

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MERRILL CITY EMPLOYEES
LOCAL 332, AFSCME, AFL-CIO

and

CITY OF MERRILL

Case 55
No. 54009
MA-9515

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
on behalf of Merrill City Employees Local 332, AFSCME, AFL-CIO.

Mr. James G. Godlewski, City Attorney, on behalf of the City of Merrill.

ARBITRATION AWARD

Merrill City Employees Local 332, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Merrill, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on June 12, 1996 in Merrill, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by August 28, 1996. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there are no procedural issues and to the following statements of the substantive issues:

- 1) Did the Employer violate the Collective Bargaining Agreement when it suspended the Grievant on November 2, 1995 for three (3) days for the incident of alleged fighting on the job? If so, what is the appropriate remedy?

- 2) Did the Employer violate the Collective Bargaining Agreement when it suspended the Grievant on November 2, 1995 for an incident involving alleged speeding and unsafe driving? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited, in relevant part:

ARTICLE 24 - MANAGEMENT RIGHTS

A) The City possesses the sole right to operate City Government and all management rights repose in it, subject only to the provisions of this Contract, which restricts those rights. These rights include, but are not limited to the following:

...

2) To establish reasonable work rules, regulations and schedules of work;

...

4) To suspend, demote, and take other disciplinary action against employees for just cause;

...

ARTICLE 25 - DISCIPLINE

A) The disciplinary procedure is intended as a legitimate management device to inform employees of work habits and conduct that are inconsistent with the aims of the Employer's public function and to, thereby, correct those deficiencies.

B) Any employee may be disciplined, suspended or terminated for just cause. The sequence of disciplinary action shall be oral reprimands, written reprimands, suspensions, discharge.

C) The sequence shall not apply in cases where there is cause for immediate suspension or discharge if merited by employee misconduct.

D) Discipline is to be administered in a manner, when circumstances permit, that makes it as confidential as possible and in observance of the employee's rights, and allow the employee the right to have a Union Steward at any disciplinary meetings.

E) The City agrees to give the employee and the Union written notice within five (5) working days of when the action was taken.

BACKGROUND

The Grievant, Phil Borchardt, has been employed in the City's Street Department for the past five years, and for the past one and one-half years has been employed as a Recycle Truck Driver in the Department. Another employe, Lloyd Bagley, has also been employed in the Department for the past five years and at the time in question, was employed as a Recycle Picker in the Department and worked with the Grievant on the recycle truck.

The Grievant had previously been a garbage truck driver for the City. When the City eliminated one of the garbage trucks, the affected drivers and pickers were given the choice by seniority of whether to be on a garbage truck or on a recycle truck and the Grievant selected the recycle truck. The Grievant and Bagley had worked together on the recycling truck for approximately a year and a half and had a history of coming to their supervisor, Street Commissioner Sturm, to complain about one another.

On October 31, 1995, at approximately 9:30 a.m., Borchardt and Bagley were working in the City's warehouse on recyclables. Another employe, Rick Voigt, was also working in the warehouse that morning and was approximately 25 feet from the work area where Borchardt and Bagley were working. There is a dispute as to what happened next. At the time, Borchardt was operating a tow motor and Bagley had got into the recycle truck and pulled it ahead. There is some dispute as to whether the truck was already loaded with the recycle boxes or whether Borchardt was still attempting to load an empty box onto the back of the truck. There is also a dispute as to what exactly Borchardt said and did to Bagley and vice-versa. The following are the respective statements given to the police investigator on November 2nd by Bagley, Borchardt and Voigt as to what happened on October 31:

MERRILL POLICE DEPARTMENT

STATEMENT

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11-02-

STATEMENT OF: Lloyd NMI Bagley

On October 31st 1995 at approximately 9:30 am I was working with Phil Borchardt in the east warehouse on recyclables for the CITY OF MERRILL. I was backing a city owned truck up, when Phil Borchardt who was operating the tow motor started bellaring at me.

I do not remember all that he was hollaring but I do know he was cussing at me. Phil told me to get out of the truck as that was his job. I got out of the truck and PHIL got off the tow motor.

I said to Phil "I should punch your nose in" we both walked toward each other and when we got almost face to face Phil kicked at my legs trying to trip me and we both fell to the cement floor.

Nothing more was said by me or PHIL. I got to my feet and walked over to help PHIL up but he would not let me help him up, after several minutes Phil got up and left the warehouse.

I remained in the warehouse until street commissioner RALPH STURM came out and asked me to come to his office. The incident was then discussed between RALPH AND I.

This statement was given of my own free will to CAPTAIN DENNIS HINTZE, and is true and accurate to the best of my knowledge.

. . .

MERRILL POLICE DEPARTMENT

STATEMENT

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11-02-

STATEMENT OF: Philip J. Borchardt

On OCTOBER 31ST, 1995 at approximately 9:20 am Lloyd Bagley and I were working in the warehouse of the City Garage on recyclables. Lloyd got into a city truck and had pulled it out of the

warehouse I was operating a tow motor and was attempting to put a box on the truck Lloyd had pulled out of the warehouse.

I pulled the loaded tow motor out of the warehouse and was going to put the box on the truck when the box fell off the fork of the tow motor. I reloaded the box onto the fork and was going to load it onto the truck but could not load it as Lloyd had pulled the truck back into the warehouse. At this point I thought Lloyd was playing some games and pulled back into the warehouse and Lloyd started pulling the truck back out. At this point I got off the tow motor and yelled "I don't know what the hell your problem is, get out of the truck I am the driver".

Lloyd at this point got out of the truck and said "I ought to belt you" and held up a clenched fist at me. I replied to him "go for it". Lloyd then came toward me and half shoved me, I fell backward landing on my back and right arm on the cement floor. I do not know if Lloyd fell down or not. The next thing I knew Lloyd was standing next to me and had grabbed my right arm and said get up.

About this time Ricky Voigt who was also working in the warehouse came over and asked what was going on. I got up turned the tow motor off and went to see the street commissioner Ralph Sturm.

This statement was given to Captain Dennis Hintze of my own free will, and is true and accurate to the best of my recollection.

. . .

MERRILL POLICE DEPARTMENT

STATEMENT

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11-01-

STATEMENT OF: RICKY R. VOIGT

ON October 31st, 1995 between 9:00 am and 9:30 AM I was working in the warehouse maintenance building just to the east of

the City garage. Employees Phil Borchardt and Lloyd Bagley were also working in the same building. While cutting up some forms my attention was drawn to Borchardt and Bagley work area which was about 25 feet from where I was working, when I heard Phil Borchardt swearing and hollaring at Lloyd Bagley. BAGLEY was in a city truck and Borchardt was operating a tow motor at the time. Borchardt hollared "GET OUT OF THE TRUCK THAT IS MY JOB" Bagley then got out of the truck and hollared back to Borchardt, "I SHOULD KNOCK YOU ON YOUR ASS" After Bagley hollared that, BORCHARDT got off the tow motor and both Borchardt and Bagley walked toward each other. When they were just a couple of feet apart, Borchardt said to Bagley, "TAKE YOUR BEST SHOT".

At this point it appeared each grabbed at each other's arms, and then both fell to the cement floor.

I walked over to where they both were lying, Borchardt was lying on his back with both of his arms being extended straight out from his body.

Borchardt said something to me as I walked up, but I am not certain as to what it was he said.

BAGLEY was in a half sitting position and had one of his arms extended out onto the floor.

Nothing further was said between the two, Bagley got to his feet and went over by Borchardt and assisted him to his feet.

Borchardt then left the work area and returned to the CITY GARAGE. Bagley remained in the work area and resumed working.

I would further like to state I did not see either BORCHARDT OR BAGLEY swing at each other during this incident.

This statement was given to Captain Hintze of my own free will and is true and accurate to the best of my recollection. . .

Voigt also gave a separate statement to Sturm on the day of the incident, however, the statement in Voigt's statement to Sturm that the Grievant made a swipe at Bagley's feet was based on what Bagley told Voigt happened and not on what Voigt actually saw. Voigt went to Sturm the next day to change his statement in that regard.

Immediately following the incident, the Grievant went to Sturm and told him that Bagley had pushed him down and that his elbow was "tingling". Sturm subsequently had the Grievant, Bagley and Phil Hill come to his office and took statements from Bagley and the Grievant. Sturm concluded from what he was told that the incident stemmed from some argument over the truck being moved and that Bagley and the Grievant were both responsible.

Sometime prior to the incident of October 31, either late September or into October, another employe in the Department, Wangin, an Equipment Operator, was in a truck picking up leaves on Summit Street and the Grievant was in the recycle truck ahead of him while Bagley was in one of the bins on the back of the recycle truck. Wangin observed the Grievant pull the truck ahead with Bagley still in the bin in order to allow Wangin to pick up leaves. Later that same day, Wangin observed the Grievant driving the truck with Bagley standing on the platform on the back and Wangin estimated that he thought that the Grievant was driving over 20 miles per hour. Wangin mentioned what he had observed that day to Phil Hill in the office. Three or four days before the October 31st incident, Hill told Sturm what Wangin had mentioned to him about observing the Grievant moving the truck with Bagley in a bin and driving the truck over 20 miles per hour with Bagley on the back.

On November 2, Sturm issued Bagley the following disciplinary letter:

November 2, 1995

Lloyd Bagley
608 W. Riverside Ave.
Merrill, WI 54452

Mr. Bagley:

After a thorough investigation of the incident on Tuesday, October 31, 1995, I have decided to do the following. Based upon the statements received by my department, I believe the incident was more than pure horseplay. Horseplay, if reckless, is still cause for discipline, but in this incident I believe you were a combatant. Fighting is unsafe in the workplace and will not be tolerated. Based upon your involvement in last Tuesday's incident, you are suspended for three (3) working days without pay.

Further episodes such as this may result in your discharge. Fighting, arguing, and/or worker intimidation will not be tolerated. Conduct yourself properly in the future and hopefully we will not repeat this process.

Sincerely,

Ralph Sturm /s/
Ralph Sturm
Street Commissioner

Also on November 2, Sturm issued the Grievant the following disciplinary letter:

November 2, 1995

Phil Borchardt
300 W. Eighth Street
Merrill, WI 54452

Mr. Borchardt:

After a thorough investigation of the incident on Tuesday, October 31, 1995, I have decided to do the following. Based upon the statements received by my department, I believe the incident was more than pure horseplay. Horseplay, if reckless, is still cause for discipline, but in this incident I believe you were a combatant. Fighting is unsafe in the workplace and will not be tolerated. Based upon your involvement in last Tuesday's incident, you are suspended for three (3) working days without pay. Additionally, you will receive five (5) more working days suspension without pay for violating safety rules in speeding and moving the recycle vehicle while a rider was in a dangerous position. Your attitude toward working with others pursuant to my direction has been insubordinate toward me.

Further episodes such as this may result in your discharge. Fighting, arguing, and/or worker intimidation will not be tolerated. Conduct yourself properly in the future and hopefully we will not repeat this process.

Sincerely,

Ralph Sturm /s/

Ralph Sturm
Street Commissioner

The recycle truck was built by the Department and consists of a cab with a flat bed and three bins placed on the flatbed. The bins have flat sides approximately three feet high and then have flat diamond-shape mesh up the rest of the sides. There is nothing to hold on to inside of the bin other than to brace one's self against the sides. There is also a small platform approximately 1 by 1 1/2 or 1 by 2 feet on the back of the truck where the picker stands and in that position can be observed by the driver through the side mirror on the truck. While there were signs in the city's garbage trucks that stated to the effect "caution: no speeding over 10 mph with picker on the back and go no further than .2 miles with picker on the back", there are no such signs in the recycle truck. There is no written rule in the Department about the speed the recycle truck may be driven while a picker is on the back. The Grievant disputes that he has driven the truck over 20 miles per hour with Bagley on the back, and grieved both the three-day suspension he was given for the fight and the five-day suspension he was given for speeding.

The grievances regarding the Grievant's suspensions were processed through the parties' grievance procedure and, being unable to resolve their disputes, the parties proceeded to arbitration on the grievances before the undersigned.

POSITIONS OF THE PARTIES

City

The City takes the position that it acted within its rights under the parties' Agreement when it suspended the Grievant for three (3) days for fighting with Bagley and also when it suspended the Grievant for five (5) days for exceeding the safe speed with another employe on the back of the recycling truck. With regard to the facts, the City asserts that the statements and the testimony of Bagley and the Grievant, as well as the witness, Voigt, established that both Bagley and the Grievant equally participated in the altercation. The Grievant encouraged the altercation by responding to Bagley's threats by saying, "Go for it". The suspension for the speeding charge was the result of reports received by Sturm in late October that Borchardt had exceeded the allowable speed limits while travelling with Bagley on the back of the recycle truck in late September or early October. Those reports were received from another employe, Wangin, who testified that he had observed the Grievant driving in excess of the safe speed with Bagley on the outside platform at the back of the recycle truck. Sturm also testified that he observed the Grievant exceed the allowable speed limit in late October. Bagley also testified that the Grievant drives in a manner which places him in danger. The rule regarding the speed allowed when an employe is on the exterior platform of the vehicles has been verbally discussed with members of the unit, and is posted in the garbage trucks. While a similar sign is not posted in the recycle truck, the Grievant has operated the other garbage trucks in the past and should have been aware of the allowable speed. While the Grievant testified he has observed other drivers exceeding the allowable limit, he

admitted that he had never reported those infractions to Sturm. The City also asserts that the testimony of both the Grievant and Bagley made clear that the two employees do not like each other, and would probably prefer not to work with one another.

Under Article 24, paragraph A(2), of the Agreement, the City has the right to "establish reasonable work rules, regulations and schedules of work." Further, paragraph A(4) grants the City the right to "suspend, demote and take other disciplinary actions against employes for just cause." In addition, Article 25 of the Agreement provides for the disciplinary process and normally anticipates a discipline sequence beginning with oral reprimands and ending with discharge, however, paragraph C of that Article provides that "The sequence shall not apply in cases where there is cause for immediate suspension or discharge as merited by employe misconduct." The undisputed evidence establishes that a fight occurred between the Grievant and Bagley on October 31, 1995. Contrary to the Grievant's claims that he was the innocent victim, the evidence indicates that the Grievant both aggravated and encouraged the altercation and was an active participant. Such activity is a flagrant violation of good order on the job, and requires a suspension of the normal disciplinary sequence. The City notes that Bagley apparently agreed with the City's position as he did not contest his suspension.

Similarly, the Grievant's speeding is also a clear violation of established work rules and presents a significant safety hazard to employes. While the incident reported by Wangin in late September or early October happened considerably before the discipline was imposed, Sturm was not made aware of that incident until after he had observed the Grievant speeding in late October. The City asserts that to not take swift disciplinary action under those circumstances would ignore the seriousness of the misbehavior by the Grievant. Further, the Grievant must have known of the rule, as he has operated the garbage truck in which the speed limit sign is posted.

The Grievant's work record as an employe in the City further justifies the City's actions in this instance. The Grievant has received prior oral reprimands for rule violations, and served a ten-day suspension in 1991 for sleeping on duty. The City concludes that it had to discipline the Grievant in order to maintain good order in the workplace. Contrary to the Grievant's arguments, the evidence indicates he was an active participant in the altercation on October 31st, and that he placed Bagley at risk by driving in excess of the allowable speed when Bagley was on the exterior of the recycle truck. The Grievant's motive for his behavior was his poor working relationship with Bagley. The City asserts that it had an obligation to its employes as well as its citizens to maintain a safe working environment, and therefore requests that the grievance be denied.

In its reply brief, the City asserts the Union offered no testimony to support its factual assertion that Bagley had problems with the previous recycle driver. The City would assert that Bagley has had no problems with his co-workers other than the Grievant. The Union's claim that Sturm testified that the discipline issued for the speeding incident was also a result of his belief that the Grievant was fighting is contrary to Sturm's testimony and to the disciplinary letter, i.e., the fighting and the speeding were treated as two separate incidents in terms of discipline. The City

also disputes the claim that the discipline issued against the Grievant was the result of management's attitude towards him. The sole basis for the discipline was the Grievant's own behavior. The testimony of the neutral witness clearly indicated that both the Grievant and Bagley equally participated in the altercation. The Grievant's motivation for the altercation was his inappropriate feeling that he had the sole right to operate the recycle truck and his strong dislike for Bagley. Despite the Grievant's feeling that he was the only one entitled to drive the recycle truck, both Bagley's position description and Sturm's testimony indicate that Bagley is both qualified and allowed to operate the recycle truck. It is clear from the Grievant's disparaging remarks regarding Bagley in his testimony that he holds Bagley in low esteem. The City also asserts that it had the right to immediately suspend the Grievant for both the fighting incident and for the unsafe speeding while another employe was on the back of the recycle truck. The Union's claim that the passage of two days between the day of the fight and the date of the discipline eliminated the justification for the suspension ignores the need for the City to conduct an investigation before it imposed discipline, especially given the Grievant's allegations that he was the victim of an assault. The City appropriately had an investigation conducted by the Police Department and, upon receiving the statements of the two combatants and a third witness, took the appropriate action of suspending both the combatants. Similarly, the information regarding the Grievant's movement of the recycle truck while Bagley was on the back in a bin was not reported to Sturm until just prior to the October 31st incident. Sturm also testified that he observed the Grievant speeding sometime in late October. The action taken by Sturm to suspend the Grievant for the additional five days, while issued in the same letter as the discipline for fighting, was separate, but at the same time close enough to the other event so as to notify the Grievant of management's concern at the same time. Based on the amount of animus that the Grievant showed towards Bagley, as well as this being the Grievant's third offense requiring suspension since 1991, the extra length of the suspension for the vehicle rule violation was appropriate. Both the fighting incident and the unsafe operation of vehicle are clear violations of departmental good order and posed a significant safety risk to other employes. Given the serious nature of those incidents, the immediate suspensions were justified under Article 25.

Union

The Union takes the position that the discipline imposed on the Grievant, if warranted at all, was excessive and was without just cause and that the alleged conduct did not rise to the level of seriousness that would justify summary disciplinary suspensions. The Union asserts that the Grievant is a seven-year employe with a good work record. While he and Bagley have had problems working together, and Sturm has voiced concern with regard to the Grievant's completing his recycle route too slowly, those problems had not resulted in discipline prior to the time in question.

Regarding the October 31st physical encounter, the Union asserts that the incident was immediately preceded by Bagley's repeatedly moving the recycle truck while the Grievant was attempting to load a box on the back with a tow motor. While there is some difference between

the versions of what Bagley said to the Grievant, both indicated that a verbal exchange ensued in which Bagley threatened the Grievant with physical violence. Bagley then approached and confronted the Grievant in a hostile manner. Bagley indicated in his statement to the police that the Grievant kicked his legs, however, at hearing, he testified that their feet became tangled. The Grievant claims that Bagley "half shoved" him, knocking him backward to the floor. The only other witness was Voigt, whose view of the two men was limited to their waist up. There is no dispute that following the encounter, Bagley ended up in a "superior position over the Grievant", who was lying on his back. The police investigated the incident on November 2, but no charges were filed. On November 3, the City issued both men a three-day suspension. However, at the same time, the Grievant was also issued an additional suspension of five days for allegedly speeding and moving the recycle vehicle with a rider in a dangerous position. No date or specifics relating to that infraction were provided. Sturm testified that the five-day suspension was also connected with the Grievant's physical encounter with Bagley.

The Union finds the timing of the two suspensions imposed on the Grievant to be revealing. Allegedly, at some unspecified date and time the Grievant moved the recycle truck about 20 feet at a very slow rate of speed while Bagley was in the bins. There was no discussion about that incident at the time and no discipline was issued. Then followed the incident on October 31st. While the City's action in imposing three-day suspensions on both men for the altercation may appear to be equitable and just, the manner in which the City handled the situation evidences that there were other dynamics involved which call into serious question both suspensions issued to the Grievant. While the disciplinary letter received by the Grievant imposed the same three-day suspension as Bagley received, it also imposed an additional five-day suspension for the previous, totally unrelated traffic incident. No date or time of the alleged speeding infraction is provided in the letter, and Sturm was unsure as to when it allegedly occurred. Sturm testified that he did not counsel or otherwise notify the Grievant at the time of that alleged infraction. Further, Sturm acknowledged at the hearing that the five-day suspension was also a result of his belief that the Grievant was fighting. The Union questions why, if the speeding incident warranted such severe discipline, was it not issued at the time it allegedly occurred, and why was not the Grievant at least notified at the time of the alleged occurrence? Sturm also admitted that he often joked with other employees about excessive speeds with pickers on the back of the trucks, belying the City's claim as to the seriousness of the alleged offense. A reasonable person would question the extremely coincidental timing of the two suspensions, as well as the respective levels of discipline. It appears then that the disciplines were issued for the same event, i.e., the Grievant was disciplined for eight days, while Bagley only received a three-day suspension. That conclusion is supported by Sturm's testimony acknowledging that the five-day suspension was related to the alleged fighting incident. The coincidental timing and unequal treatment of the two employees demonstrates the City is clearly taking sides with Bagley, the aggressor in the altercation.

The Union also questions Sturm's conduct on October 31st. The Grievant's un rebutted testimony was that upon reporting the incident to Sturm, Sturm immediately attempted to change

the subject by indicating that the Grievant should be attempting to more quickly complete his route. When the Grievant insisted that Sturm deal with the problem, Sturm commented that, "You two have to get along" and that, "If you two can't get along, I'll put the two of you in a room, shut the door, and have you go at it, and then I get the one left standing." Sturm's response does not amount to an enlightened or compassionate approach to a legitimate cry for help from an employe who had just reported being physically assaulted, and could only serve to encourage further violence, as well as raise additional concern with regard to the Grievant's physical safety. Sturm then waited two days before asking police to investigate the matter, during which time the Grievant was forced to work alongside his attacker. Thus, a conclusion of management animus towards the Grievant is unavoidable. There is no coincidence that the two suspensions were issued together. Sturm had other opportunities to impose the five-day suspension before that or at least caution the Grievant relative to his driving, and he admitted that the two disciplines were connected. Sturm was "waiting in the weeds" for the Grievant and the incident on October 31st provided an excuse. This obvious animus towards the Grievant, as demonstrated by the unequal treatment of the two men, casts a shadow over both of the suspensions issued to the Grievant.

The Union also asserts that the Grievant's claim that he was assaulted by Bagley cannot be dismissed. There is little dispute that Bagley's actions and words provoked the incident and that he purposely and repeatedly moved the vehicle while the Grievant was attempting to load a box onto the back. It was not Bagley's job to be moving or otherwise driving the vehicle and he was obstructing the Grievant from performing his duties. Then, he threatened the Grievant with physical violence and attacked him. Management's response compounded the problem. After little or no investigation, the two men are disciplined very unequally, with the victim of the assault being punished nearly three times more harshly than the assailant. Management's action was clearly inconsistent with the just cause requirement contained in the parties' Agreement.

In addition to the just cause requirement, Article 25 of the Agreement also requires progressive discipline for minor misconduct and the five day notice of disciplinary action being taken. Both requirements were ignored in this case. Oral and written warning should have preceded any suspension in both cases, and especially with regard to the five-day suspension for the alleged speeding. Further, while Article 25 does not require that progressive discipline be followed in all cases, it does provide that "The (progressive discipline) sequence shall not apply in cases when there is cause for immediate suspension or discharge is merited by employe misconduct." (Emphasis added). The five-day suspension was not immediately imposed with regard to the alleged speeding incident and occurred days, perhaps weeks, after that incident. That is clearly inconsistent with the requirement of Article 25 that it be "immediate". Further, the corrective purpose of progressive discipline requires that employers avoid unreasonable delays before imposing a penalty. Arbitrators have held that additional misconduct committed while the employer is waiting to impose discipline on the individual may be thrown out if the penalty is later protested, reasoning that an employer is not entitled to discipline an individual for repeated instances of misconduct when it knew of his activities and gave him no opportunity to avoid the more severe discipline by warning him that his misconduct had to stop. Citing, Air Force

Logistics Command, (Arbitrator Koven, 1984).

The Union notes that the employer has the burden of proof in a discipline case. As to the altercation, the only witness, other than the Grievant and Bagley, was Voigt, who had a limited view and could not determine whose account was accurate. There is no dispute that Bagley provoked the dispute by repeatedly moving the truck, and further provoked the matter by threatening the Grievant with physical violence, then approached the Grievant, and when the two separated, Bagley was in a "superior position" over the Grievant. According to the Union, the Grievant's claim that Bagley instigated the incident and that he was the victim of an assault can hardly be disputed.

In terms of the level of the discipline, while a three-day suspension may be warranted for a physical altercation where both employees were involved in the fight, in this case the Grievant was assaulted and any discipline would be unwarranted. The matter of the five-day suspension for a minor traffic infraction is "preposterous". Neither of the disciplines can meet any reasonableness standard as to the appropriate level of discipline. There is no established work rule against moving the recycle truck with an employe in the back. While there may be such a rule for a garbage truck, there has never been one for the recycle truck. Further, an examination of the recycle truck by the Arbitrator following the hearing confirms that it was not inherently dangerous for the vehicle to be moved slowly with a picker inside of the basket. The Union questions how management determined that the Grievant was "speeding". Sturm indicated that on some unspecified date he observed the vehicle moving at an excessive rate of speed, but he had no equipment with which to measure the vehicle's speed, and no traffic citation was issued. The Union also finds it ironic that management is on one hand complaining that the Grievant is taking too long to complete his recycle route, and at the same time disciplining him for speeding. To the extent that any discipline was warranted, it was far too harsh, and the alleged conduct did not rise to the level of seriousness requiring summary discipline. Therefore, the City did not have just cause to discipline the Grievant and he should be made whole for all of his losses.

In its reply brief, the Union first asserts that the City's argument that since Bagley holds a commercial driver's license, he is permitted to operate any Department vehicle is illogical. The Union also disputes the City's characterization of the incident as the Grievant approaching Bagley, asserting that the evidence shows that the incident occurred only a few feet from the tow motor the Grievant was operating at the time. The Grievant's report, as well as the relative placement of the two employes, indicates that Bagley had to have initially approached the Grievant. As to the claim that the Grievant "encouraged" Bagley's assault, the Grievant's reply, "Go for it", was in response to Bagley's threat and was understandable under the circumstances. The Grievant was merely expressing his lack of fear of Bagley in order to maintain a relationship with Bagley as an equal partner. With regard to the City's reliance on Wangin's report that he had observed the Grievant exceeding the allowable speed limit, the Union questions how Wangin determined that the Grievant was speeding, and concludes that it was at best a judgement call, and at worst, a guess. Further, Wangin did not provide either the approximate date or the place of the alleged occurrence

at the hearing. That information was mentioned for the first time in the City's brief and is clearly inappropriate. The Union notes that the Grievant was on vacation for an entire week in "late October", the time at which the City now claims Wangin observed him. The Union concedes that speeding with a picker on the back of a truck has been verbally discussed with the members of the bargaining unit, however, Sturm testified that he often joked about such conduct, and it should not be concluded that there was some type of formal directive or "oral warning" provided in this regard. Further, the Grievant testified that he has followed other City trucks and ascertained that they were speeding or driving in a reckless manner and that he reported those incidents with times, dates and places to Sturm, only to have him ignore it or joke about it. With regard to the relationship between Bagley and the Grievant, the Union asserts that Bagley had difficulty working with his previous driver as well, while the Grievant testified that he had a very good working relationship with his previous picker. While the Grievant was frustrated with Bagley's slowness, it was due largely to the complaint of his supervisor about how long it was taking to complete the recycle route. While Bagley's slowness was a problem, it did not directly relate to either the altercation or the alleged speeding incident. Regardless of the Grievant's frustration with Bagley, it must be remembered that it was Bagley who attacked the Grievant. The Union also disputes characterizing the altercation as a "fight", as that would imply two combatants jointly engaged in a physical encounter, and there is no evidence that the Grievant played anything but a defensive role in the altercation. It was the Grievant who was attacked, but when he turned to supervision for help, he was threatened, suspended and harassed and treated more harshly than his attacker. The Union agrees that Bagley's acceptance of his discipline was significant, but asserts it was also revealing. If he in fact assaulted the Grievant, he should be willing to accept the consequences and be thankful that he was not discharged. Further, Bagley received only a three-day suspension, while the Grievant suffered an eight-day suspension. Finally, the Union notes the City's claim that the Grievant was suspended for ten days in 1991 for sleeping on the job, and asserts that there was no evidence presented in that regard at hearing, and that it is totally inappropriate to raise it in a post-hearing brief. Further, it was objectionable on the basis that it was unrelated and stale. Raising the incident supports the claim that the City had a vendetta against the Grievant.

DISCUSSION

It is initially noted that the parties' Agreement not only provides that the City may suspend for "just cause", it also provides that "The sequence of disciplinary action shall be oral reprimands, written reprimands, suspensions, discharge," except "where there is cause for immediate suspension or discharge if merited by employee misconduct." As is often the case, the parties' Agreement does not define "just cause", nor does it provide examples of what the parties consider to be types of employe misconduct that would merit immediate suspension. Under the just cause standard, there are two essential questions that must be answered in determining whether there was just cause for the discipline imposed: (1) Whether it has been sufficiently established that the employe is guilty of the misconduct for which he has been disciplined; and, if it has, (2) whether the level of discipline that has been imposed is appropriate.

The alleged misconduct in this case was fighting in the workplace and violating safety rules by speeding and moving the recycle truck while the picker was in an unsafe position. Taking the fighting incident first, the evidence amply demonstrates that the Grievant and Bagley do not get along well with one another and that this has been the case since they have been working together.

Bagley has complained to their supervisor, Sturm, that the Grievant "treats him like a dog" in that he swears at Bagley and moves the truck on him. The Grievant has complained to Sturm about how slow Bagley works. While there is some dispute as to what exactly happened on October 31st, the dispute appears to be more in the manner in which each employe's actions are characterized. The Grievant's own statement of the facts (Joint Exhibit 8) indicates that he was upset with Bagley for first moving the recycle truck out of the warehouse, and then moving it back in; each time as the Grievant was attempting to place a box on the back of the truck with a towmotor. By the Grievant's own statement, he got off the tow motor while Bagley was still in the truck and yelled at Bagley, "I don't know what the hell your problem is, get out of the truck I am the driver." Bagley then got out of the truck and holding up a clenched fist, said, "I ought to belt you." The Grievant then responded, "Go for it", and Bagley came toward him and "half shoved" him, causing him to fall backward to the floor. The Grievant's testimony in that regard was that Bagley moved towards him, they tangled up, and fell over. Under even the Grievant's version of what happened, he was as much responsible for what happened as was Bagley. Bagley's actions with the truck upset the Grievant, he in turn yelled at Bagley in a manner that was likely to provoke him. 1/ Despite the Union's attempt to portray him as the victim, it is apparent that the Grievant was a willing participant in escalating the matter to the point of physical contact, telling Bagley to "go for it". Consistent with their attitude toward one another, they both acted like "jerks", and they both deserved to be disciplined for their actions.

The next question then, is whether the Grievant's conduct merited an immediate suspension, as opposed to following progressive discipline. In that regard, it is noted that the Grievant was ostensibly treated the same as Bagley, i.e., he was given a three-day suspension for fighting. It is assumed that both men knew that fighting on the job was wrong and would not be tolerated. To that extent, the warning aspect of progressive discipline, i.e., placing an employe on notice that certain conduct is not acceptable and will result in discipline, is not a relevant consideration in this instance. There is also the need to bring such conduct to a quick halt before it escalates into something more serious. While the incident was more a very brief grappling than it was a "fight", there is a need to nip such conduct in the bud and it does not appear that talking to either of the employes about the need to get along with each other in their jobs has been very effective. Sturm testified that he talked to Bagley and the Grievant a number of times in the past and that it only resulted in a bigger argument, rather than getting them to work better together. It seems that nothing less than imposing harsh discipline would get their attention. For those

1/ Voigt's statement differed from the Grievant's as to the words used by Bagley and the Grievant, but the words were similar in nature, and both Bagley and Voigt's statements indicated that the Grievant was "cussing" or "swearing" at Bagley.

reasons, it is concluded that the Grievant's actions on October 31st merited going outside the sequence of progressive discipline and immediately imposing a suspension. While a three-day suspension is harsh, under the circumstances it is not so harsh as to be unjustified. Thus, it is concluded that the City had just cause to immediately suspend the Grievant for three days on November 2, 1995 for fighting and did not violate the parties' Collective Bargaining Agreement in that regard.

Going now to the five-day suspension, Sturm's letter stated the suspension was imposed for violating safety rules by speeding and "moving the recycle vehicle while a rider was in a dangerous position." The evidence offered by the City to establish that the Grievant engaged in the conduct alleged consists of the testimony of Wangin, Bagley and Sturm. Wangin, a fellow employe, testified that in late September or early October of 1995, he was on Summit Street picking up leaves when he observed the Grievant pull the recycle truck ahead, while Bagley was in one of the bins on the back of the truck, so that Wangin could pick up a bag of leaves. 2/ Wangin testified that he did not report what he saw to Sturm, but that he did mention it that day to Phil Hill, who works in the Street Department's office. Wangin further testified that later that same day he observed the Grievant driving the recycle truck approximately 20 mph with Bagley standing on the back of the truck. Again, Wangin did not report the matter to anyone. Wangin conceded that he was guessing as to the speed of the truck. Bagley's testimony as to the speed of the truck while he was in the bin was that he did not know, but guessed it was around 10 mph, or maybe under that speed, and that it was for approximately half a block. The Grievant testified that he moved the truck ahead approximately 20 feet at 1 mph. Sturm testified that he first learned of the "speeding" matter three or four days prior to the fighting incident. Sturm also mentioned a speeding incident in late October, but offered no specifics in that regard. Viewed in its best light for the City, the evidence at most establishes that on one occasion the Grievant moved the recycle truck approximately half a block while Bagley was in a bin on the back of the truck at a speed of 10 mph or less, so that another City employe could pick up leaves and that on another occasion he was driving the truck at approximately 20 mph while his picker was standing on the back.

The suspension letter states that the Grievant violated "safety rules". The "rule" Sturm relied upon is a sign posted in the garbage truck that cautions that the truck is not to be driven over 10 mph with a picker on the back and for no further than .2 mile. Sturm concedes there is not a similar sign in the recycle truck, and that he has not discussed the matter with the recycle truck driver, but testified that he views it as being a matter of common sense that the same rule would apply to the recycle truck. Wangin testified he has not seen any rule about moving a truck while someone is in a recycle bin, but acknowledged that there are no handles to hold on to in a recycle bin. As to "speeding", Sturm admitted he has observed other drivers whom he felt were going too

2/ Contrary to the Union's recollection in this regard, Wangin did approximate the time and specified the location in his testimony. Further, the Grievant also recollected the event on Summit Street.

fast with a picker on the back, and testified that he has talked to them two or three times about it and that he had also talked to the Grievant once or twice about it.

Within the requirements of the just cause standard is the need for adequate notice that the conduct complained of is not acceptable and that engaging in it may result in discipline. 3/ While there is certainly a speed at which it is obviously unsafe to drive with a rider on the back, the speeds at which the Grievant is accused of driving, 20 mph in the second incident and 10 mph in the first, are not in that category. Further, there is no specific rule that the recycle truck is not to be moved at all while the picker is in a bin. The posted rule in the garbage truck simply limits the speed to 10 mph and the distance to .2 mile while a picker is on the back, which apparently is the same that Sturm would apply to the recycle truck when a picker is on the back, i.e., standing on the small platform at the back of the truck, as opposed to being in a bin.

Even assuming that it has been adequately established that the rules the Grievant is accused of violating were known to the employees and that the Grievant has been shown to have violated those rules, the just cause standard also requires that the discipline imposed be appropriate to the misconduct of which the employee is guilty. A typical method of determining whether the "punishment fits the crime" is to review how the employer has treated other employees who have engaged in similar conduct. Evidence in that regard is useful both as to determining the appropriate level of discipline and whether the employee had adequate notice that such discipline could result from engaging in the conduct. Sturm testified that he has observed other drivers whom he felt were speeding with a picker on the back and that he talked to them about it two or three times and that he had talked to the Grievant about it once or twice. 4/ Sturm did not describe these discussions as any type of oral warnings, nor did he state that he informed the employees that severe discipline would result if it happened again. Moreover, it does not appear that any discipline was imposed for the second or third incidents with the other drivers. In contrast, the Grievant was given a five-day suspension for the same type of conduct after allegedly being talked to about it once or twice.

Sturm testified that the Grievant received more punishment than Bagley because it was his second infraction, while Bagley had a clean record. Contrary to the City's recollection otherwise, Sturm also testified that he felt that the fight was a result of the speeding and the aggravation, but conceded that no one had told him that was the case. Sturm's reasoning is not clear from his testimony. If Sturm felt that the Grievant had in effect caused the fight, then arguably he would have been punished more severely than Bagley in that regard, but he was not. If Sturm is claiming that the fighting incident was the Grievant's first infraction and the speeding/unsafe driving the

3/ As noted previously, there is certain conduct that is so obviously unacceptable that express notice is not required.

4/ The Grievant denies that Sturm ever talked to him about speeding before this.

second infraction, that ignores the fact that they are separate, unrelated incidents, as well as ignoring the progressive discipline sequence specified in Article 25. It also would not be appropriate to "piggyback" a lesser violation on a more serious violation that merited immediate suspension and impose an even more severe penalty for the lesser violation as a result of it being a "second infraction". 5/ Unrelated, the alleged infractions must be considered on their separate merits. Given the manner in which other employees have been treated for engaging in such conduct two or three times, the speeding/unsafe driving violations alleged would not by themselves merit ignoring the progressive discipline sequence and the imposition of an immediate suspension.

The disparate treatment of the Grievant for allegedly having violated safety rules, when considered in light of the timing of the discipline, and Sturm's testimony that he viewed the fight as being the direct, or at least indirect, result of the Grievant's speeding and aggravating Bagley, leads to the conclusion that Sturm's intent was to punish the Grievant more severely than Bagley for the fight. Contrary to the Union's claim, the Arbitrator does not find evidence of a vendetta against the Grievant; rather, it appears that, for various reasons, Sturm held the Grievant more responsible for the two employees' inability to get along, than he did Bagley, and felt he deserved more severe discipline for that reason. 6/ Whether or not Sturm's view was accurate, that does not justify the punishment he imposed on the Grievant for "violating safety rules". The fact that the five-day suspension was not justified, does not, however, alter the finding that the Grievant was at least equally responsible for escalating matters to the point of the physical confrontation on October 31st and equally deserving of the punishment that followed.

For the foregoing reasons, it is concluded that the City did not have just cause to suspend the Grievant for five days for violating safety rules. Therefore, the City is being directed to expunge all mention of that discipline from the Grievant's personnel records and to make him whole for whatever pay and benefits he lost as a result of that suspension.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

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- 5/ As the Union noted, there was no evidence adduced at hearing regarding a prior suspension. The City's assertion in that regard is not considered and even if it were, the alleged sleeping on the job in 1991 is unrelated to the misconduct alleged in this instance.
- 6/ It is noted in that regard that Sturm's November 2nd letter also stated, "Your attitude toward working with others pursuant to my direction has been insubordinate toward me."

AWARD

1. The grievance as to the three-day suspension for fighting is denied.

2. The grievance as to the five-day suspension for speeding and unsafe driving is sustained. Therefore, the City is directed to immediately remove all mention of the alleged violations, and the suspension imposed for those alleged violations, from the Grievant's personnel records, and to immediately make the Grievant whole by paying him all pay and benefits he lost as a result of the five-day suspension.

Dated at Madison, Wisconsin, this 13th day of February, 1997.

By David E. Shaw /s/
David E. Shaw, Arbitrator