BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
EAU CLAIRE COUNTY JOINT COUNCIL OF UNIONS, AFSCME, AFL-CIO, LOCAL 254 (Highway Department Employees; Parks and Forest Department Employees)	Case 171 No. 43739 MA-6056
and	
EAU CLAIRE COUNTY	

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 17 Woodridge Drive, Eau Claire, Wisconsin 54701, appearing on behalf of Eau Claire County Joint Council of Unions, AFSCME, AFL-CIO, Local 254 (Highway Department Employees; Parks and Forest Department Employees), referred to below as the Union.

Mr Keith R. Zehms, Eau Claire County Corporation Counsel, 721 Oxford Avenue, Eau Claire, Wisconsin 54703, appearing on behalf of Eau Claire County, Wisconsin, referred to below as the Employer or as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union and the County jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Kermit Adank, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held in Eau Claire, Wisconsin, on May 16, 1990. The hearing was transcribed, and the parties filed briefs by June 29, 1990.

ISSUES

The parties stipulated the following issues for decision:

> Was the Grievant, Kermit Adank, discharged for just cause?
>
> If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1

RECOGNITION AND MANAGEMENT RIGHTS

. . .

1.06 The Employer shall have the right to:

. . .

(c) Suspend, discharge, or take other appropriate disciplinary action against the employee for just cause . . .

BACKGROUND

Thomas Walther, the County's Highway Commissioner, detailed the basis for the Grievant's discharge in a letter to the Grievant dated January 19, 1990, which reads thus:

> On November 2, 1989 I learned that you had been driving County owned vehicles from September 5, 1989 through October 10, 1989 after the State of Wisconsin had revoked your driver licenses. On December 28, 1989 you, Union President Roger Biegel, Personnel Director Marvin Niese and myself discussed this situation. At that meeting you were allowed to fully explain the situation as you viewed it and you admitted to driving

> County owned vehicles from September 5, 1989 through October 10, 1989 after revocation of your driver licenses.
>
> Based upon both your having driven after license revocation and upon your personnel record you are hereby terminated from employment with Eau Claire County at the close of the work day on January 19, 1990.

It is undisputed that the Grievant operated County vehicles while his personal and chauffeur's licenses were revoked. Certain circumstances surrounding the revocation are, however, in dispute.

The incident underlying the revocation occurred on August 5, 1989. 1/ At about 7:30 p.m., Deputy Sheriff Jeffrey Pettis was summoned to the scene of a one car accident. Pettis testified that he found a car which had been run into a ditch. The Grievant was lying in the front seat of the car, being treated by a paramedic. Pettis testified that the paramedic informed Pettis that he could smell alcohol, and believed the Grievant had been drinking. Pettis stated he could detect a strong smell of alcohol, and could discover no source for the smell other than the Grievant. Pettis then followed the Grievant to the emergency room, where he attempted to serve the Grievant a citation for operating a motor vehicle under the influence of an intoxicant. The "Incident Report" portion of the citation reads thus:

> (the Grievant) was the driver of a car involved in a single vehicle personal injury accident. He smelled very strong of the odor of an alcoholic beverage. He was uncooperative with medical attendants and said he was fine. His speech was extremely slurred. He was issued a (citation) for OMVWI and was read the Informing the Accused. He refused to submit to a blood test.

The "Informing the Accused" form read by Pettis requires an officer "requesting a person to take one or more chemical tests under s. 343.305(2) Wis. Stats." to "to inform the person," among other things, that: "If you refuse to submit to any such tests, your operating privilege will be revoked as provided under s. 343.305(9) Wis. Stats." Pettis testified that the Grievant was conscious throughout this period of time, and that he believed the Grievant understood what Pettis was saying.

After the Grievant refused to submit to a blood test, Pettis attempted to issue him a form headed "**NOTICE OF INTENT TO REVOKE OPERATING PRIVILEGE**." The heading to that form contains a series of boxes to identify, among other things, the name, address and driver's license number of the person receiving the form. Under those boxes appears a prefatory paragraph which reads thus:

> I the undersigned law enforcement officer for and on behalf of the County of Eau Claire, state that on 8-05-89 (date), I requested the aforementioned person to submit to a test or tests as provided under s. 343.305(3) Wisconsin Statutes. I also state that prior to a request for a test under s. 345.305(3)(a) Wis. Stats., I placed the person under arrest for violation of: 2/

The form then states, on separate lines, a series of six statutory sections and a line identifying the citation number issued the Grievant. The balance of the form reads thus:

> I complied with s. 343.305(4) by reading to the person the information printed on form SP4197 (Informing the Accused) and provided that person a copy thereof. GIVEN TO WIFE 3/
>
> The person refused a request under s. 345.305(3)(a).
>
> A hearing may be requested on the revocation of your operating privilege by mailing or delivering a written request therefore, within 10 days of the date of this

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1/ References to dates are to 1989, unless otherwise noted.

2/ The underscored portions of this paragraph are blank lines, which were filled in by Pettis.

3/ The reference "GIVEN TO WIFE" was handwritten on the form by Pettis.

notice to the court at:

. . .

> The issues to be decided at the hearing are limited to whether I was entitled to request that you submit to the test, whether proper notice was given, whether you refused to submit and whether you have a physical disability or disease unrelated to the use of alcohol or controlled substance which was the basis for your refusal.
>
> If you do not request a hearing within 10 days of the date of this notice shown above, your operating privilege will be revoked for a period of not less than one year or more than three years. The period of revocation commences 30 days after this notice issued to you.
>
> If it is determined that you refused the test you will be ordered to comply with assessment and a driver safety plan, unless your refusal was for a test under s. 346.63(2m) Wis. Stats.
>
> This notice of intent to revoke your operating privilege is hereby given you as required by s. 343.305(9) Wis. Stats.

Pettis testified that he attempted to give this form, and the citation form summarized above, to the Grievant. After the Grievant refused to accept the forms, Pettis attempted to give them to the Grievant's wife, who also refused to accept them. Pettis then informed the Grievant's wife and daughter, who was also present, that he would place the forms in the Grievant's boots. Pettis did so, and left the examining room. He did not take the Grievant's personal or chauffeur's licenses. The Grievant's wife was present while Pettis attempted to explain the various forms to the Grievant. Pettis testified she asked how Pettis could justify his conduct given the Grievant's accident, and that he informed her of the revocation process.

The Grievant testified that he could not recall anything from the time of the accident until he awoke in his hospital room on August 6. The parties stipulated that his blood alcohol content on that evening was .35.

He was hospitalized until August 10, 1989. The Grievant stated that about two days after his return home from the hospital, he found, in his dresser drawer, the forms Pettis had issued. He stated he was looking for the forms to determine the date he would have to appear in court. He stated he learned his court date from the citation form, and did not fully read the "**INFORMING THE ACCUSED**" or the "**NOTICE OF INTENT TO REVOKE OPERATING PRIVILEGE**" forms. He testified that he read each form until he came to a reference to a statute, and then he stopped reading because he did not understand the statutes.

Having discovered he was scheduled to appear in court on a day he had planned to be out of town, the Grievant rescheduled the appearance date noted in the citation from August 28 to September 6. He testified that he did not consult an attorney regarding his situation because he could not afford one. He did not request a revocation hearing because he did not understand why he would need to do so. He assumed throughout this period that his operating licenses would continue to be valid until a court ordered him to surrender them.

The Grievant testified that he based this belief on his prior experience with a charge of driving under the influence. The prior charge was based on complaint filed against him on May 8, 1979, for an offense alleged to have occurred on April 8, 1979. In that case, the Grievant initially pleaded not guilty, requested a jury trial, then later agreed to plead guilty no contest. The Grievant testified that in that case, his licenses were valid until a judge ordered him to physically surrender the licenses to the Clerk of Court.

The Grievant did enter an appearance on September 6, and pleaded not guilty to the charges which had been filed against him. During this appearance, the Grievant was given a trial date of October 4. He testified that no one informed him that his licenses had, by force of law, been revoked.

Edward Asselin is a Patrol Sergeant employed by the County Sheriff's Department. He testified that he had a conversation with the Grievant sometime in early September. 4/ More specifically, Asselin testified that the Grievant

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4/ Asselin was unsure of the precise date, but was sure, from the substance of the conversation, that it occurred prior to any final disposition of

had been referred to the Sheriff's Department from the Court Commissioner's Office concerning the Grievant's referral for an Intoxicated Driver Assessment. The Grievant, according to Asselin, asked how he could be ordered for an assessment without having been found guilty. Asselin noted the Grievant had the "**NOTICE OF INTENT TO REVOKE OPERATING PRIVILEGE**" form with him, and asked the Grievant if he had requested a revocation hearing. After the Grievant had informed Asselin he had not, Asselin informed him that the State would automatically revoke his driving privileges thirty days after his refusal. Asselin testified that the Grievant appeared to understand him, and that after the conversation ended, he directed the Grievant to a counselor at the Alcohol Assessment Center.

The Grievant testified that he could not recall having had the conversation recounted by Asselin. He did state that he spoke with the County Sheriff in early September "to see if he could get my refusal dismissed." 5/

It is undisputed that the Grievant operated County vehicles for about 140 hours between September 5 and October 2. The Grievant also operated his personal vehicle throughout this period.

The Grievant testified that on October 2, he received the following letter, dated September 29, from the State Department of Transportation:

> It is ordered that your privilege to operate a motor vehicle on the highways of this state and licenses #A352-5193-7345-07REG . . . and #A352-5193-7345-07CHF . . . are revoked effective September 4, 1989.
>
> Your operating privilege is revoked, as ordered by the Eau Claire County Circuit Court, for a period of one year because of your refusal to submit to a breath or chemical test for intoxication.
>
> . . .
>
> Surrender any revoked license in your possession to the Division of Motor Vehicles. Failure to surrender licenses may make you subject to prosecution.
>
> Your operating privilege remains under revocation beyond the basic period of revocation until reinstated. Do not operate any motor vehicle until your operating privilege has been reinstated according to law and a reinstated license is in your possession . . .

The Grievant testified that he read and understood this letter, and was shocked to learn his license had been revoked as of September 4.

The Grievant took sick leave from work from October 3 through October 12. On October 4, he appeared in court and entered a plea of no contest to the charge filed against him. The judge ordered him to surrender his license to the Clerk of Court. The Grievant testified that the Clerk informed him to keep his Chauffeur's license, but he informed her that the Division of Transportation had ordered him to surrender both licenses.

On October 10, the Grievant applied for a Temporary Occupational Operator's License, which permitted him to operate vehicles during certain hours for occupational purposes. He received the temporary license the following day. Sometime after October 11, he spoke to the County Patrol Superintendent, John Frueh. The Grievant testified that he informed Frueh they had to discuss the hours of work "I could work on an occupational." 6/ Frueh testified that this conversation occurred within a week or two of the Grievant's return to work from sick leave. Frueh stated the Grievant did not show Frueh a copy of his temporary occupational license, and did not inform Frueh of the revocation of his regular licenses. Frueh stated he did not ask the Grievant why the Grievant had to work a restricted schedule of hours. This point was, according to Frueh, "his personal thing . . . (i)f he wanted to tell me anything else, that was his business, and he didn't." 7/ Frueh stated he had heard of the Grievant's arrest for operating a vehicle while under the influence, but did not ask about the status of the Grievant's licenses.

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the charges against the Grievant. Asselin testified the conversation would probably have occurred on or about September 6.

5/ Transcript (Tr.) at 153.

6/ Tr. at 103.

7/ Tr. at 149.

Frank Draxler is the County's Purchasing Agent, and issued a memo to Walther dated October 31, which reads thus:

> This memo is written to notify you that upon checking the driving records of employees driving fleet vehicles, the records show (the Grievant's) drivers licenses has been revoked. I believe you will agree that (the Grievant) should not be operating County vehicles. My opinion is based on decisions I make relative to the fleet vehicle program and in the area of risk management.

. . .

Walther testified that he received Draxler's memo on November 2, and that this was the first notice he had that the Grievant did not possess a valid operator's license. Walther instructed Frueh to discuss the matter with the Grievant. Frueh testified that this instruction was his first notice that the Grievant had operated County vehicles without a valid license. Walther stated that he investigated the matter and met with the Grievant, to obtain the Grievant's view of the facts, on December 28. The Grievant informed Walther, at this meeting, that he was not aware of the revocation of his license until October 2. After the conclusion of the meeting, Walther determined to "find any more data I could find on this affair." 8/

As a result of this investigation, Walther issued the Grievant the following letter dated January 10, 1990:

> On December 28, 1989 Personnel Director Marvin Niese and myself discussed with you and Union President Roger Biegel the status of your driver's license, the events leading up to the revocation and subsequent issuance of your occupational license and what you were operating under between September 5 and October 11, 1989. You understand that I can't allow people to knowingly operate a department vehicle without a license.
>
> The purpose of our talk was to determine if any disciplinary action would be called for in your case. You explained that you were not aware of the suspension until October 2 or 3, 1989, and indeed you didn't drive any vehicles between that time and when you received your occupational license.
>
> This sounds fine, however, normally an investigating police officer will give an intoxicated driving suspect information about a pending revocation at the same time the citation is issued. You stated you didn't receive any papers other than the citation. Since this seems so unusual, I wondered if your medical condition after the accident may have been a contributing factor.
>
> To better understand this unusual situation, I request that you consider giving me a voluntary release of the medical information relating to your hospitalization on August 5, 1989. This can be done by completing the attached release form. If you choose to authorize this release, I must have the completed form returned to me by 7:00 A.M. on Monday, January 15, 1990.
>
> After the above time, I will review your earlier statements and any additional information, including the medical records, which you may choose to give me, to determine if any disciplinary action is warranted.

The Grievant did not execute this authorization.

As noted above, Walther discharged the Grievant effective January 19, 1990. As noted in the termination letter, Walther reviewed the Grievant's personnel file prior to that date, and based the decision to discharge, in part, upon the contents of that file.

The first disciplinary incident noted in the file was summarized in a letter dated July 25, 1977, from the then-incumbent Highway Commissioner to the Grievant. That letter states:

8/ Tr. at 49.

. . .

> On Friday, July 22, 1977, it was reported that you and Mr. James Ausman, were drinking beer on the job. Mr. John A. Frueh, Patrol Superintendent and Mr. Donald E. Larson, went to check this out and saw you and Mr. Ausman, drinking beer with a friend during working hours.
>
> Friday, July 22, 1977, I instructed Mr. John A. Frueh, to suspended you without pay for one week, for disciplinary action, you may report back to work on Monday, August 1, 1977, at the regular time.

The second instance of discipline was summarized in a letter dated May 4, 1979, from County Committee on Transportation and Public Safety to the Grievant, which reads thus:

> Pursuant to our discussion of April 26, 1979, relating to the incident which occurred on April 8, 1979, in which you caused approximately $3,400.00 damage to a county truck while driving under the influence of alcohol, it is the determination of this Committee that the following disciplinary action be taken:
>
> > You are hereby informed that you are to be suspended without pay for a period of one hundred eight (180) calendar days from and after April 8, 1979. Thereafter, upon your return to active job status with the Highway Department, you will not be allowed to drive any county trucks or other vehicles upon public roads and highways. Instead, the Highway Commission is directed to use your services in respects which do not require driving.
>
> . . .
>
> It is the employer's position that the seriousness of the accident in question, your arrest for driving while under the influence of alcohol at the scene of the accident and the subsequent blood test taken within approximately one hour of our arrest, which test showed that your blood contained 0.2% by weight of alcohol, when considered in conjunction with the fact that you had been "on the job" for at least four (4) hours prior to the said accident, all merit the above-referred to suspension. Please be advised that any further infractions of work rules or policies during the course of your employment shall constitute cause for your dismissal.

The Union grieved this suspension. The grievance was ultimately denied by an arbitrator.

The next instance of discipline is summarized in a letter from Walther to the Grievant dated February 29, 1988, which reads thus:

> > You are hereby reprimanded for your actions in the motor vehicle accident of December 28, 1987. As noted in the police accident report, you were following too close under adverse driving conditions, causing $978.00 in damage to a privately owned motor vehicle. This negligent driving cannot continue. Therefore, in an effort to stress to you the need for more caution in your day-to-day work activities, you are hereby notified that future incidents of negligent driving will result in further discipline including, but not limited to, suspension without pay.

The final instance of discipline is summarized in a letter from Walther to the Grievant dated October 31, 1988, which reads thus:

> On Tuesday, October 25, 1988, citizen Dale Lunderville registered a formal complaint with this office and the Eau Claire County Sheriff's Department that you had illegally removed election campaign signs that he had legally placed on private property off of the highway

> right of way along STH 93.
>
> I had reviewed the sign placements myself and believed them to be legal at the time I checked them at noon on October 24, 1988 . . .
>
> We believe you did improperly remove election campaign signs that were legally placed and that you only removed signs placed by the republican party and left in place illegal signs placed by democratic party supporters. This occurred after you and the entire staff had been warned verbally on several occasions about citizen concerns with this problem. The two most recent of these being a warning put out over the radio system on October 21, 1988, and a warning issued at the department safety meeting on September 16, 1988, at which you were present.
>
> Based upon all the information the decision has been made that you shall be suspended for five consecutive working days commencing on Tuesday, November 1, 1988. You may return to work on Tuesday, November 8, 1988. Any future repetition of this act will result in your dismissal.

The Union grieved this suspension. The grievance was ultimately denied by an arbitrator.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union initially argues that "the real issue" is whether the Grievant knowingly drove County vehicles after his license had been revoked. Walther's testimony that the Grievant's knowledge of the infraction was not relevant to the discharge decision is contradicted, according to the Union, by the January 10, 1990, letter. It follows, the Union contends, that the County fired the Grievant because he "knowingly" operated County vehicles without a license, and it further follows that the Grievant's knowledge is "the heart of this case."

Noting that the Grievant's blood alcohol content on the night of August 5, 1989, was .35, the Union concludes that the Grievant could not possibly have understood Officer Pettis' recitation of the content of the legal documents served on the Grievant that night. Nor does the record demonstrate, according to the Union, that the Grievant knew his license had been revoked prior to October 2, 1989. More specifically, the Union notes that the Grievant has had limited schooling, and that as a result of his prior revocation, reasonably concluded that his license would not be revoked until "after he went to court." That the Grievant could not have understood the various legal documents he had received is demonstrated, according to the Union, by the fact that he did not request a refusal hearing; that he continued to drive his own vehicle; and that he ceased to drive his own and County vehicles after "he finally learned, on October 2, 1989, that his license had in fact been revoked on September 4th."

The Union argues that Asselin's testimony does not contradict this conclusion. The Union notes that Asselin was a "surprise" witness, whose testimony must be closely scrutinized. More specifically, the Union argues that Asselin's testimony should be rejected since he would not have testified but for his conversation with Pettis, who does not like the Grievant; since Asselin "was not sure of the date that this alleged conversation with the Grievant took place;" and since "the Grievant rebutted . . . Asselin's testimony when he stated that he did not remember talking to Asselin."

Beyond this, the Union argues that "(m)anagement completely and utterly failed to assist the Grievant with his situation." Contending that the Grievant's arrest had been common knowledge, the Union argues that the County refused to look into the matter because it "wanted to get rid of (the Grievant) because he was a Union Vice-President who was unafraid to file grievances in defense of his own job."

The County must, according to the Union, establish cause for the discharge beyond a reasonable doubt. Acknowledging that the Grievant "is guilty of driving County vehicles without a license," the Union argues that "(the Grievant) did not knowingly violate County work rules." That he did not understand his license had been revoked is demonstrated by his use of his own car, and by his failure to apply for an occupational license before October 2, 1989. Because the Grievant lacked the necessary intent to violate work rules, it follows, the Union argues, that the County has failed to meet its burden of

proof.

The Union states the remedial considerations appropriate to the County's violation of the just cause provision thus:

> We ask that the Arbitrator order the County to reinstate the Grievant to his former position, expunge the record of this incident, and to make him whole for wages and benefits. Should the Arbitrator find that the Grievant should pay some price for either unknowingly violating County work rules, or for not exercising proper diligence in ascertaining his license status, we ask that the penalty of discharge be appropriately reduced, and that the Grievant be made whole.

THE COUNTY'S POSITION

After a review of the record, the County argues initially that the discharge must be upheld unless "(t)he decision was patently arbitrary or baseless." Relevant arbitral and judicial precedent establish, according to the County, that an employer's imposition of discipline should not be overturned unless the employer has abused its discretion. In this case, the County contends that it has not. More specifically, the County asserts:

> The Grievant's testimony is incredible. He covered up the fact that his driver's licenses had been revoked and almost got away with it. To accept the Grievant's explanation is to discount the testimony of Deputy Jeffrey Pettis, Highway Commissioner Thomas Walther, Patrol Superintendent Frueh and Sheriff's Patrol Sergeant Ed Asselin.

Viewing the record as a whole, the County concludes that "(n)othing in the record supports overturning the discharge and, thus, the grievance must be denied."

The County's next major line of argument is that it has demonstrated cause for the discharge "(b)y meeting each and every one of the seven Daugherty tests." Specifically, the County notes that "(s)tate statutes require obtaining and maintaining a valid driver's license(s) in order to operate motor vehicles on public highways," and that this fact was well known to the Grievant, thus satisfying the first of the seven Daugherty tests. The second test has also been met, the County contends, because its requirement that the Grievant drive its vehicles only if properly licensed is "(r)easonably related to . . . the orderly, efficient and safe operation of the County's business." Because "(a) complete investigation was undertaken by Highway Commissioner Walther" the third Daugherty test has been met, according to the County. Since the Union has never "alleged that the County did not impartially investigate the August 5, 1989 incident," it follows, the County argues, that the fourth Daugherty test is "essentially a non-issue in this case." The fifth test is also a non-issue, the County contends, since "(t)he Grievant's daily time reports and Grievant's own admissions indicated he had driven County vehicles while his driver's licenses were revoked." Since this is the first time Walther has disciplined an employe for driving after a revocation, it follows, the County asserts, that the sixth Daugherty standard has been met. The final Daugherty test has also been met, according to the County, because the severity of the Grievant's offense, standing alone, merits discharge and because his past record affords no basis for a lesser sanction.

The County also specifically rejects the Union's assertion that the Grievant was not aware that his license had been revoked. Specifically, the County argues that the Grievant can read, and has demonstrated an ability to comprehend what he reads. The assertion that he "stopped reading the Notice of Intent to revoke" is baseless, the County contends, since "(a)ny reasonable person would have read the entire document . . . or obtained assistance immediately." Beyond this, the County contends that the Grievant was aware of what happened on the evening of August 5; could well have afforded an attorney; did consult with Asselin about the papers he had received; and willfully withheld information regarding his revocation throughout September and October.

Viewing the record as a whole, the County concludes that granting the Union the remedy it seeks "(c)onstitutes a penalty and contravenes the express language of the contract." It follows, according to the County, that the grievance must be denied.

DISCUSSION

The stipulated issue is whether the County had just cause to discharge

the Grievant. The elements to a just cause analysis have been variously stated. Fundamentally, a determination of just cause requires that the County establish that it has a disciplinary interest in the Grievant's conduct, and that the discipline imposed for his conduct reasonably reflects that interest.

That the County has a disciplinary interest in assuring that a Maintenance Patrolmen possesses a valid license to operate equipment on the highway is self-evident. The more closely disputed point here is the Union's assertion that the County's disciplinary interest is not implicated if the Grievant was unaware that his license had been revoked.

It is apparent that if the Grievant knowingly operated County vehicles without a license, the nature of the County's disciplinary interest is different than if he was unaware that his licenses had been revoked. Establishing the precise nature of the County's disciplinary interest is, however, more relevant to the second element of the just cause determination than the first.

More to the point here, fully crediting the Grievant's version of the facts can not operate to eliminate the County's disciplinary interest in his conduct. The Grievant acknowledged that he was aware that his licenses were in jeopardy due to the events of August 5. His interest in his court dates, his initial entrance of a not guilty plea, and his conversation with the County Sheriff all underscore that he was attempting to delay the revocation of his licenses. In spite of this, and knowing that his driver's licenses were essential to his position with the County, the Grievant made no effort to notify the County of his dilemma until sometime in early October, well after any doubt about the revocation had been resolved. Even then, his notification to Frueh was, by his own account, less than candid. Rather, he advised Frueh that "we had to get together and I had to talk to him about hours because I had certain hours I could work on an occupational." 9/ The result of the Grievant's actions, at a minimum, was that he made a belated application for an occupational license. The Union points out that he did not drive County vehicles from October 2 until after he received the occupational license. This is because he was on sick leave for that period, and could not drive a County vehicle. The fact remains that he neither promptly acted to secure an occupational license nor notified the County of the jeopardy to his driving privileges until the last possible moment. He thus deprived both himself and the County of the ability to plan to accommodate his work schedule to the limitations of the occupational license. In sum, even fully crediting the Grievant's account does not establish that the County lacked a disciplinary interest in his failure to either timely notify the County that his licenses were to be revoked, or take action to assure he possessed valid licenses.

The next element of the just cause analysis is to determine if the discipline imposed by the County reasonably reflects its disciplinary interest in the Grievant's conduct. The Union correctly notes that it is essential to define the nature of the County's disciplinary interest to make this determination, and that the Grievant's awareness of the revocation process must be part of this determination.

The Union forcefully argues that the Grievant stopped driving both his personal and County vehicles after he received the September 29 Order of Revocation, and that this affords a basis to credit his testimony that he was unaware of the September 4 revocation. From the Union's perspective, the Grievant's driving of County vehicles without a valid license is itself proof of the truth of the Grievant's account, since doing so unnecessarily put his job in jeopardy. The Union's arguments are well-stated, but cannot resolve the point. The Grievant may have continued to drive personal and County vehicles because he felt he could get away with it until he surrendered his licenses. Although the Union's arguments cannot resolve the dispute, they set the stage for the Grievant's testimony, providing a basis to credit his account if the account is creditable.

The Grievant's testimony is not, however, creditable. Initially, it can be noted that his testimony is marred by inconsistency. For example, the Grievant asserted he did not consult an attorney after his arrest because "you can't afford one working for the highway department." 10/ It is not necessary to attempt to justify the existence or the price of attorneys to note that the Grievant was represented by one in 1979, when he was charged with driving under the influence. 11/ This inconsistency, standing alone, is not fatal to the credibility of the Grievant's account. It does preface, however, the difficulty of understanding, by the Grievant's own account, the basis of his behavior following August 5.

9/ Tr. at 102-103.

10/ Tr. at 124-125.

11/ See Union Exhibit 2, at (2).

The Grievant accounted for his conduct by noting that he is not well-educated, and was ignorant of the operation of the law. This account is internally inconsistent. Intelligence is not necessarily a function of formal education, and the Grievant's testimony indicated he is an intelligent man. He found and postponed his initial court date without assistance, and entered a plea without assistance. He was capable of reading and understanding each of the forms concerning the revocation. He testified that he fully understood the September 29 Order of Revocation which is as complex a document as the "**INFORMING THE ACCUSED**" or the "**NOTICE OF INTENT TO REVOKE OPERATING PRIVILEGE**" forms. He read and understood the latter form during the arbitration hearing. The contention that he was incapable of understanding the revocation process is, then, belied by his own conduct and his own testimony. Similarly, the Grievant contended he believed his license would be valid until surrendered to Court, as was the case in 1979. However, in response to Asselin's testimony, the Grievant asserted he was seeking to consult with the County Sheriff, to "to see if he could get my refusal dismissed." 12/ If the Grievant had not understood the significance of his refusal to submit to a blood test, and believed his license was valid until surrendered to the Court, it is difficult to understand why he would consult with the Sheriff.

Beyond this, the Grievant's testimony is directly contradicted, in significant respects, by credible testimony. Frueh denied that the Grievant informed him of the reason for discussing a restricted set of hours. More significantly, Asselin's testimony that he informed the Grievant of the effect of a refusal to submit to a blood test stands unrebutted. This is not due to the fact that Asselin's testimony came as a surprise to the Union. Rather, it is due to the unpersuasiveness, noted above, of the Grievant's response to Asselin's testimony. The Grievant denied any recall of talking to Asselin in early September, which has some support in Asselin's uncertainty on the date of the conversation. This does not, however, serve to deny that the conversation with Asselin occurred. More significantly, the Grievant attempted to rebut Asselin's account by testifying that he attempted to speak with the County Sheriff at that time. Paradoxically, Asselin's testimony is consistent with the Grievant's assertion that he believed, at least up to the time of the conversation, that he had valid licenses until they were surrendered to the Court. The Grievant's testimony that he was seeking the Sheriff's assistance regarding his refusal to submit to a blood test is difficult to square with his purported ignorance of the law.

Other troublesome points in the Grievant's account can be noted. His assertion that he was unaware of Pettis' informing him of the revocation process on August 5 can be accepted. His .35 blood alcohol content supports that contention. However, his testimony does not account for the fact that his wife heard Pettis' account, and questioned Pettis during the account. Whether his wife fully understood the situation cannot be determined on this record. It is apparent, however, that the significance of the forms left by Pettis did not go unnoticed. Those forms were retained, and left for the Grievant to review when he returned home. The Grievant's assertion that he was concerned enough about the forms to seek them out, yet not sufficiently concerned to read them beyond any statutory references is difficult to accept on its face, and impossible to square with his own conduct. Something on those forms or in the circumstances following the issuance of those forms induced him to seek the assistance of the County Sheriff.

In sum, even without regard to the testimony contradicting the Grievant's, it is apparent that he was aware that his licenses were in jeopardy, and knowingly withheld that information from the County until it could no longer be withheld. More to the point here, the testimony contradicting the Grievant's is more credible than the Grievant's. Even disregarding the testimony of Pettis, Asselin's testimony establishes that the Grievant was aware of the status of his licenses in early September, or had been sufficiently warned that either notice to the County, or effective action to secure an occupational license was indispensable. The Grievant nevertheless continued to withhold such notice and failed to secure a valid license, while continuing to operate County vehicles.

The County determined that the Grievant's conduct was sufficiently egregious that, when considered in light of his disciplinary history, discharge was the appropriate sanction. In light of the record reviewed above, this determination cannot be considered unreasonable. If, as the record indicates, the Grievant knowingly operated County vehicles without a valid license, there can be no doubt that discharge reasonably reflected the County's disciplinary interest in his conduct. Even if the Grievant deluded himself into believing that his licenses remained valid until a court ordered him to surrender them, the result does not change. The record will not support the assertion that the Grievant reasonably or innocently maintained this belief. Rather, the record establishes that the Grievant ignored a series of clear warnings that his

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12/ Tr. at 153.

licenses were in jeopardy, and failed to either notify the County of the problem or take timely action to secure valid regular or occupational licenses.

In sum, the Grievant's operation of County vehicles during a time in which he did not possess valid licenses to drive constitutes conduct in which the County has a disciplinary interest. The County's discharge of the Grievant, viewed in light of the facts posed here and in light of the Grievant's disciplinary history, reasonably reflects the County's disciplinary interest in that conduct. It follows that the County has demonstrated just cause for the Grievant's discharge.

AWARD

The Grievant, Kermit Adank, was discharged for just cause.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 21st day of September, 1990.

By_____
Richard B. McLaughlin, Arbitrator