected with regard to that work.

Dated at Madison, Wisconsin, this 29th day of August, 1995.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator