

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LABOR ASSOCIATION OF WISCONSIN, INC.,
GENERAL EMPLOYEES ASSOCIATION LOCAL
807

and

VILLAGE OF THIENSVILLE

Case 8
No. 52332
MA-8921

Appearances:

DuRocher, Murphy, Murphy & Schroeder, S.C., Attorneys at Law, by Mr. Scott L. Schroeder, appearing for the Union.

Davis & Kuelthau, S. C., Attorneys at Law, by Mr. Roger E. Walsh, appearing for the Village.

ARBITRATION AWARD

Labor Association of Wisconsin, Inc., General Employees Association Local 807, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. The Village of Thiensville, herein the Village, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Thiensville, Wisconsin, on October 24, 1995. A transcript of the proceeding was received on November 9, 1995. The parties completed the filing of post-hearing briefs on January 23, 1996.

ISSUES:

The parties stipulated to the following issues:

Did the Village have just cause to terminate the grievant, Dennis Helms? If not, what is the appropriate remedy?

BACKGROUND:

The grievant, Dennis Helms, is a forty-two year old male who has been a life-long resident

of Thiensville. He is married with four children. In 1971, Helms lost several fingers on his right hand in a farm accident. Helms began working as a laborer for the Village's Department of Public Works in 1973, and continued to be so employed until his termination on February 28, 1995. His normal hours of work were from 7:00 a.m. to 3:30 p.m. Monday through Friday, although he often worked overtime on weekends taking care of the pump station. Since approximately 1979, Helms also worked part-time as a custodian for the local school district. Apparently, that job involved working about four hours each weekday evening. Frequently, Helms would split those hours so that he could either coach, or watch, an athletic team on which one of his children was a participant. On such occasions, Helms might not get home from the custodial job until 1:00 or 2:00 a.m. In addition, Helms has been a volunteer firefighter for the Village's Fire Department since 1982.

In 1987, Helms was suspended for five days without pay for the theft of gasoline from the Village. In that case, Helms had been observed putting gasoline from the Village pump into his personal vehicle. Helms admitted said act and also admitted that he had taken gas from the Village on three other prior occasions in 1987. On or about October 19, 1987, Helms and the Village entered into a settlement agreement, which agreement read in part as follows:

1. The Village will suspend Helms for five (5) days without pay and Helms will agree to accept this suspension without protest, appeal or other recourse.
2. Helms agrees to make restitution to the Village in the amount of \$54.00 within three (3) days of the complete execution of this Agreement.

In the summer of 1994, two of Helms' co-workers, Patrick Williams and Andy Dowling, began to suspect that Helms was stealing gasoline from the Village by filling Village gasoline cans at the gasoline pump at the public works garage, taking the full cans to the parks garage in a Village truck, and putting the full cans in his personal truck after the end of the work day. Williams and Dowling mentioned their suspicions to Bob Gehrke, the Public Works Supervisor. Gehrke appears to have raised the subject to Helms in November of 1994, and was advised that no such thing had occurred.

In late January of 1995, Williams and Dowling contacted the Thiensville Police Department concerning their suspicions that Helms was continuing to steal gasoline. On January 30, 1995, the Police Chief, Richard Preston, initiated a surveillance operation. A police officer marked the bottom of several empty Village gasoline cans with a black "X" and left those cans at the parks department garage. At about 3:00 p.m. each weekday, Preston parked a vehicle at various locations from which he could observe Helms if Helms drove to the parks department garage from the public works garage at the end of his workday. On February 2, 1995, Preston informed Police Officer Scott Nicholson, who was stationed near the parks garage, that Helms

appeared to be driving toward the parks garage. Nicholson went into the parks garage and lifted the marked six gallon gas can. Said can was full. Nicholson took three photos of the cans and left the garage. When Nicholson received another radio call from Preston to the effect that Helms was driving toward the parks garage, Nicholson went into the municipal building and went to the windows in the fire department from which he could see the doors of the parks garage. He observed Helms enter the parking area in his personal truck and back the truck up to the parks garage. Nicholson was not able to see Helms get out of his truck, but he did see the garage door being opened. Less than a minute later, he saw the garage door being closed and Helms then driving away in his truck. When Nicholson went into the parks garage, the marked six gallon gas can was gone. Preston learned that Helms had gone to a middle school to watch a basketball game in which one of Helms' children was a player. At the middle school, Preston and Nicholson located Helms' truck and observed two gas cans, including the six gallon gas can which was missing from the parks garage, in the back of the truck. Nicholson went into the school gym and told Helms to go see Emory Sacho, the Village Administrator, at the Village Hall. Helms did go to the Village Hall and met with Sacho, during which meeting Helms admitted that he had taken gas "once or a couple of times," including that day. Sacho advised Helms that he was suspended with pay while the Village investigated the situation.

On February 20, 1995, Sacho conducted a pre-termination hearing at which Helms was present, as were Helms' attorney and a Union representative. At said hearing Helms admitted to stealing gas from the Village on both January 26 and February 2, 1995, and also on two or three other occasions during the period from July 1, 1994 to January 26, 1995. Helms also took three cans of a gasoline additive (Heet) on January 26, 1995, although he later returned one of the cans. On February 28, 1995, the Village terminated Helms.

After his suspension in 1987, Helms began being treated by a psychiatrist, Dr. Dinshah D. Gagrat. Helms first met with Dr. Gagrat on March 29, 1988. Dr. Gagrat placed Helms on an antidepressant medication and continued to meet with him and, on occasion with Helms and his wife. Helms and his wife also met with a therapist for family and marriage counseling. In 1992, Helms stopped treating with Dr. Gagrat due to coverage limits of the visits by Helms' insurance and to his feeling that the meetings were no longer useful.

Helms telephoned Dr. Gagrat on February 3, 1995, and met with Dr. Gagrat on February 6, 1995. Based on that meeting, Gagrat diagnosed Helms as having a "major depressive disorder, recurrent, severe" and a "mixed personality disorder, not otherwise specified, with some features of avoidant personality." Dr. Gagrat last saw Helms on June 26, 1995, and concluded that Helms would be on antidepressants for anywhere from three to five years and that he would continue to receive psychotherapy. On June 30, 1995, Dr. Gagrat advised the parties that he felt Helms could return to work both as a public works employe and as a firefighter. Gagrat concluded that Helms had been severely biologically depressed and, therefore, mentally ill at the time he committed the theft.

On August 30, 1995, Helms was examined by Dr. Walter T. Davison, a psychiatrist, at the Village's request. Davison concluded that Helms had some personality characteristic defects and also he had mild depression, but that he was not suffering from a mental illness which would impair him from working.

POSITION OF THE UNION:

At all stages of this matter, Helms has admitted that he stole gasoline from the Village and, therefore, it is appropriate for the Village to discipline him. However, the Village did not consider his mental illness prior to terminating him.

Helms' life was in such turmoil in the winter of 1994-95, that the theft of gasoline in front of his co-workers was a cry for help. The theft was not a premeditated act. Helms simply did not know what he was doing at the time. He was operating on little or no sleep, while working 16-20 hours per day plus weekends on three jobs. He was actively involved in the activities of his children. His mother's cancer weighed heavily on his mind. His wife was recovering from knee surgery. He had financial concerns with his wife off work for the surgery and a reduction in his overtime work with the Village. He and his wife were having marital problems. His overcompensation for his hand injury fueled this "pressure cooker." He simply knew subconsciously that he would be caught stealing gasoline.

Both Dr. Davison and Dr. Gagrat considered Helms to be clinically depressed at the time of the thefts. Dr. Davison did not present the theory that Helms failed to exhibit "psychomotor retardation" which is a clinical sign of depression. The MMPI test rendered an absurd personality characteristic profile for Helms. Several witnesses, including those of the Village, agreed that said profile was not realistic.

Since he was caught stealing gas on February 2, 1995, Helms has come a long way through counseling, psychotherapy and antidepressant medication. Termination was an excessive penalty because Helms was mentally ill at the time of the thefts. The only evidence in the record shows that Helms was a good worker, who was always on time, volunteered for overtime and always performed his job well. His immediate supervisor for the Village testified that he would have no problem taking Helms back if it is shown that a mental illness was involved. Helms is a long-term employe with a good work record. The only blemishes on his record are the 1987 and 1995 incidents. The 1987 incident cannot be considered because it was more than one year prior to the 1995 incident without any intervening discipline. Helms has changed and is dealing with his problem. The Village should have dealt with him in a more compassionate manner. Helms is willing to continue treatment as a condition of his reinstatement.

The Village made a hasty decision to terminate Helms, prior to the receipt of Dr. Gagrat's findings. Because the termination was an unfair, arbitrary and discriminatory action, the arbitrator does have the authority to overturn the termination.

The Union requests the arbitrator to find that the Village lacked just cause to terminate Helms and to grant his request for reinstatement with a substantial suspension without pay and other reasonable conditions.

POSITION OF THE VILLAGE:

Helms admitted to stealing gasoline on February 2, 1995, as well as three or four other occasions. Helms was aware that he could be terminated for stealing gasoline based on the 1987 incident. No other Village employe has been caught stealing gasoline, while Helms has been caught twice. Termination is proper and reasonable for a second such offense.

Dr. Gagratt testified that Helms told him that he had stolen gasoline from the Village on only two occasions, i.e. in 1987 and in February of 1995. Dr. Gagratt noted that Helms was not depressed on March 29, 1988, and his diagnosis found that the problems Helms was experiencing were secondary to marital difficulties with his wife. Dr. Gagratt first prescribed an antidepressant for Helms on March 29, 1988. Helms did not follow Dr. Gagratt's recommendations for taking the medication and the prescription was discontinued following a visit on July 31, 1990. Helms did not see Dr. Gagratt again until March 25, 1992. Helms also saw Dr. Gagratt on March 30, April 20 and July 16, 1992. After the visit on July 16, 1992, Helms was told that in the event he felt depressed, he was to contact Dr. Gagratt for a refill of the antidepressant medication which had been prescribed for him after the previous three visits and to come in for additional psychotherapy. After the visit on July 16, 1992, Helms did not return to Dr. Gagratt for either a prescription for an antidepressant medication or for any psychotherapy until the telephone contact on February 3, 1995.

Dr. Gagratt testified that a component of Helms' depression on February 6, 1995, was due to the fact that Helms had lost his job a few days earlier. The Village submits that the facts of the case do not support Helms' claim that his thefts were a manifestation of an attempt to call attention to a depressive mental illness. He told Dr. Davison that he had stolen gasoline only once, on February 2, 1995. There would have been a financial benefit based on several incidents of theft. Further, the method of theft does not demonstrate the profile of someone who is afflicted with a severe and recurrent depressive illness and who is crying for help. The thefts covered a period of seven months. Helms did not pump gas directly into his truck, but rather, would fill up gas cans, take the cans to the park department garage, pick up the gas cans after work with his personal truck, and return the empty cans the following day.

The arbitrator should not modify the penalty imposed by the Village, since the decision to terminate Helms was not of a discriminatory or capricious nature.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 13 - DISCIPLINE POLICY

13.01 - EMPLOYEE DISCIPLINE:The Village shall have the right to establish and amend reasonable rules and regulations for the conduct of the Village's business and of its employees in accordance

with the terms of this Agreement, provided, however, that the Association shall retain the right to grieve the reasonableness and/or application of said rules. Grievances involving loss of compensation (demotion, suspension, discharge) shall be commenced at **Step 4** of the grievance procedure contained herein.

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13.03 - DISCIPLINARY ACTIONS: Discipline may take the form of oral reprimands, written warnings, suspensions, demotions or discharge from employment and will normally be progressive in nature. The following guidelines shall be follows:

- (a) Every type of disciplinary action taken against an employee shall be for just cause and administered in a fair and impartial manner.
- (b) In determining the penalty to be imposed, the Village shall consider the severity and gravity of the offense and the employee's work record, including length of service and disciplinary records.
- (c) In imposing discipline, the Village will not take into account any prior infraction which occurred more than one (1) year previously without intervening disciplinary action. After a written warning has been on file for twelve (12) months without any intervening disciplinary action, it will be removed from the employee's employment record. Disciplinary action which results in a suspension, demotion or discharge shall remain in an employee's permanent record.
- (d) Disciplinary action must be based upon just cause.
- (e) For each disciplinary action, excluding discharge, the Village will indicate the desired correctional action(s) for the employee to take.

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DISCUSSION:

There is no dispute over much of the background in this case. As a result of the 1987 incident, Helms knew that he could be disciplined for stealing gasoline. The Village conducted a fair investigation and obtained substantial evidence that Helms stole the gasoline before it confronted him. Helms then admitted stealing gasoline on three or four occasions during the period of July 1, 1994 to February 2, 1995, the date on which the Village suspended him pending its investigation into the matter.

There is no evidence of any prior occasions where the Village has discovered theft of its property by an employe, except for Helms' theft in 1987. Thus, there is no basis to show that the Village has been inconsistent in disciplining employes for theft. Neither is it disputed that theft is a serious offense, which offense should be the basis for discipline. However, the Union contends that the penalty of termination was excessive because Helms was mentally ill at the time of the thefts.

The record is clear that Helms told both Dr. Gagrat and Dr. Davison that February 2, 1995, was the only occasion on which he stole gasoline from the Village, since his suspension in 1987. Dr. Gagrat last saw Helms on June 26, 1995. During a deposition on June 30, 1995, Dr. Gagrat stated that he believed Helms was ready to return to work. Implicit in such a belief is the conclusion that Helms was sufficiently recovered so he would not again steal from the Village. Yet, during his session with Dr. Davison on August 30, 1995, Helms again was untruthful in his response to the question of how many times he had stolen gasoline. Such behavior fails to instill confidence either in Helms' assertion that he is aware of his problems and is dealing with those problems or in Dr. Gagrat's belief that Helms was ready to return to work.

The Union asserts that the thefts by Helms constituted a cry for help. It is true that for several months Dowling and Williams had suspected Helms of stealing gasoline. Said individuals saw Helms fill up Village cans at the Village gasoline pump and take those cans to the parks department garage with a Village truck. They also noticed that the same cans would be empty within a few days. However, Williams and Dowling never saw Helms put the full gasoline cans into his personal truck. If Helms really was seeking to get caught stealing gasoline, then it is difficult to understand why he did not put the gasoline cans directly into his personal truck from the Village truck, rather than returning to the parks department garage during non-work hours to put the full cans into his truck and to put the empty cans back in the garage. Although there is no evidence that Helms covered the cans, e.g., with a blanket, in an attempt to conceal their presence in the bed of his personal truck, there was a cap over the bed of his truck which afforded a degree of concealment.

While some variance exists between the findings of Dr. Gagrat and Dr. Davison as to whether part or all of Helms' depression either resulted in the theft or resulted from being caught stealing the gasoline, the undersigned does not doubt Dr. Gagrat's conclusion that Helms was suffering from a major depressive disorder on February 6, 1995. However, the undersigned is not

persuaded that, simply based on such a diagnosis Helms should be disciplined less severely than another employe, who had not been diagnosed with a major depressive disorder, would be for the similar act of stealing Village property. Neither does the undersigned believe that Helms' condition as diagnosed on February 6, 1995, excuses behavior which is illegal. There is nothing in the record to show that Helms' performance on any of his jobs had become unsatisfactory during the period beginning on July 1, 1994, and ending on February 2, 1995, which is the period during which he admitted to stealing gasoline. Neither the Fire Chief nor Helms' co-workers testified to any significant change in behavior by Helms during said period of time, which would have indicated that he was depressed. Helms' supervisor at the public works department testified that, although Helms might have appeared more tired and might have had a shorter fuse, during the weeks preceding the February 2, 1995 incident, his fuse was not shorter than the fuses of the other employes and he seemed pretty stable and normal during that time.

The Union urges the arbitrator to consider Helms' substantial length of service with the Village during which twenty-two years he has had an excellent work record with only two blemishes, i.e., the 1987 and 1995 incidents. Further, the Union asserts that the 1987 incident cannot be considered according to Section 13.03(c) of the contract. It is true that an employe's past record is often a factor in the determination of the proper penalty for an offense. In the instant case Helms has a lengthy record of service with the Village. However, if the undersigned is to consider Helms' past record, as the Union urges, then any prior disciplinary matters are relevant. Moreover, when the conduct resulting in discharge is the type of conduct for which discharge could occur even in the absence of any prior instance of similar conduct, then it is proper to review any previous instances of discipline in the employe's record when weighing the appropriateness of the discharge. In addition, the undersigned does not agree with the Union's assertion that Section 13.03(c) of the contract clearly prohibits the consideration of the 1987 incident in this matter. Rather, said provision is sufficiently ambiguous to support the Village's interpretation that any disciplinary action more severe than a written warning does remain in the employe's record and can be considered in weighing the appropriateness of a disciplinary action even after twelve months have passed since the prior action.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the Village did have just cause to terminate the grievant, Dennis Helms; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 9th day of April, 1996.

By Douglas V. Knudson /s/

Douglas V. Knudson, Arbitrator