BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF WAUPUN

and

WAUPUN CITY EMPLOYEES UNION, LOCAL 1112, AFSCME, AFL-CIO

Case 59
No. 58655
MA-11024

(Chuck Landaal Grievance)

Appearances:

Mr. Lee Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2236, Fond du Lac, Wisconsin 54936-2236, on behalf of the Local Union.

von Briesen, Purtell and Roper, S.C. by **Attorney James R. Korom**, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202-4470, on behalf of the City.

ARBITRATION AWARD

According to the terms of the 1998-2000 collective bargaining agreement between the City of Waupun (City) and Waupun City Employees Union, Local 1112, AFSCME, AFL-CIO (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the discipline of employe Chuck Landaal. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. The hearing was held on May 25, 2000, at Waupun, Wisconsin. No stenographic transcript of the proceedings was made. At the hearing, the parties agreed that they would waive the requirement in Article XII, Section 12.05, requiring the undersigned to issue her written award within ten (10) days of the last meeting regarding this case. The parties also agreed to submit their post hearing briefs by July 14, 2000, which the undersigned would exchange for them. The parties reserved the right to file reply briefs in this case. They filed their reply briefs by August 18, 2000, which the undersigned exchanged for them.

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.

ISSUES

The parties stipulated that the following issues should be determined in this case:

Did the City of Waupun violate the collective bargaining agreement with AFSCME Local 1112 when it suspended employe Chuck Landaal for ten (10) days for activities which took place on January 7, 2000? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE III
FUNCTIONS OF MANAGEMENT

3.01 Except as hereafter provided, the management of the work and the direction of the working forces, including, but not limited to, the right to hire, assign work and duties, transfer and promote, demote, suspend or discharge or otherwise discipline for proper cause, lay off or relieve from duty, to subcontract work, and the rights to determine the Table of Organization, the number of employees to be assigned to any job classification and the job classifications needed to operate the Employer's public jurisdiction are vested exclusively in the Employer.

. . .

ARTICLE IV
RULES AND REGULATIONS

4.01 The Employer shall have the right to adopt and publish rules; such rules, and amendments thereof, shall be submitted to the Union for its consideration and suggested amendments prior to adoption.

4.02 Provided no action is taken by the Union to amend or alter said rules within ten (10) days of written submission to the Local Union President, they shall become effective on the tenth (10^{th}) day of submission to the Union. In the

event of a dispute as to such proposed rules or regulations, the dispute shall be referred to the grievance procedure for settlement and shall be initiated at Step 2 of said grievance procedure.

ARTICLE XI
DISCIPLINARY PROCEDURE

11.01 The following disciplinary procedure is intended as a legitimate management device to inform employees of work habits, etc., which are not consistent with the aims of the Employer's public function, and thereby to correct those deficiencies.

11.02 Any employee may be demoted, suspended, or discharged or otherwise disciplined for just cause. The sequence of disciplinary action shall be oral reprimands, written reprimands, suspension, demotion, and discharge. A written reprimand sustained in the grievance procedure or not contested shall be considered a valid warning. No valid warning shall be considered effective for longer than a twelve (12) month period.

11.03 The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension or discharge, such as theft of personal or public property, drinking on the job, being drunk on the job, or illegal use and/or possession of a controlled substance.

11.04 Any discharged, or suspended employee, may appeal such action through the grievance procedure and shall initiate grievance action by immediate recourse to Step 3 within ten (10) days of notice of discharge.

11.05 Suspension shall not be for less than two (2) days, but for serious offenses or repeated violations suspension may be more severe. No suspension shall exceed thirty (30) calendar days.

11.06 Notice of discharge or suspension shall be in writing and a copy shall be provided the employee and the Union.

FACTS

The Grievant has been employed as a mechanic by the City for the past 12 years. It is undisputed that prior to January 7, 2000, the Grievant had never received any warnings or any other discipline from the Employer. It is also undisputed that the Grievant's work has been very good in his 12 year tenure.

On January 7, 2000, the head of the Public Works Department, Scott Hermsen, called a meeting of certain employes of the City's Department of Public Works at the City garage to deal with the effects of City employe Vern Hagen's up-coming retirement. Present at this meeting were Hermsen, Superintendent of Public Works, Bill Nanney, and employes Landaal, Hagen and Dykstra. The meeting started shortly before 2:00 p.m. Hermsen opened the meeting by making statements regarding Hagen's job duties which included welding. Hermsen also made other statements about Landaal's duties as a mechanic. Landaal disagreed with Hermsen's description and stated words to the effect that if that's what Hermsen thought he (Landaal) did for the City, Hermsen was not around the City garage enough. Hermsen responded to Landaal that in construction season Landaal did more construction work. Hermsen then laid out a description of how he wished to distribute Hagen's duties after Hagen's retirement indicating that some of these duties would go to Landaal. Landaal then spoke up again, indicating that the City was not going to hire anyone to do Hagen's welding work but that it intended to push this work off on Landaal.

According to Hermsen, Landaal said that he was going to get screwed by the City because of these work assignments and that every time Hermsen came around someone got "fucked." 1/ Hermsen responded to Landaal's statement by asking Landaal why do you (employes) get so defensive; when management tries to talk to you (employes), management is "fucked up" and if we don't talk to you, management is still "fucked up." At this point, Hermsen told Landaal he was out of line and to punch out and go home. 2/

1/ Lloyd Dykstra stated that Landaal did not use the "f" word — that Hermsen used the word "fuck." Superintendent Nanney also stated he did not believe that Landaal swore first. Rather, Nanney stated herein that Hermsen swore first, but that he could not recall the incident well enough to be certain as of the date of the instant hearing. Landaal stated that Hermsen used the word "fuck" first and that he (Landaal) only used the word "fuck" when he returned to get his "fucking coat" after he left the building at Hermsen's request.

2/ Landaal stated that he did not hear Hermsen tell him to punch out at this time; that Hermsen only told him to leave. Dykstra and Nanney corroborated Hermsen on this point. At the hearing, Landaal did not deny that Hermsen could have told him to punch out, Landaal merely stated that he did not hear Hermsen tell him to punch out at this point.

Landaal asked for Hermsen's decision (to send him home) in writing and stated that he wanted to see his Union Representative. Hermsen did not respond but walked past Landaal to the time clock, took Landaal's timecard and punched it out and held open the lunchroom door and stated that Landaal should leave the building. Landaal exited and followed Hermsen through the garage. Landaal again asked for a union steward and asked if he was fired. Hermsen then opened the outside door of the garage and held it for Landaal to exit. At this point, Landaal asked again for Hermsen's decision is writing and stated that he wished to see

leave. Landaal asked if he was fired, stated he wanted to have Hermsen's decision in writing and to see his Union Steward. Hermsen replied that Landaal was this close (indicating a one-half inch gap between his index finger and his thumb) to being fired. 3/ Landaal exited the garage.

3/ Hermsen stated that he was in control and that his tone of voice was conversational until he told Landaal he was out of line and to punch out and go home. Landaal stated that both he and Hermsen raised their voices during the confrontation. Hermsen stated that Landaal yelled at him during the confrontation in the lunchroom and that Landaal also spoke in a sarcastic tone of voice. Landaal denied this. (Landaal is corroborated by Lloyd Dykstra on these points.)

At this point, Landaal realized how cold it was outside and that he did not have his jacket. He decided he had to go back into the facility to get his jacket. Landaal re-entered the building stating "At least I can get my fucking coat," and went straight to the locker room where he got his coat. At this point, Union Representative Dave Bresser, who had been out in the garage, but not at the meeting, asked Landaal what was going on. Landaal responded that he did not know if he had been fired, he simply knew that he had been sent home. Bresser and Landaal then spoke to Superintendent Nanney and asked Nanney whether Landaal had been fired. Nanney said he did not think so; he thought that Hermsen had simply sent Landaal home. Bresser said that was not a good enough response and Bresser advised Landaal to stay at the facility until he received written notification of the status of his employment from Hermsen. Landaal decided that he should follow Bresser's instructions and stayed at the facility until quitting time at 3:00 p.m. even though Hermsen had punched him out earlier.

Hermsen admitted that he did not tell Landaal what would happen if Landaal did not leave the building and did not warn Landaal that he would be suspended if he refused to leave the building. Hermsen admitted that Landaal never refused to leave the building and that Landaal never disobeyed a direct order from him on January 7, 2000. Hermsen also admitted that he never told Nanney to direct Landaal to leave the building after Nanney told Hermsen later on the afternoon of January 7th (at 2:10 p.m.) that Landaal had not left the building. Hermsen also stated that he never told Landaal that he could not return to the facility to get his coat.

Hermsen stated that Landaal's requests for a steward were not unreasonable but he felt that Landaal should go home immediately in order to defuse the situation and so that he could get on with the meeting. 4/ Hermsen stated that he did not believe he escalated the situation by swearing at Landaal. Hermsen stated that the discipline that he issued Landaal was not based on Landaal's refusal to leave the facility on January 7th, but rather was based upon two statements Landaal had made on January 7th. The first statement was to the effect that if this is what Hermsen thought Landaal did for the City, Hermsen was not around the City garage

enough. The second statement was words to the effect that Landaal felt he was getting work

pushed off on him, that he was getting screwed and that every time Hermsen came around the garage somebody got "fucked." Hermsen stated that these two statements were sufficient for Landaal to receive the discipline that he (Hermsen) meted out. Hermsen stated that in his opinion an employe's use of profanity to a supervisor in the presence of other staff constitutes insubordination. Hermsen stated that he used the "f" word because Landaal had used it previously, that he was quoting Landaal.

4/ The meeting of January 7th never resumed.

January 7th was a Friday. Landaal reported to work the following the Monday as usual, as he had received no communication to the contrary. After his arrival at work, Hermsen called Landaal to Hermsen's office at City Hall. Landaal went there with two Union Stewards, Dave Bresser and Todd Frederickson. At this time, Hermsen requested that Landaal write out a statement regarding what he felt had occurred on January 7th. Hermsen then took statements from everyone who had witnessed the events of January 7th. Hermsen then suspended Landaal with pay for two days while he investigated the incident of January 7th. Hermsen also contacted Attorney Korom and requested arbitration awards regarding insubordination. Korom sent Hermsen three such awards.

On January 11th, Hermsen called Landaal into his office and offered him two options contained in a DISCIPLINARY AGREEMENT document as follows:

. . .

> Based on the events of January 7, 2000 we agree to resolve this issue as noted below:
>
> _____ Option 1 Three (3) day suspension without pay, January 10, 11, 12, 2000
> Post attached apology on bulletin board at Public Works Garage
> No grievance will be filed regarding this issue
>
> _____ Option 2 Three (3) day suspension without pay, January 12, 13, 14, 2000
> Post attached apology on bulletin board at Public Works Garage
> No grievance will be filed regarding this issue

_____ _____
Chuck Landaal Scott Hermsen

_____
On behalf of the Union

Landaal was also offered the option of taking a ten-day suspension if he chose not to take options one or two above. Landaal chose to consider the matter and stated that he and the Union would get back to Hermsen.

On January 13, 2000, Landaal and the Union delivered a letter to Hermsen indicating that the Union and Landaal would accept "no form of disciplinary action against (Landaal)" stating that there was "no just cause for such discipline." This letter also further advised Hermsen that the Union would grieve Landaal's suspension. By letter dated January 13, 2000, Hermsen notified Landaal "based on my investigation of the above incident (January 7, 2000) you are suspended for ten days without pay." On January 14, 2000, Hermsen advised Landaal of the start date of the suspension. The parties stipulated that the grievance was properly processed and through all of its steps and that no procedural issues are before the Arbitrator.

POSITIONS OF THE PARTIES

The City

The City contended that the Grievant was ordered to punch out and go home and that he refused that direct order twice, forcing Hermsen to punch the Grievant out and escort him out of the building. In addition, the City urged that the record clearly showed that the Grievant had initiated the profanity directed toward his supervisor, Hermsen, in front of other employes. These two actions by the Grievant constituted insubordination in the City's view. The City also noted that Hermsen never lost his temper.

The City contended that the Union's attempt to prove disparate treatment should fail. Here, the evidence of past disciplinary actions showed that open confrontation with supervisors has led to minor disciplines. The Grievant's open refusal to obey Hermsen's orders, his return to the workplace for his jacket and his additional statements using profanity upon his return, make the Grievant's case much worse than cases which have occurred regarding other employes in the past. In any event, the City noted that there has never been an incident similar to the instant one — where an employe has been insubordinate and used profanity toward a supervisor.

The City cited several cases in support of its arguments in this case. The City also contended that any reduction in the penalty would erode the seriousness of the Grievant's

no mitigating circumstances were proved here by the Union and that the Grievant failed to show any remorse which might call for a lessening of the penalty. In addition, the City noted that Hermsen was careful and reasoned in his approach to the discipline meted out in this case, unlike other cases where employers have been shown to be arbitrary or random in their assessment of penalties.

The City argued that no WEINGARTEN violation occurred in this case because the Grievant was not denied Union representation during any investigatory interview held by the City. In this regard, the City noted that on January 7th, the Grievant was not asked any questions but that discipline was given immediately by Hermsen. Article 12.07, in the City's view, is more restrictive than WEINGARTEN because the contract states that employes are to receive Union representation when there is "discussion for the record" of their conduct. In addition, the City noted that Section 11.03 allows for the suspension of employes in cases where cause for immediate suspension exists. The contractual list of activities for which an employe may be suspended is, in the City's view, merely illustrative and not exclusive, making the fact that the parties failed to list insubordination in Section 11.03 irrelevant.

In the City's view, the Grievant's actions, his attempt to denigrate the chain of command at the City, his disrespect for his department head in front of other employes should not be tolerated and the grievance should be denied in its entirety.

The Union

The Union argued that insubordination, if it means anything at all, constitutes a refusal or failure to perform a valid work order. Under certain circumstances, objectionable or abusive language and behavior towards a supervisor may also constitute insubordination. The Union argued that Landaal engaged in none of these activities on January 7th. In this regard, the Union argued that the Grievant did not refuse to leave the facility after he was ordered to do so by Hermsen. Rather, the Grievant merely asked for Union representation and that Hermsen put his actions in writing so that Landaal would have a record of the action taken against him. The Union argued that these requests by the Grievant were not unreasonable.

In addition, the Grievant had to return for his jacket, as it was January and it was too cold for him to return home without it. Thereafter, when Landaal re-entered the facility, he was told not to leave by his Union Steward and his immediate supervisor, Bill Nanney, did not contradict the Steward's instruction to the Grievant not to leave the facility. As the Grievant did not know that he was risking suspension by not leaving the facility and because Hermsen knew from his later conversation with Nanney that the Grievant never left the facility, the fact that the Grievant stayed until quitting time on January 7th should not be held against the Grievant, as it was Hermsen's responsibility to make clear that the Grievant was not allowed to stay at the facility. And Hermsen never did this.

The Union noted that the investigation by Hermsen, who was witness, prosecutor and judge in the case, was patently unfair. Hermsen decided to suspend Landaal because Landaal did not leave but he failed to take into consideration the fact the Union Steward had ordered Landaal to remain in the facility and that that order was never countermanded by Nanney or Hermsen.

The order to leave given by Hermsen was not reasonably related to Landaal's job. Indeed, the Union contended, Hermsen should have ordered Landaal back to work after Landaal made statements during the January 7th meeting. Hermsen's order was not a valid work order and did not serve any legitimate business purpose. In any event, the Union asserted that Landaal's presence at the workplace was not a deterrent to work.

The Union argued that Landaal was not forewarned of the consequences of his actions on January 7th. Indeed, Hermsen admitted that he failed to tell Landaal that he would be suspended if he refused to leave the building on January 7th. In addition, the Union argued that Landaal did not use profanity first; that the City had the burden of proof on this point and that it failed to prove that Landaal had used profanity before Hermsen. The comment, which Landaal made regarding his jacket, was not directed toward any supervisor. The Union argued that the Arbitrator should not credit the testimony of Nanney as the record clearly showed that he was under great pressure from both sides regarding what he heard and perceived on January 7th. The Union further noted that Lloyd Dykstra unhesitatingly corroborated Landaal's version of the events on January 7th. The Union also noted that Lloyd Dykstra testified that Hermsen swore first. Finally, the Union noted that the Grievant's work history showed that he was a conscientious employe with a spotless work record. The fact that employes use profanity in the shop is not remarkable and any profanity that Landaal used was not directed at a supervisor and was within the normal level of shoptalk/profanity used at the City garage.

The Union argued that Section 11.03 lists infractions which allow the City to apply non-progressive discipline. On this point, however, the Union urged that the Grievant's actions even if one were to credit Hermsen's version of the facts, do not rise to the level of such seriousness as to call for non-progressive discipline under the contract. In the three prior cases of insubordination at the City, the Union noted that progressive discipline was applied to each of those cases and that one of them was more serious than the situation that the Grievant found himself in on January 7th. The Union noted that regarding a fight between two summer employes, the City merely gave both summer workers an oral warning. In regard to the Bresser discipline, his oral warning was later removed from his file. Therefore, the Union urged that Landaal had been treated disparately and had been punished more harshly than other employes who had engaged in more serious misconduct in the past.

Section 12.07 requires that employes get Union representation upon request. The fact that Landaal was a steward does not mean that he should have no representation when his activities are being called into question as they were on January 7th. Indeed, the Union noted

that the contract does not exclude stewards from the right to Union representation. The Union

observed that at the instant hearing, Hermsen admitted that discussion about Landaal's conduct affecting his status as an employe on the record had occurred on January 7th. The Union, therefore, asked that all references to the discipline of January 7th be expunged from Landaal's work record, that Landaal receive back pay and full benefits for the period of the ten day suspension including any potential overtime he might have worked during the period that he was suspended.

Reply Briefs

The City

The City observed that the Union's initial brief contained arguments which are inconsistent with their theory of the case, as well as misstatements of fact which raised collateral arguments that distract from the issues in this case. In this regard, the City noted that Hermsen did not know on Friday that Landaal had refused to leave the facility. The City asserted that Hermsen only knew this fact on the following Monday. In regard to the WEINGARTEN issues raised by the Union as well as the issue regarding Article 12.07, the City argued that these arguments were a "red herring." Here, the supervisor asked no questions of the Grievant; he merely directed the Grievant to leave the facility and no discussion of the Grievant's work or employment status was held on January 7, 2000. Therefore, in the City's view, neither the contract (Section 12.07) nor the principles of WEINGARTEN are involved in this case. In addition, the City noted that the Grievant never asked for a steward until after he was directed to leave the facility by Hermsen.

The Union challenged the appropriateness of the investigation and the City defended as follows. The City asserted that Hermsen considered all relevant facts during his investigation and that Hermsen did not hold Landaal responsible for Bresser's advice to stay at work. The City contended that it is not inherently unfair for a supervisor to conduct an investigation into a situation in which the supervisor was involved, as the Union claimed. As Hermsen was careful to treat Landaal fairly and as it would create much greater cost to the employer if the immediate supervisor cannot conduct an investigation, the City urged that this argument by the Union should fail.

The Union argued that Landaal did not know the consequences of his not immediately leaving the facility because Hermsen did not advise him of these. On this point, the City argued that if an employer gives an employe a direct order to punch out, "failure to promptly obey can lead to some sort disciplinary action." If Landaal did not know his job was in jeopardy, the City queried, why did he ask Hermsen if he was fired before leaving the facility. The City asserted that Landaal returned to the building and in Hermsen's presence began to swear "and speak in a confrontational manner" regarding picking up his jacket. This, the City urged, showed "an intentional act of disrespect and disregard of the Employer's legitimate

interests in discipline and its supervisory authority." Therefore, the City believed that the Union's arguments were without merit.

In regard to whether Hermsen or Landaal swore first, the City noted that Hermsen is a high-ranking supervisor; that shoptalk is not something that he normally hears and the City, therefore, implied that a different standard regarding the use of shoptalk and swearing should apply to Hermsen. In any event, in the City's view, the record evidence demonstrated that Landaal swore first. Even if the Grievant did not swear first, Landaal's statements showed a disregard and contempt for Hermsen and Landaal knew that he was risking his job by making these statements and acting the way he did.

The real issue in this case, in the City's view, is the proper penalty to be assessed. The City urged that it has met its burden of proof in this case but that the Union has not shown that the City otherwise violated the contract. Thus, the Union failed to meet its burden of proof here. Finally, the City noted that in the circumstances of this case, the Employer must have the right to send employes home to de-escalate an otherwise volatile situation and that Landaal's lack of remorse in this case is quite significant and should be taken into account.

The Union

The Union argued that the cases cited by the City in its initial brief are factually distinguishable from the instant case. In regard to the charges of disrespect and profanity, the Union noted that BRYAN FOODS, INC., 109 LA 633 (BARONI, 11/97) involved an employe who engaged in much more serious conduct than Landaal — the employe in BRYAN cursed his supervisor and aggressively chased the supervisor, using profanity to embarrass, ridicule and degrade the supervisor before other employes. The Union also noted that in BRYAN, the Arbitrator recognized the mitigating force of frustration on the part of the employe as a reason to decrease the penalty assessed by the employer. In regard to WILL-SON CORP., 108 LA 920 (NADELBACK, 5/97), the Union observed that the employe there cursed his supervisor in public and had a prior record of being warned and disciplined, as well as suspended, for using profanity, unlike the instant case. Concerning OFFICE OF MENTAL RETARDATION, 113 LA 312 (GROSS, 8/99), the Union noted that the employe in that case directed profanity toward a supervisor in the presence of members of the public and that the employe had been disciplined three times previously for using profanity. Similarly, regarding TRI-COUNTY BEVERAGE, CO., 107 LA 577 (HOUSE, 10/96), the employe used provocative, contemptuous and extreme profanity toward a supervisor which was not present in this case. Here, the City has exaggerated and mischaracterized Landaal's conduct and statements, in the Union's view, and attempted to apply the cited cases to the instant situation when it would be unfair to do so. Finally, in regard to CHARDON RUBBER CO., 97 LA 750 (HEWITT, 6/91) and GAYLORD CONTAINER CORP., 107 LA 431 (HENNER, 9/96), the Union observed that in these cases, the employes engaged in misconduct which was more egregious than Landaal's. In addition, the Union asserted that Landaal's refusal to apologize in the instant case cannot be used to determine just cause. What Landaal stated was essentially shoptalk, not directed at any person, and therefore, it did not rise to the level of abusive language which can constitute

insubordination.

Regarding the insubordination charges, the Union asserted that the cases cited by the City are distinguishable. Here, Landaal was not insubordinate. It is not unreasonable for an employe to want to return to the facility to get this coat in January in Wisconsin and it is not unreasonable for an employe to ask for his steward when he is being essentially hustled out of the facility without a clear statement regarding his employment status. In this case, Article XII, Section 12.07, was clearly violated by the Employer's refusal to grant Landaal's request for a steward. The Union noted in this regard that Hermsen understood Landaal's requests and refused to provide a steward nonetheless. In all the circumstances of this case, the Union urged that there was no just cause for the suspension given to Landaal and sought that the grievance be sustained; that the disciplinary notice and all references thereto be withdrawn from Landaal's file and that Landaal be made whole.

DISCUSSION

Article III specifically provides that there must be "proper cause" for the suspension of employes. Although Article IV indicates that the City has the right to adopt and publish rules, the Employer failed to submit any rules that were relevant to this matter. In addition, Article XI, Section 11.02, provides that "any employee may be demoted, suspended, or discharged or otherwise disciplined for just cause." This section also specifically states that the sequence for disciplinary action shall be a progressive one—oral reprimands, written reprimands, suspension, demotion and discharge. Section 11.03 indicates that the normal progressive disciplinary sequence "shall not apply in cases which are cause for immediate suspension or discharge, such as theft of personal or public property, drinking on the job, being drunk on the job, or illegal use and/or possession of a controlled substance." Insubordination and the use of profanity are not examples listed in Section 11.03 for immediate suspension.

The initial question that must be answered in this case is whether Landaal refused a direct order from Hermsen. Landaal stated that he did not hear Hermsen tell him to punch out — he merely heard Hermsen tell him to leave. It is clear that emotions ran high between Landaal and Hermsen on January 7th and it is understandable that Landaal may have been confused and upset by Hermsen's failure to tell him the meaning of Hermsen's statements and actions towards him. In any event, when Landaal hesitated to act or did not act as quickly as Hermsen wished, Hermsen became very angry and took immediate action by punching out Landaal and hustling him out of the building. According to Supervisor Nanney, the entire confrontation between Landaal and Hermsen took less than five minutes.

It is significant that at the instant hearing, Hermsen stated that Landaal never refused to leave the garage and that he (Landaal) never disobeyed a direct order from Hermsen. It is also significant that Hermsen stated herein that the discipline he issued Landaal was not based on Landaal's remaining at the facility on January 7th, but rather was based upon the two statements that Landaal had made — that Hermsen did not know what Landaal did for the employer and

that every time Hermsen came around the garage, someone got fucked. Therefore, it is not

critical to the outcome of this case whether Landaal left the facility or not, as his ultimately staying at the facility was not considered a refusal to follow a work order by Hermsen. 5/

5/ Landaal reasonably returned for his jacket and was going to leave again when Bresser stopped him. Bresser asked Nanney if Landaal had been fired and Nanney responded that he was not sure but he thought the Hermsen had only sent Landaal home. Bresser then advised Landaal not to leave until Hermsen's action against him had been received in writing. It is significant that at this point, Nanney did not direct Landaal to leave the facility. Indeed, at 2:10 p.m. that day, Nanney advised Hermsen that Landaal had stayed at the garage after Hermsen had ordered him to leave. Nevertheless, Hermsen did not direct Nanney to tell Landaal to leave the facility. At the instant hearing, Hermsen stated that he did not hold Bresser's advice to stay in the garage against Landaal in disciplining Landaal. Therefore, even if Landaal's actions in failing to leave the facility constituted insubordination, as both Nanney and Hermsen condoned Landaal's actions in following Bresser's advice and staying at the garage on January 7th, no finding of insubordination on this basis can be made.

It is axiomatic in labor relations that if a supervisor tells an employe to leave, the employe should leave and that employes have no right to question or request specifics regarding an order to leave. Thus, contrary to the Union's claims herein, I believe that employes know that the word "leave" means that the employe should punch out and leave the facility. In this case, confusion was created when the union steward essentially countermanded Hermsen's order that Landaal leave. Apparently, Bresser was under the mistaken impression that Landaal should receive written notice of a suspension or discharge (pursuant to Section 11.06) prior to leaving the premises. However, Section 11.06 does not require written notification of an employe's suspension or discharge by a date certain so that a reasonable time period would be implied. Therefore, the Union's insistence that Landaal remain at the facility on January 7th was erroneous.

Having found that Landaal was not insubordinate in leaving (slowly) and then returning to the garage on January 7th, the question arises whether the language Landaal used on January 7th rose to the level of insubordination. The parties have hotly contested the question whether Hermsen or Landaal first used profanity on January 7, 2000. Even assuming that Hermsen's version of the events which occurred on January 7th is credited in its entirety 6/, I do not find that Landaal's language rose to the level of insubordination on January 7th.

6/ During his examination and cross-examination, I note that Hermsen refused to characterize his own tone of voice as angry or upset and he denied losing his temper. I find this incredible. I also note that during his examination and cross-examination, Landaal appeared to be a relatively steady and even-tempered individual. Nonetheless, I have, for the sake of argument, credited all of Hermsen's version of what occurred on January 7th.

In this regard, I note that the Union offered evidence (which remained uncontradicted) that "shoptalk" including profanity was used at the City garage on a regular basis. In my view, a separate standard regarding the use of "shoptalk" is unnecessary in Hermsen's presence. In this regard, I note that Hermsen responded in a confrontational manner to Landaal's statement and that Hermsen himself used profanity in response to Landaal. The fact that Landaal stated that he was going to get screwed by the City and that every time Hermsen came around the City garage, someone got "fucked," although not the kind of polite exchange which occurs in an office setting, is one which could easily occur in a City garage.

In regard to the comment which Landaal admitted when he returned to the lunchroom to get his coat, I do not find Landaal's comment to be confrontational as the City claimed. Landaal's return for his jacket was not an intentional act of disrespect or disregard for Hermsen's authority, as the Employer claimed. Rather, Landaal was reasonably responding to January weather in Wisconsin when he felt it was important for him to return for jacket.

The City cited a number of cases for the proposition that Landaal was properly disciplined in this case for insubordination and the use of profanity. I find those cases to be inapposite. Initially, I note that several cases cited by the Employer were factually distinguishable from the instant case. In BUTTREY FOOD AND DRUG CO., 110 LA 641 (PRAYZICH, 5/98), an employe there was discharged for dishonesty and for failing to tell his employer about the terms of his release on bail. That case had nothing to do with insubordination. Concerning both OFFICE OF MENTAL RETARDATION, 113 LA 312 (GROSS, 8/99) and WILL-SON CORP., 108 LA 920 (NADELBACH, 5/97), these cases concerned employers who had rules against the use of profanity. In the instant case, the City has no rule prohibiting profanity. In regard to CHARDON RUBBER CO., 97 LA 750 (HEWITT, 6/91), I note that the grievant reported to work under the influence of alcohol, that he refused to perform a job duty within his job description, that he told the foreman that it was "not his fucking job" and that the grievant stated that he would "get the foreman's ass for this." When the foreman ordered him to punch out, the grievant refused to leave the premises. The grievant later repeated his refusal to punch out and go home in the presence of the union steward and the department manager, at which point his foreman threatened to call the police and the grievant left the facility. In my view, this case is entirely distinguishable from the one before me.

In addition, VANDEKAMP'S INC., 111 LA 180 (DILAURO, 5/98), concerned a grievant who essentially threatened his supervisor with bodily harm. The supervisor took the grievant's statement as a threat and asked if the grievant had intended to threaten him. The grievant remained silent. The supervisor then stated that he interpreted the remark as a threat and ordered the grievant to punch out. The grievant said "I ain't going nowhere." The supervisor again ordered the grievant to leave and he refused. The grievant was then escorted out of the facility. In these circumstances, the Arbitrator felt a suspension was warranted. This case is not applicable here.

Concerning the language used by Landaal, the City cited GAYLORD CONTAINER CORPORATION, 107 LA 431 (HENNER, 9/96) and TRI-COUNTY BEVERAGE, 107 LA 577 (House, 10/96). In GAYLORD, the Arbitrator found that use of the term "fuck you" directed at a supervisor (after the grievant had been suspended) was a breach of decorum but did not rise to the level of insubordination or outrageous conduct. In TRI-COUNTY BEVERAGE, the grievant used the words "fuck you," "bullshit" and "get the fuck out of my face" toward a supervisor. Nonetheless, the Arbitrator stated that every vulgarity is not per se punishable, but found that the grievant's language was provoking and showed contempt of his supervisor such that the grievant should be given a 60-day suspension. In BRYAN FOODS, INC., 109 LA 633 (BARONI, 11/97), the Arbitrator did not recount the profanity used by the grievant, although he did state that such profanity was used to embarrass, ridicule and degrade the supervisor in the presence of other employes, finding that the grievant should be suspended for his conduct. In sum, I have not found the cases cited by the City to be particularly helpful in determining the outcome of this case, as they are either factually distinguishable or they involve unknown profanity or worse profanity and conduct than was engaged in by Landaal even according to Hermsen's version of the events of January 7th.

The Union has argued that the investigation of this case was improper. I disagree. In this regard, I agree with the City's assertion that a supervisor who is personally involved in an incident must be allowed to attempt to investigate the incident when the employer is unwilling to expend additional resources for more professional assistance in the matter. The Union also argued that Landaal was disparately treated when this situation was compared with others that have occurred in the past. In this regard, I note that none of the situations recounted involved employes making disrespectful statements to supervisors in front of other employes.

Thus, what is left in this case is whether the profanity Hermsen claimed Landaal engaged in was sufficient to constitute insubordination. Here, the Employer could have made a work rule prohibiting profanity in the work place. No such rule existed. In fact, evidence was placed in the record in this case to show that employes engaged in profanity at the work place on a regular basis in front of supervisors. Landaal's statements were certainly disrespectful. And they were made in front of other employes which made them worse. However, Landaal's statements did not constitute a threat or a personal attack on Hermsen. Rather, Landaal's comments related to Hermsen's supervisory abilities.

A ten-day suspension for engaging in disrespectful public commentary toward a supervisor which neither threatens the supervisor nor is a personal attack upon the supervisor is excessive. In this regard, I note that the evidence showed that no employe had ever been suspended for confronting a supervisor in a disrespectful manner. Indeed, Section 11.03 fails to mention profanity or disrespecting a supervisor as cause for immediate suspension or discharge. Therefore, it would have been reasonable and appropriate that Landaal, who has never before been disciplined by the City, should receive an oral warning for his comments to

Hermsen on January 7, 2000.

On the basis of the above analysis and the relevant evidence and argument herein, I issue the following

AWARD

The City of Waupan violated the collective bargaining agreement when it suspended Chuck Landaal for ten days for activities which took place on January 7, 2000. The City shall therefore make Landaal whole for his loss of pay and benefits 7/ for the period of the ten day suspension given Landaal and expunge any reference thereto from his record.

7/ The Union argued that Landaal should be paid for overtime he missed during the period of his suspension. I disagree. The Union proffered no evidence to show that any overtime occurred to which Landaal was entitled during the period of Landaal's suspension. In any event, overtime payments would not be a normal outgrowth of a make whole remedy without such evidence.

Dated at Oshkosh, this 20th day of September, 2000.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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