

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LOCAL 546-B, AFSCME, AFL-CIO

and

CLARK COUNTY

Case 83  
No. 50791  
MA-8383

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by Ms. Kathryn J. Prenn, on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Neillsville, Wisconsin, on July 20, 1994. The hearing was transcribed and both parties filed briefs and reply briefs which were received by October 10, 1994.

Based upon the entire record, and the arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Did the County have just cause to terminate grievant Mary Kurutz and, if not, what is the proper remedy?

DISCUSSION

Grievant Kurutz worked for the County since 1983 and was twice promoted from a temporary Clerk/Typist to Secretary/Inspector in the County's Planning and Zoning and Solid Waste Department and then to Acting Zoning Administrator in April, 1993. 1/ Kurutz worked in that office from 1983 to 1993 at an eighty percent capacity, with the other twenty percent of her time being spent working for the Wisconsin Department of Natural Resources ("DNR"). In April-

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1/ Unless otherwise stated, all dates hereinafter refer to 1993.

May, 1993, Kurutz began spending 100 percent of her time on her County job. As part of her job, she personally conducted inspections for the installation of septic tanks because she had received a license to do so. Throughout her employment, Kurutz was never disciplined.

By letter dated July 1, 1985, Earl Smith, the then-Zoning Administrator, informed Kurutz:

July 1, 1985

Mary Kurutz

I would like to bring to your attention certain items that should be improved. For some time, we have notice (sic) your lateness to work. We also have concerns in regards to time off without proper notice. These 2 items have been brought to my attention from others besides the office people.

We also have concerns of the appearance of your desk and other work areas in the front office. Any break time activities should be done in areas where the public does not immediately enter.

We trust these problems can be corrected in the near future.

There is no evidence that this letter was ever considered to be disciplinary in nature.

In May, 1988, Smith and several other County management representatives met with Kurutz and there discussed her work. Smith and Forester/Office Manager Dan R. Streiff by memo dated May 12, 1988, confirmed this understanding in a memo which stated:

This is a follow-up of a meeting with Mary Kurutz. The meeting was held at 3:30 p.m., attended by Don Streiff, Earl Smith and Tom Reene, Personnel Director. The purpose of the meeting was to call Mary's attention to a few work related habits that was brought to the attention of Don by Ron Cork and Mike Gappa. Namely, it is alleged that:

1. Mary occasionally took more than 1 hour for noon but still left work at 4:30 p.m.
2. Took more than the PM and AM 15 minute breaks as prescribed in the union contract. These breaks were a result of a no smoking policy in the office and Mary was doing her smoking in the hall.

3. It was suggested that Mary leave notice in the office when she was out for a break or other duties such as copying.
4. It was stated that occasionally Mary would be doing something on personal business and would ignore anyone who might come in the office.

These are basically the replies and/or understandings we all came to agree:

1. Agreed that Mary would take 1/2 hour noons and quit at 4:30 unless expressly told otherwise.
2. Agreed that this was the case occasionally and that this would cease. Up to 30 minutes would be allowed as breaks, 15 minutes in AM and 15 minutes in PM.
3. Leaving notice on every little thing when Mary left the office is not a very agreeable situation. It was agreed that any extended absence, word or a note should be left.
4. This was or seemed not to be an issue.

These further comments were made. It was suggested that everyone try to better understand the complicated work system that Mary has. This is caused by the versatile duties she is expected to perform. It was mentioned that DNR was getting more than their share of secretarial service according to what they contribute. It is also felt that Mr. Cork and Mr. Gappa may expect more secretarial service than should be expected.

There is no evidence that this letter was ever considered to be disciplinary in nature.

Bryce Luchterhand, the County's former Zoning Administrator, resigned in April, 1993. Kurutz was then named temporary Zoning Administrator, at which time she was given a pay raise of about a dollar an hour. Kurutz bid for the vacant Administrator's position, but was passed over in favor of Jay Shambeau, who became the new Zoning Administrator on or about July 19.

Kurutz thereafter helped Shambeau - who just graduated from college and who did not have a license to conduct sewer inspections - break into his new job. Shambeau over time became concerned over Kurutz's work and the backlog that had accumulated in the Zoning Office. He therefore began to keep detailed notes on Kurutz's daily activities in the Fall of 1993.

On November 18, Shambeau and County Personnel Coordinator Tom C. Renne met with Kurutz and a Union representative, at which time they discussed Kurutz' alleged failure to complete an inspection report for the John Cox property and her alleged failure to keep proper time records. Those were the only two issues discussed at that time. Kurutz was then suspended without pay and told to report back to work on November 24. In a November 18 letter to Kurutz, Renne stated:

We have discussed the November 3rd John Cox inspection issue and your time sheet as submitted for the pay period 10/31/93 through 11/13/93. As a result, you have been suspended without pay effective today at 8:40 a.m., November 18th through Tuesday, November 23rd, 1993. You will return to work and report directly to the Personnel Office at 8:00 a.m. on Wednesday, November 24th.

Shambeau conducted a further investigation of Kurutz's work immediately after Kurutz was suspended, during which time he discovered that Kurutz had conducted about 66 inspections between July 19 - November 16, and that there were no finished reports - such as County Exhibit No. 2 which is an inspection report form prepared by the DNR - for about 48 of them. 2/

Kurutz returned to work on November 24 and met with Renne, Shambeau, and Union Representative Lori Hendrickson. At that time, Renne offered to go with Kurutz to the Zoning Office to see whether they could find the missing reports, but she refused to do so. Renne also testified without contradiction that Union Representative Hendrickson encouraged Kurutz to go down to the office and locate the missing documents, but without success.

Kurutz admitted doing most of the inspections in issue and said, "In some instances I will agree that actual - actual report forms were not completed on those", but that "I made field notes on all jobs that I went to." She also said that she went to the Zoning Office to locate the Cox report before her suspension and that she could not do so. She added that when she reported to work after her suspension on November 24, management told her to go to the Zoning Office to retrieve her notes and to find the missing reports, but that she did not do so because, in her words, "I did not feel comfortable trying to go back to my desk to produce these notes and files since I

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2/ Kurutz subsequently provided a report for the Township of Unity during the grievance process. It was the only missing report that Kurutz ever supplied.

had gone to my office that morning . . . and when I did so that morning, I noticed that all of the files and materials that had been on my desk had all been rearranged. I wasn't sure that I could even find anything that I was supposed to be looking for." She also claimed that if her office had not been rearranged, "I would have reason to believe that I would have found enough field notes and inspection notes to justify a majority of these files." When asked on cross-examination why Shambeau was unable to find any of those files in the office, Kurutz replied, "I don't have an explanation."

Unsatisfied with Kurutz's response, the County on November 24 fired her via a November 24 letter stating, inter alia, "This is to verify the termination of your employment with Clark County as of 8:40 a.m. this morning, November 24th, 1993. Your final payroll check will be computed through this date."

Pursuant to the Union's subsequent request for a detailed specification of the charges against her, the County by letter dated December 23 stated that:

. . .

Employee was terminated for the following reasons:

1. There were no reports or data to complete reports for 48 out of 66 septic system inspections done between 7/1/93 and 11/16/93.
2. Mary was habitually late for work, mornings and afternoons.
3. Mary frequently left the office in the afternoon, often without explaining where she was going, and never returned.
4. Mary failed to keep up on her secretarial duties such as issuing copies of permits to townships, filing, sending checks to the Treasurer's office for deposit. (The extent of this neglect was still under investigation at time of termination, see below.)

Neglect of secretarial duties is illustrated as follows:

- a.) (On several occasions over the year before her termination, old checks totaling \$200-\$300 were found and finally deposited.)

After a thorough search of loose papers and files just before and after her termination, \$4,571.00 in checks and \$215.75 in loose, unallocated cash were found. The checks were dated from 8/13/90 through 6/30/93.

b.) Several completed 1991 DNR applications for recreational vehicle permits by County residents, together with their personal checks were found. (They may never have been registered.)

c.) As a Notary Public, Mary and a contractor, signed and sealed a blank Holding Tank Agreement and a Holding Tank Service Contract form.

d.) 100's of files were found to be incomplete.

e.) For the years 1988, 1990, 1991, 1992 and 1993, the portion of zoning permit application fees belonging and payable to the State have not been sent to them. After many weeks of reviewing files and papers scattered about the office, the Zoning Director found that the County owed the State \$27,600. This involved 515 case files. For 55 of those files, the office was missing or had incomplete documents as required to accompany the States check.

f.) As noted previously, there were literally stacks and stacks of unfiled papers spread about the office.

. . .

Defending herself against all these charges, Kurutz testified that prior Zoning Administrator Luchterhand in 1993 became "aware of the fact that there was a problem with checks and monies not being properly accounted for"; that she thereafter developed a system to account for those checks and monies and that she never got to finish it because of her termination; that certain DNR applications may have been lost on her desk; that certain files were not filed because of a lack of cabinet space and because Luchterhand intended to purge some of them; that for the time right before her discharge, her secretarial duties took a back seat to her inspection duties; that former Zoning Administrators Smith and Luchterhand were, in her words, "either aware of [these problems] and did nothing about them or were not aware of them, but they never made any comment to me about them"; and that when problems were brought to her attention, she addressed them. She also said she was not required to punch a time clock because she was under a flex time schedule which had been agreed to by Shambeau and which allowed her to come to work late. Shambeau denies that any such agreement ever was reached.

Kurutz on November 24 filed the instant grievance over her termination, which was subsequently denied by the County.

The Union contends that the County did not have just cause to discharge Kurutz because it did not follow progressive discipline and because the County never previously informed her about her purported job deficiencies; because it never gave her a chance to correct supposed shortcomings; because Shambeau deliberately elected to "lay in the weeds building a case against. . ." her; because the County effectively "waived" its right to complain about many of the older allegations lodged against Kurutz by virtue of its prior inaction; and because much of the blame here should be directed against former Zoning Administrators who were responsible for running the office.

The County, in turn, mainly contends that it had just cause to terminate Kurutz because she failed to file required inspection reports for 48 out of the 66 inspections she conducted between July 19 - November 16; because she was "habitually late" for work and frequently left the office without any explanation; and because she failed to keep up her secretarial duties. The County also maintains that "it had no knowledge of the depth of the problems until November, 1993", and that it was not then required to follow all of the procedural "tests" set out in such cases as Enterprise Wheel Co., 46 LA 459, (Daugherty, 1966), since Kurutz knew, or should have known, that her performance was so poor that it could lead to her immediate discharge.

In resolving these issues, it must be acknowledged at the outset that it is very difficult to now determine exactly who was responsible for all of the Zoning Department's woeful deficiencies before July, 1993, when Shambeau became the new Zoning Administrator. But, these deficiencies are a separate question of whether Kurutz now should be held solely accountable and disciplined over these problems when: (1), she was never previously disciplined; (2), she apparently was not warned about many of them at the time; (3), she was not given the chance to improve her work performance in these areas once they were discovered; and (4), the prior Zoning Administrators may have been just as responsible as Kurutz for this mess.

Thus, the record fails to establish who conducted some inspections since Leroy Gerald Jansy, a Waste Water Specialist employed by the State of Wisconsin, testified that he had gone through certain County files and that he could not tell whether Kurutz or the prior Zoning Administrator had conducted certain on-site inspections. Shambeau testified that he could not tell who conducted certain pre-1993 inspections and that he did not know whether prior Zoning Administrators knew about unfiled documents; \$27,000 in unpaid fees to the State; incomplete files; incomplete DNR applications; hundreds of dollars in cash lying around; and about \$4,500 worth of uncashed checks.

It therefore is fundamentally unfair, and hence violative of the contractual just cause standard, for the County to suddenly single out Kurutz - particularly after it had twice promoted her and named her Acting Zoning Administrator with a dollar an hour raise - and fire her over

prior matters which may have arisen because of prior management's own failure to properly operate and supervise the Zoning Office. For as the Union correctly points out, it is well established that: "Arbitrators have not hesitated to disturb penalties, assessed without clear and timely warnings, where the employer over a period of time had condoned the violation of the rule in the past". . . since that may "lead employees to reasonably believe that the conduct in question is sanctioned by management." How Arbitration Works, Elkouri and Elkouri, pp. 683-684 (BNA, 4th Edition, 1989).

Absent, then, clear proof that Kurutz was solely responsible for these errors, it therefore follows that the County has failed to meet its burden of proof and that little weight can be given to Kurutz's alleged shortcomings which predated July, 1993. The County's discharge decision therefore must stand or fall on what happened after Shambeau arrived on the scene on July 19, 1993, and tried to operate the office in a more professional manner.

As to that, I find that Kurutz was repeatedly late for work since Shambeau credibly testified that Kurutz was "late from the get-go", as he produced written documentation to the effect that she was late for work and/or absent without any explanation on October 22, November 1, November 3, and November 5. In addition, Kurutz on some of the days in question was at the Cozy Kitchen Restaurant where she held a part-time job on weekends. However, Shambeau admitted that he never confronted Kurutz about her tardiness until November 24 because, in his words, "Mary knew the work hours" and because "I wanted to make sure I had enough documentation to warrant my suspicion."

He likewise never counseled her over her secretarial shortcomings. Shambeau similarly never counseled Kurutz over discrepancies in her time sheets which showed that she had failed to properly account for all her time and that she had not properly documented her request for compensatory time.

While serious and hence warranting some level of discipline, these deficiencies, standing alone, are insufficient under the contractual just cause standard to warrant Kurutz's immediate discharge. Thus, the County never subjected Kurutz to progressive discipline pursuant to Article XIX of the contract, entitled "Discipline and Discharge", which states:

19.1 The parties recognize the principle of progressive discipline.  
No disciplinary action shall be taken against employees except for just cause.

19.2 The following shall be the sequence of disciplinary action:

1. Vocal warning;
2. Written reprimand;
3. Suspension;



4. Discharge.

The County may repeat disciplinary action. The above sequence of disciplinary action need not apply in cases where the infraction is considered just cause for suspension or immediate discharge. (Emphasis added).

The Employee shall have the right of Union representation at any disciplinary meeting or hearing. The Employer and the Union shall receive copies of any disciplinary action placed in the employee personnel record.

For the County to prevail, then, it must show that progressive discipline does not apply here because Kurutz's failure to keep proper inspection reports was so egregious that it represents the kind of serious misconduct which warrants her immediate termination pursuant to the underlined proviso, ante, in Article XIX of the contract.

As to that, Shambeau testified that Kurutz conducted about 66 inspections between July 19 - November 16 and that, as reflected in County Exhibit No. 5 which he prepared, there were no written reports for about 47 of those inspections. He also said that when he met with Kurutz at the second step of the grievance procedure, "For the most part, no response was given" by her as to why such reports were never prepared. The record further shows that Kurutz never complained before her termination that she did not have sufficient time to finish these reports. Indeed, since she went from eighty percent to full-time status in April-May, she actually had more time to do them once Shambeau arrived on the scene.

As related above, Kurutz on November 24 was given the opportunity to go to the Zoning Office and locate these missing reports but she refused to do so, saying here that she would not be able to locate them because her files had been moved during the time of her suspension. However, Kurutz herself admitted that she earlier could not find the Cox report before her files were supposedly moved. In addition, Shambeau testified that he also could not find them during his search of the office between November 18 - 23.

Even assuming, arguendo, that Shambeau somehow missed them, it is inherently implausible to believe that Kurutz could not have found them had she actually taken the trouble to look for them on November 24 when she was asked to do so. For even if the office were reorganized and papers moved, it appears that Kurutz would have been given all the time she needed to find them.

Given the totality of these circumstances, I find that Kurutz had not completed about 47 reports and that her failure to do so warranted her immediate discharge, as progressive discipline

was not required in the face of such a gross dereliction of duties. 3/

For the record establishes that without such finished reports, it sometimes is necessary for a project to be dug up in order to conduct an inspection all over again. In addition, the absence of finished reports can lead to legal liability against homeowners and others who subsequently sell their properties and are unable to document whether their systems are up to code in the event that their systems fail. The importance of these reports therefore cannot be overemphasized, which perhaps is why state inspector Jansy testified that Clark County marks the first time in his work experience that such reports have not been prepared. As a licensed inspector who served as Acting Zoning Administrator, Kurutz certainly knew without any warning from the County that she was absolutely required to maintain proper records in order to avoid such pitfalls. By failing to do so, she thereby failed to perform the single most important aspect of her job and thereby demonstrated that the County had just cause to immediately terminate her.

In light of the above, it is my

AWARD

That the County had just cause to terminate grievant Mary Kurutz; her grievance is therefore denied and dismissed.

Dated at Madison, Wisconsin this 13th day of February, 1995.

By Amedeo Greco /s/  
Amedeo Greco, Arbitrator

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3/ It is well established that progressive discipline need not always be followed in the face of an employees' gross dereliction of duties. See, for example, Sawyer County, WERC Case 103, No. 48834, MA-7728 (Jones, 1993); Polk-Burnett Electric Cooperative, WERC Case 18, No. 49546, MA-4801 (Yaeger, 1992).