BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
AFSCME LOCAL 326	
and	Case 180 No. 45060 MA-6492
MARATHON COUNTY (HIGHWAY DEPARTMENT)	

Appearances:
Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO for the Union.
Ruder, Ware & Michler, Attorneys at Law, by Mr. Jeffrey T. Jones, for the County.

ARBITRATION AWARD

AFSCME Local 326, hereafter the Union, and Marathon 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 appoint an arbitrator to hear and decide a grievance over the terms and application of the agreement's provisions relating to discipline. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Wausau, Wisconsin on March 29, 1991; it was not stenographically recorded. The Union and County filed briefs on April 5 and April 16, respectively; the County submitted a reply brief on April 24; on May 22, the Union waived its right to do the same.

ISSUE:

At hearing, the parties stipulated to the following issue:

> Did the County have just cause to discipline the grievant, Thomas LeDuc, for making an unauthorized stop at his home over the lunch hour? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

RELEVANT CONTRACT LANGUAGE

Article 2, Management Rights, provide in part:

> Public policy and the law dictate clearly the Department's primary responsibility to the community as being that of managing the affairs efficiently and in the best interests of our clients, our employee, and the community. The employer's rights include, but are not limited to, the following, but such rights must be exercised consistent with the provisions of this contract.
>
> 1.To utilize personnel, methods and means in the most appropriate and efficient manner possible.
>
> 2.To manage and direct the employees of the department.
>
> . . .
>
> 4.To establish reasonable work rules and rules of conduct.
> 5.To suspend, demote, discharge, or take other appropriate disciplinary action against employees for just cause.
>
> . . .

Article 3, Grievance Procedure, provides in part:

> 6.Steps in Procedure:
>
> . . .
>
> F.Decision of the Arbitrator: The arbitrator shall not modify, add to or delete from the express terms of the agreement.

Article 5, Hours and Overtime, provides in part:

1. Normal Hours: The normal hours of work for employees of the Highway Department shall be forty (40) hours a week as follows:

. . .

C. Other Employees: All employees not mentioned above shall work the regular day shift, Monday through Friday, 7:00 a.m. to 3:30 p.m., with a thirty (30) minute duty free lunch period.

. . .

BACKGROUND:

Thomas LeDuc, the grievant, is a four-year veteran of the Marathon County Highway Department. An Operator 3, LeDuc's duties include the maintenance and cleaning of the County wayside areas, which job sites he travels among and between in a well-marked departmental truck. This grievance concerns a written reprimand he received for taking a County vehicle home over his lunch period, on September 25, 1990.

Although they disagree on their implications, the parties are in essential agreement as to most of the material facts on the day in question.

Shortly before the noon lunch break, as LeDuc was passing through the Wausau area, on his way from the Mylan wayside to the one at Hatley, he felt it necessary to stop at his home to take some non-prescription cold medicine and go to the bathroom. Aware of the County policy against personal use of official vehicles without permission, LeDuc attempted to obtain such permission by contacting a supervisor over his two-way radio, but found that his radio, which had been receiving, would not transmit. At this time, LeDuc was on Sherman Street, west of 17th Avenue and heading east; the highway shop is on 17th Avenue, a block north of Sherman Street; LeDuc's home is on Sherman Street, at about 7th Avenue, ten blocks east of 17th Avenue. Rather than go to the highway shop where he could either (a), find a supervisor to authorize his use of the county vehicle, or, (b), transfer to his personal car which was parked there, LeDuc proceeded past the turn-off for the Highway shop, and drove to his home, where he arrived at a few minutes before noon. Parking the county vehicle on the street in front of his house, LeDuc then tried to call in, but found that the office phone lines were busy. At about this time, Highway Operations Superintendent Dennis Wanke and another departmental supervisor, having observed LeDuc's truck in front of his house, drove to the shop to obtain a camera to photograph the scene, which they then did before parking their car a few blocks away. LeDuc, having taken care of his bathroom business, was then notified by an observant neighbor of the surveillance by his supervisors, at which time (approximately 12:21 p.m.) he drove to the shop, where he was confronted by Wanke and given a written reprimand for "taking County truck home at lunch time without permission."

LeDuc grieved this discipline, which grievance was processed through the appropriate steps pursuant to the collective bargaining agreement. In his October 12, 1990, appeal, LeDuc contended he had suffered "unfair application of management rights in regards to circumstances involved." In denying the grievance on November 8, 1990, Personnel Director Brad Karger stated, in part, as follows:

. . .

At issue is a letter of reprimand issued to Tom LeDuc for taking a County vehicle home for lunch without permission on September 25, 1990. The facts as they were presented at the grievance meeting are:

1. Tom LeDuc attempted to ask for permission to stop at home by radio but receive(d) no response. He wanted to go home in order to take some cold medicine.

2. Tom LeDuc deviated from his work route about a mile, drove by the Highway Shop and went home. (emphasis in original).

3. Tom LeDuc tried to call the Highway Office from his home but received no answer.

4. At 12:20 p.m. Mr. LeDuc left his home after a neighbor provided him with a tip that his actions were being monitored by someone in a County vehicle.

During the meeting Dennis Wanke indicated that he had warned Tom LeDuc on three (3) previous occasions with regard to the need to obtain advance permission before going home for lunch. The last of these three warnings was

> documented as an oral reprimand for an incident occurring on July 25, 1990. The Union's argument that there is no formal rule with regard to taking a County vehicle home for lunch may be true, but there is no question that Mr. LeDuc knew that he was required to receive advance permission. (emphasis added).
>
> In considering this matter, it seems clear that Mr. LeDuc realized that he was required to obtain permission to go home for lunch; that he had an opportunity to obtain such permission by stopping at the office; and that this was not the first time that this type of problem had occurred. Thus, Grievance No. 1-90 (LeDuc) is denied.

The July 25 incident referenced above involved another instance of LeDuc stopping at home over lunch to pick up some non-prescription cold medicine. While the parties agree on that, they disagree on other material elements of the incident.

According to the County, Wanke radioed LeDuc to report to his office before the end of the shift, at which time Wanke advised LeDuc to never take a county vehicle home again without permission, and that if he followed this directive, the matter would go no further, but that if LeDuc committed further violations, Wanke would "write him up." According to LeDuc, Wanke did not call him in, but instead approached him in the parking area, where he told LeDuc "don't ever do that without permission again," but said nothing about being written up if there were a reoccurrence. To Wanke, the exchange represented an oral reprimand, which he memorialized in a Record of Corrective Action which he thereupon placed in his desk drawer without providing a copy to LeDuc. LeDuc testified that this exchange did not represent discipline of any sort, and that, indeed, had he known that Wanke was considering this an oral reprimand, he "would have taken it more seriously."

Earlier that summer, in late May or early June, Wanke had observed a county highway truck parked outside a private residence at approximately 11:40 a.m. When LeDuc emerged a few minutes later, Wanke forcefully expressed strong disapproval of LeDuc's actions. Neither formal discipline nor grievance was filed in regard to this action. LeDuc testified that he thought his violation was for being out of his normal work route (the trip to the residence, that of his father, constituted a deviation of about four miles), not for unauthorized use of a county vehicle.

In approximately that same seasonal period, a tipster alleged to county officials that LeDuc had driven a county vehicle to his home, where he cut the grass with a county lawnmower. As the county could not verify this allegation, no discipline was lodged. However, the county, especially Wanke and another supervisor, decided to conduct occasional surveillance of LeDuc's residence to see if he were committing further violations.

Sometime between July 25 and September 25, LeDuc did request, and Wanke did grant, permission to take a county vehicle home to pick up some medicine.

POSITIONS OF THE PARTIES

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

> There can be little question that the penalty of a written warning for this offense was too severe. Neither the facts of this particular incident, nor the grievant's complete file, justify this level of discipline.
>
> The grievant stopped at his home during his unpaid lunch hour in order to obtain cold medicine and to use his home's bathroom facilities, a plan prompted by his desire to avoid discomforting fellow employes who would at that time be eating their lunch in a room adjacent to the Highway Department's rest room. He tried to obtain permission before the stopover, but found his radio was not transmitting; he tried phoning from his home, but the lines were busy.
>
> For some unexplained reason, departmental supervisors had followed the grievant's truck to his home, where they took photographs of the truck parked in his driveway. Although the grievant had never formally been disciplined for this offense, he had once been approached by his supervisor and once counselled for related incidents.
>
> Normally, discipline for minor infractions begins with an oral reprimand and progresses to a written reprimand; that is customary throughout industrial relations in

general, and at this employer in particular. Further, it is expected that employes who are being disciplined should be made aware of such fact, and that a record of same should be preserved. Marathon County disciplinary forms make explicit these understandings.

An incident arose on September 25, 1990, but that incident was not considered disciplinary by the parties. Nothing on the form indicates it constituted an oral warning; nothing indicates it was made a part of the employe's personnel file; nowhere is there the requisite signatures from the grievant and the Highway Commission. Clearly, this event did not constitute an oral warning or any other form of discipline.

As such, the County has made a significant procedural error; progressively harsher penalties (e.g., written warning) are inappropriate when past incidents of misconduct have not been identified as such to the employe and made a matter of record.

Accordingly, if the arbitrator finds there is merit to discipline, such discipline should be reduced to an oral reprimand.

The basis, and motive, for this discipline is also called into serious question by the supervisor's admission that he has always granted employe requests in cases such as this, and that he would surely have done so here.

It is indisputable that the grievant made a good faith effort to obtain the necessary permission before the event; it is indisputable that the reason the grievant sought to stop at his home was reasonable and acceptable; it is indisputable that the grievant was on a duty-free lunch break, and that the County suffered no harm by his action. The supervisor admitted he surely would have granted permission. Based on these facts, the grievance should be sustained.

If there indeed was a work rule which was violated, said rule has been inconsistently applied. Work Rule #12 allows employes to leave their place of duty when their task has been completed. The grievant had completed his task as the Hatley wayside, and was thus free to leave the work site. It is common for employes to leave their work site without authorization during lunch; indeed, it is unreasonable to restrict the rights of employes to travel during an unpaid, duty-free lunch period. The grievant was on his own time and within a block or two of the route between the two waysides at which he was working. As the express terms of the work rule were not violated, there was no just cause for discipline.

Finally, there is sufficient evidence of animus by the county towards the grievant to suspect that the grievant was disciplined as a retaliation for filing a previous grievance, one of the very few filed, and one which was sustained. Such hostility is demonstrated by the fact that the County's supervisors were monitoring the grievant with a camera, and by the County Personnel Director's allegation that the grievant had sabotaged his truck's radio in order to provide an alibi for not having called in. A reasonable case could be made that the discipline was retaliatory and pretextual.

For all the foregoing, the grievance should be sustained and the grievant made whole.

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

The County's issuance of a written reprimand to the grievant for taking a county vehicle home without permission was for just cause.

By arbitral and judicial case law, just cause simply means that an employer, acting in good faith, has a fair reason and supporting evidence for disciplining an employe. The evidence in this matter meets said standard.

The evidence unequivocally establishes that the grievant violated a known work rule, which he was aware prohibited the taking of a County vehicle home without permission. Indeed, the grievant himself was caught violating this work rule previously, once in May/June, 1990, and again on July 25, 1990, for which incidents he was first counselled and then admonished. There is absolutely no question but that the grievant was fully aware of the rule prohibiting taking a vehicle home without permission; his actions on September 25 constituted a flagrant violation of the rule.

The arbitrator should defer to the County's judgment as to the proper penalty to be imposed for the grievant's misconduct. It is an established arbitral principle that arbitrators should not substitute their discretion for that vested with the employer to determine the proper penalty for misconduct. (Citations omitted) As the County's issuance of a written reprimand was not unreasonable, arbitrary or capricious, it should thus be upheld.

The grievant's testimony and his "excuses" for violating the work rule are simply not credible, and, as such, should be given little weight by the arbitrator. Said excuses are full of holes, do not hold water, lack substance, and are reflective of self-interest rather than credibility.

The Union's contention that the grievant could do what and how he wished on his duty-free lunch period is essentially a challenge to the reasonableness of the rule which prohibits employes from taking a County vehicle home without permission. Under the collective bargaining agreement, the County has authority to enact reasonable work rules; this rule -- which protects the County's financial and other interests -- clearly is reasonable.

The Union also contends that, pursuant to proper progressive discipline, the September 25 discipline should have been an oral reprimand; this claim is based on the belief that the May/June and July 25 incidents cannot be considered since the grievant was not formally advised he was being disciplined. This claim, too, is without merit, for testimony showed that within the Highway Department there are variations from the customary progression of discipline. Moreover, because the grievant was personally made well aware that this conduct was prohibited -- indeed, he had been twice warned about this behavior in just four months -- this discipline was appropriate.

The Union's final allegation, that the County was retaliating against the grievant for having previously filed several other grievances, is totally without any credible support in the record.

In summary, the County had just cause to issue the grievant a written reprimand for taking a County vehicle home without permission; the grievant was aware his actions were in violation of a legitimate work rule, and his excuses are without substance or merit. Accordingly, the grievance should be dismissed in its entirety.

In its reply brief, the County further posits as follows:

The Union has misconstrued the record evidence, erroneously stating that the supervisors were following the grievant, and doing so with a camera. Neither allegation is true. Instead, the supervisors, being in the area, simply decided to drive past the grievant's house, a reasonable and responsible action in light of the grievant's prior violations of the work rule on taking County vehicles home. Then, once they saw another violation, they went to the highway shop to get a camera to record the scene.

The Union's argument as to progressive discipline is totally without merit, and makes much ado of the supervisor's failure to specifically advise the grievant that the July 25, 1990 incident constituted an oral reprimand. Under the Union theory, neither party considered this incident a disciplinary action; but the facts --

especially the supervisor's advice "never to do that again," and the warning that if he did, he would "write him up," -- show the Union's theory to be without foundation. The supervisor completed a "Record of Corrective Action," but gave the grievant a second chance if the grievant would follow the work rule, which he did not.

Further, the Union concedes that the grievant was counselled over the May/June, 1990 incident. Whether or not the July 25 incident constituted a formal oral reprimand, the fact that there were three violations of the same work rule within a four month period certainly establishes that the written reprimand for the September 25 incident was consistent with progressive discipline.

The Union's argument that the issue is moot because Wanke would have granted permission for the grievant to stop home anyway is also without merit. First, such permission is not automatic, and may be denied if sought for unjustified reasons. Further, the point of the rule is to protect the County's interests, making it irrelevant whether Wanke would have granted after-the-fact permission.

The Union's argument that the grievant did not violate Rule 12, because he could have left his work site when his task was completed, is specious. The literal language of Rule 12 is irrelevant; the real issue is that the rule, as the grievant fully understood, prohibits employes from taking County vehicles home without first obtaining permission to do so.

Notwithstanding the Union argument, employes are free to do as they wish during their unpaid, duty-free lunch break; however, they are not free to do as they wish with County property (such as a County vehicle), unless they have first received the proper permission. This is in accordance with the collective bargaining agreement and arbitral law, which grant to County the right to manage and control its property.

The Union allegation that this discipline was imposed in retaliation against the grievant for filing a previous grievance is without support in the record. Further, such contentions are more properly addressed in a different forum.

For all the foregoing, the grievance should be dismissed in its entirety.

The Union waived its right to file a reply brief.

DISCUSSION

Thomas LeDuc was issued a written reprimand for taking a County vehicle home over his lunch break without authorization. The question before me is whether this discipline was issued with just cause, as required by the contract.

The contours and concepts of just cause are fairly well-understood. They include: foreknowledge to the employe of the adverse consequences of certain acts; a reasonable rationale to support a policy or procedure the employer seeks to enforce; a fair and objective investigation; application of rules and penalties which is neither arbitrary nor capricious.

Here, LeDuc was well aware that using a County vehicle for an unauthorized purpose would subject him to discipline. That message had been given to the work force as a collective body, and to LeDuc specifically. There is no doubt that LeDuc knew that the employer did not permit the unauthorized use of official vehicles for such personal purposes as going home over the lunch break.

Was such a policy reasonable? I believe it was. The key, I believe, is that the policy was not a flat and immutable ban on such activity, but rather a requirement that permission be sought and obtained before such activity be conducted. Indeed, LeDuc himself had sought and received permission for a similar personal errand sometime prior to September 25.

As accurately stated by the employer's witness, members of the public take a great interest in the way public employes use public resources; the sight of a County vehicle parked in a private driveway is certain to generate curiosity, perhaps even accusations, among certain segments of the citizenry.

By itself, however, this reaction is not what makes the policy reasonable; what makes the policy reasonable is the County's legitimate need to be able to respond when the predictable inquiries and/or accusations come in. That is, the public employer may not adopt personnel policies solely to appease the constituency, but it may adopt policies which require prior permission for certain acts. If a constituent wants to know why a public employe is using a public vehicle for personal errands, the public employer has a legitimate interest in being able to give a better answer than an expression of ignorance as to the entire situation.

Moreover, from a legalistic perspective -- especially concerning insurance liability and worker's compensation -- I believe both the employer and employe have an interest in establishing that the personal use of an official vehicle had prior permission. I am not an expert in the law of liability or worker's compensation, and the record includes no formal, expert testimony in this regard; however, I find convincing the employer's testimony about the serious legal and financial consequences which would arise should an employe have an accident while conducting an unauthorized personal errand in a county vehicle.

The investigation itself was objective. The grievant may not find it fair that his supervisors made a practice of swinging by his home to check up on him, but I find their actions not so egregious as to amount to unacceptable surveillance. Further, given the grievant's prior record of unauthorized use of a vehicle and deviation from proper route, it seems the supervisor's suspicions had some substance.

Was the discipline reasonable -- not only in abstract theory, but in the actual practice of these parties -- under these circumstances?

The Union has put great weight on the fact that the superintendent did not formally notify the grievant that the incident of July 25 was being held by the employer to be an oral reprimand. Because established principles of progressive discipline require an oral reprimand as a precedent for written reprimand, the Union contends, the employer is prevented from doing what it has here sought to do.

Admittedly, progressive discipline, which does appear to be the practice of the parties, involves an incremental approach, in which the discipline grows more severe with each incident; generally, dismissal happens only after suspension, suspension only after written warning/reprimand, written warning/reprimand after oral. This practice, of course, does not apply in situations where the severity of the infraction justifies immediate discipline of a more severe nature without the intervening steps.

There is unavoidable conflict in the testimony as to the incident of July 25. Wanke says he called LeDuc into his office, where he reprimanded him for unauthorized personal use of a county vehicle; LeDuc says the meeting took place in the parking area. Wanke says he told LeDuc to never commit the infraction again, that if there were further infractions, Wanke would "write him up," and that if there weren't, the July 25 incident would not go into LeDuc's personnel file. LeDuc says Wanke only told him not to do it again, but said nothing about the potential for written reprimands or memorializing this incident in the files. Wanke says he considered the meeting to represent an oral reprimand; LeDuc says he had no such understanding.

By Wanke's own admission, the Record of Corrective Action was neither provided to LeDuc, nor countersigned by the Highway Commissioner, but was instead placed, along with a number of other similar documents, back in Wanke's desk drawer. Wanke's apparent practice of filing partially-completed oral reprimands in his desk rather than in an official personnel file is something I am not comfortable with. If, as the County postulates, this practice is designed to give an employe a second chance without formally tarnishing her or his official record, the policy is acceptable; if, as the Union fears, it is a subterfuge which can ensnare unsuspecting employes in written reprimands or suspensions without adequate forewarning, the policy is not acceptable.

Here, I believe the County's analysis is more accurate than that of the Union. LeDuc was certainly aware of the policy on unauthorized use of an official vehicle. By LeDuc's own admission, he had already been given a "hard language" counselling by an "upset" Wanke over the May/June incident. LeDuc's defense that if Wanke had formally designated the July 25 encounter an oral reprimand, "I would have taken it more seriously" is not much of a defense.

One of the many oddities of this case is that, had the grievant been able to contact a supervisor, permission to drive his county vehicle home would have been given. LeDuc says he tried the radio, but it would not transmit; he tried the phone from his house, and the lines were busy. The reason he didn't stop at the garage as he passed a block away -- either to talk to a supervisor in person, or transfer to his personal car which was parked there -- LeDuc says, is because of the pressing need for prompt use of a toilet.

Certainly, exigent circumstances will excuse a number of acts which might otherwise justify discipline. I do not find such exigencies here. LeDuc's job

includes cleaning and maintaining washrooms; he had just left the wayside at Mylan, where there was a bathroom available. Stopping at the garage -- either to obtain permission or to transfer to his own car -- would have added no more than a minute or two to his trip. The Union did not present such evidence as to convince me that such a delay would have caused undue hardship to the grievant. LeDuc's sensitivity to the olfactory concerns of his comrades during their lunch-break is commendable, but it does not entirely excuse his actions.

The range of discipline goes from informal counselling to dismissal; a reprimand, albeit a written one to be included in the grievant's personnel file, can safely be termed a modest punishment, especially since its impact on possible future discipline will no doubt diminish as time passes without further like incidents.

In its brief, the Union contends that the County was "apparently relying" on work rule 12, which sets conditions under which an employe can leave a job site. Noting that LeDuc was on his unpaid, duty-free lunch period, the Union asserts the rule 12 provisions are (a), unreasonable as pertains to the lunch break, and (b), not violated in this instance.

Without commenting on Rule 12's basic validity or lack thereof, I agree that LeDuc did not violate its terms. However, LeDuc was not disciplined for leaving his worksite without authorization; he was disciplined for travelling on a personal errand in a county vehicle without authorization. LeDuc was not disciplined for his ends; he was disciplined for his means.

The Union also alleges that "a reasonable case could be made" that the discipline was a pretextual retaliation against LeDuc for his having engaged in protected, concerted activity. Whether or not such a case could be made, it has not been made on the record evidence before me. Moreover, as the County notes, the forum of a hearing on a prohibited practice complaint is where such an allegation "could be more properly addressed."

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

AWARD

That this grievance is denied and dismissed.

Dated at Madison, Wisconsin this 14th day of June, 1991.

By _____
Stuart Levitan, Arbitrator

SL/ms
F6101F.25