BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WOOD COUNTY COURTHOUSE EMPLOYEES, LOCAL 2486, AFSCME, AFL-CIO

and

WOOD COUNTY

Case 164
No. 63668
MA-12665

(Dale Kleifgen Grievance)

Appearances:

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

Ruder Ware, **by Attorney Dean R. Dietrich,** 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, on behalf of the County.

ARBITRATION AWARD

Wood County Courthouse Employees, Local 2486, AFSCME, AFL-CIO (herein the Union) and Wood County (herein the County) have been parties to a collective bargaining relationship for many years. At the time of the events chronicled herein, the collective bargaining agreement in effect until December 31, 2001, had expired and the parties were negotiating a successor agreement. On May 19, 2004, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over an oral reprimand issued to bargaining unit member Dale Kleifgen (herein the Grievant). The Undersigned was appointed to hear the dispute and a hearing was conducted on October 18, 2004. The proceedings were not transcribed. The County filed its initial brief on November 29, 2004, and the Union filed its initial brief on December 1, 2004. On December 29, 2004, the Union notified the Arbitrator it would not be filing a reply brief. On January 10, 2005, the County filed a reply brief, whereupon the record was closed.

ISSUES

The parties did not agree to a statement of the issues. The Union would frame the issues as follows:

Did the Employer violate the collective bargaining agreement when it issued a verbal reprimand of Dale Kleifgen on or about October 7, 2003?

If so, what is the remedy?

The County would frame the issues as follows:

Whether the County violated the Labor Agreement when it disciplined the Grievant for his conduct on April 16, 2003?

If so, what is the appropriate remedy?

The Arbitrator frames the issues as follows:

Did the County violate the collective bargaining agreement when it reprimanded the Grievant for his conduct on April 16, 2003?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

Article 1 – Management's Rights

1.01 Except as otherwise specifically provided in this Agreement, the Employer retains all rights and functions of management that it has by law.

1.02 Without limiting the generality of the foregoing, this includes:

1.02.01 The management of the work and the direction and arrangement of the working forces, including the right to hire, discipline, suspend or discharge for just cause or transfer. The right to relieve employees from duty because of lack of work or for other legitimate reasons is left exclusively to the

Employer, provided that this will not be used for purposes of discrimination against any member of the Union because of union activity;

. . .

1.02.03 The determination of the layout of the equipment to be used in the Employer's activities; the determination of the processes, techniques, and methods of conducting the Employer's activities, including any changes or adjustment of any machinery or equipment, the determination of materials to be used, and the right to contract out work when it is economically feasible;

. . .

1.02.06 The determination of the size of the working force, the allocation and assignment of work to workers, determination of policies affecting the selection of employees, establishment of quality standards and judgment of workmanship required;

. . .

1.02.09 The determination of safety, health, and property protection measures where legal responsibility of the Employer is involved;

. . .

1.02.11 The Employer may enforce work rules and regulations now in effect and which it may issue from time to time not in conflict herewith.

1.03 It is agreed that disputes which arise from the application of Management Rights are grievable.

BACKGROUND

Dale Kleifgen has been a County employee for over 22 years. At the time of the events that are at issue herein, he was the Work Relief Shop Coordinator for the County Department of Emergency Management. As such, his duties comprised overseeing and working with County work crews on various repair and maintenance projects for the County, as well as local

municipalities. The work crews under his supervision were made up largely of community service workers who were either on probation or parole. Kleifgen, in turn, reports to the Director and Assistant Director of Emergency Management.

On April 16, 2003, Kleifgen was assigned to take a crew to Marshfield, Wisconsin, and power wash the basement of the City Park and Recreation Building. When he arrived, he was provided with a gasoline powered power washer, which he had set up in the basement, whereupon his crew washed the basement walls. During this time, Kleifgen had the doors to the basement open to provide ventilation. After approximately 1½ hours, Kleifgen had to shut down the washer and send the crew outside because of the effect of the exhaust fumes. He told the City Project Supervisor he would not continue the job unless provided with proper equipment. One of the workers, Elizabeth Fawley, had to be taken to the hospital and was kept there overnight due to possible carbon monoxide poisoning. Another worker had to be let out the jail later in the evening to obtain fresh air. Fawley eventually filed a claim for injuries against the County due to the incident. Kleifgen reported to Assistant Director Tom Buchholz that he developed a headache from breathing the exhaust fumes.

On April 17, Kleifgen and his crew returned to Marshfield to complete the job. Hose extensions were provided, which made it possible to keep the washer engine outdoors, and the project was completed without further incident. Later that day, Kleifgen filed an Office Report on the April 16 incident in which he described needing to shut down the washer occasionally due to the effect of the exhaust fumes.

As a result of the incident, an investigation was conducted by Emergency Management Director Steve Kreuser, who then met with Kleifgen on or about April 21. At the meeting, Kleifgen indicated the City was at fault for giving him unsafe equipment. Kreuser, along with Assistant Director Buchholf, maintain that Kleifgen was issued a verbal reprimand for negligence at that time. Kleifgen denies the issuance of discipline, or that Buchholz was present at the meeting. On April 22, Fawley filed an Illness Report, witnessed by Kleifgen, as a result of the incident. Kleifgen also filed a Supervisor's Report on the incident wherein he described operating the power washer until the crew began to feel light-headed and then stopping. Kleifgen attributed the incident to unsafe operation methods and inadequate ventilation.

In September, 2003, Brian Margan, the County Safety Director, was completing the investigation on Fawley's injury claim and asked Kreuser for documentation of any discipline issued in the matter. Kreuser responded on September 29 with a memo to Margan wherein he stated:

> This is in response to your Interoffice memorandum dated September 25, 2003. As you will recall, several days after the above-referenced incident.
> I had spoken to you on the negligence of supervisor Dale Kleifgen in regard to Elizabeth Fawley. At that time I informed you that he was given a verbal warning. Therefore, please accept this letter as a written response for your records. A copy of this will be forwarded to Human Resources for Dale's file.

Subsequently, on October 7, 2003, Kreuser reduced the warning to writing, although it was specified to be a "verbal warning." On that date, he called Kleifgen in and presented him with the document, which Kleifgen signed. On October 21, 2003, Kleifgen grieved the reprimand. The grievance advanced according to the contractual grievance procedure, without resolution, resulting in the instant arbitration. Additional facts will be referenced, as necessary, in the discussion section of the award.

POSITIONS OF THE PARTIES

The County

The County asserts that the discipline was issued for just cause. Due to the low level of discipline, the County's burden is to prove just cause by a preponderance of the evidence. This requires establishing that the Grievant committed the alleged misconduct and that the level of discipline imposed was appropriate to the wrongdoing. [See: CITY OF LACROSSE, MA-8742, (JONES, 12/1/95); COLUMBIA COUNTY, MA-12560, (MCLAUGHLIN, 10/7/04)] In this case, the facts surrounding the incident are undisputed. The Grievant's conduct violated several County safety and work rules and endangered himself and fellow employees. The rules require that employees make sure that all equipment is used in a safe and proper manner. The Grievant violated these rules by operating a gas powered pressure washer indoors and exposing himself and his crew to poisonous fumes. This also demonstrated a complete lack of common sense. Thus, the first prong of the just cause standard has been established.

The discipline issued to the Grievant was a verbal reprimand, the lowest form of disciplinary action available. This makes the question of whether the level of discipline was appropriate moot.

The discipline is also warranted by the Grievant's experience and training. The Work Relief Shop Coordinator is "responsible to know and practice the Safety policies of the County" and "perform all job tasks in a safe and prescribed manner." Kleifgen had over 20 years experience with power tools and should have known it was dangerous to operate a gasoline engine indoors for an extended period of time. He also had received extensive training in the proper operation of power equipment. The County has a right to expect experienced employees to perform in a manner that will not endanger fellow employees. MARATHON COUNTY (HIGHWAY), MA-6977, (CROWLEY, 8/4/92)

It should also be noted that this was not a case where the Grievant's conduct might have resulted in injury to a fellow employee. One employee was hospitalized for possible carbon monoxide poisoning and another was required to be released from jail to obtain fresh air. The serious consequences of the Grievant's actions also support the case for discipline.

The Union may argue that the discipline was untimely due to the fact that the written notice of discipline was given in October, but this is not true. The Grievant claimed he did not know he was reprimanded until October and that that he believed the reprimand was issued at Safety Director Brian Margan's request as part of handling the Fawley claim, but this contradicts the evidence. The testimony shows that Kleifgen was first given the reprimand in April in a meeting with Steve Kreuser and Thomas Buchholz. Kreuser's and Buchholz's testimony about the meeting was detailed and credible. Kleifgen's testimony, however, was questionable, such as his assertion that he only shut down the washer at the end, which contradicts his own contemporaneous report to the effect that "the washers were shut down occasionally to get fresh air." (Jt. Ex. 3)

The County also denies that the October written notice of the reprimand constituted additional discipline. The October document was drafted at Margan's request and did no more than verify for the record the issuance of the reprimand in April. Kreuser amended the Disciplinary Action Form to indicate that the reprimand was verbal and not written to ensure that it would not result in additional or greater discipline. The form did not delay, change, or add to the discipline and the grievance should be dismissed.

The Union

The Union contends that there was not just cause for the discipline. On the day in question, the Grievant was using a power washer in a large, well-ventilated room. When one worker complained of light-headedness, the Grievant stopped the equipment and he refused to continue the job without proper equipment, which was provided the next day. Kleifgen reported the problem immediately to Thomas Buchholz, who noted "unsafe operation method" on the report. Kleifgen noted, however, that he ventilated the room as much as possible and stopped when people began to get light-headed. Kleifgen told Director Kreuser that the fault lay, if anywhere, with the City of Marshfield for giving him unsafe equipment to use. It was Buchholz' opinion, however, that the problem was inadequate ventilation, although he had never inspected the equipment. Neither Buchholz, nor the City supervisor, therefore, did their job to determine that the equipment was safe to use in that location.

Kreuser and Buchholz testified that Kleifgen was initially given the reprimand at a meeting on April 21, but Kreuser had no intention of documenting it. In fact, it was given on October 7 when Kreuser gave Kleifgen the written documentation of the verbal reprimand. The reprimand was drafted, not for Kleifgen's file, but for Brian Margan's records in the Fawley injury claim, and would not otherwise have been drafted. Kreuser's practice has been to not document verbal discipline, but to keep it between himself and the employee. Only at Human Resources Director Ed Reed's insistence did he document the reprimand. According to Kleifgen, he was unaware of the discipline prior to receiving a copy of the written document on October 7.

It should also be noted that the record does not indicate that Kleifgen was ever instructed in the proper operation of a gas engine in a large ventilated room, or how much ventilation is required. Some of the training he received dealt with gas-powered equipment, but there is no indication that the training ever addressed the issues raised here. They dealt with the noise created by using chainsaws indoors and proper ventilation when fuelling weed cutters, but not risks from using gas engines indoors. There is also no evidence that Kleifgen was given a copy of the County Safety Manual, which is the basis for the list of violations contained in County Exhibit #2. Further, the rules cited do not address the situation at issue here.

The evidence suggests that Kleifgen did the best he could under the circumstances with improper equipment, although he had not been properly trained. It further suggests that the meeting on April 21 was not, in fact, a reprimand, but was a counseling session. Typically, a "verbal reprimand" is a documented first stage reprimand, which occurred here on October 7. To informally warn Kleifgen on April 21 and then formally reprimand him on October 7 constitutes double jeopardy, which is not approved in arbitral precedent. Elkouri and Elkouri, How Arbitration Works, 6th Edition, pp. 980-81 (2003). Further, the delay which occurred denied Kleifgen due process. To hold back and only issue the written verbal reprimand after a damage claim makes the discipline untimely, which is an element in a consideration of just cause. Kleifgen believed Kreuser's assertion that the April 21 meeting was just "me and you talking." To allow the County to use that as a basis for expanding the discipline months later puts all similarly situated employees at risk and the grievance should be sustained.

The County in Reply

The County has several objections to arguments raised by the Union. In the first place, the Union cannot pass the buck for the incident to the City of Marshfield or Tom Buchholz. Kleifgen was specifically responsible for the safety of the workers under his supervision. To the extent that he failed in that responsibility, he is accountable. The Grievant complained about inadequate equipment because it could not be used outdoors. Be that as it may, the Grievant was trained in using gas-operated equipment and should have known it was unsafe to use it indoors.

The Union also mischaracterizes Kreuser's testimony to state that no discipline was given at the meeting on April 21. In fact, Kreuser and Buchholz testified that the meeting on April 21 was not a "counseling session," but was a disciplinary meeting where a reprimand was given. Kreuser typically did not document these meetings, but that does not change the fact that the verbal reprimand is the first disciplinary step, whether or not it was in writing.

It is also not true that the discipline was given at the behest of Mr. Margan or Mr. Reed. Margan did ask for documentation of any discipline for his file, but the document created in October only verified what had occurred in April. In fact, according to Kreuser, he

alone decided to issue the discipline and was not influenced by anyone, including Margan and Reed. The testimony of Buchholz and Kreuser is consistent and credible that the discipline was issued on April 21. The grievance should be denied.

DISCUSSION

Article 1, Section 1.02, Paragraph 1.02.01 of the contract gives the County the authority to ". . . discipline, suspend, or discharge for just cause . . ." As has been generally accepted in arbitral law, the determination of the existence of just cause involves the consideration of two factors. First, it must be shown that the employee committed an offense for which discipline is warranted. Second, if the allegations of the offense are established, the ensuing punishment must be appropriate in degree to the wrongdoing. Under the circumstances of this case, due to concerns raised by the Union over an alleged delay or increase in the discipline, an additional factor which must be reviewed is whether the employee was provided with due process in the disciplinary action.

The undisputed facts show that on April 16, 2003, the Grievant took a crew of County workers to Marshfield to clean the interior of the Parks and Recreation Building and that while there, he had them use a gasoline powered power washer, which was supplied by the City, in the basement of the building for approximately 1½ hours. He shut down the washer after he and members of the crew began to suffer ill effects from the exhaust. He insisted that the City provide him with equipment that could be operated outdoors, which it did the next day, and reported the incident to his superiors. Ultimately, two of the workers experienced prolonged symptoms and one had to be hospitalized.

The Union asserts for a number of reasons that this conduct did not warrant discipline. It argues that the Grievant tried to ventilate the work area as best he could, that he was not properly trained to know of the inherent dangers in operating the equipment indoors, that the City was culpable for giving him unsafe equipment and that as soon as workers began complaining he stopped the machine and insisted that the City provide different equipment. For the reasons set forth below, I disagree.

First, the Grievant is a 22-year employee who has been supervising work crews for the duration of that time. As crew leader, part of his responsibility is to see to it that all equipment is used properly, to work in a safe manner and to see to it that the workers on his crew work in a safe manner. (County Ex. 2) In the course of his employment, he has been trained in the operation of numerous types of gasoline operated power equipment, including chain saws, wood splitters, wood chippers, weed trimmers, lawn mowers and stump grinders. (County Ex. 3) According to the testimony of Safety Director Brian Margan, in each instance the trainees are warned to avoid indoor operation due to the risk of carbon monoxide poisoning. While there is no evidence that he was ever trained on a power washer, in that it was a gas operated machine, the same cautions would presumably apply and the Grievant could

be expected to extrapolate from his training with other power equipment. Further, there is a common sense component in play, as well. It is commonly known that people suffer serious illness and frequently die from breathing gasoline exhaust fumes indoors. The Grievant further testified that he was aware at the time that carbon monoxide gas is heavier than air and odorless. To expose himself and his crew to such danger with the explanation that he assumed the City would not give him the equipment if it was dangerous to use indoors is, to my mind, borderline reckless.

The Grievant's own behavior at the time indicates that he was aware of the risk and yet continued. The office report he filed on April 17 states: "Myself and crew were somewhat affected by the fumes, even thou [sic] the washers were shut down occasionally to get fresh air." (Joint Ex. 3) 1/ This indicates to me that he and the workers were having problems breathing, making it necessary to take breaks for fresh air, yet he continued to try to operate the machine indoors as long as he could. Only when he and others began to get sick did he stop and report to the City supervisor that different equipment would be needed. The Supervisor's Incident/Accident Report Form, which the Grievant signed, also indicates that the causes of the incident were determined to be unsafe operation methods and inadequate ventilation. In the face of this evidence, it is incredible to me that he did not know that there was a safety risk involved in using the power washer indoors. It is my determination that the Grievant did commit the acts alleged, that the acts did constitute violations of County Safety Rules and that the acts did warrant discipline.

1/ At the hearing, the Grievant testified that the office report was incorrect and that he did not stop work to take breaks for fresh air. He could not account for why he wrote the report as he did. Presumably, his testimony was intended to show that there was no known risk prior to his decision to stop work. It is my determination that the report is likely to be more accurate than the Grievant's testimony in that it was written immediately after the event and prior to the time that discipline was issued.

The level of discipline issued for the incident was a verbal warning. In the scheme of progressive discipline, a verbal warning is the first and lowest degree of discipline available to the employer. Given that I have determined that discipline was warranted, therefore, it naturally follows that the level of discipline imposed was not unduly severe.

The remaining issue of due process raises two questions. First, the Union asserts that the discipline was not issued in April, as the County maintains, but when the Grievant was given the written notice of verbal reprimand in October. If true, this would amount to a passage of approximately six months between the incident and the discipline. The Union contends that such a delay makes the discipline untimely and violates the Grievant's industrial due process rights. In the alternative, assuming that discipline was issued in April, the Union asserts that the October notice constituted an increased level of discipline and thus exposed the Grievant to double jeopardy.

