BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS LOCAL UNION NO. 662

and

VILLAGE OF FAIRCHILD

Case 3
No. 57191
MA-10545

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Frederick Perillo**, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney William G. Thiel**, appearing on behalf of the Village.

ARBITRATION AWARD

General Teamsters Local Union No. 662, hereinafter referred to as the Union, and the Village of Fairchild, hereinafter referred to as the Village, agreed to submit the thirty-day suspension of Kenneth Nelson to final and binding arbitration. The Union made a request, with the concurrence of the Village, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide whether there was just cause for the suspension. The undersigned was so designated. Hearing was held in Eau Claire, Wisconsin, on March 25, 1999. The hearing was not transcribed and the parties submitted post-hearing briefs, the last of which was received on April 27, 1999.

BACKGROUND

The grievant is employed by the Village of Fairchild which has a population of 510 and is located about 30 miles southeast of Eau Claire, Wisconsin. The grievant is the only Village employe who is a State certified Water System Operator and performs a wide variety of

maintenance duties including the running and repair of the water and sewer systems, snow plowing, street sweeping, road patching, minor maintenance and other duties of a similar nature. The grievant has been employed by the Village for 23 years and is supervised by the Village Board and in the past, his immediate supervisor has been the Village Board President. The grievant was never disciplined by the Village until May, 1998. Prior to April, 1998, the Village employed another full-time employe and a half time employe. The half-time employe was injured and did not return to work for the Village and in April, 1998, the other full-time employe quit and was not immediately replaced. Thus, the grievant was the only Village employe performing maintenance and other duties from April, 1998 through December, 1998. Sometime in April or May, 1998, the Village Board President assigned supervision of the grievant to Village Board member Tom Gorkowski. The grievant was given a written reprimand on May 4, 1998, for failure to perform certain duties, failure to follow the supervisor's directives, failure to maintain records, failure to work the hours the Village assigned and other failures. The grievant was put on notice that if his attitude and willingness to follow the instructions and directives of his supervisor and/or the Board did not improve substantially that further discipline and/or discharge may follow. The grievant was also informed that he would be evaluated 90 days from the letter of reprimand. (Exhibit 3)

After a closed session of the Village Board on November 10, 1998, where the grievant's performance was discussed, the grievant was given a letter dated December 4, 1998, wherein a list of 25 deficiencies were listed with a notice that the grievant's supervisor recommended that the grievant be discharged. (Exhibit 2) At the Village Board meeting on December 10, 1998, the grievant was given a thirty (30) day suspension without pay.

ISSUE

The parties stipulated to the following:

Whether there was just cause for the 30-day suspension of the grievant in December, 1998?

If not, what is the appropriate remedy?

VILLAGE'S POSITION

The Village contends that the grievant's failure to abide by the State requirements with regard to flushing water system valves and hydrants and preparing the records related thereto by itself justifies the disciplinary action taken. It submits that in 1996, the Village was alerted to the fact that the grievant was not performing these duties. The Village claims that the grievant failed to perform the required hydrant flushing and the appropriate documentation and

the grievant admitted at the November 10, 1998 evaluation session that he had not performed these duties in the manner required by DNR. It points out that in May, 1998, the grievant was advised to provide copies of all correspondence to and from governmental agencies including water and sewer reports to the Village Clerk and the grievant had not done so by December, 1998, a failure and refusal to follow a direct order. It alleges that the grievant is responsible to operate the Village's water system in accord with State standards to ensure the safety and health of the residents and the grievant cannot decide which rules he will follow and those he considers to be superfluous.

The Village claims that the grievant was clearly insubordinate in general terms. It alleges that, over an extended time, the grievant failed and refused to perform required job responsibilities. It argues that after the grievant failed to respond to oral directives, he was given written directives which were to be signed and returned when the task was finished. It refers to Exhibit 5 as evidence of such directives which were not followed through by the grievant. It insists that the grievant's excuses that he was the only maintenance man where previously there were two and the new sewer project kept him away from his normal job, falls flat. The Village maintains that the grievant was not asked to perform what two men had performed before; rather he was asked to perform assigned tasks. It contends that fixing a library window should not require a memo on May 26, 1998, another on June 15, 1998, yet another on August 16, 1998, again on August 31, 1998, and a further memo on October 12, 1998. It observes that the grievant never did fix it but the recently hired helper did. It states that the grievant was told to sweep Humbird Street, not to spend so much time on the new sewer project, to put machine parts away and not to work overtime unless authorized, yet the grievant did not do what he was told to do. It submits that the grievant continued to question the authority of his supervisor and failed to follow his instructions. It asserts that the grievant received numerous written reminders to perform certain job tasks which the grievant ignored.

The Village contends that the grievant destroyed Village records, to wit, water test results. It notes that he admitted throwing these away without any authorization. It submits the grievant was to turn in all records to the Village Clerk and the grievant's response that some vendors sent materials to his home address is an unsatisfactory explanation, as all the grievant had to do is timely deposit records with the Village Clerk. It insists the destruction of the water test results is another expression of insubordinate behavior on the grievant's part.

The Village claims the grievant failed to abide by Village policy with respect to reporting accidents. It points out that on July 5, 1998, the grievant failed to set the brakes on the Village truck and it rolled down a slope into the edge of the lagoon. It notes that the grievant enlisted the assistance of a nearby farmer to pull the truck out. It asserts that by this conduct the grievant exposed the Village to potential liability or personal injuries and/or property damage. It alleges that the grievant's actions violated the Village handbook which requires employes involved in accidents to immediately notify the police, their supervisor and

the Village Clerk, none of which the grievant did on the basis he did not consider this to be an accident. The Village claims that the grievant's supervisor should have been notified and the decision as to whether or not this was an accident was not the grievant's to make.

The Village argues that the grievant failed to adequately deal with an emergency situation. It submits that the grievant did not want to be disturbed while at a tavern and failed to respond to an emergency call about a sewer backing up into a residence. The Village claims that the grievant's calling the resident and determining it was not an emergency is another example of the grievant's insubordinate behavior towards his supervisor who directed him to go to the house and look into the matter.

The Village states that the standard applicable to the grievant's suspension is "just cause." It cites numerous arbitral authorities which stated a "just cause" standard and the Village summarized it by asserting that "just cause" means that an employer, acting in good faith, has a fair reason to discipline the employe and the reason is supported by the evidence. It adds that the misconduct must be directly connected with an employe's work, represent a willful disregard for the employer's interest and be inconsistent with an employe's obligations to the employer. The Village argues that it had ample "just cause" for the grievant's thirty-day suspension. It insists that it engaged in progressive discipline and the grievant engaged over a substantial period of time in the same conduct for which he was reprimanded on May 4, 1998. It claims that the grievant simply refused to do what his supervisor directed him to do and the grievant decided when and how to do several job tasks. The Village maintains that it was not up to the grievant to decide what jobs should be done or delayed but to respond to the Village's demand for services. It submits the grievant was disrespectful of the Village's needs and persisted in doing things his own way.

The Village asserts that it did not act precipitously, punitively or without basis in fact. It characterizes its actions as a last resort—one final attempt to convince the grievant he could not act in an insubordinate manner and he was not an entity unto himself. It observes that the grievant's past record, the written reprimand of May 4, 1998, plus the numerous memos sent to him establishes that he was warned.

It maintains that the grievant was insubordinate in that he refused to obey his supervisor's many orders. It contends that the grievant was issued clear and direct orders which were constantly and consistently disobeyed by the grievant. The grievant, according to the Village, did not like the memo system, so he ignored it and he did not care for his supervisor, so he was argumentative with him and perhaps he just didn't "get it" but that is not the Village's fault.

The Village insists that on one occasion the grievant was directly insubordinate when his supervisor told him not to work unauthorized overtime and an argument ensued. It observes that the grievant was required to obey his supervisor's order even if he did not agree with it.

The Village submits that the grievant engaged in a pattern of activity where he was repeatedly given instructions which he disobeyed warranting his discipline and it asserts that it engaged in "a great deal of forebearance" before it disciplined him. It suggests that the grievant could have been discharged for his egregious conduct but was properly disciplined by the 30-day suspension.

The Village insists that it had "just cause" to impose this particular penalty. It points out that the grievant was reprimanded in May, 1998, and up until the suspension, was given guidance, directions and orders which the grievant chose to ignore. It argues that the grievant's blatant disregard of supervisory authority was so severe that it merited the 30-day suspension. It claims that it attempted to correct the grievant's behavior but nothing less than the 30-day suspension would have brought to the grievant's attention that it is the Village and not he that establishes policy and determines what staff should work on within their respective job duties. It concludes that just cause exists for the 30-day suspension.

UNION'S POSITION

The Union contends that the grievant was suspended without just cause and in violation of his rights under Secs. 111.70(3)(a)1 and 3, Stats. The Union asserts that the thirty offenses with which the Village charged the grievant fall into four categories:

1. He was rude and insubordinate to Village officials.
2. He failed to perform work adequately in response to his supervisor's orders.
3. He failed to follow Village policy regarding schedules, reports or other procedural matters.
4. He failed to follow DNR guidelines on water system maintenance.

The Union claims that these charges are untrue or there are substantial mitigating factors that render the severe discipline imposed unjust. It submits that the claims of rudeness and insubordination were not substantiated. It insists that the grievant's supervisor, rather than the grievant, was the abrasive, confrontational party. It states that at worst, the incidents cited by the Village reveal a personality conflict and discipline based on mere personal dislikes cannot be the basis of even minor discipline. It observes that the grievant had no such conflicts in the previous 23 years although he worked with different administrations. It notes that the grievant has harmonious relations with citizens in general, employes of contractors and the DNR but not with a few Village Board officials. It claims that this evidence suggests that the problem inheres in unreasonable officiousness and hypersensitivity on the part of these officials.

The Union contends that the Village's attempt to force this case into the mold of classic insubordination, characterizing the grievant as a willful worker who simply refused to follow instructions must fail. It asserts that the grievant was repeatedly given orders he could not follow or was not obliged to follow. It points out that he was not obligated to work unsafely in a second story window. It takes the position that it was unreasonable to expect him to perform all the assignments given to him after the loss of two other Village employes. It cites arbitral authority for the proposition that discipline cannot be imposed upon employes given such "Catch 22" dilemmas.

With respect to the claim that the grievant did not work promptly to resolve citizen and supervisory complaints, the Union submits that virtually all of these complaints were manufactured and concerned a relative of a Village official or the supervisor's own street. It points out that there is a dearth of evidence that citizens in general believed the grievant was slow to respond. It alleges that the problems stemmed from the supervisor's dislike of the grievant or the failure of the Village to hire enough workers to perform the work needed. It insists that the Village made inconsistent demands upon the grievant by adding Sewer Inspector duties at the same time other employes left. It argues that the supervisor's officious style was designed to put the grievant into impossible situations where he would always be guilty of something. It maintains that three employes were required to maintain the level of service but the Village refused to hire the help it needed and any discipline for not doing the work of three is simply unjust.

The Union insists that the charge that the grievant's being faulted for not rigidly following scheduling procedures are largely irrelevant to a one-man operation. The Union observes the failure to call an empty clerk's office to report a change in starting time, or to change the time of his lunch or break have no demonstrated impact on any operation of the Village. It notes that arbitrators have rebuffed exaltation of the trivial by officious and bureaucratic-minded supervisors. It observes that there is no evidence that the grievant's rearrangement of breaks or starting time was part of a scheme to claim pay for time not worked or to avoid work or that it caused an inconvenience to any Village operation. It terms these so-called offenses as unreasonable restrictions having no purpose but to hobble the grievant's work and then to find fault with him afterwards.

With respect to the failure to perform his primary duties required by the State DNR, the Union refers the State's environment engineer's opinion that the grievant was dedicated to the proper operation of drinking and wastewater systems to comply with the appropriate rules and he found the delayed reporting not to be a deficiency worthy of formal enforcement. The Union finds that it is not surprising that the Village reached the opposite conclusion because it is not the safe operation of the system that is important, but rather, the paperwork. The Union points out that there was no evidence of a single adverse consequence to the Village from the minor delays in keeping certain forms and it asks the undersigned not to champion form over substance but to apply the common sense approach of the State engineer.

The Union argues that there is substantial evidence that anti-union prejudice played a part in the grievant's discipline. It points out that there was an explicit statement made in the context of an organizing drive that the grievant could be fired for organizing a union. It observes that the wife of this official is one of the grievant's contemporary accusers. The Union refers to the grievant's clean record for his first 23 years until he mentioned organizing a union. It claims the Village only made a pretense at progressive discipline and attempted to discharge him under a blunderbuss of charges. It claims that the grievant was under surveillance and that two incidents were "set ups" designed to entrap the grievant using management members or their relatives. It concludes that these factors show that the decision to suspend the grievant was based, in part, on anti-union reasons. It states that the grievant was not guilty of any offense and he should be compensated for his unjust suspension with full back pay and benefits.

DISCUSSION

The Union has raised an issue that involves a statutory violation of Secs. 111.70(3)(a)1 and 3, Stats. There was no evidence that a complaint of prohibited practices regarding the grievant's suspension has even been filed and thus there has been no deferral of the issue to the instant arbitration. It follows that the undersigned has no jurisdiction to determine whether anti-union animus played a part in the grievant's suspension. The cases cited by the Union in support of its position, ANTILLES CONSOLIDATED SCHOOL SYSTEM, 110 LA 136 (KANZER, 1998) and UNIVERSITY OF MINNESOTA, 111 LA 676 (NEIGH, 1998) contained contractual language prohibiting discrimination based on union activity. Inasmuch as the parties have not yet reached agreement on a collective bargaining agreement, there is no enforceable contractual provision prohibiting discrimination based on union activity. Additionally, the parties stipulated that the issue before the undersigned was whether there was just cause for the suspension. Thus, the undersigned lacks any authority to decide whether the suspension was based in part on protected union activity.

The Village has offered many definitions of "just cause" which other arbitrators have used in the cases before them. Again, because the parties do not have a contract, there is no contractual definition of just cause nor is there any listing of the steps in a progressive disciplinary scheme as there might be, say similar to the Village's handbook. An amalgam of the various definitions can be stated as whether the Village proved misconduct on the part of the grievant, and under all the circumstances, is the discipline appropriate.

The Village offered evidence that the grievant failed to perform certain duties as directed by the Village or his supervisor. The Village has shown that the grievant did not flush the water mains and cycle the valves and make a record of it. On October 20, 1995, the Village had a PWS sanitary survey performed by the DNR with the assistance of the grievant and certain deficiencies were noted by letter of January 10, 1996, including requiring maintenance records with valve and hydrant information. (Exhibit 7) The record keeping was

to be established by March 31, 1996. (Exhibit 7) The DNR even attached forms for this use and the grievant was aware of these as well as the requirements. At the February 5, 1998 Village Board meeting, the grievant updated the Board on the maintenance report and the Board passed a motion that a copy of reports and correspondence would be given to the Clerk by the grievant to copy and maintain. (Exhibit 9) On May 4, 1998, the grievant was given a letter of reprimand for, among other things, failing to give the Clerk the reports and correspondence. (Exhibit 3) On September 18, 1998, the grievant was given a memo to give all reports and records to the Village Clerk. (Exhibit 5) The letter of suspension dated December 4, 1998, indicated that the grievant had not submitted the reports nor had the grievant performed hydrant flushing as required by the DNR. (Exhibit 2) The grievant's reliance on Mr. Thon's letter to Mr. Novacek dated March 29, 1999 (Exhibit 14), is not persuasive because it is hearsay, and secondly, Mr. Thon conducted the 1995 survey which resulted in the DNR directing the Village to take certain action in a timely fashion, and then states that delayed reporting was not worthy of formal enforcement action. (Exhibit 4) Obviously, Mr. Thon is speaking of action by the DNR against the Village and it is noted that as of March 23, 1999, the reports are current. (Exhibit 14) The Village apparently took action so that the reports became current. In any event, the evidence establishes that the grievant's performance as directed by the Village was not up to the standards made known to the grievant and so this misconduct has been proven by the Village.

The Village has asserted that the grievant was insubordinate in that he failed to perform his assigned duties. Insubordination is an offense for which severe discipline may be imposed. Insubordination is defined by the Village, citing a number of arbitration decisions. Insubordination involves a direct order from a supervisor and a refusal of that order, other than on grounds of safety, morals or illegality, and a warning of the consequences of failing to follow the order. It is really a direct affront to the authority of the supervisor. For example, say a custodian is told to sweep up the floor, a normal duty, and he flatly refuses and after told of the consequences, he still refuses. The supervisor leaves and the custodian changes his mind and sweeps the floor. On the other hand, a custodian is told to sweep the floor and says "yes, sir," and after the supervisor leaves, he does not sweep the floor. The first case would be insubordination as it directly challenges the supervisor. The second is not insubordination even though the work is done in the prior case but not the latter. The latter would be neglect of duties. The evidence in this case is not your classic insubordination but certainty borders on it. The evidence firmly establishes a neglect of duties.

The Village established a work order system whereby work orders were given the grievant and he was to complete the work order and sign it indicating it was completed. The Union greatly exaggerates by referring to this system as "intensely bureaucratic" and "numerous lengthy memoranda" and "bullying tactics." The Village acted in an appropriate manner to give the grievant work orders which he was to sign off when completed. The Village is small and the supervisor has a full-time job elsewhere, so this system was neither bureaucratic nor burdensome but entirely reasonable. The various memoranda were short. (Exhibit 5) The memoranda were somewhat numerous because the grievant never performed

them requiring repetition of the same memo or the grievant did not sign off and return the completed work order. This alone is indicative of the fact that the grievant failed to perform assigned duties.

The evidence established that the grievant continued to work overtime contrary to instructions from his supervisor and continued to spend time at the new sewer addition contrary to the directives of his supervisor. (Exhibits 5 and 8) The record establishes that the grievant apparently did not like any supervision. Perhaps he had none for over twenty years and did not adjust to the change in management style. The grievant for the most part simply ignored his supervisor and performed his duties as he deemed appropriate. The grievant apparently failed to realize that everyone has a boss and while he might not agree with the directives of the supervisor, he had to comply where the job was within his normal duties and did not involve health or safety or other concerns that would legitimize a refusal to follow the instructions. A clear example is the library window. On May 26, 1998, the grievant's supervisor sent the grievant the following memo: "It has been reported to me that an upper window in the Library has been broken and needs to be repaired. Thank you." There were no instructions on how or when to do it. The grievant argued it was unsafe, yet the grievant could have decided how to do it so it would be safe whether it was to build a scaffold or use a cherry picker. The grievant was reminded of the window on June 15, 1998, and was asked to check if it could be repaired from the inside. The grievant did nothing. On August 16, 1998, two months later, the grievant was instructed to board the window up from the inside. On August 31, 1998, the grievant was directed to fix or secure the window by September 3, 1998, and it was then boarded up. On October 12, 1998, the grievant was told to remove the window and replace it with glass. The grievant never did this. Here, a minor repair within the job duties of the grievant was left to the grievant's discretion as to how and when to do it and due to the grievant's failure to do so, the job instructions became more specific both as to how to do it and when. The grievant cannot complain that supervision became closer than it previously was because he brought this on himself. Other examples could be given but there is sufficient evidence in the record that the grievant failed to perform duties as directed and discipline was warranted.

Having concluded that discipline was warranted, the next issue is whether there was just cause for the quantum of discipline imposed. As noted earlier, the contract has not been agreed to so there are no guidelines as to the amount of discipline for offenses. Generally, the concept of "just cause" provides for progressive discipline which is corrective rather than punitive. The concept of progressive discipline is that except for major offenses such as theft, selling illegal drugs, etc., the discipline will follow in increasing amounts, ultimately resulting in discharge. The theory is that a small amount of discipline will correct an employe's behavior, and if not, greater discipline will and if that is unsuccessful, the employe cannot be salvaged and dismissed is appropriate. In the instant case, the grievant had a written reprimand and was then given a 30-day suspension. The Village justifies this on the basis that the grievant engaged in a pattern of conduct over a period of time such that 30 days was appropriate. The problem with this argument is that an employer cannot allow a number of

transgressions to build up so that it has a sufficient number of offenses to justify a severe penalty. In the instant case, the grievant should have been given discipline at a lower amount after he continued the same conduct that resulted in the written reprimand. The grievant may have realized the error of his ways had he been given a five- or ten-day suspension early on when his conduct did not improve after the May 4, 1998 letter of reprimand. Additionally, the delay and failure to take prompt action may have given the grievant the impression that the Village condoned or did not consider the grievant's failure to perform as directed serious enough to warrant discipline. In any case, the 30-day suspension is too severe when taking into account the failure to give any intermediate discipline when the offenses continued over a long period and each one taken by itself would not be serious enough to warrant a severe penalty. Just cause requires that the penalty fit the crime. Given the grievant's 23 years of service and only a written reprimand, the undersigned concludes that just cause should be limited to a ten-day suspension without pay. The grievant's failure to properly perform his job duties as directed in a number of areas warranted a ten (10) day suspension which should be sufficient to put the grievant on notice that future conduct of a similar nature will result in greater discipline and ultimately discharge.

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

AWARD

The Village had just cause for a 10-day suspension without pay of the grievant, but not for the 30-day suspension. The Village shall reduce the 30-day suspension to a 10-day suspension without pay, and the grievant shall be made whole for the other 20 days.

Dated at Madison, Wisconsin, this 11th day of June, 1999.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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