

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**OUTAGAMIE COUNTY HIGHWAY DEPARTMENT
EMPLOYEES UNION, LOCAL 455, AFSCME, AFL-CIO**

and

OUTAGAMIE COUNTY

Case 250
No. 56074
MA-10169

Appearances:

Mr. Richard C. Badger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Davis & Kuelthau, Attorneys at Law, by **Mr. Roger E. Walsh**, appearing on behalf of the County.

ARBITRATION AWARD

Outagamie County Highway Department Employees Union, Local 455, AFSCME, AFL-CIO, herein the Union, and Outagamie County, herein the County, jointly requested the Wisconsin Employment Relations Commission to designate the undersigned as an arbitrator to hear and to decide a dispute between the parties. The undersigned was so designated. Hearing was held in Appleton, Wisconsin, on April 2, 1998. A stenographic transcript was made of the hearing and a copy of said transcript was received on May 27, 1998. The parties completed the filing of post-hearing briefs on August 10, 1998.

ISSUES

The parties were not able to stipulate to the issues and agreed that the arbitrator would frame the issues in his award.

The Union stated the issues as follows:

Did the County have proper cause to impose any discipline on the grievant for events that occurred on October 9, 1997? If so, did the County have proper cause to discharge the grievant?

The County stated the issues as follows:

Did the County have proper cause to discharge the grievant on October 15, 1997? If not, what is the appropriate remedy under the agreement?

The undersigned believes the following to be an accurate statement of the issues:

Did the County have proper cause to discharge the grievant (JC) on October 15, 1997? If not, what is the appropriate remedy under the contract?

BACKGROUND

The grievant began working for the County on July 6, 1993, as an Equipment Operator I. He was rated as an average employee on his performance evaluations after both two and four months of employment. On December 20, 1993, the grievant received a verbal reprimand for running into the rear of a truck with another piece of equipment. In January of 1994, the grievant was rated as an average employee in a six month performance evaluation. On January 31, 1994, the grievant was given a written reprimand, apparently for unsafe operation of a County truck. In June of 1994, in a performance evaluation, the grievant was rated as a satisfactory employee. On July 18, 1994, the grievant was given a written reprimand for being absent from work without notifying the County. In the Fall of 1994, the grievant transferred to the landfill operation as an equipment operator I. On December 23, 1994, the grievant was given a written reprimand for tardiness. On February 17, 1995, the grievant was given a written reprimand for denting a County-owned pickup truck with a loader bucket. In a performance evaluation in June of 1995, the grievant's performance was rated as satisfactory. In the spring of 1995, the grievant moved to the County's recycling center. On September 17, 1996, the grievant was given a written reprimand for damaging a County-owned truck with another piece of County-owned equipment. On October 8, 1996, the grievant was given a written reprimand for leaving work early without obtaining permission to do so from his supervisor. On October 15, 1996, the grievant was late for work and failed to notify his supervisor that he would be tardy. As a disciplinary action, the grievant was sent home for the day without pay. On April 1, 1997, the grievant was given a three-day suspension without pay for leaving his job site prior to the end of his shift without obtaining permission to leave early. In the written report informing the grievant of the suspension, he was advised that any work rule violation between April 1, 1997 and April 1, 1998 would result in the termination of his employment. In July of 1997, the grievant received an unsatisfactory performance evaluation and was denied the longevity hourly rate increase for which employees are eligible after four years of employment.

On October 9, 1997, Gary Steede, the County's Solid Waste Superintendent, assigned the grievant to paint the rails, brackets and posts for the newly installed truck scale at the Solid Waste Facility. The grievant was given two new paintbrushes, a three inch brush and a one-and-one-half-inch trim brush for the areas where there was less space in which to work. Steede did not return to the scale area to check on the grievant's progress. The grievant testified that he first applied a coat of white primer paint, which application took until about 11:45 a.m. He then took his lunch break and began applying the final coat of yellow paint at about 12:30 p.m.

