BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RUSK COUNTY COURTHOUSE EMPLOYEES & HEALTH AND HUMAN SERVICES SUPPORT STAFF, LOCAL 2003, AFSCME, AFL-CIO

and

RUSK COUNTY

Case 33
No. 71256
MA-15113

(Ducommun Suspension Grievance)

Appearances:

Mr. John Spiegelhoff, Staff Representative, 1105 E. 9th Street, Merrill, Wisconsin, appearing on behalf of Rusk County Courthouse Employees & Health and Human Services Support Staff, Local 2003, AFSCME, AFL-CIO.

Ms. Mindy K. Dale, Attorney, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of Rusk County.

ARBITRATION AWARD

Rusk County Courthouse Employees & Health and Human Services Support Staff, Local 2003, AFSCME, AFL-CIO, hereinafter "Union," and Rusk County, hereinafter "County or Employer," 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 assigned. The hearing was held before the undersigned on March 26, 2012, in Ladysmith, Wisconsin. The hearing was not transcribed. The parties submitted briefs, the County submitted a reply brief and the Union declined to file a reply brief. The parties informed the Arbitrator on May 21, 2012 that the Union would not be filing a responsive brief 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 and framed the substantive issues as:

> Did the County have just cause to suspend the Grievant for three days? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

. . .

ARTICLE 14 – DISCIPLINARY PROCEDURE

SECTION 14.01 The parties recognize the authority of the Employer to initiate disciplinary action against employees, provided such disciplinary action is for just cause.

SECTION 14.02 The employer recognizes the principle of progressive discipline when applicable to the nature of the misconduct giving rise to the disciplinary action.

SECTION 14.03 An employer shall be entitled to appeal any disciplinary action through the grievance procedure.

SECTION 14.04 If oral disciplinary action is taken against an employee, the employee will receive a copy of this disciplinary action. If at the time a request is made by the employee a copy can be provided to the Union. In all other disciplinary actions against an employee a copy of the action will be provided to both the employee and the Union.

SECTION 14.05 If an employee is in unpaid status due to a disciplinary action, his/her health insurance shall be prorated.

. . .

BACKGROUND AND FACTS

The Grievant, Jon Ducommun, has a 37 year long employment history with the County including work in Social Services, Dispatch and in the Jail as the Jail Administrator until 1999 when he retired. The Grievant returned to County employment sometime prior to 2008 working in the capacity of a Grounds/Maintenance position with primary responsibility for lawn care and building maintenance at the County fairgrounds. The Grievant's job description includes maintenance work at the Courthouse and the expectation that he is "on call" seven days per week and at night to respond to problems that occur. The Grievant's work record was unblemished until this incident.

At all times relevant herein, Michael Naczas was the Building and Grounds Supervisor and the Grievant's supervisor. Naczas has held this position since 1991. In addition to the Grievant, there are four other bargaining unit employees in the Building and Grounds Department including: Tom Thorsen, Walt Good, Jim Moore and Mike Kupta.

The events giving rise to the Grievant's discipline occurred on Sunday, September 25, 2011. Rusk County Deputy Jane Nitek telephoned the Grievant's home at 8:16 a.m. and the following conversation took place:

Nitek: [to other person in background] That one's your's (sic) o.k.?

Grievant: Hello.

Nitek: Hey John, this is Jane.

Grievant: Ya?

Nitek: Hey, the fire alarm is going off downstairs, do we have a key to reset it?

Grievant: I don't even know if I have a key to reset it.

Nitek: See, we had a problem with this the last time it went off, we checked the whole building and garage and everything, everything's fine, um, we just don't know how to reset it.

Grievant: This is the one downstairs by the entrance?

Nitek: Yah, Bob, this is the one by the entrance right? The fire alarm? [background voice unintelligible] O.k. [background voice unintelligible] But you silenced it? [background voice unintelligible] O.k., he did silence it. [background voice unintelligible] But I don't know how to reset it.

Grievant: If there's not a reset button on it I would wait and leave it and see if it resets itself.

Nitek: O.k. We'll check it in a little bit.

Grievant: Alrighty.

Nitek: O.k. Thanks John, take care, bye.

The Grievant neither visited the Courthouse or Law Enforcement Center and he did not telephone Dispatch to follow up on the fire alarm. No member of the Law Enforcement Center telephoned the Grievant regarding the fire alarm after Nitek's call. Nitek did not

check the fire alarm during the remainder of her shift and the record is silent as to whether any other law enforcement personnel checked the fire alarm after Nitek's telephone conversation with the Grievant.

The Grievant did not work on Monday, September 26, 2011.

When the Grievant arrived at work the following morning, he was summoned to Naczas' office and was issued the following Notice of Disciplinary Action:

To: John Ducommun

From: Mike Naczas

Date: September 26, 2011

RE: Notice of Disciplinary Action

- o Oral Reprimand
- o Written Reprimand
- Notice of Suspension

This document is intended to serve as an official notice of disciplinary action. The type of disciplinary action is identified above and the reason(s) for the disciplinary action is cited below:

Ducommun was contacted by dispatch regarding an active fire alarm on Sunday, September 25, 2011. Instead of investigating the cause of the alarm, Ducommun instructed dispatch to ignore the alarm and claimed that the alarm should reset itself. This action created an unsafe work environment for all employees and an unsafe environment for inmates and members of the public present in the building at the time. Due to the seriousness of this matter, Ducommun is being placed on an unpaid suspension for three days (September 27, September 28, and September 29).

The following corrective action plan is required:

Ducommun needs to follow up and investigate all safety issues reported to him. In the event that he is unable to do so, he is required to inform his supervisor of the issue and reason for not investigating the issue. All work assigned to Ducommun is expected to be completed in a timely fashion or a timely explanation provided to the supervisor as to why the work could not be completed as requested.

> Failure to perform the required corrective action described above may result in further disciplinary action, up to and including suspension and/or termination.
>
> . . .

The Grievant refused to sign the disciplinary notice.

The Union filed this grievance on September 30, 2011 describing the dispute as, "Employee is appealing the disciplinary action under Section 14.03." The remedy sought was "[m]eet to discuss the alleged violation. Reinstate lost pay." The County denied the grievance at all steps placing it properly before the Arbitrator.

Additional facts, as relevant, are contained in the DISCUSSION section below.

DISCUSSION

The Grievant is challenging his three day suspension asserting that it failed to meet the just cause standard. The County maintains that the discipline was warranted and justified.

I accept Arbitrator Richard McLaughlin's examination of just cause as articulated in BROWN COUNTY, Case 655, No. 60134, MA-11535 (2002) wherein he stated that, "…first the Employer must establish conduct by the Grievant in which it has a disciplinary interest. Second, the Employer must establish that the discipline imposed reasonably reflects the interest."

The County has an interest in providing safe and secure buildings to its employees and visitors, therefore I find that the County has met the disciplinary interest standard. I move to whether there is sufficient evidence to establish that the Grievant was guilty of the alleged conduct and whether the penalty imposed was reasonable.

The County determined that the Grievant created an unsafe environment for employees and visitors by failing to investigate an active fire alarm, telling dispatch to ignore the active fire alarm, and claiming the alarm would reset itself. I will address each of the three specific allegations that the County relied on to reach its ultimate conclusion.

Did the Grievant investigate the active fire alarm?

On September 25, 2011 the fire alarm on the first floor of the Law Enforcement Center audibly signaled prompting Deputy Bob Stolp to search the facility. Stolp was able to locate the origin of the alarm and silenced it. While Stolp was searching for the active fire alarm, Deputy Jane Nitek, who was working in Dispatch, telephoned the Grievant. She telephoned

the Grievant because maintenance is responsible for addressing fire alarm issues.[1] Stolp returned from searching for the active fire alarm and stood outside the Dispatch window during Nitek's conversation with the Grievant. From Nitek the Grievant learned that the alarm had signaled, that the alarm had been silenced, and that Nitek was concerned about resetting the alarm.

When presented with an activated and audibly signaling fire alarm with employees and inmates in the facility, the Grievant failed to take any affirmative steps to address the situation. He did not visit the Courthouse/Law Enforcement Center to determine whether there was a fire, whether the alarm had been temporarily or permanently silenced, or if the alarm was reset or reactivated. He did not review any manuals or other informational materials on-site nor did he telephone his supervisor or a co-worker to inform them of the activated alarm or to ask what his obligations were when an alarm went off. And, even though he and Nitek discussed monitoring the alarm to ensure that it was in working order, the Grievant did not call Dispatch later in the day to make sure that the alarm was in working order. The evidence establishes that the Grievant failed to investigate the fire alarm.

There is no dispute that the Grievant knew that he was on-call and responsible for maintenance related issues for the Courthouse and Law Enforcement Center when called in. The Grievant had been called by Dispatch on prior occasions during his non-working hours to address maintenance issues. He testified that he traveled to the Courthouse and Law Enforcement Center to respond to calls for overflowing toilets and an activated outdoor security alarm. He further testified that he made the decision whether to travel to the site or not depending on the circumstances reported to him.

The Union argues that since the County did not have a policy which required maintenance staff to travel to the Courthouse whenever they were called, then it was up to the Grievant to decide whether it was necessary to address the signaling alarm. I agree with the Union, but the Grievant's inaction is indefensible. The Grievant had primary responsibility to address the alarm and he failed to do anything. Regardless of whether there is a written policy or not, all employees are expected to exercise their best judgment, especially when presented with safety issues and dangerous conditions. An activated fire alarm is a dangerous safety issue and some action by the employee with primary responsibility over fire alarms was required.

Did the Grievant tell Dispatch to "ignore" the fire alarm?

The County concluded that the Grievant told Dispatch to "ignore" the fire alarm, yet there is absolutely no evidence in the record, whether testimony or written documents, that substantiates this charge.

---

[1] There is no contract clause or County policy or practice which must be followed when calling in a maintenance staff person outside of regular work hours. Dispatcher Nitek testified that she telephoned the Grievant because he lived the closest.

The fire alarm incident occurred on Sunday, September 25. The following morning, maintenance department employee Walt Good learned that the alarm had gone off on Sunday. Good informed Naczas. Naczas testified that Good told him the fire alarm in the Law Enforcement Center went off on Sunday, that it wasn't taken care of, and that Good followed up and talked to Dispatch. The record is silent as to whom Good spoke with in Dispatch, but it was not Nitek.

According to Nitek, the only person that she spoke to about the September 25 incident was her supervisor, Jail Superintendent Gloria Brunner, when Brunner asked Nitek to write a statement. There is no date on Nitek's statement and Nitek was unsure as to when she was asked to prepare a statement and when she wrote the statement, but was able to narrow it down to having been the day after the incident (September 26) or within the next 13 days. Nitek's statement is:

> On Sunday September 25th 2011, at approximately 8:15 am, Officer Stolp advised me that the fire alarm was going off in the lobby area of the Law Enforcement Center. He advised me that he checked the area and there was no fire but he did not know how to reset the alarm. He did advise that he silenced the alarm.
>
> I called John Ducommun and advised him that the fire alarm in the LEC was going off. We did not know how to reset the fire alarm in the LEC. He advised he didn't think he could reset the alarm and it should reset itself.

Nowhere in Nitek's statement is there any reference, directive or command to Dispatch to "ignore" the fire alarm.[2]

Naczas testified that he spoke to Nitek on September 26, asked her what happened on the 25th, and asked her to write a statement. Nitek denies speaking to Naczas. Nitek is a fifteen year employee with the County who knew the procedure to follow when a fire alarm went off. The record provides that Nitek accepted responsibility to check on whether the fire alarm reset itself after her telephone call with the Grievant, but she never did, and therefore, would have been subject to some level of scrutiny. In the face of this, Nitek's testimony was credible.[3] In contrast, Naczas has a vested interest in the outcome of this case and the Union has challenged the manner in which he completed the County's investigation.

---

[2] The County argues that there is no evidence to suggest that Nitek's statement was received after the discipline was imposed. I disagree. Had the County had Nitek's statement, it would have used that document to prepare the discipline.

[3] The Grievant was not the only County employee that knew on September 25 that the fire alarm may not have been properly reset. Nitek and Stolp knew that the audible alarm had been silenced and Nitek agreed to "check it [the fire alarm] in a little bit," but did not do so.

The only two people that would know if the Grievant told Dispatch to "ignore" the fire alarm were Nitek and the Grievant. The Grievant was never asked by Naczas or any other County official what happened on September 25. Nitek was asked by her supervisor what happened, but the Grievant had already been disciplined when this request was made since Naczas prepared the disciplinary letter on Monday, September 26. This record suggests that the charge that the Grievant told Dispatch to "ignore" the fire alarm arose from Good's conversation with someone in Dispatch and that Good then relayed that to Naczas the morning of the 26th.

Finally, the transcript of the recorded telephone call confirms that at no time did the Grievant tell Nitek to "ignore" the alarm. The Grievant told Nitek to "wait and leave it and see if it resets itself." Nitek and the Grievant left the conversation with Nitek accepting responsibility to check and see if the fire alarm reset itself. The Grievant's response – to wait and see - completely fails to recognize the urgency of his obligation to ensure that the fire alarm system for a public building is in working order, it does not communicate a desire to "ignore" the fire alarm.

Did the Grievant tell Dispatch that the alarm would reset itself?

The third charge against the Grievant was that he told Dispatch that the fire alarm would reset itself. Nitek's statement and her testimony confirm that she believed the Grievant told her the alarm system "should" reset itself. The transcription from the Grievant's telephone call with Nitek indicates that he suggested to Nitek that she 'wait and leave it and see if it resets."[4] There is no evidence which supports the conclusion that the Grievant definitively told Dispatch that the alarm would reset itself.

The Union argues that the Grievant cannot be disciplined for failing to reset the fire alarm when he was never trained on the fire alarm system. The Grievant can't have it both ways. If he was not trained, then he had no rational basis from which to conclude that if the alarm was not making a noise – silenced – that it was in active status. If he was trained, which he denies, then he would have known that the fire alarm did not reset itself and that he needed to immediately travel to the Courthouse to reset the alarm.

The County based its conclusion that the Grievant "created an unsafe work environment for all employees and an unsafe environment for inmates and members of the public present in the building at the time" on three charges. The evidence establishes that the Grievant failed to investigate the activated fire alarm after he was called in by Deputy Nitek on September 25, 2011. There is no evidence to support the assertion that the Grievant told anyone in Dispatch to "ignore" the alarm or that he "claimed" the alarm "should" reset itself.

---

[4] The language of the Grievant's discipline letter and Nitek's statement both use the same "should reset itself" language. I attribute the similarity to coincidence rather than concluding that the County possessed Nitek's statement when the disciplinary letter was prepared since the County would not have included the "ignore" charge in the disciplinary letter when it wasn't in Nitek's statement.

Due Process Challenges

The Union maintains the County violated the Grievant's due process rights when it imposed the three day suspension. The Union asserts the County denied the Grievant the opportunity to be heard, denied the Grievant Union representation, failed to provide the Grievant a copy of the charges against him and failed to conduct a fair and complete investigation prior to imposing discipline.

An employer's obligation to conduct a fair and impartial investigation was explained by Arbitrator Michael Beck in OSBORN & ULLAND, INC., AND RETAIL STORE EMPLOYEES UNION, LOCAL.1001, 68 LA 1152 writing:

> A primary reason arbitrators have included certain basic due process rights within the concept of just cause is to help the parties prevent the imposition of discipline where there is little or no evidence upon which to base a just cause discharge. Thus if an employer does engage in a reasonable investigation or inquiry of charges brought to it by a supervisor prior to implementing discipline or discharging an employee who may later grieve such action; or it will discover that there is insufficient evidence upon which to base a just cause discharge or other discipline and thus will not expose itself to liability by disciplining or discharging the employee. Thus it can be seen that due process is not a mere technical requirement; it is an integral part of the just cause clause that the parties have agree upon. For an arbitrator, in constructing a just cause clause, particularly where discharge is involved, to reach determination without considering whether due process has been afforded a Grievant is to invite labor unrest the parties hoped to avoid in including such a clause in their collective bargaining agreement.
>
> LINCOLN LUTHERAN, 113 LA 72, 77 (Kessler, 7/99)

The County did not afford the Grievant the right to be heard. Naczas prepared the Grievant's disciplinary letter on September 26. The Grievant did not work on the 26th. When the Grievant arrived at work on the 27th, Naczas presented the disciplinary letter to him. Naczas acknowledged that he did not ask the Grievant what had occurred. Not only was the Grievant denied the opportunity to be heard, of greater import in this case is the lack of a fair and impartial investigation.

The Grievant's supervisor, Naczas, discovered that the fire alarm had been disabled for almost 24 hours on September 25 from Walt Good. Good learned that the fire alarm had not

been reset after it went off the day prior when he stopped at the Law Enforcement Center at the start of his shift on September 26. Good's knowledge of what transpired on September 25 was gossip and the County relied on that hearsay, and only that hearsay, to conclude that the Grievant had engaged in misconduct. At no time prior to the imposition of discipline did any County management official attempt to ascertain the facts and circumstances surrounding the disabled fire alarm system in the Law Enforcement Center on September 25 nor did management offer the Grievant the opportunity to deny, explain or justify his actions.[5] These flaws resulted in the County taking action based on an incomplete set of facts which is unacceptable.

The County's failure to afford the Grievant industrial due process is a serious lapse with far reaching implications. There is no question that the Grievant disregarded his duties and obligations placing employees, inmates and visitors in danger. Yet, given the County's egregious violations of the basic tenets of fairness and just cause, I am compelled to sustain the grievance.

AWARD

1. No, the County did not meet the just cause standard when it suspended the Grievant for three days.

2. The appropriate remedy is to remove any and all reference to the three day suspension from the Grievant's personnel file and make the Grievant whole.

Signed this 16th day of August, 2012 in Rhinelander, Wisconsin.

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

[5] Although Supervisor Naczas consulted with "Cassandra" in the County Clerk or Auditor's office, her role was limited to letter preparation and not investigation.

rb
7820