BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUPACA COUNTY HIGHWAY DEPARTMENT EMPLOYEES LOCAL 1756, AFSCME, AFL-CIO

and

WAUPACA COUNTY

Case 145
No. 63777
MA-12708

Appearances:

Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 35, Plover, Wisconsin 54467-0035, appearing on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney James R. Macy**, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "County" are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held on September 22, 2004, in Waupaca, Wisconsin. The hearing was transcribed and the parties thereafter filed briefs that were received by December 6, 2004.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUES

The Union poses the following issues:

1. Did the employer violate the collective bargaining agreement when it reprimanded William Dallman for activity on January 17, 2004?

2. If so, what is the appropriate remedy?

The County frames the issue in the following manner:

1. Did the County have just cause to issue the Grievant an oral reprimand for the incident of January 17, 2004?

Having reviewed the entire record, the Arbitrator frames the issues in the following manner:

1. Did the County have just cause to issue the Grievant an oral reprimand for the incident of January 17, 2004?

2. If not, what is the appropriate remedy?

DISCUSSION

On February 2, 2004, the County gave William Dallman ("Grievant") a verbal warning for not answering "his telephone on Saturday, January 17, 2004 when he was called in to plow snow." According to the County this failure "resulted in the following infraction of the Waupaca County Personnel Policies and Procedures:

- Negligent work performance or failure to perform duties in accordance with department standards." (Emphasis in the Original).

The Union argues that there is no basis for this discipline while the County takes the opposite position.

There are two fundamental, but separate, questions in any case involving just cause. The first is whether the employee is guilty of the actions complained of which the County herein has the duty of so proving by clear and satisfactory preponderance of the evidence. If the answer to the first question is affirmative, the second question is whether the punishment is contractually appropriate, given the offense.

Basis for Discipline

Applying the above standard to the instant case, the Arbitrator first turns his attention to the question of whether the Grievant is guilty of the actions complained of.

The Grievant has been employed with the County for about twenty-one years. For the last fifteen (15) years he has been in the position of Patrolman. The Patrolman job description specifically lists the requirement of plowing snow. In addition, the job description specifically notes that the employee must be available for overtime, particularly in the winter months. The Grievant has received and signed for this job description.

Dean Steingraber, the County Highway Commissioner, has been the Commissioner for the past five (5) years. Within his tenure, he has implemented a policy wherein employees must notify the department in the event they become unavailable for snow plowing. In addition, employees are to seek a replacement in the event they are unavailable. Furthermore, when called, employees are either to report to work, or to call the County back in regard to the employee's availability. This policy has been reinforced through employee training programs, patrolmen meetings, specific postings and counseling sessions. One specific posting listing these requirements was provided to employees on October 30, 2003.

On January 16, 2004, there was discussion of a gathering after work. The shop foreman was going to have a Christmas party that evening, and everybody in the shop was invited. The Grievant attended the party and had alcoholic beverages at the party.

On January 16 and 17, 2004, a significant snowfall occurred in the County that required calling-in employees to plow snow. Patrol Superintendent Lance Penny began calling employees at about 2:30 a.m. following his call from the County Sheriff's Department indicating a need to plow snow. In the course of calling in employees, Penny was connected to an answering machine when he called the Grievant. The Grievant was called to plow a state highway. State highways are the first priority and first calls for plowing snow. The Grievant has been assigned to plow the state highway for many years and knows of this priority.

Penny left a message for the Grievant on the answering machine. Penny does not remember exactly what he said on the Grievant's answering machine. He normally says: "This is Lance. I need you to come to work. If you can give me a call back, or if you can, give me a call." He usually leaves the same message.

The Grievant did not hear the phone ring. On the answering machine, the Grievant heard the following message: "Bill, if you can - - if you are available, call me back." The Grievant testified that he was not available because he had been drinking alcoholic beverages earlier and believed that he did not have to call back because of his unavailability. He believed because of his drinking he needed to wait eight (8) hours before he could operate a snow plow. Eight (8) hours would be over at 7:00 a.m.

The Union argues that the Grievant was excused from his snow plowing duties because he attended a social function and drank alcoholic beverages. The Union opines that because management employees were also at the social function, they would automatically understand that the Grievant had drunk alcoholic beverages and was unable to plow snow.

However, other employees attended the same party. Most were able to report to work to plow snow on the evening in question. Nothing in the record suggests that consuming an alcoholic beverage in and of itself either excludes an employee from reporting to work or calling the County back in regard to the employee's availability. Nor is there any evidence that management employees in attendance at the party would automatically understand that the Grievant had consumed enough alcoholic beverages to be unable to plow snow. Another

employee, believing he consumed too much alcohol, appropriately returned the phone call and informed the Patrol Superintendent that he had had too much to drink and could not come in until 7 a.m. He was not disciplined because he followed the County policy.

The Union also argues that the Grievant's actions are excusable because the discipline, as written, is limited to a failure to answer the phone, and the message left was "interpreted" to mean the Grievant only need respond if available. Such a literal interpretation places form over substance, ignores the past application of policy and a past counseling of the Grievant to answer the phone when called to plow snow. In a meeting on February 14, 2003, Highway Commissioner Steingraber specifically informed the Grievant that he had a "responsibility to plow roads and be available when the telephone call comes before or after the normal working hours." He added that if the Grievant "knows that he will not be available, he should inform the duty supervisor so different arrangements can be made, if necessary."

The County has left the same type of phone message to employees for many years. Contrary to his assertions, the Arbitrator believes that the Grievant knew or should have known what that message meant, that being, the County needed him to report for snow plowing, or call back and let them know if he was not available. Other employees knew what that message meant, and other employees responded accordingly. There is no indication that the Grievant wasn't physically capable of calling the County back after hearing the message that he needed to report for snow plowing.

The Union asserts that the Grievant didn't return the County's call in the middle of the night because the Grievant was not available to plow snow. However, by his own admission the Grievant was available to plow snow at 7 a.m. on January 17, 2004. However, he still didn't return the County's call. At 6:30 a.m. he listed to the scanner. People were on routes so he went to the restaurant for coffee. He saw that his road was plowed because it went past the restaurant so he didn't think that he needed to respond to the County's request that he plow snow.

However, that doesn't excuse his failure to follow policy and call the County back. Not only County policy but common courtesy both to the County and his fellow employees required the Grievant to return the County's phone call and indicate his availability for snow plowing. Even though his road had been plowed, other roads may have needed additional plowing or employees who had been plowing could have used some relief. The County was entitled to make such a determination, not the Grievant, and by not calling the County back the Grievant deprived the County of its management right to make a decision whether the Grievant was needed to plow snow.

Therefore, based on all of the above, the Arbitrator finds that the County has proven that the Grievant is guilty of the actions complained of. A question remains as to whether the punishment is contractually appropriate.

Appropriateness of the Discipline

Article II of the collective bargaining agreement provides that the County may take disciplinary action against employees for just cause.

The County argues that the oral reprimand provided the Grievant is fair and appropriate in this case. For the reasons discussed below, the Arbitrator agrees.

The Grievant has plowed snow for fifteen (15) years and knows the phone call and what it means. In fact, he was specifically counseled on the very same issue in February, 2003. As a result, he was put on notice of the conduct expected of him as a Patrolman when called to plow snow.

In addition, the Grievant has been treated like all other employees. Except for the mechanics, all other employees have always been required to be available and communicate in regards to their unavailability to plow snow. In fact, another employee who consumed too much alcohol returned a phone call and informed his supervisor that he had had too much to drink and could not come in to plow snow until 7 a.m. He was not disciplined by the County.

In the past, employees failing to be available or return phone calls for snow plowing call-in have been counseled for their first violation of policy. The Union President was counseled on January 16, 2004 in this regard. In February, 2003, the Grievant was counseled for violating this policy on three separate occasions. Following the Grievant's prior counseling, an oral reprimand is the next step in progressive discipline and the mildest form of discipline.

Finally, the Grievant's past record does not mitigate the penalty imposed herein. In November, 1988, the Grievant received an oral reprimand for insubordination by taking a County vehicle to a work site in violation of a supervisor's order. In August, 2003, the Grievant received a written reprimand for refusing a supervisor's directive to wear an appropriate safety vest required by County policy. The Union argues that the Grievant was reliably available for snow plowing in the past. That may be true. However, as noted above, he has failed to answer the call to plow snow in the past for which he has been counseled.

Based on all of the above, and on the record as a whole, and absent any persuasive evidence or argument by the Union to the contrary, the Arbitrator finds that the County has sufficient factual basis upon which to discipline the Grievant, and that the penalty imposed is contractually appropriate given the offense. Therefore, the Arbitrator finds it reasonable to conclude that the answer to the issue as framed by the undersigned is YES, the County did have just cause to issue the Grievant an oral reprimand for the incident of January 17, 2004.

In reaching the above conclusion, the Arbitrator has addressed the major arguments of the parties. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

Based on all of the foregoing, it is my

AWARD

That the grievance filed in the instant matter is denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 11th day of February, 2005.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

DPM/gjc
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