

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**SUPERIOR CITY EMPLOYEES' UNION,
LOCAL 235, AFSCME, AFL-CIO**

and

CITY OF SUPERIOR

Case 205

No. 67920

MA-14052

Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin 54864, on behalf of the Union.

Ms Cammi Koneczny, Human Resources Administrator, City of Superior, 1316 North 14th Street, Superior, Wisconsin 54880, on behalf of the City.

ARBITRATION AWARD

Superior City Employees' Union, Local #235, AFSCME, AFL-CIO (herein the Union) and the City of Superior (herein the City) are parties to a collective bargaining agreement dated January 5, 2006 and covering the period from January 1, 2006 to December 31, 2008. On April 10, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the disciplinary suspension of Al Nord (herein the Grievant). The parties jointly requested the undersigned to hear the dispute and a hearing was conducted on June 30, 2008. The proceedings were not transcribed. The parties filed initial briefs by August 11, 2008, and reply briefs by October 6, 2008, whereupon the record was closed.

ISSUES

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

Did the Employer have just cause to give the Grievant a three day unpaid suspension?

And if not, the appropriate remedy is to make the Grievant whole for any and all lost wages and benefits due to this action. The Employer is to furthermore, remove any and all references of this action from the Grievant's personnel files.

The City would frame the issues as follows:

Did the City violate the AFSCME Union Local #235 Contract, Article 10-Dismissals, when suspending All Nord for three days without pay?

The Arbitrator characterizes the issues as follows:

Did the Employer have just cause to give the Grievant a three day unpaid suspension?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 10 **DISMISSALS**

- 10.01** The City of Superior agrees that it will act in good faith in the discipline or discharge of any employee. No employee will be disciplined or discharged except for just cau
- 10.02** In the event a disciplinary action is taken against any Union employee, a notification of such action shall be given in writing to the employee and the Union stating the reasons said action shall be taken and when it will commence.
- 10.03** All disciplinary action and discharges shall be subject to the grievance and arbitration procedure of this Agreement.

The City uses counseling, oral and written reprimand, suspension, demotion and dismissal as progressive discipline measures as appropriate to resolving issues of discipline.

BACKGROUND

Albert Nord is a Data Processing Technician for the City of Superior and has been an employee of the City and a member of AFSCME Local #235 since August 1998. Prior to that time, Nord worked in information technology in the private sector and the military and has received extensive training in computers. In his current capacity, he provides computer

technical support and trouble-shooting services for City departments, as well as some Douglas County agencies through a shared services agreement, which includes updating software, eliminating viruses and repairing malfunctioning computer equipment and programs. Since 2005, Nord has come under the scrutiny of management for various performance related issues. In July 2005, as well as May 2007, Nord received performance evaluations from Information Services Supervisor Dan Shea, noting in each case that Nord needed improvement in the areas of communication with clientele and satisfactory completion of tasks. In addition to meetings during this time period to discuss performance and behavior issues, Nord received a written reprimand on February 16, 2006 for poor communication, going beyond the requested service when working on computers and creating more problems. On April 26, 2007, he received a one day suspension for work quality and workplace language issues. On November 2, 2007, he received a written reprimand from the Mayor for using threatening language in the workplace.

On November 5, 2007, the County received complaints from Sheriff Thomas Dalbec regarding Nord, raising three particular issues: 1) Nord was alleged to have removed Deputy Charlie Law's laptop computer from his work area on November 2 without Law's permission and without notice, 2) due to a history of allegedly unsatisfactory performance on Sheriff's Department computers, Dalbec requested that Nord no longer be assigned to work on Sheriff's Department computers, and 3) Dalbec complained about Nord's "loitering" in the Sheriff's Department and asked that he be told that it is unwanted and unwelcome. On November 29, 2007 Finance Director Jean Vito and Shea met with Nord and Union President Edward Lambert to discuss the Sheriff's complaints. Subsequent to that meeting, on January 14, 2008, Vito issued a three-day suspension without pay to Nord for January 15, 16 & 17, as a result of the Dalbec complaint, a separate incident the previous summer where Nord had supposedly worked on a police detective's computer without authorization and the previous disciplines issued to him. On January 15, 2008, the Union filed a grievance on Nord's behalf seeking to have the discipline removed from Nord's record and to have him made whole. The grievance was denied and was advanced through the contractual grievance procedure to arbitration.

Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The City

The City asserts that Al Nord's performance problems have been documented since 2005. He has also received progressive discipline for poor performance and communication problems, including a written reprimand on February 16, 2006 and a one day suspension on April 25, 2007. He has also been counseled at various times about these problems and has been given directives on the areas in which he needs improvement. Many of the Union exhibits attest to Nord's technical abilities, which are not in issue. Rather, it is his inattention to detail, difficulty finishing projects and poor communication with other employees that are matters of concern.

On November 2, 2007, Nord undertook to work on Deputy Charlie Law's laptop without his permission. He began working on the computer at Law's work station while he was away and when he couldn't solve the problems he took the computer without notifying Law. Nord later claimed to have left Law a note, but did not mention the note or produce a copy until more than a month had passed, even though management spoke to him about the incident on two different occasions during that period. This incident prompted the Sheriff to request that Nord not be assigned to work on Sheriff's Department computers in the future and that he not loiter in the Sheriff's Department. Management met with Nord and Union representation on November 29, prior to his suspension, but Nord claimed he could not remember the meeting or anything said there, including his admissions of wrongdoing, which were documented. In all, his credibility is questionable and, given the history of progressive discipline, the three-day suspension was warranted.

The Union

The Union contends that the suspension was imposed without just cause. The three issues cited by the City justifying discipline were the removal of Deputy Law's computer without his knowledge, the Sheriff's request that he no longer work on Sheriff's Department computers and the charge of loitering in the Sheriff's Department.

As to Law's computer, the Union asserts that Nord only worked on it a short time while Law was not there, which is preferable. He removed the computer and took it to his office in the same building for only twenty minutes and left Law a note explaining what he had done and providing his office and cell phone numbers. Other employees were aware that Nord had removed the computer. While in his office, Nord discovered and removed a virus from the computer. When Nord returned the computer, Law was still gone from his desk. The work Nord did on the computer is a testament to his diligence. Further, the City relied on the complaints of Deputy Law and Sheriff Dalbec in issuing the suspension, but did not call either to testify at the hearing.

The absence of the Sheriff at the hearing also casts doubt on the significance of his other concerns. If he had such grave concerns about the quality of Nord's work, he should have appeared to testify. His absence suggests that his concerns were not so serious and perhaps that he does not fully appreciate the difficulty of Nord's job. Further, the complaint of loitering is a minor issue, at best. In the real world, employees talk to each other all the time and many Sheriff's Department employees are Nord's friends. It is also notable that Nord continues to work in the Sheriff's Department, which raises a question as to whether there is really a problem.

The City in Reply

The Union fails to address the central issues surrounding Nord's suspension, which center on a history of work performance concerns, counseling for them and progressive discipline to correct them, which have not been successful. He does not adequately

communicate with those whose computers he works on, as evidenced by his removal of Deputy Law's computer without permission or notice. This is unacceptable given the importance of computers in the workplace and, in particular, the Sheriff's Department. Likewise, the concern over loitering in the Sheriff's Department is an ongoing problem, evidenced by previous admonitions to Nord to stick to his work, to leave socializing for breaks and to not have inappropriate conversations in the workplace. The complaints of Sheriff Dalbec and Deputy Law are well documented and Nord does not deny their central contentions, making the suspension he received appropriate.

The Union in Reply

The Union takes issue with the City's apparent suggestion that poor job evaluations are part of the progressive discipline process. Evaluations are just that. They are not discipline and Nord was not required to respond to them, nor can adverse inferences be drawn from the fact that he did not. It should be also noted that the one day suspension in April 2007 was grieved, even though the grievance was later dropped. It cannot be contended that Nord or the Union felt the previous discipline was just. Further, the substantive allegation that Nord did not communicate with those whose computers he worked on is false. He left Law a note telling him what he was doing and how to get a hold of him. The note was preserved and produced at the hearing. The fact is the City has no case against Nord. He did communicate with Law, the County's two principal witnesses did not appear to testify and Nord continues to work in the Sheriff's Department, despite the Sheriff's supposed desire that he not do so. The grievance should be upheld.

DISCUSSION

The Grievant, Al Nord, received a three-day suspension after the Douglas County Sheriff complained to the City Information Technology Department about work Nord had done on the laptop computer of Deputy Charlie Law, pursuant to an IT sharing agreement between the City and County. Specifically, the Sheriff stated that Nord had taken Law's computer without permission to work on it. He further stated that the Sheriff's Department had been dissatisfied with Nord's work in the past and requested that he no longer be assigned to work on Sheriff's Department computers. He also asked that Nord be told to refrain from loitering around the Sheriff's Department. There was also a separate allegation of a previous incident in the summer of 2007 when Nord worked on the computer of City Police Department Detective Rich Schnell without permission.

Article 10, Section 10.1 of the contract specifies that no employee may be disciplined except for just cause. Further, Section 10.3 specifies that the City uses progressive discipline in addressing disciplinary issues with bargaining unit employees. There are many factors that go into a determination of whether just cause for discipline exists, but essentially the analysis boils down to whether the employee engaged in the conduct that resulted in the discipline, whether the employer had a disciplinary interest in the employee's conduct and, if the first two questions are answered in the affirmative, whether the discipline was commensurate with the

offense. Here, there are three essential allegations that formed the basis for Nord's suspension: 1) the taking of Deputy Law's computer on November 2, 2007 without his knowledge or permission, 2) doing more than requested on office computers, relating back to the incident with Detective Schnell's computer in Summer 2007 and 3) loitering.

Since at least 2005, Nord has received performance evaluations that indicate needed improvement in the areas of communication with other employees, thoroughly completing his assigned tasks, using his time more wisely and getting employees' computers problems fixed in a timely fashion rather than looking for additional problems to work on. He has also been counseled by his supervisors on these issues and was reprimanded by Finance Director Jean Vito on February 16, 2006 for similar performance related issues. On April 26, 2007 he received a one day suspension from Vito due to complaints about his work quality and workplace language. Nord grieved the suspension, but the Union elected to not pursue the matter. He was also reprimanded by the Mayor in June 2007 for making threatening comments in the workplace.

As to the incident with Law's computer, the evidence suggests that he was first asked to work on the computer in September 2007, but was unable to completely resolve its problems. On November 2, 2007, he was in the Sheriff's Department and noticed that Law was out so decided to reload the Windows operating system on the computer. While doing so, the computer crashed, whereupon Nord decided to take the computer back to the IT Department to work on it. There is no dispute that Nord took the computer without Law's knowledge or consent while Law was out of the office in order to attempt to reinstall the operating system. Nord conceded the point, but felt it was necessary due to the problems with the computer, and that the lack of notice or permission was mitigated by the fact that he left a note for Law explaining what he had done and leaving his contact information. Further, according to Nord, other Sheriff's Department personnel, including the Sheriff, were aware that he took the computer and did not object. From the City's standpoint, Information Services Supervisor Dan Shea testified that prior notice approval is always necessary when removing other employees' computers and that leaving a note was insufficient. Further, Mayor Ross noted in his Step 2 denial letter dated February 20, 2008, that Nord did not mention the note when he was first questioned about taking Law's computer, nor did he produce a copy of it until a month later.

Nord discovered a virus on the computer that he was unable to remove. He returned the computer and was attempting to have Sgt. Alexander from the City Police Department retrieve Law's files, when Law returned. Law was upset because he was unable to access information on the computer he needed for a meeting. He asked Alexander to secure the computer and instructed Nord to not work on it further. Law complained to Sheriff Dalbec, which, in turn, prompted Dalbec's complaint to the IT Department. In her disciplinary memo of January 14, 2008, Vito noted that Nord acknowledged in their November 29, 2007 meeting that he took Law's computer without prior notice or permission, he was aware that communication lapses had led to discipline in the past and he promised to not make the same mistakes in the future.

The incident with Detective Schnell's computer occurred in the summer of 2007. At that time, Nord allegedly used Deputy Schnell's computer without permission and printed off an advertisement for his own personal use. Nord testified that he was authorized to work on Schnell's computer by his supervisor, Sgt. Anderson, and that he was trying to resolve a virtual memory issue. He stated that he ran the print ad as a test page to determine the computer's printing capacity and did not intend to use it. Nord also disputed Dalbec's allegation of loitering and claimed to not have been aware that the Sheriff had a concern about it prior to the grievance meeting with his supervisors on November 29. In the disciplinary memo, Vito linked Dalbec's complaint about loitering to previous admonitions to Nord that he needed to make better use of his time.

There is no allegation that Nord is not technically skilled in his position. He has received extensive training in using and repairing computer technology and Shea testified to his competence. The record does not support a finding that Nord was responsible for the problems with Law's computer, nor do I make such. This, however, was not the basis for the discipline. Rather, it was the disregard for Department protocols regarding work done on other employees' computers and failure to adequately communicate with other employees about what he was doing, which have been ongoing concerns. In my view, therefore, Nord's removal of Law's computer, without his knowledge or consent, was an act for which discipline was justified. It is clear that he had been counseled repeatedly that he needed to improve his communication with those on whose computers he was working, focus on correcting the problem at hand rather than looking for additional problems and make getting the employee's computer up and running quickly his first priority. He had been disciplined after counseling appeared ineffective. Several of the elements of the November 2 incident reflect continuing problems in these areas.

When Nord noticed Law was out of his office, he took it upon himself to work on Law's computer without obtaining advance permission, notwithstanding that Nord did not know how long Law would be gone or whether he needed access to the computer. Nor was Nord aware of what was wrong with the computer or how long he would need to work on it. While working on Law's computer, Nord discovered a virus that he could not resolve in Law's office. Rather than wait for Law's return, he then took the computer to work on it in his own office. Shea made it clear that, whether or not Nord left Law a note explaining what he was doing, this was a violation of Department protocol regarding communication with customers. As it turned out, Nord needed the computer and access to his files, and Nord's actions interfered with his work. Nord testified that he could not recall whether Shea had ever told him pre-approval was necessary, but he believed he had an open invitation to work on Law's computer whenever he had an opportunity. Clearly he was mistaken about the standing invitation from Law and his past disciplinary history should have cautioned him to make sure he had authorization to work on the computer prior to commencing.

Clearly, Nord is someone who has a passion for working with computer technology and has a significant amount of technical expertise. It is also clear from the record, however, that he sometimes loses sight of the need to focus on resolving immediate problems so that users

have renewed access to their computers and data as soon as possible and, instead, troubleshoots for additional undiagnosed problems that may take significantly more time and effort to correct. This, combined with his failure to clearly communicate with users about what he is doing or how long it may take, has resulted in frustration among users and, hence has caused some to specifically request that Nord not work on their machines. This has caused problems for the Information Services Department, which has limited personnel and finds it difficult, therefore, to always honor such requests.

I do not believe the allegations regarding Detective Schnell's computer merit discipline. This incident occurred sometime in the summer of 2007, but the record is vague as to specifically when it occurred. The matter was apparently first raised with Nord at the November 29, 2007 discipline meeting. Thus, the matter was first addressed with Nord at least two months or more after the incident occurred, and perhaps much longer. In my view, the incident was too distant in time from the disciplinary meeting to warrant discipline. The City was aware of the incident for substantial period of time. In my view, if it felt the matter warranted discipline, the City had a duty to put Nord on notice in a more timely manner. Likewise, the charge of loitering does not merit discipline. The charge is based on the request by Sheriff Dalbec that Nord be told that he should cease loitering around the Sheriff's Department. Sheriff Dalbec did not testify, however, so there is no direct evidence of what he meant by "loitering" or how serious he considered the problem to be. Certainly, nothing in his email to Dave Dusek indicates that he believed Nord should be disciplined. On this record, therefore, I find insufficient evidence to warrant discipline of Nord on the basis of loitering.

As to whether the level of discipline was justified, I find that it was. Standing alone, Nord's infraction might seem too minor to warrant a three-day suspension. It is necessary, however, to consider the entirety of Nord's disciplinary history. He had been counseled about these types of performance issues multiple times in the recent past. He had also received previous progressive discipline, including a written reprimand and a one-day suspension. For an infraction falling within the same general pattern of misconduct, therefore, a three-day suspension would be the next progressive disciplinary step short of termination. It is also necessary to consider that Nord did not know when he began working on Law's computer when Law would return or what need he might have for it. To take a law enforcement officer's computer offline under such circumstances, without his knowledge or consent, is a serious matter, regardless of the outcome.

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

AWARD

The Employer had just cause to give the Grievant a three-day unpaid suspension.

The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 6th day of January, 2009.

John R. Emery /s/

John R. Emery, Arbitrator