

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:
of a Dispute Between	:
	:
CITY OF RACINE (WASTEWATER COMMISSION)	: Case 374
	: No. 45626
and	: MA-6679
	:
LOCAL 2807, AMERICAN FEDERATION OF	:
STATE, COUNTY AND MUNICIPAL EMPLOYES,	:
AFL-CIO	:
	:

Appearances:

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Mark L. Olson, 111 East Kilbourn, Suite 1400, Milwaukee, Wisconsin 53202-3101, appearing on behalf of the Employer.

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin 53401-0624, appearing on behalf of the Union.

ARBITRATION AWARD

City of Racine (Wastewater Commission), hereinafter referred to as the Employer, and Local 2807, American Federation of State, County and Municipal Employes, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances concerning the interpretation, application or compliance with the collective bargaining agreement. Pursuant to a request for arbitration the undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the suspension of an employe. Hearing on the matter was held in Racine, Wisconsin on August 8, 1991. A stenographic transcript of the proceedings was prepared and received by the undersigned by September 4, 1991. Written arguments and reply briefs were received by the undersigned by November 22, 1991. Full consideration has been given to the testimony, evidence and arguments presented in rendering this award.

ISSUE

During the course of the hearing the parties agreed upon the following issue:

"Did the Employer violate the collective bargaining agreement when it suspended the grievant for three (3) working days, January 29, 30, 31, 1991?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACT PROVISIONS

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ARTICLE 4

MANAGEMENT RIGHTS

The Commission possesses the sole right to operate the Commission and all management rights repose

in it, but such rights must be exercised consistent with other provisions in this contract. These rights normally exercised by supervision include, but are not limited to the following:

- A. To direct all operations of the Commission.
- B. To hire, promote, transfer, assign and retain Employees in positions with the Commission and to suspend, demote, discharge or take other disciplinary action against Employees, for just cause. Probationary Employees are not protected by this just cause standard.
- C. To lay off Employees due to lack of work or funds in keeping with the seniority provisions of this Agreement.
- D. To maintain efficiency of the Commission operations entrusted to it.
- E. To introduce new or improved methods or facilities.
- F. To change existing methods or facilities.
- G. To contract out for goods or services; however, there shall be no layoffs or reduction in hours due to any contracting out of work.
- H. To determine the methods, means and personnel by which such operations are to be conducted.
- I. To take whatever action might be necessary to carry out the functions of the Commission in situations of emergency.
- J. To take whatever action is necessary to comply with State or Federal Law.
- K. Overtime. The Commission has the right to schedule overtime work as required in a manner most advantageous to the Commission and consistent with the requirements of Commission operations and the public interest.

In addition to the Management Rights listed above, the powers of authority which the Commission has not officially abridged, delegated or modified by this Agreement are retained by the Commission. The Union recognizes the exclusive right of the Commission to establish reasonable work rules.

The Union and the Employees agree that they will not attempt to abridge these Management Rights and the

Commission agrees that it will not use these Management Rights to interfere with rights established under this Agreement. Nothing in this Agreement shall be construed as imposing an obligation upon the Commission to consult or negotiate concerning the above areas of discretion and policy.

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ARTICLE 12

DISCIPLINE

- A. Discipline. The Union shall be furnished with a copy of any written notice or reprimand, suspension or discharge. The Commission agrees that it will attempt at all times to use the disciplinary process as a means to correct shortcomings on the part of Commission Employees in terms of their overall work performance. Discipline, therefore, is intended to initiate a corrective action on the part of the Employee. A written reprimand sustained by the Grievance Procedure or not contested shall be considered a valid warning. The Union agrees upon receipt of the reprimand notice to review the situation with the Employee in an attempt to correct the problem. When an Employee's record is cleared of minor infringements for a year, all previous records of minor infringements shall be removed from his personnel file.
- B. Discharge. Although the Commission continues to exercise its sole discretion in determining when it will discharge an Employee (subject to the requirement of discharge for just cause), when practical, in its discretion, the Commission will advise both the Union and the individual Employee that his job is in jeopardy. Receipt of reprimands or suspensions will be deemed to serve as such notice to the individual Employee. Upon receipt of copies of such notices, the Union agrees that it will meet with the individual Employee in an attempt to correct his inadequate job performance.

When a grievance involves discharge, it shall be reduced to writing and referred directly to the Manager. Steps 1 and 2 would not apply in this type of case, and the decision of the Manager shall be subject to arbitration as provided in Article 10 of this Agreement. Discharges of probationary Employees shall not be subject to the Grievance or Arbitration provisions of this Agreement.

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PERTINENT WORK RULES

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1. MAJOR RULES

Violators of major rules are normally subject to discharge on the first offense.

1. Theft, unauthorized possession, or deliberate abuse or misuse of Utility or employee equipment or property.
2. Misuse, or any removal from the plant premises without authorization, of any Utility property, records or time cards.
3. Restricting production, interfering with others in the performance of their jobs, encouraging, engaging or participating in any interruption of work or production.
4. Falsification of records or reports, or falsely stating or making claims of injury.
5. Bringing weapons of any kind, narcotics or intoxicating liquors into the plant.
6. Immoral conduct or indecency.
7. Insubordination.
8. Fighting, use of threatening or foul language against a person, or any deliberate action endangering the person of any employee.

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BACKGROUND

The Employer operates a wastewater treatment facility on the shore of Lake Michigan in Racine, Wisconsin under a permit issued by the Wisconsin Department of Natural Resources (DNR). During the summer of 1990 high counts of fecal coliform were found on Racine's beaches. To ensure that the Employer's facility was not causing this problem Operations Supervisor Richard Pace stressed to all employes the importance of maintaining effluent readings within DNR permit limits. On August 16, 1990 Pace issued a short handwritten memo on a DNR issued report as a directive to employes stressing the importance of maintaining a proper residual reading and on the importance of reporting residuals which were above DNR limits. Roger Overson, hereinafter referred to as the grievant, a wastewater treatment plant operator, viewed the directive as a order requiring him to incorrectly report effluent readings. The grievant resisted Pace's memo, stating he could not comply with it and asked Pace to tell him what chlorine level to maintain. The grievant believed the directive required him to report readings within DNR limits regardless if the reading exceeded the limits or not.

To keep fecal coliform discharges within DNR limits the employes monitor the wastewater. Chlorine is added to the wastewater discharge to reduce fecal coliform. If too much chlorine is added to the discharge a residual amount of chlorine is left in the wastewater discharge. The Employer's DNR permit requires the chlorine residual to be under 0.5 milligrams per liter. At the

time Pace issued the handwritten memo samples of discharge water were taken twice a day by employes and the results were recorded in accord with DNR requirements.

On September 10, 1990 to control the fecal coliform discharge and to dispel any possible confusion Pace issued the following memo to all operators:

MEMO TO: ALL ROTATING SHIFT OPERATORS
FROM: RICK D. PACE, OPERATIONS SUPERVISOR
SUBJECT: CHLORINE RESIDUAL & AERATION FLOW DIVERSION
DATE: SEPTEMBER 10, 1990

CHLORINE RESIDUAL:

The Racine Wastewater Utility's WPDES permit has a maximum daily chlorine residual limit of 0.5 mg/l. Any residual higher than this is a violation of our discharge permit and has to be reported as such to the DNR.

It is the responsibility of the plant Operator to monitor and adjust the chlorine dosage to maintain the chlorine residual under 0.5 mg/l. Failure to do so may result in disciplinary action.

As of the date of this memo, the Operators will run the chlorine residual test 3 times each shift. If further monitoring is required to insure we are in compliance, it is the responsibility of the Operator to do so.

The chlorine residual should be maintained between 0.2 -0.4 mg/l and should not exceed the daily permit limit of 0.5 mg/l.

AERATION TANK DIVERSION (HIGH FLOW)

The guidelines for aeration tank diversion are as follows:

"The Operator shall maintain a flow of 50 MGD thru the aeration system at all times. If for some reason this is not practical, the Operator shall make a written notation in the Operators log book explaining his reasoning behind his actions."

The Operator is responsible for the quality of the effluent of the wastewater plant at all times. Changes in the above procedures to improve wastewater effluent quality are acceptable with approval from Supervision or in emergency situations. Where changes are implemented, written explanations are required in the Operators log book.

PLEASE READ AND SIGN BELOW:

Signature lines here.....

The grievant refused to sign the memo, being the only shift operator to refuse to sign it, and asserted it was impossible to comply with. The grievant claimed he had no control over the initial reading he took on his shift and thus he could not be responsible if the reading exceeded the 0.4 milligrams per liter because of the actions on the previous shift. The grievant also believed the memo violated DNR policy in effect requiring him to falsify the reading. Such a falsification could result in the loss of his operator's licence.

On September 28, 1990 the grievant was given a written reprimand from Pace for neglecting his job duties and responsibilities, loitering and wasting time during work hours, and insubordination. The grievant grieved the reprimand. It was denied by management and it was not processed to arbitration.

The instant matter arose as a result of actions on January 14, 1991. At the commencement of the grievant's 3:00 p.m. work shift while in the Employer's lunchroom, Pace directed the grievant to take a monthly summary sheet for the South End (the grievant's work location) and return it to the South End. The grievant than left the lunchroom without the summary sheet and went to his locker to obtain his updated operator's license which he had recently received in the mail. He then went into the Employer's control room to read the logbook. Pace, as he was leaving the lunchroom, was informed by employe Roger Stephens that the grievant had not taken the summary sheet with him. Pace then took the summary sheet to the control room where he met the grievant. Pace handed the summary sheet to the grievant and again informed the grievant he wanted the grievant to return the summary sheet to the South End. The grievant replied, "eventually". Pace left and the grievant laid the summary sheet down on a table in the control room and then went to the secretary's office to have a copy made of his license update for the Employer's files. The grievant was informed by the secretary he needed a receipt for the testing and that a copy of the check he wrote for the test fees would suffice. The grievant's checkbook was in his vehicle in the Employer's parking lot. The grievant then went to the South End to do a reading, then went to the parking lot to get his checkbook. During this time Pace returned to the control room and he was informed by employe Joe Orth that the grievant had left the summary sheet in the control room. Orth then volunteered and took the summary sheet to the South End. Orth met the grievant as the grievant was going to see the secretary. The grievant took the summary sheet from Orth and took it to the South End.

At approximately 4:10 p.m. the grievant went to Pace's office. While there he demanded that Pace give him a copy of his "revised written reprimand". Pace informed the grievant there was no revised reprimand, that the copy he had was the one in his file and that if the grievant was confused about this matter he should talk to his Union representative. The grievant than informed Pace that he was "talking to him". The grievant than informed Pace he was going to file a harassment suit against him and that he was going to report Pace to the DNR for telling operators that they could not report chlorine residual numbers above 0.5 milligrams per liter. Pace told the grievant to do what he had to do and directed him to go to his assigned work station. The grievant then returned to his work station.

On January 28, 1991, the grievant received the following disciplinary action:

MEMO TO: Rodger Overson
FROM: Rick D. Pace, Operations Supervisor

SUBJECT: Three Work Day Suspension Without Pay.

This letter is to notify you that you are being issued a three work day suspension without pay for insubordinate conduct. The suspension shall be January 29, 30, 31, 1991.

On September 8, 1990 you were issued a Written Reprimand for conduct that was of an insubordinate nature. This current progressive discipline action is being taken for your continued lack of cooperation and your attitude towards the directions of your supervisor. (See attached report of incident.)

Further violations of work rules or any of the universally accepted modes of conduct in a employer/employee relationship shall result in further disciplinary action up to and including discharge.

I hope this disciplinary action will elicit the necessary corrective action on your part.

cc: Stan Budrys
Tom Bunker
Tom White
Local 2807

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January 14, 1991 4:30 p.m.

(3:00 p.m.)

Rodger Overson came into the North lunchroom just before 3 p.m. I gave him a monthly summary sheet for the South End and asked him to return it to the binder on the South End. He took it and didn't say a word. He left. As I was leaving the lunchroom, Roger Stephens pointed out to me that the paper I had given Rodger Overson was lying on the lunchroom table. I took it with me to Primary Control. I met Rodger Overson coming out of Primary Control. I gave him the Summary Sheet again and explained that I wanted it returned to the South End. He looked at me obviously annoyed and answered "EVENTUALLY"! He then left. I returned to Primary Control later, and Joe Orth called my attention to the summary sheet **again**. Rodger had left it there lying on the table. I told Joe that I had given it to Rodger 2 times already. He (Joe) told me not to worry, that he would take it and return it to the South End.

4:10 p.m.

Rodger Overson came into my office and demanded a copy of his "REVISED WRITTEN REPRIMAND." I told him there wasn't any revised version, and the copy he had was the one in his file. I told him to talk to his Union representatives if he was confused. He said "I'm talking to you." I told him to do what he felt he had to do. He then told me he was reporting me to the DNR for telling the Operators that they couldn't report any chlorine residual numbers above 0.5 mg/l. I again told him to do what he had to do. I then told him to go to his assigned work area and do his job. He left.

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MEMO TO: Rodger Overson
FROM: Rick D. Pace, Operations Supervisor
SUBJECT: Areas that need improvement

1. Follow Supervisors orders promptly and courteously.
2. Be here in North Lunchroom and ready to receive instructions and go to work at 7 a.m. or 3 p.m.
3. Freely give verbal reports to your Supervisor as well as list in Log Book.
4. All requests for vacation, any reimbursements, etc. go thru your immediate Supervisor.
5. You will be courteous to your Supervisor and other employees at all times.
6. You will submit your DNR test results to your Supervisor without having to be hounded to turn them in.
7. Answer any pages by your Supervisor as soon as possible.

On February 19, 1991 a representative from DNR met with the Employer to discuss a complaint raised with the DNR by the grievant. While the DNR representative felt the September 19, 1991 memo could be made more clearer, he found that the Employer had not committed any violations of its DNR license.

Thereafter the grievance was processed to arbitration in accordance with the parties grievance procedure. At the hearing in the instant matter Pace acknowledged he did not like the grievant's work performance or the grievant's personal attacks against him.

EMPLOYER'S POSITION

The Employer contends it had just cause under Article 4, Paragraph B of

the collective bargaining agreement to discipline the grievant and suspend him for three (3) days without pay for insubordination and continual noncompliance with the Employer's directives. The Employer argues the grievant has a proven history of insubordination and of failing to follow directives. The Employer points out the grievant was verbally resistant to the August and September 1990 written directives and the grievant was the only employe to refuse to sign the September memo. The grievant failed on September 11, 1990 to properly implement the supervisor's directive to take a residual reading at 2:30 p.m. instead of 1:30 p.m.. The grievant failed to perform a job as directed by his supervisor (scum the clarifiers). On September 28, 1990 the grievant was issued a written reprimand placing him on notice his behavior had been unacceptable and intended to initiate corrective action on the grievant's part. While the grievant did grieve the reprimand it was not processed to arbitration. The Employer argues that despite the written reprimand the grievant's behavior did not change. The Employer contends the grievant was given the three (3) day suspension after another situation occurred where the grievant was insubordinate and failed to follow supervisory directives.

The Employer points out that on January 14, 1991 the grievant's supervisor instructed the grievant at least three (3) times to take a summary sheet to the South End where the grievant would need the sheet in order to perform his duties. The Employer argues the reasonableness of this directive is indisputable since it was necessary for the grievant to have this summary sheet in order to perform his duties. The Employer argues the grievant deliberately and blatantly disregarded his supervisor's directive. The Employer concludes there can be no question the grievant was deliberately seeking to provoke a confrontation with his supervisor.

The Employer argues insubordination is a serious offense because this manner of conduct poses a direct challenge to management's fundamental right to direct the work force. Further, that if such behavior was deemed acceptable and followed by co-employes supervision would be ignored or treated with contempt and chaos would result.

The Employer also points out that later on January 14, 1991, after a different employe took the summary sheet to the South End, the grievant barged into his supervisor's office, demanded a non-existent document and attempted to intimidate the supervisor. The grievant threatened to file a complaint with the DNR against the supervisor and the Employer concerning the August, 1990 supervisory directive with which the grievant never agreed. This threat the grievant later carried out.

