

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 67, AFSCME, AFL-CIO**

and

**CITY OF RACINE**

Case 571

No. 58037

MA-10821

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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 suspension. 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 on 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 normally assigned to clean the second floor and periodically the grievant is given special assignments to perform. In April, 1999 the City had a contractor replace digester pumps which are located in an eight foot deep pit located in the library's mechanical room, a room to which the public does not have access. The work was completed on April 3, 1999 and the

contractors did not clean up the mess they made including muddy footprints which contained raw sewage. On April 28, 1999, the grievant was given a work order to wet mop the floor in the area of the new digester pumps. (Ex-13) The grievant testified that he mopped the floor on April 28, 1999 and used three buckets of water but could not get it cleaned that day and intended to finish the job on Friday, April 30, 1999. (TR-53) He also testified that he cleaned up the scraps and pieces. (TR-61) The grievant's supervisor, Daniel Schultz, checked the mechanical room on April 30, 1999 and observed the same footprints and debris that had been there all along. (TR-18) Schultz then called Ed Doonan, the Building Complex maintenance supervisor, who came to the library and brought a camera and took pictures of the mechanical room. (Exs-10, 11 and 12) Schultz recommended that the grievant be given a five-day suspension and the Personnel Director concurred and Ed Doonan gave the grievant a five-day suspension in writing which stated as follows:

This five day suspension is being issued to you for not performing your assigned duties: On Tuesday, April 27, 1999 you were given a work order to wet mop the equipment room. As of Friday, April 30, 1999 you still haven't done this task. By not cleaning this area you have violated Work Rule Q Work Performance, Section 1, Article E. Any future such violations shall result in further disciplinary action up to and including discharge. (Ex-8)

The suspension was grieved and appealed to the instant arbitration.

### ISSUE

The parties stipulated to the following:

1. The issues are properly before the arbitrator.
2. Did the City violate the collective bargaining agreement when it suspended the grievant on April 30, 1999?

If so, 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.
- 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.

#### CITY'S POSITION

The City contends it did not violate the collective bargaining agreement when it suspended the grievant. It argues that the grievant failed to clean up the mess in the mechanical room around the newly installed digester pumps. It notes that the grievant was not disciplined for being careless or not cleaning the mess up on his own but rather because he was given a written work order on April 28, 1999 and he failed and/or refused to mop up the area for at least two (2) complete work shifts on April 28 and 29, 1999.

It observes that the grievant's excuse is that he did mop it up but the dust on the floor was rust and he was going to finish it on Friday, however Doonan and Schultz clearly recalled that the debris found on the floor consisted of metal filings, bits and pieces of plastic pipe and

excrement in the form of foot prints tracked around by the construction crew. It notes that Doonan and Schultz did not see any evidence of sweeping up of the loose items before the wet mopping is administered and the photos show that the items were not swept up and the footprints were still evident.

The City maintains that the grievant has never accepted the fact that he is not carrying out his assigned duties and has not corrected his behavior after repeated discipline for similar behavior. It points out that the grievant denies knowing what Work Performance Rule Q(1)(a) is even though eight (8) of his disciplinary actions involve a violation of the Work Rule. It seeks dismissal of the grievance.

### UNION'S POSITION

The Union contends that the City did not meet its burden of proof. It points out that the grievant got the Work Order on April 28, 1999, not on April 27, 1999 as stated in the suspension notice, and the same day that he got the order, the grievant attempted to mop the floor which he stated was filthy and used three buckets of water in the effort. It claims that the grievant could not finish this assignment and because the work order did not indicate it was a priority, the grievant decided to finish the mopping on Friday, April 30, 1999. It observes that, according to Schultz, it would be reasonable to allow the grievant 48 hours to complete the job which would be April 30, 1999, however Doonan issued the suspension on April 30, 1999 which was prepared before the grievant reported to work that day, so the suspension did not recognize the time frame Schultz thought reasonable. It asserts that Schultz should have waited until Monday and Doonan issue the suspension based on the erroneous date of the work order.

It insists that the grievant did not disregard the order, the area was filthy and the grievant tried to mop the floor. It states that the pictures show the mop bucket the grievant used in the attempt. It maintains that the grievant could not clean the floor in the time allotted and waiting to complete the job on Friday would have been reasonable given the testimony of Schultz. It asks that the grievance be sustained and the grievant made whole, and the discipline be expunged from his record.

### DISCUSSION

It is undisputed that the grievant was given a written work order on April 28, 1999 to wet mop the mechanical room floor. (Ex-13) The grievant testified that he mopped the floor and used about three buckets of water but he was unable to clean it in the amount of time allotted. (TR-53) Schultz testified that he checked the mechanical room on the morning of April 30, 1999 and he observed the same dirt and debris that had been there all along. (TR-18)

He testified that it was in the same condition as on April 5, 1999. (TR-21) Ed Doonan testified that he talked to the grievant on April 30, 1999 and the grievant told him he did scrub it but Doonan told him he didn't think so because the pieces of PVC pipe, plaster and the dust particles would not still have been there. (TR-38, 39) It was Doonan's testimony that the floor had not been swept and had not been mopped in any way. (TR-39) Doonan took pictures of the area. It is said that a picture is worth a thousand words and a review of the pictures reveals that the debris and foot prints are clearly visible. (Exs-10, 11 and 12) The undersigned therefore credits the testimony of Schultz and Doonan and concludes that the grievant did not wet mop the area as he claimed in his testimony. The grievant is an experienced custodian who knew how to wet mop a floor and had he done so, the floor would not contain pieces of debris, PVC pipe or foot prints.

The Union asserted that the grievant was not given sufficient time to perform the job and Schultz stated that 48 hours was a reasonable amount of time. The grievant was given the order on Wednesday at the start of his shift and was suspended on Friday, presumably at the start of his shift which is 48 hours later. The credible evidence is that the grievant did nothing to clean the floor in that time period. It is concluded that the grievant failed to carry out the assignment or instruction and the City therefore had just cause to discipline him. A review of the grievant's disciplinary record indicates that since May 4, 1995 he has received oral and written reprimands, two one-day suspensions and a five-day suspension for violation of Work Rule Q(1)(a), the same work rule violated here. (Ex-14) The five-day suspension was on 12-15-98. (Ex-14) Given the grievant's disciplinary history, a five-day suspension for the failure to wet mop the mechanical room floor is not too severe but is warranted.

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 violate the collective bargaining agreement but had just cause to suspend the grievant for five (5) days on April 30, 1999, and therefore, the grievance is denied.

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

Lionel L. Crowley /s/

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Lionel L. Crowley, Arbitrator

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