

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MENASHA MUNICIPAL EMPLOYEES UNION,
LOCAL 1035, AFSCME, AFL-CIO**

and

CITY OF MENASHA

Case 116
No. 71237
MA-15108

(Grievance of Mark Ceelen)

Appearances:

Ms. Mary Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, W5670 Macky Drive, Appleton, Wisconsin 54915, for the labor organization.

Ms. Pamela A. Captain, City Attorney/Human Resources Director, 140 Main Street, Menasha, Wisconsin 54952, for the municipal employer.

ARBITRATION AWARD

Menasha Municipal Employees Union, Local 1035, AFSCME, AFL-CIO and the City of Menasha are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The union made a request, in which the city concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the application and interpretation of the terms of the agreement relating to discipline. The Commission designated Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Menasha, WI on February 14, 2012. The parties filed written arguments, the last of which was received on April 16, 2012.

ISSUE

The parties stipulated to the following issue:

“Did the employer have just cause to issue a one-day suspension to the grievant on January 17, 2011? If not, what is the appropriate remedy?”

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE II – MANAGEMENT RIGHTS RESERVED

- A. General. Unless as otherwise herein provided, the management of the work and the direction of the working forces, including but not limited to, the right to hire, promote, demote, suspend or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer.

...

ARTICLE VII – SUSPENSION, DEMOTION AND DISCHARGE

Suspension is defined as the temporary removal without pay of an employee from his designated position.

- A. Suspension for Cause. The Employer may for disciplinary reasons suspend an employee. An employee who is suspended, except probationary and temporary employees, shall be given written notice of the reasons for the action, and a copy of such notice shall be made a part of the employee's personnel history record, and a copy shall be sent to the Union. No suspension for cause shall exceed thirty (30) calendar days.

...

- E. Usual Disciplinary Measures Shall Be:

1. Oral Reprimand
2. Written Reprimand
3. Suspension
4. Dismissal

The Union shall be furnished a copy of any written notice of reprimand, suspension or discharge. A written reprimand sustained in the grievance procedure or not contested, shall be considered a valid warning. In the case of serious infractions prior warnings are not a prerequisite for disciplinary action that includes suspension or dismissal. Written and oral reprimands shall not be used as the basis of suspension or dismissal after twelve (12) months.

OTHER RELEVANT LANGUAGE

MENASHA GENERAL ORDINANCES

8-3-6 COLLECTION OF REFUSE

(a) PLACEMENT FOR COLLECTION

- (1) Residential solid waste shall be accessible to collection crews. Residential refuse in approved containers shall be placed immediately behind the curb of the public street for collection....All containers shall be placed at least 3 feet from any obstruction.

BACKGROUND

The City of Menasha is a municipality in Wisconsin's Fox River Valley. Among its general government activities, it maintains a Department of Public Works. Mark Ceelen, the grievant, has been a sanitation worker with the Menasha DPW since July, 1995, responsible for operating a refuse and recycling truck. This grievance concerns the one-day disciplinary suspension DPW Superintendent Tim Jacobson issued Ceelen for knocking over a resident's mail box on January 6, 2011.

According to the promulgated Position Description, the Essential Functions for a Menasha DPW Sanitation Worker include "Pick up garbage and refuse along established routes," and "Maintain records and prepare reports." Among the Position Requirements/Qualifications are "Ability to operate semi-automated recycling truck which requires a minimum of 500 entries and exits per day," the "Ability to operate fully automated refuse collection truck with a minimum of 650 stops per day," and a "Working knowledge of work hazards and safety precautions."

In operating an automated refuse truck, the sanitation worker sits on the right side of the truck cab. S/he drives so the cab is a few feet past the refuse cart and, using a series of mirrors, lines up the truck's grippers with the target cart. The operator uses a joystick to operate the hydraulic arm, which telescopes out towards the target; after the gripper arms close around the cart, the operator uses the joystick to cause the hydraulic arms to lift, empty and return the cart. The city has used automated refuse trucks since 1994.

On January 6, 2011, Ceelen was working his normal route in the southwest quadrant. It was not snowing, but there was snow on the ground. Ceelen testified that the snow was "a couple of feet high," but had been shoveled out where the refuse cart was sitting at 1104 Airport Road. Ceelen testified that he saw the mailbox and refuse cart as he approached, but that after he passed the cart and mailbox, he could not tell the exact distance between them when he prepared to extend the automatic gripper arm to lift and empty the cart. But even

though he could not see the mailbox, he testified that he “didn’t think the mailbox was that close to the cart.” Believing that there was sufficient clearance, Ceelen did not get out of the cab to move the cart. When he extended the automatic gripper arm to lift and empty the refuse cart, the gripper arm collided with and snapped the mailbox post, sending the mailbox skidding across the yard. Ceelen thereupon called and notified DPW of the incident.

On January 17, 2011, Jacobson issued Ceelen a Disciplinary Notice, suspending him for one day. Jacobson appended the following statement explaining the suspension:

On January 6, 2011, Mark hit the mailbox of 1104 Airport Road with the gripper arm of the refuse collection truck while servicing the refuse cart.

Based on the details provided in the incident report completed by Mark it is reasonable to conclude that the resident placed their refuse cart to the curb in compliance with city ordinance 8-3-6.

While investigating this incident it was noted that the differences in the height of the cart, mailbox and operators chair are:

1. Cart approximately 38” tall.
2. Mailbox post approximately 48” tall.
3. Operators position approximately 84” high.

It is also reasonable to conclude that Mark had an uninhibited view of the positioning of the cart and mailbox during his normal approach prior to his attempt to service the cart.

This is the seventh time during Mark’s employment as a Sanitation Worker that he has struck and caused damage to property, city owned and private, with the most recent being 7/27/2009.

Therefore with Mark’s latest discipline being a written reprimand on 5/14/2010 a one (1) day suspension is in compliance with Article VII-E of the bargaining agreement.

The one (1) day suspension shall be Tuesday January 18, 2011.

It shall be expected that Mark return to work on Wednesday January 19, 2011 for normal work duties.

Any further performance deficiencies shall be followed by disciplinary action in accordance with Article VII-E including termination of employment with the City of Menasha.

If Mark thinks it is necessary the City of Menasha does offer an Employees Assistance Program which is recommended at this stage of the discipline process.

On January 17, 2011, Jacobson also issued the following letter to Ceelen, providing additional background into their respective actions in the immediate aftermath of the incident:

Re performance notice

This letter is sent to inform you about your performance as a sanitation worker in the Department of Public Works with the City of Menasha.

On January 6, 2011 you filled out an incident report about hitting a mailbox with the refuse collection truck. I expected a complete form which accurately described the incident with enough detail to determine the cause of the damage to property. I also expected the report to be complete. There was not enough detail to determine such things as exactly where the refuse cart was placed in relation to the street and mailbox and whether the resident complied with City ordinance.

By not filling out the incident report accurately and completely you showed disrespect and contempt towards the City, Department and fellow employees. You are expected to be a part of the team of employees that works hard every day to provide excellent public services. Fellow employees, including the City Attorney review incident reports and rely upon the information contained therein to determine such things as whether a claim should be paid on damages or whether better methods of operation or other changes are necessary in order to avoid similar incidents. Costly inefficiencies occur when employees and/or the City Attorney review incident reports that are incomplete of detail or inaccurate information is provided.

Furthermore, when I asked you to complete the incident report and provide more detail your response was "I don't write a book." This response was disrespectful and did not serve a legitimate work purpose. Filling out complete and detailed incident reports are important to the community and a function listed on all job descriptions.

This type of conduct is unacceptable and borders (on) insubordination and will not be tolerated in our work place. Incompetence or inefficiencies; failure to complete reports promptly and accurately; any activity which is not compatible

with good public service. (see City of Menasha Personnel (sic) Policy Handbook, article XIX.)

You are hereby put on notice that if you engage in similar behaviors in the future, corrective action will take place. This letter shall be used as part of the evaluation as to the value of your continued employment with the City of Menasha.

On May 14, 2010, Jacobson had issued Ceelen a written reprimand for installing unauthorized modifications to a city-owned vehicle, with the following written explanation:

On April 27, 2010, John Quella was involved in an incident that caused significant damage to the west wall of the Public Works Facility.

According to John's statement during the Accident Review Committee, "an operator installed an unauthorized modification to the seat" that may have contributed to the incident. After investigating it was found to be Mark Ceelen. (emphasis in original).

The vehicle has operated for many years with a moderate "authorized modification" that the labor force petitioned for and everyone has become accustomed too. (sic)

Mark did not have permission or the authority to make any changes to #1001.

Vehicle #1001 was manufactured to operate as a "stand up" right side drive collection truck.

Any unauthorized changes to vehicles and equipment are prohibited and as evident in this matter become a serious liability to the City of Menasha.

Therefore Mark shall receive this written disciplinary action.

If this type of performance deficiency continues, further disciplinary action shall follow according to Article VII-E.

If Mark thinks it is necessary the City of Menasha does offer an Employee Assistance Program.

On March 19, 2004, Ceelen had submitted the following Incident Report:

Describe how the incident occurred: *The cart was to (sic) close to the mailbox.*

When I extended the arm to get the cart the arm dented the mailbox.

How do you feel this incident could have been prevented: *By not having the cart so close to the mailbox.*

On March 22, 2004, Ceelen's then-supervisor filed the following Supervisor's Incident Investigation Report, which he provided to Ceelen:

Nature of Incident and/or Damage: *Damage to mailbox when the arm of the garbage truck hit it, trying to pick up the cart.*

Estimated Cost of Property Damage:

What do you believe caused the incident? List all contributing factors. *The cart being to (sic) close to the mail box. The Employee trying to dump the cart in to (sic) tight of conditions.*

List any recommendations you might have in preventing this type of incidents.

- 1. Employee should have gotten out of the truck and moved the cart away from the mailbox and then dumped it.*
- 2. If the cart is placed by the mailbox continuously then employee should notify there (sic) supervisor.*

POSITIONS OF THE PARTIES

In support of its position that the grievance should be granted, the union asserts and avers as follows:

Ceelen did not intend to do any damage, and hitting the mailbox pole with the garbage truck grippers was an accident. For the city to claim Ceelen was lazy and that he didn't want to get out of the truck is preposterous. Sanitation workers pick up about 700 carts a day; if they had to get out of the truck every time they estimated the gripper might hit an object, they would never get their work done. In determining that Ceelen had an uninhibited view of the cart and mailbox, Jacobson failed to calculate that the truck was positioned beyond both the cart and the mailbox. Given that Jacobson has never operated an automated garbage truck, how does he truly know the complexity in servicing the carts, let alone make a determination that Ceelen had an uninhibited view? At the end of the day, Ceelen did not intentionally hit the mailbox, nor did he think doing so was okay; it was an accident, plain and simple.

In justifying the one-day suspension, the city not only used prior discipline that was stale and outdated, the incidents were not similar in nature. None of the prior discipline should be afforded any weight in this matter.

Ceelen is a long term dedicated employee with a good work history. Over the course of a day he empties up to 700 garbage trucks. He must pay close attention to many distractions. He did not intentionally hit the mailbox. His view was obstructed by the garbage cart which prevented him from seeing that the right side of the gripper arms was going to clip the mailbox. It was an accident. Given the environment and type of work in DPW, accidents will occur from time to time, albeit not intentional. The employer did not have just cause to issue a one-day suspension.

In support of its position that the grievance should be denied, the employer asserts and avers as follows:

The city has a reasonable expectation that employees pay attention and take care when operating city equipment so as to not damage city or private property. Here, the employee caused property damage, for which he alone is responsible. If he did not see the mailbox, he should have gotten out of the truck to see where it was in relation to the cart; if the cart was too close, he should have moved it. The grievant is a veteran employee who knew what was expected of him, but was lazy and did not want to get out of the truck.

Even if the ordinance allows carts to be placed too close to a mailbox for safe operation of the truck, the grievant failed to articulate this argument as a mitigating factor at the time the city was investigating. He offered no explanation for the damage except that he did not see the mailbox. He cannot now argue or provide additional information that he failed to provide when the city was conducting its investigation. Even so, an ordinance defect does not explain or offer a cloak of protection for the lack of responsibility and care Ceelen showed in performing his job. The city reasonably concluded that the incident was caused by Ceelen's poor performance.

Further, the level of discipline was reasonable under the circumstances based on Ceelen's disciplinary history, his lack of remorse, his denial of responsibility, and the need to prevent future similar conduct. He had received three oral reprimands within 12 months which led to a written reprimand in May, 2010. The city has a legitimate and justifiable interest in ensuring that employees perform their work without exposing the city to legal and financial damages. Here, Ceelen chose not to move the cart and as a result caused property damage which the city is responsible for. He offered no explanation or apology as to why he did not exit the truck and move the cart, and is unwilling to accept

responsibility. His work performance must change and the level of discipline is necessary in order to get his attention and effectuate improvement.

DISCUSSION

The residents and taxpayers of Menasha have a right to expect that city sanitation workers will perform their routine duties without damaging public or private property. The city sanitation workers should expect that, absent mitigating circumstances, they will be disciplined for doing such damage.

The union has not identified any mitigating circumstance to excuse Ceelen's poor performance on January 6, 2011 (e.g., a child did not suddenly dart out into traffic, there were no adverse weather conditions). As Jacobson's narrative notes, Ceelen had an unobstructed view of the refuse cart and mailbox as he approached, and there is no evidence the placement of the cart violated the relevant city ordinance.¹ And since at least 2004, Ceelen has been on notice that if he believes a cart is too close to a mailbox, he should get out of the truck and move the cart.

The union contends that the incident of January 6, 2011 was "an accident." While it was certainly an unexpected and inadvertent mishap, the conditions were entirely within Ceelen's control. Ceelen was driving the refuse truck, and it was he who misjudged the clearance necessary for the safe operating of the gripper arm. The union has not offered any evidence that the cart was placed too close to the mailbox; and even if it were, Ceelen should have recognized that and acted appropriately (by getting out of the truck and moving the cart). Ceelen is properly subject to discipline for his poor performance and damage to property. The only remaining question is the degree of discipline.

Article VII provides that the employer "may for disciplinary reasons suspend an employee," and that the "usual disciplinary measures shall be" an oral reprimand, a written reprimand, suspension and dismissal. Although the labor agreement does not use the phrase "progressive discipline," the numbered listing of those four steps, and the section's title, indicate that progressive discipline is what the agreement calls for, except "(i)n the case of serious infractions," when "prior warnings are not a prerequisite for disciplinary action that includes suspension or dismissal." While the incident of January 6, 2011 was regrettable, I do not believe it constituted a "serious infraction" as used in Article VII, Section E. Thus, pursuant to the labor agreement, Ceelen was entitled to a prior warning before being suspended for knocking over the mailbox post on January 6, 2011. The labor agreement defines "a valid warning" as a written reprimand which was either sustained after a grievance or not contested.

In his narrative accompanying the notice of suspension, Jacobson wrote, "This is the seventh time during Mark's employment as a Sanitation Worker that he has struck and caused

¹ I emphatically reject the city's argument that the union cannot raise at arbitration an argument the employee did not raise during the investigative stage. Just as the employer is required to prove *at hearing* the elements supporting discipline, the union is free to offer *at hearing* all elements in opposition.

damage to property, city owned and private, with the most recent being 7/27/2009.” However, the collective bargaining agreement provides that, “Written and oral reprimands shall not be used as the basis of suspension or dismissal after twelve (12) months.” That is, as the union argues, the contract explicitly prohibits the exact analysis Jacobson undertook in determining Ceelen’s discipline.

Taking all the elements into account, I interpret Article VII, Section E to mean that, except for “serious infractions,” an employee under this labor agreement cannot be suspended unless s/he had received a written reprimand for relevant misconduct within twelve months of the subsequent misconduct.

The only discipline Ceelen had received within twelve months of January, 2011 was the written reprimand for installing unauthorized modifications to a city-owned vehicle in April, 2010. Such misconduct is not relevant to the poor performance for which Ceelen was disciplined in January, 2011. As Jacobson’s narrative for the earlier reprimand states, “If *this type* of performance deficiency continues, further disciplinary action shall follow according to Article VII-E.” (*emphasis added*). Knocking over a mailbox post is not the same type of performance deficiency as installing unauthorized modifications to a city-owned vehicle.

The labor agreement does not, however, prevent oral or written reprimands older than twelve months from being used as the basis for discipline other than suspension or dismissal. Therefore, the oral reprimand Ceelen received in July, 2009 for backing into a power pole – poor performance resulting in damage to property, the same elements cited in the discipline here under review – may be taken into account when considering discipline short of suspension. I have done so.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is sustained. The one-day disciplinary suspension shall be modified to a written reprimand, and the grievant made whole for loss of wages and benefits. For the purpose of applying Article VII, Section E., the written reprimand for the January 6, 2011 incident shall be considered as being issued on the date of this Award.

Dated at Madison, Wisconsin, this 12th day of June, 2012.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

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