BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between KENOSHA COUNTY HIGHWAY EMPLOYEES, LOCAL 70, AFSCME, AFL-CIO and KENOSHA COUNTY	Donald Poikonen grievance dated 8-15-91 Case 120 No. 46314 MA-6946

Appearances:

Ms. Judith Weseman, Assistant Corporation Counsel, Courthouse, Kenosha, WI 53140-3747, appearing on behalf of the County.

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFl-CIO, PO Box 624, Racine, WI 53401-0624, appearing on behalf of the Union.

ARBITRATION AWARD

At the joint request of the parties, the undersigned was designated by the Wisconsin Employment Relations Commission as arbitrator to hear and decide a dispute concerning the above-noted grievance under the grievance arbitration procedures contained in the parties' 1989-91 Agreement (herein Agreement).

The parties presented evidence and arguments to the Arbitrator at a hearing at Kenosha, Wisconsin on December 8, 1991. No transcript was made of the proceedings, but the parties agreed that the Arbitrator could maintain an audio tape recording of the hearing exclusively for the Arbitrator's use in award preparation. The parties summed up at the conclusion of their evidentiary presentations, so the case was fully submitted as of December 8, 1991.

ISSUES

At the hearing, the parties agreed that the Arbitrator was authorized to decide the following issues in this matter:

1. Did Kenosha County have just cause to suspend the Grievant for three days, August 21, 22, and 23, 1991?

2. If not, what is the appropriate remedy?

FACTUAL BACKGROUND

The Grievant is a veteran Truck Driver with 26 years' seniority.

On August 9, 1991, Highway Commissioner Frederick Patri notified Grievant that he was being suspended for a total of three days for conduct occurring on July 19. A copy of the three-page suspension notice is attached to and made a part of this Award.

At the arbitration hearing, the Union took issue with some of the facts as found in the notice of suspension, and the arbitration hearing testimony of various witnesses differed materially with regard to numerous points. No effort has been made in this Award to expressly identify and resolve every such difference. Rather, the Arbitrator has done his best to decide what most likely happened, utilizing traditional standards for resolving disputes of fact and credibility issues.

The Arbitrator finds that on July 16, 1991, at about 3:15 PM, several Highway Department employes were gathered near the wash basin of the Department's East Shop talking about management's announced selection of an individual to a road supervisory position. With them was Frank Caravetta, the Highway Shops Foreman, and the only supervisor remaining at the facility at that time. Some of the employes were expressing the opinion that a more senior bargaining unit applicant for the supervisory position should have been the one promoted. One of the employes expressed the opinion that the individual selected got his supervisory position "by kissing ass." (Whether the term was "kissing ass" or "sucking ass" is disputed but not important.)

Grievant, who had been at the wash basin a few feet away, walked toward Caravetta and said to him, within the earshot of the others, "You got your job by kissing ass too, Frank," or words of that type and to that effect. Caravetta either silently shook his head in the negative or briefly responded, "I did not get my job by kissing ass." In any event, Grievant continued walking past, and there was no further conversation between them at the workplace that day. Grievant punched out at the usual quitting time of 3:30 PM and drove to a nearby tavern where he met two other Department employes for some beers.

Caravetta then spoke with Union secretary Gerald Rauen. It is undisputed that Caravetta told Rauen to give Grievant a message and that Rauen agreed to do so. According to Caravetta, the message was that Caravetta had a problem with what Grievant had said to him; that Grievant should "lay off" such remarks; and that Caravetta would be "taking him up front" about the incident. According to Rauen, the message was that if Grievant ever said anything like that again Caravetta would "take him up front" about it. In any event, Rauen punched out and drove directly to the nearby tavern where he knew Grievant would be at that time.

At the tavern, Rauen asked Grievant what had happened between Grievant and Caravetta. Grievant asked why Rauen asked. Rauen said something to the effect, "because Frank says he wants to take you out. I don't know whether he means take you out to a fish fry or what." Rauen testified that "take you out" is what he took Caravetta's "take you up front" message to mean, but Rauen testified that he himself was not sure what "take you out" meant.

Upon receiving that message, Grievant immediately telephoned Caravetta at home at about 4:00 PM. Grievant, in what Caravetta characterized as a loud voice and an "upset" tone: identified himself; told Caravetta that Rauen had given him a message from Caravetta that Caravetta wanted to take him out; and asked whether Caravetta was talking about taking Grievant out for fish or for a fight. Caravetta responded that he was not referring to taking Grievant out for a fight but rather to taking Grievant up front for the Highway Commissioner's consideration of possible disciplinary action regarding Grievant's remark. Grievant asked Caravetta why he would be taking him up front and Caravetta replied that Grievant had called him a name. Grievant replied that he had not called Caravetta a name. Caravetta asserted that he had. Grievant replied that he had "just made a statement in common everyday talk that 'you probably kissed ass to get your job.'" According to Caravetta, Grievant also asserted that it would take a bigger man than Caravetta to take Grievant out. Caravetta repeated that he had no intention of taking Grievant out for a fight and that the matter would be taken up with the Highway Commissioner the following Monday. Then, finding the conversation becoming repetitive, Caravetta hung up on Grievant.

Grievant called Caravetta again about a half an hour later, but as soon as Grievant identified himself, Caravetta hung up on him.

The following Monday, July 22, 1991 Caravetta reported his above-noted interactions with Grievant to Highway Commissioner Patri. The Commissioner conferred with Grievant and then with Rauen (both in the presence of Union President George Serpe). On July 29 and July 30, Patri caused the one-page pre-disciplinary interview notices (attached to and made a part of this Award) to be prepared by his secretary. Patri initialed each, and each was sent to the Union and Grievant as well as the listed "cc" recipients. After issuing the first of those notices, Patri spoke the County's "Due Cause Officer," Personnel Director Brooke Koons. Patri then issued the July 30 notice with a more realistic interview date and a five-day rather than a one-day suspension listed as the disciplinary action being considered. Patri told Union president Serpe at that time that the July 29 notice had been issued by clerical error and that it had been his intention to finalize the notice only after Koons had reviewed his initial draft and had conferred with him about it.

The pre-disciplinary interview was conducted on August 9, after which the attached suspension notice was issued. The instant grievance was then initiated, processed, and submitted to arbitration as noted above.

POSITION OF THE COUNTY

The subject suspension met each of the recognized seven standards for just cause.

Grievant was on fair notice that conduct of the sort at issue herein could subject an employe to disciplinary action. The County published and Grievant received a copy of the work rules Patri cites in the pre-disciplinary interview notice. Patri told all Department employes in his introductory meeting with them in April of 1991 that profane and abusive language that had previously been allowed in the Department would no longer be tolerated because the Department needed to adjust to the changing composition and expectations of the workforce which now included both minorities and women. Patri also had occasion in April to tell Grievant personally that profane references about a supervisor in that supervisor's presence was not acceptable conduct in the Department, even though it is acknowledged that the parties agreed that no discipline was being imposed in that instance.

As Patri testified, the Rules cited in this case relate to legitimate operational concerns of the County regarding respect for others and maintaining an effective hierarchy of authority.

Patri personally conducted an investigation to determine what had happened, speaking with all of the individuals involved and then holding a pre-disciplinary interview after giving the usual notice to the Union and Grievant concerning same. While two such notices were issued, the first was sent to Grievant and the Union by clerical mistake since Patri had not had reviewed it with Personnel Director Brooke Koons before it was mistakenly sent out.

The investigation was fairly and objectively done. It revealed substantial evidence to the effect that Grievant had made a profane, abusive, insubordinate and disrespectful remark to Caravetta during and after work hours and had engaged in after hours conduct that adversely affected Grievant's relationship with Caravetta by twice calling Caravetta at home, thereby violating the rules cited in the pre-disciplinary interview notice.

The Commissioner has applied the work rules involved evenhandedly. There is no showing that any other incident involving a violation of any of the three rules involved has been called to Patri's attention and condoned since he started with the County in March of 1991.

And finally, the suspension imposed was proportionate to the Grievant's offenses when consideration is given to Grievant's work record. Patri has reasonably viewed Grievant's misconduct as very serious matters, especially because it followed Patri's communication with Grievant on that very subject in April. In addition, the Department's changing workforce and workplace environment mandate a change from shop talk to more civil interactions among the employes. The fact that Caravetta has not spoken to Grievant since July 19 also underscores the fact that Grievant's conduct adversely affected his relationship with Caravetta. While Caravetta

does not routinely supervise Grievant, they do have occasions for interactions about equipment and when Caravetta substitutes for Grievant's immediate supervisor.

In response to Union arguments, the County notes that Patri instructed his supervisors, Caravetta included, to avoid shop floor arguments or confrontations with employes and to report to Patri any dispute or incident between employes or between an employe and a supervisor, so that Patri could, if appropriate, gather all involved to calmly sort out the problem. Caravetta was abiding by those instructions when he chose to avoid confronting Grievant on the shop floor. Caravetta was also using good judgment when he chose not to confront Grievant even privately off the shop floor because Caravetta felt angry and shocked by Grievant's profane, abusive, insubordinate and disrespectful remark.

The County further responds that what Caravetta may have thought would be the appropriate management response to Grievant's remark is immaterial. It is Patri and not Caravetta who is responsible for deciding whether to convene a pre-disciplinary interview and whether to impose discipline. Patri's instructions to his supervisors required Caravetta to report the incident to Patri for Patri to determine what if anything would be done about it. Caravetta spoke to Rauen only after finding that no other member of supervision and no higher ranking officer of the Union was on the premises. His doing so was consistent with Patri's expressed commitment to keep the Union informed and to work closely with the Union to resolve problems.

It was Grievant's workplace misconduct coupled with Rauen's decision to give Grievant the message outside of work hours and with Rauen's garbling of the message to Grievant that set the stage for Grievant's calls to Caravetta's home. Rauen and Grievant, respectively, could just as well have waited until the following Monday to pass on Caravetta's message and to obtain any clarification Grievant needed about it. While Rule 18 might permit a friendly discussion of work-related matters after hours, as Patri testified, it surely forbids employes--except in an emergency which was not the case here--from contacting a supervisor at home to discuss a personnel matter.

Accordingly, the grievance should be denied in all respects.

POSITION OF THE UNION

The facts of this case do not justify discipline of any kind.

Grievant's statement in the wash basin area was shop talk common to the County's Highway Department. It was merely a follow up to other previous comments, all made in jest without any objection from Caravetta. No women or minority group members were present, so the situation was outside the scope of the special concerns about language use that Patri referred to in his introductory remarks to the Department's personnel in April. The discussion had in April between Patri, Grievant and others resulted in an agreement that no discipline of any kind was being imposed; the County cannot therefore treat that incident as having been even so much as an oral warning.

The phone calls resulted directly from Caravetta's inappropriate decision to communicate a message to Grievant through a third party. If he had a message for Grievant, Caravetta should have called Grievant aside off the shop floor and communicated it to him directly. Instead, he told Rauen to give Grievant a message; the message was garbled; and Grievant called Caravetta in an attempt to determine precisely what Caravetta's message had been. Grievant did not threaten Caravetta during that phone conversation. Rather it was Grievant who could reasonably have felt that Caravetta had sent a potentially threatening message. Grievant understandably sought to promptly clarify and respond to that message. Grievant's second call to Caravetta was from Grievant's home, not the tavern, and its purpose was to apologize and straighten out the situation if he could. Grievant was unable to pursue that objective because Caravetta hung up on him immediately.

Significantly, Caravetta's message to Rauen was that Grievant should avoid making similar comments to Caravetta in the future because if it ever happened again, Caravetta would take him up front. Similarly, Caravetta clearly stated just before and again during the pre-disciplinary investigation that he would have "let . . . slide" the wash basin remarks had Grievant not called him at home. Thus, Caravetta did not consider the wash basin remarks, alone, to be something serious enough for him to take up with the Highway Commissioner at all. Caravetta's message to Grievant through Rauen violated Rule 18. That message prompted the calls, yet Grievant is being disciplined and Caravetta is not.

The County's disciplinary action was also procedurally flawed because a first pre-disciplinary interview notice contemplating a one-day suspension was initialed and issued in the usual manner to the Grievant and Union. Then, without discovering any new facts, Patri issued a second notice contemplating a five-day suspension. Finally, a suspension totaling three days was imposed with portions applicable to separate aspects of Grievant's conduct without any notice that two or more separate suspensions were being contemplated. Each notice constituted an offer to

settle the case at the level of discipline specified. The changes in the length of the suspension constitute impermissible triple jeopardy.

In any event, the disciplinary penalty imposed here is excessive given Grievant's long years of service. The fact that he has one- and ten-day suspensions on his record for traffic/vehicle related conduct is irrelevant both because there has been no proof in this arbitration that those incidents were Grievant's fault and because they were entirely different types of alleged misconduct from that involved here.

For those reasons, the Arbitrator should conclude that there was no just cause for any discipline in the matter and should order the County to make Grievant whole for his entire economic loss and to fully expunge the discipline from Grievant's record.

DISCUSSION

The Arbitrator finds no merit in the Union's procedural argument. The evident purpose of the specification of contemplated disciplinary action in the pre-disciplinary interview notice is to advise the Grievant and the Union what action the Commissioner is considering. As such it is not an offer to settle the case, and it is not a commitment that is otherwise binding on the County. If the pre-disciplinary interview is to be a meaningful part of the investigation process, the County ought not be expected or deemed to have firmly and unchangeably made up its mind as to the disciplinary action that it intends to take once it has had the benefit of that interview. Upon conferring with Koons, the Commissioner apparently realized that the disciplinary action that he had been contemplating was not necessarily the maximum that the situation might call for. Re-notifying the Union to that effect in the second notice was permissible, appropriate, and surely preferable to later issuing significantly more discipline than was identified as under consideration in the originally issued notice. The fact that the discipline ultimately imposed differed from that identified in the notice as under consideration is not improper since, as noted, the pre-disciplinary interview should and evidently was a meaningful part of management's on-going investigation and disciplinary decision-making process. The bifurcation of the suspension as between the on-premises and off-premises conduct does not appear to have denied the Union fair notice of what conduct on Grievant's part was being considered as a possible basis for discipline. The Arbitrator therefore finds nothing in the procedural processing of the disciplinary action that undercuts its validity.

Similarly, the fact that Caravetta made it known in various ways and times that he would have let the matter slide had Grievant not called him at home does not foreclose the County from deciding that there was just cause to impose discipline both for Grievant's July 19 remark during working hours as well as for the after hours phone calls. As the County argues, it is Patri and not Caravetta who decides whether and to what extent to impose discipline within the Department. Caravetta only reports facts and offers recommendations as to disciplinary actions. Regardless of

whether Caravetta would have reported the workplace remark had Grievant not phoned him, Caravetta ultimately did report that remark to Patri, and Grievant remains responsible for having made that workplace remark no matter who caused the subsequent phone calls to be made.

The Arbitrator also finds no merit in the Union's shop talk defense. Grievant's comment was made about supervisor Caravetta and to his face. The Arbitrator is not persuaded that the remark was made in jest, and it clearly was not taken that way by Caravetta. Although the Highway Commissioner's introductory remarks to all Department personnel in April made specific reference to the presence of minorities and women in the Department, it is not reasonable for Grievant or the Union to have concluded that the Commissioner's warning, that previously accepted profanity at the workplace must cease and that the employes must be careful about what language they use at work, was intended by Patri to be limited only to situations where women or minorities were present. Grievant is in a particularly poor position to claim such an understanding about the Commissioner's expectations because he was personally informed by the Commissioner, during the course of a discussion of his having referred to a supervisor as a "fucker," that such language was not acceptable, even though the parties agreed that no discipline of any kind was to be imposed on that occasion. There is no indication that a woman or minority individual was involved in any way in that incident. Thus, that April incident put Grievant on notice of the Commissioner's expectations even though it did not burden his disciplinary record in any way. The Arbitrator has no doubt that profane language has not been entirely eliminated from the Department. Nevertheless, the Grievant's remark to Caravetta was not only profane, it was also abusive, insubordinate and disrespectful. It was said to and about a supervisor in the presence of other employes.

For those reasons, Grievant's remark to and about supervisor Caravetta in the presence of other employes was a violation of Work Rules 4 and 5 and a valid basis for some measure of disciplinary action in the circumstances.

At the hearing, Patri stated that besides the one day of the suspension imposed for the workplace remark, an additional day was imposed for each of the two phone calls.

With regard to the first phone call, Grievant exercised poor judgment both in calling Caravetta at home from a tavern while drinking and in speaking loudly to Caravetta about a personnel matter that could have waited for the following work day if Grievant needed clarification of Caravetta's message. Especially so since Grievant wound up engaging Caravetta in a mini-debate about whether Grievant had called Caravetta a name during which Grievant had occasion to repeat his offensive remark in the course of characterizing what he had said at the workplace. (Of course it is of little consequence that Grievant technically had not called Caravetta a name at the workplace, since his remark was violative of Rules 4 and 5 anyway.) The Grievant also spoke inappropriately to Caravetta in that phone conversation when he went out of his way to emphasize

that if Caravetta had been referring to taking him out in a fight, it would take a better man than Caravetta to do so, especially after Caravetta had told Grievant that he had not been talking about a fight with Grievant at all. In sum, as a general matter, such a phone call and conversation would constitute conduct violative of Rule 18, reasonably interpreted.

However, the Arbitrator concludes that Caravetta and the County must bear a substantial degree of responsibility for Grievant's phoning Caravetta in the first place. Caravetta could have simply made a note of the conversation and communicated with no one about it until reporting the matter to the Commissioner the following Monday. Caravetta also had the time and opportunity to call Grievant aside and privately tell him that he considered his remark inappropriate and that he would be taking the matter up with the Commissioner the following Monday. If Caravetta wanted the Union to be aware of the situation either as a means of avoiding a contention that Grievant's remark was never made or to conform to the Commissioner's commitment to keep the Union informed and involved in all relevant matters, he could have simply advised Rauen that the incident occurred and also perhaps told Rauen what, if anything, Caravetta was going to do about it. What seems most likely from the evidence is that Caravetta wanted to send Grievant an informal, friendly warning that if Grievant said anything to Caravetta like that again, Caravetta would then report him to the Commissioner. But whatever his intentions were, by all accounts, Caravetta did not merely give Rauen a notification to the Union about the remark. Rather, Caravetta gave Rauen a message to be passed on to Grievant. By doing that, Caravetta (as agent for the County) took and bore the risks: that the message would be communicated to Grievant promptly, i.e., during nonworking hours (as it was); that it would be miscommunicated (as it apparently was); that its meaning would be unclear to Grievant (as it may well have been); and that Grievant might well respond promptly (and hence outside of work hours) to obtain clarification of Caravetta's message after receiving it outside of work hours from Rauen (which he did).

It was Caravetta's unconventional and unnecessary communication of a message to Grievant through Rauen that prompted Grievant to respond with the first call. While Grievant told Patri early in the investigation that his workplace remark and phone conversation with Caravetta were light-hearted and fun-loving, those characterizations do not square with Caravetta's perceptions and descriptions of either interaction. Hence the Arbitrator finds that in both situations, Grievant was serious and not merely kidding around. While Rauen's testimony does not adequately explain how or why he miscommunicated the message as he apparently did, and while Grievant's approach during the first phone call was neither constructive nor appropriate, supervisor Caravetta's giving Rauen a message for Grievant constitutes a significant mitigating factor regarding Grievant's after hours conduct.

With regard to the second phone call, Grievant has at all times asserted that he called Caravetta the second time from Grievant's home after discussing the situation with his wife and after his wife (a co-worker of Caravetta's wife) persuaded him to call to apologize to avoid

possible hard feelings between the wives. Because Caravetta hung up on Grievant immediately, the County is in a poor position to deny that such was Grievant's purpose for the second call.

As a general proposition, a call for the purpose Grievant claims, even though it was directed to Caravetta's home, would not have violated the spirit or the letter of Rule 18. If the Commissioner intends that Rule 18 prohibits any and all non-emergency work-related or personnel-matter-related communications to supervisors at their homes outside of work hours, then that interpretation should be more clearly communicated to the employes than is accomplished by the language of Rule 18, alone.

In the instant circumstances, however, the Grievant's justification for calling the second time (i.e., to apologize and try to straighten out the situation) is undercut somewhat by the facts that Grievant had reason to know that Caravetta had been sufficiently alienated by Grievant's earlier call that he had hung up on Grievant after stating that the matter would be taken up on Monday with the Highway Commissioner. On the other hand, the evidence did not establish that Caravetta told Grievant during the first conversation that he considered it inappropriate that Grievant had called him at home or that Grievant would be subject to greater discipline if he persisted with the conversation or if he were to call Caravetta about it again.

On balance, the first phone call constituted a violation of Rule 18, but one which is mitigated to a substantial extent by fault on the part of the supervisor. The second phone call constituted, at most, a technical violation of Rule 18, and only because it followed the first call. Therefore, those phone calls marginally constituted just cause for some measure of disciplinary action against Grievant in this matter, as well.

As noted, the Arbitrator considers both Caravetta's degree of fault in prompting a telephone response from Grievant and Grievant's uncontroverted explanation that the second call was made from his home in an effort to apologize, as significant mitigating factors regarding the seriousness of the phone calls. Patri's analysis as reflected in the suspension notice and his testimony do not give the former factor any mitigating effect, and it seems likely that the same is true regarding the latter since Patri's testimony equated the additional discipline attributable to second phone call with that attributable to the first. For those reasons, the Arbitrator does not accord as much deference as he might otherwise to Patri's judgments about the seriousness of Grievant's offenses and about the discipline to be imposed in the circumstances.

In determining whether a three-day suspension was reasonable in the circumstances, the Arbitrator considers (as Patri did) that Grievant is a long service employe. It was also proper to consider (as Patri did) the fact that Grievant's disciplinary record includes two prior suspensions. The fact that those suspensions were imposed, coupled with the absence of any evidence that either of them remains the subject of a pending grievance, establishes that they are a part of Grievant's employment record and worthy of consideration regarding the appropriateness of the disciplinary

action taken herein. The fact that those suspensions involved conduct very different than that at issue herein may render them worthy of somewhat less weight in this particular case, but it does not render them of no consequence at all. At a minimum, the past suspensions on Grievant's record undercut what might otherwise be the Union's argument that the Grievant's long service is entirely unblemished so as to make a suspension for a first offense of any kind inappropriate. On the other hand, the agreement resolving the April incident was that there would be no disciplinary action of any kind recorded against Grievant on account of that incident. Thus, so far as the evidence in this case would show, Grievant's disciplinary record is free of any prior oral or written warning or suspension for conduct of the sort at issue in this case.

All things considered, the Arbitrator concludes that the County had just cause to discipline Grievant in the circumstances of this case, but only to the extent of a one-day suspension rather than a three-day suspension. Well-established patterns of behavior can be difficult to change, and Grievant appears to be having difficulty in adjusting to the altered language and personal interactions with supervisors which the new Highway Commissioner has called for. However, Grievant had clear notice from his April incident that whether he calls a supervisor a name directly or not, speaking profanely and disrespectfully to and about a supervisor is no longer acceptable conduct in the Department. In addition, Grievant is not entirely free from fault regarding his first phone call to Caravetta because Grievant's overall approach during that call was not constructive and because during that call Grievant repeated the offensive remark during Grievant's attempt to deny having called Caravetta a name. A suspension therefore appears justified even though Grievant's record contains no prior oral or written warnings for an offense of this kind. While the mitigating factors noted above warrant a reduction of the suspension, they do not warrant setting it aside altogether.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the ISSUES noted above that:

1. Kenosha County did not have just cause to suspend Grievant for three days, August 21, 22 and 23, 1991; however, Kenosha County did have just cause to suspend Grievant for one day, August 21, 1991.

2. As the remedy, the County shall immediately:

   a. make Grievant whole for the loss of pay for August 22 and 23, 1991 that he experienced by reason of the instant suspension;

b. modify Grievant's record to reflect a one-day suspension rather than a three day suspension; and

c. insert a copy of this Award (including the attachments) into Grievant's record in place of the subject three-page notice of suspension.

Dated at Shorewood, Wisconsin
this 23rd day of December, 1991.

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator