

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES,
acting on behalf of the
MARINETTE CITY EMPLOYEES UNION,
LOCAL 260-A, AFSCME, AFL-CIO**

and

SCHOOL DISTRICT OF MARINETTE

Case 62
No. 65523
MA-13242

Appearances:

Dennis O'Brien, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5590 Lassig Road, Rhinelander, Wisconsin 54501, for Wisconsin Council of County and Municipal Employees, acting on behalf of the Marinette City Employees Union, Local 260-A. AFSCME, AFL-CIO, referred to below as the Union.

Robert W. Burns, Davis & Kuelthau, S.C., Attorneys at Law, 318 South Washington Street, Suite 300, Green Bay, Wisconsin 54301, for the School District of Marinette, referred to below as the District or as the Employer.

ARBITRATION AWARD

The Union and the District are parties to a collective bargaining agreement which was in effect at all times relevant to this matter and which provides for the arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve a grievance filed on behalf of Martin Olson, who is referred to below as the Grievant. Hearing on the matter was conducted in Marinette, Wisconsin on February 23, 2006. Carrie Bohrer filed a transcript of the hearing with the Commission on March 14, 2006. The parties filed briefs and reply briefs by May 17, 2006.

ISSUES

The parties stipulated the following issues for decision:

Did the District have cause to terminate the employment of the Grievant?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 20 - Managerial Rights

. . .

2. The functions and rights listed in this section are some illustrations of the responsibilities retained by the school district and are not intended as a(n) all-inclusive list: the management of all custodial and maintenance operations; the direction of the working forces, including but not limited to . . . the right to . . . suspend, discipline or discharge for cause . . .

BACKGROUND

The grievance, filed on October 10, 2005 (references to dates are to 2005, unless otherwise noted), challenges the District's discharge of the Grievant under Article 20, Section 2. Paul Fox, the District's Director of Buildings and Grounds, issued the Grievant a letter, dated October 6, to summarize a meeting held on that date. The letter states:

. . .

At that meeting Dr. Hipskind questioned you about the condition of Higley Field for the homecoming game on Friday, September 30 . . . In addition to the lines on the field being unacceptable for WIAA standards, a number of 6" long screws were found near mid-field potentially endangering players, officials, and band members. The game official was concerned to the point of postponing the game and had it not been for Principal Stauss's interaction our homecoming game would have been postponed.

When asked why this occurred you stated that, "By that time, you didn't care." Not caring creates the potential for other situations that could endanger the safety and well-being of the students.

Also discussed were the sudden outbursts of obscenities on school property which your response was I don't remember. More specific on Tuesday, October 4, 2005 a co-worker heard you shouting obscenities on the north side of the building. In anger you have on numerous occasions abused school property, as you stated yes; "I slam vehicle doors, throw things, and squeal the tires on the vehicles."

The letter notes that the Grievant received a three day suspension on March 12, 2003 and a five day suspension on February 21, and concludes thus:

. . . the above mentioned incidents clearly show poor judgment, not meeting the standards of this school district, destructive behavior to school property and mannerism not appropriate to a school district setting. Most importantly endangering the safety and health of others.

As a result of these past and present incidents you have been released of your duties . . . as of October 6 . . .

Fox confirmed the three day suspension in a letter dated March 12, 2003, which states:

. . .

My first concern is your demonstration of poor work standards as it relates to a freeze up of HV4 heating coil that was discovered on . . . March 11 . . . As we discussed that morning, we would isolate the broken coil and run the unit with one coil. On Tuesday afternoon . . . when I returned from a meeting in Green Bay . . . I specifically asked if the coil was isolated and were we ready to go back on line. You replied "yes" as it was relayed to you that myself and a service person from System Services were going to check the freeze stat as it was jumped out. Here is what I found when I checked the coil. The valve to the coil was approximately 15% open allowing water to spray out of the end cap of the coil. When this was brought to your attention, you replied "I couldn't close the valve tight". We had no trouble closing the valve and stopping the water using a pair of channel locks. It was also discovered that to expose the coil an access panel was partially unbolted and bent open . . .

It is obvious that the access cover is bolted down on four sides of the perimeter. It would be standard procedure in that situation to take off bolts on three sides, then loosen the bolts on the side adjacent to the duct sliding it to your left. This is clearly a demonstration of failing to meet school district work standards, poor work attitude and destruction of school property. Behavior of this type will not be tolerated in this District.

My second topic of concern was not filling out monthly pool reports that are required by the State of Wisconsin. This has been an ongoing problem and it was brought to your attention in January 2001 and again in September 2002. After a state pool inspection on Tuesday, March 4, 2003, it was documented by a state official that no reports were received for the entire calendar year of 2002 . . .

Fox confirmed the five day suspension in a letter dated February 21, which states:

. . .

In February of 2005, it was brought to my attention that the Secretary in the Office of Building and Grounds was not receiving monthly pool reports. After reviewing our file it was found that we had not received reports for December 2004 and January 2005.

After monitoring the situation, On Thursday, February 17 you were asked by myself, Paul Fox, Director of Building and Grounds, for the missing pool reports. You handed me a unfinished report that you indicated was for December 2004 . . . You stated that the January 2005 report was in the receiving room as you could not produce the report. I (Paul Fox) then asked to review the February 2005 report. You stated it was in the pool mechanical room. We then walked to the pool mechanical room and as you opened the door you stated "I don't have the report, I spilled acid on it yesterday and it was destroyed."

. . . your dishonesty was very disappointing. This is a demonstration of not meeting school work standards and a poor work attitude. . . .

The Grievant did not file a grievance on either suspension.

The Grievant worked as a District Maintenance worker from November 13, 1990 until October 6. At the time of his hire, the District employed nine Maintenance workers to cover six elementary schools, a middle school, and a high school. As of October, the District employed three Maintenance workers to cover four elementary schools, a middle school and a high school. At the time of his discharge, the Grievant was the Maintenance worker at the high school. Maintaining the pool and Higley Field, the site of Marinette High School football games, were two of his primary responsibilities. Pool maintenance required him to test the pool twice a day and attend to any maintenance problems, including appropriate chemical levels. Normal protocol had him document the tests in his daily work log, then turn in reports to Fox' Secretary, who would ultimately file an inspection report form, on a monthly basis, with the State of Wisconsin Department of Health and Family Services.

His maintenance of Higley Field required him to mow the field, paint yard lines, side lines, end zone lines, yard markers and hash marks as well as the Marinette High School logo. That logo is a purple "M" painted against a white background. The "M" straddles the fifty yard line. Painting the logo requires the use of a stencil, which must be assembled, then affixed to the ground to guide the painting process. The stencil was originally attached to the ground with the use of aluminum rods, but as the rods wore out or were lost, they were replaced with six-inch drywall screws. Under ideal conditions, the painting of the logo, including the assembly and disassembly of the stencil, takes one employee four to five hours.

Tim Stauss is the High School Principal. On September 23, Peshtigo and Lena Catholic Central played a football game at Higley Field. Stauss watched the game. After

hearing numerous complaints about the “laughable condition of the lines on the field” (Transcript [Tr.] at 70), Stauss looked over the field and noted that the yard lines were not parallel. On the next school day, Stauss discussed the condition of the yard lines with the Grievant and with the District’s Athletic Director.

Marinette High School’s varsity football team’s homecoming game was played on Friday, September 30. As is his custom, Stauss went out on the field prior to the start of the game to greet the officials and to shake hands with the opposing team’s coaches. Stauss learned that one of the officials had, while walking near the fifty-yard line, kicked up a six inch drywall screw. Stauss and the officials searched the area around the fifty-yard line, uncovering roughly sixteen of the six-inch drywall screws. Concern among the game officials regarding the screws coupled with their observation that not all of the yard lines were parallel led the officials to discuss calling the game. After a discussion with Stauss and after a search of the field, they decided that a cancellation of the game would not be necessary.

The background to this point is essentially undisputed. The balance of the background is best set forth as an overview of witness testimony.

Paul Fox

Fox has served as Director for roughly twelve years. He has been, throughout that period, the Grievant’s direct supervisor. Stauss discussed the field’s condition for the homecoming game with Fox on the following Monday. Fox then approached the Grievant, who affirmed the problems and showed the drywall screws to Fox. Fox asked the Grievant about the drywall screws as well as the yard lines. When Fox asked why the lines were crooked, the Grievant responded, “Well, by the end of the day I just didn’t care” (Tr. at 13-14), or “I didn’t give a shit at that time” (Tr. at 40). Fox determined to investigate the matter further, but did not inform the Grievant on October 3 that he considered the events of September 30 to be disciplinary.

Fox started his investigation by questioning two District employees, Sue Erdman and Rick Henry, who assisted the Grievant by removing the stencil from the field. He was convinced after discussing the matter with them that the screws had not been left on the field through any action on their part. Fox concluded that the screws had been left while the Grievant installed the stencil.

Fox’ conversation with Henry included a discussion of the Grievant’s conduct earlier in the day. Fox understood Henry to have observed the Grievant slamming the doors on a District truck so hard that Henry wondered if the windows would break. Henry also noted that the Grievant backed the truck so fast that the tires squealed. Fox also discussed the Grievant’s work place behavior with another Maintenance worker, Peter Ninnemann. Ninnemann noted to Fox that the Grievant had yelled obscenities so loud that Ninnemann clearly heard them over the noise of the mower Ninnemann was operating. Fox understood that the Grievant was next

to the High School building at a water valve, getting water to mix with paint, when he yelled the obscenities.

Fox reviewed the Grievant's personnel file, which included the suspensions noted above, and met with Stauss. Fox knew that he had, between February 21 and October 6, reminded the Grievant on at least three occasions "that his job was on the line" (Tr. at 24). Two involved the Grievant's failure to assist as needed on a major pool repainting project. The third involved Fox' observation that plates covering certain valves on Higley Field's irrigation system were cracked. Fox informed the Grievant that this posed a safety issue and needed to be attended to. The Grievant's observation that the plates had been cracked for some time prompted Fox to inform the Grievant that the failure to fix them was unacceptable.

The results of the investigation led to a meeting on October 6. Fox attended the meeting with Nancy Hipskind, the District Superintendent, Pauline Borgen, the District's Director of Business and Finance, Ken Lesperance, a Union Steward and the Grievant. Fox viewed the meeting as the Grievant's opportunity to respond to the allegations against him. In his view, the Grievant acknowledged a level of misconduct warranting termination.

Fox and the Grievant had a series of discussions concerning lining the football field. The Grievant took the position that he had been trained to line the field only with a two-person crew. In his view, a proper lining job demanded two employees since one was needed to string the lines that guide the painter while the other ran the painter. Fox took the position that a single employee could perform the job as long as earlier painted lines remained visible. Stringing would be necessary, under his view, only when the lines became obliterated by play or by weathering. Fox never told the Grievant he could not have help to line the field, and never told the Grievant he could not string the field prior to painting it.

Tim Stauss

Stauss spoke with the Grievant briefly after the Peshtigo game and informed him, "we got to get those lines straighter on that field" (Tr. at 70). He instructed the Athletic Director to make sure the field was properly lined. The field's condition generated considerable commentary to Stauss during and following September 30. Some of the comments were written and obscene. After he and the officials collected the drywall screws on September 30, and agreed that the field was safe to play on, he took the screws to the Grievant, who said, "I must have left them out there" or "something to that effect" (Tr. at 74). Stauss found the discharge determination troubling, but felt that the Grievant's comment to the effect, "he didn't really give a shit at that point on that Friday of what it looked like" (Tr. at 75) indicated an attitude that could not be tolerated from an employee.

Rick Henry

Since 2001, Henry has served as a Cleaning Supervisor for the District. Prior to that, Henry served as a Cleaner at the middle school. Henry has assisted the Grievant in lining

Higley Field, and has watched other District employees line the field. He watched the Grievant's predecessor, Dale McDonald, line the field alone and with assistance.

On September 30, Henry met the Grievant in passing in the early afternoon and he informed Henry that he was behind. Henry offered to help, and noting that Sue Erdman, a District Cleaner, had arrived early, offered her assistance also. The Grievant asked them to remove the stencil. He gave Henry no specific instructions, and did not tell him how the stencil was attached to the field. He did not inform them how many fasteners held the stencil. Henry drove a District truck onto the field, parking it close to the stencil at midfield. They removed the stencil piece-by-piece, lifting it to loosen the anchor screws, then removing the screws. After Erdman had nearly filled her hand with drywall screws, she asked what to do with them. Henry found a box for the screws, leaving it in the front seat of the truck. They walked back and forth from the stencil to the truck, putting the drywall screws into the box to avoid dropping any screw on the field. Erdman and Henry were each concerned with the screws. They talked about how badly a student could be injured if they left any screws on the field. Each was careful that no screw touched the ground after being removed. After they had removed the stencil, Henry drove the truck from the field. He and Erdman did not search the field for drywall screws other than to remove those that attached the stencil to the field. Henry brought no drywall screws onto the field.

Henry believed that the Grievant was in a bad mood that day, and had observed him slamming a truck door so hard that Henry thought the window might be broken. He had also observed the Grievant squeal the tires on the truck, leaving visible skid marks in the parking lot. He had heard Fox twice counsel the Grievant, "You're on thin ice" (Tr. at 94). One occurred during the pool repainting project and one occurred while Fox and the Grievant discussed the irrigation covers on Higley Field.

Sue Erdman

Erdman works for the District part-time. Erdman noted that she asked Henry what to do with the drywall screws as they removed them. Henry found a box and they put the screws in the box as they pulled up the stencil sections. She was careful with the screws because she is "a paranoid mom" (Tr. at 109), who found them dangerous on a field that students played on. She was very careful removing the screws and was certain none that she handled touched ground after she had removed them from the stencil. After Henry drove away, she assisted the Grievant painting other areas of the field. She quit when the Grievant ran out of paint, because he informed her that he could finish without further assistance. Neither she nor Henry checked the field for drywall screws because they had been careful removing those that attached the stencil and were unaware that any other screws might be on the field.

Peter Ninnemann

Ninnemann started as a District Maintenance worker on January 5. On Fox' direction, Ninnemann authored a statement dated October 4, which states:

On October 4, 2005, at about 1:30 p.m., I was cutting the soccer field grass by the goal cage. (The Grievant) was about 20 feet away from me; lining up the field painter when he let out a stream of obscenity's that I heard over both of our engines. He appeared mad over something that he forgot, I think it was fuel for the compressor. If there were windows open on that side of the school or students outside, this could have been heard.

Also, I have worked with Martin on several of jobs and on many occasions, and his bodily functions and body odor may have offended both students and teaching staff members. . . .

Ninnemann testified that he might not have reported the incident, but there was a student study group outside the school building, and Ninnemann observed one of the students pointing toward him after the Grievant's rant. As a probationary employee, Ninnemann did not want to be held responsible for the Grievant's obscenities.

Ninnemann felt that the Grievant had not helped Ninnemann get acquainted with the work. McDonald spoke to Ninnemann after the Grievant's discharge to question why Ninnemann had not watched out for the Grievant more, to assist him remembering his duties and to watch his physical appearance. Ninnemann understood the counseling to be that McDonald thought that Ninnemann's neglect meant "a brother is - - - is fired" (Tr. at 119). Ninnemann responded to McDonald that it was not his job to baby sit for a more senior and better paid employee who should be helping a younger worker.

Nancy Hipskind

Hipskind has been Superintendent for roughly three and one-half years. Borgen is Fox' direct supervisor and Hipskind is Borgen's. Hipskind was aware of the Grievant's personnel file and of Fox' investigation prior to the October 6 meeting. She viewed the meeting as a chance for the Grievant to explain his actions, and found his explanations either unclear or unsatisfactory. When informed of the door slamming incident, he responded that "sometimes he lost his temper" (Tr. at 132). However, the most telling response was his acknowledgement that at the end of his day of September 30, he just did not care. This response followed an explanation of the potential of serious injury and she found it remarkable. In her view, it demonstrated an attitude toward work that could not be improved.

She acknowledged that staffing in the Maintenance department may be an issue. During the October 6 meeting, the Grievant stated that he did not believe he left any screws on the field.

The Grievant

District reductions in staffing had added considerable workload pressure on maintenance staff over the years. He was District trained in pool maintenance and he tested

the pool twice a day. He would, however, let the reports slide to attend to other duties. The pool was always properly maintained, and there was never any problem reported regarding water quality. No one questioned him regarding the pool reports until he was disciplined. Fox' secretary was responsible for mailing in pool maintenance reports. He acknowledged that he does have a temper, but he noted he has never damaged any District property or threatened any person. He sought out and completed anger management therapy.

On the week prior to the homecoming game, he hoped to cut the grass on Higley Field on Wednesday, lay out the stencil and start marking the field on Thursday, then finish marking the field on Friday. Weather kept him from the field on Wednesday morning, and band practice kept him from the field on Wednesday afternoon. On Thursday morning, he cut and swept the field, but was again kept from the field by band practice on Thursday afternoon. On Friday, he began to set the stencil while dew was still on the field. Later in the morning, the field dried enough so that he could paint. He had to keep the band off the field while the logo dried. When he started to paint the yard lines, the painter malfunctioned. He had trouble with the painter all day from that point on. After he completed the job and had time to disassemble the painter, he discovered that an O-ring in the spray gun had given out.

His normal quitting time is 2:30 p.m., but the problems with the spray gun meant that when Henry arrived, he still had considerable work left to do. By 3:00 p.m., he was still trying to get the spray gun to work. While Henry and Erdman removed the stencil, he painted a different area of the field. He did not finish painting until 5:00 p.m. He never requested overtime, because he had no authorization for it. Prior to the start of the game, Stauss asked about the drywall screws and he responded that he did not think he had left anything on the field. Stauss had, roughly one week earlier, complained to him about the condition of the field and he responded that Fox wanted him to mark the field alone, without stringing it, if he could see the lines. The Grievant did not report the conversation to Fox.

Fox and the Grievant discussed the problems of September 30 on the following Monday. The discussion concerned how they could fix the field prior to the next scheduled game and did not involve any hint of discipline. The Grievant described the end of the conversation thus:

I told him that by the end of the day I was so angry and so upset I just didn't care anymore. I don't recall saying I don't give a shit (Tr. at 169).

At no point in the conversation did the Grievant say or imply that he did not care about the condition of the field. Had he known drywall screws were on the field, he would have removed them. His statement was not that he did not care about his job, but a statement of how frustrated he felt at that point of the day on September 30. Fox and the Grievant had discussed, prior to this conversation, whether the field could be properly lined using less than two employees.

The Grievant has received a number of commendations for his work, and never had problems with his work until staffing problems created a workload he had difficulty keeping up with. He acknowledged he did not specifically instruct Henry and Erdman regarding how to remove the stencil. He did not tell them how many screws anchored the stencil because he has never counted them. He acknowledged it would have been reasonable to do so. To install the stencil, he placed the box of screws on the field. He would take a handful of screws from the box to attach the stencil, and then walk back and forth from the stencil to the box as he needed more screws. He acknowledged it is possible that he could have dropped screws or they could have spilled from the box.

The Grievant had, after the first or second game of the year, asked another employee to help him line Higley Field. Fox observed this and called the Grievant into his office. He then berated the Grievant for wasting man hours and wasting time. Fox told him there was no need for stringing lines other than the first lining of the field or when the yard lines had become indistinct through use or weathering. Fox admonished him to “straighten up” (Tr. at 184) because he had one foot out of the door.

Fox intimidated the Grievant. He acknowledged that he lied about acid eating up a pool report, because, “I panicked” (Tr. at 185).

Joanne Konyn

Konyn worked as a Maintenance worker for the District, but was laid off roughly five years ago. She and McDonald lined Higley Field together. She never saw McDonald line the field alone. While she assisted McDonald, the varsity field was relined for every game. She worked for Fox, and felt that work assignments reflected his attitude toward her, and could be made punitively.

Don Belling

Belling served as a District Maintenance worker for thirty-two years, prior to his retirement roughly four years ago. He maintained District playing fields, including Higley, and all the necessary equipment to do so. He never lined Higley Field without stringing the yard lines. It might be possible to line a practice field without string, but the quality of work required for the game field demanded that the yard lines be strung before painting. Such work could not be done with less than two workers. The field has four hundred hash marks on the sides of the field and two hundred in the middle. They must be painted by hand. Attempting to do the yard lines by hand invites poor work. Beyond stringing, painting the field alone puts tremendous pressure on a worker’s back, because of the virtually constant bending over the sprayer. Properly lining the field took a work crew an entire work day.

Dean Nelson

Nelson worked in various maintenance positions for the District for thirty-one years, prior to his retirement in March of 2002. Fox was abrupt with employees and with his work assignments. Nelson often assisted in lining the field, and never lined a field alone or observed another employee line the field alone. If weather conditions made time an issue, the work crew could expand from two to three.

Further facts will be set forth in the DISCUSSION section below.

The District's Brief

The District contends that termination of the Grievant's employment is within its authority under Article 20, Section 2. Noting that the agreement does not define "cause", the District notes that the seven tests of ENTERPRISE WIRE CO., 46 LA 359 (Daugherty, 1966) constitute "the most specifically articulated analysis . . . as well as an extremely practical approach." A review of the evidence establishes that the District met each standard.

More specifically, the District argues that it was the Grievant's sole responsibility to remove the stencil from the field including the anchoring drywall screws. Stauss learned of the field's condition prior to the homecoming game on September 30. He was aware that game was almost called, and testified that when he handed the drywall screws to the Grievant on the evening of the game, heard the Grievant acknowledge responsibility. Stauss' report of the incident prompted Fox's investigation. That investigation revealed that the Grievant had assistance removing the stencil and that the persons who assisted him were diligent in their removal of the screws. Their testimony establishes that the Grievant had all the help he needed to properly prepare the field.

The Grievant's placement of the stencil establishes that he, unlike his assistants, took little effort to keep the screws off of the playing surface. Beyond this, Stauss' testimony establishes that the yard lines had not been properly laid out for the homecoming game, and that this was not the first time the Grievant neglected this duty. Witness testimony establishes that the Grievant was in a foul mood on the day of the homecoming game, and had abused District equipment. Union testimony falls short of excusing his job performance. The testimony fails to establish that two employees were necessary to line the field. Under any view, his preparation of the field was inadequate and his attitude toward work unacceptable.

Fox's investigation disclosed further reason to question the Grievant's work, including obscene outbursts directed at District equipment within the hearing of students. Beyond this, the investigation includes past discipline, including a three day suspension in 2003 for poor work performance, including failure to fill out required pool reports; and a five day suspension for failure to fill out pool reports as well as a poor work attitude. Beyond this, the Grievant had been repeatedly counseled concerning his attention to detail, including three conversations with Fox between February 21 and October 6 during which the Grievant was warned that his

job was on the line. Testimony further establishes that the Grievant was the source of numerous complaints from teachers concerning the quality of his work.

This establishes that the District has proven each of the seven standards. Any other conclusion “would result in handing down another ineffective suspension” which would put the “District and its constituents . . . at . . . risk.” It follows that the grievance should be denied.

The Union’s Brief

The Union notes that arbitrators define just cause in various ways, including the Daugherty standards. Under any standard, the District’s case “is woefully deficient.” The discharge rests on six basic accusations, and the Union contends that none will support discharge.

The most serious accusation is that the Grievant’s negligence regarding the drywall screws endangered the safety and health of students and game officials. There is no assertion that this reflects an intentional act. Thus, the issue turns on the degree of negligence involved. This issue turns less on who put the screws there than on who was responsible for their removal, and its resolution must acknowledge that the work was performed at the last minute due to no fault of the Grievant’s. That poor communication occurred between the Grievant and the two employees who assisted him cannot be held solely against the Grievant and will not support discharge. While those two employees removed the stencil, the Grievant worked on a different area of the field. The District’s choice to impose no discipline on anyone but the Grievant is “(a)stoundingly unfair”. Egregiously, it avoids holding Henry responsible in any fashion, in spite of the fact that “he was the last person there.”

Nor will the record support the assertion that the Grievant “failed to respond to warnings of inadequate work performance, and demonstrated wanton disregard for the District’s image.” District concerns with the Grievant’s statements that he did not care manifest a biased investigation and take his remarks out of context. The sole meeting at which the Grievant was afforded an opportunity to explain himself to anyone but Fox was “pro forma” since “the decision to discharge the Grievant was already made.” The prior suspensions considered by the District are not a fair reflection of his work or work ethic. The absence of a grievance on the matters cannot obscure that they afford little support for the discharge at issue here. Fox’s testimony that he repeatedly counseled the Grievant reflects more an intent to intimidate than an intent to correct work performance. In fact, Fox’ direction that the Grievant not string the field is the background to the unfortunate events of the homecoming game.

The Grievant’s testimony establishes that he cared for his job. Past District commendations affirm this, and any deterioration in his work performance is more readily attributable to District layoffs than to the Grievant’s work ethic. Accusations that the Grievant used profane speech in the presence of students are unproven. Ninnemann’s account cannot be reconciled to Fox’ and neither account is plausible in any event. Similarly, accusations that the

Grievant damaged District equipment are unproven. There is no evidence of actual damage. Fox never disciplined the Grievant for the alleged outbursts and could not document them other than by Henry's account, which Fox secured well after the fact. The Grievant's candor regarding his problems controlling his anger cannot be held against him.

The assertion that the Grievant failed to meet District performance standards regarding the maintenance of the football field is the "least significant accusation the District brings against the Grievant." That the lines were not straight is less an indication of the Grievant's work ethic than a reflection of the embarrassment of administrators who sought a scapegoat. Testimony of former District employees establishes that it takes at least two employees to properly line the football field. In spite of this, Fox forced the Grievant to act alone and under impossible time constraints. When the Grievant sought to use string before an earlier game, Fox summarily dismissed the suggestion and warned the Grievant that "he had one foot out the door." Stauss had discussed the condition of the field prior to the Homecoming game with Fox, but Fox took no action.

The grievance poses "a troubling matter." The Grievant cannot be held solely accountable for the "District's own planning and staffing", and should not be made a scapegoat. Rather, the grievance should be granted and "the Grievant be made whole."

The District's Reply Brief

The Union's attempt to avoid placing any responsibility on the Grievant should not be accepted. The suspensions rest on egregious behavior by the Grievant, not Fox. The pool reports were to be forwarded to the State by Fox, but filled out by the Grievant. Similarly, the Grievant's attempt to avoid responsibility for the repair or replacement of the irrigation valves misplaces responsibility. Inadequate staffing cannot alibi for the Grievant's failure to inform Fox that the valve covers were cracked and needed repair. That the Grievant used foul language in the presence of students is demonstrated and inexcusable.

Beyond this, the Union ignores that in spite of receiving assistance in removing the stencil, the Grievant made no effort to check the field's condition, which is his responsibility. That the Grievant insisted on repainting crooked lines cannot persuasively be traced to Fox. His alleged intimidation of the Grievant never involved approving crooked lines or denying the Grievant necessary help. Lack of training or counseling cannot alibi for the Grievant's indifference to his work performance. Nor did the District fail to employ progressive discipline. Whether or not each item of misconduct separately warrants the level of discharge, "in the aggregate (they) clearly surpass it."

The Union's Reply Brief

The District ignores that Fox never conducted "a fair investigation" and allowed the Union no opportunity to do so. Rather, he ambushed the Grievant on October 3. The flawed

investigation did not discover and in fact glossed over disparate treatment. The end result is that a discharge rests on “simple human error” for an incident in which no one was hurt.

Examination of the investigation shows that Fox was biased. He ignored that the lines on the football field were not straight for two weeks, effectively putting the Grievant in a position to fail. Similarly, Fox ignored that the Grievant was assisted in removing the stencil and further that the Grievant was not the last employee to leave the area of the field in which the drywall screws were found. That the lines were not straight obscures that it takes two employees to properly line the field and that the Grievant had no assistance until it was too late in the day to line the field properly. The attempt to focus blame solely on the Grievant has no persuasive record support.

The District mischaracterizes the Grievant’s work record. However it is characterized, there is no history of insubordination as asserted by the District. The “cracked plates” and “teacher complaints” are uncorroborated. The asserted use of progressive discipline ignores that the Grievant was started at a suspension step.

The investigation culminated in a meeting which afforded the Grievant no chance to defend himself, and the assertion that he could have done so is “cynical”. In fact, Fox had never told the Grievant that the condition of the field for homecoming could jeopardize his employment. The record demonstrates that even if the Grievant bears some responsibility for the underlying misconduct, the District “discharged a good 15 year employee.” The Union concludes by asking that “the discharge be put aside and the Grievant be returned to his employment and made whole.”

DISCUSSION

The District’s and the Union’s briefs refer to the usefulness of the “Daugherty” standards. I view this as a stipulation that I should use the seven standards of ENTERPRISE WIRE to structure the determination of “cause” under Article 20, Section 2.

I

Did the District give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee’s conduct?

The record does not pose a significant issue concerning the application of this standard. The Union argues that Fox did not warn the Grievant on October 3 that he was about to undertake an investigation that put the Grievant’s job at risk by October 6. That the Grievant entered the October 6 meeting without realizing that his job was on the line poses issues better addressed under the standards III, IV and V, which govern the integrity of the investigation and its results.

This standard concerns the Grievant's knowledge of the potentially disciplinary implications of his behavior on September 30. It is undisputed that Stauss alerted the Grievant on September 23 that the yard lines on Higley Field were unacceptably crooked. The Grievant does not challenge that the yard lines were not parallel on September 23 or 30. The Grievant's testimony acknowledges that he would have removed the screws had he known they were there. This acknowledges the existence of a disciplinary interest in their presence on the field. In any event, there is no reasonable doubt that the Grievant knew that yard lines should be parallel and that the playing surface should be free of hazards. Beyond this, the Grievant had received two suspensions questioning the quality of his work. Whatever is said of Fox' informal counseling efforts following February 21, there can be no doubt that the Grievant was aware that further discipline put his position at risk.

Thus, the evidence establishes that the District has met the first standard. Union contentions that Fox' counseling efforts were improper or that the events in which the District asserts a disciplinary interest are unproven must be addressed under the remaining standards. This standard addresses no more than the Grievant's awareness of the potential of discipline for his conduct on September 30.

II

Was the District's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of its business and (b) the performance that it might properly expect of the employee?

This standard poses no significant issues. The District's enforcement of safety and quality standards concerning the playing condition of Higley Field is reasonably related to the appropriate operation of its business. It can reasonably expect the Grievant to paint parallel yard lines and to keep drywall screws from the playing field.

This cannot obscure that the Union challenges whether the District failed to appropriately articulate or implement any rule or order that the Grievant violated on September 30. Whether the field could be lined by a single employee without stringing the field and whether the Grievant is responsible for the presence of the drywall screws on the field remain issues to be addressed in the application of the remaining standards.

III

Did the District, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

The strength of the District's case is that the Grievant is responsible for the condition of Higley Field. From this perspective, his conduct warrants discipline whether he was directly responsible for the presence of the drywall screws, or indirectly responsible for failing to

instruct or check on Henry and Erdman. There is no dispute that Fox made an effort to determine whether the Grievant's conduct failed either branch of this interest. He interviewed Henry and Erdman, and became convinced that the installation of the stencil rather than its removal caused the presence of the drywall screws. Fox' and the Grievant's testimony establish that each understood that the condition of the field was among the primary responsibilities of the Grievant's position. No independent effort was necessary to determine this fact. It was an understood function of the workplace.

However, the Union forcefully argues that the District's effort is inadequate under this standard regarding any other purported basis for the discipline. The Union accurately notes that there is no evidence of self-examination on the District's part regarding the condition of the yard lines. Stauss had a brief conversation with the Grievant noting the need to straighten the lines. There is no evidence Fox made an effort to pursue this point as a part of his investigation. There is no evidence Fox or any other District administrator engaged in any examination regarding whether the condition of the yard lines could be traced to a flawed procedure to line the field.

The evidence regarding the other purported bases for discipline is debatable. Fox weighed the credibility of Henry's assertion that the Grievant threw a tantrum in a District vehicle. It is not clear that this assertion was tested prior to October 6. There is no clear evidence that Fox attempted to get the Grievant's side of the story prior to then.

The effort Fox put into determining the validity of Ninnemann's allegations against the Grievant cannot be considered "an effort" under this standard. Ninnemann's and Fox' testimony bear little relationship to each other or to Ninnemann's written statement. That Fox testified that the Grievant swore while at a water faucet attached to the High School building, while Ninnemann testified the Grievant did so while operating equipment at some distance from the building cannot be reconciled to a serious attempt to determine fact. It is difficult to reconcile Ninnemann's testimony that students, studying outside of the building, pointed at him at the time the Grievant swore, with his written statement, which does not mention it. More to the point here, Fox made no attempt question these allegations. Their existence was sufficient for his purposes. Ninnemann's allegations regarding "bodily functions and body odor" warrant no serious analysis here. Fox gave them none during his investigation.

In sum, the record establishes that Fox made "an effort" to determine whether the Grievant properly performed his duties on September 30. It establishes that he interviewed Henry and thus became aware that the Grievant may have treated District equipment abusively earlier in the day. It affords no support for the assertion that he made "an effort" to investigate Ninnemann's allegations or to question whether District procedures may have played a role in the condition of the yard lines on September 30.

Fox' investigation was the preface to the meeting of October 6. At that meeting, the District made "an effort" to obtain the Grievant's side of the story. This prefaces the fourth standard, which addresses the quality of the investigation.

IV

Was the District's investigation conducted fairly and objectively?

Application of this standard highlights the strongest part of the Union's case and the weakest part of the District's. There is some evidence that Fox sought to fairly investigate the issues posed by the events of September 30. He interviewed Erdman and Henry. There is no reason to believe he did anything other than seek and evaluate their recollection of those events. Past that, the evidence regarding the fairness and objectivity of the investigation starts to fray, and then unravel.

It is not clear how, if at all, Fox attempted to investigate Henry's assertions regarding the Grievant's misuse of the truck. The evidence indicates Fox was more concerned on this point with accumulating information damning the Grievant than with finding fact. His handling of Ninnemann underscores that this effort became a central feature of his investigation. As noted above, the variance between the written statement obtained by Fox and the testimony at hearing establishes that the effort to accumulate damning information predominated over any attempt to fairly and objectively find fact. That Fox made no attempt to secure the Grievant's view on these points underscores this, and undercuts the quality of the information obtained on October 6.

The evidence will not support the Union's view that the Grievant was ambushed at that meeting. He had representation. This cannot, however, obscure the force of the Union's arguments. Fox had yet to secure the Grievant's side of the story and had not informed him of the investigation. The Grievant is not as communicative as those he confronted on October 6. It is evident that Fox intimidates the Grievant. This essentially assured that the Grievant's responses would be curt and guarded, and diminished the possibility that the Grievant could provide detail relevant to a determination of fact.

The adverse consequences of this type of procedure are exemplified in Stauss' testimony. When asked at hearing if he supported the discharge decision, Stauss responded in the affirmative, noting the significant role played by the Grievant's comment that he "didn't give a shit." To Stauss' way of thinking, the comment showed that the Grievant had neither the willingness to acknowledge fault nor the motivation to address it. Stauss had, however, no evidence that the Grievant made the statement beyond Fox' assertion. Stauss rested his conclusion on an unsupported assertion. This highlights the significance of Fox' investigation. Decisions flowed directly from it.

This highlights the fundamental force of the Union's arguments, but does not exhaust the evidence on this point. The Stauss example cannot control this standard since the record establishes the discharge decision was made by other administrators. The weakness of the investigatory procedures leading to the October 6 cannot obscure that the meeting did afford the Grievant an opportunity to address the allegations against him. There is no persuasive evidence that Fox controlled the meeting or that the administrators intimidated the Grievant.

More significantly, the weakness of the investigation of circumstances other than the field's condition cannot obscure that the evidence on that matter was largely undisputed. In my view, the meeting afforded the District no reliable basis to assess credibility. If the investigation had unearthed factual issues on which credibility played a significant role, then the meeting of October 6 afforded the District no assistance. The Grievant's candor as a witness was remarkable, and there is no reason to believe it was any less remarkable on October 6.

However, the allegations involve matters on which credibility sheds no light. The Union's arguments overstate the significance of the Grievant's comments concerning his attitude toward his job. What was ultimately at issue was less an attitude than the quality of his work and the likelihood that it could be improved through the imposition of discipline less stringent than discharge. The District's investigatory effort, if flawed in significant respects, was sufficiently fair and objective to yield fact on which there was no meaningful dispute. The condition of Higley Field on September 30 and the circumstances leading to that rest on an investigation sufficiently fair and objective to meet this standard. No aspect of the District's investigation of Ninnemann's allegations can, however, meet this standard.

V

At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

This standard focuses the weaknesses and strengths of each party's arguments. Application of the standard to the evidence highlights the grievance's tragic aspect. The Grievant's testimony was remarkably candid, manifesting a willingness to assume responsibility lacking in all too many disciplinary situations. The Union accurately asserts that the record affords substantial proof that the Grievant cared for his job. As prefaced by the application of the prior standard, there is no substantial proof that the Grievant swore, or otherwise improperly behaved in the presence of students.

The Union's assertion that the District lacked substantial proof that the Grievant "failed to meet District performance standards in the manner in which he maintained the football field" cannot, however, be accepted. Erdman's and Henry's testimony was credible and detailed, establishing that the Grievant gave no instructions on the stencil's removal and did nothing to check the field after its removal. Significantly, their testimony establishes how carefully they attended to the stencil's removal. Henry made sure the box containing the screws remained in the truck. Both took care not to drop any screws on the field. The Grievant's testimony stands in marked contrast. He did not challenge the accuracy of their recall, and acknowledged that he did not tell them how many screws held the stencil because he did not know. When he installed the stencil, he did not keep the drywall screw box in the truck. Rather, he took the box onto the field. His willingness to acknowledge the deficiency of the procedure stands in contrast to that of his supervisor, but cannot obscure that the procedure is deficient and resulted in over a dozen screws being left on the field. There is little, if any, chance that Erdman's or Henry's actions did that. More significantly to the

application of this standard, there is substantial proof that the deficiency in the installation/removal procedure is traceable to the Grievant's conduct.

The condition of the yard lines is similar. Whether or not a proper painting of yard stripes requires more than a single employee, the fact remains that for at least two games, the Grievant left Higley Field with yard lines notably out of parallel. Game officials considered calling off the homecoming game. The Union's attempt to defend this conduct is ultimately unpersuasive. Whether or not the field can be properly lined with a single employee cannot obscure the condition of the field on September 30 or the Grievant's willingness to leave the field in that condition. The contract does not authorize an arbitrator to determine the number or composition of a lining crew. If it is impossible for a single employee to accurately line a field, the Union's defense would be more persuasive if the Grievant had lined as many parallel yard lines as he could, or if he had taken any action to string the field or to secure assistance to do so. Yet there is no evidence that the Grievant sought, or that Fox denied the Grievant any assistance. Rather, the evidence establishes that Fox agreed that restringing the field was appropriate where prior parallel lines could no longer reliably guide a paint sprayer. That Stauss or the Athletic Director did not follow up on Stauss' concern with the field prior to the Homecoming game cannot obscure that the Grievant did nothing to advise Fox of the concern or to do anything on September 30 other than follow lines which he knew were not parallel. Those who confronted the Grievant on October 6 had substantial proof of these points.

Beyond this, the District had substantial proof that the Grievant's conduct on September 30 manifested his personal frustration far more than concern for work quality. The Grievant may not have damaged the truck, but there is substantial proof that he abused it by slamming the door and squealing the tires. These acts are not, in themselves, determinative in the discharge decision. However, when combined with the Grievant's comments to administrators on September 30, October 3 and October 6, they point to a course of behavior arguably rooted less in concern for work quality than in personal feeling. There is, then, substantial proof of the underlying conduct on which the District concluded the Grievant cared less for the quality of his work than he should.

Granting that the record establishes that the Grievant does not bear sole responsibility for the condition of Higley Field cannot obscure that there is no dispute that the field's condition is one of his primary work responsibilities. In sum, the record establishes that the District had substantial proof that the Grievant's conduct on September 30 left the yard lines crooked and resulted in a significant number of six inch drywall screws being left on the field. The District also had substantial proof that the Grievant had, during the course of the day, abused District equipment.

VI

Has the District applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

The Union asserts that the District improperly focused fault for the condition of Higley Field on the Grievant. There is no evidence to compare the District's action toward the Grievant against disciplinary action regarding other employees. The Union's assertion that the District lacked evidence to focus on the Grievant is not persuasive. As noted above, Erdman's and Henry's testimony is credible and the Grievant's does not challenge it. In the causal chain leading to the condition of Higley Field on September 30, only the Grievant and Fox played a significant role. Fox bears the ultimate responsibility for the field's condition, but the Grievant bears the initial responsibility for the work to properly prepare the field. The record contains substantial proof that he failed to do so.

The Union contends that the District made the Grievant a scapegoat. The argument has persuasive force, but falls short of establishing discrimination. As noted above, Fox' handling of the investigation is troubling. The variance between his account of Ninnemann's allegations and Ninnemann's testimony is particularly troubling. Beyond this, it is not clear when Fox became aware of Stauss' complaints regarding the field's condition. Fox' testimony is, at best, unclear. He stated at one point, "two weeks prior to the homecoming Tim Stauss had shared with me that he had gotten - received some complaints . . ." (Tr. at 14). At another point, Fox stated, "They reported to me after the homecoming game that the lines were crooked" (Tr. at 32). Stauss' testimony indicates he did not speak to Fox prior to homecoming. At a minimum, this lack of clarity is troubling.

It does not, however, follow that District failure to discipline Fox reflects discrimination. The most significant evidence on this point is undisputed. The Grievant did not seek help on September 30. Rather, he accepted some assistance offered him. He neither approached Fox, nor any maintenance or cleaning employee to help him line the field. He took no action after his conversation with Stauss to make the yard lines parallel or to advise anyone that he needed assistance to make them parallel. Rather, he chose to follow lines he knew to be crooked. Whether or not Fox intimidated him in an earlier conversation regarding the lining of the field, the discipline rests on the Grievant's conduct alone. District action against Fox could not mitigate that. To test Fox' belief that a single employee could properly line the field, the Grievant needed to take action to properly line the field, even if that meant overtime or getting assistance. His failure to prepare the field properly cannot be traced to Fox under this standard, and the evidence does not manifest discrimination.

VII

Was the degree of discipline administered by the District reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the District?

There is no significant issue regarding the application of (a). The maintenance of Higley Field is among the Grievant's prime responsibilities. The presence of six inch drywall screws coupled with crooked yard lines almost prompted the cancellation of the homecoming game. This poses a significant offense.

The more considerable issue concerns (b). The strength of the Union's position is that the Grievant, a long-term District employee, did not warrant discharge. If there was deterioration in his job performance, the Union asserts that rather than the Grievant's conduct, District cut-backs and the accompanying pressure of under-staffing are the cause.

On this record, the Union's arguments stretch arbitral authority beyond the bounds of the cause analysis. The contract does not specify a series of steps for progressive discipline. There is no evidence of past practice on the point. The Grievant had, as of October 6, two suspensions on his work record. He grieved neither. Each establishes a basis for concern regarding his attention to detail and to the quality of his work. Each establishes a basis for concern regarding his ability to amend his behavior. His representations that he closed a valve later found partially open or that acid had ruined pool reports are troublesome to an assessment of his ability to conform his conduct to supervisory directives. His comments regarding his personal frustration on September 30 are similarly troublesome, even if the District overstates their significance.

Arbitral review under the seven standards is a test of the reasonableness of an employer's decision-making process, not a vehicle for an arbitrator to inject his personal view of employment policy. Under the seven standards, the evidence will not support characterizing the District's decision to discharge the Grievant as unreasonable.

Before closing, it is appropriate to tie this conclusion more closely to the Union's arguments. The Union summarizes the problems underlying the discharge thus:

The Grievant took the fall, not because he did slipshod work, but because his work could have been a problem for Fox. Someone needed to be held responsible.

This puts the tragic aspects of the grievance into focus. As noted above, there are proven reasons to question Fox' treatment of the Grievant. Beyond these, his citation of heavy workload to explain the reason why his secretary had not filed pool reports stands in marked contrast to his suspension of the Grievant. The Grievant's candor as a witness was singular.

However, the discharge does not pose credibility issues shrouding the determination of fact. Rather, it rests on the Grievant's conduct. The evidence establishes slipshod work on September 30. Whether or not to use one employee to line a field is a District decision, not an arbitrator's. Had the Grievant tried to string the field or to seek help to do so, this case could turn in the direction the Union points. The fact remains that the work performed on September 30 was slipshod. This reflects the Grievant's conduct, not Fox'. This does not make the decision any easier or more palatable, but highlights the impossibility of characterizing the District's decision as unreasonable by moving the focus from the Grievant to Fox.

AWARD

The District did have cause to terminate the employment of the Grievant.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 3rd day of August, 2006.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

