BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL UNION 953 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

and

CITY OF BARRON (ELECTRIC UTILITY)

Case 13
No. 56859
MA-10438

Appearances:

Mr. James S. Dahlberg, International Representative, Local Union 953 of the International Brotherhood of Electrical Workers, 2206 Highland Avenue, Eau Claire, WI 54702-3005, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Kathryn J. Prenn**, P.O. Box 1030, Eau Claire, WI 54702-1030, appearing on behalf of the City.

ARBITRATION AWARD

Local Union 953 of the International Brotherhood of Electrical Workers, hereafter Union, and City of Barron (Utilities), hereafter City or Employer, are parties to a collective bargaining agreement that provides for the final and binding arbitration of certain disputes. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. On November 3, 1998, the Commission appointed Coleen A. Burns, a member of its staff, to hear and decide the instant dispute. Hearing was held on December 22, 1998, in Barron, Wisconsin. The hearing was not transcribed. The record was closed on February 3, 1999, upon receipt of post-hearing written argument.

ISSUE

The Employer frames the issue as follows:

> Did the City have just cause to terminate the grievant for falsifying an accident report filed with the City regarding his injury on September 3, 1998?
>
> If not, what is the appropriate remedy?

The Union frames the issue as follows:

> Did the Company violate the collective bargaining agreement by discharging the grievant without just cause?
>
> If so, what is the proper remedy?

The undersigned adopts the Employer's statement of the issue.

PERTINENT CONTRACT PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

Section 1. The Utility possesses the sole right to operate the Utility and all management rights repose in it subject to the provisions of this Agreement and applicable law. These rights include, but are not limited to, the following:

A. To direct all operations of the Utility;

B. To establish reasonable work rules and regulations;

C. To hire, promote, schedule and assign employees to positions within the Utility;

D. To suspend, demote, discharge or take other disciplinary action against the employees;

E. To maintain efficiency of the Utility's operations;

F. To take whatever action is necessary to comply with state or federal law;

G. To introduce new or improved methods or facilities or to change existing methods or facilities;

H. To determine the kinds and amounts of services to be performed as pertains to the Utility's operations; and the number of positions and kinds of classifications to perform such services;

I. To determine the methods, means and personnel by which the Utility's operations are to be conducted;

J. To take whatever reasonable action is necessary to carry out the functions of the Utility in situations of emergency;

K. To Agreement out for goods and services, provided that it does not result in the layoff or continued layoff of any bargaining unit employee; and

I. To relieve employees from their duties subject to other provisions in this Agreement.

Section 2. The Union and its officer agree that they shall not attempt to abridge these management rights.

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ARTICLE IV – GRIEVANCE PROCEDURE

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Section 3.

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STEP III

If the Board's answer is not satisfactory, the matter may be appealed to the Wisconsin Employment Relations Commission (WERC) for arbitration. When a request has been made for arbitration, the WERC shall be requested to submit a list of five (5) arbitrators. As soon as the list has been received, the parties or

their designated representatives shall determine by lot the order of elimination and thereafter each shall, in that order, alternately strike a name from the list. The fifth and remaining name shall act as arbitrator.

a. The decision of the arbitrator shall be in writing and shall set forth his/her opinions and conclusions on the issues submitted to him/her, in writing, and/or at the hearing.

b. The decision of the arbitrator shall be binding for both parties, shall be final, and is limited to terms and conditions set forth in this Agreement.

c. Nothing in the foregoing shall be construed to empower the arbitrator to make any decision amending, changing, subtracting from or adding to the provisions of this Agreement.

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ARTICLE V – SENIORITY

Section 1. Seniority Defined. Seniority is the continuous service of an employee with the Utility compiled by the time actually spent on the payroll, plus properly approved absences. employment, (sic) for the purposes of determining seniority, shall include time for vacations, paid leaves of absence properly applied for and granted, compulsory military service prescribed by law, illness or accident under the sick leave provisions hereinafter set forth, or by mutual agreement between the Utility and the Union.

Section 2. Loss of Seniority. Seniority in the employment relationship shall be broken and terminated if an employee:

1. Quits;

2. Is discharged for just cause;

3. Is absent from work without justification for three (3) consecutive working days without notification to the Utility.

4. Is laid off and fails to report for work within five (5) to ten (10) working days after having been recalled by certified mail;

5. Is absent from work for any reason for twenty-four (24) months other than military leave;

6. Fails to report for work at the termination of a leave of absence or after expiration of a vacation period or period for which worker's compensation was paid;

7. If an employee on leave of absence for personal or health reasons accepts other employment without permission; or

8. Retires.

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BACKGROUND

On Thursday, September 3, 1998, Jerry Olson, hereafter grievant, was assigned to assist fellow employes in placing a light pole at a local trailer court. When the grievant and fellow employe Todd Frankhauser arrived at the trailer court, the owner of the trailer court rode up to their work site on an ATV. When the grievant admired the ATV, the owner suggested that the grievant take the ATV for a ride. The grievant got on the ATV; rode the ATV into a drainage ditch; and was thrown off the ATV. As a result of this accident, the grievant injured his nose. Subsequently, another employe, Ron Karnitz, arrived at the scene of the accident and transported the grievant to a local hospital.

Later that day, the grievant's supervisor, Utility Manager Alan Junkers, saw the grievant sitting in a truck with a bandaged nose. When Junkers asked the grievant if he had something removed from his nose, the grievant responded that he had tripped and fell by the digger truck. Junkers then told the grievant that he should pick up an accident report.

The grievant went into the Utility office. As the grievant was completing the report, he told Junkers that it was tough filling out the report and asked Junkers what he should say. Junkers replied that the grievant should tell what happened.

The grievant completed the accident report, which is entitled "Employer's First Report of Injury or Disease," and filed this report with the Utility in the afternoon of September 3, 1998. On that same day, Junkers submitted the report to City Hall.

In this report, the grievant stated that he had been injured in the afternoon of September 3, 1998, and that the injury occurred in the course of his employment. In the portion of the report that requested an injury description, the grievant wrote "damage to nose from eyeglasses." In the portion of the report that questioned "What Happened to Cause this Injury or Illness," the grievant wrote "Was RUNNING TO DIGGER TRUCK – TRIPPED & FELL and landed on face – GLASSES CUT NOSE."

On September 4, 1998, pursuant to the Employer's normal business procedures, Tony Slagstad, the City Clerk-Treasurer, telephoned the City's Worker's Compensation carrier, Wausau Insurance, and relayed the information that had been reported by the grievant on the "Employer's First Report of Injury or Disease." The grievant did not work on September 4, 1998, but rather, drove to Eau Claire to be examined by his doctor.

When the grievant returned to work on his next scheduled work day, Tuesday, September 8, 1998, he approached Junkers and requested that the "Employer's First Report of Injury or Disease" be returned to the grievant. Junkers replied that the report had been submitted to City Hall. Shortly thereafter, the grievant went into the room where the Utility Commission was meeting and told the Commission that he wanted to "confess." At that time, the grievant stated that he had been injured while riding a four wheeler.

On September 8, 1998, Junkers issued the following to the grievant:

> This letter is to inform you as of 3:30 p.m. this day. (sic) I am placing you on paid administration leave pending further investigation of your actions in regards to the September 3, 1998 incident.

On September 8, 1998, in response to a request from Junkers, the grievant prepared the following statement:

> On Sept. 3, 1998 I and Todd had the digger truck out to set transformer at Riverview school. After setting the transformer we went out to the pole pile to get a 30 ft. pole. On the way out I mentioned to Todd that Bob wanted a st. light pole set at his trailer court on South Mill St. We loaded a pole (Todd driving) and we left. I also knew we had to set a pole at Joe Johnston's (near the trailer court) Todd drove to Bob's trailer court. We meet (sic) Bob and Todd and I went back to where we were to set the pole. When we got there Bob pulled up with a new 4 wheeler. I said "Looks like another tax write off". He just laughed and said "take it for a ride" I said "NO" and he said "come on take it and try it out". I said "I guess I could check those 2 high voltage peds on the edge of the field". (If we are in an area and think of it, we usually check peds for being locked and if they might be rusty). I then got on the 4 wheeler and went out into the field. I had only went a short distance (I wasn't looking straight ahead, I was looking to my left to see where the ped was) when I looked straight ahead, I saw the huge ditch but it was too late. The 4 wheeler dropped into the ditch, throwing me forward and off into the grass. I didn't hear Bob or Todd talking, so I didn't think they saw what had happened. I was unable to

holler (I think I was dizzy, and I knew I was bleeding from my head or someplace). It was maybe about 15 seconds, when I heard Bob's voice say "oh my god Todd".. (sic) They both ran over to me. They looked at the cut and Bob took the 4 wheeler and went to get a first aid kit. Todd ran to the truck to get our first aid kit also. They both returned about the same time. Bob put a bandage on my nose while Todd went to call Ronny on the radio, so he could come and take me to the doctor.

On September 15, 1998, Gerald Novinski, President of the City of Barron Light and Water Commission, issued the following:

RE: **Notice of Hearing**

Dear Mr. Olson:

This letter is to advise you that a hearing has been scheduled for 5:30 p.m. Monday, September 21, 1998, at the Barron City Hall. The purpose of the hearing will be to consider Utility Manager Junker's (sic) recommendation that your employment be terminated as a result of the incident which occurred on September 3, 1998. Specifically, the recommendation for termination is based on the fact that you falsified an accident report filed with the City regarding the circumstances of your injury on that date.

The hearing will be held in closed session, unless you request that the hearing be held in open session. You are advised that you have the right to be represented at the hearing. You further have the right to call witnesses and submit evidence on your behalf. You have the right to cross examine and to rebut any testimony which may be unfavorable to you. At the conclusion of the hearing, the Commission will deliberate in closed session and will take final action on the recommendation that your employment be terminated.

On September 22, 1998, Commissioner President Novinski issued the following:

RE: **Notice of Termination**

Dear Mr. Olson:

On September 8, 1998, you were placed on administrative leave pending further investigation of your actions regarding an incident which occurred on

> September 3, 1998. On September 15, 1998, you were advised that a hearing was scheduled for 5:30 p.m. September 21, 1998, to consider Utility Manager Junkers' recommendation that your employment be terminated as a result of the incident which occurred on September 3, 1998. The recommendation for termination was based on the fact that you falsified an accident report filed with the City regarding the circumstances of your injury on that date.
>
> This letter is to confirm that at the conclusion of the September 21, 1998, hearing, the City of Barron Utility Commission passed a motion to terminate your employment effective immediately.

Thereafter, the grievant filed a grievance on his termination. The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

On September 4, 1998, the grievant was not at work due to a doctor visit in Eau Claire, Wisconsin, for treatment of the injury resulting from the September 3, 1998 mishap. The grievant was not at work the following Monday due to its being Labor Day, a recognized holiday at the Utility.

On Tuesday morning, upon arrival at work, the grievant requested his accident report back from the Utility General Manager but was told that it had already gone to the City Clerk. At approximately the same time, the grievant spoke directly to the Utility's Commission and admitted that his initial accident report was untrue and revealed the truth to the Commission.

No policy had been communicated to the grievant that use of non-Utility owned equipment was forbidden. The grievant was utilizing the all terrain vehicle to transport him to a nearby "pedestal" for inspection.

The Employer failed to conduct a fair and non-discriminatory investigation. Discharge is too severe a discipline in light of the long tenure of the grievant and in comparison to other disciplinary action taken by the Utility.

The Union has shown a violation of the agreement by the Employer. The grievance must be sustained. The equitable remedy is to award that the Employer did not have just cause

to discharge the grievant. The award should provide for immediate reinstatement, back wages and benefits, reduction of the discharge to a one-week suspension without pay, correction of the record and return of seniority.

Employer

There is no dispute that the standard to be applied to the disciplinary action taken against the grievant is the just cause standard. Numerous arbitrators have concluded that management's decision regarding the appropriate disciplinary action should not be set aside by the arbitrator unless the action was arbitrary, capricious, discriminatory or excessively severe in terms of all relevant circumstances.

There is no written policy or work rule that instructs employes not to lie on injury report forms. However, conduct that is dictated by common sense does not require a written rule or policy. The concept of telling the truth on injury reports is so basic that a written rule is not necessary.

Arbitrators have held that, regardless of an employe's prior job performance record, misconduct such as dishonesty and falsification of records is a "cardinal sin" which warrants discharge in the first instance. The grievant is employed as a Utility Lineman for an electric utility, an industry in which honesty and truthfulness are vital to employe safety. In an unsolicited letter, the grievant's co-workers' statements question the grievant's trustworthiness.

At the time that the grievant "came clean," five days had passed. One can only surmise that this belated revelation was motivated by a strong belief that the City had already found out that he had lied in the injury report. The grievant's claim that he filed the false report because he was "shook up" about the accident and scared is clarified by his admission that he was scared because he was not doing what he was supposed to be doing. In other words, he got caught.

An unwritten policy was in place and understood to the effect that the use of private vehicles to perform work without prior authorization was prohibited. The grievant's claim that he was performing work for the Employer by checking "peds" is not substantiated by the record evidence.

The termination is clearly supported by the record. The grievance should be dismissed.

DISCUSSION

The grievant was terminated for falsifying an "Employer's First Report of Injury or Disease" that had been prepared and filed by the grievant on September 3, 1998. The testimony of the grievant, as well as the testimony of other witnesses to the accident, demonstrates that the grievant's injury was not due to the fact that he "Was Running to Digger Truck-Tripped and fell and landed on face-GLASSES CUT NOSE," as he stated on the "Employer's First Report of Injury or Disease." Rather, as the grievant acknowledged at hearing, he suffered this injury when he had an accident while riding an ATV. According to the grievant, he was not looking where he was going, nosedived into a ditch, and fell off the ATV.

The grievant's statements describing what happened to cause the injury were not true. The grievant knew that they were not true at the time that he prepared and filed the "Employer's First Report of Injury or Disease."

The grievant intentionally falsified the "Employer's First Report of Injury or Disease" that was prepared and filed on September 3, 1998. The grievant knew, or should have known, that it was wrong to falsify the "Employer's First Report of Injury or Disease."

As soon as the Employer had reason to doubt the veracity of the "Employer's First Report of Injury or Disease," the Employer undertook to view the accident site, contact witnesses and ascertain the facts. Contrary to the argument of the Union, it is not evident that the Employer's investigation was either unfair or discriminatory.

On the morning after the report was filed by the grievant, the information on the report was transmitted to the Employer's Worker's Compensation insurer by the City Clerk-Treasurer. It is not evident that, at the time of the transmittal, the City Clerk-Treasurer had any reason to doubt the truth of the grievant's statements. Thus, the City reasonably relied upon the statements contained in the "Employer's First Report of Injury or Disease" when it reported an employe injury to its Worker's Compensation insurer.

The undersigned is not persuaded that the grievant had any intent to file a false Worker's Compensation claim. Rather, as the grievant stated at hearing, he falsified the report because he was scared of getting in trouble.

The December 10, 1990 minutes of the Employer demonstrate that the Employer voted not to grant a wage increase to the grievant at that time. The minutes, however, do not provide any rationale for this action. The June 10, 1991 minutes demonstrate that the Employer voted to grant the grievant a wage increase, effective June 10, 1991, but do not provide any rationale for this action. At hearing, the Utility Manager testified that, in 1990, the grievant's pay was frozen because the Utility was dissatisfied with the grievant's "work

ethics" and "job performance." The Utility Manager acknowledged, however, that he was not present at the time the decision was made to freeze the grievant's wages. The record fails to demonstrate that the 1990 wage freeze was disciplinary in nature, or due to work performance problems.

In 1992, the grievant was demoted from Line Superintendent to Line Foreman. At hearing, the Utility Manager claimed that the 1992 demotion was due to the fact that the Utility was dissatisfied with the grievant's attitude, work performance, and his handling of the work crews. The documentation provided by the Employer does not state the reasons for the Utility's action, but does suggest that the movement to Line Foreman resulted from the elimination of the Line Superintendent position. The record fails to demonstrate that the 1990 wage freeze was disciplinary in nature, or due to work performance problems.

In 1994, the grievant was demoted from Line Foreman to Lineman Operator/Meter Tech, the position that he occupied at the time of his discharge. At hearing, the Utility Manager asserted that this demotion was due to the grievant's poor job performance. The grievant acknowledges that he received this demotion. The grievant further acknowledges that, at a meeting that included Union representatives, the Utility Manager stated that the grievant's demotion was due to poor job performance.

On May 12, 1993, the grievant received a personnel reprimand for a poor attitude towards fellow employes. On July 1, 1997, the grievant received a personnel reprimand for failing to follow a supervisor's instruction to secure the work premises.

Given the evidence of the grievant's prior disciplinary record, the next step in the application of progressive discipline would be a suspension, rather than discharge. A just cause standard, however, does not require the imposition of progressive discipline in every instance. Some misconduct is sufficiently serious to justify immediate discharge.

In the present case, the grievant falsified an employment record. The employment record that was falsified was a record that the Employer relied upon in processing claims with its Worker's Compensation carrier. The information contained in the report was information that the Worker's Compensation carrier could consider when determining the Employer's insurance premiums. Thus, the grievant's misconduct interfered with the Employer's ability to conduct business with its Worker's Compensation carrier.

More importantly, however, is the nature of the offense. As the Employer argues, the falsification of the "Employer's First Report of Injury or Disease" provides the Employer with a reasonable basis to conclude that the grievant is not trustworthy.

As the testimony of Utility Manager Junkers demonstrates, the grievant's lineman duties include preparing reports for the State and the PSC. The Employer, as well as the public, has a fundamental interest in ensuring that these reports are accurate and not falsified because the grievant is scared of getting into trouble.

As a lineman, the grievant works with high voltage wires. Errors of omission, or commission, can have life threatening consequences.

It is harsh to discharge a twenty-eight year employe that is nearing eligibility for retirement. However, the grievant's falsification of the "Employer's First Report of Injury or Disease" is a material breach of the employer-employe relationship. The Employer's conclusion that the most stringent form of discipline is needed to safeguard the Employer's legitimate business interest in having employes prepare and file accurate employment and business records is reasonable.

The grievant claims that he was still "shook up" by the accident at the time that he falsified the report. The fact that the grievant was able to drive himself to the doctor in Eau Claire on the day after the accident militates against the conclusion that any incapacity continued on Friday, September 4, 1998.

The Employer's business office was open on Friday, September 4, 1998. Additionally, the grievant knew how to contact Employer supervisors and/or managers outside of the Utility's normal business hours.

The grievant did come "clean." He did so five days after the falsification, at a time in which the Employer was well into an investigation of the circumstances of the grievant's injury. Any mitigating effect of the grievant's confession is counterbalanced by the untimeliness of this confession.

The Union argues that discipline is too severe in comparison to other disciplinary action taken by the Utility. The comparison that the Union makes is to an altercation that took place between Ron Karnitz and Todd Frankhauser in which Frankhauser received a one-day suspension without pay.

Karnitz testified that he was involved in a physical altercation with Todd; that the altercation occurred at lunch time; and that Frankhauser, but not Karnitz, was disciplined. The only other evidence regarding this "altercation" came from Junkers. According to Junkers, Karnitz and Frankhauser had an altercation during a coffee break; Frankhauser took a swing at Karnitz; Junkers did not know if Frankhauser made contact; Frankhauser had been provoked; and, when Junkers questioned Frankhauser about the altercation, Frankhauser immediately told

Junkers what had happened. The evidence of the altercation between Frankhauser and Karnitz does not demonstrate that Frankhauser's misconduct was substantively similar in kind or degree to that of the grievant.

Several of the grievant's coworkers were disciplined in connection with the incident of September 3, 1998. The record regarding the employe conduct that gave rise to this discipline is muddled. It is not evident, however, that these employes, or any other employe, falsified an employment record. Contrary to the argument of the Union, a comparison of the grievant's misconduct with the evidence of other employe misconduct does not warrant the conclusion that the discipline imposed upon the grievant is too severe.

The grievant was not disciplined for using the ATV. Thus, not withstanding the parties' arguments to the contrary, the issue of whether or not the grievant intended to use the ATV to check "peds" is irrelevant, as is the Union's argument that the Employer failed to communicate to the grievant that use of non-utility owned equipment was forbidden.

In summary, the grievant engaged in the misconduct for which he was disciplined. The level of discipline imposed, i.e., discharge, is reasonably related to the Employer's interest in discouraging or preventing such misconduct. The Employer has just cause to discharge the grievant.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The City has just cause to terminate the grievant for falsifying an accident report filed with the City regarding his injury on September 3, 1998.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 6th day of May, 1999.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

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