

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 562

No. 57456

MA-10632

(Marckus Dyess 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 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 a five-day suspension which was imposed upon Marckus Dyess on January 5, 1999. The Commission designated Sharon A. Gallagher and, as required by the contract, Arbitrator Gallagher mediated said dispute on June 16, 1999. Thereafter, hearing was scheduled and held on July 26, 1999, at Racine, Wisconsin. A stenographic transcript of the proceedings was made and received by August 19, 1999. The parties agreed that they would file their briefs in this case on October 1, 1999, and that the undersigned would thereafter exchange them. The parties also agreed that they would waive their right to file reply briefs herein.

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 City have just cause to impose a five-day suspension on Grievant Marckus Dyess on January 5, 1999? 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.

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WORK RULES

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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

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BACKGROUND

The normal workday at the DPW is from 7 a.m. to 3 p.m. The City sends out solid waste trucks as well as paper recycling trucks and hard/co-mingled recycling trucks. The recycling routes are one-person routes, while the solid waste routes are two-person routes. Employees are normally paid at time and one-half for overtime work. Following the 1997 holiday season, the City decided to change its policy regarding garbage and recyclables pickup on holidays. As a result, the City decided to start picking up solid waste and recyclables on holidays, beginning with the July 4th holiday in 1998. However, after the Union pointed out that scheduled vacations would conflict with this approach, the City decided to start holiday pickup with the Thanksgiving holiday in 1998. (The City's holidays at Thanksgiving are the holiday and the Friday following the holiday.)

In October 1998, approximately one month before the Thanksgiving holidays, Department of Public Works Superintendent Joseph Golden held meetings with all Public Works employees wherein he advised DPW employees of the City's new holiday pickup policy and specifically stated that no employee would be guaranteed eight hours of work on a holiday pickup day but rather that they would go home when their work was completed. 1/ Union Steward, John Tate, stated that he was present at a meeting in which Golden announced the new holiday pickup policy. Tate stated that he understood that employees would not be guaranteed eight hours work on holiday pickup days. Tate also stated that he worked less than eight hours per day over the Christmas and New Year's holidays doing holiday pickup work. No employees complained about not being guaranteed eight hours of work over the Thanksgiving and Christmas holidays. It is undisputed that Dyess worked the Thanksgiving holiday and that he worked less than eight hours that day without complaint. No one worked a full eight hours on December 31, 1998.

1/ Dyess admitted that he could have been at the October meeting where Golden made these comments. However, Dyess stated that he did not understand from Golden's comments that he would not be guaranteed eight hours of work on a holiday pickup day.

FACTS

Dyess became a regular full-time employe in early May, 1996, after having worked as a seasonal employe for some time. Dyess is employed in the Solid Waste Division of the Department of Public Works collecting garbage and recyclables.

Dyess' disciplinary history indicates that on January 27, 1997, he received a two-day, five and one half hour suspension for insubordination. This suspension was upheld by Arbitrator Mawhinney in her Award of October 7, 1998. Thereafter, Dyess was disciplined five times for other types of activities, not involving insubordination.

On December 31, 1998, Dyess was assigned to collect paper recyclables on a one-person route beginning at 7 a.m. that morning. On this day, there were seven garbage routes sent out, three paper recycling routes were performed and three hard/co-mingled recycling routes were completed. Dyess' immediate supervisor, William Folstrom, finished his route for the day and returned to the shop around 1:55 p.m. Folstrom went into the lunchroom at this time and told employes to go home; that they were done for the day. Dyess and approximately five other employes were in the lunchroom at this time. Folstrom did not make his comment directly to Dyess but directed his comments to all of the employes in the lunchroom. 2/ Dyess stated that he was not going to go home. Folstrom stated that it was time for everyone to go home. Dyess said he was staying because he was guaranteed eight hours of work. At this point Folstrom explained to Dyess that he was not guaranteed a full day's work on a holiday pickup day and that employes were expected to work on holidays just until the job was done and to go home. Folstrom then turned to Union Steward Rogers and asked, "Am I explaining this right?" Rogers replied, "Yes." Dyess then replied that he was staying and he began to clean up the lunchroom. At this point Folstrom left the lunchroom.

2/ Shortly thereafter all employes who were present, except Dyess, punched out and left the facility.

At about 2:30 p.m. Folstrom went back out to the lunchroom and noted that Dyess was still cleaning the lunchroom. Folstrom told Dyess he should go home, that he would not be paid to clean the lunchroom and that he was supposed to have gone home at 2 p.m. Dyess said that there was work to do and he was staying. Folstrom again left the lunchroom and went back to his office.

At about 2:40 p.m., Folstrom heard a solid waste truck being started up in the garage. Folstrom went out to the garage and found that Dyess had started the truck and was putting garbage in the back of it. Folstrom asked Dyess to turn off the truck, punch out and go home. Dyess went back to the lunchroom but he did not punch out at this time. Folstrom then went to his office and called Superintendent Golden. Golden received the call at his home at

approximately 2:45 p.m. on December 31st. During their conversation, Folstrom told Golden that he had an employe who had refused to go home. Golden asked who the employe was and Folstrom stated it was Dyess. Golden asked to speak to Dyess on the phone and Folstrom went to the lunchroom and asked Dyess to speak to Golden on the phone. Dyess refused to speak to Golden without a union representative. Folstrom went back to his office and told Golden that Dyess was not going to talk to him on the telephone without union representation. Golden stated that he would come to the shop immediately.

By the time Golden arrived at the shop, Dyess was gone. Golden spoke to Folstrom and got the full story regarding Dyess' several refusals to punch out and leave the workplace. After Golden found out that Dyess had refused to leave the shop at least three times, he called the personnel director, James Kozina, at home. Golden and Kozina discussed the situation and Kozina told Golden to immediately tell Dyess he would be suspended until further notice. However, as Dyess had already left, Golden could not perform this duty. Golden called Dyess at home and left a message for Dyess to call him as soon as possible. Dyess did not call Golden back. Dyess' first workday after December 31st was January 2, 1999, and at this time Dyess was suspended indefinitely.

POSITIONS OF THE PARTIES

City

The City argued that the Grievant knew or should have known that he was not entitled to a guarantee of eight hours of work on December 31, 1998. In this regard, the City noted that when Folstrom asked all employes to punch out and leave, everyone but Dyess left the facility. In addition, no employe received more than 7.8 hours for the day of December 31st and employes working on recycling routes received between 6.1 and 7.1 hours that day. Furthermore, the City noted that Dyess had worked on the Thanksgiving and Christmas holidays and knew that no guarantee of eight hours had been made by the City for work on holidays under the new policy. Indeed, Union Steward Tate demonstrated on the stand that he understood that the pickup policy on holidays did not include a guarantee of eight hours of work for employes.

The City noted that no grievances were filed regarding the City's failure to guarantee employes eight hours of work on holiday pickup days and the contract did not require a guarantee of eight hours of work. Thus, the City urged that Dyess should have done as he was told by Folstrom and then if he had a problem, he should have filed a grievance thereon.

In this case, Dyess was told three times to punch out and go home. On each occasion he refused to do as he was told by his supervisor. The City urged that Dyess' actions on December 31st constituted insubordination and on that basis, the City contended it had just

cause to discipline Dyess as he had been suspended for 2.5 days previously for a prior incident involving insubordination and failure to follow work orders given by supervisors. Thus, the City urged that the grievance be denied and dismissed in its entirety.

Union

The Union argued that the Employer did not meet the just cause standard in disciplining Dyess. The Union noted that Dyess finished his route and returned to the shop on December 31st and because Dyess felt additional hours of work were needed that day, he decided to busy himself in the hopes of being selected for that work. Indeed, several employees were still punched in and in the lunchroom but not working, when Dyess arrived from his route. Yet Folstrom singled out Dyess and told him to punch out and leave. The Union noted that Dyess felt singled out by Folstrom and this was one of the reasons why Dyess did not punch out and leave as directed. The Union noted that employees Christenson and McWhorter did not punch out on December 31st until 2:48 p.m., yet Folstrom specifically told Dyess to go home at 1:55 p.m., thus showing that Folstrom singled out Dyess.

At the instant hearing, the Union noted, Superintendent Golden stated that if Dyess had left after talking to him (Golden) on the telephone on December 31st nothing more would have been done to Dyess and no discipline would have been issued. Here, Golden's objectives were met because Dyess had already left when Golden arrived to speak to him. Therefore, in the Union's view, there was no logical reason to discipline Dyess because Dyess left before Golden arrived at the shop on December 31st. The Union contended that Dyess was not insubordinate and that the City did not have just cause to discipline Dyess. The Union therefore sought an award sustaining the grievance, expunging Dyess' record and making Dyess whole.

DISCUSSION

It is axiomatic that employees are required to work now and grieve later. Failure to complete work or to follow instructions of supervisors can result in discipline for insubordination, although there are exceptions to this general rule. Thus, where an employee reasonably believes that a rule or order is either illegal or immoral, where the employee reasonably believes that obedience to an order would place the employee (or others) in imminent danger of harm or where the employee (or others) would suffer immediate and substantial harm and no satisfactory remedy would be available after the fact, the employee may be allowed to disregard management orders.

None of the above-described exceptions is applicable to this case. In my opinion, Dyess should have obeyed Folstrom and grieved his contention that he was guaranteed eight hours' work on December 31st. Instead, Dyess choose to flagrantly disregard the repeated direct orders of his supervisor to punch out and go home.

I note that Dyess' version of what occurred on December 31st is different from that of Golden and Folstrom. 3/ Dyess stated that he returned to the shop after finishing his recycling route just before 2 p.m. that day; that he went into the lunchroom and saw five or six people there who were not punched out; that he went to the bathroom and that he then decided to pick up the chairs from the lunchroom and sweep the floor, to continue working. Folstrom came into the lunchroom and told Dyess to punch out and go home. Dyess stated that he asked Folstrom why he should punch out and go home; he asked if there was anymore work for him to do and why he should go home when Irv Keller (another supervisor) had been calling Drew Hardville on the radio to come back to the shop to perform more work. 4/

3/ Where Dyess' version differs from Folstrom and Golden's I have credited Folstrom and Golden, although Dyess' substantive admissions render such a finding largely unnecessary.

4/ Dyess stated that because there were other people in the lunchroom who were on the clock, he thought there was more work for him to do and that he knew Hardville (who was more senior than Dyess) was not available to work more hours, as Hardville had just left the shop. Dyess stated that he believed that Folstrom was condescending and short with him and that he felt singled out by Folstrom.

At this point, Dyess stated that Folstrom told him to punch out and go home, that there was no more work for him to do. Dyess admitted he refused to leave. According to Dyess, Folstrom stated that he would call the police if Dyess did not leave. Dyess told Folstrom to go ahead and call the police. Later on, Dyess admitted, Folstrom told Dyess to put the mop down and leave. Dyess admittedly refused. Thereafter, Folstrom came into the lunchroom and stated that Superintendent Golden wanted to speak to Dyess on the phone. Dyess refused to speak to Golden on the phone. 5/ Shortly thereafter, Dyess decided to punch out and go home.

5/ Dyess stated herein that he felt that Golden had belittled him in the past and he (Dyess) did not feel comfortable talking to Golden on the phone without a witness.

Dyess specifically denied getting into a truck and starting it on December 31st and denied that Folstrom told him to go home three times. Rather, Dyess also stated that Folstrom told him go home once and thereafter "threatened" Dyess several times by telling him to put the mop down and get out of there, which Dyess admittedly refused to do. Dyess stated that he did not recall a conversation between Folstrom and Union Steward Rogers in the lunchroom regarding the eight-hour guarantee because he was not part of the conversation and he was cleaning up at the time.

On the basis of this record, there is no evidence to show that Dyess was confused or mistook the meaning of Folstrom's statements to him. Here, even by Dyess' account, Folstrom's orders were clear and distinct and all employes present (except Dyess) understood them and followed them. In addition, the record demonstrated that Folstrom's orders to Dyess

(and the other employes initially present) were reasonable. In this regard, I note that only Dyess stated that he did not understand Superintendent Golden's prior announcement to employes that employes would not be guaranteed eight hours' work on holiday pickup days. Even if Folstrom had been wrong in directing Dyess (and the others) to punch out and go home, Dyess should have obeyed Folstrom and raised his objections later in a grievance. However, Dyess chose to ignore Folstrom's directions, and to defy Folstrom by refusing three times to do as Folstrom directed.

Dyess' testimony regarding what occurred on December 31st and his admissions that he ignored Folstrom's direct orders to punch out and go home, support the City's arguments herein. Whether the City was seeking employes to perform additional services on December 31st by calling on the radio is not relevant. In any event, it was not up to Dyess to decide whether additional hours of work were needed on December 31st. This was a decision properly made by City managers.

Furthermore, whether there were employes in the lunchroom who had or had not punched out as of 2 p.m. on December 31st is again irrelevant. When Folstrom entered the lunchroom and asked employes to punch out, all employes, except Dyess, did as they were directed. The evidence failed to show, contrary to Dyess' uncorroborated assertions, that Folstrom somehow singled Dyess out and asked him specifically to punch out and leave the facility. In this regard, I note that Folstrom specifically denied that he singled Dyess out. Because the Union presented no evidence to contradict or impeach Folstrom, I have credited Folstrom. Whether Dyess felt singled out and whether he became angry when his personal plan to stay and work additional hours failed, were Dyess' emotions, which were not created by any statements or actions of Folstrom's.

The fact that employes Christenson and McWhorter did not punch out until 2:48 p.m. does not show that Dyess was somehow treated in a disparate fashion by Folstrom. In this regard I note that Christenson and McWhorter were assigned to a regular garbage disposal route which generally takes longer to perform than do recyclable routes. The City also proved herein that employes are not necessarily paid for every minute they are on the clock.

Close examination of Dyess' work record demonstrated that the level of discipline issued by the City for Dyess' insubordination on December 31st was appropriate. In this regard, I note that Arbitrator Mawhinney held that the City had just cause to give Dyess a two-day, five and one-half hour suspension for insubordination on January 27, 1997. In her Award, Arbitrator Mawhinney also observed:

...

I find that the discipline imposed was reasonable under all of the circumstances of this case. First, the Grievant has been insubordinate less than one year before this incident, and he almost did not get a full-time position with the City because of his attitude with Golden while he was being evaluated for a

permanent position. He told Golden, "Who do you think you are to evaluate me?" Dyess needs to realize just who Golden is, and hopefully, he has figured it out by now that Joe Golden is the Superintendent of Public Works- the person with the authority to hire, evaluate, supervise and discipline. Golden holds a high level of authority in the Department, and if Dyess continues to challenge Golden's authority, how will he ever accept any orders from lower level supervisors? CITY OF RACINE, MA-9945, (MAWHINNEY 10/98), SLIP OP. AT PAGE 7.

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This quote demonstrates that Dyess has had difficulty accepting authority over a period of years and that he has been disciplined therefor. It is also clear from the instant case that Dyess has been unwilling to accept orders from (lower level) supervisor Folstrom. Although the level of discipline meted out in this case is high, I cannot say it was unreasonable given Dyess' work record and his prior suspension for two days and five and one-half hours which was upheld in October, 1998, by Arbitrator Mawhinney. As no evidence was submitted to show that the City was arbitrary, capricious or abused its discretion in setting the penalty for Dyess' actions of December 31st, it would be inappropriate for the Arbitrator to disturb the penalty in this case.

The Union has argued that because Dyess left before Golden arrived at the shop on December 31st, the City should not have disciplined Dyess. I disagree. Dyess' actions demonstrate that he was intentionally and repeatedly insubordinate to his supervisor on December 31st. Superintendent Golden had every right to discipline Dyess on the basis of Dyess' actions on December 31st, which were largely admitted by Dyess herein.

In all the circumstances of this case, I find that Dyess was insubordinate and blatantly disobedient on December 31st, having failed three times to obey his supervisor's clear and reasonable orders, in violation of City Work Rule Q, 1(a). I therefore issue the following

AWARD

The City had just cause to impose a five-day suspension on Grievant Marckus Dyess on January 5, 1999. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 7th day of December, 1999.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator