BEFORE THE ARBITRATOR

IN THE MATTER OF THE ARBITRATION OF A DISPUTE BETWEEN

CITY OF MANITOWOC

and

CITY OF MANITOWOC EMPLOYEES LOCAL 731 AFSCME, AFL-CIO

Case 132 No. 55082 MA-9893

APPEARANCES

Patrick L. Willis, City Attorney, City Hall, 817 Franklin Street, PO Box 1597, Manitowoc, Wisconsin, 54221-1597, for the City.

Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, PO Box 370, Manitowoc, Wisconsin, 54221-0370, for the Union.

ISSUE

The parties stipulated to the following issue:

Did the employer violate the collective bargaining agreement when it suspended Dennis Nooker for two hours on January 23, 1997? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISONS

Article II - MANAGEMENT RIGHTS

(d) To suspend, demote, discharge, and take other disciplinary action for just cause.

Article III - GRIEVANCE PROCEDURE

Section 2 Procedure

Step 1 As far as can reasonably be expected, in an event of a grievance, the employee shall continue to perform the assigned task and grieve later.

Article VI - DISCHARGE

Section 1 Procedure

The Employer shall not suspend, demote or discharge any employee without just cause. Where just cause for any particular incident would not warrant an immediate suspension, demotion or discharge, the Employer agrees to give at least one written warning.

Section 3 Service of Notice

Discharge or suspension of an employee must be by proper written notice registered mail, return receipt, sent to the last known address of the employee with a copy to the Union. Any employee may request an investigation as to his discharge or warning notice.

Section 4 Appeal and Reinstatement

Should such investigation prove that an injustice has been done, the employee shall be reinstated and compensated at his usual rate of pay while he has been out of work.

BACKGROUND

This grievance arises out of a confrontation which occurred on January 16, 1997, between Dennis Nooker (the grievant) and his immediate supervisor, Building and Grounds Supervisor, Ralph Kracht. The grievant is a Building Custodian at the City of Manitowoc Senior Center. Ralph Kracht, at the time of the grievance, was the City's Building and Grounds Supervisor in charge of all City buildings, including the Manitowoc Senior Center.

On January 10 and January 14, 1997, Kracht had observed the grievant and Maintenance Engineer John Schroeder standing in an unlit entrance of the Senior Center. On those occasions, Kracht was concerned that they might be taking an unauthorized break as Kracht was not aware of any work related activity the two employees were performing at the time.

On January 16, 1997, Kracht stopped at the Senior Center to drop off some papers. At that time, Kracht observed that the grievant was in the building and performing his assigned tasks. As Kracht drove away from the Senior Center, he saw Schroeder's truck in the Senior Center parking lot and decided to stop and talk to him about a boiler problem at the Senior Center. Kracht went to the basement of the Senior Center, where the boiler is located, and spoke to Schroeder.

After their conversation, Kracht closed the door to the boiler room leaving Schroeder inside the boiler room and started up the short basement stairway to exit the building. Simultaneously, the grievant opened the door to the basement and started down the stairs. At that point, a verbal confrontation took place between Kracht and the grievant. The grievant wanted to ask Schroeder whether Schroeder had finished repairing a cart that stores and moves chairs. However, when asked by Kracht why he wanted to speak with Schroeder, the grievant did not give him the reason. It is disputed whether Kracht ordered the grievant back to work. It is not disputed that Kracht refused to let the grievant speak to Schroeder. Kracht told the grievant that he could speak with Schroeder later as Schroeder was busy working on a project in the boiler room, and that the grievant also had work to do. The grievant continued down the stairs despite being at least told he could not speak to Schroeder. As the verbal confrontation continued, the grievant produced and turned on a personal tape recorder, recording part of the conversation between him and Kracht. Kracht ultimately told the grievant that he was being insubordinate and again told the grievant that he was not going to let the grievant talk to Schroeder. At that point, the grievant went back to work and Kracht left the building. Schroeder was in the boiler room the entire time with the door closed; he evidently heard none of the conversation.

On January 23, 1997, Kracht suspended the grievant for two hours without pay for insubordination stemming from the January 16 incident. Kracht delivered the suspension notice by hand to the grievant; Kracht did not give a copy to the Union. The grievant immediately called Union Steward Richard Neuser advising him that he had received a notice of suspension. At the time of the arbitration hearing, Kracht was no longer the grievant's supervisor, having been replaced by Jim Muenzenmeyr, who had assumed the duties of Building and Grounds Supervisor.

The Union filed a grievance on January 29, 1997, alleging that the grievant had been suspended without pay for two hours on January 23, 1997, without just cause, requesting that the grievant be reimbursed for two hours lost wages, that the record of the suspension be removed from his permanent work record, and that the grievant be made whole. The parties were unable to resolve the grievance. The Union petitioned the Wisconsin Employment Relations Commission on April 8, 1997, to appoint an arbitrator from the Commission. An arbitration hearing was held by the arbitrator on Thursday, June 26, 1997, in the City of Manitowoc. At the arbitration hearing, the Union alleged that the City had violated the collective bargaining agreement by not serving the notice of suspension to the grievant by registered mail with a copy to the Union. The parties were given the opportunity and filed briefs which were received by the arbitrator on July 17 (City) and July 25 (Union). The hearing was not transcribed. The hearing was closed at approximately 4:00 p.m. on June 26, 1997.

POSITION OF THE PARTIES

The Union:

It is the Union's position that the City did not have just cause to suspend the grievant because the grievant was not insubordinate during the confrontation between the grievant and his supervisor, Kracht, on January 16, 1997, at the Manitowoc Senior Center. The Union argues that the suspension should also be overturned because the City failed to serve notice of the suspension to the grievant by registered mail, return receipt, with a copy to the Union as required by the collective bargaining agreement. The Union argues in its brief that it had a right to amend the grievance at the arbitration hearing to allege that the employer failed to provide the required contractual notice of suspension and requests that the arbitrator consider it even though the issue was never raised by the Union during the grievance procedure. Further, the Union argues that during the confrontation between the grievant and his supervisor, the supervisor never ordered the grievant to return to work, or if he did, it was in such ambiguous terms that the grievant could not reasonably have understood that he was to return to work. The Union also takes the position that not only did Supervisor Kracht have to give the grievant a clear order, which the Union states he did not, the failure to obey the order could only result in discipline if in fact the grievant also was told by Kracht of the consequences of disobeying his order.

The Union takes the position that there was not in place any procedure to prevent casual communication between employees and that Kracht's work order procedure was not applicable. The Union states that for the above reasons the grievant should be reinstated with two hours of pay and that the record of suspension should be removed from his work record.

The City:

It is the position of the City that the two-hour suspension was a modest suspension and was given for just cause pursuant to the terms of the collective bargaining agreement. The City takes the position through its testimony and evidence that there were two situations that establish a finding of insubordination.

1. That Kracht's testimony is credible that he ordered the grievant to return to work and the grievant disobeyed, and

2. That grievant refused to tell Kracht why he wanted to talk to Maintenance Engineer Schroeder.

It is the City's position that if the arbitrator does not credit Kracht's testimony that he ordered grievant to return to work, the tape recording made by the grievant proves that grievant failed to respond to Kracht's legitimate question of why the grievant wanted to speak to Schroeder. The City argues that Kracht had a legitimate concern, based on observing the grievant and Schroeder on two previous occasions in conversation, that the

conversation the grievant wanted to have with Schroeder might not be work related. Kracht, therefore, was justified in wanting to know why grievant wanted to speak to Schroeder. It is the position of the City that the evidence, including the testimony of the grievant, reveals a disgruntled employee who objected to being supervised by anyone at the work site, and this led to the altercation with Supervisor Kracht on January 16, 1997. Lastly, it is the position of the City that the Union did not state in its grievance, or at any point during the grievance procedure leading up to the arbitration hearing, a claim of contract violation for failure of the City to give proper notice of the grievant's suspension. The City argues that adequate notice was given to the grievant and the Union by Kracht's hand delivery of the notice of suspension to the grievant. The City requests that the arbitrator deny the grievance.

