

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MUSKEGO AREA PUBLIC EMPLOYEES
LOCAL 2414, AFSCME, AFL-CIO

and

CITY OF MUSKEGO

Case 58
No. 52527
MA-9013

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Lindner & Marsack, S.C., Attorneys at Law, by Mr. Jonathan T. Swain, appearing on behalf of the City.

ARBITRATION AWARD

Muskego Area Public Employees Local 2414, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Muskego, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties agreed to waive the contract provision regarding the Board of Arbitration and instead the Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to designate a member of its staff to act as the sole arbitrator to hear and decide a grievance over a suspension. The undersigned was so designated. Hearing was held in Muskego, Wisconsin, on June 22, 1995. The hearing was transcribed and the parties' filed post-hearing briefs which were exchanged on August 8, 1995.

BACKGROUND:

The grievant has been employed by the City since February, 1980. 1/ She currently occupies the position of Park and Recreation secretary, a position she has held since September, 1982, and she reports to Gordon Jacobson, the Recreation Department Director. 2/ Jacobson has

1/ Tr. 72.

2/ Tr. 73.

been Director since July, 1990. 3/ Under the jurisdiction of the Recreation Department is a public access cable TV channel, Channel 7, which airs council meetings, public hearings, some committee meetings, public service announcements and tapes of things of interest to the community. 4/ The public service announcements which might be city council meeting times or school district meeting times or a fund raiser are presented as a scrolling calendar on the public access channel. The process of putting this information on is by a character generator, similar to a word processor, where the message is typed and appears on the screen. 5/ The character generator has a limited capacity and once that limit is reached, if something is to be added, something else must be deleted. 6/ The grievant would generally enter the information into the character generator, editing it so that the essential information appeared on the TV screen. 7/ Other individuals would also add information by use of the character generator. 8/

3/ Tr. 24.

4/ Tr. 25-26, 74.

5/ Tr. 27-28, 74-75.

6/ Tr. 28.

7/ Tr. 32.

8/ Tr. 29.

On November 8, 1994, the secretary to the Superintendent of the Muskego-Norway School District telephoned the grievant and requested that two announcements be placed on the cable access channel; one was that as the Muskego-Norway football team won its game on November 7, 1994, it would play in the championship game on November 11, 1994, and second, the Education for Excellence dinner scheduled that same evening was cancelled. 9/ The grievant told her that there would be no public service announcements this month. 10/ That same day, Robert Rammer, the Muskego-Norway High School Principal, went to the Recreation Department office with a typed schedule of the championship game and asked the grievant if it could be put on the public access channel. 11/ The grievant responded that there was no room and told him that no announcements were being put on. 12/ Rammer reported to Jacobson what had occurred. 13/ Jacobson then went to where the grievant was working and asked about her conversation with Rammer and she confirmed that she told him they weren't accepting any public announcements for the month. 14/ Jacobson asked the grievant if she made the decision not to accept public announcements and she responded yes and he asked if someone had directed her to do this and she responded no. 15/ The grievant eventually stated to Jacobson, "If you want to change it, you get your butt in there and change it." 16/ Thereafter, Jacobson commenced an investigation of this incident and informed the grievant of this in writing on November 10, 1994. 17/ On November 11, 1994, Jacobson put a memorandum in the grievant's basket as she had already left for the day. The memorandum stated as follows:

EFFECTIVELY IMMEDIATELY:

All information to be placed on the Character Generator Scroll for

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- 9/ Tr. 16-17.
10/ Tr. 18.
11/ Tr. 129.
12/ Tr. 129.
13/ Tr. 131.
14/ Tr. 37.
15/ Tr. 39.
16/ Tr. 40-41.
17/ Em. Ex. 2.

Channel 7-Public Access must be reviewed and approved by the Recreation Director.

This refers to all information, including City schedules, School District schedules, M.P.A.G. tapes, and public announcements.

Thank you.

cc: M.P.A.G. Cable Club 18/

On Monday, November 14, 1994, the grievant reported to work at 8:00 a.m. and Jacobson was present when she came to work. 19/ The cable system was operating and the grievant observed that someone had added something over the weekend on the character generator. 20/ She had no reaction to this because it was a common occurrence for someone to add information. 21/ At about 9:30 a.m., the grievant went through her in basket and read the memo from Jacobson. 22/ Jacobson was not in his office at this time. 23/ The grievant pulled the scroll off the air and placed the tapes and airing calendar on the table in Jacobson's office. 24/ The effect of the grievant's actions were to turn off the video transmission but music was still on the cable channel. The grievant then handwrote the following note on Jacobson's memo and went to the Mayor's office and handed it to the Mayor who was in a conversation at his secretary's desk:

Mayor De Angelis:

All tapes for Monday, (scroll was shut off,) and calendar for November was turned over to Gordon Jacobson pursuant to receipt of this directive.

18/ Em. Ex. 3.

19/ Tr. 76.

20/ Tr. 77.

21/ Id.

22/ Tr. 77-78.

23/ Tr. 80.

24/ Tr. 79-80.

The Mayor was busy and did not review the memo nor did he say anything to the grievant, and the grievant returned to her office. 26/ Jacobson returned to his office in the afternoon and ascertained what had happened. 27/ Jacobson asked the grievant why she took everything off the air and the grievant said that she was not going to put anything on the air until she got specific information and unless it was word for word. 28/ Jacobson concluded that the grievant was insubordinate and told her that he was suspending her. 29/ The grievant called the Mayor's office and a meeting was held with the Mayor, Jacobson, the grievant and the Union Steward present and the Mayor concurred with Jacobson. 30/ That same day, November 14, 1994, the grievant was given a two-day suspension to be served on November 15 and 16, 1994. 31/ On November 15,

25/ U. Ex. 1, Tr. 82.

26/ Tr. 84.

27/ Tr. 51.

28/ Tr. 51-53.

29/ Tr. 59.

30/ Tr. 139.

31/ Em. Ex. 4.

1994, the grievant was given a written reprimand for her conduct on November 8, 1994. 32/ The grievant did not grieve the written reprimand but did grieve the two-day suspension which is the subject of the instant arbitration.

ISSUE:

The parties stipulated to the following:

Did the City of Muskego have proper cause to suspend the grievant on November 15 and 16, 1994?

If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE I - MANAGEMENT RIGHTS RESERVED

Section 1.01. Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, demote, or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested in the Employer.

CITY'S POSITION:

The City contends that the grievant's conduct was outrageous and warranted, at a minimum, a two-day suspension. It points out that the grievant's suspension was based on two separate aspects of her conduct: 1) pulling the cable programming off the air; and 2) insubordination. It asserts that the second ground for her suspension was not refuted and was clearly established by the evidence and alone suffices as appropriate grounds for a two-day suspension.

With respect to the unauthorized removal of programming from cable channel 7, the

32/ Em. Ex. 7.

grievant offered three factors for her motivation:

1. Modifications were made and not approved by Jacobson;
2. The memo states "effective immediately";
3. Fear of being disciplined if action was not taken.

The City claims these are self serving and closer examination reveals that the grievant had other motives. It questions why the grievant refused to put the programming back on the air after Jacobson told her to do so and her insubordination in failing to cooperate. With respect to the modifications, the City submits that the grievant offered no supporting evidence that there were modifications made to the calendar. The City alleges this claim was an after thought to serve the grievant's self interest as no claim of modifications was made until the hearing.

Even if modifications had been made, the City maintains the grievant had no authority to take the actions she did. It points out that she never conferred with Jacobson before shutting down the cable channel and there was no reasonable explanation for her failure to do so. The City submits that the language "effective immediately" relied on by the grievant is misplaced because the grievant could not have known whether or not Jacobson had approved the modifications as she never spoke to him or to the cable club. It claims the grievant knew the importance of her actions because she knew at least one viewer would be calling in when the airing calendar was not on at 10:00 a.m. The City questions the grievant's motivation in seeking out the Mayor as opposed to the author of the memo.

With respect to the fear of discipline, the City challenges this claim by questioning why the grievant removed all of the programming rather than just the modifications. It alleges that the grievant's claim that she had no authority to remove the modifications is at odds with her removing all programming. Furthermore, the City observes that the grievant was never disciplined in fourteen years and Jacobson was not prone to discipline his employees.

In conclusion, the City insists that the grievant did not make a sincere effort to comply with Jacobson's memorandum. It urges a conclusion that her conduct was a continuing pattern of insubordination, was inexcusable and demonstrated extremely poor judgment which caused actual harm to the City as well as to the individuals who rely upon the City's cable channel. It argues that her actions speak louder than words in that she caused a certain level of mischief by relying on the literalness of the memo to distort its meaning. It maintains that the grievant subjected herself to a well-deserved suspension.

UNION'S POSITION:

The Union claims that the question to be decided in this matter is why the grievant turned off the character generator on November 14, 1994, and to answer this, her state of mind must be considered. It contends that when the grievant came to work on November 14, 1994, and saw the memo, it was not a reiteration of policy but stated the instructions were effective immediately, implying they differed from past policy. It states that Jacobson could have conveyed his intent orally but chose to rely on an ambiguous memo. It notes that before receiving the memo, the grievant could delete from and edit the character generator and she became nervous after reading the memo and had reasonable cause to feel that her not complying with the memo could be viewed as insubordination. It contends that she sought out Jacobson for clarification and he was nowhere to be found, so she turned off the character generator to comply with Jacobson's instructions. It claims she was in a Catch 22 and if she allowed unauthorized information to air, she could be disciplined, so she made an educated guess how to handle the situation. It points out that she immediately informed the Mayor of her actions. It claims that the City did not have proper cause to suspend her on November 15 and 16, 1994.

The Union argues that the City's reliance on the November 8, 1994 incident is not relevant to the suspension for a totally unrelated matter. It submits that the City devoted much testimony and evidence to the incident but the City's effort to hang her for the November 8, 1994 incident merely resulted in her paranoia. The Union insists that the grievant is not the loose cannon the City portrays her to be. It suggests that she was frightened and acted in a prudent manner. It admits that a breakdown in communications occurred, but it was the City's responsibility to express procedures to employees in a clear and concise manner rather than in a manner that is open to interpretation. It submits that this is not a case where an employee arbitrarily chose to ignore a direct order; rather, this is a case where the order given to the grievant was subject to an ambiguity. The grievant, according to the Union, turned off the character generator because her failure to do so could be insubordination. It argues that the grievant was in a no-win situation and should not be disciplined for a good faith effort to comply with a directive. It asks that the grievance be sustained and the grievant made whole.

DISCUSSION:

The genesis of the grievant's two-day suspension is Jacobson's memorandum of November 11, 1994. It is undisputed that after the grievant read it, she removed all information from the public access cable channel on the basis of the memo which stated it was effective immediately and required all information to be approved by Jacobson. The Union has claimed that the memo was ambiguous and the grievant was caught in a dilemma, either not follow the memo and be disciplined or follow the memo and be disciplined. The underlying premise that the memo is ambiguous is not persuasive. The memo states that effective immediately all information to be placed on Channel 7 must be approved. (emphasis added) The memo does not state

anything about materials already on Channel 7. To read this as requiring or authorizing the removal of all materials is an unreasonable interpretation of the memo.

A review of the evidence establishes that the grievant acted in a fit of pique. Although the Union argued the November 8, 1994 incident was irrelevant, the undersigned concludes that the grievant's conduct was related to that incident. It is evident that the grievant's turf was invaded by the memo.

The following factors demonstrate that the grievant was not attempting to comply with the memo in good faith. First, how did the grievant know that Jacobson hadn't approved the materials running on cable Channel 7 before 9:30 a.m. on November 14, 1994? The grievant never asked him. The memo says "to be placed" on Channel 7 and the grievant did not place anything on Channel 7, so she could not be expected to seek any approval. Nothing in the memo required that the grievant to police what was put on the channel. She did not wait for Jacobson to return to discuss the memo with him which she easily could have done. Secondly, when Jacobson told her to put the material back on Channel 7, the grievant refused, seeking more explicit instructions. The grievant had been putting materials on the public access channel for at least five years, so explicit instructions were not needed. Thirdly, her refusal to put the material back on is a rerun of the incident on November 8, 1994, where she refused to put announcements on which resulted in an investigation. Now she took all announcements off and refused to put them back on, a reversal of her prior conduct without any rational explanation. Fourthly, she went to the Mayor, not once but twice, which appears to be an attempt to undercut Jacobson's authority. There appears no reason to go to the Mayor without going to Jacobson first. Finally, the grievant testified that she knew at least one person would call and complain about a religious service tape not being shown. 33/ Her actions were intended to produce the result she wished, i.e. make Jacobson look bad apparently in retaliation for the November 8, 1994 action. In conclusion, the grievant did not misread or misinterpret the memo, rather she acted in an unreasonable manner in order to embarrass her supervisor and to show him up. Her conduct was inappropriate and insubordinate and designed to undercut Jacobson's authority. Under all the circumstances, the two-day suspension was appropriate for the grievant's misconduct.

Based on the above and foregoing, the record as a whole, and the arguments of the parties, the undersigned issues the following

AWARD

The City of Muskego had proper cause to suspend the grievant on November 15 and 16, 1994, and therefore, the grievance is denied in all respects.

33/ Tr. 108, 110.

Dated at Madison, Wisconsin, this 14th day of September, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator