

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**AFSCME LOCAL 807**

and

**CITY OF BURLINGTON**

Case 81  
No. 71419  
MA-15136

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**Appearances:**

VonBriesen & Roper, S.C., Attorneys at Law, by **Kyle Gulya**, Three South Pinckney Street, Suite 1000, Madison, Wisconsin, 53703-4200, appearing on behalf of the City of Burlington.

Ehlke, Bero-Lehmann & Lounsbury, S.C., Attorneys at Law, by **Bruce F. Ehlke**, 6502 Grand Teton Plaza, Suite 202, Madison, Wisconsin, 53719, appearing on behalf of AFSCME Local 807.

**ARBITRATION AWARD**

The City of Burlington, Wisconsin (“City”) and AFSCME Local 807 (“Union”) are parties to a collective bargaining agreement which provides for final and binding arbitration to resolve grievances arising between the parties. On June 17, 2012, the Union filed a request with the Wisconsin Employment Relations Commission seeking appointment of an arbitrator pursuant to the terms of the collective bargaining agreement. The undersigned was appointed to arbitrate this dispute. The Union sought recusal of the undersigned and the request was denied.

This matter was heard on March 28, April 3, and May 22, 2012 in Burlington, Wisconsin. A transcript of the proceedings was prepared and available. Both sides submitted briefs and reply briefs, and this matter is ripe for decision.

**ISSUES**

The parties stipulated that the issues were as follows:

Did the City of Burlington violate the collective bargaining agreement by terminating Mr. Kerry Jenkins? If so, what is the appropriate remedy?

## DECISION

The grievant in this matter is a twenty-year employee of the City of Burlington Wastewater Department. His employment with the City was terminated on July 21, 2011 based upon an allegation that he stole City property. He had no prior disciplinary history and was otherwise a satisfactory performer. The collective bargaining agreement provides that the employer may not discharge or suspend an employee without just cause. The agreement also provides that “dishonesty or theft” is sufficient basis for discharge without regard to prior disciplinary history.

There are no jurisdictional or other impediments to a decision on the merits and the central underlying issue is whether Kerry Jenkins stole from the City of Burlington.

The City of Burlington Department of Public Works consists of twenty-five employees who work in the Wastewater, Water and Streets/Parks Departments. The bargaining unit positions are covered by a collective bargaining agreement between the City and the Union. The grievant, Kerry Jenkins, worked as an operator in the Wastewater Department. The DPW is physically located next door to the Wastewater facility that Jenkins worked at. Both are in buildings on the outskirts of the City.

The grievant was discharged because the City believed that he stole gasoline on July 2, 2011 and cleaning supplies on July 8, 2011. Reference was also made in the letter of discharge to an incident that occurred in February of 2011 regarding the purported theft of diesel fuel. Additionally extensive evidence was submitted from both sides concerning evidence of purported thefts which were discovered after the discharge of the grievant.

### Management Suspicions

In February of 2011, Donald Hefty, a fellow wastewater operator formed a belief grievant may have taken diesel fuel which belonged to the City for his personal use. The incident occurred while grievant was working on weekend duty. Hefty observed two gas cans in the back of grievant’s pick-up truck. He believed grievant was acting nervously. Hefty, who had been a recent hire, did nothing with the information until June 14, 2011. At that time he reported his suspicions to Connie Wilson, head of the DPW. Wilson in turn involved Kevin Lahner, the City Administrator. The decision was made to notify the police department which began an investigation.

The Union correctly notes that the City has apparently abandoned the February diesel fuel incident as a basis for the termination. The Union suggests that the diesel fuel incident was presented for the purpose of embarrassing or otherwise creating bias against Jenkins. I do not accept that contention.

In my judgment, the prior report from Hefty along with the reports of suspicious behavior from co-worker Petersen (which occurred in June) explain the City's decision to involve the police in an investigation of the grievant. To the extent that the Union suggests an impure motive on the part of the co-workers in reporting their suspicions, I believe it is appropriate for the City to explain the basis for the co-workers' actions. If the evidence showed that the co-workers' reports were driven by a desire for personal advancement or malice, it might undermine the City's case for just cause. I am satisfied that there was no evidence that the co-workers were acting for improper reasons and that the City's decision to involve law enforcement was appropriate based upon the accusations of co-workers. Had the City failed to provide that background information, its decision to involve the police together with the obvious focus on Jenkins would have suggested a preconceived notion that Jenkins was a thief.

### **Gas Theft Investigation**

Officers from the Burlington police department examined records and interviewed co-workers. Following that they set up surveillance cameras at the facility used by city workers to refuel city vehicles. The clear focus of their attention was on Jenkins. This was not a case where material was missing and the question was who. The investigation was designed to determine conclusively whether Jenkins was stealing City property.

The grievant was scheduled to work on Saturday, July 2, 2011 which was the first day that surveillance was in place. Grievant had a practice of refueling department vehicles on the weekends. The refueling facility was at a privately-owned oil company and workers purchased fuel with city-issued credit cards. The oil company facility was not open to the general public and was unmanned. The police suspected that if the grievant was stealing gasoline from the city it was occurring when the grievant was fueling department vehicles on the weekends when he was scheduled to work.

The police set up video surveillance at the oil company. At 7:22 a.m. on July 2, grievant, who was on the clock, arrived with a city-owned pickup truck. He purchased \$15.93 gallons of gasoline using the city credit card. Between four and five gallons of the purchase was pumped into a gas can. Grievant later transferred the gasoline from the can to his personal vehicle. There is no dispute as to the above-described sequence. The pumping of the gasoline into the city vehicle and the gas can was recorded on video.

At the hearing in this matter, the grievant indicated that he began work on July 2 at either 5:30 or 6:00 a.m. He noticed when he left for work that his personal vehicle was low on gas. At around 7:00 a.m. he discovered that he forgot his wallet. He considered calling his wife but he rejected the idea as she was preparing to attend a renewal of wedding vows ceremony in Whitewater.<sup>1</sup> He attempted to contact his adult son but was unsuccessful.

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<sup>1</sup> The grievant resides on a farm ten to twelve miles from the City of Burlington.

Grievant testified that he wrote a note to himself as a reminder to talk with Connie about the gas, but had no discussion or other contact with anyone from the City about the gasoline until the investigatory interview on July 20, three weeks after the July 2 “purchase”.

I conclude that based on the entirety of the evidence that the grievant took the gasoline with no intention of repaying the City. Grievant was fully aware that taking gasoline from the City without paying for it was an offense that could lead to termination. He had previously been warned in connection with a claim he had taken gasoline on an earlier occasion. He testified he had never done so in the past but was aware of the consequences. It is unlikely that grievant, who had worked in Burlington for twenty years, did not have one friend or co-worker he could have called to borrow ten dollars from in order to purchase gas. Even more implausible is his explanation for not telling his supervisor. Grievant indicated every time he called her with the intention of disclosing the taking of the gasoline he was told she was in a meeting. When he finally did meet with her, he did not raise the issue of the gas payment. It is inconceivable that in a small department three weeks could pass without grievant being able to reimburse the City for less than twenty dollars worth of gasoline. The grievant’s explanation that he needed direction as to how the payment was to be made, i.e., by cash or through a payroll deduction, simply does not ring true. This was not a significant financial transaction requiring bureaucratic decision making. Grievant could simply have dropped off a check at the administrative headquarters of the City with any member of staff.

I also conclude that the manner in which grievant took the gas was suspicious. Why not simply drive his own vehicle down to the pump and pump in several gallons in a separate transaction? Instead, he goes through the difficult process of filling a separate gas can and then filling his own vehicle from the gas can. Wrestling a heavy gas can into position and filling a vehicle is significantly more difficult than inserting a gas station pump into a vehicle. If one were inclined to steal the gas, use of the gas can rather than filling one’s personal vehicle in plain sight of the public might be a more cautious approach.

The alleged contemporaneous reminder note adds nothing to grievant’s denials. While one might plausibly forget to reference it during the shock of an unexpected confrontation with his supervisor and the City Administrator, the fact that the note did not appear until the hearing in this matter some nine months later is implausible and suggests an after-the-fact attempt to buttress his story. His explanation for the gas “purchase” and his failure to disclose it simply requires too much reliance on coincidence piled on top of coincidence. In my judgment, the theft of the gasoline standing alone constitutes just cause for the discharge of the grievant.

### Cleaning Supplies

On July 8, 2011, co-workers reported that grievant took three aerosol-type cans of cleaning supplies that were the property of the City. The City purchased, in bulk, commercial cleaning supplies manufactured by the Elkhorn Chemical Company, located in Elkhorn, Wisconsin. The grievant had placed the cans in a Menards plastic bag and took them with him when he left for the day at noon on July 8.

Following the investigatory interview with City Administrator Lahner and Ms. Wilson conducted on July 20, the grievant left the premises and was escorted home by Burlington Police Department officers. He consented to the search of a work shed located on his farm.<sup>2</sup> The officers videotaped the interior of the shed in connection with the search. In a subsequent review of the video by Administrator Lahner he identified those cans as being the same type of cleaning supplies purchased by the City.

Grievant offered a somewhat convoluted explanation for the witnessed removal of the spray cans. He claimed he took the cans to another facility identified as the “Old Site” in anticipation of some cleaning efforts to take place in the future. The cans in the shed video and the cans later discovered in the “Old Site” have the same odd water stain marking. Grievant explained the cans in his shed as being items he purchased directly from Elkhorn Chemical Company in previous years. He offered no explanation for the presence of the apparently identical watermark stains. The City surmises that grievant took the three cans on the 8th and then moved them into the “Old Site” shed shortly after the initial suspension in order to avoid detection.

It would be a remarkable coincidence that the same label stain would appear on products purchased by the City as those appearing on cans purchased years earlier by the grievant. While grievant may have been a conscientious employee, it is difficult to believe that he would place three cans of different cleaners in a bag, and then transport the cans in his personal vehicle to the “Old Site” on his own time in anticipation of cleaning the facility at an unspecified date in the future. The credibility of the explanation is further strained by grievant’s assertion that he moved the bag of chemicals from one place to another at the “Old Site” in further anticipation of the cleaning project.<sup>3</sup>

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<sup>2</sup> Grievant and his family live on a large farm, but the majority of the land is rented out. The family does farm, but on a relatively small scale.

<sup>3</sup> Grievant claimed that he originally placed the bag of cans behind the door at the “Old Site”, and moved them into plain view the day before his termination. This explanation was offered to explain away the testimony of co-worker Hefty who stated he had not seen the cans at the “Old Site” prior to July 20.

I am satisfied that the City has proven that grievant took three cans of chemical cleaning solution for his personal use. That conclusion further supports the City's contention that the taking of the gasoline on July 2 was an intentional theft rather than an error in judgment by Jenkins.

### After Acquired Evidence

The theft of the gasoline and the cleaning supplies constituted the basis for the City's decision to terminate the grievant. Following the termination, the City uncovered what it believes to be further evidence of dishonesty or outright theft that occurred during grievant's employment. While "after acquired" evidence of misconduct may effect a remedy it is generally not admissible in order to prove just cause for the discharge. See generally, Sheehan v. Donlen Corp., 173 F.3d 1039, 1047 (7th Cir., 1999). The admissibility here is not an issue as the evidence was received without objection.

Much of the after acquired misconduct evidence forms the basis for criminal charges presently pending in the Circuit Court for Racine County. Any determination I might make relative to these incidents would frankly add nothing to the resolution of the criminal charges, nor would it add anything to the conclusions I have already reached. I therefore decline to address those claims leaving any further determination to the criminal justice system.

To lose one's job after twenty years of employment, over the petty theft of items is a tragic result. On the other hand, taxpayer-supported entities have a special interest in ensuring the trustworthiness of their employees. Accordingly, the decision reflects obedience to that principle.

### AWARD

The grievance in this matter is denied.

Dated at Madison, Wisconsin, this 15th day of November, 2012.

James R. Scott /s/

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James R. Scott, Arbitrator