

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TWO RIVERS CITY EMPLOYEES, LOCAL 76, AFSCME, AFL-CIO

and

CITY OF TWO RIVERS

Case 87
No. 55294
MA-9969

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Mark L. Olson**, appearing on behalf of the City.

ARBITRATION AWARD

Two Rivers City Employees, Local 76, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Two Rivers, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a suspension. The undersigned was so designated. Hearing was held in Two Rivers, Wisconsin, on April 29, 1998. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on September 18, 1998.

BACKGROUND

The facts underlying this case are not in dispute. The grievant has been employed as a wastewater treatment plant operator for the last thirteen years. Prior to June 5, 1995, the wastewater treatment plant was manned 24 hours a day. Beginning June 5, 1995, the plant was manned from 7:00 a.m. to 7:00 p.m. and was unmanned from 7:00 p.m. to 7:00 a.m. during which time a wastewater treatment plant employe was on paid standby in case his services were needed. During the period it is unmanned, dial out alarms are sent to the water filtration plant, which is manned 24 hours a day. Certain alarms are critical, others are normal and some alarms require no response. Depending on the alarm, the water plant operator will call the standby wastewater plant operator, who in turn will take care of the problem.

The grievant was on paid standby the evening of February 17, 1997 and the early morning of February 18, 1997. At approximately 1:03 a.m. on February 18, 1997, a transformer failed resulting in a power outage in a part of the City. The water plant operator, Kevin Perry, called the Electrical Department and reported that the transformer was out and they responded to repair it. The 37th Street lift station signaled a pump failure. At 1:31 a.m. the water plant operator called the grievant and told him about the power outage and that the 37th Street lift station signaled a failure. The grievant told him not to worry about the alarm and that when the power was restored, the station would return to normal operation. The power was restored and the electricians completed their work by 2:28 a.m. The 37th lift station continued to alarm every half hour for a total of 12 times.

Sewage accumulates at a lift station and it is pumped out to a higher location so that it will flow by gravity to the wastewater treatment plant. Without power, the pump cannot operate and the sewage continues to collect in the lift station and if it is not pumped out, it will back up to the lowest location which is usually someone's basement. Generally, the capacity of the lift station is such that no action need be taken for two hours or more depending on sewage flow. If the power is off for longer than this time period, the wastewater plant operator can hook up a generator to the pump and pump the sewage out. If power is restored, the pump generally, but not always, resets itself and the sewage is pumped out clearing the alarm. However, if it does not reset, then the wastewater plant operator must reset the pump manually and it then pumps the sewage out.

On February 18, 1997, after the power was restored, the lift station pump did not reset and sewage backed up into the basement of a house occupied by the Rezachek family. There was substantial damage and the Rezacheks had to move out of their house for a week until cleaning and repairs were completed and the cost to the City's insurer for damages was over \$13,000. On February 28, 1997, the grievant was given a three-day suspension for failure to respond and correct the problem with the lift station which failure caused the sewer backup and resulting damage and inconvenience to the Rezacheks. The grievant grieved his suspension which was appealed to the instant arbitration.

ISSUE

The parties were unable to agree on a statement of the issue. The City stated the issue as:

Did the City of Two Rivers violate the terms of Article III, Section D and Article V, Section K-1 when it suspended Chris Behrendt for three days on February 28, 1997?

If so, what is the proper remedy?

The Union states the issue as:

Did the employer violate the collective bargaining agreement when it suspended Chris Behrendt for three days?

If so, what is the proper remedy?

The undersigned frames the issue as follows:

Did the City have just cause to suspend the grievant for three days?

If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE V – EMPLOYMENT

K. Suspension: Suspension is defined as temporary removal without pay of an employee from his/her designated position.

1. Suspension for Just Cause: The Employer may for disciplinary reasons suspend an employee. Any employee who is suspended, except probationary, temporary and seasonal employees, shall be given written notice of the reasons for the action, and a copy of such notice shall be made a part of the employee's personnel history record. No suspension for just cause shall exceed thirty (30) calendar days.

City's Position

The City contends that the required procedure is that once the paid standby employee is called, the employee must report on-site to correct the problem. It states that the grievant did not report as required and the predictable consequences followed. It argues that the grievant was lucky to get off with a three-day suspension. It insists that the grievant had a duty which he breached by making the unwarranted assumption that the pump would reset itself but he was wrong and his failure to act resulted in damage to the City and the discipline is justifiable.

It maintains that the grievant has no excuse for his inaction. It points out that he could have reported or he could have told Perry to call him back if the alarms continued or he could have called Perry later to verify that the alarms had ceased, but he didn't do any of these. It submits that there are two possible excuses; simple laziness, the grievant did not want to report; or arrogance, he knew better and was not required to report. It insists the grievant's conduct cannot be countenanced.

