

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 67, AFSCME, AFL-CIO

and

CITY OF RACINE

Case 580
No. 58347
MA-10918

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Guadalupe G. Villarreal, Deputy City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

Local 67, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Racine, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held on February 29, 2000, in Racine, Wisconsin. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged by May 31, 2000.

BACKGROUND

The grievant has been employed at the City's public library for thirteen years as a custodian. The grievant works Monday through Friday from 4:00 p.m. to midnight and is assigned to clean the second floor including the second floor men's room. On October 11, 1999, Daniel Schultz, the City Library's Business Manager, reported to work at 8:00 a.m. and was approached by an employee of the Grunau Mechanical Company, who was doing some

maintenance work for the Library, and said that Schultz should look at the second floor men's room. Schultz did and observed that a toilet had overflowed and there was excrement, toilet paper and water over a good third of the bathroom floor. The employee from Grunau Mechanical plunged the toilet and unplugged it. Schultz then called Marianne's Janitorial, who is responsible to clean the men's room on Saturday and Sunday and Valerie Bernal from Marianne's came and cleaned the men's room. After cleaning the men's room, Valerie spoke with Schultz and told him that she had come to the library on Friday night October 8th at about 7:15 or 7:30 p.m. with two persons she was training and they observed in the second floor men's room that a toilet was plugged and they left it because they were not working and figured the grievant, who was, would take care of it. Bernal stated that she cleaned the men's room at 6:00 p.m. or 6:30 p.m. Saturday October 9th, and the toilet was in the same condition she observed the previous evening. Bernal figured that maintenance knew about it so she cleaned the rest of the men's room but left the toilet as she found it. Schultz asked Ed Doonan, Building Maintenance Complex Supervisor, to come to the library and take a look at the situation. When the grievant reported to work, Schultz asked the grievant to come to the senior librarian, Jessica McPhail's office, and they told the grievant what had transpired and McPhail asked the grievant to write his side of the story. The grievant wrote the following:

On 10/8/99 Friday in making my rounds of the bathrooms about 5:10 or 5:15 I checked the mens bathroom in adult department, and found spotting on the rim and large blob on the floor. As they were hardened and we were about to close, I soaked the stains with wet toilet paper to make clean up easier, and locked the stall because we were closing soon anyway. Later, I went to clean the stall and the stains were easily removed, threw the paper in the toilet and flushed it – everything was working fine, no clogs at all.

Schultz talked about the matter with Doonan but left it in personnel's hands to handle and personnel did not solicit his opinion on the amount of discipline.

Doonan spoke to Bernal on Monday, October 10, 1999 and accepted her version of events and never spoke to the grievant or read the grievant's statement and recommended the grievant be terminated. Prior to terminating the grievant, the Personnel Director sent the grievant the following letter dated October 18, 1999:

This letter is intended to officially notify you that it is the City of Racine's intention to terminate your employment as a Stationary Engineer at the Racine Public Library.

The reason for this anticipated action is your continuing violation of the City's work rules and your continued failure to perform your assigned duties.

You have been suspended without pay since October 13, 1999 and will have until the close of business on Friday, October 22, 1999 to submit to this office, in writing, any mitigating circumstances as to why the City should not carry out its intended action.

Upon review of the written documentation, if any, the City will inform you of its final determination as to your employment status.

Any questions concerning this letter may be directed to the undersigned.

The grievant responded on October 21, 1999 with the following:

This letter is in response to your letter of termination of my employment with the City of Racine, dated October 18, 99. I am requesting clarification of the work rules I have violated, and also an explanation and clarification of assigned duties I have not performed. I would appreciate a response on or before October 29, 1999.

On November 3, 1999, the grievant was sent a termination letter which provided, in part, as follows:

This letter is intended to officially notify you that your employment relationship with the City of Racine as a Stationary Engineer at the Racine Public Library is terminated effective immediately (11-3-99).

You have not submitted any reasons that would mitigate the City's intention to terminate your employment as outlined in the letter to you dated October 18, 1999.

The termination was grieved and appealed to the instant arbitration.

ISSUE

The parties stipulated to the following:

Did the City have just cause to terminate the grievant on November 3, 1999? If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

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:

. . .

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.

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.

POSITIONS OF THE PARTIES

City's Position

The City contends it had just cause to terminate the grievant for his failure to promptly clean up or unplug the toilet in the library on Friday, October 8, 1999. The City points out the grievant's long history of failing to perform or complete assigned duties and the progressive disciplinary measures meted out to the grievant. It observes that the grievant admitted he saw the plugged toilet and decided to clean it up later when the library closed for the day. It argues that a plugged toilet is not something that should be left for later and the grievant's version of the plugged toilet's condition is worse than that described by Bernal. It submits that the

grievant's version does not fit the facts as related by Bernal as Bernal and her trainees would not have been able to observe the toilet had the grievant locked the stall door as he claims. It points out that the grievant's version was written at a time when he did not know what, if anything, Bernal had seen on Friday evening or the weekend. It claims that Bernal's observations are more credible and consistent with the interests of the parties. It notes that the private firm is not required to unplug toilet bowls and it would have performed its job without addressing the plugged toilet's condition on Friday or Saturday. It asserts the grievant had a duty to clean up the mess when he saw it and to unplug the toilet. It maintains that the grievant's conduct is consistent with his attitude that if he ignores something, someone else will take care of it. It concludes that the termination is the result of the grievant's continued failure to abide by the work rules and the City has reached the end of a long, progressive disciplining of the grievant which failed to do what it was intended to do and the grievant refused to understand.

Union's Position

The Union observes that if the contracted service sees a clogged toilet, City management is to be contacted, yet neither Doonan nor Schultz were contacted by Bernal on Saturday or Sunday. The Union points out that the library is open from 9:00 a.m. to 5:00 p.m. on Saturdays, and on any given Saturday, 300 to 400 visitors come to the library and hundreds of people could have used the restroom in question. Also, the Union notes that 12 to 15 library staff are on duty, yet not one single complaint about the toilet either by the public or staff was made on Saturday, October 9, 1999 or Sunday, October 10, 1999.

It argues that the grievant's work record is less than stellar; however, the burden of proof falls on the City to prove its case and it clearly did not. It contends that no members of management saw the mess, no staff member reported any mess, no members of the public notified library staff of a problem with the toilet and no calls were made by the janitorial service reporting the problem. It argues that the entire case revolves around the testimony of Bernal who admitted she did not like the grievant. It claims there is absolutely no proof that the grievant did not clean the restroom on October 8, 1999 or that the mess Bernal saw on Saturday was the same seen by her on Friday.

It submits that Doonan recommended discharging the grievant without even talking to him, hearing his side of the story or even talking to other staff and the termination was based on Doonan's opinion.

The Union asserts that the grievant does not work on Saturday or Sunday and the mess could have been created on Saturday or Sunday when it is the contracted service's responsibility to clean the restroom. It claims that Bernal's accusations are self-serving and appear to be a public attempt to justify the shoddy work performed by the contracted service.

The Union argues that the City fell woefully short in its burden of proof and the grievant was not terminated for just cause. It asks that the grievant be reinstated with no loss of seniority and he be made whole for all lost wages.

It argues in the alternative, that if there was just cause to discipline the grievant, discharge was too severe a penalty and in at least three instances, the City issued long-term suspensions of 30-45 days for other employees, but the grievant has never been given a 30 or 45 day suspension. It states that in the unlikely event it is determined that the City met its burden of proof, then a suspension would be in order and the grievant made whole for lost wages and benefits in excess of the suspension.

DISCUSSION

The issue presented is whether the City had just cause to discharge the grievant. The incident that precipitated the grievant's discharge was a toilet that overflowed in the library's men's room located on the second floor. The only evidence tying the grievant to this incident is the testimony of Valerie Bernal, the Assistant Manager for Marianne's Janitorial, the private contractor, who is responsible for cleaning the men's room on Saturdays and Sundays. Bernal testified that she observed the toilet on the evening of October 8, 1999 when she was showing two new janitors their duties (Tr. 96-98). The two new janitors did not testify nor did they show up for work on Saturday, so Bernal had to clean up on Saturday and she observed the toilet and testified that it was the same thing she saw on Friday night (Tr. 99). Bernal did not contact anyone and left it as she found it. (Tr. 101). Bernal testified that her Sunday janitor put an "out an order" sign on the bathroom door on Sunday after the toilet overflowed. (Tr. 112). The Sunday janitor never cleaned the overflow up (Tr. 112) and did not testify in this matter. It is unclear why she did not clean it up or report it to anyone. On Monday when the overflow was discovered, there was no indication of any sign having been placed anywhere. Additionally, no one from Marianne's contacted the City. Bernal apparently told Doonan that no calls were made to City management because she was tired of the grievant not doing his work. (Tr. 126).

On an average Saturday, three to four hundred people visit the library. (Tr. 88). There are also 12 to 15 employees who work on a Saturday. (Tr. 89). Not one of the public or staff made any complaint about the men's room on either Saturday or Sunday (Tr. 91).

Bernal is the only person other than the grievant to testify about the condition of the toilet on Friday, October 8, 1999. Bernal's testimony was not corroborated in any way. She testified that she observed the problem on Friday which was still there on Saturday and yet she did not call management as she was supposed to do. Bernal testified she observed the toilet at 6:00 p.m. or 6:30 p.m. on Saturday, which was after the library had closed for the day. The toilet could have gotten plugged up anytime during the day on Saturday. It had not overflowed

and Bernal did not put up an “out of order” sign. Had Bernal observed the toilet before the library opened on Saturday and it was in the condition she described, it would have been easy to call Doonan to verify its condition which would then clearly prove that it was the grievant’s fault. Additionally, her Sunday janitor did not clean up the overflow as she should have, but merely left it. Why? Doonan testified that you don’t leave a toilet in a public building where the public can get at it messed up; you clean it. (Tr. 115.). Perhaps Bernal is protecting her employe and the subcontractor’s contract and perhaps she was attempting to cause trouble for the grievant. Bernal admitted she was mad on Saturday when she saw the toilet (Tr. 99), and she testified that she did not like the grievant (Tr. 107). There were too many intervening factors between Friday evening and Monday morning. The toilet could have been plugged Friday, Saturday or Sunday. No one from City management saw it, no one either from the public or staff had a complaint, and no one reported it to supervision. The janitors from Marianne’s could have been called to corroborate Bernal’s version of events. They were not. The grievant’s testimony and his written statement indicate that the toilet was cleaned and properly working on Friday night. (Tr. 143, Ex. 15). Bernal’s testimony is not sufficient to conclude that the grievant was responsible for the overflowing toilet. The grievant’s past record demonstrates that he has failed to carry out his assignments in the past but his past record is not evidence that he failed to do his job in the instant case. This factor, coupled with Bernal’s testimony, simply is not sufficient to establish that the grievant failed to clean the toilet on Friday, October 8, 1999.

The preponderance of the evidence presented in this case fails to prove the grievant did not unplug and properly clean the toilet on October 8, 1999, and therefore, the City did not have just cause to discharge or discipline him. Thus, the discharge must be set aside and the grievant reinstated and made whole.

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

AWARD

The City did not have just cause to terminate the grievant on November 3, 1999. The City shall immediately reinstate the grievant to his prior position and make him whole for all back pay and benefits less any interim earnings or unemployment compensation received, if any. If the grievant received Unemployment Compensation which is offset from back wages, the City shall reimburse the Department of Workforce Development the amount offset. The

letter of discharge shall be expunged from the grievant's file. The undersigned will retain jurisdiction for a period of thirty (30) days from the date hereof solely for the purpose of resolving any dispute with respect to the remedy herein.

Dated at Madison, Wisconsin this 29th day of June, 2000.

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator

