BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MARSHFIELD CITY EMPLOYEES UNION,
LOCAL 929, AFSCME, AFL-CIO

and

CITY OF MARSHFIELD

Case 111
No. 52624
MA-9047

Appearances:

Mr. Jeffrey J. Wickland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Dean R. Dietrich, appearing on behalf of the City.

ARBITRATION AWARD

Marshfield City Employees Union, Local 929, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Marshfield, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union, with the concurrence of the City, requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held in Marshfield, Wisconsin, on August 2, 1995. The hearing was not transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were received on September 25, 1995.

BACKGROUND:

The grievant has been employed by the City as a full-time employe from May 1, 1970, until his discharge on March 29, 1995. On that date, Nicole Onder, Human Resources Specialist, sent the grievant a letter which stated, in part, as follows:

> This letter is to advise you that your employment with the City of Marshfield is terminated as of today, March 29, 1995. You will receive pay through 3:00 p.m. today. This decision is based upon an investigation of your conduct as Equipment Operator I at Wildwood Zoo and a determination that you stole City property during the course of your employment.

Shari Bischoff married the grievant in 1983, and they were divorced on January 4, 1994. In April, 1994, Bischoff reported to the grievant's supervisor that the grievant had stolen a number of items from the City during his employment. In July, 1994, Bischoff gave a statement to the Marshfield Police Department alleging that the grievant stole a number of items from the City including deer fawns from the Zoo, approximately four each year from 1986 through 1992, eight gallons of paint, sacks of feed, including chicken starter and deer pellets, four heat lamps, a picnic table, two rolls of snow fence, fertilized eggs, a number of birds, lumber, gas and T-shirts. Bischoff also alleged the grievant pocketed money paid by campers as well as stealing dimes from coin-operated feed machines but stopped stealing these in 1992 because he felt his boss was suspicious.

Bischoff testified that with respect to the dimes, she removed the cracked corn from the coins and cashed them in for paper bills at different banks and at Shopko. The amounts were usually $60 - $80 but on one occasion, it was over $250.00. Neither Shopko nor any bank corroborated this but the receipts for coin-operated feed dispensers for the years 1980 through 1993 reveal the following:

1993	1,417.47	1986	1,541.42
1992	1,183.89	1985	2,174.36
1991	653.87	1984	2,024.62
1990	310.72	1983	1,760.05
1989	336.57	1982	1,618.27
1988	714.23	1981	1,560.28
1987	1,276.48	1980	883.80

During this time frame, some of the machines needed repairs and in 1989, a machine was stolen.

With respect to many of the alleged stolen items, the police investigation revealed that the grievant had permission to take them or there was no corroborating evidence to support that they were stolen. Only two allegations had support. One was taking gas from the City pumps as the grievant admitted on occasion filling his truck with his supervisor's permission. The other was the theft of the dimes and the corroborating evidence was that Bischoff took a polygraph test which indicated she was truthful as well as the reduced receipts from 1988-1991.

The grievant filed a grievance over his discharge and asked for a bill of particulars. On April 13, 1995, Randy Allen, City Administrator, sent the grievant a letter which stated, in part, as follows:

> Your termination was based on our determination, following an investigation and further discussion with you, that you stole City property during the course of your employment. This included the stealing of money at the Zoo and the stealing of gas for use in your

private automobile.

The grievance was denied and processed through the grievance procedure to the instant arbitration.

ISSUE:

The parties stipulated to the following:

> Did the City violate the collective bargaining agreement when it terminated the employment of the grievant on March 29, 1995?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

> Article 20 - Suspension, Discharge, and Disciplinary Action
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> . . .
>
> Section 2. No employee who has completed his/her probationary period shall be discharged or suspended without one (1) warning notice of the complaint in writing to the employee with a copy to the Union and steward, except no warning notice is required for discharge due to dishonesty, being under the influence of intoxicating beverages while on duty, recklessness resulting in a chargeable accident while on duty, or other flagrant violations.
>
> 1. For the first offense, an oral reprimand;
>
> 2. For the second offense of the same or similar nature, a written reprimand with a copy placed in the employee's file;
>
> 3. For the third offense of the same or similar nature, one day's suspension without pay;
>
> 4. For the fourth offense of the same or similar nature, suspension or discharge.

An employee's record of each offense will be cleared in the event the employee has not committed the same offense within a period of one (1) year from the date of notification of that offense.

An employee's record of a tardiness offense will be cleared in the event the employee has not committed the same offense within a period of two hundred and seventy (270) days from the notification of that offense.

. . .

Article 21 - Management Rights

. . .

A) The Union recognizes that the management of the City of Marshfield and the direction of its working forces is vested exclusively in the City, including but not limited to the right to hire, suspend or demote; discipline or discharge for just cause;

. . .

CITY'S POSITION:

The City contends that the evidence establishes that it had just cause to discharge the grievant for his dishonest behavior of stealing gas and vending machine proceeds. The City cites a number of arbitral authorities to support its assertion that the applicable burden of proof is a preponderance of the evidence. The City submits that it undertook a full and fair investigation before deciding to terminate the grievant. It claims that it reviewed the police reports and met with the grievant to hear his statements. It insists that the City's reliance on the results of the police investigation is entirely acceptable and often times desirable. It observes that a major function of the Police Department is to conduct investigations of criminal matters and it was independent of the grievant's department, thus the investigation was fair.

The City maintains that the evidence clearly establishes that the grievant stole City property. It claims his denials are not credible and the testimony of Shari Bischoff and the documentary evidence of the Zoological Society are more credible. It notes that the grievant has a strong self-interest to deny the charges. The City argues that the grievant admitted to the police that he filled his truck with City gas on occasion and recanted this at the hearing stating he did this on only one occasion and Duke Schueller recalled two occasions when he might have given the grievant permission to use gas. It observes that two occasions does not constitute a continuing arrangement to take gas. The City contends that Bischoff's allegations of the theft of dimes is supported by the significant drop in income in 1989, 1990, 1991 and 1992. It denies that the drop

in revenue could be entirely due to the poor repair of the machines, lower attendance rates or the use of cracked corn. It takes the position that Bischoff is credible because she could be charged criminally as an accessory and it is against her interest to make these charges and she also described the cleaning of the coins from the corn kernels or chaff and going to separate banks to cash them in, details that lend credibility to her testimony. The City alleges that Bischoff's credibility is further supported by the results of her polygraph examination which indicated that she was being truthful in her statements to the police.

The City asserts that the grievant's theft is such a grave offense that the parties provided in their agreement that no prior notice is required for a discharge for dishonesty and it had just cause for summary discharge.

The City argues that the polygraph test results should be admitted to show credibility and the Union's objection to them should be overruled. It submits that the Wisconsin Supreme Court has held that polygraph evidence is not admissible in a criminal matter but the instant case is not a criminal proceeding and many arbitrators have allowed polygraph evidence for certain purposes including its use to bolster witnesses' credibility. It points out that the polygraph examiner is highly qualified, being the oldest member of the Wisconsin Polygraph Association, and has conducted thousands of polygraph examinations since 1974. It argues that the test results should be admitted for the limited purposes of assessing the credibility of witness Bischoff.

In conclusion, the City insists that it had just cause to terminate the grievant. It submits that Bischoff testified against her own interests and the police investigation found Bischoff credible. It notes that the grievant was given the opportunity to respond but refused and his current denials are not credible in light of the weight of evidence against him. It asks that the grievance be dismissed.

UNION'S POSITION:

The Union contends that the City did not have cause to discharge the grievant for allegedly stealing gasoline from the City's pumps and coins from the corn vending machines at the City's Zoo. It asserts that the City based its decision on statements by the grievant's ex-wife, Shari Bischoff, which formed the basis for a police complaint and investigation. It points out that all but two charges she levied against the grievant proved false. It submits that the police believed they had proof of the gasoline theft but a small amount of additional investigation also eventually proved this complaint false. It asserts that only one unresolved issue remained and that was theft of coins. It believes that the police doubted the veracity of Bischoff and resorted to a polygraph exam. It takes the position that with or without the polygraph test, there was insufficient proof of guilt either in a criminal or employment related matter and the District Attorney did not file charges and the matter was dropped. The Union states that after the police ended its investigation, the City did not conduct any additional investigation but decided to discharge the grievant. It argues that the City failed to provide any evidence to contradict the grievant's denial other than the claim of a bitter ex-wife.

The Union seeks application of Arbitrator Daugherty's seven tests of just cause which the instant case fails, so just cause does not exist. The Union submits that the records and accounting practices were inadequate to detect or prove theft. It states that the record shows that inventories were not required, the amount of money collected from each corn vending machine was not recorded, and the amount of money deposited was not known until the bank provided the information. It notes that the money was simply collected from the machines and placed in a bag in the general office area at the Zoo and was not locked up and persons including Bischoff were known to frequent this area. It points out that Bischoff has a documented history which includes theft. The Union observes that when the revenues decreased in the late 1980's, no one noticed the drop or it was not a concern and there was no investigation into the drop in revenues. It asserts that other causes could explain the fall in revenue such as vandalism, the long delays to receive repair parts, the weather and other factors. It claims that without a record of inventory or revenues it is doubtful that theft could be proven unless the thief confessed or was caught in the act, neither of which occurred in this case. The Union maintains that the grievant denies any theft committed by him and suspects his ex-wife, but if theft occurred, the failure to follow basic accounting and business practices undermined the City's ability to operate in an orderly and efficient manner.

The Union claims the investigation was inadequate as the City never contacted a number of witnesses for information such as Duane Schueller who testified about giving permission to the grievant to use City gas in April, 1985. Additionally, the Union argues that the City did not contact witnesses until after it had made the decision to discharge the grievant. It observes that seven months elapsed between the end of the police investigation and the grievant's discharge which allowed the City ample time to fully investigate the matter but this is not what occurred. The Union alleges that the investigation was not conducted fairly and objectively. It observes that Bischoff reported her allegations to the grievant's supervisor in April, 1994, and nothing was done until the City reported it to the police on June 30, 1994. The police investigated and made a report to the District Attorney who decided not to press charges and, according to the Union, the City's investigator was the same person who filed a charge with the police, thereby evidencing a bias. It argues that the City failed to adequately investigate the matter and refused to consider Judge Zappen's "gag order" on the grievant as well as the fact that his attorney advised him to abide by the Judge's order. It asserts that at the meeting of March 23, 1995, between the grievant and the City's representative, the City behaved as though time was critical, yet it had waited months after the police completed its investigation and time was not critical to the City's case and it could have waited to allow the grievant to seek a release from the Judge's order, but instead it based its decision, in part, on the grievant's declining an opportunity to present facts and information on March 23, 1995. It concludes that the investigation was unfair and biased. The Union insists there is no evidence that the grievant stole gasoline or coins. It maintains that the only evidence is Bischoff's statement and her credibility was so suspect that the police found it necessary to have her submit to a polygraph exam. The Union states that the result of a polygraph are not admissible as evidence in any forum.

The Union notes that the City discharged the grievant for two reasons: theft of gasoline and theft of coins. It submits that the gasoline charge was disproved at the hearing and the City then argued that it would have discharged the grievant solely for the theft of coins. The Union says "nice try" but when one of the two reasons is no longer valid, it should invalidate the penalty of discharge. Additionally, as to the theft of coins, no one saw or suspected the grievant of stealing coins and there is no evidence that he stole the coins, only the testimony of his ex-wife. It notes that the grievant repeatedly denied to the police that he stole anything from the City. The Union submits that the grievant made change from the dimes and it would not be uncommon to bring these home, but these were not stolen but change from his own personal paper money. It concludes that Bischoff's statements and accusations to the police were found time and again to be inaccurate or false. It alleges that the grievant's ex-wife has a strong motive to see the grievant discharged so she would get access to the grievant's deferred compensation. The Union points out that Bischoff was discharged from two different employers for stealing money. It argues that she had knowledge of the method of embezzling a lot of change without drawing attention to herself. It maintains that there is no other evidence to support the charge that the grievant stole coins from the City.

The Union, citing State v. Hamm, 146 Wis.2d 130 (Wis App 1988) argues that the use of polygraph evidence is inadmissible in non-criminal and administrative proceedings, and the polygraph evidence should not be admitted because it is unreliable. It notes that it never agreed to the use of any polygraph evidence and it should not be considered.

The Union argues that the City failed to apply its rules, orders and penalties evenhandedly and without discrimination to all employes. The Union insists that the City has failed in its burden of proving just cause and the City presented no evidence that the grievant's behavior was of a flagrant nature which would allow the City to discharge without regard to progressive discipline. It contends that discharge was inappropriate because the evidence does not support the City's contention and the grievant should be reinstated and made whole for all lost wages, benefits and damages suffered.

CITY'S REPLY:

The City maintains that it has clearly established just cause for discharge. The City asserts its investigation was adequate and it should not be faulted for relying upon the results of a police investigation. It points out that the police have extensive experience in conducting investigations and were not involved in the employment situation attendant to the investigation. It submits that the use of the police reports in no way biased the grievant or interfered with the grievant's opportunity to defend himself. The City claims that the investigation was fair. It argues that the Union has overlooked the fact that the police investigation was conducted by a disinterested third party and the decision was based on this impartial investigation. The City contends that the grievant's refusal to discuss the allegations based on the gag order are misplaced as the City was

not asking the grievant to comment about his ex-wife, it simply asked him about the accusations of theft. It points out the incongruity of the Union's argument that the City should rely on the police reports to ascertain that the grievant denied the accusations but for other aspects it challenges the City's reliance on the police reports. It contends that the City looked at the police reports and the grievant's refusal to discuss the matter and determined that it had just cause to discharge the grievant.

The City disputes the Union's claim that all but two accusations were disproved and simply because it did not choose to pursue the other allegations does not mean they were disproved. The City claims it did not consider the other charges because there was not convincing proof upon which the City wished to rely, and so the grievant was not found innocent, only that sufficient proof did not appear.

Contrary to the Union's assertion that only Bischoff charged the grievant with stealing, the City points out that the grievant first admitted to the police that he had a continuing arrangement with the City to use gas from the City pumps to fill his truck which he later reduced to only two occasions. The City also maintains the drop in corn feed vending receipts, Bischoff's testimony against her own interest and the grievant's initial admission of taking gasoline is persuasive evidence that he stole dimes from the City. It asserts that the Union's theory that Bischoff stole the dimes is unsupported and a smoke screen to divert attention from the grievant. It suggests this attack is made because the Union cannot offer a legitimate response to her statements or challenge the results of the polygraph showing she was truthful in her statements to the police. The City further contends that the City's accounting and recordkeeping which the Union challenges is merely a diversionary tactic. The City claims that the drop in revenues is too drastic to result from broken handles or vandalism.

The City denies that the grievant received disparate treatment. It argues that the Union has failed to offer any proof that the grievant was treated differently than other employes. It states that there can be little doubt that the City would discharge any employe who steals from it and the parties' agreement provides that progressive discipline need not be undertaken in cases of "dishonesty," and theft is dishonest behavior so summary discharge was appropriate.

The City submits that the polygraph evidence should be admitted. The City asserts that the Union misinterpreted State v. Hamm, supra, where it stated that this evidence was not admissible in non-criminal and administrative proceedings when, in fact, Hamm only excluded such evidence in criminal proceedings. Additionally, the City disputes the Union's reference to State v. Ramey, 121 Wis.2d 177, 181 (Wis App 1984) as it involved a probation revocation hearing, which hearings are treated historically the same as criminal proceedings. The City also points out the statutory reference to Sec. 111.37(4), Stats., does not prohibit polygraph examinations of non-employe witnesses to theft. The City distinguishes the facts of Eau Claire v. AFSCME Local 1744, (unpublished, Honeyman, 8/82). The City insists that there is a mix of authority on the issue of polygraph evidence and some arbitrators admit test results offered as "helpful

supplemental evidence" and test results of witnesses are more likely to be admitted than that of a grievant. It notes that the polygraph examiner was examined and available for cross examination. It urges admission of the polygraph test in support of Bischoff's statements to the police. In conclusion, the City argues that the grievance must be dismissed because it had just cause to discharge the grievant for stealing dimes from the City Zoo. It insists that the proof is substantial and theft cannot be tolerated in any fashion and warrants discharge.

UNION'S REPLY:

The Union takes issue with the City's statement of facts on two points: The City referred to the police report and taking of dimes from 1988-1991 when the report states 1988, 1989 and 1990. It suggests the City added 1991 because it could not explain the drop in revenues for that year. It notes that the City stated that Bischoff reported that her ex-husband often filled his truck with gasoline from the Zoo; however, the police report talks about the grievant and a Mr. Zschernitz loading lumber and gasoline in the grievant's vehicle as well as lumber and gasoline for Zschernitz's vehicle or gas in cans. It claims the gas in cans was for City lawn mowers.

With respect to the City's arguments, the Union takes exception to the burden of proof argued by the City and asserts that where the charge is criminal in nature, many arbitrators require proof "beyond a reasonable doubt" rather than a mere preponderance of the evidence. It reiterates that the grievant is a long-term employe with a solid work record and his discharge was for conduct which by its nature is criminal and the City should be held to the highest standard of proof.

The Union claims the City's investigation which consisted of a review of the police reports and a meeting to hear the grievant's statements is entirely inadequate. The Union observes that the police investigation led to no criminal charges against the grievant so either the grievant did not steal gasoline and coins or there was not sufficient evidence to prove the charge of theft. It argues that the City had to supplement the police investigation to prove theft and it failed to do so. It concludes that the City failed to conduct a thorough and fair "employment related" investigation.

The Union disputes the City's argument that a preponderance of the evidence indicates the grievant stole City property. It claims the City has not presented any evidence except Bischoff's incredible testimony and her statements to the police. According to the Union, it is a case of "He said, She said" and if the grievant's denials are discounted due to self interest and Bischoff's testimony is not credible due to a lack of veracity, what evidence does the City have? It answers that the City has no evidence that the grievant stole gasoline and has no evidence linking the grievant to the theft of coins. It argues that absent proof that the grievant was guilty of theft, the grievant should be reinstated and made whole.

With respect to the polygraph examination, the Union renews its argument that this

evidence should not be admissible. The Union observes that the City has built its entire case on one person, an ex-wife of questionable character and veracity and even with the polygraph evidence, the City cannot prove its case. It requests that the discharge be set aside and the grievant be reinstated with full back pay and a make-whole remedy.

DISCUSSION:

Polygraph Evidence

The courts and arbitrators have been reluctant to rely on the results of a polygraph examination. In his paper to the National Academy of Arbitrators, Arbitrator Edgar A. Jones, Jr. stated as follows:

> On the record, it is obvious that an 'overwhelming majority' (of arbitrators) do reject the polygraph as valid evidence. This is so even though my net impression (from reading the opinions) is that the arbitrators have too frequently been unduly restrained, even apologetic, in their analysis of and reaction to the negative implications of the polygraph to collective bargaining and grievance administration and particularly to the individual employees implicated. I suspect that this does not so much evidence respect for the polygraph as it reflects well-warranted concern for the plight of the rather desperate employers who have proffered that polygraph evidence, many of whom are quite obviously being ripped off by some thieving employees.
>
> Those employers are hardly in the mood--and, after all, we are mood-sensitive decision-makers--to sit in a hearing and listen to some squeamish arbitrator philosophizing about the role of "truth" in arbitral proceedings; or about the nondelegable arbitral duty to decide issues of credibility; or about the inherent unreliability of polygraphs and their operators in coping with ascertaining truth or deception among employees; or that the majority of employees in any industrial setting are more apt than not to be innocent of wrongdoing. The arbitrator learns, and the employer probably realizes, that the employees must be presumed to be innocent, even though those same presumably innocent employees may well, and if intelligent most assuredly will, quail under the stress of the prospect of the loss of livelihood under a cloud of moral turpitude in an investigation situation which they can readily and accurately sense to be rampant with Catch-22 possibilities.
>
> So the arbitral response in that tense situation, I hunch, has often been to resort to some version of the hoary ruling, 'I'll admit it for what it's worth,' and even less desirably to indicate that it will

> be given some indeterminable weight along with the other evidence in the record even if no weight is actually accorded it. 1/ (footnotes omitted)

Arbitrator Jones has in a nutshell crystallized what arbitrators have done. Some won't admit polygraph evidence while others do but give it varying amounts of weight. In the instant case, the evidence related to the polygraph is offered to bolster Bischoff's testimony or more accurately to bolster her statements to the police investigator. This is quite similar to the use of a prior consistent statement to the police to bolster the testimony of a witness. It becomes part of the mix of evidence of varying weight to establish the veracity of the witness. Thus, I conclude that the polygraph evidence is admissible and it will be weighed with all the other factors in the case.

Burden of Proof

The parties differ as to the appropriate burden of proof required in this matter. The Union suggests proof beyond a reasonable doubt. This burden of proof is required in criminal cases but this is not a criminal case even though the charge of theft may involve an element of criminal intent. The consequences of a criminal conviction which may include the deprivation of one's liberty or other legal consequences are not present in the instant case. The undersigned therefore concludes that the appropriate burden of proof is a preponderance of the evidence.

Merits

1/ Truth, Lie Detectors, and Other Problems In Labor Arbitration/Proceedings of the 31st Annual Meeting of the National Academy of Arbitrators, (BNA, 1979).

The issue presented here is whether the City has established by a preponderance of the evidence that the grievant stole gasoline from the City and coins from the coin operated feed machines at the Zoo. These charges are based on the reports of Shari Bischoff, the grievant's ex-wife. Obviously, the City gave credence to Bischoff's statements bolstered by the polygraph results. The undersigned concludes that in addition to demeanor, Bischoff is not a credible witness for the following reasons. It is clear that the divorce and its aftermath was acrimonious and she has a motive to see the grievant discharged, whether it be spite or to obtain access to the grievant's retirement and deferred compensation. She did not report the alleged thefts until April 1, 1994, which was after her divorce in January, 1994. She was fired for theft from Shopko where she had been employed and fired from Yellow River Speedway for theft of a bag of money. Additionally, many of the allegations she made were shown to be inaccurate or uncorroborated, such as the theft of the picnic table. The gasoline incident she observed was denied by Mr. Zschernitz. 2/ With respect to the coins, no one saw the grievant take any coins. No bank or other institution or business confirmed that Bischoff ever cashed in dimes and $250 worth of dimes would appear to be a large amount of coins. Bischoff testified that she usually cashed in $60 - $80 worth of dimes with one time the amount being $250, yet her report to the police indicated that on each occasion the amount of coins turned in was approximately $200. 3/ The only factor supporting Bischoff is the reduction in revenues in the years in question; however, other factors, such as theft of a machine, 4/ vandalism, low attendance at the Zoo due to weather and getting feed out of the machines by cranking on them without putting money in, can also explain the drop in revenue. Additionally, there could be theft by other persons because the money was not put in a secure location. Thus, the reduction alone was insufficient to make Bischoff's charge on coin stealing credible. With respect to the polygraph exam as bolstering her testimony, it must be concluded that the exam is in fact unreliable or that Bischoff actually believes what she says is true even though it isn't. For these reasons, her testimony is found incredible.

It appears that initially the City, too, did not find the charges credible. Bischoff reported them to Bill Landvatter in April, 1994, who at that time was the Parks and Recreation Director and the grievant's supervisor. He apparently did nothing until June, 1994, when it was reported to Nicole Onder, the City's Human Resources Specialist, who in turn reported it to the police. The police promptly investigated the matter, completing it by August 22, 1994, forwarding it to the District Attorney in late August or early September. The District Attorney did not prosecute. The City did not meet with the grievant until March 23, 1995, and discharged him on March 29, 1995, almost a year after the alleged theft was first reported. The City has failed to explain these delays.

2/ Exhibit B, page 2 of 11 dated July 11, 1994.

3/ Exhibit 13, page 3 of 5 dated July 1, 1994.

4/ Union Exhibit 8.

When all the evidence is reviewed, it is insufficient to establish that the grievant stole gasoline or coins from the City. No one saw the grievant put gas in his truck, other than Bischoff, whose testimony has been discredited. The grievant admitted that he would fill his pickup truck with gas on occasion at the City gas pumps but with permission of his supervisors. 5/ His supervisor backed up his statement in part by his testimony that on two occasions he gave the grievant permission to use City gas. The admission by the grievant was to the use of gas with permission which is not the same as an admission of theft of gas. It is concluded that there is insufficient evidence to support the charge of theft of gasoline. As to the coins, no one saw the grievant take the coins and Bischoff's testimony that he did is not believable. The reduction in revenues is not enough to show that there was any theft given other factors to explain the reduction. Here too, the evidence is not sufficient to prove that the grievant stole any coins. It must be concluded that the City has failed in its burden of proving that the grievant stole gasoline and coins from it. Inasmuch as the City has not proven that the grievant stole anything from the City, it is unnecessary to address the Union arguments with respect to the other elements of just cause such as the conduct of the investigation, and its fairness or the appropriate discipline.

Based on the above and foregoing, the record as a whole, and the arguments of the parties, the undersigned issues the following

AWARD

1. The City violated the collective bargaining agreement when it terminated the grievant on March 29, 1995.

2. The City is directed to immediately reinstate the grievant to his former position with no loss of seniority and to make him whole for all lost wages and benefits less any interim earnings.

3. The undersigned will retain jurisdiction for a period of thirty (30) days from the date hereof solely for the purpose of resolving any dispute with respect to the remedy herein.

Dated at Madison, Wisconsin, this 8th day of November, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

5/ Exhibit 13, page 10 of 11 dated July 11, 1994.