

BEFORE THE INDEPENDENT HEARING OFFICER

In the Matter of the Grievance of

EILEEN CLARK

Under the Grievance Procedure of the

CITY OF GREEN BAY

Case ID: 284.0006

Case Type: IHO

DECISION NO. 36732

Appearances:

Mr. Sean Daley, Staff Representative, AFSCME Wisconsin Council 32, Post Office Box 19, Ashippun, Wisconsin, appeared on behalf of Eileen Clark.

Attorney Geoffrey Lacy, Strang, Patteson, Renning, Lewis & Lacy, S.C., 205 Doty Street, Suite 201, Green Bay, Wisconsin, appeared on behalf of the City of Green Bay.

DECISION OF THE IMPARTIAL HEARING OFFICER

The City of Green Bay (“City”) discharged Eileen Clark from her employment as a maintenance operations attendant (“MOA”) effective on May 19, 2015. Section 12.3.3 of the City’s Personnel Policy provides that an employee may request a hearing before an impartial hearing officer (“IHO”) if her grievance regarding the City’s personnel decision is not resolved in two prior, requisite steps. AFSCME Wisconsin Council 32 made such a request on behalf of Clark. Pursuant to the City’s policy for an impartial hearing, the parties selected Karl R. Hanson, from the Wisconsin Employment Relations Commission, to serve as the IHO.

The hearing in this matter was held on May 24, 2016, in Green Bay, Wisconsin. The parties filed written arguments after the evidentiary hearing which was transcribed. The last of the written arguments was received by the IHO on August 23, 2016. Based upon the evidence and arguments of the parties, the IHO makes and issues the following decision:

BACKGROUND AND FACTS

Eileen Clark began her work for the City in approximately 1992. Since 2003 she worked as an MOA. In March 2015, the City employed four MOAs. The MOAs rotate duties each week. Typically each MOA collected coin revenue from City parking meters once every four weeks. When not collecting revenue, the MOAs performed other parking operation duties for the City. Among those duties were maintenance and repair of parking meters.

On March 10, 2015, MOA Cheryl Carol collected revenue from parking meters. She was unable to collect revenue from four meters identified as numbers 3200, 3505, 0462, and 0464, because the lock mechanisms were frozen or jammed. She attempted to clean and unlock those four meters a second time on March 10, 2015, without success.

Carol placed a note in the staff's shared office indicating, by number, that the four meters could not be opened. Clark and MOA Dan Vandermuse were in the office at the time. Vandermuse commented that he had been unable to collect from the same four meters the prior week. Clark said she would repair the meters the next day. Based upon the rotation of MOA duties, it was Clark's responsibility to maintain and repair meters that week.

On March 11, 2015, Clark repaired the four meters identified as jammed, and also a fifth, Meter 3717. To repair the meters, Clark attempted to free the lock mechanism of each. When this failed, she drilled out the existing locks on each meter and inserted a new lock into each. For each meter this required several trips back to her utility truck to change drill bits or for other equipment. To change the lock mechanisms, Clark had to remove the coin cups from the vault of each meter.

Prior to opening each meter, Clark entered information on a handheld device indicating that she was about to repair the meter. This device is also used by MOAs each time they open a meter to collect revenue. When collecting revenue, the MOA "audits" the meter using the device. During an "audit," the device and meter communicate electronically and the device indicates how much money was put into the meter since the last audit. The device then resets the meter's balance to zero. The amount audited by the device is added to a report generated by a computer program. This happens whether or not revenue is actually collected from the meter.

When Carol attempted to open Meter 3200 on March 10, 2015, she first audited it and her device showed that \$31.05 had been deposited in the meter since its last audit. Later the same day, when Carol cleaned and attempted to open the meter a second time, she again audited it and her device indicated that \$2.80 had been deposited into the meter since the last audit. None of that revenue was collected due to the inoperable lock. At least \$33.85 should have been in the meter's coin cup at that point (not just \$2.80, as the audits are not cumulative but are only a reflection of deposits since the last audit).

After Clark repaired the five meters, including the four identified by Carol as jammed, she returned to the MOA's shared office space. Carol asked Clark if she was able to repair the meters (referring to the four she had tried to collect from on March 10, 2015). Clark reported that they were now fixed. Carol asked Clark if she should collect revenue from the meters. Clark

replied that it was not necessary for Carol to collect the revenue because the coin cups had sufficient room to hold additional coinage until Clark collected revenue the following week.

The coin cup inside a parking meter is about the size of a soda can. According to Clark, a meter's coin cup can hold about \$40.00 to \$42.00 when full and almost overflowing. When a coin cup overflows, the meter will continue to accept coins that then spill out of the cup and into the meter's vault that holds the cup. When the meter is subsequently opened, the coins that spilled out of the cup spill out of the meter.

Based upon Carol's March 10, 2015 audits, the four meters she could not open should hold at least the following revenue: Meter 3200 - \$33.85; Meter 3505 - \$39.40; Meter 462 - \$5.00; and Meter 464 - \$12.00. This totals to be \$90.25. If Vandermuse did not collect revenue from these four meters the prior week, the meters likely held more than \$90.25 by March 11, 2015.

After talking with Clark about whether revenue should be collected from the now-repaired meters, Carol decided to check the four meters herself. She testified that based upon her audits of the meters, she believed at least one of them, Meter 3505, would be near overflowing as it had not been collected in two weeks. She stated that in a typical week Meter 3505, which is in a popular location outside the county courthouse, receives revenue of about \$25.00.

Carol testified that when she checked the first repaired meter on March 11, 2015, Meter 3200,¹ she performed an audit. Her handheld device indicated that Meter 3200 should hold \$6.20, in addition to the \$33.85 audited for that meter the prior day. At this point, the meter should hold at least \$40.05, and be near full or at the point of overflowing. She testified that when she opened the vault and looked into the coin cup, however, she only counted \$1.85.

Carol testified that she then drove to Meter 3505. She audited and then opened the meter slowly expecting it to be overflowing. As of her second audit on March 10, 2015, Meter 3505 should have held at least \$39.40. Her March 11, 2015 audit indicated that another \$2.95 had been deposited into the meter. At this point the meter should have held at least \$42.35, and been at the point of overflowing. Instead, she reported the meter was empty.

Carol called MOA Sharron Gerrits, who was assigned other duties, to come to Meter 3500 and verify that it was empty. Carol told Gerrits she believed Clark had taken the revenue and recounted the events of the past two days. Carol said that because Clark may be in the process of collecting the revenue herself for deposit, she would wait until the end of the day and determine if Clark had done any audits of meters or deposited any revenue. Carol had the ability to see this information through the City's computerized collections program. Clark did not audit the meters or deposit any revenue.

¹ Carol testified to checking Meter 3207 or 3208, but later referred to checking Meter 3200 once her memory was refreshed with documents she printed and added notes to on March 11, 2015. Her testimony taken as a whole indicates that she was referring to Meter 3200, but misidentified its number at several times during the hearing.

Suspecting that Clark had taken money, Carol asked City Custodian Dawn Jolly to accompany her to check the last two meters. Jolly did so. Carol again audited the meters and then opened them. At this point, Meter 462 should have held at least \$5.25, but was only found to hold \$0.50; and Meter 464 should have held at least \$15.20, but was only found to hold \$0.75. Carol reported this information to her superiors and an investigation ensued.

When questioned during the City's investigation and when testifying at hearing, Clark stated that she did not take any money from the City's meters.

Additional facts, as relevant, are presented in the Discussion section below.

DISCUSSION

I. JUST CAUSE STANDARD.

The City is required by law to create a grievance procedure that addresses employee terminations. Wis. Stat. § 66.0509(1m). The legislature requires that the grievance procedure include the right to a hearing before an IHO and the right to an appeal before the City's governing body. *Id.* The legislature has not required that the City enact a just cause standard for the discipline or discharge of employees.

Nonetheless, the City, in Section 14.5 of its Personnel Policy provides that an employee may only be discharged for just cause. This is sufficient to create a property interest for Clark in her MOA position, which may only be taken from her with due process. The minimal features of such requisite due process are defined by *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985) and its progeny. The City's grievance procedure meets the minimal elements of due process.

Clark argues that in addition to the minimal rights guaranteed to her, the IHO should require the City to prove its case by more than a preponderance of the evidence. Generally, a claim outside of criminal offenses is proven if a party supports its case by a preponderance of the received evidence. This general standard may be altered by statutory law or common law.

The City concedes that it has the burden to demonstrate Clark committed the alleged misconduct and that such misconduct merited discharge. The City's grievance procedure does not state whether it must prove its case by a preponderance of the evidence, by clear and convincing evidence, or by the highest burden, beyond a reasonable doubt.

Clark argues that in cases such as hers, involving allegations of what may be criminal conduct and moral turpitude leading to discharge, a higher standard, such as proof of misconduct by clear and convincing evidence is necessary to establish just cause. She does not cite any authority for this argument. This position has been adopted by some arbitrators, although there is no clear consensus.

In cases involving state employees, agencies of Wisconsin state government must prove that misconduct occurred by a preponderance of the evidence. This is true even in cases involving theft, which carries a harsher stigma because it is potentially a criminal act and one of moral turpitude. Although this is not controlling in the context of these proceedings, it is instructive.

Having given due consideration to Clark's argument to apply a higher burden of proof, I decline her invitation. I have examined this matter requiring that the City must prove its case for just cause to discharge Clark by a preponderance of the evidence received.

II. DID CLARK COMMIT MISCONDUCT?

I find that the City met its burden and proved by a preponderance of the evidence in the record of this matter that Clark took City funds. She committed misconduct.

There is no direct evidence that Clark took money from Meters 3200, 3505, 462, and 464. No one saw her take money from any meter and put it into her pocket. The City alleges that the circumstantial evidence presented at the hearing is sufficient to prove that Clark stole this money. Clark denies taking any money and argues that the circumstantial evidence does not support a finding that she took money.

The City has proven that the money is missing. The City's system for parking meter revenue collection is not accurate to the penny. The system does, however, have a relatively high degree of accuracy when comparing deposits to audit reports (which are generated based upon the handheld device audits of the meters). Revenue is collected and deposited in groups. There is a degree of variation between what the City's automated records show should be collected versus what is deposited on a weekly basis for each group.

On March 10, 2015, Carol's deposit for Group 3, which includes Meters 3200 and 3505, was short \$70.90, compared to her audit report. Revenue not collected from Meters 3200 and 3505, but audited by Carol on March 10, 2015 was \$73.25. Therefore, a variance of \$2.35 exists. Presumably, from among the other 76 meters in Group 3, \$2.35 was collected that was not audited by Carol using her handheld device. Although variances of this nature appear somewhat common, a variance of \$70.90 is not.

On March 10, 2015, Carol's deposit for Group 7, which includes Meters 462 and 464, was short \$5.96, compared to her audit report. Carol's March 10, 2015 audits for Meters 462 and 464 indicated that those meters contained \$17.00 which was not collected. Therefore, somewhere among Group 7's other 38 meters, Carol found \$11.04 of revenue that was not audited but was deposited.²

² In her daily report, Carol noted that she collected revenue from Meter 467 within this group, but had failed to audit the meter. The following day she audited that meter and it showed \$5.25 of revenue.

Based upon Carol's March 10, 2015 deposit reports, \$76.86 was missing from her Group 3 and Group 7 deposits. Although this amount is less than the \$90.25, that the four meters in question ought to have held on March 10, 2015, according to her audit report, the City has established that money – somewhere between \$76.86 and \$90.25 – was missing on March 11, 2015.³

I am persuaded that Clark took the funds. Two of the meters were at the point of being full or overflowing by March 11, 2015. Based upon Clark's testimony regarding how much revenue a coin cup can hold, Meters 3200 and 3505 would have appeared full or nearly full when Clark opened the meters to replace their locks. Given the approximate revenue anticipated for those meters (which are located in popular areas) in a normal week – about \$25.00 – Clark must have known that they would overflow by the following week when she collected revenue. Her statement that the meters could wait another week for collection is not supported by the balance of the record regarding how much revenue was deposited into the meters by March 11, 2015 and the capacity of the meters.

Clark's assertion that she could not have stolen future revenue (and therefore did not take any money) is not supported by the record. Clark testified that when she approached each of the four meters she entered a code into her handheld device that logged each meter as being in a repair mode. She argues that by entering each meter into repair mode, the audit feature associated with each meter was reset to zero (in the same way that a meter's revenue count is reset to zero each time that it is audited with the handheld device). The record, however, does not support this conclusion. The testimony and exhibits support the opposite conclusion. When a meter is put into repair mode with a handheld device, the meter's revenue count is not reset to zero, but continues to add revenue to the balance then accumulating since the last audit of the meter.

