BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A.F. of L. - C.I.O., LOCAL UNION #2304	Case 69 No. 54043 A-5476
and	
MADISON GAS AND ELECTRIC COMPANY	

Appearances:

Mr. Kurt C. Kobelt, Kelly and Haus, Attorneys at Law, 148 East Wilson Street, Madison, Wisconsin 53703-3423, appearing on behalf of the Union.

Ms. Kristine A. Euclide, Stafford, Rosenbaum, Rieser & Hansen, Attorneys at Law, 3 South Pinckney Street, Suite 1000, P. O. Box 1784, Madison, Wisconsin 53701-1784, appearing on behalf of the Company.

ARBITRATION AWARD

Pursuant to a request by International Brotherhood of Electrical Workers, A.F. of L.- C.I.O., Local Union #2304, herein the Union, and the subsequent concurrence by Madison Gas and Electric Company, herein the Company, the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on August 26, August 27 and September 13, 1996, at Madison, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on November 4, 1996.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties were unable to stipulate to the issues. The Union frames the issues as follows:

> Was the grievant, Randy Paul, terminated for just cause? If not, what is the appropriate remedy?

The Company frames the issues in the following manner:

> Did Madison Gas and Electric Company violate the collective bargaining agreement when it terminated Randy Paul's employment effective August 31, 1995?
>
> If so, what is the appropriate remedy?

Based on the entire record, the Arbitrator adopts the Company's framing of the issues.

DISCUSSION:

At issue here is whether the Company violated the agreement when it terminated Randy Paul's employment effective August 31, 1995, for the following reasons:

1. Without authority, you used your issued cellular phone for your business and personnel (sic) phone calls.

2. You did not pay for these phone calls.

3. These excessive calls took place on Company time.

4. Without authority, you used a Company vehicle to visit relatives and to visit your various properties on Company time.

5. You falsified your daily time reports.

Standard

A threshold issue requires a determination of the appropriate standard by which to judge Paul's discharge. The Union argues that the Company is subject to a just cause standard while the Company maintains that the agreement gives it broad discretion to terminate employes provided it does not act arbitrarily or capriciously.

Article I, Section 4, paragraph A, vests the right to discharge "exclusively in the Employer," but makes the right subject to the grievance procedure. The Company contends that

because the agreement does not expressly limit its discharge authority to specific reasons, such as "just cause" or "cause," the sole limit on its authority to terminate an employes is that said decision must not be arbitrary or capricious. However, Article I, Section 3, paragraph A, states that for the first nine months of employment the Employer has the right to discharge "notwithstanding any other provisions of this Agreement." It follows then that an employe who has completed the nine-month period cannot be discharged except in conformance with the rest of the agreement. The Arbitrator points out that Article I, Section 4, paragraph F, and Article III, Section 1, paragraph A, subparagraph 2(g) both refer to dismissal for cause. Neither governs discharge, but, like Arbitrator Richard B. McLaughlin in Madison Gas and Electric Company, Case 64, No. 49206, A-5067 (2/94), the Arbitrator finds it unpersuasive to conclude, as suggested by the Company's arguments, that an employe makes a lesser claim to continued employment than to accrued sick leave or to return from a leave. In addition, as pointed out by the Union, Article IV, Section 2, paragraph A, allows employes who have been "unjustly dealt with" to file grievances. Therefore, as Arbitrator McLaughlin did in Madison Gas and Electric Company, supra, the Arbitrator finds that the Union's claim for a cause standard herein is well rooted in the agreement.

Likewise, the Arbitrator rejects the Company's attempt to distinguish "cause" from "just cause." As noted above, Article IV, Section 2 refers to employes who have been "unjustly dealt with" in the context of their right to file grievances. The Arbitrator agrees with the Union's position that this language supports an equation of "cause" with "just cause." In addition, the Arbitrator notes that many arbitrators find no significant difference between the terms "cause" and "just cause." 1/ Finally, the Arbitrator rejects the Company's reliance on Leavens v. Chief Donald Bloedorn and City of Wauwatosa, Decision Nos. 19310-B, 19311-B and 19312-B at 10 (Crowley, 1982) which construed the phrase "for cause" narrowly to mean arbitrary and capricious. Unlike the instant dispute, a clear reading of the contract in the aforesaid complaint case supported a conclusion that the parties did not agree to a just cause standard for the termination of probationary employes. In addition, strong bargaining history in said case supported narrowly interpreting "for cause" as an arbitrary and capricious standard.

Finally, the Arbitrator agrees with the accuracy of the Company's statement:

> Moreover, even under the 'just cause' provision read into the agreement, Arbitrator McLaughlin concluded that because 'cause' actually did not appear in the agreement in relation to discharge, MGE was entitled to 'claim (a) somewhat broader discretion than if the contract did so.'

1/ Elkouri and Elkouri, How Arbitration Works, Fourth Edition, pp. 652-53 (1985).

However, the Arbitrator does not agree, as argued by the Company, that this is consistent with the "arbitrary and capricious" standard. To the contrary, Arbitrator McLaughlin reasoned: "Viewed with other contract provisions, however, that discretion is a more technical point than the Employer asserts." 2/ (Emphasis added) And, as noted above, when looking at the contract as a whole, Arbitrator McLaughlin, like the undersigned, rejected the arbitrary and capricious standard in favor of a broader cause standard.

Thus, while it is true, as pointed out by the Company, that arbitrators in a number of cases have refused to superimpose a "just cause" requirement onto an agreement that, by its terms, contains no such requirement, based on the specific facts of this case, and the discussion noted above, the Arbitrator finds it reasonable to conclude that the agreement provides for a "just cause" standard by which to judge Paul's discharge. A question remains as to the exact nature of the "just cause" standard to be applied herein.

In the absence of an agreement by the parties as to the use of the Daugherty 3/ or any other just cause standards, the Arbitrator will apply his own test.

This Arbitrator believes there are two basic and fundamental questions in any case involving just cause. One is whether the employe is guilty of the actions complained of, which the Company herein has the duty of so proving. If the answer to the first question is affirmative, the second basic question is whether the punishment is contractually appropriate, given the offense.

Burden

The parties are in agreement that the Company has the burden of proof. However, the Union argues that all of the evidence must be evaluated by the highest standard of proof available "beyond a reasonable doubt" because "the claims made against Paul involve allegations of theft and other issues of moral turpitude which could stigmatize Paul and impact his future employment opportunities." The Company, on the other hand, argues that either a "preponderance" of the evidence or a "clear and convincing evidence" standard, not the higher standard of proof cited by the Union, must be used to evaluate the evidence.

The Arbitrator is aware that arbitrators differ as to the appropriate standard to be applied.

2/ Madison Gas and Electric Company, Case 64, No. 49206, A-5067 at 23 (2/94).

3/ This is an analytical framework devised by the late Carroll R. Daugherty, a Professor of Labor Economics and Labor Relations at Northwestern University and well-established arbitrator. It was his attempt at defining "just cause". His approach has its critics and its shortcomings.

Some, as pointed out above by the Company, have concluded that a "preponderance of the evidence" or "clear and convincing" standard is sufficient, while others, as pointed out by the Union in its brief, have adopted the more stringent "beyond a reasonable doubt" standard. After reviewing the authorities, including those cited by both parties, the Arbitrator agrees with the Company that proof beyond a reasonable doubt need not be shown. Although some arbitrators in some discharge cases apply a "beyond a reasonable doubt" standard, most do not. See, Kansas City Area Transport Authority, 82 LA 409 (Maniscalco, 1984). Nevertheless, "the majority of arbitrators do require a higher burden of proof than preponderance of the evidence standard in cases of a kind recognized and penalized by the criminal law." Indiana Bell Telephone, 93 LA 980, 987 (Goldstein, 1989), citing, Caterpillar Tractor Co., 78-2 ARB Par. 317 (Petrie, 1978), Dockside Machine & Boilerworkers Inc., 55 LA 1221 (H. Block, 1970) and Kroger Co., 25 LA 906 (1955). Where, as here, the alleged misconduct of Paul is criminal in nature and carries the stigma of strong social disapproval as well as being regard as morally reprehensible, the Arbitrator finds that the Company must prove that Paul committed the charged offenses by "clear and convincing" evidence.

Merits

Applying the above standard to the facts of the instant dispute, the Arbitrator must first decide whether Paul is guilty of the conduct complained of.

The Company fired Paul for his improper use of the cellular phone. In particular, as noted above, the Company alleges that Paul, without authority, used his issued cellular phone for business and personal calls, that he did not pay for these phone calls and that they were excessive and took place on Company time.

The record is clear that Paul made more telephone calls for non-MGE business and personal reasons during the time in question than any other bargaining unit employe.

The Union tries to minimize Paul's misconduct by asserting that he "only" spent an average of approximately 20 minutes per month pursuing his real estate business on Company time. However, as pointed out by the Company, the "20 minutes" the Union refers to is based only on a calculation of time spent on outgoing calls. Paul's phone bills also showed numerous, lengthy incoming calls. Although the phone bills do not identify the source of incoming calls, many of the calls were well over the expected two to three minutes that the typical Company business-related call would have taken. Paul has not claimed that these calls were Company-related at any time material herein. In addition, Paul admitted that his real estate attorney, real estate agent and insurance company representative had his cell phone number and that this accounted for some of the lengthy incoming calls. Based on same, the Arbitrator finds it reasonable to conclude that Paul spent significantly more time pursuing his own business interests than the Union is willing to admit to. Therefore, the Arbitrator rejects this effort by the Union to

explain away Paul's behavior.

The Union also tries to minimize Paul's misconduct by asserting that the Company never attempted to impose any objective criteria for employes to follow in limiting their phone use. For example, according to the Union, employes were never told to "punch out" while making personal calls on the phone. The Union adds:

> No employee was ever told to limit calls to 'X' minutes per week. No employee was ever told that it was permissible to make calls for some purposes but not others.

However, it is undisputed that the Company bought the cellular phones for work-related use. The Company pays for the cost of calls and all other costs related to the use of the cellular phones. The Company has clearly informed its employes that they must pay the cost of non-Company related calls on the cellular phone. The record is clear that Paul did not reimburse the Company for his personal use of the Company's cellular phone.

It is true, as pointed out by the Union, that the Company did not prohibit the use of the cellular phones for personal calls. However, Company witnesses testified, unrebutted by the Union, that employes were told that personal calls should be limited to emergency situations, or, for example, the occasional need to discuss scheduling with a spouse, and even then such calls should be kept to a minimum. Company witnesses also testified, unrebutted by the Union, that although the Company had no hard and fast rule as to how many personal calls were permissible, employes were informed to use their common sense and not to allow their personal calls to in any way interfere with their work. Based on all of the foregoing, the Arbitrator rejects this effort of the Union to minimize Paul's improper behavior as well.

The Union further suggests that Paul's high number of phone calls can be excused because they were related to his personal problems. However, notwithstanding the fact that Paul may have made some phone calls for very good reasons, the number of his phone calls is still excessive. In addition, Paul did not expound on the nature of his marital problems at any time material herein. He did not ask for time off to deal with said problems under the Wisconsin's Family and Medical Leave Act, or ask the Company for any formal assistance in addressing same. Furthermore, there were other options available to Paul to deal with his personal problems that did not involve making a large number of personal calls on Company time. Finally, contrary to the Union's assertion, the Company did not rebuff Paul's only attempt to bring his personal problems to the attention of the Company. To the contrary, the Company's representative told Paul that he hoped things worked out. Therefore, based on the foregoing, the Arbitrator also rejects this claim of the Union.

Finally, the Union argues that Paul and another employe, Robert Bartle, committed essentially the same offense with their cellular phone. However, it is clear that Paul conducted

personal and real estate business on his cellular phone. There is no such evidence that Bartle placed and/or received as many personal/business calls while working for the Company. Second, unlike Paul, Bartle paid for some of his calls during the time in question. While according to the Union "it is clear that these payments were estimates and amount to a token of what Bartle really owed for his calls to Paul," the Company had no persuasive evidence of same at any time material herein. Third, Paul's lengthy incoming and outgoing calls far exceeded those of other servicemen, including Bartle. The Arbitrator rejects for these reasons any comparisons between Paul and Bartle.

Based on all of the above, the Arbitrator finds that the Company has proven its allegations with respect to Paul's improper use of the cellular phone. A question remains with respect to the two remaining allegations.

The record is undisputed that Paul used his Company vehicle to visit relatives on Company time. In this regard, the Arbitrator notes that Paul admitted going to Tom's Upholstery Shop and to the airport during work hours to talk with his mother-in-law and uncle, respectively, about his divorce problems. The Union argues that this was proper because Paul was entitled to two fifteen minute breaks each day. However, the Union admits that Paul exceeded his 30 minutes of breaks on August 23 by 15 minutes. In addition, the daily time reports Paul filled out indicated that he was performing Company work at the same time he was visiting relatives at Tom's Upholstery or at the airport. The Union argues that the Company cannot point to any policy that Paul violated by using his Company vehicle during these stops. However, Robert Domek testified, unrefuted by the Union, that employes were told not to leave their service area and/or not to use their Company vehicle to conduct personal business. Based on the foregoing, the Arbitrator finds that the Company has proven that Paul improperly used his Company vehicle to visit relatives on Company time.

Likewise, the Arbitrator finds that the Company has proven that Paul visited his various properties on Company time. In this regard the Arbitrator notes that Paul admitted in his discharge meeting on August 31, 1996, that he visited his Hooker and Butler Street properties on Company time. There was no official Company reason for him to do so. Paul also admitted at said meeting that he had done repair work at his rental property during his lunch break. The Arbitrator agrees with the Company's observation that it was highly unlikely that Paul could have traveled to and from his rental properties while at the same time performing his repairs within the 30 minute lunch break he was allowed. Paul further admitted that he showed his rental properties during his lunch breaks. Again, it is not only unlikely that Paul was unable to do this within the 30 minute lunch break he was allowed, but it was improper to use his Company vehicle to go to his rental properties during the work day whether on his lunch break or not.

In addition, investigators from an outside investigation firm, Attoe and Watson, while conducting surveillance of Paul, observed him stopping in front of one of his properties on North Butler Street for a short while, then driving his Company truck a short distance down the

street where he appeared to be looking towards his North Butler Street property as if expecting to meet someone there. Paul's work itinerary did not call for any stops in the Johnson/Butler Street area at the time. Roger Attoe's investigators also reported other instances where Paul appeared to be conducting personal business on Company time. Contrary to the Union's assertions, the Arbitrator can find no persuasive basis in the record to attack the credibility of Attoe's report.

The last question before the Arbitrator is whether Paul falsified his daily time reports. This is a closer call. It is true, as pointed out by the Union, that the Company had a fairly "lackadaisical" practice of record keeping during the time in question. It is also true that the Company failed to put employes on notice regarding the disciplinary consequences of poor record keeping prior to Paul's termination. However, even by the Union's own admission "Paul was an admittedly sloppy recordkeeper." Furthermore, during Paul's April, 1995 performance appraisal, his poor record keeping practices were considered the only "dark spot" on his otherwise good performance. Thus, Paul was put on notice that he needed to improve his record keeping. In addition, Doug Bufton testified, unrebutted by the Union, that the grievant's record keeping was the worst that he had seen in over 30 years with the Company. Likewise, Jack McGuire testified persuasively that many of these paper errors seemed "deliberate." Finally, while it is true as pointed out by the Union, that other employes made errors on their paperwork too, the document offered by the Union showing that errors had been made on time sheets involved time sheets from September, 1995, following Paul's termination. The Company offered testimony from Bufton, unrebutted by the Union, that most of those errors were computer generated. Finally, the Union did not establish, unlike the Company herein, that any other employe error was anything other than an honest error.

The Union argues, in particular, there is no basis in the record for the Company's claim that discrepancies in the time records indicate that Paul falsified his time records on various days in June and August to conceal his conduct of personal business. The Union adds:

> Paul testified regarding each of the repairs performed in June in detail and explained the sources of the discrepancies cited in Co. Exh. 14.[12] It will not serve any purpose to repeat these detailed responses to the voluminous claims in Co. Exh. 14 here. Paul's testimony was forthright, detailed and credible. (footnote omitted)

The Arbitrator does not agree. It is true that Paul explained many of the discrepancies cited in the Company's exhibit. However, Paul's explanation often was the job was not done and, therefore, pursuant to Company policy, the paperwork was not completed. This explanation wears thin when repeated over and over again. In other instances, Paul either did not have an explanation or simply acknowledged that a "mistake" had been made. Again, these explanations do not hold up in face of the "voluminous claims" relied upon by the Company in support of its allegation that

Paul falsified his daily time reports. Finally, the record indicates that Paul was involved in numerous telephone calls for non-Company business and personal reasons at times when he was supposed to be working. Paul's explanations that his numerous visits (and calls) were done on his "break time," or that he could "merge his morning and afternoon breaks into one 25 minute break, or that they were always done to and from a job or just before, or after a job was completed just doesn't add up especially in light of numerous discrepancies in his paperwork and the huge volume of calls on Company time."

The Union cites numerous arbitration awards for the proposition that the Company did not have just cause to discharge Paul for the reasons discussed above. However, said cases are

distinguishable from the instant dispute. For example, the Union cites Carbide Corp., 100 LA 763, 765 (Felice, 1993) for the proposition that "any discipline based upon an after-the-fact subjective judgement by supervisors that the use of the phone by an employee is 'excessive' is inherently suspect." Assuming arguendo that said case stands for the proposition it is cited for, the Union's argument still must fail. In this regard, the Arbitrator notes the record is clear that the Company communicated to its employes that they were trusted to use their good judgment in using the Company phone for personal reasons, and that said personal use was to be limited. Paul's personal use of the Company phone was "excessive" by any common sense definition of the term. In addition, unlike Carbide Corp., the Company herein has proven that Paul misused his Company phone and falsified daily time reports. The Company also warned Paul about his sloppy record keeping and conducted a fair investigation of the complaints against him.

The Union also relies on Alameda-Contra Costa Transit Dist., 76 LA 770 (Koven, 1981), in support of its position. In that case, the employer was aware that the grievant was registered as a longshoreman and had an unsatisfactory attendance record. Based upon these facts alone, it concluded that the grievant was working as a longshoreman when he was absent from work and discharged him for violation of a rule (Number 12) against working for outside businesses that interfered with the performance of job duties. The arbitrator found that such speculation was insufficient to justify the discharge. However, in the instant case, the Company did not terminate Paul on the basis of "assumptions" alone. In this regard, the Arbitrator points out, as noted by the Company, the following criteria supporting discharge:

> Paul admitted that he made numerous personal telephone calls, including the 661 minutes during the first five months of 1995 he spent on the phone with Robert Bartle.
>
> Paul admitted that he conducted non-MGE related business on the phone during the work day when he called his real estate attorney and agent and sometimes made appointments with rental tenants.
>
> Paul's lengthy incoming and outgoing calls far exceeded those of other servicemen.
>
> Paul *never* paid for any non-MGE business related cellular phone calls.
>
> Paul admitted that he gave his MGE cellular phone number to his real estate attorney and agent, and his mother-in-law.
>
> Paul admitted that for at least 70 minutes on two of the four randomly selected days that he was followed, he was not working

for MGE, but was visiting his mother-in-law and uncle. The Union admitted that at least some of this time was when Paul was supposed to be working.

Paul admitted that he had done repair work at his rental property during his lunch break.

Paul was not supposed to leave his work area during his lunch break.

Paul admitted that he went to his Hooker and Butler Street properties on Company time.

Paul used MGE's vehicle without authorization to visit his relatives and to go to his rental properties during the work day (whether on his lunch break or not).

Paul many times indicated on his field reports and/or time sheets that he was on service calls when he was in fact visiting relatives or on the phone for non-MGE related reasons.

The Company had no reason to believe that the four days on which Attoe conducted his surveillance of Paul were not representative of how Paul typically spent his work day.

The loss Paul's conduct caused to the Company is two fold. Not only is the Company's equipment being used for an impermissible purpose and at a cost to the Company, but the Company is also paying Paul for time he is not actually working.

The Union further argues that Paul was denied due process because he was not given the opportunity to respond to the allegations made against him early in the investigation. However, contrary to the Union's assertions, the Arbitrator finds nothing materially wrong in either the Company's lengthy and extensive investigation into Paul's wrongdoing or its decision to hire a private investigator. Nor is there any persuasive evidence that the Company's representative had made up his mind to discharge Paul prior to the August 31 grievance meeting. To the contrary, the evidence supports a finding that Domek decided to terminate Paul after the August 31 meeting in which Paul confirmed much of what the documentary and other evidence suggested regarding his misconduct. Finally, the record indicates Paul was given an opportunity to tell his side of the story at said meeting. Paul was less than honest in his explanation. In addition, the Arbitrator cannot fault the Company for Paul's failure to bring up his deteriorating relationship with his wife

as an explanation for his behavior.

Finally, there is nothing in Paul's employment history that would mitigate the penalty imposed herein. Contrary to the Union's assertion, the record does not contain any persuasive evidence that Paul was treated differently than other employes similarly situated. Nor does Paul's employment history mitigate the penalty imposed herein.

In view of the foregoing, the Arbitrator concludes that the answer to the issue as framed by the undersigned is NO, the Company did not violate the collective bargaining agreement when it terminated Randy Paul's employment effective August 31, 1995.

Based on all of the above, and the record as a whole, it is my

AWARD

That the grievance of Randy Paul is hereby denied and this matter is dismissed.

Dated at Madison, Wisconsin, this 24th day of January, 1997.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator