BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SUPERIOR CITY EMPLOYEES' UNION
LOCAL 244, AFSCME, AFL-CIO

and

CITY OF SUPERIOR

Case 173
No. 58084
MA-10838

(Terry Jacobson Grievance)

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

Fryberger, Buchanan, Smith & Frederick PA, by **Attorney Joseph Mihalek**, on behalf of the City.

ARBITRATION AWARD

The Superior City Employees' Union Local 244, AFSCME, AFL-CIO (herein the Union) and the City of Superior (herein the City) are parties to a collective bargaining agreement, dated August 13, 1997, covering the period January 1, 1997, to December 31, 1999, and providing for binding arbitration of certain disputes between the parties. On October 18, 1999, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding the discharge of Terry Jacobson (herein the Grievant) and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on February 2, 2000. The testimony was not transcribed. The parties filed briefs on March 21, 2000. Reply briefs were filed by April 20, 2000.

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 were unable to stipulate to a statement of the issue. The Union proposed to frame the issue as follows:

> Did the Employer have just cause when it terminated the Grievant from his position in the Waste Water Treatment Plant?
>
> And if not, the appropriate remedy is for the Employer to reinstate the Grievant to his position and to make him whole for any and all lost wages and benefits.

The City proposed to frame the issue as follows:

> Whether Terry Jacobson's employment with the City of Superior was terminated on April 7, 1999, for "just cause" as that term is used in Sections 3D and 10.01 of the collective bargaining agreement between the City of Superior and Superior City Employees' Union Local 244, AFSCME.

The Arbitrator frames the issue as follows:

> Did the City have just cause under the collective bargaining agreement to terminate the Grievant as an operator at the Waste Water Treatment Plant?
>
> If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 3
MANAGEMENT RIGHTS

The City possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

. . .

D. To suspend, demote, discharge and take other disciplinary action against employees for just cause. In the event that a demotion will cause a layoff, the person demoted will be laid off.

ARTICLE 10
DISMISSALS

10.01 The City of Superior agrees that it will act in good faith in the discipline or discharge of any employee. No employee will be disciplined or discharged except for just cause.

10.02 In the event a disciplinary action is taken against any Union employee, a notification of such action shall be given in writing to the employee and the Union stating the reasons said action shall be taken and when it will commence.

10.03 All disciplinary action and discharges shall be subject to the grievance and arbitration procedure of this Agreement.

OTHER PERTINENT PROVISIONS

OPERATIONAL POLICIES

These policies are established in accordance with Article 3 of the Working Agreement between the City of Superior and Local 244. They are intended to concur with all regulations as they pertain to the Federal, State and Local Code and to set standards in order to promote a safe, clean, and productive work place.

ARTICLE 1 – CODE OF CONDUCT

1.01 Any activity which is in violation of local, state or federal law is prohibited and may result in civil or disciplinary action. Further, if any employee is aware that their coworker(s), or any other employee is; in possession of a firearm or similar weapon, drinking alcohol or consuming drugs on the job, sleeping on the job, falsifying plant documents, physically threatening or assaulting other employees, stealing, intentionally causing damage to city property or otherwise abusing the trust bestowed upon their position, that operator has an obligation to notify their supervisors of such abuses. If any operator is aware of such abuses and through passive acceptance tries to cover up or willingly goes along with such activities, they become accomplices in the act and are similarly liable for their actions.

1.02 Other prohibited behavior includes performing personal activities at work. Examples include but are not limited to:

A. Watching Commercial Television (unless authorized or as part of a training program)

B. Working on personal hobbies such as electronics, wood working, mechanics, welding, musical instruments, real estate, etc.

C. Washing, waxing, servicing, or maintaining private vehicles
D. Completing personal taxes, balancing checkbooks, or paying bills
E. Making unauthorized long distance telephone calls at City expense or having extended telephone conversations on City time. Please understand that the primary function of our phone system is for business use, NOT personal use
F. Allowing friends, guests, and children to tour the yard area and buildings.

. . .

BACKGROUND

The City of Superior maintains a Waste Water Treatment Plant (WWTP) on the Northeast side of the City, adjacent to Superior Bay, which consists of 26 different buildings and structures. The plant operates 24 hours per day and runs three shifts, the first, or midnight shift, from 11:00 p.m. to 7:00 a.m., the second, or day shift, from 7:00 a.m. to 3:00 p.m., and the third, or afternoon shift, from 3:00 p.m. to 11:00 p.m. One plant operator is on duty during each shift.

In 1992, the State of Wisconsin brought an action against the City for violations of Wisconsin Statutes and Administrative Rules regulating the disposal of wastewater. In April, 1992, the State and the City entered into a stipulation resolving the litigation which conditioned the reissuance of the City's Water Pollutant Discharge Elimination System (WPDES) permit on, among other things, an upgrade of the wastewater treatment facilities and improvements in its monitoring procedures. To that end, the City initiated a $5.5 million program to improve its facilities and in 1995 received notice of compliance from the State.

As part of its efforts to improve the quality of its operations, the WWTP management and the plant operators developed an Operator Rounds Manual in 1995 in order to systematize the procedures for monitoring the plant and reduce the risk of future problems. A rounds schedule was created and during each shift the plant operator is to go through the facility to check the equipment, record various readings and make sure all the necessary systems are online and functioning properly. On each round, the operator is to stop at 15 separate stations, perform various tasks and then check off the tasks and record the time of the stop on a checklist maintained at each station. This is done twice during each shift and, according to the time lines contained in the manual, around two hours are set aside for the first round, whereas the second round takes about an hour. During the remainder of the shift, the operator takes samples, performs maintenance and does various other tasks. Due to the past problems, the plant management has stressed the importance of accurate testing and meticulous record keeping to the operators.

The Grievant, Terry Jacobson, was an employee of the Superior Department of Public Works since 1977, working in the City's Waste Water Treatment Plant. Over that period of

time he had held various positions, eventually becoming a plant operator. He contributed to the development of the Operator Rounds Manual. In 1986, the Grievant was diagnosed with Type I (insulin dependent) diabetes.

In November, 1995, the Grievant was issued an Employee Disciplinary Report for falsification of records, in that Michael Beattie, at that time the Interim Assistant Superintendent, had discovered that on November 27 he had filled in some of the station checklists from his rounds that day after the fact. The Grievant objected to the discipline and explained that he was having a low blood sugar reaction which made him disoriented while performing his rounds and he was unaware that he hadn't filled out the forms until later. He then went back and filled in the information. He was told, thereafter, that the discipline would be withdrawn, but that he needed to see his doctor about regulating his condition to prevent a recurrence. In January, 1996, Dr. Robert Sjoberg examined the Grievant and recommended the installation of an insulin infusion pump to regulate his blood sugar, which was done. Thereafter, the management did not make any regular effort to monitor the Grievant's work habits or record keeping. Since that time, the Grievant has not had any low blood sugar events at the workplace. There is no other recent record of discipline in the Grievant's file.

On March 31, 1999, the Grievant was the operator on the afternoon shift. On that day, Beattie, now the Assistant Superintendent for Operations, left instructions that he should go to Lift Station #1 to turn on the pumps then check on Combined Sewer Overflow Station #5 (CSO-5), on the South side of the City. The Grievant left the Main Plant in a City pickup truck at approximately 6:30 p.m. While returning to the Main Plant at approximately 7:00, the Grievant made a one-block deviation from his route to deliver a kerosene heater to his ex-wife and was observed doing this by Beattie, who happened to be passing by. Beattie returned to the plant and determined to confront the Grievant, as it was against department policy for employes to use City equipment for personal business without permission. While looking through the plant for the Grievant, Beattie noticed that the second round had been checked off for that shift on several of the station checklists with times logged from 8:45 p.m. to 9:40 p.m., even though it was not yet 8:00. He also noticed that on some other checklists neither round had been checked off.

When Beattie located the Grievant, he confronted him about his personal use of the truck and the checklists. The Grievant admitted using the City truck to deliver the heater and stated that he didn't think it would be a problem. He also admitted filling out the checklists ahead of time and explained that he had just decided to fill out the forms for both shifts at once to save time, but that he fully intended to complete the second round of inspections at the times indicated. At that point, Beattie sent him home and then collected all the checklists for that day. The next day, Jeff Vito, the Public Works Director, issued the Grievant a Notice of Intent to Release from Employment for ". . . deliberate falsification of records and inappropriate use of a City vehicle. . .," immediately suspending him without pay and informing him that his termination would occur on April 7, 1999. The Grievant and representatives from the Union met with members of management on April 6 without result

and Vito issued a Notice of Release from Employment on April 9 confirming the termination. The Union filed a grievance on April 20, 1999, which was not successfully resolved through the grievance process, and the matter proceeded to arbitration.

POSITIONS OF THE PARTIES

The City

The City had just cause for terminating the Grievant. He admitted falsifying official records on March 31, 1999, despite two previous warnings, in 1991 and 1995, that falsification of records would result in termination. Further, he used a City truck for personal business on the same date, in direct violation of City policy.

Many arbitration awards uphold the right to terminate an employe for falsifying records. (cf., STATE OF OHIO DEPT. OF REHABILITATION AND CORRECTION, 104 LA 579 (1995); STAR TRIBUNE, 100 LA 1106 (1993); BI-STATE DEVELOPMENT AGENCY, 96 LA 1090 (1991); WESTERN AUTO SUPPLY CO., 96 LA 644 (1991); LEASEWAY TRANSCO SERVICE, 96 LA 823 (1991). Moreover, in each of these cases the infractions were much less serious than the Grievant's conduct here. The Grievant was responsible for inspecting and maintaining equipment which prevents pollutants from being released into Lake Superior. He failed to perform his proper duties and attempted to conceal this fact by falsifying the records of his inspections. His dereliction risked harm to the environment, substantial cost to the taxpayers and legal liability to the City. The importance of keeping accurate records was stressed to the employes and particularly to the Grievant, because he had been previously reprimanded for falsifying records in 1995 and was warned that any further infractions would result in termination. Further, his conduct violated Sec. 283.91(4), Wisconsin Statutes, which prohibits falsification of records required to be filed or maintained under Chapter 283, the Pollution Discharge Elimination Act.

Under the circumstances, termination is the only appropriate response to the Grievant's conduct. The plant operators' function with little or no oversight and the City must be able to trust them implicitly. The Grievant violated that trust and compounds his misconduct by continuing to deny his repeated wrongdoing and maintaining against all logic and reason that the night in question was the only time he engaged in misrecording his inspection times. Failure to terminate the Grievant for his wrongdoing would undermine the City's ability to require honesty and accuracy from its other employes, would cause the City to potentially lose its Wastewater Treatment permit and would expose the supervisors who sign his reports to possible criminal sanctions. The City cannot be required to run such risks by retaining a dishonest employe in such a responsible position.

The City's right to terminate under the circumstances is not impeded by the Grievant's seniority. Length of service does not immunize an employe from discipline for violations of work rules or State law. Many arbitrators have upheld terminations despite many years of

service. Here, the Grievant's conduct would merit termination even if he had an unblemished record, which he does not. His falsification of records, combined with his unapproved personal use of City equipment, more than justifies his termination and the grievance should be denied.

The Union

For several reasons, the City's termination of the Grievant was without just cause. In the first place, the City did not apply progressive discipline. The Grievant is a 22-year employe with a good work history. Other than some problems which occurred in 1995 as a result of his diabetes, which were resolved, he has no history of problems at work. For the City to terminate him under these circumstances, without any previous less severe disciplinary action taken, was unwarranted.

With respect to the alleged misuse of a City truck, this matter was overblown by the Employer. The City originally claimed that the Grievant was concealing the truck in a garage, but it came out at the hearing that the truck was parked in a driveway. This is an example of the City's exaggeration of the facts and failure to conduct a proper investigation, which challenges the credibility of the City's entire case. It should be also noted that the deviation was one block out of the Grievant's way, a minor violation at worst and hardly worthy of more than a letter of reprimand [cf., WINNEBAGO COUNTY, MA-4246 (ENGMANN, 1987)].

The allegations regarding the misrecording of time records are also questionable. The City argues that the Grievant's admission that he recorded the times of certain monitoring rounds beforehand raises suspicions that the Grievant did not do his work and is untrustworthy. The City produced no evidence of this, however, and there is nothing to suggest that the Grievant did not, in fact, do his job. The supervisors at the facility clearly were not doing their jobs, however, because they never investigated to see whether the Grievant was doing his work or whether his time records actually reflected the times he was performing the prescribed tasks. They also did not closely monitor the time records they were approving, despite the fact that the City stresses the great importance placed on accuracy and compliance with State standards. The supervisors never questioned the Grievant's time records previously which implies that they either aren't as important as the City contends, or that the supervisors were derelict in their duty. The City failed to perform an adequate investigation or develop clear evidence, and has failed to prove its case.

The recording of the same time on the timelogs does not establish intent to defraud the Employer. The Grievant had nothing to gain by doing so and there is no evidence that his work was not, in fact, being done. Also, if the Grievant truly had a desire to deceive he would have entered different times rather than recording the same time every day, which would eventually draw attention to himself. Again, this was never previously questioned by management, which suggests they either did not review the sheets or did not care. In the absence of proof of intent to deceive or defraud, termination for falsification of records is

unwarranted (citations omitted). The Grievant testified that he is so punctual "you can set your watch by him" and that, due to the proximity of the rooms and his many years of experience, it doesn't take him as long to complete his rounds. The City failed to refute this.

Finally, the City never adequately communicated the supposed importance of accurate time records to the employes. The Grievant was generally aware that the City had some trouble with the State, but was unaware of the specifics and certainly never saw the pleadings and other documents, which the City entered into the record. He testified that he was never told that accurate time records were so critically important. The failure to give notice of that which is later alleged to have been violated undercuts the existence of just cause. The failure to warn prior to termination challenges the propriety of the penalty. CARBIDE CORPORATION, 100 LA 763 (FELICE, 1993). For all the foregoing reasons, therefore, the grievance should be sustained and the Grievant be returned to work and made whole for all lost wages and benefits.

City Reply

The Union argues that the City failed to prove that the Grievant engaged in misconduct and that, even had it done so, the misconduct did not warrant termination. The Union is wrong on both counts.

The City proved conclusively that the Grievant falsified inspection records, did not perform necessary inspections, and could not do his job adequately in the time stated. Accurate record keeping of inspections is a necessity. The Grievant did not do this, however, because he was not doing the inspections. This was borne out by proof that the Grievant recorded impossibly short inspection times, recorded being in two places at the same time, recorded the same inspection times every day and pre-recorded his inspections. This is more than adequate evidence to support the City's action.

The Grievant claims to be so regular "you can set your watch by him," but it defies reason to suppose he could do the same inspections at the exact same times every day for two years. This fails to account for changes in weather, duties and unplanned interruptions. It is impossible to suppose he could do this at identical times day in, day out for that period without deviating once. The Grievant's ability to do his rounds so quickly is also doubtful. He claimed this was because his experience allows him to listen to the sounds of the plant and, thus, ascertain if anything is wrong, which saves a lot of time. The Grievant's duties often require visual inspection of equipment and gauges, and recording of information, which cannot be accomplished by just listening and then recording inspections which were not done.

The Union attempts to shift the blame to the Grievant's supervisors by suggesting that they failed in their duty of oversight. It is not the Grievant's fault for shirking his duty and lying about it; it is the City's fault for not catching him sooner. The alleged misconduct of other employes is not a defense to the Grievant's misconduct and has no bearing on whether the Grievant was properly disciplined here. The City may discipline employes differently, or

not at all, even for the same misconduct, and the burden is on the Union to show improperly disparate treatment. It was established that plant operator is a responsible position and the City must be able to trust these employes. It cannot be expected to provide additional supervision to accommodate an unreliable employe.

There is no question that the Grievant falsified crucial plant records. This has been consistently found to be "just cause" for termination (citations omitted). There is also no merit to the Union's argument that the Grievant had nothing to gain in falsifying the records. His gain was the ability to claim credit, retain his job and get paid for work he did not do, in effect defrauding the City. Even if there were not pecuniary benefit to the Grievant, however, the misconduct would still merit termination due to the seriousness of the infractions.

Finally, it is not true, as the Union alleges, that the Grievant was not informed of the importance of accurate record keeping. Numerous exhibits establish the City's efforts to instruct the operators on this point and the Grievant was, in fact, reprimanded in 1995 for failure to complete an inspection log. There is no way that he could not have known the importance the City placed on accurate record keeping or the severity of the consequences for not doing so. Furthermore, because the Grievant's misconduct constituted a violation of Wisconsin law, his termination would be justified even without prior notice.

Union Reply

The Union takes issue with several points raised by the City. First, the City erroneously contends that the Grievant knew that inaccurate record keeping would jeopardize its Wastewater Treatment Permit. Prior to the hearing, the Grievant had not seen any of the documents concerning the State's past action against the City, nor had management informed the operators as to the details or status of the matter. The failure of the City to give the operators this information undercuts its argument that the information was vital to the operation of the facility.

The City also attempts to use the 1995 incident to suggest that the Grievant has a poor work record. In fact, the Grievant's problems at that time were directly related to his diabetes and he sought and received a change in medication, which corrected the problem. The City concedes that the Grievant's health problems did not interfere with his work after that point and even used that as a rationale for not supervising him more closely thereafter.

It is also clear that the supervisors were not exercising proper oversight. If they had checked the timelogs they would have noticed the pattern in the Grievant's time entries, but they did not. Despite the importance the City supposedly places on these records and the fact that false reporting can allegedly lead to imprisonment, the supervisors never reviewed the logs.

Much of the City's case is based on the theory that the Grievant falsified records to hide the fact that he was not doing his work. This was never proven. No investigation was done to see if the Grievant was actually doing his work. Rather, the City merely reacted precipitously to the situation after discovering the incident of the Grievant's using the truck to haul a kerosene heater to a private residence. The City tries to elevate this act to the level of a crime by likening it to stealing, but no charges have been filed for either incident and neither would stand up in a court of law. Where such allegations are made, the City must prove its case for just cause beyond a reasonable doubt. Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 907 (1997). The City's evidence consists of conclusions drawn by Supervisor Beattie that the Grievant was only performing half his required inspections. This is not evidence, it is speculation and cannot support the termination of an employe with 23 years experience.

The City cites cases upholding terminations for falsifying records, but these cases are not on point and, in fact, as often as not, arbitrators have reduced or overturned discharges based on falsification of records. Some of the cases involved theft or attempts to conceal illegal activity. Others involved employes who had been working only a short time and/or had poor work records. None of those circumstances apply here. The Grievant did not attempt to defraud the Employer or hide illegal conduct and had a long and good work history. He is entitled to reinstatement and an opportunity to correct his behavior.

DISCUSSION

Burden of Proof

In a discharge case, such as this, where just cause is the standard, two questions necessarily arise. In the first instance, it is necessary to determine whether the employe committed the acts for which he was discharged. If that is established, then the analysis turns to whether the penalty was appropriate to the offense. In both cases, the burden is initially on the Employer to bring forth evidence sufficient to prove its case. Assuming that is accomplished, then the Union must rebut the Employer's prima facie case with evidence of its own.

Discharge is, of course, the "capital punishment" of labor relations. For this reason, arbitrators frequently impose a higher burden of proof than the typical "proof by a preponderance of the evidence" standard. While not directly arguing the point, the Union has cited awards in which the arbitrator has applied the "proof beyond reasonable doubt" standard in evaluating evidence in discharge cases. This standard, however, is generally reserved to criminal felony cases where the consequences of conviction may be a loss of life or liberty. I am not persuaded that such a standard is appropriate here and adopt, instead, what is familiarly known as the middle burden, which is "proof by clear and convincing evidence." Ultimately, however, whatever phraseology is used to articulate the standard, what it boils down to is that

the Arbitrator must be satisfied in his own mind that a) the employe did that of which he is accused and b) the conduct was of a severity meriting discharge and the onus is on the Employer to establish those elements.

The Merits

The Grievant is accused of two offenses. The first is the unauthorized use of a City pickup truck to deliver a kerosene heater to his ex-wife on the evening of March 31, 1999. This was observed by Mike Beattie, the Assistant Supervisor for Operations for the Waste Water Treatment department, who saw the truck parked at the Grievant's ex-wife's residence. When Beattie confronted the Grievant about the matter, he readily admitted it, so as to this offense there is no question that the Grievant committed the acts of which he is accused.

Unauthorized personal use of City property is prohibited. This was made clear to the employes in a memo issued by Dan Romans, Wastewater Treatment Administrator, on August 3, 1994, as follows:

. . .

> We do not authorize the use of City (WWTP) Equipment or our facility for personal gain on City Time. Examples might include, but are not limited to, working on personal vehicles or other items such as trailers or boats.
>
> We do not authorize the use of City (WWTP) Equipment or our facility for personal gain, even on the employee's own time, unless they receive permission from the appropriate supervisor, (Mark or Dan for the Main Plant and CSO #2) or (Mark or Neil for CSO #5, CSO #6 and the collection system). This also applies to the borrowing of tools or equipment from the Superior WWTP.
>
> Please post one set for two (2) weeks and place the other sets in the Operational Manual. One set goes under MEMOS while another set goes under POLICIES.

The Grievant testified that he was familiar with the document, although he had never directly discussed the subject of personal use of City property with management. Thus, it is clear that the Grievant did use a City vehicle for personal business on the date in question and was aware that this was a violation of City policy.

As far as the record shows, however, the City's Operational Policies do not establish specific penalties for commission of the proscribed acts. It becomes necessary, therefore, to evaluate the seriousness of the conduct in light of the punishment imposed. In this case, the Grievant's uncontroverted testimony was that he had brought the heater to work in his personal vehicle, with the intention of dropping it off at his ex-wife's house after work. That afternoon, however, Beattie had left instructions that the Grievant should go turn on the pumps at Lift

Station #1 on the South side of the City. The Grievant's direct route between the plant and the lift station took him within one block of his ex-wife's house, so he decided to drop the heater off on the way. He loaded the heater into the City truck and went to the lift station. After turning on the pumps he called his ex-wife to determine if she was home, then dropped the heater off on his way back to the main plant. The deviation took 3-5 minutes, but it happened to coincide with the time Beattie was driving by.

Having determined that the Grievant's conduct was a technical violation of the City's Operational Policies, it must be said that this is somewhat less than the type of egregious conduct one would expect to result in the termination of a 23 year employe with a good work record. It is clear that the Grievant was not attempting to take advantage of the Employer, or to use City property for personal gain. He simply considered dropping the heater off on his way between the two plants to be the most expeditious plan. In all probability, had he discussed his idea with his supervisor beforehand, permission for the side trip would have been granted, however, the supervisor had already left for the day. Standing alone, therefore, I agree with the Union that this offense was minor in nature and would have merited little more than a written reprimand.

Now, however, we must turn to the second, and more complicated, set of events. As has been recorded, it was while he was looking for the Grievant on March 31 to discuss his improper use of the truck that Beattie discovered the discrepancies in the maintenance logs at the Waste Water Treatment Plant. The Grievant admitted checking off the second inspection round on some of the log sheets early. His explanation was that he fully intended to perform both inspection rounds, but thought it would save time to just check off the rounds all at once. He could not account for why the first inspection round had not been checked on some sheets, although he typically completed the first round by 4:45 p.m. and it was then after 7:00. As a result of this conversation Beattie, relieved the Grievant and sent him home for the remainder of his shift. The next day the Grievant was issued a Notice of Intent to Release from Employment from Jeff Vito, the Public Works Director, which took effect on April 7.

The City maintains that the Grievant's conduct constitutes a falsification of records, in that the Grievant recorded inspection times for inspections that were not performed. The corollary to this, of course, is that the falsification was intended to cover up the fact that the Grievant was not doing his job. That is, he recorded times for two inspection rounds, but only performed one. The City further maintains that this was not an isolated incident, but reflects a pattern of conduct which had been occurring for at least two years. Due to the importance of keeping accurate records, the risks caused by improper maintenance and the need to rely on the honesty of its employes, the City argues that termination was the only reasonable response to the Grievant's actions.

The Union asserts that this was an isolated incident, which had never occurred before, that the Grievant would have completed both rounds had he been given the opportunity and that the City had never stressed the importance of accurate time recording on the inspection logs in the past. Given the Grievant's long history of employment and good work history,

summary termination without any warning or prior discipline is unwarranted. The Union maintains that the Grievant should be reinstated and made whole. Obviously, there is a wide gulf between these positions.

The evidence supporting the City's position is as follows. After discovering the inaccuracies in the March 31 logsheets, Beattie went back over inspection logsheets retained by the City for several years. He discovered that for nearly two years, with very few exceptions, the Grievant had filled in the exact same times for his inspection rounds. For instance, if he was working the day shift, the Grievant would invariably inspect Heat Exchanger #1 at 7:35 a.m., the Sludge Transfer Room at 7:37 a.m., Heat Exchanger #2 at 7:39 a.m. and so forth. (Employer Ex. #22) Beattie testified that, given changing weather conditions, varying tasks and unforeseen interruptions, it is impossible that an operator could conduct two inspections per day of 15 separate stations for two years and be at the same stations at the same times, to the minute, every day. He also noted that on at least two occasions the Grievant logged phone calls in the main plant building at the same time the inspection logs indicated he was in another building. Finally, Beattie, along with Assistant Superintendent Timothy O'Brien, testified that the Grievant's log times indicate that he was completing his inspection rounds in much less time than that allotted, and that he could not do a thorough and adequate inspection in the amount of time he was reporting.

The Grievant testified that he had never pre-recorded inspection times prior to March 31 and that it was a total coincidence that Beattie should happen to arrive on the one day he did so and notice the discrepancies. He further indicated that he intended to complete both inspection rounds and would have done so had he been allowed to complete his shift. As to his habit of recording the exact same inspection times every day, the Grievant testified that he has a reputation for timeliness and that people say they could "set their watch by him." He asserted that, notwithstanding the times recorded never vary, his inspection logs are accurate. As to the occasions where the Grievant appears to have been two places at once, he testified that the clocks in the various buildings aren't synchronized and sometimes differ from each other by several minutes. Thus, he could have recorded the same times in two different places. With regard to the shortness of his inspection rounds, the Grievant asserted that his 22 years of experience enable him to complete his rounds in less time. Due to his familiarity with the plant and machinery, he can often walk through a building and tell by just looking around and listening whether everything is working correctly, without needing to examine each piece of equipment.

I have to say that, on the whole, I find the Grievant's version of events to be inherently incredible. Based upon the record, and the various intervening factors raised by the City, it is not reasonable to believe that the Grievant is so punctual and regular in his habits that he could perform his inspection rounds at the exact same times, twice a day, every day, for two years. I do not believe, therefore, that the times he entered in the inspection logs were always accurate. This conclusion is buttressed by the evidence of the occasions on which the records show the Grievant to be two places at once. His explanation was that the clocks in the various buildings aren't always set at the same time, creating the possibility for recording the same

different places, but he also testified that he recorded the times for his inspection rounds. Logic would dictate that if he relied on his watch for one, he would do so for the other. It is also highly unlikely that March 31 was the first time the Grievant preemptively entered inspection times in the logs. Again, it would be an enormous coincidence that the one time he did do, as he testified, would be on the same day that a supervisor showed up unexpectedly and checked the logs. Therefore, there is a pattern of record keeping irregularities by the Grievant dating back to at least 1997.

This is, undoubtedly, a serious matter, and the Grievant should have known it. The Grievant testified to his familiarity with the Operators' Rounds Manual, and, in fact, the operators were involved in its creation. The Inspection Check List contained therein states, in part, as follows:

. . .

> 2) Each check list consists of a variety of tasks the operator must perform at each location. The first item the operator is required to fill in on each check list is the time the inspection takes place. This is important because it provides an accurate time line for responding to an emergency and allows us to determine the events leading up to it. (Jt. Ex. 6)

. . .

This clearly apprises the operators of the importance of, and rationale behind, accurate time reporting on inspection logs. Further, the 1995 incident, wherein the Grievant was initially reprimanded for entering log times after the fact, should have indicated to him the importance management attached to this practice. 1/ The Grievant can hardly argue, therefore, that he had no notice that accurate time recording was expected.

1/ It was determined that the Grievant's failure to initially record the inspection times was due to an episode of disorientation caused by the Grievant's diabetes. The medical problem was corrected and there has been no recurrence. For this reason the initial written reprimand was withdrawn. The arbitrator draws no inference of intentional wrongdoing from the episode, nor is it considered a blemish on the Grievant's work history.

I also note, however, that the evidence is conflicting as to just how much of a premium the City places on accuracy in maintaining inspection logs. In the first place, the fact that the Grievant unvaryingly recorded the same times on his inspection logs every day went undetected for two years, although these logs are supposedly reviewed by supervisors before they are filed. Secondly, there is apparently no practice of routine spot checking by

as outlined in the Operator Rounds Manual, despite the fact that there are potentially severe consequences for violating the WWTP permit and that the Superior facility had quite recently been sanctioned by the State for noncompliance. 2/ This leads me to conclude that standards for timekeeping on inspection logs may not have been as stringently enforced as other records of sampling, chemical values, etc. Thus, while important, the inspection logs may not be as crucial or as closely scrutinized as other records specifically referenced and required by the permit.

2/ It is also not clear from the record that the inspection logs qualify as the types of records the State requires to be maintained or, in the alternative, whether strict timekeeping is a necessary component. The permit requires retention of " . . . records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the application for the permit for a period of at least 3 years from the date of the sample, measurement, report or application." (Employer Ex. 16)

The City, however, would have me conclude that the Grievant was falsifying records in an attempt to hide the fact that he was consistently not performing two inspection rounds per shift, as he was supposed to. I am not prepared to make that leap. What the evidence establishes, and all it establishes, is that the Grievant was slipshod in his timekeeping practices on his inspection rounds, even to the point where he may have regularly been recording his second round before the fact. The evidence does not indicate what, if any, purpose lay behind the Grievant's recording discrepancies and to ascribe any particular motive on this record would be speculative. I would note the following facts from the record, however, which militate against the City's theory. Prior to March 31, 1999, there is no evidence of anyone discovering the Grievant not performing his inspections, as noted. Other than the incorrect log sheets, there is no evidence that the Grievant was not performing his duties on March 31. There is no evidence that operators on shifts subsequent to the Grievant noted more problems due to improper or insufficient inspection and maintenance of equipment by the Grievant. The Grievant, in fact, had a higher incidence of problems with equipment, which may indicate that he was at least as diligent in his inspections as other operators, if not more so. I conclude, therefore, that the record supports a finding that the Grievant did not accurately report the times of his inspection rounds, but no more.

According to the City, however, the falsification alone is enough to support the discharge. Cases are cited where falsification of records has warranted the summary discharge of even long term employes with good work histories. For various reasons I find these decisions not to be on point. STATE OF OHIO DEPT. OF REHABILITATION AND CORRECTION, 104 LA 579 (1995) involved an employe who falsified travel records in order to obtain reimbursement for unincurred expenses. BI-STATE DEVELOPMENT AGENCY, 96 LA 1090

employe who falsely filed a workers compensation claim for a non work-related injury. In each case the discharge was sustained largely because the falsification was part of a scheme to defraud the employer. The City argues here that such was the Grievant's intent, as well, because he was being paid for work not done, but, as I have noted above, I do not believe the record supports that conclusion. STAR TRIBUNE, 100 LA 1106 (1993) involved an employe-driver who falsified mandatory Department of Transportation logs to conceal excess driving time. The discharge was sustained because the Grievant had previously received a warning regarding such conduct and the collective bargaining agreement made falsification of records and ignoring of warnings subject to immediate discharge. In this case, there was no previous warning or progressive discipline of any kind and the agreement doesn't provide any specific penalty for violation. In LEASEWAY TRANSCO SERVICE, 96 LA 823 (1991), the Grievant deliberately falsified production records because he had been previously disciplined for failing to meet specified quotas and wanted to avoid being disciplined again. Here, the Grievant had no past history of discipline.

It is also noteworthy that the 1995 episode only warranted a written reprimand, which was subsequently rescinded, for essentially the same offense. Admittedly, this was an isolated incident, whereas the present case apparently involves record inaccuracies over an extended period of time, but it is a long reach from a written reprimand to summary discharge. The City asserts, however, that there is precedent in that other employes have been dismissed in the past for the same offenses. Again, I am not persuaded that these cases are necessarily close enough in kind or degree of severity to support the termination here. On one occasion an operator and a supervisor were dismissed for failure to report a problem with a piece of equipment, which ultimately caused damage to a pump and cost the City tens of thousands of dollars in repairs. There is no record of any damage or costs being incurred by the City as a result of negligence by the Grievant. In the other case, an employe was terminated for falsifying records and improper use of City equipment. The record does not indicate the circumstances of the falsification, but apparently the employe was using a City truck to stalk another employe, which was considered to be the more serious offense. As previously noted, the Grievant made a short route deviation in a City truck to deliver an item to his ex-wife.

I conclude, therefore, that although the Grievant did commit the acts of which he is accused – using a City truck for personal business and falsely reporting times on inspection logs – these acts were not onerous enough to warrant summary discharge. Nevertheless, they are serious violations, particularly that of wrongly recording inspection times over an extended period of time. I agree with the City that reliability is an important characteristic in being a plant operator, inasmuch as they often work alone and much depends on them performing their duties competently and responsibly. For this reason I conclude that the Grievant's actions warrant a suspension of 60 days without pay. I feel that this level of discipline demonstrates the seriousness of the violation, both to the Grievant and the other employes, and adequately sanctions him for his irresponsible behavior. Further, although he is to be reinstated, his reinstatement is subject to a last chance agreement, which will result in immediate discharge

for any future infractions.

Based upon the foregoing, and upon the record as a whole, the undersigned hereby enters the following

AWARD

The City did not have just cause to terminate the Grievant and, therefore, violated the collective bargaining agreement by doing so. The Grievant did, however, commit the acts of which he was accused and, therefore, a suspension of 60 days is warranted. It is ordered, therefore, that the City shall reinstate the Grievant as a plant operator at the Waste Water Treatment Plant, and will pay him back pay, along with any other attendant benefits, from May 31, 1999. The reinstatement will be subject to a last chance proviso whereby any future violations by the Grievant may result in immediate discharge.

The arbitrator will retain jurisdiction over this matter for a period of six months in order to resolve any issues surrounding the implementation of the remedy.

Dated at Eau Claire, Wisconsin this 19th day of July, 2000.

John R. Emery /s/
John R. Emery, Arbitrator

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