The Employer asserts that as the grievant had previously received a written warning for this exact kind of insubordinate behavior he was suspended. The Employer argues just cause did exist and further, that the Employer chose to follow progressive discipline even though the grievant's actions of insubordination would have been grounds for termination. Here the Employer argues that grievant's attempt to intimidate the supervisor is in essence a use of threatening language and under the Employer's Major Rules grounds for discharge.

The Employer also argues that where the undersigned to impose a lesser penalty on the grievant such a reduction in penalty would serve no purpose and would infringe upon management's rights and responsibilities. Particularly in the instant matter where the grievant's conduct was such that the Employer would have had cause to impose the more severe penalty of discharge. The Employer also argues that leniency is the prerogative of the Employer, not the arbitrator, and the undersigned should not substitute his judgement for that of the Employer's unless there is compelling evidence the Employer abused its discretion. The Employer points out that not only did the grievant fail to

follow a direct supervisory directive more than once, but he also compounded the matter by entering his supervisor's office and confronting his supervisor in a loud, threatening and abusive fashion.

In its reply brief the Employer contends that it engaged in no activity which violated Article 4, Paragraph B, or Article 12, Paragraph A. Therefore the grievance must be dismissed. The Employer argues that there can be no question that it adhered to the principle of progressive discipline. The Employer points out the grievant received a written reprimand for the same type of unacceptable behavior for which he received a three (3) day suspension. Prior to receipt of the written reprimand the grievant exhibited an uncooperative, irresponsible and belligerent attitude towards his work and his supervisors which culminated in the written reprimand. The Employer asserts that the written reprimand was not processed to arbitration. The Employer contends this is significant because the written reprimand was in his file when he engaged in further acts of insubordination and uncooperative conduct which resulted in his three (3) day suspension.

The Employer argues the grievant's behavior did not improve following receipt of the written reprimand. This behavior culminated in the incidents which occurred on January 14, 1991. The Employer points out the grievant failed to follow the direct orders of his supervisor and engaged in threatening and abusive behavior. The Employer points out the January 28, 1991 document points out seven (7) areas of concern which led to the grievant's discipline. The Employer concludes the evidence demonstrates the grievant was conducting himself in a manner which is wholly unacceptable to a productive work environment and that the grievant had not made any attempt to improve his conduct or attitude as an employee. The Employer further points out that under the work rules the employees are subject to discharge on a first offense for falsification of records or reports, insubordination, or for use of threatening or foul language against a person. The Employer contends the grievant is guilty of all three (3) work rules. The Employer also argues that the grievant is guilty of violating the general rules of the Employer which would in and of themselves result in the grievant's suspension.

The Employer also asserts the Union's attempt to limit the issue before the undersigned to whether the grievant was insubordinate on January 14, 1991 ignores the larger context for which the grievant was disciplined and fails to recognize the premise that the grievant was not solely disciplined for being insubordinate. The Employer argues the January 28, 1991 document itself specifies that the discipline being imposed on the grievant was for a far more larger array of misconduct.

The Employer also argues there is no justification or rationalization for the conduct in which the grievant engaged on January 14, 1991. The Employer asserts the Union's attempt to demonstrate the grievant never directly refused his supervisor's direct order, that the grievant would have eventually taken the summary sheet to the worksite, and that the grievant was seeing the Employer's secretary are facts which are neither relevant or pertinent to the instant matter. The Employer argues that what is relevant is that the supervisor ordered the grievant more than once to take the summary sheet to the South End and that these orders were ignored by the grievant. The Employer concludes that the direct refusal of an employee to carry out orders given to him by his supervisor is nothing other than insubordination, conduct for which the grievant had already been issued a written reprimand. The Employer argues the Union cannot justify or turn this act of misconduct into anything other than what it is, insubordination by the grievant.

The Employer also points out the Union fails to address the second act which occurred on January 14, 1991. The Employer again points out the grievant

threatened to report the supervisor and the Employer to the DNR and further threatened he would misrepresent the facts concerning discharge chlorine residual in order to harass the supervisor and the Employer. The Employer stresses the grievant did in fact carry out this threat and the Employer was ultimately cleared of any wrongdoing. The Employer asserts an employe has no right to engage in acts of self-determination in the face of direct, reasonable orders from his supervisor nor does an employe have any right to confront, harass, harangue or threaten his supervisor or any other employe.

The Employer further points out the Union fails to address the fact that the grievant's supervisor cited seven (7) areas in his January 28, 1991 letter of suspension to the grievant, all of which were areas in which the grievant was deficient in. The Employer argues the Union did not present any evidence to refute any of these seven (7) points.

The Employer submits to the undersigned that the grievant is expected to conduct himself in a manner which is appropriate to standards of conduct which can be expected of all employes. Further, that the Employer has the right to expect employes to conduct themselves professionally and appropriately and to interact cooperatively with other employes. The Employer argues the record demonstrates the grievant flagrantly and egregiously failed to conduct himself in this fashion. The Employer asserts acts of insubordination, harassment and inattention to duty cannot be tolerated in any work setting. The Employer concludes the grievance is without merit and should be dismissed.

UNION'S POSITION

The Union contends the fundamental issue herein is whether the grievant was guilty of insubordination and asserts the grievant was not. The Union argues that for an employe to be disciplined for insubordination for failing to follow a supervisor's order, the order must meet two (2) tests. First, it must be clear and specific enough to let the employe know exactly what is expected.

Second, the employe must be told exactly what the consequences will be for refusing to comply. The Union points out both Pace and the grievant knew the summary sheet was not needed at the South End until 10:00 p.m. and when Pace first saw the grievant it was 3:00 p.m.. The Union acknowledges that the grievant informed Pace he would bring the summary sheet to the South End "eventually". The Union points out that Pace never informed the grievant "eventually" was unacceptable nor did Pace at any time give the grievant a direct order that the summary sheet had to be delivered right away. The Union stresses that Pace never indicated that failure to deliver the summary sheets post haste would result in discipline. The Union concludes that the grievant never refused Pace's directive, that the discipline did not meet the above criteria and therefore the Employer did not have just cause to discipline the grievant.

The Union also points out that on January 14, 1991 the grievant was turning in proof that he had updated his operator's license. The Union points out that this is normally done during work hours. After going to his truck to get his checkbook so he could verify that he had paid for the testing necessary to update his license he went to the South End to complete his 3:00 p.m. reading. The Union stresses that the grievant would have brought the summary sheets to the South End after he turned in a copy of his canceled check to the Employer's secretary. The Union also asserts that if Orth had not brought the summary sheet to the South End, the grievant would have. The Union concludes that the grievant intended to have the summary sheet at the South End in a timely manner and that therefore the Employer did not have just cause to discipline the grievant.

The Union also argues that the sole issue before the undersigned is whether the grievant was insubordinate on January 14, 1991. The Union asserts the Employer's attempt to demonstrate that the grievant had committed myriad actions which prompted the discipline ignores the fact that the grievant had not been disciplined relative to the other accusations. The Union argues the grievant's complaint to the DNR did not violate any Employer policy. The Union also argues that the grievant had sound reasoning for concern about the Employer's August and September memos. The grievant felt the directive was tantamount to his having to falsify readings and that he could be disciplined for situations beyond his control. The DNR's representative suggested that the memo be restructured to allay the grievant's concern. The Union also stresses Pace acknowledged in cross-examination that the grievant was disciplined for the January 14, 1991 incidents and further, that had January 14, 1991 not happened he would not have been disciplined the grievant. The Union also points out that Pace's 3:00 p.m. entry does not state the grievant refused Pace's order, does not show the grievant was abusive towards Pace, does not show Pace ordered the grievant to carry out his directive immediately and acknowledges the grievant's statement the directive would be followed eventually. The Union concludes the Employer's attempt to paint the grievant as a substandard employe carries no weight and that the January 14, 1991 incidents do not justify discipline.

The Union also stresses that Pace acknowledged things had gotten personal between him and the grievant. The Union argues that the Employer can only discipline employes for just cause and the personal feelings of a supervisor

towards an employe do not meet the "just cause" standard.

In its reply brief the Union asserts the Employer has attempted to shift the focus of the instant matter from whether the grievant was insubordinate on January 14, 1991 to a macro response of unsubstantiated allegations. The Union stresses the calling in of the DNR by the grievant to investigate a perceived violation is not wrong. The Union also argues that a three (3) day suspension from work without just cause cannot be viewed as leniency. The Union reasserts that the grievant was disciplined for the incidents which occurred on January 14, 1991 and nothing else. This fact was substantiated by management witnesses during cross-examination. The Union submits the Employer falls short in meeting its burden of proof as the grievant was never insubordinate on January 14, 1991 because he never refused Pace's directive and Pace never made issue of the grievant's understanding of the directive. The Union argues it is reasonable to deduce that the grievant, when he was not contradicted by Pace, was totally unaware of any alleged insubordination or the possibility of discipline.

The Union would have the undersigned sustain the grievance, find the Employer did not have just cause to discipline the grievant, and to direct the Employer to make the grievant whole.

DISCUSSION

The parties' collective bargaining agreement requires the Employer to have just cause in order to discipline an employe. During the hearing in the instant matter the Employer acknowledged that had it not been for the incidents which occurred on January 14, 1991 the grievant would not have been disciplined. 1/ The record demonstrates that on September 28, 1990 the grievant received a written reprimand for neglecting job duties and responsibilities, wasting time and insubordination. Between September 28, 1990 and January 14, 1991 no actions of a disciplinary nature were taken by the Employer against the grievant. The Employer has argued and presented evidence that certain acts of the grievant during the above time frame support its decision to discipline the grievant. The Union had argued the Employer cannot rely on these incidents to support its decision to discipline the grievant as the Employer took no action at the time they occurred and had not the alleged actions of January 14, 1991 taken place no disciplinary action at all would have been taken against the grievant. The undersigned agrees with the Union position. In order for corrective disciplinary action to succeed an employe must be notified if he/she is continuing to demonstrate behavior which is deemed inappropriate by the Employer. Herein, if the Employer determined the grievant's actions were such that it constituted inappropriate behavior the time to inform the grievant was at the time at which the incident occurred. Rationally, unless informed otherwise, the employe can only conclude that his conduct is acceptable to the Employer. Thus, the Employer's failure to notify the grievant at the time the complained of conduct occurred precludes the right of the Employer to rely on that conduct as a example of the grievant's incorrect conduct in a distant future.

The record also demonstrates that the grievant's supervisor, Pace, at least twice at around 3:00 p.m. on January 14, 1991, directed the grievant to

1/ Transcript, pages 32-33, pages 109-110.

take a summary sheet necessary for a 10:00 p.m. reading to the South End. The grievant failed to follow these directives. Here the record demonstrates that the grievant did go to the South End during this time frame to do his 3:00 p.m. reading. 2/ The grievant also acknowledged that the second time Pace gave him the summary sheet Pace had stuck the sheet in his chest and told him to take it to the South End. 3/ It was at this time that the grievant stated "eventually". The undersigned finds the grievant was well aware the second time when the supervisor "stuck" the summary sheet in his chest that the supervisor was directing him to take the summary sheet to the South End. The grievant chose to again lay the summary sheet down. While the undersigned is aware the summary sheet was not needed in the South End until 10:00 p.m., it is also equally clear the grievant had no reason for not taking the summary sheet to the South End when he had to go there anyhow to do his 3:00 p.m. reading. However, Pace, who told the grievant to take the summary sheet to the South End at the commencement of the grievant's workday was also aware the summary sheet was not needed at the South End until 10:00 p.m.. When the supervisor handed the summary sheet to the grievant a second time and the grievant stated "eventually" Pace did not correct the grievant and direct him to immediately take the summary sheet to the South End. The undersigned finds the grievant's failure to comply with the supervisor's order, particularly when the grievant was going to the South End to do his 3:00 p.m. reading, can be construed as an act of insubordination.