The City asserts that the grievant is attempting to muddy the waters by claiming he did not have to respond until the third alarm. It points out that he did have to report plus he assured the operator not to worry about the alarms. It further observes that the grievant dwelled on assumptions he made but he had no authority to make such assumptions and he could not gamble with the public's health and besides his assumptions were false and unreasonable. It concludes that the proximate cause of the damages to the City was the grievant's willful failure to respond. It contends that because the grievant did not reset the pump, the damage occurred and had he performed as he was required nothing would have happened.

The City takes the position that the grievant's attempt to shift the blame to Perry for not calling him back is ironic because it was the grievant who told him not to worry and assured him that once the power was on the pump would reset itself. It insists that the grievant cannot dodge his responsibility by blaming another employe when he never told the employe to call him back if his "assumptions" were wrong. It submits that the grievant's story is so full of holes that there is no fabric left.

The City claims that the grievant acted recklessly and irresponsibly by failing to respond to the call by going to the lift station. It maintains that the grievant exercised "discretion" without justification or excuse which had disastrous results and was so clearly beyond his authority as to provide ample cause for discipline. The City asserts that the three-day suspension is lenient and the grievant must be sent a message that his judgment was faulty and his behavior improper so that he does not repeat his behavior with more serious consequences. It states the grievance should be denied.

Union's Position

The Union contends that after the power was restored, the pump remained in alarm and the water operator, Perry, should have called his supervisor or again called the grievant. It notes that there were ten alarm calls after Perry contacted the grievant yet Perry did nothing. The Union asserts that the standby person should not be called until after the third dialer alarm and Perry should not have called until after the third alarm. It asserts the City's argument that the standby person must report when called is not correct as evidenced by a call to Supervisor Larry Lambries in 1995 where Lambries told the water operator to wait for the third call.

The Union argues that after a power outage, a lift station may reset itself and it is prudent to wait until the power comes back on and if a lift station resets within at least two hours, there is no problem. It points out that a lift station cannot be reset until the power comes back on so having the grievant respond immediately would only incur greater costs and his judgment would be subject to question. The Union observes that employes must use their own judgment in responding to calls and no one has told the grievant not to use judgment.

The Union blames Perry for not calling the grievant again or for not calling his supervisor after the power was restored and the alarm continued. The Union suggests that the City did not properly inform Perry as to his duties with respect to the procedures for calling the standby

person. It claims that the grievant rightly assumed that Perry knew his job but the evidence suggests that his training was inadequate. It argues that even without adequate orientation, the water operator, Perry, should have done something during the five hours of dialer calls.

The Union observes that the City did not talk to the grievant prior to his suspension and did not conduct a proper investigation before issuing the suspension. It notes that the grievant was accused of making comments that he was not concerned about what happened to the Rezachek's home; however, this was based on hearsay and no credible evidence was presented for this allegation which is denied by the grievant.

The Union insists that the grievant did exactly what he was supposed to do. It points out that the alarm situation was due to a power outage which was expected to be of short duration and based on his experiences the grievant assumed that the lift station would reset itself and if it did not, he assumed Perry would call him back. It notes that Perry never called him back. It argues that the grievant's behavior was appropriate as he assessed the information he received and expected to be called again if the pump did not reset as Perry would know to call him again if the lift station continued to alarm.

It asks that the grievance be sustained, the suspension withdrawn and all records related to it expunged from the grievant's files and the grievant be made whole.

City's Reply

The City contends that the grievant has admitted everything which the City needs to make its case. In rebuttal to the Union's assertions, the City observes that the grievant's testimony that he asked Perry whether an emergency generator was needed, was never corroborated and only came up at the arbitration hearing. It claims that, in any case, it is irrelevant because the grievant's job was to investigate the alarm and correct it and Perry's job was solely to inform the grievant of the alarm. It argues that the grievant is attempting to foist the blame onto Perry.

The City finds it amazing how quick the Union is to tell other people how to do their job when the grievant failed to do his. It notes the Union claims that Perry should have called the grievant after the power came on and the alarm from the lift station came in again at 3:05 a.m. It states that had the grievant come in as he was required, there would have been no problem, and besides, Perry did not call the grievant because the grievant assured him that nothing further needed to be done.

The City reiterates its position that the grievant's claim that he should have been called after the third dialer call is irrelevant as there is no reason to believe the grievant knew or could know if it was the third or tenth call on the alarm. It maintains that the grievant "assumed" mistakenly that the pump would reset itself and assured Perry it would and then "assumed" Perry would call him back if the alarm persisted, despite never advising Perry to call him back. The

City insists that Perry never called back because of the grievant's assurance that Perry did not have to do anything further. The City observes that the 1995 event involving supervisor Lambries is materially different and Lambries did go to the lift station in a timely manner and reset the pump.

The City agrees that a lift station may reset itself but "may" does not equal "will" and this is the heart of the case because the grievant made an erroneous and unwarranted assumption which turned out to be wrong and unreasonable. It argues that the real issue is that the grievant had a duty to go out and monitor the situation and he failed to do so and an unnecessary disaster occurred. It points out that the grievant was not disciplined for waiting an hour or even two but rather for his failure to report at all.

The City insists that the grievant's purported claim of his exercise of judgment is unreasonable and unauthorized. It asserts that there is a certain amount of discretion during the day but not when on standby. It observes that the grievant's total failure to respond is the first such occasion by an employe of the City. The City contends that the grievant was not disciplined based on conversations with the Rezacheks but rather the damages in excess of \$13,000 to their home.

The City concludes that the Union's arguments are based on irrelevant facts and unreasonable assumptions. It alleges that the grievant was negligent by failing in his duty to correct a routine problem which resulted in a preventable consequence of over \$13,000 damage to the Rezachek's home and it requests denial of the grievance.

Union's Reply

The Union contends that Perry should have called the grievant again after the power was restored and the lift station continued to dial in alarms. It states he could also have called his supervisor but instead he did nothing. It suggests that perhaps his orientation was inadequate and it is the City's responsibility to assure that appropriate operational policies are in place. It notes that there is no policy to cover a power outage at a lift station. It claims the grievant used good judgment based on his experience that lift stations reset after power outages and the grievant assumed that Perry would use good judgment too. It argues that the grievant had no responsibility to instruct or direct Perry. It reiterates its claim that the City did not conduct a thorough investigation in an unbiased manner. It insists that the grievant did nothing wrong as he knew he could not reset the lift station until the power was on and he told Perry the pump would reset itself after the power was restored. It states that the grievant did not know this did not happen and Perry was in a position to do something but did nothing, so the grievant should be completely exonerated. The Union seeks the relief requested in its brief in chief.

DISCUSSION

As noted in the Background set out above, the basic facts underlying this grievance are not in dispute and need not be repeated here. The main issue presented is where to assess fault for the damage done to the Rezachek's home. The grievant contends he is blameless.

It should be noted that the grievant was on paid standby. What was he being paid for? Obviously he was receiving pay to be available to perform work if required and to exercise good judgment in the performance of his duties. The grievant as an experienced wastewater treatment plant operator had knowledge and experience in the operation of the wastewater system. The grievant was called by Mr. Perry on February 18, 1997 and informed of the power outage and the alarm on the 37th Street lift station. Mr. Perry had no wastewater treatment plant experience. Once the grievant was notified of the alarm, it was his responsibility to handle it using his experience and knowledge. The grievant made two assumptions. The first was that the pump would reset itself after the power came on and the second was that Perry would call him again if the alarm continued after the power was restored. Both assumptions proved incorrect. The grievant was not warranted in making these assumptions. It is clear that a pump doesn't always reset itself when power is restored and the grievant told Perry not to worry about the alarms and when power was restored, the station would return to normal operation. After telling Perry this, the grievant's assumption that Perry would call him again is not particularly a good assumption. The instant case is not much different from the following scenario. The grievant is called by Perry about the alarm and the grievant tells Perry not to worry and the grievant would take care of the problem. The grievant then falls back asleep and does nothing either because he decided to ignore the call or he assumed the pump would reset itself and if it did not, Perry would call him back or would call a supervisor if the alarm continued. The grievant could not excuse his failure to take any action on the assumption that subsequent events would intervene to prevent damage. The failure of the pump to reset as well as the failure of Perry to call him again would not excuse the grievant's failure to take action in the first place.

Both assumptions made by the grievant are risky and evidence very poor judgment. It was the grievant's responsibility to exercise good judgment and handle the problem. The grievant could have asked Perry to call him back when the power returned and the alarm did not clear. He could have waited an hour and called Perry to check the status of the alarm or he could have waited an hour and gone in personally to check the lift station. He could have done what Mr. Lambries did on August 9, 1995. (Ex. 19) The grievant did not do any of these things which a prudent person would. The grievant was being paid to exercise good judgment and to act responsibly and he failed to do so. The grievant cannot shift the responsibility and blame to anyone else. The grievant may have thought things would work out as he assumed, but they didn't and he must accept the consequences. Maybe the pump would have reset itself and perhaps Perry was remiss in not taking action as the alarm continued a total of 12 times but this does not excuse the grievant. The fact that the grievant's supervisors did not talk to him before disciplining him does not violate just cause as the facts speak for themselves. It was the grievant's job to do what was required and he failed to do so. As far as penalty is concerned, given the damage to the Rezachek's home as well as the inconvenience and intrusion on their lives, the three-day suspension is certainly warranted.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned issues the following

AWARD

The City had just cause to suspend the grievant for three days, and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin this 8th day of October, 1998.

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator