

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF RACINE

and

**LOCAL 67, AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, AFL-CIO, Affiliated with
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**

Case 563

No. 57457

MA-10633

(Randall Maurer Grievance)

Appearances:

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin 53401-0624, on behalf of the Union.

Mr. Guadalupe G. Villarreal, Deputy City Attorney, City of Racine, 730 Washington Avenue, Racine, Wisconsin 53403, on behalf of the City.

ARBITRATION AWARD

According to the terms of the 1998-99 collective bargaining agreement between the City of Racine (City) and Local 67 American Federation of State, County, and Municipal Employees, AFL-CIO (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding whether the City had just cause to impose a five-day suspension on Randall Maurer on December 15, 1998. The Commission designated Sharon A. Gallagher to hear and resolve the dispute, and, according to contract, Arbitrator Gallagher mediated said dispute unsuccessfully on June 16, 1999. Thereafter, hearing was scheduled and held on July 21, 1999, at Racine, Wisconsin. A stenographic transcript of the proceedings was made and received on August 11, 1999. The parties agreed that they would file their briefs in this case on September 15, 1999, and that the undersigned would thereafter exchange them. The parties also agreed that they would waive their right to file reply briefs.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties stipulated that the following issue shall be determined by the arbitrator in this case:

Did the Employer have just cause to impose a five-day suspension on Randall Maurer on December 15, 1998? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS AND RELEVANT WORK RULES

ARTICLE II – MANAGEMENT AND UNION RECOGNITION

E. Management Rights. The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

1. To direct all operations of City government.
2. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge and take other disciplinary action against employees for just cause.
3. To lay off employees due to lack of work or funds in keeping with the seniority provisions of the Agreement.
4. To maintain efficiency of City government operations entrusted to it.
5. To introduce new or improved methods or facilities.
6. To change existing methods or facilities.
7. To contract out for goods or services, however, there shall be no layoffs or reduction in hours due to any contracting out of work.
8. To determine the methods, means and personnel by which such operations are to be conducted.
9. To take whatever action which must be necessary to carry out the functions of

the City in situations of emergency.

10. To take whatever action is necessary to comply with State or Federal Law.

11. Overtime: The City has the right to schedule overtime work as required in a manner most advantageous to the City and consistent with the requirements of municipal employment and the public interest. Part-time and seasonal employees shall not be assigned overtime unless all regular employees are working overtime or are unavailable. This shall not apply to full-time or part-time recreation supervision employees in the Recreation Division of the Park and Recreation Department.

In addition to the Management Rights listed above, the powers of authority which the City has not officially abridged, delegated or modified by this Agreement are retained by the City. The Union recognizes the exclusive right of the City to establish reasonable work rules. The Union and the employees agree that they will not attempt to abridge these Management Rights and the City agrees that it will not use these Management Rights to interfere with rights established under this Agreement or the existing past practices within the departments covered by this Agreement, unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. Nothing in this Agreement shall be construed as imposing an obligation upon the City to consult or negotiate concerning the above areas of discretion and policy.

. . .

WORK RULES

. . .

Q. Work Performance

1. Following is a list of prohibited conduct which may result in disciplinary action ranging from written or oral reprimands to immediate discharge, depending upon the specific form of conduct and/or the number of infractions.

- a) insubordination including disobedience or failure to carry out assignments or instructions.
- b) tardiness, loafing, loitering, sleeping or engaging in unauthorized City and personal business.
- c) abusive use of sick leave benefits
- d) failure to comply with health, safety, and sanitation rules and regulations.
- e) negligence in performing assigned duties

. . .

BACKGROUND

The Veteran's Plaza is a large paved area with benches and trashcans, which abuts on Racine city streets, and is lit by between 10 and 20 lights in the evening. An east-west arterial street dead-ends at the Plaza. It is undisputed that in the Winter, leaves blow into the Plaza from this east-west arterial street; that homeless people often sit in the Plaza area during good weather and that they leave trash and, at times, sleep in that area when it is not too cold.

Randall Maurer has been employed by the City since 1987 as a custodian. At the time of the instant discipline, Maurer was employed at the Racine Public Library, working the second shift (4 p.m. to midnight) each workday. His immediate supervisor is Dan Schultz, Public Library Business Manager. Schultz's hours of work end at 5 p.m. Monday through Friday, therefore he is only at the Public Library to direct Maurer between 4 p.m. and 5 p.m. each day. Schultz has been Maurer's direct supervisor for approximately 3.5 years. After Schultz became Maurer's supervisor, Schultz instituted a daily work log/checklist of duties which Maurer is expected to complete each day. The daily work log/checklist specifically lists "clean outside plaza" as one of Maurer's daily duties, and Maurer admitted that he is aware that he should clean any leaves, debris, and/or garbage and trash from Veteran's Plaza, as stated above in Maurer's daily work log/checklist. As for other duties, Schultz generally gives Maurer a work order, indicating the special work (not done on a daily basis) which Schultz expects Maurer to perform. Maurer does not need a work order to perform the cleaning services at the Veteran's Plaza on a daily basis.

Ed Doonan, Building Maintenance Supervisor for the City for the past 20 years, is Maurer's upper-lever supervisor. 1/ On occasion, Doonan has issued Maurer warnings regarding Maurer's work and the relevant warnings, which occurred between May 4, 1995, and December 15, 1998, are as follows:

1. Oral warning issued 5/4/95 by Doonan and Working Supervisor Vasquez for Maurer's failure to clean Veteran's Plaza on 5/3/95. This warning stated that Maurer had been told in the past to clean the Plaza nightly.

2. Written warning issued on 7/21/95 by Doonan for Maurer's failure to promptly attend to a sewer backup problem at the Library.

3. One-day suspension issued 11/27/95 by Doonan for Maurer's failure to clean the Veteran's Plaza on 11/22/95.

4. One-day suspension issued on 5/22/96 by Doonan and Schultz for failure to clean the second floor Men's Room at the Library.

In each instance listed above, the City found that Maurer had violated Work Rule Q, Section 1 (Article e or Articles d and e). Maurer did not grieve any of the warnings listed above.

1/ It is not unusual for employes in the employ of the City to have more than one supervisor. Indeed, employes in the departments of Parks and Recreation, Solid Waste, Street Maintenance also have multiple supervisors.

As a general matter, Maurer's duties are to clean the second floor of the Library, oversee the lockup of the building at night, clean the Veteran's Plaza every night and to call Doonan if there is a problem at the building between 4 p.m. and midnight. Maurer is the only employe assigned to clean the Veteran's Plaza.

Over the years that Schultz has been Maurer's immediate supervisor, Schultz has repeatedly told Maurer to clean the Veteran's Plaza. Schultz has also given Maurer memos and has gone over the responsibility Maurer has to make sure that the Veteran's Plaza is cleaned each day. Schultz has also received complaints from time to time regarding the conditions in the Veteran's Plaza and has talked to Maurer to urge him to improve his work in that area. After having spoken to Maurer, Schultz has noted that Maurer's work in the Plaza has improved for a short period of time but would eventually deteriorate again if Schultz did not continuously check up on Maurer's performance in the Plaza. Schultz, however, has not documented his verbal discussions with Maurer regarding Maurer's failure to clean the Plaza over the past 3.5 years. Schultz stated that Maurer never asked him for a rake or other tools to remove leaves from the Plaza. 2/

2/ I have credited Schultz on all of these points.

Maurer admitted that during his employment under Schultz, Schultz has told him that cleaning the outside of the Library, including the Veteran's Plaza and raking leaves therein, were his primary responsibility, and that he understood that he was responsible to clean up the Veteran's Plaza whenever leaves, debris or garbage were in the Plaza. Maurer admitted that he has had to re-clean the Veteran's Plaza the day after he cleaned it due to winds blowing leaves and debris into the Plaza and trash and debris left by homeless people. Maurer stated that he has never cleaned the Veteran's Plaza after dusk when the lights in the Plaza are lit.

FACTS

On December 14, 1998, Building Maintenance Supervisor Doonan received a call from the Department of Parks and Recreation wherein a private citizen stated that litter and leaves had been in Veteran's Plaza for three weeks. Doonan then went down to Veteran's Plaza sometime that afternoon and looked at the area. Doonan found a large amount of trash, leaves, debris and broken glass in the area which he stated appeared to have been there for at least one week. On December 14th Doonan met with Personnel Director Jim Kozina to determine what level of discipline should be meted out to Maurer regarding his failure to clean the Veteran's

Plaza on December 14th. Kozina and Doonan reviewed Maurer's work record and determined that a five-day suspension was appropriate. Also on December 14th, Doonan spoke with Dan Schultz, the Public Library Business Manager, about the condition of the Plaza.

Around 3 p.m. on December 15th, Doonan went to the Department of Public Works and picked up then-Union Steward John Mulhavich and took him to Veteran's Plaza to show him the area which Maurer had failed to clean. Doonan stated that on December 15th the same trash, debris, broken glass and leaves were still in the Veteran's Plaza area. 3/ Doonan took pictures of the site at this time. Doonan later spoke with Maurer regarding Maurer's failure to clean Veteran's Plaza and delivered the five-day suspension to Maurer. After the meeting with Doonan, Maurer went to Veteran's Plaza and cleaned the leaves, debris, trash, and broken glass with a broom and dustpan. Maurer admitted that the conditions depicted in the Veteran's Plaza pictures taken by the City demonstrated that the Plaza needed to be cleaned up.

3/ Neither the private citizen who complained about the condition of the Plaza nor Union Steward John Mulhavich testified herein. Maurer testified herein that he cleaned the Veteran's Plaza on December 14th between 4 p.m. and 5 p.m. and that the leaves and trash found there by Doonan on December 15th must have blown into the area or been left there by homeless people during the evening, after 5 p.m. on December 14th, but prior to 3 p.m. on December 15th.

Maurer also stated that approximately three days prior to December 14th his City-issued rake was missing and he had asked Schultz for a new rake at that time. Maurer stated that Schultz must have been lying when he stated herein that Maurer never asked him for a rake. I find Maurer's testimony incredible, given the photographs of the Plaza submitted by the City and based upon Maurer's demeanor under oath (including his assertion that he picked up the debris in the Plaza on December 15th on his hands and knees).

POSTIONS OF THE PARTIES

Union

The Union argued that the City failed to afford Grievant Maurer due process in suspending him. Before Maurer was confronted by his supervisor, before he was given an opportunity to explain himself and before a full investigation was done, Supervisor Doonan had decided to discipline Maurer. Doonan admitted at the time he decided to discipline Maurer that he believed the case would go to arbitration. In the Union's view, this type of treatment does not rise to the level of due process and is reason enough to reverse the City's actions in disciplining Maurer. In the Union's view, Maurer should have been given a chance to explain himself before any decision to suspend him was made by the City. The City simply did not give Maurer this consideration.

The Union noted that Maurer is an employe with 12 years of seniority. Maurer's supervisor Schultz never told Maurer on or before December 14, 1998, that Veteran's Plaza required immediate attention. Indeed, when Doonan received the citizen's complaint on

December 14th, neither Doonan nor Schultz spoke to Maurer about it. The Union observed that the citizen who complained did not testify in this proceeding. Furthermore, the Union argued that although Doonan stated that he checked out the Veteran's Plaza on December 14th after receiving the citizen's complaint, there was no independent evidence that he had done this and no corroborating witnesses on this point. Thus, the Union urged that the City failed to prove that anything was wrong with Veteran's Plaza on December 14th.

Indeed, the Union noted that Maurer stated herein that he cleaned Veteran's Plaza on December 14th before 5 p.m., 21 hours before Doonan inspected the plaza on December 15th. As Doonan took his pictures on December 15th and brought the Steward to observe Veteran's Plaza at or about 3 p.m. on December 15th, the Union asserted that the City failed to show that the debris and trash found in Veteran's Plaza on December 15th was, in fact, due to Maurer's negligence. Rather, the Union contended that the area must have been littered by 3 p.m. on December 15, 1998, because wind had blown debris and trash into Veteran's Plaza after Maurer had cleaned it on December 14th. The Union noted that weather reports from December 14th and 15th would tend to support this view. In addition, evidence showed that homeless people often left debris and piled leaves in Veteran's Plaza. City witnesses all admitted that they were aware that homeless people stayed in Veteran's Plaza when the weather was not too cold.

Therefore, the Union sought an award sustaining the grievance, making Maurer whole for all lost wages and benefits and expunging his record of any reference to the discipline meted out by the City herein.

City

The City noted that Maurer has been employed by it since November, 1987. The City pointed out that from May, 1995, to May, 1996, the City disciplined Maurer four times for failure to clean areas within his responsibility. These disciplinary actions included two one-day suspensions and none of them was grieved by Maurer.

The City argued that the evidence showed that a large amount of debris, leaves, broken glass and trash had accumulated in Veteran's Plaza by December 14th which the Union failed to explain away. In the City's view, the Union's arguments were unpersuasive: that debris was blown into Veteran's Plaza while Maurer was not at work; that homeless people must have engaged in littering and sleeping in the Plaza; that Maurer complained that he did not have the proper tools to remove debris from Veteran's Plaza; and that Maurer could not remove debris after dark because the Plaza was not properly lit. Rather, the City argued that Grievant Maurer had disregarded the City's consistent directives to clean Veteran's Plaza daily. In this regard, the City noted that it had given Maurer a check list (for at least the past three years) which indicated that Maurer should clean Veteran's Plaza daily. In addition, Supervisor Doonan's view of the area on December 14th and 15th and Doonan's testimony thereon was not effectively challenged by the Union. Indeed, the City observed that the Union conceded that

debris was in Veteran's Plaza on December 15th and the Union's attempt to place blame elsewhere fell short as the Union failed to provide any tangible proof of its theories in this regard. Finally, the City noted that Supervisor Schultz stated he never received a request for additional tools from Maurer.

Because the City had warned and disciplined Maurer in the past for failure to keep Veteran's Plaza and other areas of his responsibility clean, Maurer's failure to clean Veteran's Plaza on December 14th clearly warranted the discipline given by the City in this case. As this was the fifth violation of a work rule involving Maurer's work performance, the City sought an award denying and dismissing the grievance in its entirety.

DISCUSSION

The Union has argued that the City failed to afford Maurer due process when it disciplined him for his alleged failure to clean Veteran's Plaza on December 14th. I disagree. The fact that Doonan decided to discipline Maurer without first seeking Maurer's side of the story does not, in the circumstances proven here, amount to a violation of due process. The evidence herein showed that Maurer had been disciplined four times since July, 1995, for failure to properly perform his assigned duties. The most recent warnings, on November 27, 1995, and May 22, 1996, each resulted in one-day suspensions. Maurer failed to grieve these prior disciplinary actions. In addition, it is undisputed that Maurer knew that it was his responsibility to clean the Plaza daily, based upon his daily work log/checklist, formal discussions with Doonan over the years and his own admissions herein. 4/

4/ Maurer admitted that Doonan spoke to him and disciplined him twice before December 14th regarding his failure to clean Veteran's Plaza properly. However, Maurer denied that Schultz ever spoke to him regarding his alleged failure to clean Veteran's Plaza prior to December 15, 1998. For reasons stated herein, I have credited Schultz, not Maurer in these areas.

As this case involves severe discipline (a five-day suspension), proof of Maurer's misconduct must be clear in order to sustain the discipline against this long-term employe, even though Maurer has a less than desirable work record.

The Union has argued that the City failed to offer evidence to corroborate Doonan's testimony that he viewed the Plaza on December 14th and that he found the Plaza in an unacceptable condition. Generally, such corroboration would not be required unless Doonan's testimony was impeached by the Union herein. Here, Doonan's statements and his credibility were never successfully attacked by the Union. Therefore, I credit Doonan's testimony in its entirety regarding that fact that he went to the Plaza on December 14th; that he observed the condition of the Plaza on December 14th; that he found the condition of the Plaza unacceptable. The City also offered photographs showing the condition of the Plaza on December 15th in the

afternoon before Maurer's shift began. From the original photographs proffered, noting particularly the volume of leaves, trash, debris and broken glass and the compacted appearance of the leaves, it is more reasonable to conclude that the leaves, etc., were in the Plaza for more than one week as Doonan testified than it is to conclude that all of the leaves, debris, trash and broken glass either blew into the Plaza between 5 p.m. on December 14th and 3 p.m. on December 15th or were placed there by homeless people. Indeed, the possibility that homeless people brought leaves into the Plaza to sleep in and that they also left trash, debris and broken glass there during the evening of December 14th was suggested by the Union. However, these suggestions are insufficient basis upon which to conclude that homeless people were in fact responsible for the mess Doonan found in the Plaza on December 14th and 15th. Here, the Union failed to offer specific proof that homeless people used the Plaza on December 14th and/or 15th. Therefore, the Union's suggestions in this regard must be discounted. Similarly, the Union offered weather reports to show that the wind blew leaves, etc., into the Plaza on December 14th and 15th. Again, the Union failed to offer specific proof as to the condition of the Plaza on December 14th and 15th requiring a conclusion that the Union's suggestions in this regard were based on conjecture.

The fact that the City failed to call the citizen who complained about the condition of the Plaza does not require a conclusion that the grievance should be sustained. Here, the City offered Doonan's testimony which showed that Doonan took care to view the area, to show the Plaza to the Union Steward on December 15th and to take photographs of the Plaza before Doonan disciplined Maurer. The Union's failure to call the Union Steward involved in viewing the Plaza to deny or dispute Doonan's testimony is significant, as a presumption is then raised that the Steward would not have provided evidence in support of Maurer. In all the circumstances of this case and given that fact that Maurer received two one-day suspensions for failure to properly perform his assigned duties in 1995 and 1996, it was not unreasonable for the City to issue Maurer a five-day suspension for his failure, a third time, to properly perform his duties and clean Veteran's Plaza on December 14, 1998. I therefore issue the following award

AWARD

The Employer had just cause to impose a five-day suspension on Randall Maurer on December 15, 1998. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 11th day of November, 1999.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator