

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CITY OF ADAMS EMPLOYEES' UNION,
LOCAL 323, AFSCME, AFL-CIO**

and

CITY OF ADAMS

Case 17
No. 65462
MA-13229

(Terry McConnell Grievance)

Appearances:

Mr. Bill Moberly, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison Wisconsin 53717-1903, on behalf of the Union.

The Pollex Law Office of LaRowe, Gerlach & Roy, LLP, by **Mr. Eric J. Pollex**, 313 Main Street, P.O. Box 255, Friendship, Wisconsin 53934-0255, on behalf of the City.

ARBITRATION AWARD

City of Adams Employees' Union, Local 323, AFSCME, AFL-CIO (herein the Union) and the City of Adams (herein the City) are parties to a collective bargaining relationship and, at all times pertinent hereto, were parties to a collective bargaining agreement covering the period January 1, 2003 to December 31, 2005, which provided for binding arbitration of certain disputes between the parties. On January 4, 2006, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the suspension of Terry McConnell (herein the Grievant). The undersigned was selected to hear the dispute and a hearing was conducted on June 28, 2006. The proceedings were not transcribed. The parties filed their briefs on September 5, 2006, and advised the Arbitrator on September 22, 2006 that they would not file replies, whereupon the record was closed.

ISSUES

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

Did the City have just cause for its discipline and suspension of Terry McConnell?

If not, what is the appropriate remedy?

The City would frame the issues as follows:

Was this a major offense or did the City have just cause for the discipline of Terry McConnell?

If not, what is the appropriate remedy?

The Arbitrator frames the issues as follows:

Did the Employer have just cause to suspend Terry McConnell for four weeks without pay?

If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 19 – EMPLOYER’S FUNCTION

19.01 **Functions of Management:** The Union recognizes that except as herein provided, the Employer has the right to manage and direct the work force. This right includes the following: to subcontract work, provided that jobs historically performed by members of the bargaining unit shall not be subcontracted and further provided that no present employees shall be laid off or suffer a reduction of hours as a result of subcontracting; the determination and direction of the work force; the right to plan, direct, and control activities; to schedule work and assign workloads; to determine methods in work to maintain the effectiveness of the Employer; to determine the employee competence; to create, revise, and eliminate positions; to establish and require observance of reasonable rules and regulations; to select and terminate employees and to discipline and discharge employees for just cause.

APPENDIX A WORK RULES

1. The City is vested with the right to adopt and put into effect rules and regulations. Such rules and regulations shall be posted for a minimum of five (5) workdays in overlapping weeks.

2. When the City, at any time, adopts a new rule or modifies or changes an existing rule, such new rule and such change or modification shall be posted on the bulletin board. Upon the posting such rules, it shall be interpreted as giving notice to all employees. The City will not adopt any rules in conflict with this Agreement. All new future rules and regulations will be subject to discussion between the City and Union.

OTHER RELEVANT PROVISIONS

ADMINISTRATIVE RULES

HOURS OF WORK AND PAY PERIODS

. . .

3. Time form. All employees time for pay purposes will be computed from information on the individual's time form. The time form validly recorded will indicate the information for which all employees will be paid.
 - a. The City Clerk/Treasurer transcribes the hours-worked information directly from the time forms and the employee's pay is based on this information.
 - b. Employees will fill in only their own time form. Any employee who deliberately fills in another employee's time form or falsifies his own time form will be subject to discharge.
 - c. Each employee shall sign his or her time form at the end of each pay period.

. . .

BACKGROUND

The Grievant herein, Terry McConnell, has been employed by the City of Adams Public Works Department since 1997. The normal work day for Public Works employees is from 7:00 a.m. to 3:30 p.m. Pursuant to City work rules, employees are to maintain three different time sheets to record their daily activities and hours worked. There is a regular timecard, which is to be punched at the beginning and end of each shift, with the actual number of hours worked to be noted by hand. Additionally, employees fill out daily and weekly time sheets, on which they note their activities, number of hours worked and any hours which are used for sick leave, vacation, etc. These time records are used by the City to prepare the payroll and track employees' leave usage and available balances.

On Thursday, September 15, 2005, McConnell did not report for work at 7:00 a.m. as he had an appointment with an eye doctor in Madison that morning. McConnell did not give written notice of the appointment, but claimed to have verbally notified Public Works Superintendent Dave Mead on September 12. Mead could not recall the conversation, but McConnell's statement was corroborated by two other Public Works employees, Ron Wolf and Bruce Bain, who were present. McConnell arrived for work sometime during the late morning on September 15, did not check in with Mead or punch in, but met with Bain and proceeded to assist him with trimming trees for the balance of the shift. At the end of the shift, McConnell punched out and wrote down 8 hours of regular work time on his timecard and daily and weekly time sheets. He also noted on his daily time sheet that he was trimming trees from 7:00 a.m. until 3:30 p.m.

Also on September 15, City Administrator Robert Ellisor received a complaint from City Councilman Warren Laquee about the poor condition of the trees and lack of adequate pruning. Ellisor and Laquee toured the city and observed the condition of the trees together, at which time they observed McConnell in a City truck. Then Ellisor advised Mead of the tree problem and the need to attend to it, whereupon Mead indicated that McConnell, who was the City Forester, had not come to work that day, at which point Ellisor said he had seen McConnell when he and Laquee were inspecting trees. Ellisor and Mead determined to address the productivity issue with Bain and McConnell and also discuss McConnell's absence on the following Monday. Both Ellisor and Mead noted that no start time had been recorded on McConnell's timecard for September 15.

On Monday, September 19, Ellisor and Mead met separately with McConnell and Bain, with fellow bargaining unit member Jeff Moore present as a Union representative. During the meeting McConnell and Bain were presented with questions about their activities on September 15, to which Ellisor noted the responses. McConnell stated that he had come to work late due to his doctor's appointment, which he had previously mentioned to Mead. He also stated that he punched his timecard on arrival. He also stated that he had filled out a time sheet and work report for September 15 and had done so truthfully. Both McConnell and Bain stated they had been trimming trees together, although their recollections of what streets they had worked on differed somewhat. After the initial meetings, Mead checked McConnell's timecard again and noted the addition of a handwritten start time of 11:00 a.m. on September 15, and that the handwritten note of 8 hours worked for that day had been altered to 5 hours worked and 3 hours of sick time. Later on September 19, Ellisor met again with McConnell and Moore and asked McConnell whether he had altered the timecard. McConnell denied altering the card and claimed to have made the entries on September 15.

Subsequent to the meetings with McConnell on September 19, Ellisor met with the City Personnel Committee and recommended that McConnell be suspended for his violations of work rules regarding advance notice of planned sick leave and falsification of his time records. The Personnel Committee recommended McConnell's termination. The matter was then considered by the City Council, which, on September 20, issued McConnell a two-week unpaid suspension, based upon the severity of the infractions and the fact that McConnell had

received a verbal reprimand 20 months earlier. The Council further notified McConnell that its investigation would continue into the veracity of his statements regarding his whereabouts on September 15 and that additional discipline, including termination, could result. On October 5, the City extended McConnell's suspension an additional two weeks based on its finding that McConnell had deliberately falsified his time records. On September 23, McConnell grieved the discipline and the matter proceeded to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The City

The City maintains that it was justified in suspending the Grievant for four weeks based on his violations of City policies. He violated the City Code of Ethics by claiming to have completed an assignment of trimming trees when the evidence indicates that little tree trimming was done and he and the employee working with him were inconsistent in their statements about where they were working. This circumstance initiated the investigation into the Grievant's conduct.

He also violated the tardiness policy and documentation of absences, by not filling out a leave slip for his doctor's visit or checking in with his supervisor on his return. His lack of productivity and violation of the tardiness policy alone justify his suspension, but they were not his sole offenses. He also violated City policy regarding his time entries by making inaccurate entries on his time forms. Multiple mistakes in his time entries lead to the conclusion that they were deliberate. He has, therefore, lied throughout this process, which justifies the City's action in suspending him.

The Union

The Union denies that there was just cause to suspend the Grievant. The initial suspension notice cites violations of two City administrative policies – he was alleged to have falsified his time form and he was alleged to not have given advance notice of his doctor's appointment on September 15 and properly documenting it on his time sheet. The Grievant did verbally inform Superintendent Dave Mead of his appointment on September 12, which was corroborated by Ron Wolf and Bruce Bain. Mead, himself, testified that it was possible McConnell had notified him and he had forgotten it.

The allegation of falsification of his time reports is related to errant entries for September 15. These entries were honest mistakes, made more likely by McConnell's learning disability, of which his co-workers were aware. Further, it is not reasonable to assume that McConnell changed his hours worked on September 15. It was more likely done by Clerical Assistant Patty Buttner, who testified that she often corrects entries for employees when there are mistaken entries. McConnell's repeated mistakes show his difficulty with numbers. Management could have confronted McConnell about his failure to clock in on September 15,

but they didn't and instead tried to trap him by asking when he came to work on September 15. There are reasonable explanations for McConnell's mistakes that don't involve misconduct and his suspension wasn't justified.

DISCUSSION

This is a just cause case. Article 19, Section 19.01 of the contract lists as among the powers of management, "...to select and terminate employees and to discipline and discharge employees for just cause." The City contends that the Grievant violated certain work rules contained in the City's Administrative Policies and Code of Ethics, as well as certain provisions of the collective bargaining agreement, which merit the Grievant's four-week suspension. The Union contends that there was not just cause for discipline. With respect to the application of the just cause standard, this arbitrator has stated, "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." WOOD COUNTY, WERC Case 162, No. 63666, MA-12663 (Emery, 5/10/05). Therefore, the inquiry here will be first, whether the Grievant committed acts meriting discipline and, second, if so was the degree of discipline imposed commensurate with the offense. Furthermore, the burden of proof as to both elements lies with the City.

On September 20, 2005, the City issued a Notice of Suspension to the Grievant, stating as follows:

NOTICE OF SUSPENSION

Applicable Work Rules

Section 2-5-5 of the Code of Ethics states

- (a) Officials and employees should adhere to the rules of work and performance established as the standard for their positions by the appropriate authority.

Page 26 of the Administrative Policies contains provisions relating to Work Hours and the documentation thereof. Paragraph 3 states

Time Form. All employees time for pay purposes will be computed from information on the individuals time form. The time form validly recorded will indicate the information for which all employees will be paid. (b) Employees will fill in only their time form. Any employee who deliberately fills in other

employee's time form or falsifies his own time form will be subject to discharge.

Page 27 of the Administrative Policies states:

Every effort must be made to call your Department or the City Clerk/treasurer's Office if you find that you will be late for work. The circumstances of tardiness must be unavoidable. Your record of attendance and punctuality is important to you, as it will be a factor in regard to future references, consideration for promotions, salary increases and your retention as an employee. Repeated experiences of absence, tardiness, or leaving early without verifiable cause or permission, along with failure to provide proper notice to the Department Head are sufficient cause for termination.

Description of Infraction

No notice was given of any doctor visit contrary to 6.03 of the Labor Agreement. It is required under page 30 of the City Personnel Administrative Policies that you must accurately document any such sick leave on your time sheet. This was not done.

The City is hereby requesting doctors statement under 6.02 and 6.06 of the Labor Agreement.

Initial investigation disclosed that you did not report to work on time on 9/15/05. You did not forewarn your Department Head. You did not accurately document your time on your time submissions. You misled the City regarding your whereabouts and the work you performed at what times. These issues were discussed with you in the presence of a union representative. These issues were brought to the City Personnel Committee which recommended termination.

Determination

You have received verbal warnings for work rule infractions. Your personnel file has a reprimand that is less than 2 years old. Pursuant to page 24 of the Administrative Policies and given the severity of the infraction you are hereby suspended for 2 weeks effective 9/21/05. You will not be paid during this suspension. During the term of this suspension the City will be investigating the infraction further and determining the veracity of your statements as to your whereabouts on the day in question and determine if further disciplinary action is warranted, including termination.

On October 4, 2005, the Grievant was issued a Notice of Employment Discipline, which extended the initial suspension by an additional two weeks, and which stated, in pertinent part:

DESCRIPTION/REMARKS

On September 20, 2005, Notice of Suspension was issued to employee, Terry McConnell, for work rule infractions (attached). The City of Adams Personnel Committee recommended termination, pending investigation and verification of employee conduct that was in violation of the City's Administrative Policies. Upon investigation of the infraction(s), it is conclusive that the employee's time form was knowingly falsified on two occasions. Administrative Policies state: "...(b) Employees will fill in only their own time form. Any employee who deliberately fills in other employee's time form or falsifies his own time form will be subject to discharge."

In view of the flagrant and conscious falsification of the employee's time form it is determined that just cause exists for discharge in accordance with the above referenced policy. However, the decision has been made to extend unpaid suspension for two additional weeks effective October 5, 2005.

The initial suspension appears to have been predicated on four separate occurrences of wrongdoing on the Grievant's part: 1) failure to give notice of his doctor's appointment, 2) failure to notify his supervisor that he would be late to work on September 15, 3) misleading statements about his location and the work he did on September 15 and 4) falsification of his time records. The City also reserved the right to increase the discipline pending the results of further investigation of the incident and veracity of the Grievant's statements.

The Grievant denied that he did not give notice of his planned absence for the appointment, or that he did not truthfully relate his work activities for September 15. Further, while he admits to putting inaccurate information on his time records, he claims this was due to confusion and a learning disability that makes it difficult for him to work with numbers. He also denied making an alteration on his time card to change a notation of 8 hours of regular time to 5 hours of regular time and 3 hours of sick time.

Subsequent to imposition of the suspension, the City obtained statements from Department employees Ronald Wolf and Bruce Bain corroborating the Grievant's claim that he had informed Department Superintendent Dave Mead about his appointment on September 15. Both Wolf and Bain gave written statements on September 21 that they overheard the Grievant tell Mead about the appointment on September 12 and that Mead had responded to the effect that the Grievant needed to be back by that evening to participate in hydrant flushing. Both men also testified to that same effect at the hearing. Further, Mead also testified and, while he did not specifically recall the conversation, did not dispute the testimony of Wolf and Bain that it occurred. It would appear to me, therefore, that the City has failed to sustain its burden on

the matter of the Grievant failing to give prior notice as to his appointment and anticipated absence.

Prior to the suspension, the City Administrator interviewed the Grievant and Bain, who had worked together on September 15, separately to determine their activities on that day because of the complaints received about the poor quality of tree trimming that had led to initiation of the investigation. Bain and the Grievant both claimed to have been trimming trees together after the Grievant arrived at work, but gave conflicting accounts about what streets they had worked on. This is apparently what is referred to in the suspension notice regarding misleading the City as to his whereabouts and the work he performed. It is notable, however, that the record does not indicate that Bain's account was any more accurate than the Grievant's on that point. In fact, the testimony of City Administrator Ellisor was to the effect that he was dissatisfied with the responses of both men because the amount of work that they appeared to have done did not track with either their statements or with what Ellisor considered a reasonable expectation for the amount of time they had spent. Nevertheless, so far as the record indicates this did not result in any discipline being issued to Bain. To the extent that the discipline of the Grievant was based on misleading statements about his work on September 15, or the unacceptable amount thereof, therefore, the City's justification is undercut by the fact that Bain apparently escaped penalty for the same conduct.

The alteration of the time records, however, is a different matter. The record is replete with evidence that the Grievant recorded false information on his time records regarding this event on at least four occasions. Initially, he did not punch in on the time clock when he arrived at work on September 15. At the end of the shift he punched out at 3:28 p.m. and hand wrote on the time card that he worked 8 regular hours. These discrepancies were noted by Mead later on September 15 and again on September 16. In addition, the Grievant filled out a daily work sheet, detailing his activities on September 15, on which he stated that he had been trimming trees from 7:00 a.m. until 3:30 p.m. equaling 8 hours of regular time. He further filled out a weekly worksheet showing 8 hours of regular time working forestry detail on September 15. Finally, when confronted by Ellisor and Mead on September 19, the Grievant claimed to have punched in on September 15, but after the meeting added an 11:00 a.m. start time for September 15 by hand and changed the notation of his hours worked from 8 hours of regular time to 5 hours of regular time and 3 hours of sick time. The Grievant accounted for these discrepancies by stating that he does not work well with numbers and so only writes on his time sheets what his co-workers do. I find the Grievant's explanation insufficient.

In the first place, his failure to clock in on September 15 and later addition of his start time by hand are not explained by his claimed disability, nor is his changing of the handwritten 8 hours of regular time for September 15. When he punched out on September 15 he knew he had not worked a full shift due to his appointment, so, instead of just writing down the same thing Bain did, it would have made more sense for him to ask Bain to help him fill out the card correctly, rather than to put down numbers he knew to be false. It is more likely that he just did not expect anyone to follow up. Likewise, when he filled out his daily and weekly

worksheets he knew the hours he was recording were incorrect and yet he did not ask for help to make the correct entries, again presumably assuming no one would check. It is also noteworthy that, despite his claimed difficulty with numbers, on September 16 the Grievant worked 6 regular hours and took two hours of floating holiday, but appeared to have no difficulty recording these entries correctly on his time card and weekly worksheet. I do find, therefore, that the City's allegations of falsification of his time records are substantiated and do constitute just cause for discipline based upon the applicable work rules.

The two-week suspension given on September 20 appears to also be in part due to the fact that the Grievant has a previous reprimand in his record for a work time violation in 2004, in that on that occasion he took a 45 minute break when only 15 minutes is permitted. I concur with the City that deliberate falsification of time records is a serious offense and the record here suggests that the Grievant's actions were intentional rather than mathematical errors. Further, the applicable work rule clearly indicates that falsification of time records is a dischargeable offense, which the Grievant should have known. I also do not find credible the Grievant's claims that his subsequent denial of wrongdoing in this regard was do to confusion rather than an attempt to prevaricate. Therefore, in light of his past discipline for a previous work time violation, I do not think the two-week suspension meted out on September 20 is so unreasonable under the circumstances that justice requires that it be remitted.

I am concerned, however, about the additional two weeks that were added to the suspension on October 5. The initial suspension notice clearly states that additional penalties may be assessed based on the results of further investigation. The testimony at hearing, however, revealed that further investigation did not discover any additional material facts adverse to the Grievant than were known at the time of the initial suspension. In fact, after the original suspension was imposed the City obtained information in the form of Wolf and Bain's statements, as well as a statement from the Grievant's doctor, that corroborated the Grievant's claim that he had given prior notice of the exam and his intent to be gone on September 15. If anything, therefore, this should have mitigated the penalty, rather than exacerbating it. My sense, therefore, is that the City merely concluded that it had not initially penalized the Grievant enough on September 20 for what it regarded as an offense meriting discharge and so decided to double the penalty. Given the City's statement in the suspension notice that additional penalties would be contingent on discovering more wrongdoing, I find this action to be inappropriate and unreasonable under the circumstances. Having initially meted out a penalty for the Grievant's misconduct that the City considered appropriate based upon its knowledge at the time, the City acted arbitrarily in later increasing the penalty despite finding no further wrongdoing. Based on the foregoing, therefore, and upon the record as a whole, I hereby enter the following

AWARD

The Employer had just cause to suspend Terry McConnell for two weeks without pay, but acted arbitrarily and improperly in extending the suspension for an additional two weeks. The City shall, therefore, remit to McConnell two weeks' pay at his then rate of regular pay, and any other employment benefits withheld during that time.

The Arbitrator will retain jurisdiction for an additional thirty days to resolve any disputes arising in the implementation of this award.

Dated at Fond du Lac, Wisconsin, this 20th day of December, 2006

John R. Emery /s/

John R. Emery, Arbitrator

