

"If not, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

. . .

ARTICLE 10 - DISCIPLINARY PROCEDURES

10.01 - The Employer may discipline, reprimand, suspend, demote or discharge employees for just cause.

10.02 - When requested, employees shall be allowed Union representation whenever their work performance is being discussed for possible disciplinary purposes and when any discipline is given. The employee and Union shall receive copies of all discipline and reasons for same.

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BACKGROUND

The County, amongst its various governmental operations, operates a Highway Department which has responsibility for snow plowing Interstate, State and County highways. While snow plowing employes have to be particularly careful when removing snow from overpasses. Employes have been informed that if in order to remove snow from off of a highway overpass snow would fall on the road way below they are not to do so without getting traffic control for the roadway on which the snow would fall. Each of the County's vehicles for snow removal on highways has a radio with which employes can use to summon traffic control when they have to push snow over the railing of a highway overpass.

The instant matter arose on January 21, 1993 when Kurt Gustavson reported to the County that while he was driving on Interstate 51 the windshield of his vehicle had been broken by something falling from the County Highway C overpass onto his vehicle. Gustavson also claimed that he observed a County snow plow on Highway C right after the windshield was hit. To resolve the matter the County agreed to pay for a replacement windshield.

The matter was also referred to the Highway Department's Patrol Supervisor, Joe Boquist, who determined that at the approximate time of Gustavson's incident Delmer Kemnetz, hereinafter referred to as the grievant, was responsible for snow plowing Highway C on the day in question. The grievant, who does not normally plow Highway C, was not aware of any mishap which may of occurred when he cleared the highway overpass. At the hearing Boquist testified that he talked to the grievant about work rules and getting traffic control and further testified that the grievant

acknowledged he had done something wrong twice during their conversation. At the hearing Boquist also acknowledged the traffic control work rule is not a written work rule.

Highway Commissioner Robert Bohn also acknowledged at the hearing that there is no written work rule concerning the use of traffic control on Highway 51 when snow is being removed from an overpass. Bohn also testified that a written work rule is not necessary because employes have been verbally informed of the rule. Bohn also testified that he had recently spoke to the grievant about concerns that he went too fast when plowing. On January 22, 1993 Bohn issued the following reprimand, one (1) day suspension to the grievant:

WAUSHARA COUNTY HIGHWAY DEPT. January 21, 1993
Date of Incident

EMPLOYEE DISCIPLINARY NOTICE

January 22, 1993
Date of Reprimand

NAME OF EMPLOYEE: Delmer Kemnetz

JOB TITLE: Class IV DEPARTMENT: Highway

ORAL REPRIMAND _____ OR WRITTEN REPRIMAND _____

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SUSPENSION FOR 1 DAYS DISCHARGE _____

IF ORAL REPRIMAND, GIVE DATE, TIME AND PLACE OF REPRIMAND: _____

The above disciplinary action was taken against you today for:
(check one or more)

_____ tardiness	_____ leaving assigned duties without permission
_____ absenteeism	_____ slow down, or refusal to work
_____ assault or fighting	_____ loafing, or laxness on job; failure to perform assigned

_____	use of N.P. drugs or drinking while performing duties	_____	tasks
<u>X</u>	insubordination	_____	perform private work on Co. time
_____	dishonesty	_____	inability to perform job
<u>X</u>	discourteous towards or fellow employees	<u>X</u>	poor performance
_____	violation of work rules	<u>X</u>	negligence with Co. owned properties
_____	violation of Co. Personnel Policy	_____	damage to or loss of Co. owned property
_____	other (state reason) _____		

GIVE A STATEMENT OF THE FACTS CAUSING THIS ACTION,
INCLUDING THE TIME AND PLACE ACTS AND NAMES OF PERSONS
INVOLVED:

At 2:05 P.M. on January 21, 1993 employee was snow
plowing County Trunk "C" overhead above U.S. Hwy. 51. A
large chunk of ice hit a motorist's windshield traveling
on U.S. 51 below. The windshield was smashed, and glass
hit the passenger in the face, eye and hair.

When questioned by Joe Boquist on Jan. 22, 1993 at
approx. 7:45 A.M., employee said he knew overheads
should not be plowed unless there is traffic control on
road below. Employee had also been in my office approx.
2 weeks prior to this incident. He had been warned
about three negligent acts or complaints we had received
on his performance. Employee failed to follow

procedures for snow removal on overheads. Further incidents of this nature could lead to further discipline up to and including dismissal.

Robert E. Bohn

Waushara County Highway Commissioner

cc: Chief Union Steward, Larry M.

Thereafter the instant grievance was filed and processed to arbitration.

At the hearing the grievant acknowledged he had plowed the Highway C overpass of Interstate 51 on a number of occasions, some of which he called for traffic control because he would need to push snow over the railing onto the Interstate. However, on the date in question the grievant asserted he did not call for traffic control because he was not pushing any snow off the overpass and on down to the Interstate. The grievant did acknowledge that while he was plowing the overpass he did see some small object fly over the wall. The grievant also acknowledged that he was aware he was to call for traffic control if snow was going to go over the railing of an overpass.

Mike Gustin, the County Highway Patrolman responsible for snow plowing Interstate 51 on the date in question, testified that he had passed the Highway C overpass after the incident had happened and did not observe any snow which would have been thrown from the overpass. Gustin also observed that it was a sunny day, the employes were performing snow clean-up, and that the roads were wet in spots.

COUNTY'S POSITION

The County contends the rule in the instant matter is clear and that the grievant was aware of it. This rule is that an employe is to get traffic control if anything may go over an overpass railing while an employe is snow plowing. The County also stresses there is no issue concerning intent in the instant matter but it cannot allow this kind of negligence, a shattered windshield being a serious incident. Particularly when the grievant had been talked to two (2) weeks previously about a serious incident. The County concludes that anytime there is any chance something may go over a railing of an overpass the employe is to call for traffic control. The County points out the grievant was aware of the rule and acknowledged he had slowed down to cross the overpass. The County would have the arbitrator deny

the grievance.

UNION'S POSITION

The Union contends the grievant had something happen beyond his control, that this was an accident and these kinds of things happen. The Union points out the grievant took normal preventative methods. The Union also stresses this is the first time the grievant has been formally disciplined. The Union points out that the grievant was aware that if snow was going to go over the railing the grievant needed to get traffic control and had done so in the past when the situation warranted it. The Union argues the grievant was not throwing snow over the railing onto Interstate 51, that if something flew over the railing it was a surprise to the grievant and points out no one saw the incident. The Union concludes the County did not have just cause to discipline the grievant and would have the arbitrator sustain the grievant and make him whole.

DISCUSSION

The burden is on the County to demonstrate that it had just cause to discipline the grievant and issue him a one (1) day suspension. The record demonstrates the County believes the grievant violated its unwritten work rule because a motorist had their windshield broken while driving under the Highway C overpass of Interstate 51. No one observed the grievant cause this damage.

No one observed the grievant plowing snow over the railing onto Interstate 51. Nor is there any evidence the County went to the scene to determine if the grievant violated its unwritten work rule. The County's Control Superintendent, John Wedell, testified that if an employee was only pushing snow up to a railing or wall of the overpass there would be no need to obtain traffic control for the road below the overpass. Herein the County's own witnesses testified the motorist stated a piece of ice falling from the Highway C overpass broke his windshield. There is no evidence the motorist claimed there was more than a single piece of ice which came down from the overpass. The County has thus concluded that the grievant violated its unwritten work rule and pushed snow over the railing without calling for traffic control.

The undersigned finds this conclusion discredited by Gustin's testimony that there was no snow on Interstate 51 when he drove by after the motorist incident took place. The County did not rebut Gustin's testimony and the burden is on the County to demonstrate the grievant violated the unwritten work rule. Absent any evidence which would demonstrate the grievant was pushing snow over the Highway C overpass railing onto Interstate 51 the undersigned can only conclude the grievant may have dislodged a chunk of ice and this fell on the motorist's vehicle. This conclusion is supported by the grievant's testimony that he saw

something fly over the railing of the overpass as he was crossing it. While the County could of concluded that the grievant should of reported this fact and could of verbally reprimanded him for failing to do so, the fact that the grievant acknowledged this occurred is not conclusive that the grievant was pushing snow over the railing without calling for traffic control.

The record demonstrates there is no rule, written or unwritten, which requires an employe to call for traffic control when they are snow plowing across an overpass. The rule is to call for traffic control only if they are going to be pushing snow over the railing. The undersigned finds the County has failed to present any evidence which would demonstrate that the grievant was in fact pushing snow over the County Highway C overpass onto Interstate 51. Therefore, based upon the above and foregoing, and the evidence, arguments and testimony presented, the undersigned concludes the County did not have just cause to suspend the grievant for the incident which occurred on January 21, 1993. The County is directed to cleanse the grievant's record of the disciplinary matter and to make him whole for any lost wages or benefits. The grievance is sustained.

AWARD

The County did not have just cause to suspend Delmer Kemnetz for one (1) day for the incident that occurred on January 21, 1993. The County is directed to cleanse Kemnetz's record of the disciplinary action and to make him whole for any lost wages or benefits.

Dated at Madison, Wisconsin this 1st day of December, 1993.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator