

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**VILAS COUNTY COURTHOUSE EMPLOYEES
UNION, LOCAL 474-A, AFSCME, AFL-CIO**

and

VILAS COUNTY

Case 66
No. 57659
MA-10714

(Grievance of Connie Gengle)

Appearances:

Mr. David A. Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Vilas County Courthouse Employees Union, Local 474-A, AFSCME, AFL-CIO.

Prentice & Phillips, Attorneys at Law, by **Mr. John J. Prentice**, on behalf of Vilas County.

ARBITRATION AWARD

Vilas County Courthouse Employees Union, Local 474-A, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Vilas County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on October 14, 1999, in Eagle River, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by December 28, 1999. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The County raises the following issues as to arbitrability:

- 1) The grievance does not involve a dispute regarding the interpretation or application of the parties' Agreement.
- 2) The grievance is moot since it was not denied and the remedy sought has been granted.
- 3) The grievance involves protected speech.

If the grievance is found to be arbitrable, the parties stipulated that the substantive issue is:

Did the actions of the Corporation Counsel on March 25, 1999, as an agent of the County, violate the parties' Collective Bargaining Agreement, Article II, D and Article XXIV, A, in particular? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited, in relevant part:

Article II – Management Rights

The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

...

- D. To suspend, demote, discharge and take other disciplinary action against employees for just cause;

...

The County agrees that it will not use these management rights to interfere with the employees' rights established under this Agreement or for the purpose of undermining the Union or discriminating against its members. Any dispute with respect to the reasonableness of the application of said management

rights which are mandatorily bargainable with employees covered by this Agreement may be processed through the grievance and arbitration procedure herein.

...

Article VII – Grievance Procedure

A. Definition of Grievance: Any employee or group of employees in the Vilas County Courthouse unit who has a dispute regarding the interpretation or application of the provisions of this Agreement shall have the grievance processed in the following manner.

B. Time Limits: Time limits set forth in this Article must be strictly adhered to and the failure of any party to comply with the timelines will be considered a waiver of the grievance on the part of the Union or a sustainment of the grievance on the part of the Employer. If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

...

D. Steps in Procedure

Step 1: Within ten (10) working days from the date of the event(s) or when the grievant(s) knew or should have known of the event(s) giving rise to the grievance, the grievant(s) shall submit a grievance, in writing, to the immediate supervisor. The immediate supervisor shall meet with the grievant(s) and/or the Union representative within ten (10) working days and shall give a written answer to the grievance within ten (10) working days of the meeting.

Step 2: In the event the grievance cannot be satisfactorily adjusted by the immediate supervisor, the grievance will be submitted in writing to the Personnel Committee of the County Board within ten (10) working days of the date of the immediate supervisor's written answer. The Personnel Committee shall meet with the grievant(s) and the Union representative at a mutually agreeable time. The Personnel Committee shall give its answer, in writing, to the grievant and the Union within ten (10) working days of the meeting.

Step 3: If the grievance is not settled at Step 2 and the Union intends to process the grievance to arbitration,

...

E. Arbitration Hearing: The arbitrator selected or appointed shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the County and the Union which shall be final and binding upon the parties.

...

H. Decision of the Arbitrator: The arbitrator shall not modify, add to or delete from the express terms of this Agreement.

...

Article XXIV – Miscellaneous Provisions

A. Conduct: The Union and the Committee consider themselves mutually responsible to improve the public service through the creation of improved employee morale and efficiency. In this connection, the parties shall encourage the employees to conduct themselves in a workmanlike manner on the job.

...

BACKGROUND

The Grievant, Connie Gengle, is an Administrative Secretary in the UW-Extension Office in the Vilas County Courthouse and a member of the bargaining unit represented by the Union. The instant grievance concerns an exchange between the Grievant and the County's Corporation Counsel, William Glaves, on March 25, 1999. Mr. Glaves also acts as a representative of the County's Personnel Committee.

The County was in the midst of purchasing a new telephone system at the time in question. On March 25, 1999, a woman from the telephone company responsible for installing the new telephone system arrived at the UW-Extension office and there ensued a discussion between the various individuals in the offices that would be using the system, the UW-

Extension office and the Advertising office, including the department head, Brian Pierce, as to what was needed. The individual from the telephone company advised that if changes were to be made in what had been ordered, it would cost less to make those changes before the system that had been ordered was installed. Pierce asked Gengle to call Glaves and ask him to come to their office, as it was assumed that he had some role in what was being purchased and installed. Gengle called Glaves and asked him to come to the UW-Extension office. There is some dispute as to what occurred after Glaves arrived at the Extension office. Gengle and two other individuals who were present on March 25th testified as to what they saw and heard and Glaves testified as to what he felt had occurred. While there is a dispute as to whether certain words were silently mouthed by Glaves toward Gengle, there is no dispute that Glaves' conduct was offensive and unprofessional.

On March 26th, Gengle filed an incident report on the matter and filed a grievance on March 29, 1999 which stated, in relevant part:

(The contention – what did management do wrong?) (Article or Section of contract which was violated if any)

Article II – Item 1) – Bill Glaves verbally reprimanded employee without just cause.

Article XXIV, Item A, Bill Glaves' behavior, verbals (sic) and physical actions created a hostile situation. Contributing to an overall hostile work environment, particularly in view of the fact that the incident occurred in the presence of an outside vendor.

The Request for Settlement or corrective action desired):

That Bill Glaves be required cease and desist from any pattern of harassment & verbal & otherwise directed at the employee for either personal reasons or based on her union activities. That County work rules be reviewed with Bill Glaves (particularly Item IV, #2, #6 and #9 & that the consequences of violating those work rules be administered fairly & equally (see attached)

Attached to the grievance was a written statement as to what she felt had occurred and a copy of the County's work rules which, in relevant part, included:

WORK RULES – VILAS COUNTY

EMPLOYEES OF VILAS COUNTY ARE PROHIBITED FROM
COMMITTING ANY OF THE FOLLOWING ACTS:

...

IV. PERSONAL ACTIONS AND APPEARANCE

...

2. Threatening, intimidating, interfering with or abusive language towards others.

...

6. Making false or malicious statements concerning other employes, supervisors or the department.

...

9. Immoral conduct or indecency

...

The Union requested that the parties bypass Step 1 of the grievance procedure as the employe's department head was not involved and asked the Personnel Committee to notify the Union immediately if that was not acceptable.

On March 30, 1999, Glaves sent the following memorandum to everyone who works in the Extension and Advertising offices, including the Grievant:

MEMORANDUM

To: All members of the Extension and Advertising Offices

From: Bill Glaves

Date: March 30, 1999

Re: Meeting in Extension/Advertising Offices on Thursday March 25, 1999

I would like at this time to apologize to everyone in the Extension and Advertising Offices for my behavior when I met with all of you last Thursday with regards to the new phone system for the Courthouse. Until I received and read the union grievance filed yesterday, I did not realize the extent that my behavior had shocked or offended some or all of you.

While I unequivocally deny that I ever mouthed nonverbally an offensive word to anyone in your offices at the meeting last week, I am sorry that I lost my temper and started yelling. As Connie so correctly pointed out, we should all be working together towards solutions to our mutual problems and concerns. I want all of you to know that I respect each and every one of you in the performance of your jobs and realize that we are all working hard on the matters that are important to us.

I assure you that my behavior from last Thursday will not be repeated in the future. I will be redoubling my efforts to provide constructive and positive ideas and thinking to the issues facing the County, and look forward to working with all of you in the future.

On April 1, 1999, the Personnel Committee issued Graves the following letter which read, in relevant part:

We have read and studied the two write-ups, yours and the University Extension people, about the discussion that was had regarding the telephone service on March 25, 1999. We support and commend you for the hard work that you do for Vilas County, much of it beyond the responsibilities of Corporation Counsel. However, we do not support or commend you in the way you handled yourself during that discussion on March 25th.

Bill you are an attorney – a professional – and most of the time a very good one with a broad vocabulary, so there is no need to use language more becoming of a cinder snapper in a steel mill or a switchman on a railroad. When you wrote your explanation of the discussion you admitted using some of this kind of language. What we want to do is get this matter behind us with the urgent matters before us. We feel that it is imperative that you do two things: 1) make sure that you refrain from any more similar expressions in the future; and 2) write an apology for your adverse actions on March 25th and send a copy to each individual that was present at that meeting.

...

Thereafter, the County refused to discuss or respond to the grievance further until the County's legal counsel sent the Union's representative the following letter of May 20, 1999 in response to the Union's notice to the County that due to the lack of a written response, the Union was processing the grievance to arbitration:

Re: Vilas County (Grievance No. 99-5)

Dear David:

On April 26, 1999, the Vilas County Personnel Committee conferred regarding the grievance in the above-referenced matter. At that time, the Committee requested that I draft a response on its behalf. Unfortunately, I let this matter *slip through the cracks*. However, the Committee, by correspondence of its Chairman, instructed Corporation Counsel Graves to cease and desist from using offensive language and, to the extent reasonably possible, refrain from future vitriolic exchanges with employees. However, it is important to understand that Mr. Graves effectively acts as a frontline personnel manager. Owing to this, there may occasionally be difficult exchanges between Mr. Graves and union employee/officers. While it is incumbent upon all the individuals involved to maintain some modicum of decorum, the very nature of industrial relations often involves confrontation.

Please be advised that while Mr. Graves has been admonished not to engage in the type of conduct complained of here, he will nonetheless fulfill his responsibility as an instrument of the Personnel Committee to the same extent and with the same zeal as he has in the past. The Personnel Committee is adamant this incident does not compromise Mr. Graves' status or authority.

If you have any further inquiries regarding this matter, please do not hesitate to contact us. Thank you for your cooperation. I apologize for the delay in responding sooner.

Very truly yours,

PRENTICE & PHILLIPS

John J. Prentice /s/
John J. Prentice, Esq.

The above letter was followed by a letter of May 28, 1999 from County's legal counsel to the Union's representative which read, in relevant part, as follows:

Finally, we do not understand why the Union intends on pursuing the grievance against Corporation Counsel Graves to arbitration. First, we do not believe it is arbitrable inasmuch as the County tacitly accepted the grievance. Second, we do not believe the facts constitute a violation of the collective bargaining agreement. Third, the County will most likely demur to the grievance since it appears there would be no remedy available. And fourth, the Union does not have *clean hands* with respect to this particular dispute.

The grievance was thereafter processed to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union first asserts that as a factual matter, Graves did mouth a profanity at the Grievant regardless of his denial of doing same. Both Ploetz and Otte testified that they clearly saw Graves mouth the specific obscenity directly at the Grievant. In addition to the testimony of the Grievant, Ploetz and Otte, there were three other persons in the office at the time of the exchange who signed a letter that was sent to the Chair of the Personnel Committee describing the incident. Further, despite the vague accusation that the Union's hands were not clean in this dispute, Ploetz and Otte are not even County employees, but are employed by the State and the department head, Pierce, also is not a bargaining unit employee. There was no Union conspiracy against Graves.

The Union asserts that Grave's statement to the Grievant amounted to discipline without just cause in violation of the management rights provision of the Agreement. That provision states that the County has the right to "suspend, demote, discharge and take other disciplinary action against employees for just cause." (Emphasis added). The phrase "other disciplinary action" is not defined in the Agreement, however Graves' verbal and non-verbal harassment of the Grievant in front of others constitutes discipline. *Roberts' Dictionary of Labor Relations*, (BNA, Third Edition, 1986), notes that "discipline as a form of punishment to obtain conformance may be subject to question – but it is widely-used in labor-management relations." Similarly, *Black's Law Dictionary*, (West, Sixth Edition, 1990), includes in the definition of "discipline", "correction, chastisement, punishment, penalty to bring order upon, or bring under control." Clearly, the Grievant was corrected, chastised or punished by Graves for speaking up. While the County attempted to show that Graves did not have authority to discipline employees, the County's legal counsel, in his letter of May 20 to the Union's representative, stated that "Mr. Graves effectively acts as a front-line personnel manager." Thus, the County contradicts itself.

