BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
FLORENCE COUNTY HIGHWAY DEPARTMENT EMPLOYEES, LOCAL 1315, AFSCME, AFL-CIO	Case 20 No. 44377 MA-6274
and	
FLORENCE COUNTY (HIGHWAY DEPARTMENT)	

Appearances:
Mr. Michael J. Wilson, Representative, on behalf of the Union.
Mr. Robert W. Burns, Godfrey & Kahn, S.C., Attorneys at Law, on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by Florence County Highway Department Employees, Local 1315, AFSCME, AFL-CIO, herein the Union, and the subsequent concurrence by Florence County, herein the County, the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on October 25, 1990 at Florence, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on January 29, 1991.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties stipulated to the following issues:

1. Whether the County violated Article 14 of the collective bargaining agreement when it discharged the grievant?

2. If so, what is the appropriate remedy?

BACKGROUND: 1/

Daniel Throm, herein the Grievant, was hired by Florence County on October 20, 1986, as a laborer. The Grievant signed a form upon starting employment which acknowledged the safety concerns of the County.

On May 18, 1990, the County Highway Commissioner, Richard P. Leffler, herein Leffler, discharged the Grievant by letter as follows:

> I am writing this to notify you of my decision to terminate your employment with the Florence County Highway Department. This is a very difficult thing for me to do, but in consideration of past problems and the incident which occurred on 05/16/90, I feel I have no choice.
> I would like to wish you luck in your future, and if I can be of assistance to you in gaining other employment, please let me know.

Prior to discharging the Grievant, Leffler did not talk to the Grievant or ask the Foreman, Gordon Brolin, what happened on May 16, 1990.

On May 16, 1990, the Grievant injured himself with a chain saw on the job. The injury included a tear to the pants and "barely broken" skin. However, the Grievant became extremely upset after he injured himself with the saw, and expressed concern about losing his job. As a consequence, after some discussion, another County employe, Albert Bock, herein Bock, suggested a cover-up as follows:

1/ In describing the background, the Arbitrator has been presented with some conflicting testimony regarding certain material facts. As a result, to make findings it has been necessary to make credibility determinations based in part on such factors as the demeanor of the witnesses, material inconsistencies and inherent probability of testimony, as well as the totality of the evidence. Some of these credibility determinations are discussed within the context of the Arbitrator's rationale in support of his conclusions. All other conflicts in the evidence, although not specifically detailed or discussed, have been considered in reaching the Arbitrator's decision.

> Why don't we -- we'll just say you were -- you slipped on the hill and cut it on some barb wire and maybe it won't be such a big deal.

The Grievant initially reported to the office on the date in question (at approximately 3:25 p.m.) that he injured himself brushing against a barbed-wire fence. The Grievant knew this to be untrue at the time he reported it. Francine Freeberg, Leffler's secretary, asked the Grievant to complete an accident report. However, the Grievant just shook his head as if to say no, and walked away.

On May 17, 1990, the Grievant came into the office. Freeberg asked him to complete an accident report. After being warned by Freeberg that Leffler knew the truth, the Grievant filed an injury report describing the injury as occurring when he "bumped the saw onto his leg." The injury report further states the Grievant "was walking up a hill when he slipped on the hillside." However, Bock testified that the Grievant was on a lower "more" flat area. The Grievant stated on the injury report that "the saw was running at the time" of the accident. After injuring himself with the saw, the Grievant turned the saw over to another employe but almost cut his own hands when he was moving too fast under a saw being operated by Bock.

The Grievant had previously been issued a written verbal warning dated November 2, 1989, regarding safety concerns which stated: "Any further continuance of this kind of inattention or failure to wear safety equipment, may result in further disciplinary action." Leffler had also discussed the issue with the Grievant on several occasions, including meetings with the Grievant on March 17, 1989, and February 9, 1990. At the February 9, 1990 meeting, the Grievant quit his employment as a result of the concerns expressed to him regarding safety as well as his work in the stockroom. The Grievant attempted to return to work on February 12, 1990. A meeting followed on February 14, 1990, with the Union Representative, Steve Hartman, the Union President, David Bauer, and Leffler to discuss the desired reinstatement of the Grievant. The Grievant was allowed to come back to work but Leffler made it clear to those present that no further safety problems would be tolerated.

Following the February 14, 1990 meeting, a draft Memorandum of Agreement was submitted by the Union which would have expunged prior warning notices. That Memorandum was rejected by the County and it was not until May 17, 1990 that the final form of Agreement was finalized, which did not include any such expungement provision. Prior to reaching said agreement, Leffler and Union Representative Hartman agreed orally that the Grievant was on his last chance.

Other employes were concerned about the Grievant's safety practices and relayed those concerns to Leffler. Incidents where the Grievant caused injury, nearly caused injury or behaved recklessly include running a truck with the wheels locked, hitting a co-employe on the head when driving posts, working with his legs exposed under a truck blade, pulling the wrong lever and nearly trapping the hands of a co-employe, inattentiveness driving a roller machine on the highway, misdirecting a salt truck in the shop area and pulling out in traffic in front of a semi-truck on one occasion and a "carload of people" on another.

In the past County Highway Department employes have not been disciplined for accidents or lapses in safety, even though the circumstances were similar to the instant dispute. However, Leffler stated that no other case that he was aware of included dishonesty or the level of concern, and complaint by other employes regarding safety concerns, that the instant dispute does.

PERTINENT CONTRACTUAL PROVISIONS:

. . .

ARTICLE 2 - MANAGEMENT RIGHTS

> Except as herein otherwise provided, the management of the work and the direction of the working forces, including the right to hire, promote, demote, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work or for other legitimate reason, is vested exclusively in the Highway Committee and/or the Highway Commissioner.

. . .

ARTICLE 14 - DISCIPLINARY PROCEDURE

> The Employer shall not discharge any employee without just cause, and shall give at least one (1) warning notice of the complaint against such employee to the employee in writing, and a copy of the same to the Union affected, except that no warning notice need be

> given to an employee before his/her discharge if the cause of such discharge is dishonesty, drunkenness or reckless-ness endangering others while on duty, or the carrying of unauthorized passengers. Discharge must be by proper written notice to the employee and the Union affected. Any employee may request an investigation as to the discharge. Should such investigation prove that an injustice has been done an employee, he/she shall be reinstated and compensated at his/her usual rate of pay while he/she has been out of work. Appeal from discharge must be taken within five (5) days by written notice, and a decision must be reached within ten (10) days from the date of discharge. In the event a settle-ment cannot be reached within ten (10) days of the first date of appeal, then such dispute shall be submitted to arbitration as outlined in Article XV of this Agreement.
>
> Disciplines for other than summary offenses shall be progressive, and disciplinary actions taken under this article without a repeat for the same offense will be expunged from the employee's record after a period of three (3) years.

UNION'S POSITION:

The Union basically argues that the County did not have just cause to discipline the Grievant for the incident of May 16, 1990.

In support thereof, the Union first maintains that the Grievant did not act in an unsafe manner on the date in question. In this regard, the Union alleges that the saw was operated and handled in accordance with County Highway Department practice and the accident was the result of slippery conditions.

The Union next maintains that the due process rights of the Grievant were not respected because: one, the County did not conduct a reasonable investigation i.e., did not talk to either the Grievant or the foreman for their version of the events prior to discharge; and two, the County did not file proper charges in the instant case i.e., the Grievant was entitled to a specific set of charges, in writing, upon which to prepare his defense.

The Union also contends that the County did not follow progressive discipline herein. In this regard, the Union claims that the Grievant has never been suspended, and the County's reliance on "past problems" with the Grievant is misplaced. In addition, the Union claims the Grievant was not on his "last chance" as argued by the County.

In rebuttal to the County's arguments, the Union admits that the Grievant tried to deceive the office secretary but claims this minor level of dishonesty does not warrant discharge. Furthermore, the Union claims the real reason for termination was safety concerns, not dishonesty, conduct the Grievant was not guilty of. In addition, the Union maintains that dishonesty as used in Article 14 "is fair warning that theft and like conduct of consequence will not be tolerated. Fabrication or exaggeration in a conversation with the office secretary is not what" was intended to result in automatic discharge. Finally, the Union claims that Grievant's attempt to cover-up an accident was not especially serious because the Grievant, when called upon to file a report, did so, accurately and without complaint.

For a remedy, the Union requests that the Grievant be made whole for all wages and benefits he otherwise would have received had he not been discharged, including medical expenses for himself and dependent daughter not otherwise reimbursable under the applicable group health insurance plan. In addition, the Union asks that the Grievant's personnel file be purged of reference to Exhibit 2, his discharge on May 18, 1990 and the incident of May 16, 1990.

COUNTY'S POSITION:

The County argues just cause existed for the discharge of the Grievant for the following reasons. One, the contract requires only a warning, not a suspension, before discharge. The County claims "the facts here demonstrate that not only a written warning was provided to the Grievant, but he was fully aware of his precarious job status relative to safety concerns." Two, even if a warning had not been provided, the discharge should stand as the contract removes safety and dishonesty from the warning requirement. The County argues in support of this point that Article 14 expressly notes that "no warning notice need be given" when a discharge is caused by conduct which would be "dishonest" or "recklessness endangering others while on duty" among others. The County concludes that it is clear from the record, both dishonesty and dangerous conduct were present in the actions of the Grievant on May 16, 1990.

The County rejects the Union's argument that the Grievant's dishonesty was not serious because the idea for the story (hiding the accident) came from another employe, not the Grievant. In this regard, the County points out that

it was the Grievant who acted upon the idea and conveyed the lie to Leffler's secretary. The County also rejects the Union's argument that the Grievant was not given a reason for his discharge or any opportunity to present his side of the story. The County notes that in their meeting on the day the Grievant was discharged, Leffler told the Grievant the facts of which he had been made aware, and the Grievant never refuted those facts. In addition, the County maintains the Grievant was treated differently than other employes in accident situations because "of the clear history of problems with the Grievant and the prior warnings and concerns expressed to him." Finally, the County contends that the Union made several attempts to distract the Arbitrator from the substance of the Grievant's violation by making arguments unsupported by the record. In this regard, the County claims that the record supports a finding that the County had a concern for safety, and communicated this concern to its employes; that the County made suggestions to the Grievant to improve his working in a safe manner; that the Grievant had a history of unsafe conduct which endangered himself and others; that the Grievant knew he was on his "last chance;" and that the Grievant acted in a careless and unsafe manner on the date in question.

Based on all of the above, the County requests that the grievance be denied "in all respects," and the matter dismissed.

DISCUSSION:

The parties stipulated that there are no procedural issues and that the instant dispute is properly before the Arbitrator for a decision on its merits.

At issue is whether the County acted properly, and with cause, when it discharged the Grievant for his conduct on May 16, 1990.

The Union raises a number of due process, and fairness issues, in support of its position that the County did not have just cause to terminate the Grievant on May 18, 1990. More specifically, the Union argues that the County did not conduct a reasonable investigation in the matter; failed to get the Grievant's version of the events on May 16, 1990; did not file specific charges upon which the Grievant could prepare a defense and ignored progressive discipline in discharging the Grievant. Ordinarily, the Arbitrator would agree that these are among the criteria used by arbitrators in evaluating whether or not just cause for discipline exists. However, any examination of the "just cause" standard herein for discharge must be undertaken within the context of Article 14. Just cause is only a portion of said Article. Said section requires just cause for discharge but also recognizes two kinds of offenses: those justifying immediate discharge and those not involving immediate discharge. The section requires prior to discharge that the County "give at least one (1) warning notice of the complaint against such employee to the employee in writing, and a copy of the same to the Union affected." However, "no warning notice need to be given to an employee before his/her discharge if the cause of such discharge is dishonesty, drunkenness or recklessness endangering others while on duty, or the carrying of unauthorized passengers." In other words, Article 14 provides for immediate discharge without prior notice in the aforesaid specified instances.

The record is undisputed that the Grievant tried to deceive the office secretary regarding the circumstances of his injury. The Grievant admitted same at hearing:

> Q You told--you told her that what you had done was cut yourself on a barb wire fence, correct?
>
> A Yes, I did.
>
> Q And at the time you did that, you knew that was not true, correct?
>
> A Yes, I did. 2/

This, in the opinion of the Arbitrator, is dishonesty; and according to the aforesaid contract language the Grievant is subject to immediate discharge without prior notice. 3/

The Union argues, however, that the Grievant's dishonesty was not serious and did not warrant discharge. The Arbitrator does not agree. The dishonesty of the Grievant is particularly egregious in these circumstances because it related to a topic - safety - which was of serious and legitimate concern to the County.

2/ Tr. 174.

3/ Dishonesty is defined as "Want of integrity; improbity. A dishonest act or statement." The American Heritage Dictionary of the English Language, New College Edition, (10th Ed. 1981) p. 378.

The Arbitrator also point out that the contract makes no such distinctions regarding the seriousness of the dishonesty as argued by the Union. Therefore, the Arbitrator rejects this contention of the Union.

The Union next claims that when called upon to file an official report (as compared to talking to the office secretary) the Grievant did so, accurately, and without complaint. The record, however, does not support a finding regarding same. When asked to file a report on May 16th, the Grievant merely shook his head as if to say no, and walked away. The next day, the office secretary told the Grievant to complete an accident report, and it was only after she warned the Grievant "make sure you tell the truth because we need the truth because we know what the truth is" that the Grievant told the County he had injured himself with a saw.

The Union maintains that the real issue in the County's mind when it discharged the Grievant was safety, not dishonesty. The Arbitrator largely agrees. However, the County gave the Grievant the following reason for his discharge in its letter of May 18, 1990: "in consideration of past problems and the incident which occurred on 05/16/90." This explanation is broad enough to include the Grievant's dishonesty. And in fact, Leffler considered this factor in making his decision to terminate the Grievant. 4/

Assuming arguendo, however, that the bottom line in the decision to terminate the Grievant was "because I can't take a chance on someone else or himself getting further injured or seriously injured," 5/ the Union's case still must fail. The Arbitrator is persuaded that the Grievant's conduct on the date in question was reckless, and not only endangered himself but provided a risk to others as well. 6/ This type of conduct according to Article 14 is grounds for immediate discharge. 7/

Finally, the Union argues that "other reasonable alternatives" should have been exhausted prior to discharge. The Union maintains that the Grievant does not have a work record documented with "past problems" as alleged by the County, and that the Grievant should have been given better training in "safety" procedures. It is true that the County did not have a program to train its employes in safety techniques to match its concern over "safety" matters. However, contrary to the Union's assertions, the Grievant has a work record replete with "past problems," and concerns over safety problems. The County communicated these concerns to the Grievant, and he had been told to be more careful about his work habits. He was also warned by the County through the Union that safety lapses would no longer be tolerated. 8/ In addition, he received a verbal warning in writing on November 2, 1989 regarding safety concerns which stated that any more incidents of this nature could result in further disciplinary action. Based on all of the above, the Arbitrator concludes that there are simply no mitigating circumstances in the instant dispute.

Based on all of the above and foregoing, the record as a whole and the arguments of the parties, the Arbitrator finds that the answer to the issue as framed by the parties is NO, the County did not violate Article 14 of the collective bargaining agreement when it discharged the Grievant on May 18, 1990. In light of all of the foregoing, it is my

AWARD

That the grievance of Daniel L. Throm is hereby denied and the matter is dismissed.

Dated at Madison, Wisconsin this 27th day of February, 1991.

4/ Tr. 51, 57-58.

5/ Tr. 82.

6/ Tr. 60, 129-130.

7/ In arriving at this conclusion, the Arbitrator credits the testimony of Richard Leffler and Albert Bock regarding the events of May 16, 1990. In addition, the record as a whole supports a finding that the Grievant acted in on an unsafe manner on the date in question, that he repeatedly acted in an unsafe manner; and that his actions posed a risk to others. The Grievant's blanket denials of any recognition of concerns regarding safety on the part of the County; his dishonest conduct on the date of the accident; and his lack of persuasiveness at hearing lead the Arbitrator to conclude that he lacks credibility as a witness. Hence, the Arbitrator credits the County's version of the events leading to the discharge.

8/ The Grievant's attempt to cover-up the accident on May 16, 1990 showed he knew he was on his last chance.

By _____
Dennis P. McGilligan, Arbitrator