

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
WINNEBAGO COUNTY :  
and : Case 176  
WINNEBAGO COUNTY COURTHOUSE : No. 42219  
EMPLOYEES ASSOCIATION : MA-5614  
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Appearances:

Mohr & Beinlich, S.C., Attorneys at Law, 415 South Washington Street, P.O. Box 1098, Green Bay, Wisconsin 54305, by Mr. Frederick J. Mohr, appeared on behalf of the Association.  
Mr. Gerald L. Engeldinger, Attorney at Law, Winnebago County Corporation Counsel, 415 Jackson Street, P.O. Box 2808, Oshkosh, Wisconsin 54903-2808, appeared on behalf of the County.

ARBITRATION AWARD

On May 11, 1989 the Winnebago County Courthouse Employees Association filed a request with the Wisconsin Employment Relations Commission to provide an Arbitrator to issue a final and binding award on a grievance pending with Winnebago County. Following jurisdictional concurrence from the Employer, the Commission, on June 12, 1989 appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on August 16, 1989 in Oshkosh, Wisconsin. Proceedings were not transcribed. Briefs and Reply Briefs were received and exchanged by October 2, 1989.

BACKGROUND AND FACTS

On April 27, 1989, Robert Wodenjak, the grievant, was suspended without pay because his driver's license had been temporarily revoked. Wodenjak grieved his suspension and that grievance has resulted in this proceeding.

Mr. Wodenjak has been employed by Winnebago County Maintenance Department as a Maintenance Worker for approximately fourteen years. The Department is headed by Art Druke, Building Maintenance Superintendent. Under Druke there is an Assistant Maintenance Superintendent and a Night Supervisor. Other departmental employees include a Painter, a Custodian III, an Electrician/Maintenance Worker, two Maintenance Workers, and a number of Custodian I's and II's. The Custodian III works primarily in the County Courthouse performing maintenance and minor repairs. One Maintenance Worker handles all preventative maintenance in various County buildings. The other Maintenance Worker, Mr. Wodenjak, handles various jobs, as assigned, at the various County facilities. Custodian I's and II's work evening shifts, performing the daily cleaning of County-owned facilities.

The Maintenance Department is responsible for the Courthouse, Safety Building and Social Services Building, which are physically close to one another. The department is also responsible for the Fairgrounds, located approximately one mile from the Courthouse, Sunnyview Health Center, located approximately five miles north of the Courthouse, and the Twin City Center, located in the City of Neenah, which is 10-15 miles from the Courthouse. The Department also services the Mental Health Clinic and the County Boat House, both of which are some unspecified distance from the Courthouse.

In approximately September of 1985, Mr. Wodenjak had his driver's license suspended for a period of three months for operating under the influence of alcohol. At the time, he went to his supervisor, Art Druke, and asked if he could continue his employment without a driver's license. According to Wodenjak, he advised Druke that he could secure an occupational license if that was necessary, but preferred not to do so because of the adverse impact that would have on his automobile insurance. According to Wodenjak's uncontradicted testimony, Druke said it was all right for him to continue working without a license. Co-workers performed required driving. Wodenjak further testified,

without contradiction, that his job in the fall of 1985 required substantially more driving than did the job he was scheduled to work during the period of his 1989 suspension.

According to the testimony of Art Druke, he approached Wodenjak sometime during the fall of 1988 to talk with the man about the need to retain his license. Druke indicated that he had heard a rumor relating to Wodenjak's driving under the influence of alcohol and warned Wodenjak about his drinking, indicating that if he lost his license again and couldn't drive, it could impact his job. Wodenjak acknowledged that he somewhat recalled that a conversation had taken place but could not recall details.

Sometime in February, 1989, Mr. Wodenjak suffered a job-related injury and

took a Workers' Compensation leave. On or about March 5, 1989, Wodenjak was arrested for driving under the influence of alcohol, had his license revoked, and was provided with a receipt and temporary license, good for 30 days. On March 7 and the morning of March 8, Wodenjak unsuccessfully attempted to return to work. During this day and one-half, he did not mention his driving arrest, though both he and Druke indicated that Druke was aware of the incident. Wodenjak returned to leave in Workers' Compensation status on March 8.

Mr. Wodenjak was subsequently released, with certain limitations, to return to work effective April 27, 1989. On or about April 27, Wodenjak returned to work, and reported to Art Druke. After reviewing the return-to-work authorization, Druke told Wodenjak to go to the Fairgrounds to begin the substantial roof repair needed at that site. Wodenjak replied that he had no license and could not drive. Drake asked Wodenjak how he intended to get there. Wodenjak merely shrugged. Druke asked, "How can I assign you work if you have no license and can't get places?" Druke sent Wodenjak to talk with William Wagner, County Director of Personnel.

Wagner and Wodenjak met and talked briefly. Essentially, Wagner indicated that if the supervisor felt driving was necessary to the job and Wodenjak couldn't drive, then he would be sent home until his driving rights were restored. The meeting ended on that basis.

Wagner confirmed Wodenjak's status with the following letter, dated April 28, 1989:

Dear Mr. Wodenjak,

As I indicated to you in our conversation of yesterday morning, I have prepared this letter to document the events that have led to a change in your employment status and to set forth the County's position regarding your future.

Yesterday morning you returned to work from a Workers' Compensation leave and advised Art Druke, your supervisor, that your drivers' license had been suspended pending the outcome of your trial on charges of driving while intoxicated. Mr. Druke informed you that your job requires the possession of a valid drivers' (sic) license.

Accordingly, he sent you home. You then met with me and I confirmed the fact that if your work involved driving and if you did not have a valid drivers' license, Mr. Druke could send you home.

After our meeting, I had a chance to review your job description and have found that the driver's license requirement is in it. I also talked to Mr. Druke and found that your assignments often require you to drive between various work sites in the normal course of your duties. As such, we have no choice but to suspend you until such time as you can meet the requirements of your job.

This letter then, will serve to confirm that fact in writing. Your suspension became effective at 8:00 A.M. yesterday, April 27, 1989, and will remain in effect until such time as you can return to work with a valid drivers' license. Since this suspension is not disciplinary in nature but is based upon your meeting a qualification of your job, you may request vacation time for all or part of the suspension period.

The fact, however, that you have made yourself unavailable for work through your off-duty conduct, does constitute grounds for disciplinary action and as such, you are hereby warned in writing that your failure to report for work with a valid drivers' license constitutes misconduct and that future misconduct of this type will constitute grounds for termination.

In addition, in the event that your absence resulting from this suspension extends beyond the approximately 30 day time period that we discussed yesterday morning, we may be forced to terminate your employment.

Winnebago County provides an Employee Assistance Program for individuals who have had problems off the job that affect their ability to perform their jobs or to report for work. I strongly suggest that you take advantage of this program by contacting Sue Hansen at the Department of Community Programs, Clinical Services. Her number is 236-4740.

If you have any questions about the contents of this

letter or the position of the County, please contact me. In addition, please keep Mr. Druke advised as to the outcome of your case and your request for an occupational driving permit.

Sincerely,

/s/

William J. Wagner  
Director of Personnel

The Union grieved by the following letter:

Dear Mr. Wagner:

Let this letter serve as an appeal of a suspension of a member of the Maintenance Department as a result of a drunk driving conviction. Pursuant to our labor agreement we are appealing this disciplinary action to Step 2 of the grievance procedure.

Our grievance is based on two factors. First, in prior years we have had a conviction and suspension of a drivers license as a result of a driving while intoxicated charge. This offense, which occurred in the Maintenance Department in 1985, resulted in no job action on the part of the employer against the individual involved. Consequently, we believe it is discriminatory for the County to take the action in the instant case.

Secondly, I believe the County's actions are in violation of Section 111.335 of the Wisconsin Statutes which prohibits discrimination of an individual as a result of an arrest or a conviction record.

I specifically would direct your attention to subsection 1 of this Statute. That section provides that it is not employment discrimination to discriminate as a result of a conviction if "the circumstances of (the offense) substantially relate to the circumstances of the particular job or licensed activity." The key term in this exception is the word "substantially". It is my understanding that the Maintenance Department rides in tandem teams, which would mean that another individual could drive. Further, I also understand that driving is infrequently required in this job. Obviously, this would not substantially relate to the job duty in question. Generally speaking, this has been interpreted by the Courts to mean that someone convicted of embezzlement can not get a job as a bank teller.

Finally, recent Court decisions have indicated that it is incumbent on an employer to make reasonable accommodations to an employee under the circumstances. Obviously, a reasonable accommodation can be made by the County, and it is my firm belief that any job action by the County is illegal.

Finally, I am sending you this appeal immediately before I have seen all the paperwork on the suspension. I am doing so in the hopes that you will reconsider the decision before a substantial amount of expense is incurred by the County for back pay. I would ask you kindly to review this request in light of the Statute as well as the County's prior treatment for OWI convictions. I would also suggest that perhaps you consult with the Corporation Counsel's Office as to proper interpretation of this Statute. I look forward to hearing from you.

Very truly yours,

MOHR & BEINLICH, S.C.

/s/

Frederick J. Mohr

The Employer denied the grievance by the following letter:

Dear Mr. Mohr:

This letter constitutes my response at Step 2 to the grievance of Robert Wodenjak which I received in writing

from you on May 3, 1989. In the grievance letter you ask that we reinstate Mr. Wodenjak in his job without requiring him to possess a valid driver's license.

In you (sic) letter you cite a previous case involving Mr. Wodenjak in which he was allowed to continue working while his driver's license was suspended in 1985, as representing some sort of a basis for reinstating him now. In that letter you also suggest that discrimination laws protecting employees against unfair treatment in employment based upon arrest or conviction records somehow protect any employee against suspension because he fails to possess a basic requirement of his job description.

In 1985, Mr. Wodenjak was not suspended following his loss of driving privileges for two reasons. One, his loss of driving privileges was, to our knowledge, a first offense, and his supervisor, Mr. Druke, wanted to give him a second chance. Two, work circumstances were different at that time, and Mr. Wodenjak was working on long term assignments in the Neenah area and he could easily travel with another department employee.

Circumstances are different now on both counts. One, this is now Mr. Wodenjak's second offense. Two, and more importantly, driving to various work assignments throughout the course of his work day is now, and has been for some time, a continuing requirement of his job.

As my letter to Mr. Wodenjak indicates, his suspension has not resulted from his arrest or conviction but from his failure, because of apparent off-duty misconduct, to meet a necessary requirement of his job description. As such, the County certainly has no duty to accommodate him in the manner requested. By suspending him rather than (sic) terminating him, the County has already made a significant and generous accommodation. Had he received the proper warning at the time of his first offense, Mr. Wodenjak would already have been terminated.

The grievance is denied.

Sincerely,

/s/

William J. Wagner  
Director of Personnel

It appears that Wodenjak would have been assigned full time to the Fairgrounds for the period of time that he was without a driver's license. There were a relatively few times when materials had to be obtained, but the driving attendant to those tasks had been performed by other workers, as well as by Mr. Wodenjak, in the past.

#### ISSUE

The Union states the issue to be:

Was the action taken by the Employer appropriate?

If not, what is the appropriate remedy?

The County views the issue as:

Whether the action taken by the Employer constitutes a violation of the labor agreement.

If so, what is the appropriate remedy?

#### RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

##### A G R E E M E N T

THIS ONE-YEAR AGREEMENT, made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 1988, by and between WINNEBAGO COUNTY, hereinafter referred to as the "County," and WINNEBAGO COUNTY COURTHOUSE EMPLOYEES' ASSOCIATION, hereinafter referred to as the "Association," is effective January 1, 1988, and forward to December 31, 1988.

It is the intention and purpose of the parties hereto to promote and improve the efficient administration of the County service and

the well-being of the Courthouse employees in the unit; to establish a basic understanding relative to personnel policy, practices, procedures, and matters affecting conditions of employment; and to provide the means for amicable discussion and adjustment of matters of mutual interest in the unit.

All references to employees as "he," "him," and/or "his" shall also be read to mean "she," "her," and "hers."

## ARTICLE II

### MANAGEMENT RIGHTS

Except to the extent expressly abridged by law or a specific provision of this Agreement, the County reserves and retains, solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association.

Nothing in this Agreement abridges the Employer's or Employee's rights as provided by State and Federal law.

## ARTICLE VI

### DISCHARGE

The County shall have the right to discharge any employee for just cause.

In the event a discharged employee feels he has been unjustly discharged, said employee may file a complaint with his department head provided he does so in writing within five (5) working days after the date of discharge. Said complaint shall be treated initially at Step 1 of the grievance procedure as hereinafter provided in this Agreement.

If no complaint is filed within the time specified, then, said discharge shall be deemed to be absolute.

The County may establish and enforce rules in connection with the operation of the Winnebago County Courthouse and the maintenance of discipline in said operation by the County.

## ARTICLE VII

### GRIEVANCE PROCEDURE

The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions as set forth below.

All such grievances shall be processed as follows:

. . .

### POSITIONS OF THE PARTIES

The Union contends that the driver's license requirement should not form a basis to suspend the grievant. The license requirement existed at the time of the first suspension, but the grievant was accommodated without difficulty. The County could have moved a custodian into Wodenjak's position and assigned Wodenjak to custodial work, where no driving is required.

The Union points to both State and Federal law prohibiting discrimination on the basis of arrest and conviction record. Statutes and case law are cited for the propositions that the County may not engage in a blanket refusal to employ someone based on arrest and conviction. Rather, there must be a review of the job and the circumstances of the arrest and conviction in order to determine whether the arrest and conviction are job related. The Union alleges that State law requires application of a balancing test, weighing the facts of the offense against the job needs. According to the Union, none of these requirements were satisfied.

The Union views the five weeks off as disciplinary, lacking progressive application, and inconsistent with this Employer's prior treatment of Wodenjak. Accommodation would have been easy and convenient.

The Union points to the Preamble as requiring the County to deal with problems such as that raised in this grievance. It points to Article II, Management Rights, in support of its claim that the parties have agreed to abide by State and Federal law, including the law cited. Finally, the Union

points to Article VI, Discharge, which has a just-cause provision, which the Union believes to be applicable here.

The County argues that the job description requires a driver's license and that Wodenjak didn't have one. In the view of the County, Wodenjak had to drive to and from the work site and pick up materials. The workplace circumstances were different from those surrounding the prior license suspension period. Wodenjak was offered use of his vacation, and refused. He did not ask for an accommodation. The County tolerated his absence and held his job. It is the view of the County that the contract requires no more and was not violated.

#### DISCUSSION

The Union points to the Preamble as a contractual basis for its claim that the County must address and attempt to resolve problems rather than ignore them. It is the Union's claim that the County failed to balance interests or to examine potential accommodations on behalf of Wodenjak. I think the Union's characterization of the County's action is harsh. It is true that the County appears to have given little, if any, thought to an accommodation that would have the effect of waiving the duty to drive. It did, however, hold Wodenjak's job until he could return with a driver's license, invite him to use vacation to offset the wage loss, and offer him access to the Employee Assistance Program.

While these are not the kind of accommodations sought, they are consistent with the County's view of this dispute. The Preamble speaks in broad, general terms about working toward a harmonious disposition of matters of mutual concern. It neither says nor implies that either party must abandon its view of a substantive issue to effectuate this sought-after amity.

It is the view of the Union that the non-discrimination provisions of State and Federal law are incorporated into this labor agreement by reference in Article II. As such, they are alleged to be enforceable through the grievance and arbitration clause. I do not read the clause to provide this result. The first paragraph of Article II goes exclusively to the County's retention of existing rights other than those abridged by contract or law. The second sentence reads as follows:

"Nothing in this Agreement abridges the Employer's or the Employee's rights as provided by State and Federal law."

I read this as a no-waiver provision. The parties are reserving to themselves whatever rights they possess under State and/or Federal law. That is far different than incorporating all such law into the contract by reference. Nothing offered into evidence suggests that such an expansive reading of Article II was intended.

Certainly the parties have, and are entitled to exercise, rights provided by law. Those rights include employment protections under the E.E.O.C. and Wisconsin's Fair Employment Statutes (Sec. 111.81 et. seq.) However, the enabling legislation creating those rights provides for an agency, mechanism, and process for their enforcement. It is there, and not here, that the claimant must turn for relief. Those agencies possess expertise, which many Arbitrators lack, relative to the meaning and application of the discrimination Statutes. I am unwilling to casually incorporate this wealth of law into the labor agreement absent a clear indication that that is what was intended. Article II contains no such indication.

The parties disagree over whether or not the time off was disciplinary. Because of my reading of Article VI, that is not a matter I feel compelled to resolve. On its face, Article VI addresses discharge. Wodenjak was not discharged. The Union argues that the County has historically applied progressive discipline. The basis for this contention was Wagner's testimony, on cross-examination, that the County does follow a practice of progressive discipline. However, the record also contained Wagner's testimony that a member of another bargaining unit was suspended because of the loss of a driver's license in a similar case. The record further supports a finding that Druke warned Wodenjak about drinking and driving and the potential impact of another license revocation.

I do not believe the suspension violated Article VI. On its face, the Article does not address discipline other than discharge. To the extent a progressive discipline practice has emerged, I believe the elements of that practice have been satisfied. I do not regard this as a truly disciplinary

suspension (Wodenjak was offered, and refused, the ability to use vacation to soften the economic blow). The underlying purpose of a purely disciplinary suspension is to inflict economic hardship on an employe in order to communicate a serious message to that employe. The offer to allow the employe to be on paid vacation is at odds with the purpose of discipline. The duration of the suspension was dictated not by the County, but rather by the period of the license revocation. For this reason, I do not regard the suspension as

arbitrarily or unreasonably long.

The suspension came about because the employe lost his license and the license was required by his job. The County was belatedly asked to waive the requirement and refused. I find nothing in the contract that requires such an accommodation.

In the Fall of 1988, Wodenjak was warned about the possibility he might lose his license if he were caught driving while intoxicated. The context of this warning should have made it meaningful. Wodenjak had been accommodated once. He was being warned because of rumors that he had been involved in another incident. The act of driving while intoxicated is criminal, subject to fine and imprisonment. It is a crime which has increasingly come under public scrutiny and awareness. Advertising campaigns and efforts have existed for some time to try to reduce the incidence of driving while intoxicated. Mr. Wodenjak knew that he shouldn't be driving while intoxicated. It is inconceivable to me that Wodenjak acted in reliance upon the previous accommodation to his license forfeiture.

The real question posed by this proceeding is whether or not the County is contractually obligated to accommodate Mr. Wodenjak further. I believe the answer to be no.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 7th day of November, 1989.

By \_\_\_\_\_  
William C. Houlihan, Arbitrator