Sometime between 2:30 and 3:00 p.m., Al Geurts, a Patrol Superintendent in the County's Highway Department, drove up to where the grievant was painting in order to check on the placement of a post which was making it difficult for trucks to get to the scale. Geurts saw that the grievant was painting in a manner which caused paint to go on other surfaces in addition to the rails. It appeared that the grievant was almost done with the painting. Geurts briefly spoke to the grievant, but did not take any corrective action at that time. Upon returning to his vehicle, Geurts telephoned Steede and asked Steede if he had observed the paint job. Steede had not gone to observe the painting by the grievant. Consequently, after answering a couple of voice mail messages, Steede went out of his office to the scale area. The grievant had left the area by that time. Steede was not satisfied with the painting done by the grievant. In some places the paint had been applied in such quantity that paint ran down the surfaces in streaks, dried in drips and strings, and appeared on the concrete surfaces in drips, globs and splatters. There was paint on some of the concrete and metal surfaces which were not to be painted, where the brush had hit and/or dripped paint on the surfaces. There also were unpainted areas on the guardrails and brackets which should have been painted. The grievant had not used the smaller brush, but had done all the painting with the larger brush. The weather on October 9, 1997, was windy (wind velocity ranged from 17-30 mph during the day) and cool (the temperature at 3:30 p.m. was 60 degrees). The label on the paint can from which the grievant was painting recommended the use of an enamel reducer for temperatures below 70 degrees. Steede was not aware of that recommendation and no reducer was used.

On October 15, 1997, the grievant was terminated for careless and unacceptable work in performing the painting assignment. The record is clear that the painting of an unacceptable quality. However, the parties disagree as to the cause of the unacceptable quality.

The grievant had painted some groundwater monitoring wells in August or September of 1997 for the County. When he was finished painting, the grievant tried to remove the masking tape with which he had covered the letters and numbers required by the State of Wisconsin. Some of the tape could not be removed without pulling off the letters and numbers. When the grievant advised Steede of that problem, Steede told him to leave the masking tape on the wells.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE I – MANAGEMENT

1.01_ – Except as herein otherwise provided, the management of the work and direction of the working forces, including the right to hire, promote, transfer, demote, or suspend or discharge or otherwise discipline for proper cause, and the right to relieve employees from duty and to layoff (sic) employees is vested exclusively in the Employer. In keeping with the above, the Employer shall adopt and publish reasonable rules which may be reasonably amended from time to time.

POSITION OF THE UNION

The grievant painted under adverse conditions at a level commensurate with his ability. He received no guidance or supervision during the time he was painting. The grievant is not a professional painter and painting is not one of his primary duties. The assigned painting was performed in close proximity to the office where two supervisors were located. Two other supervisors observed the grievant painting, but none of the supervisors took any corrective action. The grievant feared for his job, so he did as he was told without questioning the assignment. The County abdicated its right to impose discipline to the grievant when it assigned work in adverse weather conditions and willfully or negligently failed to provide any reasonable measure of supervision. Even if some discipline is warranted, discharge is too severe.

POSITION OF THE COUNTY

In four years the grievant had been disciplined ten times. The record shows both the County's use of corrective discipline and the grievant's failure to improve. On April 1, 1997, the grievant received a last chance letter.

The grievant's performance in painting the truck scale on October 9, 1997, warranted termination. He never asked for directions, as he had done in a previous situation, when he believed that the weather was interfering with his work. The grievant did not perform to the best of his ability, as evidenced by his satisfactory performance of painting duties on a previous occasion. The unacceptable painting was caused by the grievant's poor attitude, rather than the weather. His termination should be sustained.

DISCUSSION

The Union asserts that the County failed to provide adequate supervision to the grievant while he was painting. However, the task assigned to the grievant does not appear to be of the type requiring close supervision. The assignment did not require a high degree of skill or experience to perform and should not have been difficult to understand. If the grievant had any questions concerning his instructions, he could have gone to Steede for clarification, which he did not do. The fact that Geurts took no corrective action upon observing the grievant's work fails to support the Union's theory. The grievant was almost done painting by the time Geurts saw him. Geurts did notify Steede, the grievant's supervisor, which was a reasonable course of action. Soon after receiving the telephone call, Steede did go to check on the painting project, but the grievant already had finished painting and had left the area.

Both the grievant and Joe Schumacher, the County's bridge foreman, testified that Schumacher approached the grievant as he was painting with the white primer paint, at which time they discussed the need to apply a coat of primer over the primer paint placed on the rail by the manufacturer before applying the final coat of yellow paint. The grievant said the conversation occurred about 10:30 a.m. Schumacher said the conversation occurred about 3:00 p.m. Schumacher also testified that yellow paint was already present on some of the rails and on the concrete surfaces. If one assumes that the conversation occurred in the morning while the grievant was painting with the primer, then the conversation about the need to apply a coat of the primer fits, but Schumacher's testimony about the yellow paint all over the concrete does not fit. While there was some white paint on the concrete, most of the splatters, drips and brush marks were made with the yellow paint. If one assumes the conversation occurred in the afternoon while the grievant was painting with the yellow paint, then Schumacher was inaccurate in testifying that the grievant was painting with the primer when they talked. Schumacher also testified that he informed another supervisor, Nancy Christensen, about the grievant getting paint all over the concrete. There is nothing in the record to show that Christensen talked to either the grievant or Steede about Schumacher's concerns. The Union asserts that the County deliberately did not follow up on Schumacher's report because it wanted a basis, such as unsatisfactory painting, to terminate the grievant. The undersigned is not convinced such an assertion is supported by the rest of the record. While Christensen or Steede should have followed up on Schumacher's report, if it was made, the failure to do so is not a sufficient basis to set aside the termination. The undersigned is not willing to assume that such a follow-up would have resulted in the grievant doing a satisfactory job of the painting, especially since the basis for Schumacher's report was that the grievant was getting paint all over the new concrete. Thus, it appears that the basis for the grievant's termination, i.e., the unsatisfactory painting, had already occurred by the time Schumacher made his report.

The undersigned is not persuaded that the unsatisfactory painting performed by the grievant resulted solely from the weather conditions on October 9. While the cool temperatures and the wind conditions on that date certainly made painting more difficult, such factors do not excuse the sloppy results, including the unpainted spots, the paint splatters on the concrete, the drops and strings of paint hanging from the rails, and, the paint smears on the surfaces adjacent to the areas to be painted. If the paint was difficult to spread, as the grievant asserts, then it would seem less likely for the paint to drip and/or form strings from the bottom of the rails. The grievant did not attempt to minimize the effects of the weather by using the smaller brush or dropcloths. Neither did the grievant go to Steede, or any other supervisor, either to ask for advice or to inform them of the difficulty of painting in the existing weather conditions. As shown in the record, the grievant had gone to his supervisor on previous occasions when he had difficulty in completing an assignment due to weather-related factors and on each of the occasions the supervisor had advised the grievant to cease the assignments. Thus, the grievant's contention that he did not talk to his supervisor about the difficulty of painting in the weather conditions on October 9 because he was under a last chance agreement, is not convincing. Rather, it is found that the grievant failed to make a reasonable effort to do an acceptable job of the painting assignment and instead he attempted to rely on the weather conditions to justify his poor performance.

The Union points to other instances where the painting done by an employee was unsatisfactory, but the employees were not disciplined. One instance involved the painting of a bridge. Due to the wind in that case, paint was blown onto some nearby cars. However, the employee doing the painting had commented to a supervisor three times that he thought he should stop painting because it was too windy. Each time the supervisor advised the employee to continue painting. When the employee later discovered paint was being blown onto the cars, he told the supervisor about that problem and then the supervisor told the employee to stop painting. The employee was under a last chance agreement at that time. However, the employee was not disciplined for getting paint on the cars, but rather, the supervisor, who had instructed the employee to continue painting after the employee expressed his concerns about the wind, was disciplined. Thus, that example supports the County's position, rather than the Union's position. The other example involved an employee who was assigned to paint some steps in a stairway in a building. The employee later heard from other employees that one of the supervisors had said the employee should never be assigned to paint again, because the painting he had done was unacceptable, although no supervisor complained directly to the employee about the painting. Such an example is not sufficient to support a conclusion that the County has a policy of not disciplining employees for poor painting.

An employee can be disciplined for unsatisfactory performance, even if the employer does not have a specific work rule stating such. In the instant matter, it is concluded that the grievant's unsatisfactory performance of the assigned painting duties can not be explained by

the weather conditions existing on October 9, 1997, but rather, can be attributed in large part to his attitude. The record fails to support the grievant's assertion that he performed the painting duties to the best of his ability under the existing weather conditions. Instead, the grievant did not make a reasonable effort to perform the painting work in a satisfactory manner and then attempted to blame his lack of effort on the weather.

The County has applied a progressive disciplinary process to the grievant. During the grievant's employment of less than four and one-half years with the County, the grievant received a verbal warning, several written warnings, a one day suspension and a three day suspension. The three day suspension was served on April 2, 3 and 4, 1997. At that time, the grievant was advised that any work rule violation between April 1, 1997 and April 1, 1998 would result in the termination of his employment. In light of the disciplinary history of the grievant, it was reasonable for the County to discharge him for his conduct on October 9, 1997.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the County did have proper cause to discharge the grievant (JC) on October 15, 1997; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 1st day of October, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Douglas V. Knudson /s/

Douglas V. Knudson, Arbitrator