The Union also asserts that Glave's conduct violated the parties' "conduct clause" in the Agreement. The parties felt strongly enough about the importance of promoting morale, efficiency and security that they included a conduct clause, Article XXIV, A, in the Agreement which provides:

"The Union and the Committee consider themselves mutually responsible to improve the public service through the creation of improved employe morale and efficiency. In this connection, the parties shall encourage the employes to conduct themselves in a workmanlike manner on the job."

In refusing to discuss this grievance with the Union, the County stated that it "does not believe the facts constitute a violation of the collective bargaining agreement." While it is apparent the County does not believe the conduct clause applies to its agents, the parties are mutually responsible for improving service to the public through improved morale and efficiency. As the County's effective frontline personnel manager, Glaves directed a profanity at a female clerical worker in the presence of an outside vendor, Pierce and co-workers. By any standard, he did not conduct himself in a workmanlike manner on the job, and his behavior had the effect of decreasing, not promoting, employe morale and efficiency. Thus, his actions violated the conduct clause. Had a bargaining unit employe acted in such a manner toward another employe or supervisor, the County would have been quick to discipline the employe; however, here the County informed the Union that Glaves had been told to "cease and desist from using offensive language" and "to the extent reasonably possible, refrain from future vitriolic exchanges with employes." The same letter goes on to note that "there may occasionally be difficult exchanges between Mr. Glaves and Union employes/officers" in that "the very nature of industrial relations often involves confrontation." While collective bargaining may at times be confrontational, it is difficult to envision any situation in the workplace in which such behavior as exhibited by Glaves would be deemed appropriate.

The Union asserts that the County's failure to adhere to the timelines and to meet with the Union and discuss the grievance must result in the "sustainment" of this grievance by default. Article VII, Section B, states: "Time limits set forth in this Article must be strictly adhered to and the failure of any party to comply with the timelines will be considered a waiver of the grievance on the part of the Union or a sustainment of the grievance on the part of the Employer." In filing this grievance at Step 2, the Union requested that the Personnel Committee notify the Union if it did not agree to bypass Step 1. The County did not express any objection and in fact refused to acknowledge that a grievance had even been filed. On at least two occasions, the Union was refused the opportunity to discuss the grievance with the Committee, including the April 27th Committee meeting, where although the matter was listed on the agenda, the Union's attempt to speak was cut off by Glaves. The matter was again tabled without any discussion at the Committee's May 25 meeting. Step 2 of the grievance procedure provides that, "The Personnel Committee shall meet with the Grievant(s) and the

Union representative at a mutually agreeable time.” While the Committee met with the Union, it apparently felt it did not have to actually discuss the grievance. Had the Committee permitted the Union the opportunity to discuss the issue, it is likely that the dispute would have been resolved short of arbitration.

In its reply brief, the Union reiterates its assertion that Graves’ conduct violated the just cause and the conduct provisions of the parties’ Agreement. The Union disagrees with the County’s assertion that this arbitration proceeding constitutes an abuse of process, and counters that it is the County that has abused the parties’ mutually-agreed upon grievance procedure by refusing to acknowledge the grievance and discuss it with the Union. In doing so, the County not only violated the terms of the grievance procedure by failing to adhere to the timelines, but the parties could have avoided this proceeding had the County discussed the matter with the Union in a timely manner.

As relief, the Union requests that the County be ordered to direct Graves to cease and desist from engaging in such behavior in the future, and also requests that the County be ordered to abide by the contractual grievance procedure by adhering to the specific timelines and by meeting with grievants and the Union to discuss grievances that reach Step 2.

County

The County disputes that the alleged conduct amounts to disciplinary action. Even if every allegation of the Union is accepted as true, it would be ludicrous to characterize Graves’ conduct as imposing discipline in the industrial relations context. What occurred was merely a heated squabble between co-workers. The uncontroverted testimony of both Graves and the Personnel Committee Chairman indicated that as Corporation Counsel, Graves has no authority to either discipline employees or effectively recommend their discipline. Although he acts as “personnel manager” for the County, that function is limited to coordinating Committee directives with department heads and supervisory personnel. He has no management or supervisory authority over bargaining unit employees, other than perhaps his own secretary. As a long-time employee and former Union officer, the Grievant is well acquainted with the organizational and management structure of the County and is well aware of Graves’ lack of authority in that regard.

The County also disputes that the alleged conduct violates Article XXIV, Section A, of the Agreement. That provision implicates the Personnel Committee’s responsibilities, not the Corporation Counsel’s. Graves is not a member of the Personnel Committee and was not acting as its agent or under cover of its authority when he allegedly engaged in the conduct in question. Also, the Committee fulfilled its obligation under that provision by issuing Graves written discipline and directing him to “refrain from any more similar expressions in the

future” and to write an apology for his actions and send a copy to each individual who was present at the meeting. Graves not only did so prior to the directive of the Committee, he assured the affected individuals his behavior would never be repeated.

The Grievant’s request for a corrective action states that “Bill Graves be required (to) cease and desist from any pattern of harassment verbal and otherwise directed at the employe for either personal reasons or based on her union activities. That County work rules be reviewed with Bill Graves, particularly Item IV, No. 2, 6 and 9 and that the consequences of violating those work rules be administered fairly and equally.” Graves has already been ordered to refrain from the conduct complained of, and there is no evidence whatsoever of it being a “pattern” of verbal or any other harassment. Secondly, the only work rule that Graves’ alleged conduct possibly implicates is Rule IV, No. 2, prohibiting County employes from using abusive language towards others. The Personnel Committee’s April 1, 1999 memo to Graves clearly is a review of the work rule regarding abusive language. Number 6 of that rule proscribes “making false or malicious statements concerning other employes, supervisors, or the department.” Rule No. 9 of that section forbids “immoral conduct or indecency”. Neither of the latter two rules have any application here, and none of the above-mentioned work rules involve the “interpretation or application” of the parties’ Agreement and thus, are clearly not arbitrable. Finally, there is nothing in the record from which to conclude that the work rules have not been administered fairly and equally. Inasmuch as the Personnel Committee has already granted the remedy sought by the Grievant, the grievance is moot and should be dismissed.

In its reply brief, the County asserts that it is important to recognize that the Grievant vehemently dislikes Graves. Further, there is little question that the individuals who work in this department collectively blamed Graves for the perceived inadequacies of the telephone system. They summoned Graves to the office, and then made him feel as though he had been ambushed. While Graves reacted poorly and his conduct was inexcusable, it was to some extent understandable within the context of human interaction. People can speak words that are on their face innocent, however, they can say them in such a manner and tone as to convey another more subtle message and to irritate another. That is what happened in this case.

As to the Union’s assertion that Graves’ alleged conduct constituted “discipline” as defined by *Robert’s Dictionary of Industrial Relations*, the Union failed to show what rules or procedures Graves was attempting to encourage the Grievant to follow or what form of “punishment” has been imposed. The County asserts that it was unable to locate even one case in which profanity on the part of a management employe was found to constitute the imposition of discipline. Even if Graves’ alleged conduct could somehow reasonably be construed as imposing discipline, it is clear that Graves not only had no such authority, but he was severely rebuked for the alleged conduct. While the County’s letter of May 20, 1999

referenced Graves' acting as a "frontline personnel manager", perhaps the choice of words was less than artful. However, it is clear from the uncontroverted testimony that Graves possesses no authority to discipline or effectively recommend discipline.

The Union's own argument regarding the application of the contractual grievance procedure also vindicates the County's conduct in this case. Although the Personnel Committee failed to meet with the Grievant, the County's legal counsel had several telephone discussions with the Union's representative regarding the disposition of the grievance and whether a meeting was actually necessary. Ultimately, however, pursuant to the grievance procedure provision regarding time limits, the failure of the Personnel Committee to meet with the Grievant and Union constituted a "sustainment (sic) of the grievance on the part of the Employer". Thus, the County's letters of May 20 and May 28, 1999 accurately reflected that the grievance had been accepted, not only because that was the belief of the Committee, but by the command of the Agreement, pursuant to the operation of Article VII, paragraph B. Thus, there was no further duty to meet with the Union. Since the grievance has been accepted and the remedy requested by the Grievant has been obtained, i.e., Graves was ordered to cease and desist from such conduct and to apologize, and he has been disciplined, it is unnecessary for the Arbitrator to order similar relief.

The County requests that the instant grievance be denied as it does not involve a dispute regarding the interpretation or application of the Agreement and the alleged conduct, even if true, does not amount to disciplinary action. Further, the Grievant has already obtained the remedy sought and the grievance is therefore moot.

DISCUSSION

The County has raised the issue of arbitrability. Among the bases offered in that regard, the County asserts that the grievance is moot. For the reasons set forth below, the undersigned agrees.

As the Union points out, Article VII, Grievance Procedure, Section B, provides that "failure of any party to comply with the timelines will be considered a waiver of the grievance on the part of the Union or a "sustainment (sic) of the grievance on the part of the Employer. . . ." The grievance was submitted on March 29, 1999 at Step 2 to the Personnel Committee. On April 1st, the Personnel Committee issued Graves what must be considered a letter of reprimand which concluded with the directive to Graves to "1) make sure that you refrain from any more similar expressions in the future; and 2) write an apology for your adverse actions on March 25th and send a copy to each individual that was present at that meeting." As it turns out, Graves had already issued a written apology on March 30th addressed to everyone in the Extension offices for his behavior on March 25th, albeit he denied the Grievant's allegation that

he had silently mouthed obscene words at her. While that particular detail is in dispute, his overall behavior is not, and that is what was grieved. Although the County appeared by its actions to have granted the grievance, it did not directly respond to the grievance in writing until the letter of May 20, 1999 from its legal counsel to the Union's representative, nor did it ever meet with the Union and the Grievant to discuss the matter. Hence, by operation of Article VII, Section B, the grievance must be considered to have been sustained by the County. That being the case, the only question remaining is whether the relief sought has already been granted.

The grievance requested that Glaves be required to "cease and desist from any pattern of harassment verbal and otherwise directed at the employe. . .", and that the County's work rules be reviewed with Glaves and that "the consequences of violating those work rules be administered fairly and equally." The Personnel Committee on April 1st directed Glaves "to refrain" from such conduct in the future and to apologize in writing, which he had already done. The Union's Steward, Susan Vogel, conceded that the Union did not specifically request an apology as part of the remedy. Vogel also conceded that if the Personnel Committee's April 1st letter to Glaves constituted a reprimand, that would be treating him "fairly", i.e., the consequences of violating the County's work rules would have been administered "fairly and equally", as requested in the grievance. As noted above, the April 1st letter chastising Glaves for engaging in such conduct and ordering him to refrain from engaging in it in the future and to apologize cannot reasonably be construed as anything other than a written reprimand. Hence, the relief sought in the grievance has already been granted.

Finally, it is worthwhile to note that it would seem, as the Union posits, that had the Personnel Committee met with the Union and Grievant and discussed the matter, it would not have reached this point. Beyond that note and enforcing Article VII, Section B, the Arbitrator has no authority in this case to order the County to comply with the grievance procedures in the future.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned issues the following

AWARD

The grievance and the relief sought in the grievance, having already been granted by the County, the grievance is dismissed at this point as moot.

Dated at Madison, Wisconsin this 3rd day of February, 2000.

David E. Shaw /s/

David E. Shaw, Arbitrator

