

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

FOND DU LAC COUNTY HIGHWAY  
DEPARTMENT EMPLOYEES LOCAL 1366 B,  
AFSCME, AFL-CIO

and

FOND DU LAC COUNTY

Case 108  
No. 42386  
MA-5674

Appearances:

Mr. James L. Koch, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,  
N7242 Winnebago Drive, Fond du Lac, WI 54935, on behalf of the Union.

Mr. Richard Celichowski, Labor Negotiator, Fond du Lac County, City-County  
Government Center, 160 South Macy Street, Fond du Lac, WI 54935, on behalf of  
the County.

ARBITRATION AWARD

Fond du Lac County Highway Department Employees Local 1366 B, AFSCME, AFL-CIO, hereafter the Union, and Fond du Lac County, hereafter the County, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance concerning the meaning and interpretation of the terms of the agreement relating to discipline. The Commission designated Stuart Levitan to serve as impartial arbitrator. Hearing was held in Fond du Lac, Wisconsin on September 21, 1989. It was not transcribed. Briefs were submitted by the County and the Union, respectively, on November 16 and November 29, 1989; the County submitted a reply brief on December 8, 1989. By letter received January 18, 1990, the Union waived its right to file a reply brief.

ISSUE

Did the County have just cause to discipline the grievant,  
Donald Davis, with a verbal warning on April 4, 1989?

If not, what is the appropriate remedy?

## RELEVANT CONTRACTUAL LANGUAGE

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### ARTICLE IV. MANAGEMENT RIGHTS RESERVED

4.01 Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, 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 exclusively in the Employer.

4.02 The County Board and the highway Committee shall have the sole right to contract for any work it chooses and to direct its employees to perform such work wherever located subject only to the restrictions imposed by this agreement and the Wisconsin Statutes.

4.03 In keeping with the above, the Employer may adopt reasonable rules and amend the same from time to time, and the Employer and the Union will cooperate in the enforcement thereof. Intoxicating liquors, including beer and wine, shall not be consumed by any Highway Department employee during working hours either on or off county premises. To that end, there may be no misunderstanding with regard to the above, all employees are directed to refrain from entering upon any premises wherein intoxicating liquors are sold during working hours, except in extreme emergency situations.

### ARTICLE V. DISCIPLINE, DISCHARGE AND SUSPENSION

5.01 No regular employee shall be disciplined or discharged except for just cause. Written notice of the suspension, discipline or discharge and the reason or reasons for the action shall be given to the employee with a copy to the Union within twenty-four (24) hours if reasonably possible. Any grievance that may result from such action shall be considered waived unless presented in writing within seven (7) calendar days of the receipt of the notice by the employee. The grievance may be started at Step 2 or Step 3.

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## BACKGROUND

Ronald Davis, the grievant, is a patrolman for the County Highway Department. This grievance concerns a verbal warning which the Patrol Superintendent issued to Davis for allegedly not following orders on March 29, 1989.

At 6:45 on the morning of the day in question, Davis reported to the Central Garage, and received orders from Patrol Superintendent Tom Scannell to proceed to the Mount Cavalry Garage, where he would join two other highway workers; the three men were then to proceed to a location on Highway 45, hauling gravel and otherwise assisting in the repair of shoulder washouts. Scannell also instructed Davis that he was to collect warning signs on Highways 23 and 45, as Scannell testified at hearing, "on his way in".

Later that morning, Scannell spoke to Davis by radio, directing him to remove and return certain snow fencing when he was done with the shoulder washout repair. Scannell testified this directive was given at approximately 10:30; Davis and the two other crew members testified it was given shortly after 11:00. During the brief conversation, Scannell did not offer, and Davis did not seek, clarification on the relative priorities of collecting the warning signs and retrieving the snow fence.

The County has promulgated a series of work rules. Included therein, in Article VI, Safety Rules, is the following:

6.07 When working on highways, signs that are applicable to the type of work being done should be placed on the highway. They should be taken down again at the close of the days' work. When project is completed, signs should be returned to their storage place.

Davis and his colleagues spent the rest of the work day dismantling the warning signs, breaking for lunch, returning the signs to their proper storage area, preparing themselves and their equipment for snow fence removal, and driving to an area where snow fence required removal. Just as they arrived at this location, they noted it was time to return to town and pack up for the day. No snow fence was removed.

During the afternoon, Scannell went out to review the men's progress, at which time he noted that all the roadwork warnings had been removed, but that none of the snow fence had been taken down. When he confronted the grievant about this, and asked how much snow fence had been taken down, Davis first replied, "not much", later amending that to "none". The record does not indicate whether Scannell asked for, or Davis offered, an explanation.

On April 4, 1989, Highway Commissioner Richard C. Bakken issued a written record of a verbal warning, as follows:

On April 4, 1989 I met with Ron Davis, Leonard Koenigs, Tom Scannell and Rick Rabe regarding a complaint that Ron did not follow orders. The complaint was filed by Tom Scannell, Ron's supervisor.

Ron was told to pick up snow fence once he was done shouldering on March 29, 1989. Early that morning, Ron was told to bring the signs in at the end of the day. Ron did not follow Tom's orders.

Ron and two other men spent approximately three to four hours picking up six signs.

I feel that Ron Davis did not follow orders given by Tom Scannell. This is a violation of management's rights to direct the men regarding work to be done.

It is this discipline which the Union has grieved to arbitration.

#### POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

Davis was ordered to repair the washouts, pick up signs for return to their proper garages, and then, if time remained, to start snow fence removal. This is corroborated by the other crew members, who were in the truck and heard Scannell's radioed instructions.

Nowhere does the record reflect that Scannell gave a clear and concise direct order that the crew was to stop their existing work and immediately begin snow fence removal. Instead, all three crew members testified that it was their understanding that Scannell simply added the snow fence removal project to the rest of the day's assignments, to be started when the washout repair and sign collection jobs were done.

Davis tried in good faith to follow these orders. The jobs he performed, and the travel time such jobs required, coincided with the hours in the work day.

Because the County has not advanced a meritorious reason, nor elicited facts to support any just cause to discipline, this grievance should be sustained and the verbal warning should be rescinded and expunged.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

Superintendent Scannell instructed Davis at the start of the day to pick up the warning signs (for the washout repair job) at the end of the day if no one else had picked them up. Later that morning (by Scannell's testimony, about 10:30), Scannell instructed Davis by radio to begin picking up snow fence when they were finished with the shouldering work. Davis acknowledged at hearing that this instruction was given.

Yet, over the next 3 1/2 to 4 1/2 hours, the product of the efforts of this three-person crew was the collection of six road signs. No snow fence was removed.

Management's need and right to require subordinates to obey orders given by their supervisors is well-established. Here, Supervisor Scannell gave an order -- which itself neither violated the collective bargaining agreement nor involved any safety hazard -- which Davis did not obey.

The clear testimony, including Davis' own admission, established that he disregarded an order given him by his immediate supervisor. The facts would sustain a much harsher disciplinary measure had the County chosen to impose such. Accordingly, this grievance should be denied.

The union waived its right to file a reply brief. In its reply brief, the County further posits as follows:

Several assertions in the Union's brief are inconsistent with the testimony at hearing. That start of the work day, instructed Davis to retrieve the signs at the end of the day if they were not retrieved by other workers, and then, later, ordered him to collect the snow fence when he and his crew finished the shouldering project. Scannell never ordered the snow fence removal to wait until after

the signs were retrieved; the Union acknowledged this in its written statement at hearing and in in Davis' own testimony. Moreover, as the other crew members were not present when Davis received his initial orders, they cannot testify to what those orders were.

While Scannell did not give a direct order to stop work on the shouldering project and immediately attend to the snow fence removal, he did clearly order that the crew should remove the snow fence when the shouldering project was completed.

In seeking to rationalize Davis' failure to carry out his assigned duties, the Union has apparently changed its position. Previously, it asserted that Davis received conflicting orders; now it contends that Davis got additional orders.

Davis admitted at hearing that Scannell told him to retrieve the snow fence when finished with the shouldering project. And he admitted he was at fault for not explaining himself when he talked to Scannell about that order in their radio conversation. Accordingly, this grievance should be denied.

## DISCUSSION

Both parties are partially to blame for the events of March 29, 1989. Scannell should have realized that his order to retrieve the snow fence was somewhat in conflict with the earlier order to collect the signs, and with the established work rule 6.07. Davis should have realized this conflict, too, and asked for clarification. My task, then, is to parcel out responsibility for this failure in communication, thereby to determine whether the County had just cause to impose discipline.

The County is absolutely correct that it must retain the authority to issue reasonable orders and directives, with the explicit assumption that such directives will be followed. However, it has the concomitant responsibility to make sure such directives are both reasonable and understood. The County cannot punish a worker for allegedly disregarding an order when the County has failed to ensure that such order is understood.

Even with the benefit of hindsight, I can come to no other conclusion but that the series of directives given to the grievant on March 29 were indeed confusing. This confusion -- approaching the nature of an internal contradiction -- is apparent from the written record of the verbal warning issued by the Highway Commissioner, wherein he states that the grievant was "told to bring the signs in at the end of the day, if they were not picked up by others", and that he

was later told that "if he was done shouldering" he should pick up snow fence the rest of the day. Several obvious questions emerge from this narrative -- First, how could Davis be assigned a task (bringing in the signs) which would only be evident "at the end of the day"? - Then, what is the relationship between this directive and Safety Work Rule 6.07, which calls for signs to be taken down "at the close of the days work", a time ("days work") which is presumably different from "the close of the work day". And, finally, since the latter directive did not explicitly overrule the earlier one, did it do so implicitly?

The core of the County's case is that the latter directive implicitly superseded the earlier one, and that the grievant was at fault for not seeking prompt clarification of any resultant confusion. I have trouble with this concept, especially as it relates to the relative roles of management and labor. As noted above, the County is absolutely correct that it enjoys the contractual right to manage and direct its workforce. However, the rights of supervision do not come without certain responsibilities, which responsibilities include the duty to take reasonable care that orders and assignments are able to be understood. To be sure, there could be a situation in which the supervisor's orders were so patently confusing on their face that the employee involved would be remiss in not seeking prompt clarification. Here, however, the course which the grievant followed was not so unreasonable an application of the orders he believed he received so as to constitute the willful disregard of orders.

While not a specific element of the offense charged, the County in its brief insinuated that it found the grievant to have exhibited unacceptable work habits, based on the amount of work completed following the radio call from Scannell. In that regard, it is worth noting that, at hearing, Scannell testified this call was placed at about 10:30 a.m.; however, in the Commissioner's written record of the verbal reprimand, it is stated that, "Tom called ibn at about 11:30 a.m. . . ."

Granted, the level of discipline at issue is very modest. The collective bargaining agreement, however, requires just cause for all discipline, of whatever severity. A necessary element in establishing just cause is establishing that the employe knew that the action in question was prohibited. Had this been a case of willful disregard of a legitimate order, discipline would be justified. However, the employer has failed to convince He that this was anything other than an honest misunderstanding in which the employe followed a course he reasonably believed was consistent with his responsibilities.

Accordingly, on the basis of the collective bargaining agreement, the record evidence, and the arguments of the parties, it is my

#### AWARD

That this grievance is sustained. The County shall promptly expunge all record of the



discipline herein discussed.

Dated at Madison, Wisconsin this 22nd day of February, 1990.

By \_\_\_\_\_  
Stuart Levitan, Arbitrator

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