If Clark's use of the handheld device to put each meter into repair mode had the effect of zeroing the balance for each meter, her argument would be compelling. If Meter 3505 was zeroed when she entered it into repair mode, and she took all of the money then in the meter's coin cup, she could not have taken money subsequently deposited. When Carol audited Meter 3505 on March 11, 2015, her device showed that \$2.95 had been deposited into the meter since the afternoon of March 10, 2015. Carol found the meter to be empty. If this revenue was deposited and added to the running balance only since Clark's repair of the meter, it is unlikely Clark returned to the meter a second time on March 11, 2015, before Carol arrived, to additionally take whatever revenue may have been deposited within a few hours. This would cast doubt on the suspicion that Clark took any revenue. It would tend to show that Carol, who opened the meter after the \$2.95 was deposited, took the \$39.40 audited on March 10, 2015, and the \$2.95 audited on March 11, 2015.

But, as discussed above, the record clearly shows that entering a meter into repair mode does not zero the audit balance. Instead, the meter continues to add revenue to a balance accruing

³ Among the four meters, an additional \$12.60 was audited on March 11, 2015. When she opened the four meters on March 11, 2015, Carol counted \$3.10. The record is unclear whether she collected this \$3.10.

since the last audit. \$2.95 was deposited into Meter 3505 after Carol's last audit of the meter on March 10, 2015, and before Carol's audit of the meter on March 11, 2015. Contrary to Clark's arguments, it is possible that she took both the \$39.40 audited on March 10, 2015, and the \$2.95 audited on March 11, 2015.

Although a tense relationship clearly existed between Clark and Carol, there is no evidence suggesting Carol sought to frame Clark for the theft of City revenue. The mere existence of that possibility and Carol's opportunity to take the missing money is not sufficient to overcome the balance of the circumstantial evidence that Clark took the funds.

The fact that video footage is allegedly missing from the courthouse surveillance camera does not in and of itself support Clark's insinuation that Carol took funds from Meter 3505. The video was not put into evidence by either party. Instead, I am presented only with a City employee's summary of what she saw when reviewing the video. In an email that she wrote to another City employee, Mary Scanlan said she did not see Carol collect revenue from Meter 3505 on the video, "unless this also happened when the camera was not functioning properly." Scanlan testified that one minute and eight seconds of video was missing at the time Carol was at the meter. This coincidence is suspicious, but without the video to evaluate in its entirety or at the time Carol was at the meter, it only raises an unanswered question. There is no allegation that Carol had access to the video. Therefore, Scanlan or someone else would have to be involved in a conspiracy to destroy exculpatory evidence in order to frame Clark for theft. Nothing in the record suggests this is the case.

Clark's repairs to Meter 3717 do not refute the evidence presented by the City. Clark makes an undeveloped argument that this meter's unpilfered revenue points to a conspiracy against her. On March 11, 2015, Clark repaired Meter 3717 in addition to the other four. The record is unclear as to how Clark knew this particular meter was in need of repair. Nonetheless, she repaired the meter. She asserts it is not mere coincidence that no money was reported missing from Meter 3717 and that none of her coworkers knew she repaired it.

Carol's reports from March 10, 2015 indicate that she audited Meter 3717 and it showed \$0.75 deposited into it since its last audit. Carol made no mention on her March 10, 2015 daily report that she was unable to collect revenue from this meter. The record does not illuminate why Clark repaired Meter 3717. Similarly, the circumstances of the meter's repair or the \$0.75 audited within it do not refute the evidence presented by the City pointing to the theft of funds by Clark.

III. DISCHARGE IS AN APPROPRIATE PENALTY FOR THEFT.

The parties agree theft is a serious offense that, if proven, merits discharge from employment. When theft is proven, a municipal employer generally has just cause to discharge the offending employee. As the parties agree that discharge is an appropriate penalty for theft, I find that the City has proven by a preponderance of the evidence that discharge is an appropriate form of discipline in this case.

IV. CONCLUSION.

The City has proven that at least \$76.00 of coin revenue was missing from its parking meters on March 11, 2015. Clark knew how much money a coin cup could hold. When she repaired Meters 3200 and 3505 on March 11, 2015, she should have readily identified both as being too full to wait another week for collection. Instead, she told Carol that both could wait until she, Clark, collected them the following week. Carol had reason to be suspicious of Clark's statement given her knowledge of what she audited each meter to hold and Vandermuse's report that he did not collect from these heavily used meters the week before. The City has proven by a preponderance of the evidence that Clark took the missing money. Clark's attempts to refute the evidence offered by the City are not persuasive to the point that I find the City failed to sustain its burden.

DECISION

The City of Green Bay had just cause to discharge Eileen Clark from her employment. Eileen Clark's grievance is dismissed.

Signed at the City of Madison, Wisconsin, this 20th day of October 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karl R. Hanson, Impartial Hearing Officer