The record also demonstrates that at 4:00 p.m. on January 14, 1991 the grievant entered Pace's office and demanded a copy of his revised written reprimand. The grievant further threatened to file a complaint against Pace and the Employer with the DNR alleging that Pace had directed employees to not report readings of chlorine residual readings over 0.5 milliliters. There is no evidence that Pace ever gave such a directive to employees. The complained of directives occurred in August and September of 1990. Since that time the grievant and Pace developed a personal animosity towards each other. Thus, while the grievant should have been well aware by January 14, 1991 that the intent of the memo was for employees to be vigilant about checking the chlorine residual readings and to take necessary action if the reading was too high, with failure to do so resulting in discipline, 4/ the personal animosity between the supervisor and the grievant prevented such an understanding from taking place. The undersigned does conclude however, that in January when the grievant threatened Pace with filing a complaint with the DNR the grievant was trying to intimidate Pace into revising the September 17, 1990 directive. 5/

The record thus demonstrates that the Employer had cause to discipline

2/ Transcript, page 142.

3/ Transcript, page 140.

4/ While there is some merit to the grievant's claim that he could be disciplined under the September directive for actions not within his control the reasonableness of the Employer's directives can be challenged through the grievance procedure if the Employer ever acted to discipline an employe.

5/ The fact that the grievant carried through on his threat and filed a complaint with the DNR is irrelevant. Also irrelevant is the DNR representative's opinion that the September 17, 1990 memo could of been better written. Clearly, by January 14, 1991 the grievant knew Pace had not directed employees to falsify records.

the grievant. The grievant did not dispute that Pace had given him directives to take the summary sheet to the South End and the undersigned has concluded the grievant did attempt to intimidate his supervisor by telling him he was going to file a complaint with DNR. However, Pace was aware of personal matters between the grievant and Pace were not on a good level. Pace did not, as the Union has pointed out, clarify his directive to something such as "Immediately take the summary sheet to the South End," after the grievant responded "eventually". Nor is there anything in the record to reasonably conclude the grievant could conclude Pace's directive implied "immediately" when both Pace and the grievant were aware the summary sheet was not needed until 10:00 p.m..

At this point the undersigned recognizes it can be argued the grievant's response of "eventually" is in itself a form of insubordination because the grievant is informing the supervisor he will comply with a directive in his own manner. Conversely, it can be argued when the supervisor failed to correct the grievant no insubordination occurred because silence denotes acceptance of the grievant's response. The undersigned also finds that the 4:00 p.m. conversation between the grievant and his Supervisor was an on-going disagreement between these two individuals. When Pace was informed by the grievant that the grievant still believed his memo violated DNR policy and reasonableness despite Pace's verbal claim to the contrary, Pace had not written any memos to clarify his September 10, 1989 memo. Pace's verbal assurances had been clearly insufficient in the grievant's opinion as long as the written memo stood as originally issued. The undersigned notes here that while voices had been raised during this conversation, no profanity was used by the grievant. When Pace called the conversation to a close and directed the grievant to return to work, the grievant did so. The underlying problem herein is the relationship between the two individuals involved. Thus, while the undersigned finds that the grievant's actions to be grounds for discipline, the grievant is not wholly at fault. Herein, actions by the supervisor, or inaction by the supervisor, has led to the incidents which occurred on January 14, 1991.

Based upon the above and foregoing the undersigned concludes that while the Employer had cause to discipline the grievant, a three (3) day suspension is too harsh of a discipline, particularly given the supervisor's failure to clarify his directive to take the summary sheet to the South End after the grievant stated "eventually" and given the personal animosity between the supervisor and the grievant which has arisen since the September 10, 1991 memo. Therefore the undersigned finds the Employer violated the collective bargaining agreement when it suspended the grievant for three (3) days. The undersigned directs the Employer to reduce the discipline to a January 28, 1991 written warning and to make the grievant whole for any lost wages and benefits.

AWARD

The Employer violated the collective bargaining agreement when it disciplined the grievant three (3) working days, January 29, 30 and 31, 1991. The Employer is directed to reduce the discipline to a January 28, 1991 written reprimand and to make the grievant whole for any lost wages and benefits.

Dated at Madison, Wisconsin this 5th day of February, 1992.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator