BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF KENOSHA

and

LOCAL 71, AFSCME, AFL-CIO

Case 204
No. 62545
MA-12330

(Oscar Sauceda Suspension)

In the Matter of the Arbitration of a Dispute Between

CITY OF KENOSHA

and

LOCAL 71, AFSCME, AFL-CIO

Case 205
No. 62546
MA-12331

(Oscar Sauceda Discharge)

Appearances:

Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, by **Jack Bernfeld**, Staff Representative, appearing on behalf of the Union.

Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-6613, by **Attorney Daniel Vliet**, appearing on behalf of the Respondents.

EXPEDITED ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Local 71, AFSCME, AFL-CIO (hereinafter referred to as the Union) and the City of Kenosha (hereinafter referred to as the Employer or the City) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of two grievances involving discipline against Oscar Sauceda. The undersigned was so designated. The cases were consolidated for hearing. Hearings were held on October 14, November 19 and December 22, 2003, in Kenosha, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted the case on oral arguments at the close of the hearing, with the understanding that the Arbitrator would provide an expedited decision on the matter.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the Undersigned makes the following Award.

ISSUES

The parties agreed that the following issues should be decided:

1. Did the City violate the collective bargaining agreement when it suspended the Grievant for 20 working days and/or when it discharged the grievant?

2. If so, what is the appropriate remedy?

Note: The contract contains provisions that the Employer retains the right to make reasonable work rules, and may discipline or discharge employees for just cause.

BACKGROUND FACTS

The City provides general municipal services to the people of Kenosha in southeastern Wisconsin. The Union is the exclusive bargaining representative for the City's employees in, among others, the Department of Public Works. Joe Badura is the Superintendent of the Waste Division of the DPW, Rocky Bednar is the Field Supervisor, and Ron Iwan is the Working Foreman. The Grievant, Oscar Sauceda, worked for the City for eight and a half years until his discharge in the Spring of 2003, the last six years as a waste collector in the Solid Waste Division.

In May of 2002, the Grievant was called to a meeting with Badura, Bednar and Chief Steward Scott Larsen. Badura told him he was in the top 10% in sick leave usage in 2001, and showed a pattern of using sick leave in conjunction with weekends and holidays. Badura

advised him that he was considered a sick leave abuser, and that his use of sick leave would be monitored for the next year. He was also reminded of the Division's policy on call-ins, requiring an employee to call the supervisor between 6:00 and 6:30 a.m. on any day he would be absent due to illness. The Grievant given an oral warning for his sick leave usage.

In early June, the Grievant reported that he injured his back while throwing garbage into his truck. He was examined by a physician's assistant at Aurora Health Care on June 6th, and placed on a 10 pound lifting restriction, with no bending or twisting. A subsequent visit to Dr. S. Casaclang resulted in a restriction of 30 pounds of pushing or pulling, 20 pounds lifting, and frequent position changes.

Dr. Richard Karr performed an independent medical examination on June 28th. Dr. Karr concluded that the Grievant had aggravated a pre-existing disk disease condition. He opined that some permanent lifting restrictions would probably be required, but that in the near term the Grievant should be able to perform full-time light duty work with a 25 pound maximum lifting restriction, a 10-15 pound repetitive lifting limit, and no repetitive or prolonged bending in excess of 45 degrees. Karr recommended a follow-up exam six months out to assess end of healing issues.

The Grievant was absent from work for a period of several weeks, then returned to light duty. He filed a workers' compensation claim for the injury, which was challenged by the City. In a meeting with City Personnel Director Steve Stanczyk, the Grievant had been told to get a discogram performed to show the status of his back, and that he should not return to work until the examination was done, since he might pose a danger to himself and a liability to the City. The Grievant had a great deal of trouble getting the City's health carrier to pre-authorize the discogram, and made some 16 calls to the insurance company between late August and early October. He finally was able to have the examination on October 7th at Wisconsin Health Center in Greenfield.

The Grievant continued on light duty sporadically in the Fall of 2002. Meanwhile, the City's Risk Management personnel became frustrated at their inability to reach him when he was off work, to get responses from him about his condition and course of treatment, and to sort the variety of health care providers he was using for his back problem. On October 2, he was sent for an examination at Aurora Occupational Health Services. He was examined by Physician's Assistant Daniel Sturm. Sturm noted during his examination that the Grievant had a tape recorder under his jacket and was recording their conversation. Sturm asked what he was doing and the Grievant explained that he had expected to see Dr. Casaclang again, and that he had not liked Casaclang's view of his back problems. Sturm told him he should not record their conversations and the Grievant turned the recorder off. At the end of the examination, Sturm released him to return to work with light duty restrictions.

The Grievant reported back to work, gave his supervisor's the return to work slip and said Sturm had directed him to return to work on October 8th. The date on the slip was difficult to read, so Risk Manager Jeff Warnock contacted Sturm. Sturm said he had told the

Grievant to return to work that day, the 2nd. Sturm dictated a report of the examination, including the Grievant's recording of him and his directive to return to work that day, and included the follow-up call from the City about when he had said the Grievant was to return to work. The report was dictated on the 2nd and typed and sent to the City on October 9th.

