

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

AFSCME LOCAL 284

and

THE CITY OF EAU CLAIRE

Case 231
No. 54976
MA-9847

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 1937, Eau Claire, Wisconsin 54702-1937, appeared on behalf of the Union.

Mr. Jeff Hansen, Assistant City Attorney, Office of the City Attorney, City of Eau Claire, 203 South Farwell Street, P.O. Box 5148, Eau Claire, Wisconsin 54702-5148, appeared on behalf of the City.

ARBITRATION AWARD

On March 7, 1997, the Wisconsin Employment Relations Commission received a request from AFSCME Local 284 to have the Commission appoint a member of its staff to hear and decide a dispute pending between the Union and the City of Eau Claire. Following jurisdictional concurrence from the Employer, the Commission appointed William C. Houlihan, a member of its staff, to hear and decide the matter. An evidentiary hearing was conducted on June 18, 1997, in Eau Claire, Wisconsin. The proceedings were not transcribed. Briefs were submitted and exchanged by July 29, 1997.

This arbitration addresses a written warning issued to the grievant, Robert Nyseth, for sleeping on the job. The grievant claims the discipline is inappropriate, and that he was not asleep.

BACKGROUND AND FACTS

The events giving rise to this dispute occurred at approximately 12:30 p.m. on August 21, 1996 at the City-operated water treatment plant. Mr. Nyseth, the grievant, was scheduled and did work on that day from 7:00 a.m. to 3:00 p.m. Uncontradicted testimony was that the temperature was 89 degrees that day, and was humid. Nyseth was assigned to work in the control room, the only air conditioned room in the facility. Nyseth's assignment was to monitor the various gauges and monitors which exist to regulate and monitor the complex tasks performed by the water treatment plant.

The area of the water treatment plant which houses the control room is dominated by a

pump room. The pump room, which constitutes the center of the building, is approximately 60 feet wide by 80 feet long. The control room and electrical room lie against one wall of the pump room. The control room, a much smaller room, houses the sophisticated computer equipment, is air conditioned, and has a glass-paneled wall facing out into the pump room. The wall opposite of the pump room houses a shop and a storage room. The entrance to the pump room is through the shop. Workers and visitors entering the facility park their cars and enter the facility through the shop. You must walk through the shop in order to enter the pump room. As you enter the pump room, you face the electrical room, and at a slight angle can see into the glass walled control room. The pump room wall which is to the right of the storage room, (to the left of the control room), has a door opening to the chemical feed room. Beyond the chemical feed room lies the facility's garbage Dumpster.

On August 21, 1996, at approximately 12:30 p.m., Sam Spanel, the Utilities Administrator, visited the water plant in order to monitor ongoing construction being performed at the site. It was Spanel's testimony that he entered the plant through the shop and walked through the connecting door into the pump room. Spanel testified that he saw Bob Nyseth, through the glass walls of the control room, and that Nyseth appeared to be asleep. It was Spanel's testimony that Nyseth was pushed back in his chair, with his elbow on the table, leaned back with his head at a ninety-degree angle to his body. Spanel indicates that Nyseth's head was essentially parallel to the floor. Spanel could not recall if Nyseth's eyes were closed. His observation occurred from a distance of approximately 60 feet. After he made this observation, Spanel indicated that he went to the bathroom, and upon his return, Nyseth was in the same position. Spanel indicated that he walked across the room, watching Nyseth as he walked. When he was approximately one-half of the way across the room, he testified that Nyseth startled, jumped, and woke up. It was his testimony that Nyseth pulled himself toward his desk, and tried to look busy.

When Spanel entered the control room, he testified to the following exchange:

Q "Bob, were you just sleeping?"

A "Yes, I was."

It was Spanel's testimony that Nyseth looked embarrassed, and uncomfortable and was attempting to look busy. There was no joking, laughing, or smiling involved in the exchange. Spanel indicates that he asked Nyseth if he had worked the previous night, and that the latter man said no. It was Spanel's testimony that he thereafter left the room in search of another operator.

Spanel walked across the pump room into the shop, where he found Lance Thiel. He had Thiel accompany him back to the control room. When the two men reentered the control room, Spanel asked Nyseth whether it was true that he had just told him that he was asleep. According to Spanel, Nyseth responded yes, but that he was just "bullshitting" him. At that time, Nyseth was laughing and joking.

On August 27, Spanel issued the following disciplinary reprimand:

On August 21, 1996, at 12:30 p.m. I observed you sleeping in the control room at the water plant. When I asked you if you were sleeping, you said yes. Sleeping on the job in the air-conditioned control room where you are readily visible to visitors and other employees is intolerable.

This is your third reprimand since May, 1995. Until you can demonstrate some responsibility, you will not be allowed to operate the plant. Further disciplinary problems with you will be dealt with appropriately including dismissal if necessary.