The first question involves an issue of credibility between the testimony of the Grievant and the County's witnesses, which are at variance. Steve Kreuser, the Director of Emergency Management, testified that following an investigation, he gave Kleifgen a verbal reprimand on Monday, April 21, and that at the meeting Kleifgen blamed the equipment for the problem and stated that the City should have trained him on the equipment before giving to him to use. Kreuser's testimony was corroborated by Deputy Director Tom Buchholz, who recalled Kleifgen also questioning why the City would ask him to use unsafe equipment or do a job that was inherently unsafe. Kreuser stated that it was not his practice to document verbal discipline and would not have done so here, but he was asked by Margan to provide him with a written record of the discipline for his file on the claim of the injured employee. According to Kreuser, therefore, the October document only memorialized the discipline given in April. For his part, Kleifgen stated that Buchholz was not present at the April meeting and that no discipline was issued at that time. He claimed that the first notice of discipline was the written notice in October, which Kreuser said was being issued at Margan's request.

The testimony of Kreuser and Buchholz about the April meeting was detailed and specific. I am satisfied that it accurately sets forth the essence of that meeting in terms of what passed between the parties. What troubles me, however, is the fact that the meeting was not documented in any way until the written notice of verbal warning was issued in October. In a disciplinary situation, one would expect some record of the meeting to have been kept in the Grievant's personnel file for posterity, otherwise, in the event of a future incident, there would be no record upon which to base additional discipline. Thus, even a verbal warning would be noted in order to avoid confusion and contention should that warning be part of the basis for future discipline. I can only conclude that Kreuser either didn't warn Kleifgen in the meeting or did, in fact, intend to give Kleifgen a verbal warning, but didn't intend to document it. I am inclined to believe the latter since the Union concedes the point in its brief. It was, as Kreuser described it, a warning that was intended to stay between him and Kleifgen.

This became problematic when Margan indicated he needed some written conformation of the discipline for his incident file. Initially, Kreuser sent Margan a memo on September 29 informing him that he had given Kleifgen a verbal warning in April and also forwarded the memo for inclusion in Kleifgen's personnel file. (Joint Ex. 9) Apparently, this was not sufficient, however, because on October 7, Kreuser also drafted a Disciplinary Action Form, which was given to Kleifgen, formally giving him a "verbal warning" for the April 16 incident. The document is curious in two respects. First, it does not state that it is merely written confirmation of discipline that was issued in April, but reads as if it is the first action taken against the employee. Second, the form itself provides boxes to check the level of discipline issued, beginning with "reprimand," then "written warning," "suspension" and finally "discharge." Rather than check "reprimand," which appears to be the lowest level of discipline, Kreuser checked "written warning" and replaced the word "written" with "verbal." I conclude two things from this. First, that the verbal warning given on April 21 was intended to be of an informal nature not even rising to the level of a reprimand. This is in keeping with Kreuser's testimony that the warning would stay between himself and Kleifgen. Were that not

the case, there would have been no need for Kreuser to amend the form as he did, but he need only have checked reprimand. Second, because of the informal nature of the warning, it is quite likely that Kleifgen did not see the April 21 meeting as disciplinary; thus, his surprise when he received the notice of warning on October 7.

The net effect of the October 7 document depends upon how it is interpreted. The fact of the matter is that it is something more than an informal verbal warning, because it is a documented part of Kleifgen's file and clearly states that further infractions may lead to "additional discipline." Thus, on October 7, the warning, verbal or otherwise, ceased to be informal and became formal. In my view, this constituted a form of double jeopardy, as argued by the Union because it elevated the previous informal warning to a formal discipline for the same offense. It is generally accepted that once a penalty is imposed it cannot later be increased for the same offense. CITY OF KENOSHA, 76 LA 758 (MCCRARY, 1981) If, in fact, all that was needed was documentation of the action taken for Margan's incident file, Kreuser's September 29 memo should have been sufficient. By adding the additional written notice of verbal warning and placing it in Kleifgen's file, the County violated his due process rights.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The County violated the collective bargaining agreement when it issued the written notice of verbal warning to the Grievant for his conduct on April 16, 2003, in that it exposed him to double jeopardy and thus violated the just cause provision of Article 1. The County shall, therefore, expunge the disciplinary action form dated October 7, 2003, from his personnel file and it shall not be used as a basis for any future discipline.

Dated at Fond du Lac, Wisconsin, this 3rd day of March, 2005.

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

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