On October 3rd, the Grievant was assessed a three-work day suspension for insubordination, inattention to duties, interfering with the work of other, low productivity, sick leave abuse and providing misleading information, all of which were related to the City's perception that he was refusing to provide clear information about his condition and course of treatment, and for being uncooperative with the City's attempt to secure information and return him to full duty. At the same time, he was assessed a ten-work day suspension for falsifying information on when he had been told to return to duty.

The Grievant was off on suspension from October 3rd to the October 22nd. The suspensions were grieved, and a meeting was held with the Mayor on December 3rd. The Mayor denied the grievances, but proposed that the Grievant participate in the Employee Assistance Program. He said if he did, he would reimburse him for four of the thirteen days of suspension. The Grievant did participate in EAP and was repaid the four days.

The grievances over the two October suspensions were not appealed to the Civil Service Commission or referred to arbitration. The Union considered them linked to workers' compensation issues and advised Stanczyk that they wished to wait to schedule a meeting until sometime on late February, when they determined how to proceed.

The Events of February 2003 and the 20-Day Suspension

The Grievant received a verbal warning for failing to call in on time for an absence of February 6th, and was also counseled about failing to report to Badura as directed when he reported to work on the 7th. On February 12th an incident occurred which lead to the 20-day suspension at issue in this case.

There is some substantial dispute over the events of the 12th. According to Iwen, at approximately 10:00 in the morning, the Grievant was using a truck to plow snow in one of the Department's parking lots. He called Rocky Bednar's cell phone number from the truck. Iwen had the cell phone, as Bednar was in a meeting and he was supervising operations. The Grievant told Iwen that he had backed into a utility pole with the truck and had hurt his back. Iwen told the Grievant to return to the office and wait in the break room for Badura and Bednar to return from their meeting, a matter of 10 minutes, but the Grievant refused, saying he was going to go home and take some pain medication. Iwen returned to the office, but the Grievant was not there. He told Bednar and Badura about the incident, and prepared a written statement. Badura called the Grievant at 11:20 a.m. and directed him to go to the hospital, and then come to the office to fill out paperwork on the accident. The Grievant said he would. He

then called Badura 25 minutes later to say he could not get in touch with his doctor. Badura told him to go to the hospital immediately. The Grievant refused, and said he wanted to speak to Warnock. Fifteen minutes later, the Grievant called back and said he would go to the hospital.

According to the Grievant, no directive to wait for Badura and Bednar was given. He told Iwen in person at 8:30 or 9:00 a.m. that he had hurt himself plowing and wanted to go home. Iwen told him to do what he had to do. He waited to see if Bednar or Badura showed up, but they didn't, so he called Bednar's cell phone to say he was in pain and was going to go home. Iwen answered, and he told Iwen instead. Iwen again told him to do what he had to do. He went home to take a hot bath and ease his back. Around 10:30 or 11:00 a.m. Badura called and told him to go to the hospital, so he went to Aurora. The doctors at Aurora showed on the Accident Report that they released him to return to work on the 13th. However, he then saw Dr. Capelli, who told him he did not need to return until the 24th, and gave him an undated prescription note to that effect.

The Grievant did not report for work on the 13th. On the 14th, a meeting was held with the Grievant, Badura and Iwen. Badura gave the Grievant a written warning for having called in late that day, and a 20-day suspension for insubordination for ignoring Iwen's order to wait in the break room on the 12th. The Notice of Suspension read:

> On Wednesday, February 12, 2003 Oscar called (acting foreman) Ron Iwen to tell him he injured his back while plowing snow. Ron told Oscar to wait at the Waste Division and talk with Superintendent or Field Supervisor for permission to leave. Oscar left the Department without permission or discussing this situation with either supervisor. In fact, Oscar only sought medical attention when his supervisor called him to inquire of his unexcused absence from work and subsequently suggested he see a doctor. The following work rules were violated by Oscar's actions: Section J1 and J15. these violations are a continuation of Oscar violating General Work Rules in which re received a three and ten day suspension on October 2 & 3, 2002. Oscar has been made fully aware of his continuing inappropriate behavior of not informing his Supervisors and misleading communications about his medical condition/progress resulting from his Worker's Compensation claim. Oscar's continuation of any violation of City policy or Work Rules will result in future discipline up to and including termination of employment.

Events Leading Up to the Discharge

On the morning of March 19th, the day of his return from suspension, a meeting was held with Steward Scott Larsen, the Grievant, Iwen, Bednar and Badura. Badura began the meeting by asking the Grievant if his telephone was setup to record conversations, and the

Grievant said it was not. The Grievant did, however, tell his supervisors that he was carrying a tape recorder and showed it to them. Badura told him he could not tape conversations, and he read the work rule to him. The rule cited by Badura was J31:

> J. Prohibited Conduct
>
> . . .
>
> J31 Unauthorized or concealed recording, in audio or video format, of conversations of another employee without the express knowledge and consent of said employee where there exists a reasonable expectation of privacy.

Badura told him he should read over the rule book and then sign off to show he had read the rules. He also directed the Grievant to put his recorder in his car or go back on suspension. The Grievant did not say which option he would choose, so Badura adjourned the meeting for a few minutes to give him a chance to talk to the steward in private, and told the Grievant he wanted an answer by 7:15. At about 7:25, Badura went out into the shop to find the Grievant, who seemed upset but ultimately said he would put the recorder in his car.

That afternoon at 1:45 the Grievant, Larsen, Badura and Bednar met again. Badura told the Grievant that his conduct that morning was insubordinate and that any repeat of it would be treated as insubordination and would trigger discipline.

At the end of the shift, the Grievant gave Badura a signed receipt for the rule book, but wrote on it:

> BY CONTRACT
>
> J14 Who is supervisor when supervisor are not in. are not acting foreman then acting as supervisor.
> J31 Does not say that you can't have a recording device you just can't use it without consent of person being recorded.
> A2 Said must notify supervisor no later than the beginning of their shift. Not 30 minutes before.

In response, Badura told him that Iwen was his supervisor if Bednar was gone. He also said the general City rule on calling in by the beginning of the shift did not apply to the Solid Waste Division, where the rule about calling in between 6:00 and 6:30 a.m. had been in place for years.

On April 7th, the Grievant called in and told Badura he was sore from a test he'd had to take the previous Friday, and would not be into work. After the call, Badura realized that the Grievant only had seven hours of sick leave on the books. He called the Grievant at his home

number and the Grievant's mother said he wasn't there and that she thought he was at work. Badura called the Grievant's cell phone. He got no answer, but the Grievant called him back a short time later. Badura asked where he was, and the Grievant said he was at his girlfriend's house. Badura asked why he wasn't home, and the Grievant told him he had called in sick and it was none of his business where he was. Badura asked for the girlfriend's address, and said he wanted to come talk to him, and the Grievant told it was none of his business. Badura told him it was the City's business where he was when he was on paid leave, and the Grievant asked "what the fuck is this shit, do you want to sleep with me?" The Grievant went on to say that he was going to get dressed and come to the office.

Badura called Warnock and told him the Grievant and he had had a verbal confrontation, and that the Grievant was coming in. He asked Warnock to come to the office. Meanwhile, the Grievant called Larsen and told him Badura had wanted to come out and check up on him. Larsen asked Badura about it, and Badura told him the Grievant did not have enough sick leave to cover the day. The Grievant then called Larsen back to say he was coming into the office.

Warnock, Badura, the Grievant and Larsen met around 11:00 a.m. The Grievant had his recorder out when he came in, and Warnock, Larsen and Badura all told him to get rid of it. He put it down on the table, but popped the batteries out. Warnock told him that the City did have the right to know his whereabouts when he was on sick leave, and the Grievant held the recorder out to him and asked him to repeat himself. Warnock told him the meeting was over, and the Grievant became livid, jumped to his feet and told Warnock he was stupid. That ended the meeting.

There is substantial disagreement about whether the Grievant's tape recorder was turned on after he initially disabled it. According to Warnock, the Grievant slipped the batteries back into the recorder when he reached over for it, and Warnock could tell that it was turned on, because a small red light came on. Badura agreed that the Grievant had turned the recorder on after being told not to use it. The Grievant testified that he took the batteries and the cassette out of the recorder, and never put either back in. He also said Warnock could not have seen the red light come on, because the light on the recorder wasn't working. Steward Scott Larsen testified that he thought the recorder was disabled, and he did not see the Grievant push the batteries back into place.

On April 9th, a meeting was held with the Grievant, Larsen, Local 71 President Jerry Pace, Warnock, Bednar and Badura. The supervisors asked the Grievant if he wanted to provide any information or explanation for his behavior on the 7th. The Grievant replied that Badura had no right to bother him at his girlfriend's house if he had called in sick for the day. The meeting ended, and two days later the Grievant received a notice of termination for "willful and repeated insubordination."

The 20-day suspension and termination were grieved and were appealed to arbitration. At the arbitration hearing, in addition to the facts recited above, the Grievant testified that he had had a good relationship with Badura until the time of his workers compensation injury, and that Badura's attitude then completely changed towards him. He felt that Badura was writing him up and disciplining him at every opportunity. Referring to the three-day suspension from October, he denied being uncooperative with the City over medical information or refusing to make himself available for work, noting that it was Stanczyk who told him not to work until he had a discogram. He also said he had been assigned to work on garbage routes three times while his medical restrictions were still in place. He was never told to stay in touch with his supervisors while he was injured, and he never interfered with the work of other employees. He noted that he could not have interfered with anyone else's work while he was on light duty, since he was in a small room off to the side, tagging problem items.

On the subject of the ten-day suspension, the Grievant said that Sturm had told him to return to work on October 8th, and that that was what was written on the slip he was given. He noted that he had to go by what was written rather than what was said, but then clarified that no one had ever said something other than to return on the 8th.

The Grievant said that he did settle his grievances at the Mayor's step, but that he only did so because no one told him he could appeal past the Mayor's step. Scott Larsen was on vacation at that time, so he could not consult with him. As part of the settlement, he was coerced into going to the EAP in order to get four of the days back.

The Grievant noted that he received numerous warnings for not calling in between 6:00 a.m. and 6:30 a.m., but that the City's rules just called for employees to call in before the start of their shift at 7:00 a.m. He had no recollection of ever having been told that the Waste Division had a different policy.

The Grievant testified that Iwen was simply covering himself by claiming he had told him to wait for Badura and Bednar to come in on February 12th. Iwen never said any such thing, never told him he would be in trouble if he left, and never objected to him leaving.

As to the incident on March 19th, the Grievant said he carried a recorder because the City's representatives often said things to him, then denied them later. Together with Badura's change in attitude, this caused him to think he was being set up. When Badura objected to him taping the meeting, he started to take the recorder to his car, but got involved in some conversations in the shop. However, when Badura then approached him, he confirmed that he would put the recorder in the car. He had no recollection of Badura ever telling him he might be disciplined if he ever used a recorder again.

On April 7th, he admitted losing his temper with Badura. He was in pain from a test several days earlier, and went to his girlfriend's house to escape the noise at his mother's house. He felt that his girlfriend's address was none of Badura's business, but acknowledged

that he should not have cursed at Badura or asked him if he was planning on sleeping with him. When he went to the office to meet Badura, he warned Badura and Warnock that he intended to tape the meeting. They objected so he removed the batteries. At one point, he did put his hand on the recorder, but he never put the batteries back in or turned it on. No one ever told him that he would be disciplined, much less discharged, if he turned the recorder on. He recalled that Warnock was very hostile and patronizing, and said it was Warnock who initially got up and spoke harshly, whereupon he did say that Warnock was stupid. He denied, however, becoming angry or jumping up from his chair.

Joe Badura testified that his Division has an average of four workers compensation claims each year, and that assignment to light duty is a common occurrence. According to Badura, no employee has ever been singled out or picked on because of a workers compensation injury, and no employee is assigned to work in excess of their limitations, since that simply prolongs the period of injury. Badura said he had a good relationship with the Grievant until he identified him as a sick leave abuser and placed him on monitoring in May of 2002. After that, the Grievant became very difficult to deal with and very uncooperative. Rocky Bednar testified that he was the person responsible for scheduling employees, and that he had never assigned the Grievant to work on anything outside of his medical restrictions. He did recall that, at one point, the Grievant's restrictions were lifted and he was assigned to a garbage route, but he claimed an injury that same day, and was never assigned to a route again.

Jerry Pace testified that he had never heard of a supervisor going to someone's house to check on them when they were sick, unless it was a friendly stop when the supervisor happened to be in the area. He said the grievances over the October suspensions were a matter of internal debate in the Union, and that while their status was not completely clear after the restoration of the four days, they had never been dropped, and the Union had never agreed that the discipline was warranted. Pace said he was not familiar with any other case of an employee being treated badly because of a workers' compensation claim.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the City

The City takes the position that the Grievant was disciplined for just cause and that the grievances must be denied. The Grievant has no one to blame but himself for the position he finds himself in. The record is rife with evidence of his self-destructive conduct:

- He was sent a memo in May of 2002 advising him that he was identified as an abuser of sick leave, and directing him to call in between 6:00 a.m. and 6:30 a.m.

on any day he was going to miss work. All other Department personnel know this rule. The Grievant, alone, despite the memo and despite the universal knowledge of the rule, claims he was unaware of the time frame for calling in.

- In the Fall of 2002, he was disciplined for insubordination. His response was that he didn't agree with doing what his bosses told him he should do. That is the attitude that brought him to suspension and termination.

- On October 3rd he saw a Physician's Assistant with a complaint of an injury. The Physician's Assistant directed him to return to work immediately. He didn't, claiming later that he thought the Physician's Assistant had written the 8th as the date for his return. The Physician's Assistant provided a written statement, flatly contradicting him. The Physician's Assistant also noted that he Grievant tried to secretly tape their conversation.

- The Mayor gave him a break on his prior discipline, settling a grievance by restoring several days of suspension to him in return for his participation in the EAP. He learned nothing from this, and now claims that grievance is still pending somewhere in the ether of the grievance procedure.

- In February of 2003, the Grievant claimed he had hurt his back plowing snow, when he backed his plow into a pole. Iwan, the working foreman, directed him to wait for the Departmental supervisors to come back, but he ignored his foreman and went home. When his supervisors returned, they had to twice order him by phone to go to the hospital.

- Two days later, the supervisors scheduled a meeting with the Grievant to discuss his insubordination. He called in late that day. He was given a 20 working day suspension for ignoring Iwen, to drive home to him that this was the last chance to correct his behavior.

- A month later, he tried to tape record a meeting with his supervisors, despite the clear rules against this. The rule was read to him. His supervisors told him he couldn't tape the meeting. His Chief Steward told him he couldn't tape the meeting. The meeting had to be suspended while he went to put his recorder in his car. Later that day, he was directed to read and follow all of the work rules, as the City made yet another effort to warn him away from his self destructive course of conduct. At the end of the day, he again pretended he didn't know the rules, including the call-in policy he had repeatedly been advised of.

- Three weeks later, he called in sick. When Badura tried to contact him at his residence, his mother said he was at work. When he called the Grievant's cell phone, he got no answer. When the Grievant finally called him back, he cursed

Badura and insulted him. The Grievant then told Badura he was coming to the office. When he came to the office, he again tried to tape the meeting. He was told not to. He stopped briefly, but then turned the recorder back on. Management terminated the meeting rather than put up with the Grievant's conduct.

- Two days later, a final meeting was held, during which the Grievant was combative and expressed the attitude that his sick time was his personal time, and that, despite his history as a sick leave abuser, management had no right to contact him when he claimed he was sick.

This is the series of events that finally convinced the City that it could not put up with the Grievant's behavior anymore. He demonstrated a complete inability to follow the same clear, reasonable and well known rules that everyone else follows. He abused and insulted the supervisors who tried to get him to follow the rules. He claimed that the City selected him, alone, among all of the workers who suffer workers' compensation injuries each year, to be harassed and placed at risk of re-injury, for some unknown and unknowable reason. The fact of the matter is that the Grievant could not tolerate having to follow the rules, with the result that City reasonably concluded it could no longer tolerate him.

Given his disciplinary record, the overwhelming evidence of misconduct, and the general incredibility of his explanations and justifications, the Arbitrator must conclude that the Grievant was guilty of failing to follow the specified procedures for call-ins and of insubordination in refusing to follow even the simplest orders from his supervisors. Each is cause for discipline, and the Grievant's history and conduct make the 20-day suspension and discharge the appropriate measures of discipline. Accordingly, the grievance must be denied.

The Position of the Union

The Union takes the position that the Grievant is the victim of a mindset by management – an assumption that he is a wrongdoer, and a view of his every action as a wrongful act. The Grievant was considered a good employee for eight years, until he suffered an on the job injury. At that point, his attendance record was reinterpreted as evidence of abuse, and he was placed under scrutiny.

The Grievant suffered a legitimate injury in the service of the City. Thereafter, the City embarked on a campaign of harassing and belittling him. The Personnel Director specifically directed him not to return to work until he had a discogram performed. He made every effort to obtain the examination, with no assistance from the City and with active resistance from the City's insurers. In the meantime, Dr. Karr, the City's doctor, gave him a six-month healing period, with restrictions on his activities. The City ignored these

restrictions, and assigned him to a garbage route outside of his capabilities. The discogram report, once received, confirmed that the Grievant was legitimately injured. The City ignored this evidence in its zeal to avoid the costs associated with carrying an employee on light duty.

The City followed up on its efforts against the Grievant by initiating formal discipline against him for what amounted to trifles. He was assessed a three day suspension and a ten-day suspension on the same day. His principal offense was not being able to read the return to work date on a doctor's slip. Anyone looking at the slip would have difficulty knowing whether the date listed was a "2," a "3" or an "8" and the Grievant cannot be faulted for misinterpreting this information. The physician assistant's after the fact recollection that he told the Grievant to go right back to work is not reliable – the man was not called as a witness, and his note might easily reflect either a faulty recollection or an attempt to cover his sloppiness in writing the original slip. The Union notes that – notwithstanding the efforts at compromise and the Grievant's agreement to participate in the EAP - the grievances over these suspensions remain pending, and that the Arbitrator cannot assume that this discipline was imposed for cause.

The events leading to the Grievant's 20-day suspension are fairly straightforward, but viewed objectively they raise serious questions about management's good faith. The Grievant re-injured himself while plowing snow, when he inadvertently backed the truck into a utility pole. He told his working foreman, Iwan, about the injury and he tried to call Bednar. He couldn't reach Bednar because Iwan had Bednar's cell phone. The Grievant was in pain, and he left work to go home and deal with his injury. Iwan never told him to stay, and Iwan is simply trying to cover himself when he claims that he did. Even if Iwan had asked him to stay, the request was not a reasonable one to make to a man in serious pain, and there is no evidence at all that he was told he would be disciplined if he left. A 20-day suspension on grounds such as these is, on its face, excessive and it draws management's motives into question.

The facts surrounding the discharge are similarly suspect. On April 7th, the Grievant called in to advise the City he was ill and could not report. Bednar claims he called the Grievant at home to tell him he only had seven hours of leave available, and to tell him he should get a doctor's slip. On its face, this is hard to believe. Bednar is the Director, and presumably he has some other duties than calling employees to update them on their leave account balances. In fact, Bednar was calling to harass and check up on the Grievant. When Bednar tracked him down at his girlfriend's, the Grievant was understandably reluctant to give his boss personal information about his girlfriend, such as her address. They had a heated exchange, and the Grievant did use vulgarities towards Bednar. The Arbitrator must factor in the continuing pattern of provocation by the City in assessing the Grievant's reaction. It was not a desirable thing to do, and the Grievant admits he should not have done it, but a certain amount of overreaction is not hard to understand.

In any event, the discharge resulted not from his comments to Bednar, but from the meeting with Warnock. The Grievant brought a tape recorder with him, and tried to tape the meeting. This is not hard to understand, given the City's conflicting and dishonest dealings with him since his injury. The Union points out that this was a heated meeting, with provocative statements on both sides and shop talk exchanged. He was told he should not tape the meeting, and he removed the batteries. Contrary to Warnock's recollection, he never reinserted the batteries and he never tried to tape the meeting after he was told not to. At the arbitration hearing, Warnock for the first time recalled all sorts of details, including a glowing red light on the tape recorder. That is simply not credible. The Arbitrator must instead conclude that the Grievant complied with the directive not to tape the meeting, and that there was no cause for discipline. Even if the Grievant had tried to tape the meeting after being told not to, the Union points out that he received only a warning for the prior incident of taping meetings, and was cautioned that, at most, he might face discipline if he did it again. This is hardly sufficient notice to underpin the discharge of an eight-year employee under a just cause standard and a set of work rules calling for proportionality between conduct and penalty.

Taking the record as a whole, the arbitrator should conclude that the City acted in bad faith, that it utterly lacked just cause to discipline the Grievant, much less to discharge him, and that the Grievant should be reinstated and made whole for his losses.

DISCUSSION

There are two issues before the Arbitrator – whether the Grievant is guilty of the misconduct attributed to him, and if so, whether the penalties imposed on him are appropriate.

Just Cause For Discipline

The Grievant was suspended for 20 days for allegedly ignoring an order by Ron Iwen to wait for Joe Badura and Rocky Bednar to come in before he could leave for home on February 12, 2003. He was discharged for allegedly trying to tape a meeting with Badura and Jeff Warnock after being ordered not to. In both instances, the Grievant denies the conduct. He denies that Iwen gave him any order, and he denies turning on his tape recorder after initially disabling it in the meeting with Badura and Warnock.

Credibility in General

In large part, the question of cause for discipline turns on credibility determinations. Iwen says he gave the Grievant an order to stay. The Grievant says Iwen simply told him to do what he had to do. Warnock and Badura say he turned his recorder back on, and the Grievant says he never put the batteries back in.

The Grievant has some serious problems with his credibility in this proceeding. His demeanor as a witness was, in general, evasive and his testimony on many points was fluid. He repeatedly claimed that he did not know the Division's call-in policy for absences, when the record shows that it was well known, long established, and had been explained to him in writing in the Spring of 2002. He may have disagreed with it, but it is not true that he didn't know of it. Further undermining his credibility, he claimed that, at a physical exam in October of 2002, he had understood that the Physician's Assistant told him to return to work on October 8th. He cited the unclear return to work slip as proof of his confusion. He initially said that he had to go by what was written instead of what was said, but when asked if there was a conflict in what was written and what was said, he said no, they were the same. That means that he didn't just confuse the date written on the slip – either the Grievant was told the 8th was his return date, or he wasn't and he lied about it. When Warnock called the Physician's Assistant on the 2nd for clarification, he said that he had told the Grievant to return to work that day. This was confirmed in his written report, which was dictated on that day. 1/ 2/ There is no reason for the 8th to have been mentioned to the Grievant, and there is no reason for the Physician's Assistant to make up some story about this.

1/ The Union argues that his report was not prepared until October 9th and that he might have forgotten what he said. The report was typed on October 9th, but the notes indicate that it was dictated on the 2nd, the same day as the incident. Thus, it is likely that the session with the Grievant would have been fresh in his mind. The Union also argues that the report might be an effort to cover for his sloppiness in preparing the return to work slip. Falsifying a patent's medical records on so slim a basis as that is simply not a plausible theory.

2/ I am not purporting to resolve the grievance over the ten-day suspension, which is not before me. The status of that grievance is more extensively discussed below. However, the parties litigated the underlying facts before me, and factual findings are necessary for the purpose of credibility determinations in this proceeding.

Credibility – The February 12th Incident

On the specific facts of the 20-day suspension, I found Iwen to be a very credible witness. He is a member of the bargaining unit, and a former vice-president of the Local 71. There is nothing to suggest bad blood between him and the Grievant. The Union's theory that he is covering himself by lying about what he said to the Grievant does not hold together particularly well, as it raises the question "covering himself for what?" If he was concerned that Badura would disapprove of having the Grievant go home, rather than make up a cover story he could simply have told the Grievant to wait, which is precisely what he claims to have done. There is no clear reason for him to tell the Grievant to do whatever he wants, and ten minutes later tell Badura he ordered him to stay. Instead, the weight of the evidence persuades me that Iwen told the truth about his conversations with the Grievant, and that the Grievant lied about it.

Credibility – The April 7th Incident

What happened at the meeting with Warnock and Badura also turns largely on credibility, although the determination in this case is not as clear cut as the determination in the incident with Iwen, because there is greater room for misinterpretation of events. There is no dispute that the Grievant brought his tape recorder into the meeting and was intending to tape the meeting. There is no dispute that Larsen, Warnock and Badura all told him not to tape the meeting. While the Grievant claims to have removed the cassette and the batteries, the weight of the evidence is that he popped the batteries and placed the recorder on the table. According to him, he put his hand on it after that, but didn't pop the batteries back in and didn't turn it on. According to Warnock, he did turn it on, because Warnock saw the red light on the side of the unit come on. Larsen testified that he didn't see the Grievant put the batteries back in, but did see him hold the recorder out to Warnock and ask him to repeat a statement.

At the December 22nd arbitration hearing, the Grievant produced a small recorder, and demonstrated that the red light on the unit did not work. He claimed that it was the same recorder he had with him on April 7th, and that the light had not been working at that time. Thus, he said, Warnock could not have seen the red light come on. I am not completely sure what to make of the detail about the red light. Warnock did not mention it when called to testify during the City's initial presentation in October of 2003. He simply said that the Grievant took out the batteries at one point, but then put them back in and started taping. The red light came up in rebuttal during the December hearing. The initial testimony is not inconsistent with the detail of the red light, and if Warnock was going to lie about this point, he could just as easily have told the red light detail in the first round of testimony. That said, the delay in mentioning it does raise some question about it. As for the Grievant's production of a recorder with a non-functioning red light, it provides some support for his story, but the fact that he owned a recorder with a non-functioning light eight and a half months after this incident is hardly conclusive evidence that Warnock could not have seen the red light in April.

The greatest difficulty for the Grievant in regard to the April meeting is that even his own witness, Chief Steward Scott Larsen, observed him – after being told he could not record the session – hold the recorder out towards Warnock and ask him to repeat what he had said. The only reasons to do this are either to actually tape what is being said, or to at least give the other participants in the meeting the impression that he had begun taping again. Taking things in the light most favorable to the Grievant, and assuming solely for the sake of argument that he had not actually popped the batteries back in when he picked up the recorder, it is difficult to fault the supervisors for concluding that he was doing precisely what his actions indicated he was doing – taping the meeting in direct contravention to the orders he had just been given. That is the conclusion that his actions consciously invited.

On balance, I conclude that the Grievant did attempt to tape the April 7th meeting after being ordered not to. He denies it, but his credibility as a witness is very low. His physical actions and his words at the time were consistent with an attempt to tape the meeting. He had

previously engaged in taping, including surreptitious taping. Larsen, who was a good and credible witness on the Grievant's behalf, said he thought the recorder was disabled, but obviously could not know whether the Grievant pressed the batteries back in when he picked the recorder up and held it out to Warnock. I believe Larsen, but his testimony does not preclude the Grievant having enabled the recorder when he picked it back up. Finally, given the rest of the record evidence, I conclude it is more likely than not that Warnock did see a red light on the side of the recorder when the Grievant held it out to him.

Just Cause for Discipline – The February 12th Incident

Having concluded that the Grievant was ordered by Iwen to wait for Badura and Bednar on the 12th, and that he refused, the question is whether this is insubordination. The Union raises two arguments about this. The first is whether the Grievant had reason to treat Iwen as a supervisor. Clearly, he did. The Grievant knew that Bednar and Badura were out of the building. Iwen's position was essentially the third in command, even though he was a member of the bargaining unit. The Grievant's own version of events had him reporting the injury to Iwen because the other two supervisors were gone. Moreover, when he called the supervisor's cell phone, he got Iwen, which would have indicated to any reasonable person that Iwen was in charge.

The Union's second argument is that the order to stay was unreasonable, since the Grievant was in pain and could not be expected to wait around indefinitely for Bednar and Badura to return. In other circumstances, this would be a valid point. However, Iwen's testimony and his written statement at the time both said that he told the Grievant the two supervisors would be back in ten minutes. Indeed, Iwen returned to the shop after the call with the Grievant, and the supervisors had returned. The Grievant, for his part, denied that Iwen said it would be ten minutes, but he also said no order to wait was given and I have already concluded that his testimony about this incident is not credible. As for the degree of pain the Grievant was in, that is obviously a subjective judgment, but in his version of events, he waited around for an hour or so after the accident to see if the supervisors would show up, and then left, not to go to a doctor, but to go home. His own accounting of the incident raises questions about whether he was incapable of obeying the order given by Iwen. The Union makes a valid point — an order to wait might not be one that an employee in serious pain could be expected to obey. However, a finding that it applies to this circumstance requires me to credit the Grievant and he is not credible.

The evidence establishes that the Grievant was given an order to wait for ten minutes for Badura and Bednar's return, and that he ignored the order. The order was given by a person known to the Grievant to be in a position of supervisory authority, and was one that he could reasonably have obeyed. That constitutes insubordination, and insubordination is grounds for discipline. Thus, I conclude that the City had just cause to discipline the Grievant for the February 12th incident.

Just Cause for Discipline – The April 7th Incident

As extensively discussed above, the Grievant attempted to tape a meeting with Warnock and Badura after being directly ordered not to tape the meeting. While the Grievant and the Union both made note of the fact that the work rule does not bar possession of a recorder, the discipline is not for possessing the recorder – it is for attempting to use it. Indeed, whether the supervisors' interpretation of the work rule was correct is not really in issue. Even if the rule can be interpreted in varying ways, there is no doubt that the Grievant had reason to know he had been ordered not to tape meetings. He was told unequivocally by Badura in March, when he previously sought to tape a meeting, that taping was prohibited and that further attempts to tape would cause him to be disciplined for insubordination. He was, in fact, disciplined for the March attempt at taping. Plainly, the attempt to tape the April 7th meeting was insubordination and is grounds for discipline.

The Appropriateness of the Penalties

The contract protects employees from acts of discipline which are not supported by just cause. Part of just cause protection is the proportionality of penalties to conduct, and a presumption that a progression of disciplinary penalties will be used to correct behavior. The Union asserts that the penalties here are completely out of proportion to the Grievant's conduct and are not consistent with progressive discipline. Much of this argument is tied up with the vague disposition of the two prior suspensions.

The Grievant was assessed thirteen days worth of suspensions on October 3, 2002 – three days for failing to cooperate in the management of his injury and treatment, and ten days for falsifying the return to work notice from the Physician's Assistant at Aurora. Grievances were filed on the suspensions, and were processed to the Mayor's step. The Mayor denied the grievances but proposed to restore four days of suspension time to the Grievant if he went to the Employee Assistance Program, apparently for anger management issues. The Grievant did make contact with the EAP, and four days were repaid to him in January, 2003.

At the hearing, I ruled that prior discipline which had not been appealed would be treated as having been imposed for just cause. If the Grievant has been suspended for three days and ten days for misconduct, a step to twenty days for the next serious incident and to discharge for the incident after that is not inconsistent with the general notions of progressive discipline. There is no evidence of a rigid progression of discipline in this relationship – so many days as the standard first suspension, so many for the second, etc. The purpose of a progression is to drive home to the employee the need for an improvement in behavior, through the use of increasingly severe penalties. There is no precise formula for this, and ramping up from three days to ten days to twenty days to discharge can fit comfortably within that general scheme. Having said that, while I have no reservations about the basic principle underlying my ruling, on reflection it does not fit precisely with the facts of this case.

Reviewing the documents, it is clear that the grievances over the October suspensions have not been appealed to the Civil Service Commission or to arbitration, but neither have they formally been withdrawn. They were placed on hold sometime early in 2003, pending a meeting in February. There is no evidence that such a meeting was held, and their current status is unclear.

The question then is what effect the technical pendency of the prior grievances has on the validity of the subsequent penalties. On the very peculiar facts of this case, I conclude that it has no effect.

As noted, the purpose of a progression of penalties is to drive home to the employee the need for a change in his conduct. Here, the Grievant was suspended for a total of thirteen days in October. He challenged the suspensions up through the Mayor's step of the grievance procedure. The Mayor offered an adjustment and he accepted the adjustment. According to his testimony on cross-examination, he considered the grievances to be settled after he agreed to participate in the EAP and be repaid for four of the days. He explained that he settled the grievances because his Steward was on vacation and he did not realize that he could appeal further, so felt coerced to accept the Mayor's proposed compromise. On redirect examination, he said he was not satisfied with that outcome because he did not believe he had done anything wrong, but he did not say he thought the grievances were unresolved.

Thus, notwithstanding the Union's success in keeping these grievances technically alive in the grievance procedure, from the Grievant's perspective at the time of the February incident with Iwen, he had already been assessed nine days of suspension for two separate causes and had accepted those penalties. A reasonable person in that position would have understood that the next serious incident would result in something longer than a ten-day suspension, since the prior discipline had not, on its merits, been disturbed. When the Grievant chose to ignore Iwen's order, he did so, in effect, with the reasonable expectation of a lengthy suspension.

In concluding that the ultimate penalty of discharge should not be disturbed, I am influenced by the particularly flagrant and egregious nature of the Grievant's conduct. Whether the February suspension was appropriately ten days, fifteen days or twenty days, he would in April have been well aware that he was on very thin ice as far as his job was concerned. In March, he was directly ordered not to tape meetings, was reprimanded for insubordination for trying to tape a meeting, and was cautioned that further efforts at taping would constitute insubordination and would lead to further discipline. 3/ At the outset of the April 7th meeting, he was ordered by both supervisors not to tape the meeting, and his Chief Steward also warned him not to tape the meeting. He clearly understood what he was doing then, when he held out the tape recorder and tried to tape Warnock. He deliberately invited further discipline on the heels of several lengthy suspensions. If a 20-day suspension did not deter him from this conduct, I cannot say that management abused its discretion in deciding that yet another lengthy suspension would have no effect.

3/ The Union argues that the use of a reprimand for attempting to tape record meetings in March demonstrates that it was not a serious matter, and that discharge is a disproportionately harsh penalty for the same conduct in April. On the contrary, the restraint shown by management in continuing to use reprimands for the Grievant's attendance related offenses and for this first offense of taping tends to rebut the Union's claim that they were targeting the Grievant for harassment and were bent on discharging him from the start of his workers compensation problems. It is clear that they were becoming fed up with his conduct, but they were also still trying to correct it through the use of lesser discipline.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

1. The City had just cause to suspend the Grievant for 20 days for insubordination in February of 2003;

2. The City had just cause to discharge the Grievant for insubordination in April of 2003;

3. The grievances are denied.

Dated at Racine, Wisconsin, this 19th day of February, 2004.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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