BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF EAU CLAIRE
(WATER DEPARTMENT)

and

EAU CLAIRE CITY EMPLOYEES, LOCAL 284,
AFSCME, AFL-CIO

Case 219
No. 52426
MA-8966

Appearances:
Mr. Ted Fisher, City Attorney, City of Eau Claire, 203 South Farwell, P.O. Box 5148, Eau Claire, Wi
Mr. Steven Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 1937

ARBITRATION AWARD

The City of Eau Claire (Water Department), hereinafter referred to as the City, and the Eau Claire City Employees, Local 284, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the suspension of an employe. Hearing on the matter was held in Eau Claire, Wisconsin on June 20, 1995. Post-hearing written arguments and reply briefs were received by the Arbitrator by August 21, 1995. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE:

During the course of the hearing the parties agreed upon the following issue:

"Did the City have just cause to discipline the grievant?"

"If not, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS:

. . .

Article 7 - PENALTIES

Section 1. The City shall not suspend, demote, or discharge any employee except for just cause. If the City suspends, demotes, or discharges an employee for just cause, the City shall notify the employee in writing and forward a copy of the notification to the Union at the same time. If the employee feels dissatisfied, he/she may file a grievance.

Section 2. If, after a proper hearing, the employee is found to be innocent of the charges, the employee shall be reinstated in his/her former job with the City paying for all lost time and the employee shall not lose any benefits that he/she would normally have if work had been continuous.

. . .

Article 12 - SAFETY

Section 1. The City shall furnish proper safety devices for all work and employees shall wear and/or use all safety equipment furnished by the City.

Section 2. The Union safety committee shall be authorized to make investigations of reported unsafe equipment and practices and to meet with proper City representatives during regular work hours with no loss in pay. Both City and Union representatives shall make sure safety is practiced at all times.

Section 3. All employees shall comply with the employer's safety rules and regulations.

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BACKGROUND:

Amongst its various governmental operations the City operates a Water Department. The City has employed Harold Fleig, hereinafter referred to as the grievant, for seventeen (17) years, the last five (5) being in the Water Department. For the last three (3) years the grievant has operated a truck, and, at the time of the grievance, he operated a 1988 automatic Astro van. On

January 4, 1995, at approximately 2:30 p.m., the grievant drove the truck to the City Shops Building. Like most days when it was cold, the grievant parked the vehicle at rear of the building, left the keys in the ignition, left the motor idling, put the truck into the park gear, exited the truck, and went into the Shop Building to do some paper work. The grievant was aware he had a 3:00 p.m. work appointment at a location five (5) minutes away from the Shop Building. Shortly after entering the Shop Building the truck was observed going over a steep bank at the rear of the Shop Building, over a pedestrian trail and into the Chippewa River. There it floated for a while and then sank. The City's Police and Fire Department were informed and City Fire Department divers found the truck in the water hooking it up to cables so that a hauling firm could pull the truck out of the water. The City's divers were sent into the river to make sure no individuals were trapped or in the sunken vehicle. No one was found in the vehicle but the gearshift of the recovered vehicle was in the drive position. Thereafter it was determined the vehicle sustained more than three thousand dollars ($3,000.00) in damages and was disabled for approximately one month. As a result of this incident the grievant was suspended by the City for two (2) days without pay.

On January 4, 1995 Police Officer L. Looby wrote the following police report details:

> Driver reports that he stopped his company vehicle SB in the municipal shops parking lot and believes it was in park. He left the engine running. He was inside the building when a witness and fellow employee observed the vehicle #1 driving over the embankment. Vehicle #1 traveled 87 feet SW bound, jumped a curb, travelled down a steep embankment and into the Chippewa River. When the vehicle was pulled out of the water it was found in normal drive (not over drive).

On January 5, 1995 Engineer, Utilities Administrator Sam Spanel wrote the following incident report:

CITY OF EAU CLAIRE
DEPARTMENT OF PUBLIC WORKS

UTILITIES DIVISION

MEMO TO: Don Norrell

FROM: Sam Spanel

DATE: January 5, 1995

SUBJECT: Vehicle 138 Incident Report

On January 4, 1995 vehicle 138 which is a mini van used in the water utility went over the bank behind the central maintenance facility and submerged in the Chippewa River. There was no one in the van when it happened and no one was injured.

At 2:36 PM Harold Fleig who is a serviceman I in the Water Utility arrived at the central maintenance facility in van 138. Harold was alone and parked behind the building. He was parked parallel to the building and also parallel to the river. Harold stepped out of the van to enter the building and left the van running. He claims that he put the vehicle in park. As Harold was entering the building another employee saw the van go over the edge of the bank. The van travelled forward and turned toward the river prior to going over the bank. The bank is about 25 feet high, very steep and riprapped with large rocks. The van sunk about 20 feet from shore.

Office employees call 911 and police and fire department staff arrived. Divers from the fire department hooked chains onto the van and a wrecker pulled the van out of the water at about 4:00 p.m.

The transmission and drive train on the van was damaged as it went over the rocks on the bank. The van did not roll over so there is minimal body damage. Damage to the engine is unknown at this time. There are over 72,000 miles on the van and it is not known if it will be practical to repair it.

On January 9, 1995 the grievant received the following suspension memo:

CITY OF EAU CLAIRE
DEPARTMENT OF PUBLIC WORKS

UTILITIES DIVISION

MEMO TO: Harold Fleig

FROM: Sam Spanel

DATE: January 9, 1995

SUBJECT: Discipline

You will be suspended for two days for leaving vehicle 138 running on January 4, 1995. Because the vehicle was running and probably left in drive it drove itself into the Chippewa River.

Thereafter the grievant filed the instant grievance. The grievance was denied at Step 1 and Step 2 of the grievance procedure and at Step 3 the City Manager submitted the following denial of the grievance to the Union:

TO: Bob Horlacher, President-Local 284

FROM: Don T. Norrell, City Manager

DATE: March 6, 1995

RE: Grievance #1995-1

I appreciate the time that you took in preparing the presentation on Grievance #1995-1. Your presentation was concise and well presented.

As you indicated in the presentation, there are a number of unanswered questions. Obviously with no eye witnesses to the incident, the reconstruction of exactly what happened and what caused it to happen becomes very difficult to determine. However, the central issue to me is that I believe the utility work unit was informed by their Supervisors on December 12th and 13th that vehicles should not be left running as they are parked outside the City Shops, and a posting was placed on the utility bulletin board so stating.

Mr. Fleig stated at our meeting of February 28th that he knew of no change in policy even though he did not attend the December 12th meeting. I also believe that an employee has a responsibility for protecting the equipment that they are given to do their jobs. Even though it is not crystal clear as to what caused the van to go into the river, I believe that had the employee shut off the vehicle as instructed, no accident would have occurred.

The incident cost the city taxpayers over $3,000 in vehicle repair costs as well as the manpower used to extract the vehicle from the

river. It is my opinion, that the discipline given to Mr. Fleig in this situation, is very reasonable and appropriate. For these reasons, I deny grievance #1995-1.

Don T. Norrell /s/
Don T. Norrell
City Manager

At the hearing in the instant matter Wastewater Collection Superintendent Michael Barnhardt testified he was informed by another supervisor on December 8, 1994 that several employes had left their engines running while at lunch at the City Shop, pointing out this was a waste of City resources and gave Barnhardt a list of vehicles he saw running unattended. The following morning Barnhardt informed the employes at their regular morning gathering of the City's policy concerning unattended automobiles and leaving keys in vehicles and posted the list. The employes were informed the vehicle's motor is not to be left running if it is unattended and keys are not to be left in unattended vehicles. The Grievant was not at this meeting. The Grievant's immediate supervisor, Water System Superintendent Thomas Holbrook, testified at the hearing that he informed the grievant of the matter and that the grievant acknowledged he had heard other employes grumbling about the matter. The grievant testified that Holbrook never discussed the matter with him but that he was aware of the December 12, 1994 meeting and that motors should not be left running for extended periods of time or during lunch. The grievant also testified he was not aware of any indication for possible discipline and that he did not see the posted list of vehicles. The grievant further testified he was unaware of any "Blue Book" (City of Eau Claire Health and Safety Manual Employe Summary) which he had received on July 10, 1991.

CITY'S POSITION:

The City contends that there was sufficient cause to impose a two (2) day suspension and that, given the circumstances, the discipline was lenient. The City asserts the Union may raise an issue that the precise cause of the accident remains undetermined. The Grievant testified he was "certain" he left the gearshift in "park," yet the vehicle cannot move if in "park" and it was recovered from the river in "drive." The City points out witness Bjornton testified without contradiction the removal effort did not change the gear placement. The City also points out the grievant informed the investigating officer he "believed" he had put it in "park" and was "quite sure" he had done so. The City contends the statements made by the grievant and given to the investigating officer should be given greater credibility.

The City asserts the exact process by which the accident happened is not the primary issue. The City stresses that had the vehicle been left with the motor off and the keys removed the accident would not of occurred. The City points out the grievant acknowledge this himself at the time of the accident, in the incident report he filled out, and, at the time of the hearing during his

testimony.

The City argues the actions of the grievant violated City policy and City ordinances. The City points out the grievant had received a copy of the City's policy and this policy specifically states: "Do not leave any vehicle unattended with the motor running or with the keys in the ignition." The City asserts the grievant had been given fair notice of the policy, that violation of the policy was a proximate cause of the accident, and, the discipline was appropriate given the severity of the results of the violation. The City stresses that employes were notified of the engine idling policy just prior to the date of the accident. The City also argues that Holbrook's testimony, that he had informed the grievant of the policy, should be given more weight than the grievant's. The City points out Holbrook's interest in the outcome of this matter is not as great as the grievant and Holbrook had received a directive from his superior to remind all employes of the policy.

The City also points out the grievant acknowledged he was aware that the policy was discussed at the December 12, 1994 meeting and that he had heard from other employes that engines should be shut off. The City concludes the grievant was aware of the policy and chose to ignore it.

The City also points out there is a City Ordinance which prohibits the leaving of a vehicle unattended while the motor is running or leaving the key in the vehicle. The City asserts ignorance of the law is no excuse for violating it.

The City also argues the question of third party involvement is without merit as there is no evidence any unknown individual had caused the matter to occur. The City points out that had a third party caused the accident the matter was facilitated by the grievant's actions of leaving the key in the vehicle and the motor running. Thus the discipline would have been nevertheless merited.

UNION'S POSITION:

The Union contends the City did not have just cause to discipline the grievant. The Union argues the City fails four key tests of the Daugherty standards:

A. *Notice*. Did the City give the employe forewarning or foreknowledge of the possible consequences of the employe's disciplinary conduct?;

B. *Investigation*. Did the City, before administering the discipline to the employe, make an effort to discover whether the employe did in fact violate or disobey a rule or order of management?;

C. *Proof*. At the investigation, did the City obtain substantial evidence of proof that the employe was guilty as charged?;

D. *Penalty*. Was the degree of discipline administered by the City in this particular case reasonably related to (a) the seriousness of the employe's proven office, and (b) the record of the employe in his service with the Employer?

The Union argues that when the grievant arrived at work on January 4, 1995 he was unaware that he could be disciplined for leaving his truck running for short periods of time when he was in the Water Department Building. The Union contends he did not know because it was common practice for employes to leave their trucks unattended and idling while parked at the facility. The Union points out even Superintendent Mike Barnhart testified that he had left his own vehicle running on occasion. The Union also points to employe Al Pfeifer's testimony that Supervisor Bjornton had left his vehicle idling for a lengthy period time on the day of the accident. The Union asserts the practice was common after the Health and Safety manual had been distributed in 1991 and was common in all departments at the City Shops Building. The Union also points out the practice was common prior to December 12, 1994 and that no employe had ever been disciplined for violating it.

The Union also argues the December 12th meeting concerned trucks running during lunch, that the directive took little time, and that there was no mention of possible discipline. One employe thought it was limited to lunch, another that it was lunch and extended periods of time, and another at no times. The Union also contends the posted notice, if it was posted, is limited to trucks running during the lunch period. The Union concludes there never was a notice that employes should not leave their trucks unattended and running at any time and that employes who did so would suffer discipline.

The Union also argues the individual notice that Holbrook testified he gave to the grievant is suspect. The Union points out that none of the employes Holbrook claimed he gave individual notice to could recollect any such meeting and one employe identified by Holbrook during the grievance processing was at the December 12, 1994 meeting. The Union concludes Holbrook's story kept changing and was not as credible as Al Dascher's and Tom Higley's, who had no recollection of receiving individual notice of the policy on leaving the trucks running.

The Union also points out that none of the employes recalled receiving the Health and Safety manual, there is no record they ever reviewed it or understood all twenty-five (25) pages of it, and were not given time at work to read it or ask questions about it. However, the Union points out that after receipt of the manual in 1991 the practice continued. The Union also points out there is no evidence the employes had ever received or were knowledgeable of City ordinances relating to the instant matter.

The Union also asserts the City did not take any actions to determine whether the grievant

had left the vehicle in drive gear. Nor did the City try to determine whether any one else could of put the vehicle into gear. The Union concludes the City did not have any evidence that the grievant left the vehicle in gear. The Union asserts the real reason the grievant received two (2) days of discipline was because the matter was reported on the front page of the local newspaper. The Union also points out that Superintendent Sam Spanel testified the discipline might possible have been reduced if the damage done had been less that one hundred dollars ($100.00). The Union concludes that had the van not gone into the river and appeared as a front page news story there would have been no discipline.

The Union also argues that you cannot exit the van when it is in gear as demonstrated at the hearing, that it only takes ten (10) to twelve (12) seconds for the truck to move from the shop area to the river bank, yet the grievant was inside the Shop for at least one and a half (1 1/2) minutes prior to it being seen moving into the river.

The Union also asserts the degree of discipline is too severe given the grievant's clean work record.

CITY'S REPLY BRIEF:

The City argues that the Daugherty guidelines are not as universally accepted as the Union precludes and that the guidelines cannot be applied with precision in all cases. The City contends the standard to be used should be whether the penalty is excessive, unreasonable or that management has abused its discretion. The City contends under this standard the discipline imposed was reasonable and justified.

The City argues even under the Daugherty standard the employe had received the Health and Safety manual, a notice was posted, and the grievant's supervisor personally informed him of the rule. The grievant acknowledged that had he followed the rule the incident would not of occurred. The City also argues the Union's reliance on the practice is without merit because the City took steps to stop the practice. The City asserts it is not estopped by its past actions from deciding to impose discipline in future cases when its rules have been violated.

The City also claims the grievant's confusion about the rule is not supported by Dascher's testimony. Dascher clearly understood the rule was not at any time. The grievant acknowledged this fact. The City concludes this is confirmation that Holbrook informed the grievant of the policy. The City argues the fact other employes may have taken different meanings does not mean Holbrook gave inaccurate directions. The City also argues there is no direct evidence the notice was not posted nor is there any evidence that Holbrook did not reiterate accurately the City's rule on engine idling.

The City does argue that the grievant's affirmation he had not received the Health and Safety manual where records demonstrate he had received it casts doubt on his credibility. The

City points out the grievant acknowledged he was aware idling rule but that he thought it only applied to lunch and extended periods of time. The City alleges the grievant never sought to have the matter verified because of fear he would find out that idling of engines was to be prevented. The City points out Article 12, Section 3 of the collective bargaining agreement requires employes to comply with the City's safety rules and the manual explicitly points out failure to comply may result in discipline. The City also asserts it did an adequate investigation because the grievant was disciplined for leaving his van unattended with the engine running. The City again points out the grievant has acknowledged that had he not violated the safety rule the accident would of been not of occurred.

The City also argues that adequate proof was submitted. Here the City asserts the grievant could of left the vehicle in drive and it could have crept along slowly after he left the vehicle. The City argues any tests afterwards are not reliable because the vehicle had been overhauled and the exact conditions do not exist. The City concludes the relevant fact is the grievant was disciplined for leaving the vehicle unattended with the engine running, not for leaving it in gear.

The City concludes the penalty was reasonable given the disregard of a safety rule resulting in thousands of dollars in damages.

REPLY BRIEF OF THE UNION:

The Union points out the following: in the accident vehicle report the wrecker driver states the removal of the vehicle could have altered the gear shift position; the grievant's testimony has remained the same, he was "quite sure" he had left the vehicle in park and he told Holbrook immediately afterwards he had left the vehicle in park; the Union asserts there was no clear policy on leaving engines running, that the City cannot rely on the manual, and that after the manual was distributed the practice continued; that Holbrook has a very real interest in the outcome of this matter for if he did not inform the grievant of the policy he is guilty of insubordination; finally, Pfeiffer testified he had observed the biker after the incident, had no reason to go out and observe anything before the incident, and, it was the City's obligation to fairly investigate the matter yet it refused the Union's request to look into third party involvement.

DISCUSSION:

The record demonstrates the grievant left his vehicle unattended, with the motor running, with the keys in the vehicle and with the vehicle unlocked. The unattended vehicle rolled into the nearby river. The Union has argued that the damage done to the vehicle must have been caused by a third party because of the grievant's recollection that he had placed the gear into the park position. The fact that a third party may have caused the vehicle to roll into the river is irrelevant to the instant matter. The grievant was disciplined for violating the City policy concerning unattended vehicles. Herein, as the City has pointed out, the grievant has acknowledged that had he followed the policy the incident would not of occurred. The grievant also acknowledged he

was aware the City had recently advised employes not to leave their vehicles with their motor running and that he was aware employes were grumbling about the matter. Thus, the question of whether or not Holbrook personally informed the grievant about the City's concern that vehicles were being left unattended is moot because the grievant was aware of the meeting and had knowledge of the subject matter of the meeting.

The record also demonstrates the City has a formal policy rule about leaving vehicles unattended in their Health and Safety Manual. The grievant had received a copy of this manual. While it is clear employes had not been following this procedure since the issuance of the manual in 1991, employes were made aware of the City's concern that it be followed in at the staff meeting in December of 1995. While the grievant was not at the staff meeting he was aware it took place and he was aware that unattended vehicles with motors idling was discussed. The Health and Safety Manual clearly points out that failure to comply with the City's safety rules may result in discipline. Thus the grievant was aware of the City's safety rule, the grievant was aware the City had recently expressed concerns that employes were not following the rule, and the grievant chose on January 4, 1995 to leave his vehicle unattended with the motor idling. The undersigned therefore concludes that the City had just cause to discipline the grievant.

The Union has asserted that a supervisor, who arrived at the scene of the incident, exited his vehicle and left the engine idling. However, that is distinguishable from the instant matter. There is no evidence the supervisor was ever out of sight of his vehicle. The grievant went in doors and had no way of observing his vehicle nor could his vehicle be observed by any other employe. The Union has also asserted that the instant discipline is too harsh and a result of the City's embarrassment because of the incident's news coverage. However, the grievant has acknowledged he was aware of the policy, was aware the City had recently stressed that it be complied with, and acknowledged at the hearing that damage to a City vehicle would not have occurred had he followed the safety rule. Given the fact the grievant was aware the City had recently stressed compliance with the safety rule the undersigned does not find the discipline too harsh. The undersigned notes here there is no evidence the City had issued lesser discipline in similar type situations, damage was caused to City property because an employe had failed to comply with a City work rule.

Based upon the above and foregoing and the testimony, evidence and arguments presented that the City had just cause to discipline the grievant. The grievance is therefore denied.

AWARD

The City had just cause to discipline the grievant.

Dated at Madison, Wisconsin, this 22nd day of January, 1996.

By Edmond J. Bielarczyk, Jr. /s/