

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**PLOVER VILLAGE EMPLOYEES' UNION
LOCAL 309, AFSCME, AFL-CIO**

and

VILLAGE OF PLOVER

Case 12
No. 63487
MA-12604

Appearances:

Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

Ruder, Ware & Michler, L.L.S.C., by **Ronald J. Rutlin**, on behalf of the Village of Plover.

ARBITRATION AWARD

The Union and the Village are parties to a collective bargaining agreement which provides for final and binding arbitration. Pursuant thereto, the Union, with the concurrence of the Village, requested that the Wisconsin Employment Relations Commission provide a panel of Commission-employed arbitrators from which the parties selected Coleen A. Burns as arbitrator of the grievance discussed below. A hearing was held on June 10, 2004 in Plover, Wisconsin. The hearing was transcribed. The record was closed on September 28, 2004, following receipt of post-hearing written argument.

ISSUES

The parties did not agree on a statement of the issues. The Village frames the issues as follows:

Whether the Village had just cause to issue a three-day suspension to the Grievant. If not, what is the appropriate remedy?

The Union frames the issues as follows:

Did the Employer violate the collective bargaining agreement when it suspended Mark Regnitz for the events of October 18, 2003? If so, what is the remedy?

It is concluded that the Village's statement more accurately states the issues to be decided.

RELEVANT CONTRACT PROVISIONS

- A. The Village possesses the sole right to perform all Village operations and all management rights reposed in it, subject only to the provisions of this contract and only as allowed by law. These rights by way of illustration include, but are not limited to, the following:
1. To direct and manage all operations and enterprises of the Village and to direct all operations of the Village workforce;
 2. To hire, promote, transfer, schedule and assign employees;
 3. To suspend, demote, discharge and take other disciplinary action against employees for just cause;
 4. To lay off employees from all or part of their duties or otherwise relieve employees because of lack of work or other lawful reason;
 5. To take whatever action is necessary to comply with local, state or federal law;
 6. To introduce new or improved methods or facilities;
 7. To maintain efficiency of Village operations;
 8. To determine the methods, means and personnel by which such operations are to be conducted;
 9. To change existing methods or facilities;
 10. To determine the kinds and amounts of services to be performed as pertains to Village operations and the number and kinds of classifications, if any, to perform such services;

11. To contract out for goods or services, however, it will be the policy of the Village to consider the impact on the employment security of its employees as the result of any such action and to notify and confer with the Union prior to taking such action if it affects the bargaining unit.
 12. To take whatever action is necessary to carry out the functions of the Village in emergency situations; and
 13. To establish reasonable work rules, policies and schedules.
- B. These rights shall be exercised consistent with Chapter 111 of the Wisconsin Statutes and the express terms of this Agreement. Any unreasonable exercise or application of these rights by the Village shall be appealable pursuant to Article 8 – Grievance and Arbitration Procedure. The Union, in recognizing the above listed Management Rights, does not waive any of its rights to negotiate on subjects which are held out to be mandatory subjects of bargaining.

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BACKGROUND

The Village operates a Waste Water Utility, which consists of a wastewater treatment plant and a sanitary sewer collection system. Rich Boden is the Manager of the Waste Water Utility. In addition to Boden, there are three full-time Operators, including Mark Regnitz, hereafter the Grievant.

Operators alternate working weekends. When an Operator works the weekend, he is on call from the end of the workday on Friday until the start of the work day on Monday. He also comes in on Saturday and Sunday mornings to perform routine monitoring, sampling and necessary lab work. While on call, the Operator carries a cell phone provided by the Utility. The cell phone is automatically called when there are plant operation malfunctions that require the attention of the on-call employee.

The Grievant was on call during the weekend of October 18-19, 2003. During the early evening hours of Friday, October 17th, the Grievant received a cell phone alert and responded by returning to the plant, where the Grievant discovered that the VFD on one of two aerators in that section of the plant had malfunctioned. The Grievant then telephoned Boden to report the problem. Boden returned to the plant and, with the assistance of the Grievant, began repairs. When Boden no longer required the Grievant's assistance, the Grievant left the plant. Prior to leaving, the Grievant had a discussion with Boden.

The aerators regulate dissolved oxygen (DO) levels. DO enables the bacteria to process waste. Utility management has determined that the optimal level of DO is 2.1 parts per million (ppm) and that a level of less than 1.5 ppm poses a serious threat. This threat is twofold, *i.e.*, it inhibits the bacteria from processing waste and causes the bacteria to emit phosphorus, which emissions are limited by State permit. At the time Boden left the plant on Friday evening, he had not completed the repair of the second aerator, but the single aerator was maintaining the DO level at an acceptable 2.00 ppm.

At approximately 6:45 a.m. on October 18, 2003, Boden, who had the ability to monitor DO levels from his home computer, ascertained that the single aerator was maintaining the DO levels at the set point of 2.1, and decided that he need not return on Saturday to complete the repairs. At approximately 7:00 a.m., the Grievant returned to the plant to perform normal Saturday work; ascertained that the DO levels were "OK"; and received a call on his cell phone.

Boden, who had initiated this phone call, told the Grievant that Boden had checked the DO levels; that the levels were fine; that Boden would not be coming in to complete the repairs that day; and that, if there was any drop in the DO levels, then the Grievant should call Boden, who would then return to complete the repairs. Due to static, the Grievant was only able to hear "bits and pieces" of what Boden was saying.

Following this phone conversation, the Grievant continued with his routine Saturday work. At approximately 9:00 a.m., an alarm triggered by a low DO level, alerted the Grievant to the fact that the DO level was below 1.2 ppm, the alarm set point. The Grievant silenced the alarm and continued with his routine Saturday work. When the Grievant left work, at approximately 11 a.m., he understood that the DO level problem had not corrected itself. The Grievant did not contact Boden to report the low DO levels.

Boden returned to the plant around 1:00 p.m. on October 18th, for a reason unrelated to the aerator problem; checked the DO levels; and discovered that, at approximately 9:00 a.m., the DO level had dropped below 1.0 ppm and remained below 1.0 ppm at the time that the Grievant left the plant. Boden then completed the repairs on the second aerator and, shortly thereafter, the DO returned to acceptable levels.

Boden's repairs triggered an alarm at the plant, to which the Grievant responded. Boden was at the plant when the Grievant responded to the alarm and asked the Grievant what he was doing there. The Grievant replied that an alarm had sounded. Boden then asked the Grievant why he had not called Boden when the DO level dropped and the Grievant replied that he thought Boden was going to be there anyway.

Following an investigatory interview with the Grievant and the Grievant's Union representative, Boden concluded that the Grievant's failure to monitor the DO level and contact Boden after 9:00 a.m. and prior to leaving at approximately 11:00 a.m. demonstrated a disregard of his duties and responsibilities or specifically ignoring instructions and Boden

issued a disciplinary suspension of three days without pay. (Jt. #5) The Grievant grieved his suspension, asserting it was without just cause. The grievance was denied at all steps of the grievance procedure and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Village

The Grievant was disciplined because he was negligent in the performance of his duties on October 18, 2003, and failed to follow the October 18, 2003 instructions of his supervisor. Given the nature of the Grievant's misconduct, as well as his prior disciplines, the discipline is appropriate under the contractual requirement of "just cause" for discipline.

The Grievant was negligent because he did not respond appropriately when he became aware of the low DO levels on the morning of Saturday, October 18th. He failed to follow the instructions of his supervisor when he did not contact Boden to report these low DO levels.

The Grievant's claim that he did not hear Boden instruct him to contact Boden if the DO levels fell is not credible. If the Grievant were unable to hear Boden, then the reasonable response would have been for the Grievant to use the office land line to call Boden and explain that he had not heard Boden.

The Grievant has acknowledged that he knew that the DO levels fell below 1.0 ppm at 9:00 a.m. and remained below 1.0 ppm at the time he left the plant at approximately 11:00 a.m. To assume that he need not take any action because Boden would come in to the plant was unreasonable, irresponsible and negligent behavior on the part of the Grievant.

The Grievant is an experienced wastewater system operator. He has acknowledged that the low DO levels of October 18 present a serious problem. The Union's claims that there is no risk in a temporary low DO level or that the DO levels may have recovered without further intervention do not justify the Grievant's conduct.

Union

The only instructions from Boden that the Grievant received were those given on the evening of October 17, 2003. Specifically, Boden told the Grievant that if the DO drops overnight, then when the Grievant comes in the next morning, he should call Boden right away and then Boden would come in to hook it up. The DO level was okay when the Grievant arrived.

When Boden telephoned on Saturday morning, the Grievant was unable to hear what Boden said and told Boden that "I cannot hear you." The Grievant did not hear any instruction to call Boden if the DO levels fell. The Grievant did not call Boden because he assumed that Boden would be in to correct the low DO problem and that Boden had called to explain that he would be coming in later.

Boden exaggerated the seriousness of the problem to justify suspending the Grievant for three days. There was no undue risk from the temporary low DO level. The DO levels for August 20 and 21, 2003 averaged about 0.5 ppm without apparent detrimental effect, or the discipline of any employee.

On October 18, 2003, the DO levels were recovering as the morning progressed and reached 1.1 ppm at 1:00 p.m. As an experienced plant operator, the Grievant knew that it was possible for the DO level to recover naturally due to the operation of the waste valve. This conclusion is bolstered by the fact that, overnight, the system had maintained the DO level at 2.1 ppm, as observed by Boden. Boden's claim that, if the DO level is below the set point for one hour, phosphorous may be released, is rebutted by the evidence that the low DO level on August 20th and 21st did not cause a phosphorous emission problem.

The Grievant reasonably assumed that Boden would be coming in to the plant to address the low DO level. The Grievant's assumption was correct. The Village has no just cause to discipline the Grievant, much less impose a three day suspension. The Grievance must be sustained; the Grievant made whole; and the Village ordered to expunge any reference to the suspension from the Grievant's files.

DISCUSSION

The Grievant was disciplined for failing to monitor the DO level and contact Wastewater Systems Manager Boden of a low DO level prior to leaving work on Saturday, October 18, 2003, thereby disregarding his duties and responsibilities or specifically ignoring instructions. (Jt. #5) As each party recognizes, the relevant collective bargaining agreement requires that the Village have just cause for discipline. Under the just cause standard, the initial question to be answered is whether or not the Grievant engaged in the misconduct for which he was disciplined.

The Grievant acknowledges that, at approximately 11:00 a.m. on Saturday, October 18, 2003, while on call for the weekend, he left the Wastewater plant unattended at a time when he knew that DO levels were less than the set point of 2.1 ppm that had been established as optimal for plant performance. (T. 95-96; 118) The Grievant's testimony confirms that the Grievant knew, at 9:00 a.m., that the DO levels had fallen below the alarm point of 1.2 and that the problem had not corrected itself by the time that he had left the plant. (T. 95; 116-118)

Relying upon statements made by Waste Water Utility Manager Boden during the evening of October 17, 2003, and a telephone conversation of October 18, 2003, the Grievant claims that he had no duty to call Boden unless the Grievant became aware that the DO level had fallen during the night, or the DO level was low at the time the Grievant arrived on Saturday morning, (T. 83) and that he reasonably assumed that Boden would be in on Saturday to take care of the low DO by repairing the second aerator. (T. 87; 107-108) When asked to recall what Boden stated to the Grievant on the evening of Friday, October 17, 2003, the Grievant responded:

That he (Boden) would be in the next day to hook up the drive. But if I have seen the drop when I come in, to call him right away in the morning, the drop in DO. If I see it when I come right away in the morning, to give him a call, and we'll get it hooked up right away. (T. 83)

Boden's statements to the Grievant reasonably establish that Boden intended to return on Saturday to repair the aerator, but that, the timing of the repair was dependent upon the DO level. Boden's statements of October 17, 2003 provide reasonable notice to the Grievant that, if the DO drops, then the Grievant is to notify Boden so that Boden could do the repair "right away."

In August of 2000, the Grievant received a verbal reprimand. The written confirmation of this verbal reprimand indicates that, from June 8 through June 16, the DO levels in the oxidation ditch were below the minimum needed to operate properly; that the Grievant had knowledge of this; and that the Grievant failed to take any action. In this written confirmation, the Grievant was provided with specific notice that a DO of less than 1.5 was a detrimental operating condition and that any future failure to respond quickly and appropriately to resolve problems would result in further disciplinary action.

Even absent an October 17, 2003 instruction from Boden to call if the DO level dropped, the Grievant should have known that Boden, the Grievant's supervisor and the individual with the ability to repair the second aerator and, thus, correct the low DO level that the Grievant knew was caused by the loss of the second aerator, should be notified when it became apparent that the single aerator was not maintaining the DO at an acceptable level. Indeed, the Grievant recognized a duty to contact Boden when, after responding to the first alarm on Friday evening, he telephoned Boden.

Boden credibly testified that, during the telephone conversation on Saturday morning, he told the Grievant that he would not be coming in unless there was a problem; that the Grievant should monitor the DO levels; that, if there was any drop in the DO levels, then the Grievant should call Boden and Boden would return and finish repairing the second aerator;

and that the Grievant never told Boden that he was having any difficulty in hearing Boden. (T. 20; 31) The Grievant was disciplined for disregarding his duties and responsibilities or specifically ignoring instructions.

The Village argues that the Grievant specifically ignored the instructions given to the Grievant during Boden's telephone call of Saturday, October 18, 2003. The Grievant's claim that there was too much static on the cell phone to hear Boden's instructions is credible. (T. 85) Thus, the undersigned rejects the Village's assertion that the Grievant was insubordinate by failing to follow instructions provided by Boden during the October 18, 2003 telephone call.

The Grievant states that he could hear only "bits and pieces" of Boden's Saturday morning telephone call, such as "later," "in", "today." (T. 84) Given the fact that the Grievant only heard isolated words, the Grievant's conclusions that Boden had called to tell the Grievant that Boden would be delayed and that the Grievant could continue to assume that Boden intended to return to the plant on Saturday to repair the second aerator are not reasonable.

Boden is the Grievant's supervisor and the Grievant has a duty to ensure that he understands what his supervisor is telling him. The Grievant disregarded this duty when he failed to make any attempt to contact Boden to explain that there was too much static on the cell phone to hear what Boden had said and failed to clarify whether or not Boden had given the Grievant any instructions. The Grievant knew that there was a land phone in the plant office that could be used to make such a call. (T. 116)

The Grievant was not in a position to determine whether or not Boden could understand the Grievant. The Grievant, however, was in a position to determine that he could not understand Boden. Thus, the Grievant's claim that he told Boden that he could not hear him is not exculpatory.

As the Union argues, prior to 9:00 a.m., the single aerator had maintained acceptable DO levels and, after the Grievant left, the DO levels began to rise. However, the fact that, under certain conditions, it was possible for a single aerator to maintain acceptable DO levels is irrelevant. Given that an alarm sounded when the DO levels fell below 1.2 ppm, as well as the Grievant's verbal warning of August, 2000, the Grievant should have known that management considered DO levels of less than 1.2 ppm to be a serious problem and that it was not acceptable for the Grievant to take no action when a low DO level problem arises. Although the Grievant, at hearing, tried to downplay the seriousness of the low DO level, statements made during Boden's investigation, as well during the processing of the grievance, confirm that the Grievant was aware that the drop in the DO levels presented a serious problem. (Jt. #3 and 5)

Had Boden returned to complete the repairs early Saturday morning, the DO level may not have dropped to unacceptable levels. However, the Grievant was not disciplined because the DO levels had dropped. Rather, the Grievant was disciplined because he did not take appropriate action in response to the low DO levels.

In summary, on October 18, 2003, the Grievant was the employee with the responsibility to monitor the plant processes, including DO levels. At the time that the Grievant became aware that the DO level had fallen below 1.2 ppm, he knew that there was a serious DO problem and that this problem could be corrected by Boden.

The Grievant knew, or should have known, that he had a duty to notify Boden of the low DO levels. By failing to notify Boden of the low DO problem prior to leaving work on Saturday morning, the Grievant engaged in conduct evincing a significant disregard for his duties and responsibilities.

As a review of the disciplinary letter reveals, the Grievant was not disciplined because his conduct presented an imminent threat to the operation of the wastewater facility. Thus, contrary to the arguments of the Union, it is immaterial that Boden, in his testimony, may have exaggerated the potential harm of the temporary drop in DO levels, or that, in the past, temporary DO levels of .5 ppm did not have any apparent detrimental effect.

As the Union argues, in the past, DO levels have dropped and no employee has been disciplined. However, the record is insufficient to conclude that management had any reason to conclude that other employees had failed to take appropriate action in response to these low DO levels. The record before the arbitrator does not demonstrate that the Grievant is the recipient of disparate treatment.

Prior to imposing the discipline, Boden reviewed and relied upon the Grievant's previous disciplines. (T. 65) In addition to the verbal reprimand of August of 2000, discussed above, the Grievant has received a written reprimand in September of 2001 for misuse of sick leave; a one day suspension in May of 2002 for disobeying instructions to complete important repair prior to leaving work; and a verbal reprimand on February of 2003 for violating a written policy which required the Grievant to carry the cell phone when he was the only employee on duty.

The Grievant has previously received two verbal reprimands and a one day suspension for misconduct evincing a disregard of his duties and responsibilities. Given the seriousness of the Grievant's present misconduct, as well as his past disciplinary history, the undersigned concludes that the Village has just cause to discipline the Grievant by suspending the Grievant for three days without pay.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Village had just cause to issue a three-day suspension to the Grievant.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 30th day of December, 2004.

Coleen A. Burns /s/

Coleen A Burns, Arbitrator