

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LOCAL 67, AFSCME, AFL-CIO

and

CITY OF RACINE

Case 430  
No. 50905  
MA-8427

Appearances:

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Guadalupe G. Villarreal, Assistant City Attorney, City of Racine, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to hear the grievance of Michael Patmore. The undersigned was appointed and held a hearing in Racine, Wisconsin, on September 25, 1995, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by January 24, 1996.

ISSUE:

The issue to be decided is:

Did the City violate the collective bargaining agreement when it denied the Grievant, Michael Patmore, the use of sick leave on February 4, 1994, and suspended him for three days on February 7, 8, 9, 1994? If so, what is the appropriate remedy?

BACKGROUND:

The Grievant, Michael Patmore, has worked for the City since September of 1990. He is a mechanic in the Department of Public Works' garage. The grievance stems from an incident

that occurred on February 4, 1994, 1/ shortly after Patmore started his shift at 3:00 p.m.

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1/ All dates will refer to the year 1994 unless otherwise noted.

Zolton Orosz is the second shift supervisor of the City garage. Patmore is one of the truck mechanics working under his supervision. Patmore normally worked 3:00 to 11:00 p.m.

Wayne Raffelson is the day shift lead person, overseeing the garage in the day time and giving orders to other mechanics. Raffelson normally works 6:30 a.m. to 3:30 p.m. and overlaps into the second shift to explain work orders and set up work for the next morning. Orosz hands out the work orders to the second shift personnel.

During the day of February 4th, there was a service call for a garbage truck with brakes locking up. Raffelson sent a mechanic to the scene and told him to make sure there was nothing sticking out the back of the packer, because garbage and cardboard has a tendency to shove a cable with electrical wires. Raffelson told the mechanic to bring the truck in, and he made a repair order for the second shift to repair it. Raffelson wrote up the order to repair the electrical conduit on the top of the box.

At the start of the second shift on February 4th, Orosz handed out work orders, including one to Patmore to work on the garbage truck noted above, and then went across the street to a fuel site to lock it up. Patmore testified that when Orosz handed him that assignment, he said the brakes locked up on the truck and that Patmore should go talk to Raffelson because Raffelson would know the story on it. Patmore said that when he went to see Raffelson, Raffelson seemed agitated and was abrupt and said to just replace the wiring on top of the packer. Patmore wanted to know why the wiring should be replaced, but Raffelson told him to just replace it.

Patmore then brought the truck into the garage and worked on it. He found a problem with the interlock system that causes the brakes to lock up, and he repaired that wiring. He then went back to Raffelson to ask why the wiring on the top should be replaced, and if there were any other problems that he should know about. Replacing the top wiring is a time consuming job. Patmore did not know that the truck had broken down with garbage in it at that time, and he thought he had fixed the brake problem by his repair of the interlock system's wiring. He thought the wiring on the top of the box looked good. He stated that he was not refusing to do the work, but just wanted to know why he should do the work, what happened to necessitate it.

Patmore testified that he then went into Orosz's office and told him about the situation, and that Orosz told him to fix the truck the way he saw fit. But when he went back to the job and passed Raffelson's office, Raffelson was mad and yelled at him to just leave the truck and let the first shift repair it if he was refusing to do it, and that he would tell this to the garage manager, Frank Chevalier. Patmore said he told Raffelson that he was not refusing to do the work, and they argued about that. He also told Raffelson that Raffelson was not his supervisor and if he had a problem, go see Orosz. Then he thought he might as well replace the wiring since they were having an argument about it.

