BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 3416, AFSCME, COUNCIL 40

and

CITY OF PRAIRIE DU CHIEN

Case 75
No. 70641
MA-15003

(Stovey Grievance)

Appearances:

Mr. Joseph M. Guzynski, Staff Representative, AFSCME, Wisconsin Council 40, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, appearing on Local 3416, AFSCME, Council 40.

Mr. Thomas F. Peterson, City Attorney, P.O. Box 430, Prairie du Chien, Wisconsin, appearing on behalf of City of Prairie du Chien.

ARBITRATION AWARD

Local 3426, AFSCME, Council 40, hereinafter "Union" and City of Prairie du Chien, hereinafter "City," requested that the Wisconsin Employment Relations Commission assign a sole arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot of the Commission's staff was appointed. The hearing was held before the undersigned on June 21, 2011 in Prairie du Chien, Wisconsin. The hearing was not transcribed. The parties submitted briefs, the last of which was received by August 25, 2011, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute.

The Union frames the substantive issues as:

> When disciplining Mr. Stovey, did the City of Prairie du Chien violate the just cause standard of the Agreement, and if so, what is the remedy?

The City did not agree to the Union's framing of the substantive issues and left it to the Arbitrator to determine.

Having considered the facts and arguments of the parties, I frame the issues as:

Did the City violate Article 3 of the collective bargaining agreement when it issued a one (1) day suspension to the Grievant on January 4, 2010? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Article 3 – Functions of Management

3.01 Except as herein otherwise provided, the Employer retains the rights as established by law, including the management of the work and the direction of the working forces, including the right to hire, promote, demote, suspend, or discharge, or otherwise discipline for proper cause, or transfer; and the right to determine the table of organization is retained and vested in the Employer.

Article 4 – Rules and Regulations

4.01 In keeping with the above, the Employer shall adopt and publish rules which may be amended from time to time, provided, however, that such rules and regulations shall be reasonable rules and subject to the grievance and arbitration procedure.

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Article 6 – Conduct of Business

6.01 The Union agrees to conduct its business off the job as much as possible. This article shall not operate as to prevent a steward or officer from the proper conduct of any grievance in accordance with the procedures outlined in this agreement, nor to prevent certain routine business such as posting union notices and bulletins.

6.02 Business agents or representatives of the Union having business officers or individual members of the Union may confer with such union officers or members during the course of the work day for a reasonable time, provided that permission is first obtained from the supervisor immediately in charge of such union officers or members.

6.03 The Employer hereby agrees not to deduct such reasonable time from the pay of such employees.

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Article 11 – Grievance Procedure

11.01 The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. Should a grievance arise whether in reference to a question of interpretation of the agreement or to a question relating to a safety and/or other matters, the grieving employee shall first bring the complaint to a steward or grievance committee of the Union. If it is determined after investigation by the Union that a grievance does exist, it shall be processes in the manner described below:

11.02 Step One. All grievances shall be in writing. The grievance committee shall attempt to resolve the matter with the immediate supervisor. If the grievance is not resolved within five (5) working days, the grievance shall be submitted to the Personnel Committee. The parties shall meet within one (1) calendar week of receipt of the appeal to hear the grievance. Within one (1) calendar week of the hearing, the Personnel Committee shall give its response in writing.

11.03 Step Two – Arbitration. If the grievance is not resolved through Step One, either party may appeal the grievance to arbitration by giving written notice to the other. Within five (5) days of such notice, the Employer and the Union shall attempt mutually to select an arbitrator, and should they be unable to agree within five (5) days to select an arbitrator, they may jointly or individually, request the Wisconsin Employment Relations Commission to appoint a member of its staff to be the impartial arbitrator.

11.04 The arbitrator, after hearing both sides of the controversy, shall hand down his/her decision in writing within ten (10) days of the last meeting and such decision shall be final and binding on both parties to this agreement.

11.05 Time limits as set forth above may be extended by mutual agreement.

11.06 Expenses, if any, arising from the arbitration proceedings, will be shared equally by the parties, provided that each party shall pay its own costs of preparation and presentation of its case.

11.07 All employees, other than probationary employees, shall have the right of the presence of a steward when his/her work performance or conduct or other matters affecting his/her own status as an employee are subject to discussion for the record. However, the Union shall receive a copy of all disciplinary matters that are to be placed in a probationary employee's permanent file.

11.08 The Union shall determine the composition of its grievance committee.

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BACKGROUND AND FACTS

The Grievant, Richard Stovey, was hired by the City in 1993 to an Equipment Operator position in the Street Department. The Grievant's work schedule is Monday through Friday from 6:30 a.m. to 3:00 p.m. with a break from 9:00 a.m. to 9:30 a.m. and lunch from 12:00 p.m. to 12:30 p.m. daily. During winter months, the Grievant works additional hours for snow removal and is compensated at an enhanced rate of pay when performing those extra work hours. The Grievant's supervisor is Co-Public Works Manager Terry Meyer.

On Wednesday, December 29, 2010, the Grievant received his paycheck for the time period December 12, 2010, to December 25, 2010. The Grievant noticed that his overtime was miscalculated and his total monies paid were less than he had earned. Six other bargaining unit members noticed the same problem with their paycheck and informed the Grievant that their earnings were similarly shorted. As a result of the inaccurate paychecks, the Grievant telephoned City Deputy Treasurer, Joni Clausen. Clausen is responsible for compiling City bi-weekly payroll. The Grievant informed Clausen that there were discrepancies in the paychecks for Street Department bargaining unit employees. Clausen and the Grievant spoke for approximately five minutes.

Within 15 minutes of the end of his telephone call with Clausen, the Grievant and Dirk Steiner, another City Street Department employee and bargaining unit member, traveled to City Hall to speak to Clausen. The Grievant and Steiner detoured on the way to stop at the Wastewater Treatment Plant and collect the time cards for the pay period in question. The time cards were sitting in the open on top of Meyer's desk.

The Grievant, Steiner, and Clausen spoke for between 30 and 40 minutes regarding the paycheck discrepancies. Clausen reviewed the time cards. Clausen explained to the Grievant that she receives timesheets from Meyer and pays accordingly. She told the Grievant and Steiner that she did not have the authority to make any changes and that they would need to wait until the following Monday when Meyer returned from vacation to address the Grievant's concerns. Clausen recommended that the Grievant and Steiner speak with City Administrator

Aaron Kramer. The Grievant and Steiner decided against meeting with Kramer and returned to work.

On January 3, 2011, the Grievant and Steiner met with Meyer; Larry Gates, Co-Public Works Manager; and Kramer to address the paycheck errors that the Grievant had identified. At the conclusion of the meeting, Kramer assured the Grievant that the City would investigate his concern.

A second meeting occurred on January 3. Steiner and the Grievant were separately told that they had violated the chain of command and were disciplined. Steiner was issued a verbal warning and the Grievant was issued a written warning for "Disregard of Established Rule." The details contained in the Grievant's Corrective Action Notice read:

> 1. On the payroll for the pay period of 12/12 to 12/25-2010, there were some mistakes on overtime. Terry does the payroll for the Street Dept. and he was not contacted by Rich to discuss the issue. Rich instead went around the chain of command and went directly to Joni with his concerns. This is a violation of the City/employee chain of command.
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> 2. Rich removed the time cards for the above pay period form Terry's office desk without approval of his supervisor.
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> 3. Rich spoke with Joni for approximately 30-45 minutes during work hours, he has been told before that if he needed to discuss matters it needs to be done after work hours, for the street staff this is 3:00 PM.
>
> Rich should have followed the chain of command and approached either myself or Aaron Kramer to discuss this matter prior to contacting Joni or anyone else.
>
> The Public Works Managers have discussed the chain of command previously with staff and the need to follow this requirement.

The following day, January 4, 2011, the Grievant was called to City Hall to meet with Kramer. Kramer issued the Grievant a one (1) day suspension.[1]

The Union filed a grievance on January 6, 2011, asserting that the City had violated "Article 3 – Functions of Management and all other articles that may apply." The Union described the grievance as, "On or about January 4, 2011, the employer issued Mr. Rich Stovey, the Grievant, a one (1) day disciplinary suspension."

[1] Neither the Union nor the City offered any other written material which documented the one (1) day suspension and identified the reason for the suspension.

Subsequent to the filing of the Grievance, the City's Personnel, License and Insurance Committee scheduled a meeting for January 25, 2011. The City informed Staff Representative Joseph Guzynski of the date and time for the meeting by email dated January 18, 2010. In response, Guzynski requested that the grievance be heard in closed session. Kramer responded on behalf of the City as follows:

> Joe:
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> The meeting is being noticed for January 25th as an open meeting.
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> The city (sic) does not intend to hold the meeting in closed session. It has been our past practice to hold these grievances in open session, and I find nothing in the union contract under Grievances to require said hearings to be held in closed session.
>
> If you can find anything to dispute my position, please share it with me.
>
> I have CC'd our Personnel Committee chairwoman, Linda Munson, on this email.
>
> Aaron

Guzynski replied to Kramer and referred him to the Department of Justice website and specifically the Open Meeting Law Compliance Guide. The City did not change the agenda and the grievance was addressed in open session. The minutes of the meeting include the following:

> **4. <u>Grievance Hearing – Rich Stovey</u>**
>
> Stovey filed a grievance on January 6th, objecting to a one-day unpaid suspension he received on January 4th from the City Administrator. According to Section 11.02 of the Union Contract, the grievance must be heard and responded to by the Personnel Committee. The City administrator presented several statements filed by city employees, as well as documentation by the Union. Neither Stovey nor any other union representative was present ACTION: To deny the grievance filed by Rich Stovey and uphold the suspension issued by the City Administrator MOTION: Hein SECOND: Riebe. VOTE: 4-1 (Titlbach absent)

Additional facts, as relevant, are contained in the **<u>DISCUSSION</u>** section below.

DISCUSSION

The Grievant was disciplined on January 3, 2010 for "Disregard of Established Rule." The level of discipline imposed was a written warning. There is no evidence in this record which suggests that the Grievant or the Union challenged this disciplinary action. The following day, the Grievant was issued a one (1) day suspension. Neither the Union nor the City offered a written documentation which memorialized the facts and circumstances giving rise to the discipline. Kramer testified that he imposed a one (1) day suspension for "removal of items from supervisor's desk" and "second offense of not following chain of command."

The Union challenges the one (1) day suspension citing double jeopardy. The double jeopardy doctrine provides that once discipline has been imposed and accepted for a given offense, the employer may not increase the penalty or impose another punishment. Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. (2002) p. 980. The doctrine arises out of the Fifth Amendment's protections against double jeopardy. Bornstein, Gosline and Greenbaum, *Labor and Employment Arbitration*, 2nd Ed. (Mathew Bender & Co. 2002) p. 15-25. Arbitrator Nolan explained the doctrine of double jeopardy and its application to arbitration:

> The Fifth Amendment … is the source of the claimed right … [Its] … terms are carefully chosen. They apply solely to subsequent criminal prosecutions for the same acts resolved in an earlier prosecution … the Amendment … does not prohibit the state from joining … two charges in the same indictment … withdrawing one charge … and refiling a second charge. Nor does it prohibit the state from proceeding both criminally and civilly against an individual … Nor does it prohibit … two non-criminal sanctions …
>
> Arbitrators have, however, applied a somewhat similar doctrine to discipline cases. The key to this arbitral doctrine is not the Constitution but rather fundamental fairness, as guaranteed by the contractual requirement of "just cause" for discipline. Thus when an employee has suffered a suspension for an offense, it would be unfair … to fire him before he has committed a second offense.
>
> Even this arbitral adaptation of the double jeopardy principle has its limits. Like the constitutional principle, it applies only to subsequent increases in penalties after a final decision on the merits. It does not bar correction of an erroneous or incomplete charge on the merits, at least not when the penalty remains the same.
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> Id at 15-25 citing UNITED STATES POSTAL SERV., 87-2 ARB 8490 at 5952 (Nolan, 1987).

The Grievant was disciplined by Meyer for the events of December 29. Kramer learned this when he met with the Grievant, Meyer and Steiner to address the erroneous

payroll on January 3. The following day Kramer issued the one (1) day suspension. The basis for the one (1) day suspension was removal of the timecards and not following the chain of command. These two infractions arose out of the same facts and circumstances that caused Meyer to issue the written warning for "Disregard for Established Rule." Item two of the written warning describes the removal of the time cards and the fourth paragraph of the written warning stated that, "Rich should have followed the chain of command and approached either myself or Aaron Kramer to discuss this matter prior to contacting Joni or anyone else." Jt. Ex. 2. Kramer cannot substitute his judgment for that of the direct supervisor after that supervisor has acted. Kramer's decision to levy a second disciplinary sanction for the same event that the Grievant was disciplined for on January 3, 2011, constituted double jeopardy and violated Article 3 of the collective bargaining agreement in as much as the discipline was issued not for proper cause.

I recognize that Kramer told the Grievant on January 3 that he was expected to return to Kramer's office the following day because Kramer needed 24 hours to think over the situation. While there is arbitral authority which recognizes an employer's right to delay disciplinary action in order to complete an investigation or determine the proper level of disciplinary sanctions, that is not what occurred in this case. The City, through Meyer, issued a written disciplinary sanction to the Grievant on January 3. There is no reference on that document that it was preliminary nor that the City was investigating the incident further. Kramer did not seek out nor obtain any new or additional evidence between January 3 and January 4. Kramer was specifically asked if he had any new facts relative to the December 29 situation when he issued the suspension. Kramer responded "no" and further, that Meyer had conducted the investigation and therefore he had all the relevant investigative facts. The discipline issued to the Grievant on December 29 was final.

The Union put forth multiple arguments disputing the credibility of the facts contained in the written warning. The grievance filed by the Union on January 6, 2011 does not refer to nor challenge the written warning and therefore it is beyond the scope of my authority to address whether the written warning met the just cause standard. Consistent with this conclusion, the remedy is similarly limited.

The Union next argued that the City interfered with the rights of the labor organization and retaliated against the Grievant in violation of Wis. Stats. 111.70(3)(a)2 when it published the Grievant's name and the nature of his grievance and when it conducted the step one grievance hearing in open session. The Union's assertions also challenged the City's compliance with open meeting and open record laws. Redress for statutory violations, whether chapter 111 or 19, are beyond the scope of my authority as a grievance arbitrator. Having said that, my aversion to address these statutory challenges should not be viewed an endorsement to the City's actions.

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AWARD

1. Yes, the City violated Article 3 of the collective bargaining agreement when it issued a one (1) day suspension to the Grievant on January 4, 2011.

2. The appropriate remedy is to remove any and all references to the one (1) day suspension from the Grievant's personnel file(s) and make him whole.

3. I shall retain jurisdiction for 60 days to allow the parties sufficient time to implement the terms of this Award.

Dated at Rhinelander, Wisconsin, this 21st day of November, 2011.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

LAM/gjc
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