

PERTINENT CONTRACTUAL PROVISIONS

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ARTICLE 2 - MANAGEMENT RIGHTS

2.01 - Except as otherwise herein provided, the operation and control of the Waushara County Highway Department is vested exclusively in the Employer and all management rights repose in it. These rights include, but are not limited to, the following:

- (a) To direct all operations of the Waushara County Highway Department;
- (b) To establish reasonable work rules and schedules of work;
- (c) To hire, promote, transfer, schedule and assign employees in positions within the Department;
- (d) To suspend, demote, discharge and take other disciplinary action against employees for just cause;
- (e) To relieve employees from their duties for lack of work or other legitimate reasons;
- (f) To maintain efficiency of operations;
- (g) To take whatever reasonable action is necessary to comply with state or federal law;
- (h) To introduce new or improved methods or facilities;
- (i) To change existing methods or facilities;
- (j) To determine the kinds and amounts of services to be performed as pertains to operations and the number and kind of classifications to perform such services;
- (k) To contract out for goods and services as long as bargaining unit employees are not on layoff or reduced hours as a result of the subcontracting;

- (l) To determine the methods, means and personnel by which operations are to be conducted;
- (m) To take whatever reasonable action is necessary to carry out the functions of the Department in situations of emergency.

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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. For approximately eleven (11) years the County has employed Harvey Nigh, hereinafter referred to as the grievant, and currently the grievant occupies a Class IV, Truck Driver position operating out of the County's Hancock work site. For the date of January 7, 1993 the grievant had put in a request to have the second half of the work day for sick leave so that he could go to a doctor's appointment. Shop Supervisor Ralph Gruber arrived at the Hancock work site at approximately 11:00 a.m. on January 7, 1993. Gruber observed the grievant walk out of the work site building carrying a County oil container. Gruber observed the grievant walk to his personal pick-up truck, open the hood and pour oil into the truck. Upon entering the work site Gruber did not observe any other oil cans but County oil cans. Gruber did not observe any other employe's at the work site nor was he expected to be at the Hancock work site. At the hearing Gruber testified he asked the grievant what he was doing and the grievant responded he was going home for a half day. Gruber, who is not the grievant's supervisor, reported the matter to Patrol Superintendent John Wedell. At approximately 7:30 a.m. the next day Wedell talked to the grievant about the matter. The grievant informed him he had his own oil, (Shell oil, the County uses Citgo oil which comes in five gallon cans) which he poured into a County

glass container with a spout so that it would be easier to pour into his vehicle. The grievant did not say what he did with the Shell oil container his oil came in but Wedell looked around the shop, noted that garbage had not been emptied and did not find any oil containers the grievant's alleged oil could have come in. Wedell reported the matter to Highway Commissioner Robert Bohn who discussed it with the grievant. The grievant did not ask to have a Union steward present nor did Bohn advise him to do so. Bohn advised the grievant he would be suspended for possible theft and misuse of County equipment. Thereafter the grievant was suspended for three (3) days. Bohn also testified that County employes knew they were not to work on their personal vehicles while on County time and also knew they were not to use County equipment for personal use. The County also contends the grievant was issued a disciplinary notice which was signed by Bohn and identified he had violated County Personnel Policy. The Union contends the grievant received a notice which was unsigned and did not identify violation of County Personnel Policy as an act for which he was being disciplined. The grievant did not recall which written notice he received. The grievant also testified he had never observed any other employe doing maintenance on their own vehicle. The grievant acknowledged he used a County container to pour his own oil into his personal vehicle, that he walked right past Gruber and that Gruber did not say anything to him, that he was verbally informed he was being disciplined pertaining to the oil, not for doing personal work on County time, and that he put the empty shell oil container in the back of his truck.

COUNTY'S POSITION

The County contends it had just cause to discipline the grievant. The County acknowledges this is a case of circumstance and that some inferences must be drawn. The County stresses the grievant was observed putting oil into his personal vehicle while he was on County time. The County concludes the grievant was putting County oil into his vehicle at a point in time when no one else is usually around. The County stresses it has to be concerned about the integrity of employes and that the seriousness of this offence warrants a three (3) day suspension.

The County argues it has a personnel policy which has been in effect since before the first union contract was entered into which codifies rules and practices relating to this grievance. The County also points out the grievant was aware of the personnel policy and that the Union did not dispute employes were aware of the policy. The County contends that the form which the Union introduced into evidence, which did not have the box marked concerning a violation of County personnel policy while a mixup and certainly should be avoided in the future, did not contain the Bohn's signature and the Union did not dispute that his signature is normally on a disciplinary document. The County stresses the

grievant was not disciplined on a separate basis for violation of County policy but in conjunction with it. The County also argues that because the policy of not using County equipment or working on personal vehicles on County time has been unchallenged it ought to function as an interpretive tool regardless of whether the box on the form was checked.

The County also stresses that the personnel policy laundry list of different types of conduct which would warrant disciplinary action, "F. unauthorized use or abuse of County equipment or property,..." and, "J. leave used for a purpose other than which it was requested or granted..." are valid evidence of the types of behavior the County believes is "misconduct". The County also stresses the longstanding nature of the policy put the grievant on notice and is valid evidence of the fairness of the disciplinary action. The County asserts even cases of minor theft can be dischargeable conduct. The County contends that because of the circumstantial nature of the evidence and the grievant's longstanding service to the County a lesser degree of discipline was determined by management to be appropriate.

The County concludes the personnel policy is interpretive tool to be used to give meaning to the discipline imposed and would have the undersigned deny the grievance.

UNION'S POSITION

The Union argues the burden is on the County to prove the guilt or wrongdoing of the grievant and, since the grievant is accused of theft, the appropriate quantum of proof should be "beyond a reasonable doubt". The Union contends the County has failed to meet that burden and therefore it did not have just cause to discipline the grievant.

The Union argues that the question is whether the County has proved the grievant put County oil into his personal vehicle on January 7, 1993. The Union acknowledges the grievant was observed putting oil into his truck, and further, that the grievant did indeed put oil into his truck prior to leaving the Hancock job site for his doctor's appointment. However, the Union argues, the grievant made no attempt to hide what he was doing from Gruber and if Gruber thought the grievant was stealing County oil he should have asked the grievant what he was doing, which he did not. The Union also points out the County can not even demonstrate that any of its oil is missing, let alone that the grievant took some. The Union also argues that the use of circumstantial evidence does not eliminate in any sense the requirement that there must be clear and convincing proof that the offense charged was committed, with mere suspicion being insufficient to establish wrongdoing.

The Union also argues that the grievant's version of what

occurred to be more plausible than the County's. That the grievant brought the oil from his home, kept it in his County vehicle so that it would be warm and could pour more easily, and, so he could use the County oil container so he could pour the oil into his vehicle more easily. The Union also points out the grievant claimed he did not use the same type of oil as the County. The Union concludes the grievant did not steal any oil and should not have been suspended.

The Union also contends the County assertion that the grievant violated the County personnel policy by performing personal work on County property is a grasp for anything to support a weak case. The Union argues the copy of discipline it received did not contain the "X" next to the violation of County personnel policy spot and that the "X" on the County copy looks as if it was added on after the fact. The Union also stresses that if Gruber believed this was a violation he should of said so at the time in order to correct undesirable behavior. The Union also points out Gruber testified he was concerned he was witnessing a theft and never indicated he had a concern with personal work being done on County property.

The Union concludes that putting oil into one's own personal vehicle while on County property cannot be viewed as a grievous offense not warranting any discipline. The Union argues that should the arbitrator conclude some discipline is warranted, given the fact the grievant has no prior record of discipline and the minor nature of the infraction, there should be an oral warning at most. The Union would have the undersigned sustain the grievance, direct the County to cleanse the grievant's record, and direct the County to make the grievant whole for any losses including overtime he would have worked on January 12, 13, and 14, 1993.

DISCUSSION

The burden is on the County do demonstrate that it had just cause to discipline the grievant and issue him a three (3) day suspension. The County believes the grievant, while on County time, put County oil into his personal vehicle. The grievant does not dispute he was observed putting oil into his personal vehicle, nor does the grievant dispute he used a County oil container to put the oil into his vehicle. However, the grievant does claim the oil was his oil and not the County's oil. The record demonstrates that on January 7, 1993 the grievant returned to the Hancock work site at approximately 11:00 a.m., called the County's offices and informed them he was taking sick leave for the rest of the day for a doctor's appointment. The Hancock work site is usually deserted at this time, however, Shop Supervisor Gruber arrived and as he was walking into the work site Gruber observed the grievant with a County oil container and oil in the container. Gruber asked the grievant what was going on and the grievant replied he was taking a half day off for sick leave. Gruber then

observed the grievant put the oil into his personal vehicle. Gruber also testified he did not observe anything but County oil containers on the premises. Gruber further testified as he was not the grievant's supervisor he reported the matter to the grievant's supervisor. The record also demonstrates that the next day, prior to any garbage pick up, that Patrol Superintendent Wedell looked around the Hancock work site and did not find any Shell Oil containers.

At the hearing in the instant matter the grievant testified that he brought Shell Oil in a quart container that day, that he kept it in his County vehicle to keep it warm, that prior to leaving he used a County container with a spout to put the oil in his personal vehicle, and that prior to leaving he put the Shell Oil container in the back of his truck. After testimony by Personal Director Debra Behringer that the grievant informed the Personnel Committee that he had brought the oil in a gallon container the Union agreed that the oil was brought in a gallon container. The undersigned finds this fact fundamental to whether the grievant put County oil into his personal vehicle. The County cannot conclusively prove it is missing a quart of oil because of lax record keeping. Thus it must rely on circumstantial evidence.

This evidence is the fact the grievant was seen using a County oil container putting oil into his personal vehicle. The grievant's defense is that the oil he put into his vehicle was his own and came from a gallon Shell Oil container. The undersigned finds the grievant's credibility lacking because of this key detail. On cross examination the grievant testified the Shell Oil container was a quart container, however, after Behringer's testimony the Union acknowledged the grievant informed the County Personnel Committee it was a gallon container. The grievant also claimed he put the shell oil container in the back of his truck. However, if the grievant did bring oil in a gallon Shell Oil container why did Gruber not observe such a container? Why would the grievant not have such a container with him when Gruber observed him going to his vehicle if the grievant, as the grievant testified, put the gallon container into the back of his truck? The grievant was not observed with a gallon Shell Oil container at any time nor did the grievant at any time assert that Gruber should of seen the gallon Shell Oil container. Thus the undersigned concludes that the grievant's claim that he put his own oil into his personal vehicle is not credible.

The record also demonstrates the grievant was aware of the County prohibition against using County equipment for personal use and he was aware of the prohibition against doing personal work on County time. The undersigned finds no merit in the County claim that the grievant performed personal work on County time. Putting oil into his personal vehicle is no different than if the grievant stopped to put gasoline into his vehicle while on sick leave. If at the end of a normal work day he put oil into the vehicle prior to departing for home he would of performed personal work on

County property. However, the undersigned finds such an action not violative of the County's intent to bar employes from doing personal work on County time or property. The grievant however was aware of the prohibition against using County equipment for personal use. Clearly the grievant violated this rule. The Union's claim that the copy of the written violation it received did not contain this infraction was not prejudicial. The Union did not claim at the hearing that the County's copy of the discipline was a surprise or that it was unaware of the this factor in the County's decision to discipline the grievant. The Union did not dispute that Bohn normally signs the disciplinary notice and the copy they received did not contain his signature. Thus, while an error may have been made in the copy sent to the Union such an error is not dispositive. The record demonstrates the grievant was clearly aware of the County's prohibition against using County equipment for personal use and he clearly violated this rule.

Based upon the above the undersigned finds the County had cause to discipline the grievant. The record demonstrates, however, that while the grievant's version of the matter is questionable, the County cannot demonstrate oil is missing. This failure is exacerbated by the fact that Gruber, an agent of the County, did not discipline the grievant on the spot. Clearly, as a supervisor, Gruber has the authority to enforce County work rules and procedures, whether or not he is the immediate supervisor of an employe. Had Gruber done so the question of whether the oil was County oil or the grievant's own could have been resolved immediately. The undersigned agrees with the County that theft of County property and use of County equipment is a serious offense, however, the matter should have been dealt with by Gruber immediately. Because of the County's failure to immediately deal with the matter, the circumstantial nature of the evidence, and the grievant's work record, the undersigned concludes the County did not have just cause to suspend the grievant for three (3) days. The undersigned has reduced the discipline to a one (1) day suspension, directed the County to make the grievant whole for two (2) days lost wages, and to make the appropriate alterations in the grievant's personnel record to reflect a one (1) day disciplinary action. The make whole remedy is not to include any overtime the grievant may have worked had he reported to work on any of the three (3) days, January 12, 13, or 14, 1993, he was on suspension. The record is silent concerning whether overtime worked on the days in question is mandatory and absent such a requirement the undersigned concludes any overtime performed by the grievant's replacement in not to be included in the make whole remedy.

AWARD

The County did not have just cause to suspend Harvey Nigh for three (3) days January 12, 13, and 14, 1993. The County did have

just cause to discipline the grievant with a one (1) day suspension. The County is directed to make the grievant whole for two (2) days lost wages, not including any overtime which the grievant may have worked had he reported to work on the days in question, and directed to alter the grievant's personnel record to reflect a one (1) day disciplinary suspension.

Dated at Madison, Wisconsin this 22nd day of December, 1993.

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