DISCUSSION

The arbitrator first addresses the Union's position that the grievance should be sustained because the City failed to send the notice of suspension by registered mail as required by the labor agreement. 1/ There is no dispute that the Union raised this issue for the first time at the hearing and to this the City objected. The Union responded that it had placed the City on notice because its grievance stated that the grievance covered all relevant portions of the labor agreement. 2/ As stated earlier, the suspension was hand delivered to the grievant; a copy was not given to the steward, although the steward, Neuser, was made aware of the suspension by the grievant immediately after the grievant received it from Supervisor Kracht.

The Union in its brief cites the discussion of several cases in Elkouri. 3/ The arbitrator agrees with those cases that, as a general rule, a party at the arbitration hearing is not prevented from raising new arguments, broadening the scope of the grievance, refining the grievance, and introducing new evidence regarding the presented issue. However, those same cases and the authors of the treatise make clear that this rule does not apply to new issues, particularly where the issue is separate from the original issue involved in the arbitration. The notice issue is a procedural issue separate and distinct from the substantive issue of whether the City had just cause to suspend the grievant for insubordination. The decision on the merits of the grievance can be decided without deciding the notice issue. Had the Union raised the notice issue in the original grievance or during the grievance procedure, the arbitrator would have to decide whether the procedural defect was enough to sustain the grievance. Arbitrators have also held that "*The grievances submitted to arbitration bring into issue only those matters specifically sit forth therein and not those matters not raised within the grievances, nor properly addressed in discussions during the processing of the grievances through the grievance procedures*." 4/

There is a well accepted standard of fairness and due process attached to arbitration proceedings and as cited by the Union in its brief, ". . . *technical objections are brushed aside in an endeavor to get at the facts of a given case* . . ." 5/ In this case, the grievant and the Union had notice. They were not disadvantaged by not receiving the notice by registered mail. Further, the City could reasonably have assumed that the Union was not going to

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notice contract violation when the Union never raised the issue during grievance proceedings. Therefore, the arbitrator finds that the Union cannot raise the notice issue at the arbitration hearing for the first time. The notice issue will not be considered by the arbitrator in deciding whether the suspension was with just cause.

In deciding just cause, the arbitrator considers creditability issues and the arbitral standards for insubordination and just cause.

Just cause has many definitions, but simply stated the employer ". . . *must have a reasonable basis for its actions and follow fair procedures in so acting*." And "*The just cause test mandates that the punishment assessed be reasonable in light of all the circumstances*." 6/ The City must also meet a burden of proof which in this case, given the alleged infraction, shall be the preponderance of evidence test. While the Union has cited in its brief a standard for insubordination that requires that the employee who is refusing to obey an order must at the same time be advised of the consequences, the arbitrator in this case does not adopt such a standard and nor is such a standard universal. A discharge case might be different, but this is a case involving a two-hour suspension without pay. A more reasonable standard in this case, which the arbitrator adopts, is the following: the issuance of a clear and direct order to the employee; issuance of the order by a person known to the employee as a supervisor; and refusal of the employee to obey the order. 7/ Arbitrator John B. Coyle, in a 1991 case, lists eight criteria for determining the creditability of witnesses' testimony among which are the relative strength of their recollections, and the quality and reasonableness of their testimony considered in its entirety and in relation to other credible testimony. 8/

As a backdrop to the confrontation on January 16, 1997, Supervisor Kracht had observed the grievant and Maintenance Engineer Schroeder talking on two occasions earlier that month at the Senior Center in a manner that he thought might give the wrong impression to the general public. Kracht suspicioned that the two conversations were not work related which probably affected his frame of mind when the altercation with the grievant started. There was no one to confirm the conversation between the two other than the tape recording made by the grievant of part of the conversation and accepted by the parties at the hearing as being accurate. The tape recording did not capture the initial part of the conversation when Kracht testified that he told the grievant approximately three times to go back to work. The grievant stated in his testimony that Kracht never gave him such an order; the arbitrator in this case and based on the facts of the entire record credits the testimony of the supervisor. Given that Schroeder was working on a specific project in the boiler room, it would be natural for Kracht not to want him disturbed at the moment, telling the grievant that he could talk to Schroeder later. Even if the grievant disputes being given an order to go back to work, the taped part of the conversation makes clear that the grievant persisted in his desire to talk to Schroeder even though Kracht told him he could not talk to Schroeder at that point in time. The grievant consistently challenged why he could not speak to Schroeder and kept coming down the stairway toward Kracht and the boiler room.

The arbitrator credits the testimony of employee Tomas Hein that no procedure was in place that regulated casual conversations between employees. Whether grievant’s proposed

conversation with Schroeder was a work related matter that fell under the procedure for work orders is an open question, but it probably was not. Kracht's continued reference to it during the confrontation probably was more out of frustration than anything else. The arbitrator does not find this testimony to be of material significance.

Proof of grievant's challenge of his supervisor's legitimate directives is supported by grievant's own testimony that he does not need to be "*babysat*" and that when Kracht was no longer his supervisor and someone else was appointed that the "*guy was changed, but not the situation*." The grievant testified that he preferred the supervisor situation before Kracht, when he was not directly supervised by anyone from the Building and Grounds Department, but just answered to one of the administrators of the Senior Center. On redirect testimony, the grievant stated that he did not think there was a need for him to be supervised by someone from the Department. Lastly, on cross examination by the City, the grievant admitted that he did not respond or give an answer when asked why he wanted to talk to, or ask a question of, the maintenance engineer.

The City has proven that the grievant was insubordinate. He failed to return to work when directed; he failed to respond when asked why he wanted to see Schroeder or what he wanted to ask Schroeder, and he kept coming down the stairs when he was told that he could not see Schroeder at that point. Grievant received a directive from one who he knew was his supervisor, and he refused to obey. That well accepted labor maxim "*obey now and grieve later*" was not followed by the grievant even though required by the labor contract under which he worked. 9/ While Kracht might have handled the situation better, front line supervisors are not sophisticated human resource managers. The City has proven just cause by acting in a fair and reasonable manner in the amount of discipline awarded to the grievant given the circumstances of the confrontation. It is apparent the City took into consideration the situation, and the two-hour suspension without pay strikes the arbitrator as more of a warning to the grievant rather than punishment. The grievant must learn to accept that the City has the right to supervise him in the way it wants and not in the manner that he prefers. Considering the record in its entirety, as well as the briefs of the parties, it is the decision of the arbitrator that the grievance cannot be sustained.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 15th day of August 1997.

Paul A. Hahn /s/_____
Paul A. Hahn, Arbitrator

ENDNOTES

1/ Article VI Discharge, Section 3, Service of Notice.

2/ Joint Exhibit 2 dated January 29, 1997.

3/ Elkouri and Elkouri. How Arbitration Works 5th Edition (1997) Voltz and Groggin, Co-Editors.

4/ STONE CONTAINER CORPORATION AND UNITED PAPER WORKERS LOCAL 531, 91 LA 1186, 1190 (1988) ROSS.

The Arbitrator believes that the Company's position has merit. Certainly the Company is entitled during the course of the grievance procedure to be informed of all aspects of a contract violation . . . .

LYONDELL PETROCHEMICAL COMPANY AND OIL, CHEMICAL AND ATOMIC WORKERS LOCAL 4-227, 89 LA 95, 99 (1987) CARAWAY.

5/ Union Brief pg. 13 citing Arbitrator A. Langley Coffey.

6/ BEATRICE FOODS CO. AND TEAMSTERS LOCAL 838, 74 LA 1008, 1011 (1980) GRADWHOL; CITY OF PORTLAND AND PORTLAND POLICE ASSOCIATION, 77 LA 820, 826 (1981) AXON.

7/ VERNON COUNTY HIGHWAY EMPLOYEES LOCAL 1527 AND COUNTY OF VERNON, CASE 83 NO. 45528 MA-6632 (MCLAUGHLIN, 1991) citing Roberts Dictionary of Industrial Relations, H.S. Roberts (BNA 1986).

8/ SAFEWAY STORES INC. AND UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 7, 96 LA 304 (COYLE, 1990).

9/ Article III, Grievance Procedure, Section 2, Step 1

As far as can reasonably be expected, in the event of a grievance, the employee shall continue to perform the assigned task and grieve later.

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