Raffelson recalled that Patmore came into his office and told him that there was nothing

wrong with the truck. Patmore was loud and wanted him to go up on the truck and show him if there was anything wrong with it. Patmore left Raffelson's office and when Raffelson came out, Patmore was on top of a ladder that's used to perform repairs on the top section of the truck. Raffelson testified that Patmore told him that he did not know what he was doing, that he was not a mechanic, and that he was loud and profane. Raffelson told him the electrical conduit should be replaced, and Patmore disagreed. Raffelson believed that Patmore thought that the electrical conduit had nothing to do with the brakes, that it just fed the lights, but the conduit affects both the lights and the brakes. Raffelson did not want to go up on the ladder and did not want to argue with Patmore anymore, and he went to look for Orosz. Patmore testified that Raffelson came up on the ladder and argued with him. At some point, both of them went looking for Orosz.

Joseph Pribyl is an employee who was also working in the garage on February 4th, on the second shift. Pribyl testified that he saw Patmore working up on top of the truck and Raffelson standing there screaming or yelling at him. He did not see or hear Patmore yell back at Raffelson. Pribyl only saw the incident for a few seconds, then he went back to his own work a few feet away.

When Orosz came back to the garage, someone told him that Patmore and Raffelson were fighting. He found the two of them still arguing about the truck that Patmore was supposed to work on. He hear Patmore tell Raffelson that Raffelson did not know what he was talking about. Then Orosz and Patmore started arguing. According to Orosz, Patmore used profane language and told Orosz that he had not heard the end of this. Patmore seemed really angry, putting his finger in Orosz's face. Orosz testified that he felt threatened by Patmore's remark that he had not heard the end of it. Patmore told Orosz that he was not going to fix the vehicle because there was nothing wrong with it. Raffelson told him that when the truck was at the landfill, a piece of cargo pushed the wiring harness up that caused the brakes to lock up, and Orosz told him that also, but Patmore said there was nothing wrong with the truck.

Orosz then told Patmore to punch out, and Patmore told him that he was going home sick. Orosz felt that Patmore should go home, because Raffelson was shaking and upset and Patmore was in no condition to work following this confrontation. According to Patmore, Orosz came up close to him and put his finger close to him and told him that if he did not want to fix the truck, go home. Patmore protested that he was not refusing to fix the truck, but that Orosz yelled at him and he went back to his work area. While Raffelson recalled hearing Orosz tell Patmore to punch out, Patmore does not recall that, and thought that Orosz said to fix the truck or go home.

Orosz testified that Patmore has diagnosed mechanical problems in the past and is very good at it. Another mechanic later fixed the truck by the method suggested originally by Raffelson.

Patmore stated that he was physically upset on February 4th, that he already had an upper respiratory infection, and he went to Orosz and told him he was going home sick. He wanted to

use sick time for the rest of the day, about seven hours. Patmore had made an appointment that morning -- a Friday -- to see a doctor on the following Monday. He could have made an appointment for Friday, but it would have interfered with his shift, so he made it for the following Monday before his shift started.

After Patmore left, Orosz called the garage maintenance supervisor, Frank Chevalier, who was at home, to explain the situation. Chevalier supervises both Orosz and Raffelson as well as 20 other employees. Chevalier told Orosz that he would talk with City Personnel Director James Kozina the following Monday. He told Orosz that if Patmore returned to the garage and if Orosz felt threatened, he should call the police department.

Chevalier and Kozina discussed the situation the following Monday, February 7th, and Kozina told Chevalier to call Patmore and tell him he was suspended without pay until further notice or until there was a better investigation of what had happened. Chevalier called Patmore about 1:00 p.m. on February 7th and told Patmore that he was suspended without pay until he got back to him. According to Chevalier, he never said he was suspended for one day or any specific period of time. Chevalier met with Raffelson and the second shift people that afternoon.

On February 8th, Chevalier called Patmore about 1:30 p.m. and told him that he was still suspended and that he was to call the City's employee assistance officer, William Dyess. Patmore was asked to see Dyess because there was some suspicion on the part of management that the confrontation could have been the result of a drinking or drug problem. However, there was no proof of drug or alcohol use. Dyess called Chevalier later that day and said that he had talked to Patmore, and asked Chevalier to meet again with his employees to make sure everybody had the correct facts.

Kozina said the City asked Patmore to meet with Dyess to find out if there were some extenuating circumstances to account for his conduct on February 4th. Dyess works with employees who are having problems with drugs, alcohol, behavior or medical problems and gives them information and assistance. Dyess recalled talking with Patmore, probably on February 8th while Patmore was still on suspension, and that Patmore denied having any problems with drugs or alcohol. Dyess said the two of them did not discuss anything other than potential drug and alcohol abuse.

On Wednesday, February 9th, Chevalier met again with Kozina, as well as Dyess, and Kozina decided that the discipline would be a three-day suspension. Chevalier was to call Patmore and tell him to come back to work on Thursday. He did not meet with Patmore except on the day that Patmore returned to work, when he gave him the paperwork on the suspension and offered him an opportunity to talk about it. The two of them never discussed the February 4th incident.

Patmore testified that when Chevalier called him on February 7th, he told him that he had a day's suspension for drinking. Patmore said that it was not true, and that he wanted to talk to him in his office, and that Chevalier said he had to get to personnel and he would get back in touch with him. When he talked to Chevalier the next day, Chevalier said it was now a two-day suspension. Patmore indicated that he was very upset and would have to get in touch

with his union representative because he was being prosecuted before anyone talked to him. Then Patmore testified that on Wednesday, Chevalier told him it was an automatic three-day suspension for drinking, and that he would have to talk to Dyess before coming back to work.

Patmore stated that he immediately called Dyess and went to talk to him right away and told him that he was upset that this was the only opportunity he had to talk to anybody in authority about this situation. Patmore said that his conversation with Dyess was about the people in the garage and what had happened, and that Dyess said he did not see a problem with him in regard to drugs or alcohol and he would indicate that to Kozina.

Kozina determined that the three-day suspension was warranted because of Patmore's insubordination, intimidation of supervisors and fellow employees, and his failure to perform assigned duties. Kozina took into account the City's work rules, which include a rule that warns that discipline may be taken for misconduct that is threatening, intimidating, interfering with or verbally or physically abusing others. In looking at Patmore's length of service, past record, and the nature of the offense, Kozina determined that the nature of this incident seemed serious enough in itself to warrant a three-day suspension. Patmore has no prior disciplinary matters that are similar to this, although there are a couple of minor reprimands on his record. He is described by Orosz as a good, hard worker. Kozina had no discussion with Patmore before the disciplinary decision was made, but Dyess had told him that Patmore indicated that he had no problems with drugs or alcohol. Kozina did not make a decision about the amount of time off without getting some feedback from Dyess. While the City's work rules provide for an automatic three-day suspension for the first offense on drug and alcohol use offenses, the discipline made no mention of drug or alcohol related offenses.

The disciplinary notice states:

This three (3) day suspension without pay is being issued to you for your behavior at the work place on Friday, February 4, 1994 at which time you threatened, intimidated and verbally abused supervision and your fellow employees. The City is concerned about your irrational behavior and will take the necessary steps to determine your ability and capacity to perform your duties if any future such incidents occur. The date of suspension shall be Monday, Tuesday, and Wednesday, February 7, 8 & 9, 1994.

Chevalier acknowledged that if an employee said he was going home sick, he would take that person at his word and a doctor's excuse would not be required if the illness were for less than three days. Chevalier marked Patmore's time card for February 4th as personal time, no pay, for the seven hours left on his shift. Chevalier felt that Patmore had walked out without any good reason other than the confrontation and that he might be in trouble.

THE PARTIES' POSITIONS:

The City:

The City asserts that the Grievant was obligated to carry out his assigned task by the collective bargaining agreement, which gives the employee recourse to the grievance procedure to challenge it later. The only exception is when there is a safety issue involved, which was not

the case here. The work order given to Patmore was within his job description as a mechanic, it has not been challenged as unreasonable, and it was not an incorrect analysis of the cause of the garbage truck's problem.

The City further contends that Patmore's action of refusing to perform the task amounted to insubordination of his supervisor's order. That order was both written and verbal, and the supervisor testified that he and Raffelson explained the work order to Patmore. Both the supervisor and Raffelson told Patmore what had occurred at the landfill site, and Patmore's refusal to repair the truck was clear and specific. The diagnosis made by Raffelson was accurate, because another mechanic fixed it the following day.

The Union should be estopped for challenging the appropriateness of the suspension and denial of sick pay, the City argues, given the award rendered in a case that mirrors the facts of this case. Arbitrator McCrary, in City of Racine and AFSCME, Local 67, 78 LA 627, found that the denial of sick leave and a three-day suspension was the appropriate level of discipline. He found insubordination in the act of willfully refusing to do the work and in the remarks made by the employee to his immediate supervisor. In the instant case, Patmore refused to repair the garbage truck and he also threatened the supervisor.

The City finds that Patmore's sudden illness was a pretext to claim a sick pay benefit. He never expressed any sign of being ill prior to being told to go home for his insubordinate and verbally abusive actions to his supervisor and fellow employee. The supervisor's decision to send him home got an immediate response that he was going home sick. The supervisor's decision was appropriate, given the tense situation that existed from Patmore's threatening verbal statements and physical gestures. His subsequent visit to a doctor has a certain hollow ring that is merely self serving. These facts are almost identical to those found by Arbitrator McCrary where he determined that the employee feigned illness rather than follow the directions of his supervisor. In both cases, the employee had no evidence of any illness before the incident that brought on the disciplinary action.

Therefore, the City concludes that the suspension of Patmore for insubordination and abusive behavior to his fellow employee and supervisor was for just cause. There were two acts -- refusing to do the work and verbally abusing his supervisor and fellow employee. The denial of sick pay was appropriate given Patmore's sudden request for sick time when he was being asked to go home.

#### The Union:

The Union argues that the City violated the labor contract by failing to grant Patmore seven hours of sick leave on February 4th. He had an upper respiratory infection and called his doctor on the morning of the 4th but did not schedule an appointment until the following Monday in order to not interfere with his work schedule. Patmore testified that he was physically ill on the 4th and the confrontation did not help his condition. As Chevalier testified, it was the City's policy to take a worker at his word when an employee said he was going home sick.



The Union contends that Raffelson refused to explain his diagnosis of the electrical conduit problem on the truck when Patmore asked him, and the entire matter could have been avoided had Raffelson shown Patmore what Raffelson thought the problem was. But Raffelson refused. Patmore should not be held accountable for a situation that he did not cause.

When Patmore was handed the repair order, he was never told that the truck had broken down at the dump and that garbage had lodged itself on the top wiring of the truck, which could cause a problem with the wiring. Orosz told Patmore to see Raffelson to get a better handle on what the problem was, and Patmore merely asked Raffelson for information about the mechanical break down so he could effectively repair the truck. That's when the disagreement between Patmore and Raffelson took place.

The Union states that while Raffelson testified that he felt threatened by Patmore, Pribyl saw Patmore on top of the scaffolding at the top of the truck with Raffelson screaming at Patmore, but Pribyl did not hear Patmore scream at Raffelson. Under cross examination, Raffelson defended himself for not showing Patmore the mechanical problem by claiming that he was not Patmore's supervisor.

Further, the Union notes that Patmore testified that he had been told on the 7th that he would be suspended for one day. The next day, he was told the suspension would be for two days. Then the next day, he was told he was suspended for three days which is automatic for alcohol abuse. However, Patmore was not under the influence of alcohol on the 4th and was not disciplined for that. And the City says it made the decision to suspend him for three days after he talked with Dyess, but Dyess said the decision to suspend him was made before they had a talk.

In conclusion, the Union contends that Patmore only followed the orders of supervision on the 4th. He was confused by the mechanical diagnosis of Raffelson and went to his supervisor, who suggested he go to Raffelson. When he did, Raffelson refused to give him additional information. If nothing else, this case shows that communications within the maintenance garage are nonexistent, but this break down cannot result in the suspension of Patmore. The City did not have just cause to suspend him for three working days. The Union asks that Patmore be made whole for lost wages and benefits, that his record be expunged of discipline, and that he be allowed seven hours of sick pay.

#### DISCUSSION:

The collective bargaining agreement provides a just cause standard for discipline. This case turns on both the standards that arbitrators generally use in looking at just cause, as well as credibility determinations. The parties have presented very different facts, and while it is almost impossible to tell who is telling the most correct story without corroborating evidence, the final judgment hinges on a credibility determination.

I find that Orosz and Raffelson's version more credible than Patmore's, for the following reasons. Both Orosz and Raffelson testified that Patmore told Raffelson that he did not know what

he was doing, or that he should not even be a mechanic, something to that effect. Orosz overheard that remark when he returned to the shop. Patmore denied making such a remark. However, it is fairly clear that Patmore was challenging Raffelson's diagnosis of the mechanical problems with the garbage truck. And he did it in such a way that both Orosz and Raffelson knew that he was making a challenge to Raffelson's judgment.

He also did it in a loud and disrespectful manner. Patmore tries to lay the blame on Raffelson for not telling him that the truck's brakes locked up when garbage was in the truck, because if Raffelson had told Patmore that, Patmore would have understood why he needed to fix the electrical wiring on top of the box. However, Patmore created the scene by yelling at Raffelson and then further yelling at Orosz. If he was truly concerned about getting the correct information, he could have done this in a more orderly manner that would be more appropriate in the work place.

Patmore does not recall Orosz telling him to "punch out" but both Orosz and Raffelson used that term in their testimony. Patmore testified that Orosz told him to fix the truck any way he saw fit, but Orosz made no such statement in his testimony.

Additionally, Patmore's entire version of the events of February 4th and the following days does not match with anyone else's version. Patmore differs with Chevalier about what Chevalier said regarding the increasing length of the suspension; he differs with Dyess about what was said between them. There is no evidence that the penalty imposed by the City was enhanced, except for Patmore's testimony. Patmore's testimony also differed from Dyess regarding the extent of their conversation. Thus, Patmore tells a different story than any other witness. This is a troubling matter when one is determining credibility -- one would have to be prepared to state that all other witnesses were not truthful. That is not likely to be the case here.

The collective bargaining agreement states in Article III, Section E:

Work Now - Grieve Later. In the event of a grievance, the employee shall perform his assigned work task and grieve the dispute later. In the event of a safety situation, the work shall be immediately postponed until a satisfactory solution can be determined. This grievance shall thereafter be processed within a reasonable period of time.

While the work-now-grieve-later-rule should not prevent an employee from questioning whether a particular job actually needs to be done or not, it does lend credence to the City's case that once Patmore was told what to do, he should have done it. If he had questioned Raffelson's judgment in a polite or orderly manner and was told to fix the top electrical box on the truck, he would have been obligated to perform the work even if he disagreed with it. There was no great harm in performing the work -- Patmore knew how to do it and had done it before. And while one would not want to discourage a conscientious public employee who tries not to waste time or money, that

was not the case here. Patmore was not concerned about wasting time or resources. He was throwing down the gauntlet to Raffelson.

Raffelson, while refusing to pick up that gauntlet, did not help matters when he did not tell Patmore that the truck had broken down at the dump with garbage in it. This information may have helped Patmore to accept the diagnosis to fix the top wiring. And it does appear that Patmore was missing this information, although Raffelson claims he gave it to him. Raffelson also stated that he could not show Patmore the problem because he was a second shift worker, that Raffelson was not his boss. However, Raffelson's failure to tell Patmore why the top wiring needed replacing does not excuse Patmore's statements that Raffelson didn't know what he was doing.

Therefore, the City had just cause to impose discipline on Patmore for his conduct toward Orosz, his supervisor, and Raffelson, who is a lead worker entitled to give orders regarding repairs on equipment. This arbitrator, like many others, hesitates to second guess the degree of discipline imposed once it is determined that there is just cause for discipline. It is often accepted that an arbitrator should not substitute his or her judgment for that of management unless the penalty is excessive, unreasonable, arbitrary, capricious, or management has abused its discretion.

I find the penalty of three days of suspension plus seven hours of lost pay to be excessive and unreasonable under all the circumstances. First, the City believed that Patmore came to work under the influence of drugs or alcohol, but it cannot prove that, and it should not impose a type of discipline consistent with the conduct which it cannot prove. Secondly, what appears to have happened here is nothing more than one guy blowing his top one day, and while he may have needed a cooling off period, an hour may have been more appropriate than three to four days. This length of suspension was excessively punitive and did not match the offense.

Also, the City suspended Patmore for threatening, intimidating and verbally abusing Orosz and Raffelson. I accept the fact that Patmore was both loud and profane. Profanity itself is common in this work place. Both Orosz and Raffelson were too vague about what Patmore said that threatened or intimidated them. Orosz seemed threatened only by Patmore's statement that he had not heard the end of it. Raffelson seemed threatened by Patmore's challenging Raffelson's judgment about what needed repairing on the truck. Both Orosz and Raffelson seemed reluctant to testify to any other details of what Patmore said that was threatening, intimidating and abusive to them. The question is whether a reasonable person would have been threatened and intimidated by the behavior, and without more evidence of what was said that was threatening or intimidating, such an accusation is excessive.

The City, through testimony and its brief, also believes that Patmore was insubordinate in refusing to fix the truck. Insubordination is the refusal to obey an order from proper authority and a willful disregard of express or implied directions of the employer. This is a mixed case here, because Patmore did fix the brake system in part. He was not actually refusing to work on the truck but was questioning why the work order included fixing the top wiring on the truck. Therefore, it is difficult to state that he was truly insubordinate. His misconduct really relates to

the manner in which he challenged Raffelson's work order and the manner in which he then addressed Orosz.

As to the denial of sick leave, I disagree with the City that the prior case cited in its brief is almost identical or mirrors this case. The facts are always different, the testimony is always different. I see no evidence in the prior case that the Grievant could substantiate his illness. In this case, there is evidence on the record that Patmore felt sick before coming in and called and made a doctor's appointment for the following Monday. In fact, Patmore did see a doctor that Monday, got medication and a note from the doctor. He was not required to bring an excuse back but did so voluntarily. Chevalier stated that he takes people at their word when they go home sick. The City makes a strong point that Patmore did not request sick leave before being told to punch out, but the City's denial of sick leave extends the suspension to nearly four days.

The City should restore the pay for the seven hours and deduct the time from Patmore's sick leave. The City should also rescind the three-day suspension, restore the lost wages for that suspension, and replace the disciplinary notice with a written reprimand. There is no reason that progressive discipline should not be tried first. There is nothing in Patmore's record at this time to indicate that stronger discipline would have been more appropriate. The Arbitrator even considered reducing the discipline to a verbal reprimand, but for the fact that Patmore did not accept responsibility for causing a ruckus in the first place.

#### AWARD

The grievance is sustained in part. The City had just cause to discipline the Grievant for his behavior to his supervisor and a lead worker on February 4, 1994, but the discipline of three days of suspension and seven hours of lost pay is excessive. The City is ordered to restore all the lost wages for February 4, 7, 8, and 9, 1994. It may deduct the appropriate time from sick leave for February 4, 1994. It is ordered to rescind the three-day suspension and replace it with a written reprimand in accordance with the discussion above.

Dated at Elkhorn, Wisconsin, this \_\_\_\_ day of \_\_\_\_\_, 1996.

By \_\_\_\_\_  
Karen J. Mawhinney, Arbitrator