BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 986-B, AFSCME, AFL-CIO

and

MANITOWOC COUNTY

Case 399
No. 64499
MA-12920

Appearances:

Neil Rainford, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

James Korom, Attorney at Law, vonBriesen & Roper, appearing on behalf of the County.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2004-2005 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve the grievance of Lynn Steckmesser. A hearing was held on April 24, 2006, in Manitowoc, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on June 26, 2006.

ISSUE

The parties ask:

> Did the County violate the collective bargaining agreement when it suspended the Grievant for three days? If so, what is the appropriate remedy?

BACKGROUND

The Grievant, Lynn Steckmesser, has been a telecommunicator in the Joint Dispatch Center of the County for nine years. She was given a three-day suspension without pay for her conduct on September 15, 2004. The suspension is the subject of this grievance.

Joint Dispatch Center is a 911 service for the County and other cities. Employees dispatch emergency and non-emergency vehicles and answer phone calls. They are given three months of training with a full-time veteran dispatcher, as well as CAD training of 40 hours. Three or four dispatchers work on a shift. The Grievant's job was to dispatch out emergency personnel on medical calls. Dispatchers have a computer screen in front of them that gives them some addresses, types of categories to classify calls, or who to send on calls. The screen could give multiple addresses if the same address exists in two different cities. Dispatchers then have to verify the city or location with the caller in order to send the emergency vehicles to the correct address.

Kay Beilke was the County's administrator for the Joint Dispatch Center until January of 2006. Beilke was the Grievant's supervisor. The Grievant was given a three-day suspension for not verifying an address. The Grievant admitted that she made an error. Beilke's disciplinary notice states:

> On September 15, 2004 at 1906 hours you answered a 911 call requesting EMS service. You entered the address into the CAD system and a choice of two addresses appeared. You did not verify with the caller the correct location per procedure. As a result of this failure to verify the correct address you dispatched an ambulance to the Whitelaw area when you should have dispatched them to the Newton area. This error delayed the ambulance arrival at the scene.
>
> I met with you and Union Steward Laurie Sales on October 11, 2004 to review the incident. At this meeting you admitted that you did not make any attempt to verify the address. And you offered no explanation as to why you did not verify the address.
>
> On October 15, 2004 Nancy Crowley and I met with you in regards to this incident. Lori Klosterman was your Union Steward.
>
> Your disciplinary record shows a continuing pattern of not following policy and procedure. Prior disciplines for similar offenses were issued on December 16, 2004, June 8, 2004 and August 26, 2004. A referral to the Employee Assistance program has already been made. You were given an Employee Performance Report for June 23, 2004 failure to follow procedure.
>
> The decision has been made to issue you a three day suspension for your continued failure to follow policy and procedure on September 16, 2004. This suspension will be effective October 26, 27 and 28, 2004. Future occurrences may lead to continued progressive discipline, up to and including termination of employment.

Beilke determined that the Grievant's offense fell under poor work performance and considered the fact that the Grievant had been disciplined before. She also considered whether the discipline was consistent with that given to other employees with similar records or offenses.

The Grievant testified that in the older computer system, the telecommunicators did not always have a choice when they put in an address even though there might be more than one city with the same address. In this case, the Grievant thought that she did not have any choices and that the address was the right one, but then she got a call back from the people dispatched to that address saying they couldn't find it. She called the complainant back and corrected the address. She should have asked for cross streets but she didn't because she thought she didn't have any choices to make. The Grievant knew that if there were multiple choices of cities, she had to get the cross roads, but that she did not have to get cross roads if there wasn't a choice to be made. In this case, two addresses appeared and the Grievant should have gotten the cross roads from the caller. The Grievant admitted to Beilke that she had made a mistake.

This type of problem occurred regularly, perhaps once a month per shift. The Grievant was aware of this because she would be involved in helping to fix the error. These errors were not brought to the attention of supervisors.

The Grievant's prior disciplinary record shows a verbal reprimand in December of 2003 for failing to page the Manitowoc Fire Department ambulance for a man trapped in a silo. The Grievant had paged the Cleveland 1st Responders and thought she had simulcasted the call to the Manitowoc Fire Department. The Grievant did not file a grievance over this reprimand and she did not make the same mistake again.

A second verbal reprimand was given to the Grievant in June of 2004 for not telling the dispatcher coming on duty that a Kiel Electric employee was out on a call. The dispatchers are to make a status check every 20 minutes on electric workers out after business hours. That did not happen because the dispatcher coming on duty was not told about it and did not learn that an electric worker was out until that worker called in stating they were done for the night. The Grievant did not file a grievance over this reprimand and did not make the same mistake again. Shortly after this incident, the Department created a sheet for telecommunicators to pass information on to other people or cross something off when it was done.

In August of 2004, the Grievant was given an employee performance report regarding sounding the tornado siren. This is not considered to be discipline. It noted that the Grievant made an error in failing to activate the tornado siren.

Also in August of 2004, the Grievant was issued a written reprimand for failing to get information on a vehicle suspected in a hit and run accident. The Grievant got the license plate of the vehicle but not the color of it. She called the caller back to get the color of the vehicle. The Grievant did not file a grievance over this reprimand and has not made that same mistake again.

In this warning, Beilke stated that she was becoming concerned about the Grievant's ability to remain composed and effectively function as a telecommunicator, based on this incident and the incidents in May and June. The Grievant was offered a chance to meet with someone from the Employee Assistance Program. The Grievant went to a couple of sessions with EAP. At that time, the Grievant had trouble getting along with another person and felt that it was stressful to work with that person.

In other disciplinary cases, Beilke issued a written reprimand to an employee in November of 2004 for not verifying an address when dispatching an ambulance. The same employee was issued a verbal reprimand in September of 2004 for dispatching officers to the wrong address.

A probationary employee was given a verbal reprimand in November of 2004 for selecting the wrong address on the computer when given two address choices. Beilke sent the same employee a letter later that month about an incident that occurred in June of 2004 regarding entering a wrong address in the computer. The employee knew it was wrong and corrected it before officers were dispatched. No discipline was issued for that incident.

The Sheriff's Department maintains a policy manual that includes Sec. 1-4-6 called Employee Progressive Discipline. The policy is for supervisors to follow and reminds them that discipline is to be consistent with that given to other employees with similar records and offenses. The supervisor is told to consider whether the employee had been disciplined before. The policy also provides a chart that shows what discipline would be given for a first, second, third, fourth and fifth offense. An offense called "Poor Work Performance" would show a verbal reprimand for a first offense, a written reprimand for a second offense, three days off without pay for a third offense, thirty days off without pay for a fourth offense, and discharge for a fifth offense. The policy covers all Sheriff's Department employees, including the dispatchers, correctional officers, cooks, and clerical staff in the Department. Beilke used this policy in considering the level of discipline for the Grievant, as well as the County's policy manual and the collective bargaining agreement. She also spoke with Sharon Cornils, the County's Personnel Director, as well as Nancy Crowley, the Division Coordinator and Emergency Management Director, before imposing discipline. The Grievant had never seen a copy of this policy before, although she had seen another County policy manual. Employees receive the Represented Employee Policy and Procedure manual yearly and sign a document that they have received it. However, the telecommunicators were not aware of the Department's policy and procedure manual. That manual is given out to correctional officers and deputies. Additionally, Cornils noted that there are task sheets that tell employees how to handle each call appropriately. Cornils knew that Joint Dispatch considered the task sheets to be either policy or procedure, and that discipline was imposed for not following the standard procedure for handling that type of call.

Laurie Sales is a telecommunicator in the Joint Dispatch Center and is also the Union Steward. She agreed with the Grievant that they all had picked wrong addresses at one time or another with the old computer system. She thought it happened more frequently than the Grievant had described. Sometimes they could catch their own mistake and correct it, or they might catch another's mistake. They had to watch it and be extra careful. The problem was also discussed with management, and Sales was certain that management knew that this mistake happened frequently. When Sales talked to Beilke about it, Beilke said she was doing all she could to fix it. After the Grievant's suspension, Sales questioned Beilke about why some people were disciplined for an address mistake or a policy violation and another person was not. Beilke told her that she could only discipline if she knew about the incident. Sales then reported to Beilke address mistakes that the probationary employee had made. That employee was disciplined for one of the mistakes but not for all of them. The problem with addresses was eventually fixed with a new computer system.

THE PARTIES' POSITIONS

The County

The County contends it acted properly in dealing with an employee who failed to carry out a very fundamental component of her job, and thus jeopardized the safety of the public. The County asserts it has met all seven elements of the test for just cause commonly accepted by arbitrators.

The first test is whether the employee could reasonably be expected to have had knowledge of the employer's expectations. The Grievant received on-the-job training and computer training. She admitted she was aware of the public safety implications of her actions, and that when multiple addresses were available, she had to determine from the caller which address was correct. The second test is whether the employer's expectations are reasonable. The County submits that its expectations are reasonable. Despite the Union's effort to suggest that there were flaws in the computer system, there was no connection between any computer glitches and what occurred in this case. The Grievant acknowledged that two addresses did appear on her computer screen. Also, it is reasonable to expect the Grievant to be careful and deliberate when dealing with cases where lives are on the line.

The third test is whether the employer made a reasonable effort to discover whether the employee violated the employer's expectations before issuing discipline. Beilke met with the Grievant and the Steward, and the Grievant admitted to all of the facts. She admitted she violated the policies and procedures. No one offered any extenuating circumstances. The fourth test requires a fair and objective investigation. Beilke showed a willingness to consider extenuating circumstances, taking into account immediate self-correction, or referring an employee to the EAP program. The investigation was fair and objective. The County states it met the fifth test of discovering substantial evidence of the violation, where the Grievant admitted all the relevant facts.

The sixth test – whether the employer applied its expectations fairly and without discrimination – is also met, the County submits. The Union made belated efforts to suggest that other employees engaged in similar conduct but were not held accountable. Supervisors can only act on cases they become aware of. When they become aware of rule violations, they are expected to discipline those known rule violations consistently. That has occurred here. The Grievant kept other employees' violations to herself because she did not want others to get in trouble. The Grievant had previously been disciplined for inattention to detail and deviation from policy or procedure where the safety of the public was jeopardized by her conduct. Beilke consistently applied discipline for employees who engaged in similar conduct.

The seventh test – the penalty – is a tempting target for the Union and the arbitrator. The County submits that there is nothing in the record to warrant a finding that the County's judgment was a serious violation of any concept of fairness. The impact of the employee's conduct, whether intentional or not, is very important in determining how serious the penalty must be to remind the Grievant of just how serious her job is. The Grievant's failure to take the time to focus on the proper address when dispatching emergency medical personnel, and instead relying on the computer, could have had fatal consequences for someone in need of medical services. While this might have been a very minor disciplinary issue for a regular clerical employee, the same cannot be said of this position. The County has not enforced to the fullest extent each and every penalty it could have. The Grievant received two verbal warnings in a row without going to a written warning. She got a nondisciplinary performance report. However, the County could not continue to minimize her conduct where supervisors are told that the failure to use corrective discipline endorses unacceptable behavior. A consistent level of discipline for all employees in this bargaining unit is a laudable goal.

The County notes that the Union suggests that each of the acts of misconduct in the Grievant's disciplinary history is distinguishable from one another. The County would acknowledge that widely disparate types of misconduct should not be lumped together for progressive discipline, and it is true that any type of misconduct might be called "poor work performance." However, every one of the errors here is tied directly to an important public safety aspect of the Grievant's job. The failure to press one button on one occasion and the failure to check for multiple addresses in another case are related to the same underlying problem – inattention to detail when public safety is at stake. The Grievant must understand that when time is of the essence and lives are at stake, she has to be as close to perfect as she can be. This three-day suspension came only after repeated failures to meet that high standard in the past.

The Union

The Union states that the Grievant has a good work record in her nine years with the Department. She had only one verbal warning in her first seven years which was removed from her file and she never committed that error again. The Union submits that there are mitigating factors in this case, such as the computer problems. The computer address selection

system was the source of frequent problems of this same type. The same problem occurred about once a month on the second shift, and Sales testified that it happened even more often on the first shift. Management was aware of the problems with the address selection, but took no steps to alleviate the problem except to tell employees to be more careful. Between September 13, 2004 and November 24, 2004, management issued five separate disciplinary reports to employees regarding problems with selecting addresses on the ill-functioning computer system. Management was aware of the problem with the computer system, and it cannot be allowed to blame the front-line employees and put their careers at risk.

The Union submits that this was the first time in over nine years as a dispatcher, and thousands of calls, that the Grievant allowed the computer address selection system to interfere with her attempts to deliver services. Yet, she was suspended for three days without pay when a probationary employee was issued only a verbal warning for the very same offense. Both employees committed this alleged offense for the first time in their careers. This disparity in the County's disciplinary decisions violates the just cause requirement that employees be issued like discipline for like offenses.

The Union further contends that the Grievant had a stressful relationship with a co-worker. This problem undoubtedly affected her ability to perform at work during this period from late 2003 to 2004 in which her work performance deviated from her record of the seven years prior to that period. Another factor is that the Grievant was working at the County console, which is the third out of four consoles to receive 911 calls. She was very busy with County-based calls and had to juggle those calls while dealing with urgent 911 calls at the same time.

The computer address selection error was at worst a split-second unintentional error in the Grievant's perception of choice that the computer system offered. It was a mistake commonly made by all dispatchers. This calls for nothing more than the least severe form of discipline available – a verbal warning. Two other employees were issued only verbal warnings the first time they had problems with the computer address selection system. The County's Employee Progressive Discipline policy should be disregarded, because it was never seen by the Union before the hearing in this matter. Even so, the table provides examples of improper conduct and levels of discipline in usual cases without mitigating circumstances. The policy also requires that discipline is not to be punitive but to be corrective. The harsh three-day suspension was punitive rather than corrective.

The Union anticipates that the County will claim that this is the fourth related incident and therefore a suspension is warranted. However, each of the four incidents is different. The first involved use of buttons to page multiple first responder services. The second involved remembering to pass on information to an employee coming in to work. The third involved oral communication with a call about the color of a vehicle involved in an accident. The fourth involved a split second interface with the computer's address selection system. Each of the prior warnings had the desired effect of focusing the employee's attention on that fact of the job and the errors were not repeated.

The Union also objects to the County's concept of using progressive discipline for violations of policy and procedure. This is a new super work rule about all things either written down or not written down and expected of employees. That leaves disparate events such as failing to ask the color of a car to tardiness or alcohol and drug abuse. Arbitrators have required progressive discipline to be based on the same or at least similar types of violations of rules for which an employee has been previously warned. There was no previous warning issued to the Grievant that indicated that if she had problems with the computer's address selection system, she would be suspended for three days without pay instead of orally warned. There is no comparability between the types of errors for which the County is attempting to progressively discipline in this instance. If the County were allowed to side step progressive discipline with the policy and procedure loophole, it would mean that all employees would be allowed only four offenses over the course of their careers.

The parties agreed the oral reprimands may only be retained for an additional 12 months if a subsequent reprimand for the "same offense" is issued within the 12 months that followed the first reprimand. That is a clear indication as to how the parties see moving from an oral warning to a written warning. The parties did not indicate that the oral warning could be retained if there was a "similar" or "related" offense. This should restrict the County from rewriting the progressive discipline procedure by creating the policy and procedure work rule that allows for progressive discipline for offenses that are not the same.

DISCUSSION

The collective bargaining agreement provides in Article 5 that employees may be disciplined for just cause, and it is understood and agreed that progressive discipline shall be followed. It is unnecessary and probably improper for the Arbitrator to look at the Sheriff's Department manual to determine whether the suspension was proper in this case. The disciplinary policies in that manual were not bargained into the contract, they were not distributed to employees, and the County does not rely on them ultimately anyway. The manual appears to be nothing more than a guide for supervisors. The supervisor did not strictly follow it anyway and did not always move each disciplinary notice to a higher level.

The Union's contention that the flaws in the computer system should be considered to be a mitigating circumstance is misplaced. The Grievant admitted that she made an error on the address and the computer offered her a choice of cities – she just didn't see it the first time she put the address in. She thought that the computer would not be giving her a choice of cities, so she did not verify the address with the caller. When she went back to try it again, the computer showed two choices. The fact that the computer system had been giving all dispatchers much grief did not in fact cause the error that resulted in the discipline here.

Also, whether or not a co-worker was causing so much stress that the Grievant could not function well in her position is not an issue. The Grievant admitted at the hearing that the co-worker had no effect in the mistake. The fact that the Grievant was working at the third console, the County console, and the call came through there when she was busy, does not mitigate the mistake. Telecommunicators are trained to work under pressure. Thus, I disagree with the Union's arguments that there were those mitigating factors to either overturn the discipline or soften its blow.

However, the Union makes a valid point in that the County has used a pretty broad brush by calling all incidents a violation of policy and procedure. The Union is correct in that everything could conceivably be categorized as policy and procedure, and four to five minor offenses could shove someone out the door. The County could narrow it down a little better. Calling the mistakes "poor performance" is also a little broad. Nonetheless, employees know what they are supposed to do and that errors will bring discipline. The types of errors here that have resulted in verbal and written warnings and a suspension would not warrant much discipline in other jobs. But telecommunicators cannot afford to make errors when there are emergencies.

There is no real dispute here that the Grievant made a mistake. It was not intentional, it was just a mistake. She admitted it and did not try to shift the blame around. There is no real dispute that discipline can be handed out for mistakes on the job. The only dispute is whether a three-day suspension is excessive and whether it is consistent with what other employees have received for the same or similar types of mistakes.

Once it is determined that some discipline is appropriate, arbitrators should hesitate to second guess the level of discipline imposed. If arbitrators were likely to reduce penalties in arbitration, unions would take every disciplinary action to arbitration. The penalty should be reduced only if it is found to be excessive, unreasonable, arbitrary, and capricious or that management has abused its discretion.

The Union is arguing that the penalty is excessive or unreasonable on two grounds. One, this is the first time the Grievant made this mistake in not verifying the address. Two, other people making the same mistake received only a verbal reprimand. Both of these arguments beg the question of whether the County's use of progressive discipline was proper or an abuse of its discretion, because the other people disciplined were not in the same posture or progressive disciplinary chain as the Grievant.

The Union believes that for progressive discipline to take place, the Grievant would have had to make the exact same mistake in the past and have been disciplined for it. This is not true. If it were true, an employee could make hundreds of mistakes – none of them the same – and never receive more than a verbal reprimand. Surely an employer must have the

capacity to deal with an employee who makes too many mistakes. At some point, an employee making lots of mistakes – whether or not they are the same mistakes – is simply incompetent, and an employer does not have to tolerate that. Thus, the County was within its proper use of discretion to give progressive discipline for mistakes that were similar in nature.

The Grievant received a verbal reprimand for failing to page an ambulance in an emergency, and then she got another verbal reprimand for failing to tell the dispatcher coming on the shift about an electric worker out on a call. Then she was given an employee performance report, which despite its negative tone, is not disciplinary. Then she was given a written reprimand for failing to get the color of a car involved in a hit and run accident. The first verbal reprimand and the last written reprimand before this case involved emergencies. The second verbal reprimand was also a safety measure issue, certainly for the electric worker. The prior disciplinary actions started in December of 2003 and ran through August of 2004. Beilke noted in the last written reprimand that she was becoming concerned about the Grievant's ability to remain composed and function effectively as a telecommunicator. Given the fact that the Grievant had a long term of service without problems, the supervisor could well take notice of a number of mistakes coming in less than a year. It was the reason the supervisor referred the Grievant to the Employee Assistance Program. Then in September of 2004, the Grievant made the address mistake which is the subject of this disciplinary action at issue now.

The Grievant is not being disciplined for any misconduct, and she appears to be a very conscientious employee that has much value to the County. However, the succession of errors gave the County reason enough to impose progressive discipline. The County did not immediately jump to higher steps in each instance. There were two verbal reprimands before the written reprimand.

Having determined that progressive discipline was appropriate, the question of disparate treatment is readily answered. The other people disciplined for the same mistake that the Grievant made were not in the same position as the Grievant. The County used progressive discipline with Cathy Peters.

That leaves the final question of whether the disciplinary action of a three-day suspension is excessive, unreasonable, arbitrary, capricious or an abuse of discretion. If this were a clerical job, this type of mistake would not warrant much, if any, discipline. However, telecommunicators cannot afford to make many mistakes in their jobs where the safety of other people is on the line. Thus, the County takes these mistakes more seriously. The Grievant's mistake was significant enough to cause the EMT's to go to the wrong location. I must note here, as an aside, that I disagree with the County's argument that the impact of the employee's conduct is important in determining how serious the disciplinary penalty must be. An employee could be slightly negligent and the impact could be great, or the conduct could be grossly negligent with little or no impact. Therefore, I am inclined to look more at the conduct itself, the prior conduct, and the total circumstances rather than the impact. The three-day

suspension would not have been my first choice (the County could have considered a one-day suspension or something between a written reprimand and a three-day suspension). But it becomes difficult to say that the difference between the choices of disciplinary measures of reprimands and short-term suspensions are unreasonable and excessive. The loss of pay is significant and somewhat harsh, but there is a difference between a harsh measure of discipline and one that is clearly excessive and unreasonable. This suspension is not clearly excessive or unreasonable or arbitrary. While the Union has reason to fear that future mistakes could cost this employee her job, the County still has a wide range of options available in order to keep this employee. All in all, the discipline should not be overturned.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin, this 5th day of September, 2006.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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