The next day, August 28, Nyseth visited Spanel at the latter man's office. The two men talked for approximately fifteen minutes. According to Spanel, Nyseth apologized and said he was embarrassed. He indicates that the grievant told him he was not sleeping but had his eyes closed. He further indicates that the grievant expressed a concern about his status as a plant operator.

Spanel testified that there elapsed a total of 5 minutes between the time he entered the plant and the time he went to get Thiel.

Robert Nyseth, the grievant, is a 27-year employe of the City, the last 16 of which he has worked at the water plant. On August 21, 1996, Nyseth worked the 7:00 a.m. to 3:00 p.m. shift. It was his testimony that at approximately 12:30 he observed Sam Spanel enter the pump room. It was Nyseth's testimony that he watched Spanel enter the room, pause and look at him. It is his testimony that Spanel thereafter ran the width of the room, a distance of approximately 60 feet. Nyseth testified that Spanel opened the control room door and asked if he was asleep. Nyseth acknowledges that he indicated that he answered yes, but claims his tone of voice was heavily sarcastic. According to Nyseth, Spanel walked around the control room, looked at the various gauges and monitors, remained for a period of 30 to 45 seconds, and thereafter left.

While Spanel was in the control room, it was Nyseth's testimony that he saw Lance Thiel come from the chemical room, walk through the pump room, and enter the shop.

According to Nyseth, Spanel thereafter left the control room, walked through the pump room, entered the shop, and immediately returned with Lance Thiel. According to Nyseth, Spanel indicated he intended to reprimand Nyseth for sleeping on the job. Nyseth responded that he was "bullshitting" him, that he was not asleep on the job. Following this exchange, Nyseth indicated that Thiel said that he was uncertain as to what was going on, but that he could attest to the fact that Nyseth was not asleep, and that he had seen him 1 minute prior to Spanel's arrival sitting at the controls.

It was Nyseth's testimony that he had been sitting for approximately 1/2 hour before Spanel entered the facility. Most of the time he had been immediately in front of the control panel. Approximately 30 seconds before Spanel entered the facility, Nyseth indicated that he wheeled his chair approximately five feet from the console, put his elbow on a short file cabinet and placed his head on his hand. According to Nyseth, his head was in an erect position, i.e., perpendicular to the floor. Nyseth denies that he jumped, or was startled, or was awakened. He indicates that he saw Spanel enter the facility and followed Spanel's motions as the latter man crossed the room. Nyseth testified that he could not recall if he ever closed his eyes. His testimony was that his response to Spanel's inquiry as to whether he was asleep was intended as a sarcastic rebuke.

Following receipt of his warning letter, Nyseth worked the balance of his shift, went home, and waited for Spanel's shift to begin. He thereafter called Spanel and expressed a desire to meet. It is Nyseth's testimony that he went to see Spanel on August 28 and indicated that he felt Spanel had been a little rough. He further indicates that he told Spanel that he was not asleep. He indicates that Spanel told him that it appeared that he was asleep. Nyseth indicated that he told Spanel that he did not want to grieve the matter and thought the men should settle the matter between themselves. They ultimately were unable to resolve the matter because Nyseth insisted that his record be expunged of any reference to sleeping on the job, and Spanel refused.

Lance Thiel is a 25-year City employe, who works as an Operator II and is a lead worker. He testified under subpoena from the Union. It was Thiel's testimony that immediately prior to 12:30 p.m. he was taking an armload of garbage from the shop area, through the pump room, to the dumpster which is beyond the chemical feeding room. His testimony was when walking in that direction, he habitually looks into the control room. It appears that his route would cause him to essentially be facing the control room. Thiel testified that on that particular trip, he observed Bob Nyseth sitting up at the control desk. Thiel indicates that Nyseth was seated at the computer with no hands to his face, and in an erect position.

Thiel testified that he threw the materials away, and returned, walking through the pump room, to the shop. It is not his habit to look into the control room on his return visit. To do so appears to require him to turn his head approximately 90 degrees to the right. The control room is not in his obvious line of vision when he exits the chemical feed room into the pump room. Thiel testified that his entire trip took one minute. It was his testimony that he has clocked the time of such a trip subsequent to this dispute. He further testified that from the time he saw Nyseth awake and seated at the console until Sam came to get him, constituted no more than 30 to 40 seconds.

Thiel testified that virtually immediately upon his return to the shop, he noticed a newly-arrived vehicle, and that Sam entered the shop from the plant. He indicated that Sam asked whether he had anything for the operators to do, and went on to indicate that he thought he had caught Bob sleeping. Thiel indicated that he replied that he had just seen Bob, and that Sam asked

him to accompany him to the control room to talk to Bob. When the two men entered the control room, Thiel indicated that Sam asked Bob if he had been asleep, that Bob responded no he was not. Sam then is alleged to have remarked, "Now you are denying it." Nyseth replied, "I was kidding." Thiel indicated that he then advised the two, "I don't know what's going on. I was just here, and he wasn't asleep."

As noted, a disciplinary reprimand was issued. That reprimand was grieved, and the grievance has lead to this proceeding.

ISSUE

The parties were unable to stipulate to an issue. I believe the issue to be:

"Did the written reprimand of Bob Nyseth violate any provision of the collective bargaining agreement? If so, what is the appropriate remedy?"

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article 3 - UNION SECURITY AND MANAGEMENT RIGHTS

...

Section 3. Management Rights. It shall be the exclusive function of the City to determine the mission of the agency, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations.

It shall be the right of the City to direct its employees, take disciplinary action, relieve its employees from duty because of lack of work, or for other legitimate reasons, and determine the methods, means and personnel by which the agency's operations are to be conducted. But this should not preclude employees from raising grievances about the impact that decisions on these matters have on wages, hours, and working conditions.

...

Article 7 - PENALTIES

Section 1. The City shall not suspend, demote, or discharge any employee except for just cause. If the City suspends,

demotes, or discharges an employee for just cause, the City shall notify the employee in writing and forward a copy of the notification to the Union at the same time. If the employee feels dissatisfied, he/she may file a grievance.

Section 2. If, after a proper hearing, the employee is found to be innocent of the charges, the employee shall be reinstated in his/her former job with the City paying for all lost time and the employee shall not lose any benefits that he/she would normally have if work had been continuous.

. . .

Article 29 - GRIEVANCE PROCEDURE

. . .

Section 5. The Arbitrator shall be chosen by the Union and the City. If the Union and the City cannot agree on an Arbitrator within ten (10) calendar days from the date the Union notifies the City of its intent, the Union and the City shall petition the Wisconsin Employment Relations Commission to appoint the Arbitrator. The Arbitrator shall be requested to make a finding known in writing and simultaneously to the City and the Union, within ten (10) days after their final meeting, 1/ and the decision and/or recommendations shall be effective and final and binding on both parties. The cost of the Arbitrator shall be borne as follows: Each party shall pay one-half (1/2) of the cost of the Arbitrator. The cost of a court reporter shall be borne by the party requesting such. If the court reporter is requested by the arbitrator, the parties shall share the cost equally.

Section 6. The Arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this agreement. The decision of the Arbitrator shall be based solely upon his/her interpretations of the "express language" of the agreement.

. . .

1/ The parties expressly waived the application of the ten-day provision.

POSITIONS OF THE PARTIES

The Employer contends that a "just cause" standard does not apply in this case, but that even if it did, the discipline imposed was merited. The Union contends that just cause is the appropriate standard, and that the Employer failed in its necessary proof of the alleged misconduct.

Noting the language of Article 7, Section 1, the Employer states that the parties reserved the just cause standard for the serious penalties of suspension, demotion, or discharge, and that Article 3, Section 3 provides for other disciplinary action without a stated standard. The Employer cites Article 29, Section 6 to argue against an arbitral interpretation which exceeds the express language of the agreement.

Notwithstanding that the just cause standard does not apply to written reprimands, the Employer asserts, the evidence in this case shows that the grievant's conduct rose to such a level that the discipline imposed was merited even if such a criterion were in effect. That evidence, the Employer states, shows that Utilities Administrator Sam Spanel plainly observed the grievant, Bob Nyseth, sleeping on the job. Spanel had no reason to lie, and his testimony was direct and compelling, the Employer states, while Nyseth and his union co-worker clearly had motive and opportunity to concoct a story which is inconsistent and false.

All credible evidence and testimony, the Employer states, establishes that the grievant failed in his responsibilities and threatened the sole water source for a city of 60,000 by sleeping on the job on August 21, 1996; even if a just cause standard did apply, this conduct would merit the discipline imposed. Moreover, because the Administrator had the right to issue such a written reprimand pursuant to the management rights clause without being subject to the just cause standard, and did so in this matter in a manner which was not arbitrary, capricious or discriminatory, the discipline must be upheld and the grievance denied.

The Union argues that the Employer's analysis of the standard is nonsensical, in that the contractual right to grieve disciplines is sufficient to infer the application of the just cause standard. Any standard of industrial due process assumes that the Employer must have sufficient proof of the misconduct, the Union states, and such proof is missing here.

The Union unequivocally denies that Nyseth was sleeping on the job, but rather was resting his elbow on top of a file cabinet, with his head on his hand; awake and with eyes open, he could see the Administrator running towards the control room. Contrary to the Employers description, the grievant did not admit to sleeping, but rather concurred in that assertion in a clearly sarcastic manner. A few minutes later, when Spanel reported this "confession" to another employe in the grievant's presence, the grievant responded that he was kidding, and was, in fact, not sleeping.

The testimony of the plant's working foreman, Lance Thiel, supports the grievant's testimony, the Union states. In particular, Thiel testified he saw Nyseth awake, sitting at his normal station just moments before the incident. This credible testimony from a witness under subpoena, the Union states, totally discredits Spanel's account; indeed, the foreman told the Administrator that he had seen the grievant fully awake at the time the Administrator was asking him to be a witness to the discipline.

It is Spanel's story, the Union states, which does not make sense, particularly his story about Nyseth's posture remaining unchanged over the 2-3 minutes that the Administrator was in the bathroom – a story effectively rebutted by Nyseth's testimony he saw Spanel come directly to the control room, and Thiel's testimony about elapsed time of events. This false story of Spanel's destroys his credibility, the Union asserts.

Spanel's conclusion that Nyseth was sleeping was weak, speculative and without supporting evidence, the Union concludes; there being no evidence to support a finding that Nyseth was sleeping, the Employer has no grounds for discipline. Accordingly, the grievance should be sustained, the discipline rescinded, and the City ordered to expunge all files of same.

DISCUSSION

There are two articles of this contract which address the standard against which the Employer's discipline is to be measured. Article 3 vests in the Employer "the right of the City to . . . take disciplinary action. . ." Read literally and alone, this gives the Employer unregulated authority in this area. However, the provision cannot be read alone, but must be read as a part of the overall agreement.

Article 7 also addresses discipline and does so with greater specificity. Section 1 establishes a "just cause" standard which is lacking in Article 3. However, the "just cause" standard created by Article 7 is applied to suspension, demotion, or discharge. There is no reference to either written and/or oral warnings. This very specific application of the "just cause" standard is repeated in the second sentence of Section 1. What is common about suspension, demotion, and discharge is that all typically are accompanied by a loss of wages. That common feature is not true of a written or oral warning.

Section 2 of Article 7 creates a remedy for breaches of Section 1. The Section 2 remedy provisions give reference to "reinstatement", "paying for all lost time", no loss of benefits, and "if work had been continuous". These are all terms which connote a loss of earnings, and/or unpaid absence from the job.

There is nothing to suggest that Article 7 was intended to cover discipline in the form of a written warning, and is simply inartfully drafted. To the contrary, it appears that the article was very carefully crafted to be applicable to only those forms of discipline which involve lost wages.

Article 29, Section 6, directs me to confine my award to the unaltered, expressed language of this agreement. My reading of the express language is that Article 3 governs all forms of discipline, except as is modified by Article 7. Article 7 does not modify Article 3 relative to written warnings. Under this construction, I believe the Employer has retained its discretion over the issuance of written warnings. By operation of Article 29, Section 6, I am not free to impose a standard and thereafter undertake a review.

The record is inconclusive as to whether or not Bob Nyseth was asleep. Spanel believed him to be, and gave testimony consistent with that conclusion. That is, Spanel testified as to Nyseth's posture, head position, his having been startled and awakened, his having been embarrassed, and to a subsequent admission. However, Spanel never indicated that he saw Nyseth's eyes closed.

Nyseth denied ever being asleep. Nyseth's testimony is somewhat troublesome in that his sarcastic, "Yeah, I was asleep" was his only response to a supervisor who was levelling a very serious accusation. According to Nyseth, he observed Spanel run across a 60-foot room. Under Nyseth's version of the events, Spanel made it clear by both word and behavior, that he caught Nyseth in a serious transgression. Nyseth testified that following the exchange, Spanel remained in the room for a period of 30 to 45 seconds. I regard this as a long period of silence following a serious accusation. Nyseth further testified that he could not recall if his eyes were closed. Under the circumstances, I believe that would have been a memorable event.

I found the testimony of Lance Thiel very credible. He testified that Nyseth was sitting upright at the computer with his eyes open less than a minute before Spanel entered the facility. For me to credit Thiel's testimony, Nyseth could not possibly have been asleep. Thiel's testimony corroborates Nyseth's sequence of events, i.e., that he had moved from the console to the leaning position, a mere 30 seconds before Spanel arrived. Both Thiel and Nyseth indicated that Thiel told Spanel of his observation that Nyseth was wide awake right on the spot. Spanel does not deny it.

In light of my view as to the application of the various contract provisions, there is no need, nor purpose served, by an elaborate reconciling of all testimony, or credibility findings. It is sufficient to note that the City did not prove, by preponderance of evidence, that Nyseth was asleep.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 12th day of September, 1997.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator