BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 133, DISTRICT COUNCIL #48,
AFSCME, AFL-CIO

and

CITY OF OAK CREEK

Case 116
No. 53383
MA-9339

Appearances:

Mr. James E. Burnham, Staff Representative, District Council 48, AFSCME, AFL-CIO, and Podell, Ugent, Haney & Delery, S. C., Attorneys at Law, by Mr. Robert E. Haney, appearing for the Union.

Mr. Robert L. Kufrin, City Administrator, and Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Robert H. Buikema, appearing for the City.

ARBITRATION AWARD

Local 133, District Council #48, AFSCME, AFL-CIO, 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 City of Oak Creek, herein the City, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Oak Creek, Wisconsin, on February 20, 1996. There was no transcript made of the hearing. The parties completed the filing of post-hearing briefs on April 25, 1996.

ISSUES:

The parties were unable to stipulate to the issues and agreed that the arbitrator would frame the issues in his award.

The undersigned believes that the following is an accurate statement of the issues:

> Did the City violate the collective bargaining agreement when it suspended the grievant for one day for violating Sections 4.3 (A), (B), and (D) of the City of Oak Creek work rules? If so, what is the appropriate remedy?

BACKGROUND:

The grievant is an engineering technician with the City's engineering department. His duties include the inspection of various construction projects in which the City is involved.

The City received a letter dated August 8, 1995, from a contractor who was responsible for putting topsoil and grass seed in the area between the curb and the sidewalk for a street project. Said letter alleged certain behavior by the grievant which the contractor considered inappropriate. Although the letter referred to Saturday, July 29, 1995, as the date of the incident, the correct date was Friday, July 28, 1995. Dean Thompson, a construction coordinator for the City, contacted the contractor about the letter and talked to the contractor's employe who was involved in the incident on July 28, 1995. The employe said that the grievant was not satisfied with the quality and depth of the topsoil being placed on a construction site by the contractor and, while complaining to the employe about the topsoil, the grievant had picked up and thrown two handfuls of dirt. Said employe did not say that the dirt had been thrown at himself. Thompson reported his information to Michael Mucha, the City engineer.

On August 14, 1995, Mucha and Thompson met with the grievant and a Union representative, Al Gassenhuber, concerning the matter. Mucha testified that initially the grievant denied having thrown any dirt. Later in the same meeting the grievant said he might have thrown some topsoil at the ground. Still later in the same meeting, the grievant said that he might have pitched some topsoil up to the contractor's employe to show him the poor quality of the topsoil.

On September 8, 1995, the City issued a letter of suspension to the grievant. The grievant was suspended for one day without pay for violating Sections 4.3 (A), (B) and (D) of the contract. The grievant filed a grievance alleging that he was improperly disciplined. Said grievance is the basis for the instant proceeding.

On May 24, 1994, the grievant had received an oral warning for a conversation he had with the Street Department Superintendent over the installation of certain driveway culverts by Street Department employes.

On July 24, 1995, Mucha and Thompson had met with the grievant to discuss an incident where the grievant dismantled some forms set up by a contractor for the purpose of installing a concrete driveway approach after the contractor refused to adjust the forms as the grievant requested. The grievant was told to contact his supervisor in such situations where a contractor failed to comply with his orders, rather than taking any action on his own initiative.

POSITION OF THE UNION:

The City's notice of suspension to the grievant did not refer to Sections 4.4, 4.5, 4.31 or 4.34 of the work rules. The contract prohibits the raising in arbitration any issues or arguments not raised in the prior steps of the grievance procedure. Therefore, the City must show that

Sections 4.3 (A), (B) and (D) of the work rules were violated.

The City failed to introduce any admissible evidence to show that any violation took place. None of the witnesses, who testified at the arbitration hearing, witnessed the acts for which the grievant was disciplined. Rather, said witnesses related what they had been told. Thus, their testimony was hearsay. In fact, with the exception of the testimony regarding what was said by the employe, all evidence regarding the incident is hearsay. The hearsay testimony properly was admitted to explain why the City took disciplinary action against the grievant, but cannot be used to establish that the grievant was guilty of any wrongdoing. The City failed to establish that there was just cause for the discipline. The employe should be made whole for any lost wages and all records of the disciplinary action should be removed from his work record.

POSITION OF THE CITY:

After receiving the letter complaining of the grievant's conduct, the City conducted a fair and impartial investigation. In the course of the investigation, the grievant was interviewed and admitted to the conduct alleged in the letter. The City also reviewed the grievant's recent disciplinary record before imposing the one day suspension. The grievant had been given an oral warning only four days before the most recent incident for similar conduct. He also had received an oral warning in 1994 for inappropriate conduct. The grievant's actions on July 29, 1995, violated Section 4.3 of the contract. That conduct also violated Section 4.34 of the contract. Although that specific section was not cited in the disciplinary notice given to the grievant, the alleged misconduct was specifically enumerated. Even if the City failed to cite Section 4.34, the grievant was fully aware of the charges against him and he was given an opportunity to respond. Thus, the grievant's due process rights were not violated. The City had just cause to discipline the grievant and the grievance should be dismissed.

RELEVANT CONTRACTUAL PROVISIONS AND WORK RULES:

> **Article 3 Management-Employee Rights**
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> The City retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, and regulations. Included in this responsibility, but not limited thereto, is the right to:
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> . . .
>
> D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
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> . . .

F. To establish reasonable work rules . . .

. . .

Article 9 Discipline and Discharge

A. Procedure: Any employee may be disciplined, suspended, demoted or dismissed by the employer for just cause. Any employee who is suspended, demoted or dismissed shall be given a written notice of the reasons for such action. . . .

. . .

Article 4 - Work Rules

Section 4.3 On/Off Duty Conduct

Conduct that is otherwise legal shall not be covered by this section. The circumstances under which an employee may be disciplined for on or off duty conduct may include the following:

A. conduct that is unbecoming;

B. adversely affects the morale or efficiency of the Department;

. . .

D. that destroys public respect for the employee and/or the Department and/or destroys confidence in the operation or the municipal service;

. . .

DISCUSSION:

The Union argues that much, if not all, of the testimony and other evidence presented at the hearing constituted hearsay evidence and that such hearsay evidence cannot be used to establish that the grievant was guilty of any work infraction for which discipline was imposed. In its brief the Union stated the following: "The grievants objected to the hearsay at the time it was offered as

testimony, and the arbitrator allowed the testimony to be heard for what it was worth, other than for allowing it as evidence to prove the truth of the allegations made against the employee." Such an interpretation would be a misunderstanding of what the undersigned ruled. The arbitrator allowed Mucha to testify to the statements made by the grievance, but said that Mucha could not interpret those statements. However, the arbitrator did not either agree, or intend to imply, that Mucha's testimony could not constitute evidence proving the allegations concerning the basis for the grievant's discipline. The weight to be given to hearsay evidence depends on the other evidence which is presented. Hearsay evidence may not be the best form of evidence. However, if hearsay evidence is uncontradicted, it is an acceptable form of evidence and can be the basis for a decision. Labor arbitrators are not constrained by the same strict rules of evidence that are followed by the courts and they seldom reject any evidence that is relevant to a material issue in the case. 1/ The informality and speed of the arbitration process would suffer if the introduction of hearsay evidence were limited as tightly as it is in a court. 2/

Mucha's testimony concerning the statements made in his presence by the grievant at their meeting on August 14, 1995, included a statement in which the grievant admitted that he did pitch some topsoil up toward the contractor's employe, who was sitting on a machine, so that the employe could see the inferior quality of the topsoil. The undersigned is persuaded that Mucha's testimony concerning the statements made to him by the grievant is a sufficient basis to demonstrate that the grievant acted inappropriately when he threw dirt toward the contractor's employe. The Union had adequate opportunity to cross-examine Mucha and to present other witnesses, including the grievant. The Union chose not to present testimony by the grievant or other witnesses. Since there is no evidence to contradict Mucha's testimony concerning the grievant's conduct, it is concluded that the grievant did throw dirt toward the contractor's employe on July 28, 1995.

The undersigned finds that the grievant's act of throwing dirt toward another person, even if it was for his asserted intent of showing that person the inferior quality of the dirt, was unbecoming conduct under Section 4.3 (A) of the work rules. The grievant should have used more appropriate methods of expressing his concern with the quality and quantity of the topsoil being delivered by the contractor. The City had just cause to discipline the grievant for his behavior. The grievant had received an oral reprimand for inappropriate behavior in May of 1994, and on July 24, 1995, he had been counseled by Mucha about his behavior at another

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1/ Owen Fairweather, Practice and Procedure in Labor Arbitration (Washington: Bureau of National Affairs, 1983), pp. 272-273.

2/ Ibid.

construction site. Accordingly, it was reasonable for the City to administer a more severe form of discipline for the grievant's behavior on July 28, 1995.

Based on the foregoing, the undersigned enters the following

AWARD

That the City did have just cause to suspend the grievant, Leo Hagopian, for one day without pay; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 18th day of July, 1996.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator

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