

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

WINNEBAGO COUNTY HIGHWAY  
DEPARTMENT EMPLOYEES UNION,  
LOCAL 1903, AFSCME, AFL-CIO

and

WINNEBAGO COUNTY (PARKS DEPARTMENT)

Paul Miller Suspensions/Discharge

Cases 268, 269 and 270  
Nos. 53490, 53491 and 53492  
MA-9370, 9371 and 9372

Appearances:

Wisconsin Council 40, AFSCME, AFL-CIO, 2791 Village Lane, Oshkosh, WI 54904, by  
Mr. Gregory N. Spring and Mr. Richard Badger, Staff Representatives, appearing  
on behalf of the Union.

Mr. John Bodnar, Corporation Counsel, Winnebago County, Post Office Box 2808,  
Oshkosh, WI 54903-2808, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Local 1903, AFSCME, AFL-CIO (hereinafter referred to as the Union) and Winnebago County (hereinafter referred to as the County) jointly requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute over two suspensions and a discharge imposed on employee Paul Miller and a suspension imposed on employee Chris Christensen. The undersigned was designated. Hearings were held in Oshkosh, Wisconsin on March 14, May 1 and May 2, 1996, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. No stenographic record was made. The parties submitted briefs and reply briefs, and the record was closed on July 3, 1996.

Now, having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

**I. Issue**

The parties stipulated that the issues before the arbitrator are whether the County had just cause for the three day suspension, five day suspension and discharge imposed on Paul Miller, and whether the County had just cause for the three day suspension imposed on employee Chris Christensen, and, if not, what the appropriate remedy would be.

**II. Pertinent Contract Provision**

ARTICLE 8  
DISCIPLINE

SECTION A.

An employee may be suspended, discharged, demoted, or otherwise disciplined for just cause. The sequence of disciplinary action shall be written reprimands, suspension and discharge. Any employee receiving disciplinary action shall receive written notice of such discipline and reasons for same. The Union shall also be provided a copy of all discipline.

The above sequence of discipline need not be followed in situations calling for immediate suspension or discharge.

No written reprimand shall be valid after twelve months (12) months from its issuance after which time all references to the discipline shall be removed from any and all records.

. . .

SECTION D.

The County may establish and enforce reasonable rules in connection with the operation of the Winnebago County Highway, Solid Waste, Airport and Parks Departments and the maintenance of discipline in said operation (sic) by the County.

. . .

**III. Background Facts**

The County is a municipal employer providing general governmental services to the people in Winnebago County, Wisconsin. Among the services provided is the operation of a series of county parks, including the Winneconne Community Park. The Union is the exclusive bargaining representative for employees in several departments, including those in the classification of Parks Caretaker. Paul Miller was a Parks Caretaker II, working at Winneconne Park, about ten miles west of the Parks Department Shop, until the time of his discharge in November of 1995. Park caretakers are responsible for general maintenance, such as mowing, trimming, repairs, and removing litter. The caretaker is also the contact person for persons making reservations at the park. In late September of 1992, Miller had received a three day suspension for insubordination to his supervisor, Assistant Parks Director Robert Lohry, during a meeting between the two men at Winneconne Park. Just over a week later, he was assessed a five day suspension for accumulating excessive and unexplained miles on his County truck. In mid-November, he was discharged for wasting time when he was working at the Shop. Chris Christensen, another Parks Caretaker II who was working with Miller at the Shop, received a three day suspension for the

same incident.

There is some substantial dispute in the record concerning the incidents giving rise to the discipline:

A. The September 14th Incident with Miller and Lohry  
1. County's Evidence

According to Lohry, he went to Winneconne Park at about 10:30 a.m. on September 14th as part of his normal rounds of the parks. Miller was on a riding mower, and Lohry parked his truck and walked over to where he was working. Miller shut down the mower, and Lohry asked him how things were going. He said things were going well. Lohry asked Miller why he had seen him an hour earlier over on County Trunk Highway "X". Miller replied that he had been on his way to the Kitz and Pfeil hardware store on the south side of Oshkosh to purchase reflectors, but had not been able to get what he wanted. Lohry was skeptical, since he viewed County "X" as being a very roundabout way of getting to the hardware store, and he asked Miller if he had called ahead to see if the store actually had the reflectors in stock. Miller said that he hadn't, because he needed to look at the reflectors to be sure they were the right kind. Lohry was again skeptical of this, since there was nothing special about the reflectors, but he did not pursue the issue, asking instead why he had seen the grievant driving along Oak Ridge Road about a week earlier. Miller became upset at this point, asking whether Parks Director Jeff Christensen had sent him to the park. Lohry told him "no", but Miller said he was going to call Christensen and find out. When Lohry told him to go ahead and motioned him to use the radio in his truck, Miller sat back down on his mower and told him he was just there to harass him and that he was getting in the way of his work. Lohry told him he was getting more upset than he needed to, and that he just wanted to know why he was on Oak Ridge Road, since it was not on any route Miller needed to use. Miller told him it was raining that day, and he just needed to get out of the park for awhile. Lohry said he could have done an inside project if it was raining, and Miller got upset again. He told Lohry he was just there to harass him, that he was done with him, and that he should get out of the park. Miller started the mower up, and Lohry told him to shut it off because they were not done speaking. Miller shut the mower off, took a toothpick from his mouth and threw it down by Lohry's left foot. He said he was not going to talk with him anymore and he spat on the ground next to Lohry's foot. When Lohry tried to speak, he spat on the ground again and told him to get out of the park. Lohry tried to speak several times, but Miller just started saying "no" over and over. Lohry finally said they would speak later, and started to leave. Miller started mowing again, and when he got about five feet away, he turned his head to one side and loudly said "asshole". Lohry called Jeff Christensen and reported the incident, and then met with him later in the day to give him the full details.

2. Union's Evidence

According to Miller, Lohry arrived at the park in an agitated state, and demanded to know why he had been driving on County Highway "X". He explained that he had gone to the hardware store, and Lohry initially misunderstood, thinking he was talking about a store on the other side of town. When he explained which store, Lohry seemed to understand, but

immediately demanded to know why he had been on Oak Ridge Road the week before. He explained that he had simply been taking an alternate route to the Shop. Lohry was very angry, and accused him of not doing his job. Miller decided that he should have a witness present, and told Lohry he wanted representation. Lohry said he would set up a meeting, and Miller told him that would be fine. Thinking that they were done, Miller switched back on the mower and returned to work, but Lohry ran in front of the mower. Miller immediately stopped the mower because of the terrible danger Lohry had put himself in. Lohry again demanded to know why he was driving on Highway "X" and on Oak Ridge Road, and Miller explained that he wanted a witness before they continued. By this point, both of them were getting upset, and raising their voices. Lohry was simply furious, and continued to question him. Miller suffered from depression and anxiety, and he employed a technique he had learned in a depression support group. As Lohry attempted to question him, he just repeated the word "no", and he started the mower. Lohry grabbed his hand to try and turn the mower off. Miller finally gestured toward Lohry's vehicle and told him he should get out. Lohry did not move, and Miller repeated the command. Finally, Lohry told him he would get him another way, and walked off. Miller did not recall spitting during this incident, but he may have, although not at Lohry. He also did not recall calling Lohry an "asshole", but conceded it was possible, given the heat of the moment.

That evening, Miller prepared a grievance form, asking that Lohry give him advance notice of any future interviews. The purpose of this was to allow him to prepare, and to take his anti-depressant and anti-anxiety medications before any confrontation.

B. The Allegation of Excessive Mileage  
1. County's Evidence

Lohry was approached several times in the summer of 1995 about the condition of the Winneconne Community Park. Several employees assigned to work the park when Miller was off work had complained that the park was not clean, that litter had not been picked up, garbage had not been emptied and that the grass had not been cut. On July 28th, Chris Christensen, Miller's relief man, told him that he should keep an eye on the mileage of truck P-33, the one used for Winneconne, because he always had to add fuel to it whenever he used it, and he had noticed there were a lot of entries in the fuel log for that vehicle. In August, mechanic Bob Vaughan also expressed concern about the mileage on the truck. He had changed the oil on June 2nd, and the mileage showed 49,324.6 miles. On August 18th, the mileage was 54,450.9 miles. Vaughan said that he thought 5,125 miles was a lot in just over two months for a truck used primarily for driving back and forth to Winneconne. Lohry estimated that 30 miles per day would be about average, given a 20 mile round trip and some driving around in the park itself. He noted the mileage, and then checked it again on September 19th. The odometer on P-33 showed 1,937.2 miles in just over a month. Lohry checked the mileage one day when Dan Perry used P-33 at Winneconne, and found it to be about 30 miles.

Lohry approached Jeff Christensen with the mileage issue, and showed him a calendar breaking down the summer assignments at Winneconne. Although there was no daily record of mileage on the truck, the calendar showed that between May 1st and the end of September, Miller worked 122 days, Chris Christensen worked 30 days, and Dan Perry worked 12 days. Because of

Lohry's prior sightings of Miller at Highway "X" and up on Oak Ridge Road, the two men concluded that he was probably taking the longest possible routes when he traveled, and that he might be using the County truck for non-work purposes. Christensen met with Miller on September 29th, and questioned him about his use of the truck. Miller conceded that

he sometimes needed to get away from the park and would go for a ride. He also said that he would take the long way to go to the hardware store because it was nice to take different routes. He denied that the overall mileage was out of line. Christensen imposed a five day suspension on him for running up excessive miles on his vehicle.

At the arbitration hearing, another employee testified that he had once seen the grievant's truck parked during work hours at a truck plaza well south of Oshkosh.

## 2. Union's Evidence

Miller admitted that he had been on Oak Ridge Road on September 7th. He had taken the route on his way to the Parks Shop with a load of garbage he was dropping off. He sometimes took that route, and had seen Lohry on that road before. There was no work rule regulating the routes workers use when driving County vehicles, Lohry had never commented on the appropriateness of his use of Oak Ridge as an alternate route, and he had no reason to believe it was somehow not appropriate. He preferred this route because it avoided traffic without adding much time to the trip. When Lohry saw him on County Trunk highway "X" on September 14th, he was on his way to the hardware store. He lived west of Winneconne, and always drove south and then east when going to the south side of Oshkosh. No one had ever questioned his use of this route. As for his alleged presence at the truck plaza, he testified that he did not recall being there, but might have been on his lunch hour. He subsequently amended this to say that, as he recalled, he was there on other business.

A thirty mile daily average is unrealistic, given that there is usually at least one trip each day to haul trash from the park to the Parks Shop, and there often are trips to hardware stores and other suppliers. Truck P-33 is available for use by other employees, and no record is kept of daily mileage on the truck. Thus it is impossible to know when and by whom miles are put on the vehicle.

### C. The November Discipline for Wasting Time

#### 1. County's Evidence

The incident leading to the discharge of Paul Miller and a three day suspension for Chris Christensen took place in November. Both men were assigned to work in the Shop on Monday, November 6th. Jeff Christensen was on vacation that week, and Robert Lohry assigned them to assemble prefabricated aluminum bleacher units for use during the 1996 parks season. The bleacher units consisted of five rows of seats, with foot rests and back rests. Assembling the units required bolting them together and installing wooden planks as braces under the seats. The bleacher kits were in the new Parks Department work shop, adjacent to the main Shop.

At the end of the day on Monday, Lohry observed that Miller and Christensen had finished one and a half bleachers. They were assigned to the project again on Tuesday, and at the end of the day, Lohry observed that there had been no additional work completed. Both Miller and Christensen were off on Wednesday, and Lohry assigned Dan Perry and two seasonal employees to work on the bleachers. They finished three and a half units in seven hours. On

Thursday, Lohry contacted Personnel Director William Wagner, and told him that he had two men who had been doing no work and he wanted a witness when he spoke with them. Wagner agreed to come out to the Shop.

At about 2:30 p.m., Wagner came to the Parks Shop and he and Lohry went to speak with Miller and Christensen. Wagner and Lohry observed that no more progress had been made on the bleachers. They found Miller and Christensen in the work shop charging a truck battery. Wagner said he wanted to speak with them, and they said they wanted to finish with the truck and return it to the storage building first. They disconnected the charger, and Christensen drove it out of the workshop. When he did not return within five minutes or so, Wagner went looking for him, and found him in the break room getting a soda. Wagner brought him back to the shop and asked the two men what they had been working on on Monday and Tuesday. Christensen asked him what business he had questioning them about work assignments, and Wagner replied that he was the goddamned Personnel Director, and he had the right to oversee work and the authority to fire them. Christensen pulled his Union membership card from his wallet and read the statement printed on the back, requesting the presence of a steward. Wagner told him to get a steward, and Christensen replied that he was the steward. The interview continued, with the two employees saying that they had had to get parts, drop a truck at a dealership, fuel a propane operated truck, check blueprints, and the like. Wagner estimated that they were able to account for roughly an hour and a half of activity on Monday, Tuesday and Thursday. He told them they were both suspended and should not return to work until Monday.

After returning to his office, Wagner reconsidered the discipline, and sent both employees a letter, telling them not to report to work, but instead to report to the courthouse for a meeting with him and the Union on Monday. On Monday, November 13th, he met with the men and representatives of the Union, and questioned them about their activities during the prior week. Christensen read a prepared response, which was basically the same list of activities he had recited the week before, and Miller's response was likewise a repetition of the prior weeks' explanation. The only new information they offered was that a heating unit in the shop was not functioning properly and might have been leaking fuel. Lohry told Wagner that no complaint had been lodged about the heating unit, and Wagner decided that the heater was irrelevant, since the weather had not been particularly cold the week before. After listening to both men, Wagner informed Miller that he was fired, and told Christensen he was suspended for three days.

## 2. Union's Evidence

Miller worked at County business on Monday, Tuesday and Thursday. On Monday, he and Christensen opened up Winneconne Park, and then went to the storage barn at the Exposition Center and got the bleacher kits. They unwrapped them, and sorted the hardware. Because wooden planks were being added to buttress the bleachers, special stainless steel lag screws were needed. He and Christensen had obtained and cut the planks on the preceding Thursday and Friday, and on Monday they went to price lag screws so that they could get a purchase order. Since the assembly instructions were missing, they needed to spend some time contacting the manufacturer to determine where the wheels attached to the assembly.

On Tuesday, Miller and Christensen again opened the park, and then went to Lohry's office to discuss a recent change in scheduling forms. They also mentioned that the heater in the new building had malfunctioned on the preceding Friday. Lohry told them the problem was taken care of. When they left the Shop and arrived at the new workshop, however, they found that it was very cold and that the heater was making unusual noises. They talked about whether the pipes might freeze without heat. As Tuesday proceeded, they were then asked to disconnect a truck from its trailer, and take the truck in for service at a local dealership. Bob Vaughan asked them to use the propane fueled truck as the chase vehicle, so they could fill it at the Highway Department garage. They dropped the truck at the dealership, and then stopped for ten minutes or so at the Fleet Farm store next door to price bolts. They then proceeded to the Highway Department and fueled the propane truck. Since Miller had never fueled a propane vehicle before, Christensen spent some time explaining the method to him. When they returned to the Shop, Vaughan had them work rearranging and moving the trucks in the Shop for him.

On Thursday, they opened the park and returned to the Shop. Gary Rasse worked with them on the bleachers for a time, but was called away because his wife was in labor. Vaughan asked them to remove the trailer they were using to store the unassembled bleachers, and Christensen and he got a tractor and chains, and hauled it into the parking lot. They then moved some trucks for him. When they were done, they went to Kitz and Pfeil to buy fasteners, which took about an hour. When they returned, they broke for lunch. After lunch, Miller had a headache and sat down for half an hour. He and Christensen then went to the office and returned the change from the fasteners, and stopped in the break room to heat up some pizza. The work area was filled with the bleacher kits, and they decided to move a truck out to give them room to work. The truck's battery was dead, so they went to the Shop to find a charger. Once the charger was connected, they boosted the battery for a time.

Wagner and Lohry showed up while they were charging the battery. Christensen took the truck back to the lot, and Wagner became very angry when he did not return immediately. He became even angrier when Christensen challenged his right to question them and read his Union card to him. Miller did not say much, because he was heavily medicated with anti-depression and anti-anxiety drugs. Both of them tried to answer Wagner's questions, but Wagner suspended them for a day anyway. On Friday, both men received a certified letter from Wagner, directing them not to report to work on Monday, but to go to Wagner's office for a meeting instead. At the meeting, Wagner accused them of loafing and demanded to know what they had done during the week before. Since employees do not keep detailed time cards, they tried to reply to the best of their recollection. Miller's medication made it more difficult for him to give a comprehensive response. He read a statement he had prepared for the meeting, denying loafing, and noting that his work on November 6th and 7th was hampered by a faulty gas heater, which was not heating the building and was possibly leaking gas:

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As a result, and with R. Lohry's full knowledge, I worked on related tasks as well as assisting R. Vaughan, Shop Foreman, with tasks requested by him.

Related tasks include shopping for necessary hardware and solving problems regarding proper assembly of bleachers.

Jobs for R. Vaughan included delivery of a truck, travel to highway dept. for fuel, and moving vehicles in the area.

Other matters include Park Opening (as scheduled) and an extended discussion with R. Lohry regarding a change in scheduling, the problem of the malfunctioning gas heater, and the purchase of hardware for the bleachers.

I do not keep a daily log of my activities. But R. Lohry was present both days and aware of my activities. At no time did he indicate to me that he was displeased with my work. The first I was made aware of a problem was Thursday, 9 Nov 95, at 2:30 PM when W. Wagner suspended me for 1 day (Friday, 10 Nov 95)

Chris Christensen then read a statement regarding his activities on November 6th and 7th:

- Nov. 6 - could smell gas on Fri. Nov. 3
- Furnace repairman was working on furnace on Fri. Nov. 3 - Reported for work at 7 AM
  - Observed work list to see "Work on Bleachers"
  - Went to new storage shed where bleachers were and determined the furnace wasn't working, the furnace was trying to light but couldn't and no heat was evident, it was making a funny noise
  - New storage shed was very cold
  - I was concerned about the safety hazards of a malfunctioning furnace
  - The furnace problem was reported
  - Call J. Christensen for P.O. for Fastenet to pick up a previously ordered order
  - Went to Fastenet to pick up order
  - Checked several times throughout the day to see if the furnace problem was corrected - it was not
  - Called Geneva, Ala. two times for technical assistance to assemble bleachers
  - Went to Barn E to check on bleacher parts as per a conversation with the manufacturer
  - Picked up some bleacher pieces and returned to the new storage building
  - Continued to work off the work list "Work on Bleachers"
  - At no time during the day did Mr. Lohry approach me and tell me that my work was unsatisfactory!

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Nov. 7

- Reported for work at 7 AM
- Observed work list to see "Work on Bleachers"
- Went to new storage shed and observed that the furnace was still not working, the furnace was making a funny sound and no heat was evident
- New storage shed was very cold
- I was concerned about the safety hazards of a malfunctioning furnace
- Met with Mr. Lohry about questions concerning the changes in park openings and weekend duty
- Reported to Mr. Lohry that the furnace was still not working
- No other orders were issued by Mr. Lohry
- Mr. Lohry had a question about bolts from Fastenal
- As the furnace was not working in the new storage building, I found out truck P-51 needed to be delivered to Pommerening Chev. for service work and volunteered to deliver the truck for Bob Vaughan, our mechanic
- Mr. Lohry was present to hear all this and didn't object
- Mr. Vaughan also asked if I could put propane in truck P-32, I agreed
- With Mr. Lohry's knowledge, I drove truck P-51 to Pommerening Chev. to be worked on. Paul Miller followed me in truck P-32.
- After dropping off the truck at Pommerening Chev., Paul and I went next door to Fleet Farm to check on bolt prices for additional carriage bolts needed for bleacher assembly
- Proceeded in Truck P-32 to Hwy. Dept. to fill up with propane.
- Returned to Shop area
- Furnace still not working
- Acquired various misc. small tools and pieces needed to work on bleachers
- Continued to "Work on Bleachers" as per work list
- At no time during the day did Mr. Lohry approach me and tell me that my work was unsatisfactory!

Wagner listened to their statements, and then advised Christensen that he would be suspended for three days, and Miller that he was fired.

Additional facts, as necessary, will be set forth below.

#### **IV. Arguments of the Parties**

##### **A. The County's Initial Brief**

The County asserts that each of the acts of discipline against Miller is supported by just cause and, since the suspension of Christensen flowed from the same facts as the discharge of Miller, the Christensen suspension was also imposed for just cause. The County's burden is to show that the preponderance of the record evidence establishes misconduct. The evidence against Miller and Christensen is more than ample.

The three day suspension against Miller resulted from his blatant insubordination against Robert Lohry on September 14th. On that occasion, he yelled at his supervisor, spit in his direction and called him an "asshole". Obviously, the grievant denies taking these actions, but the testimony of Lohry should be credited. Miller admits that he did not deal well with stress, and his own grievance characterized this as a stressful interview. The record shows that he has a history of becoming upset and aggressive when questioned or challenged. He also has a history of animosity towards Lohry, and of trying to avoid Lohry whenever he came to the park. These traits and behaviors are consistent with Lohry's testimony that the grievant became very upset on September 14th. His testimony is further buttressed by the fact that he immediately called Jeffrey Christensen to relate the grievant's behavior. The arbitrator must resolve the differences between Lohry's account and that of Miller, and the great weight of the circumstantial evidence supports Lohry.

Miller's conduct is obviously insubordinate, and it calls for a strong disciplinary response. Even though the normal progression of discipline begins with a written reprimand, the progression is not absolute, and the contract itself recognizes that the normal sequence of discipline "need not be followed in situations calling for immediate suspension or discharge". This is just such a situation. The County simply cannot tolerate an employee swearing, yelling and spitting at a supervisor who is questioning him about his work performance, and a written reprimand would not be sufficient to bring this lesson home to the grievant.

Turning to the five day suspension, the County established beyond any question that the grievant's truck ran up 5,125.8 miles between June 2, 1995 and August 19, 1995. Between August 19th and September 19th, the mileage was 1,937.2 miles. A round trip by the most direct route between the Parks Shop and the Winneconne Community Park is 20.4 miles. Miller was assigned to truck P-33 every day that he was working in the Winneconne Community Park, and the only reasonable inference is that he ran up these excessive miles. This inference is supported by the fact that Miller himself fueled the vehicle on most occasions, including two days when he

filled it up twice. On August 5th, he put 12 gallons in the tank, then returned later to add 9 gallons. On September 18th, he put 8.2 gallons in at the beginning of the day, and later added 21.3 gallons. Fuel and mileage records show an average miles-per-gallon of 15.8 m/p/g. It is extremely unlikely that he did not fill the tank at the beginning of each of these days, and his gas usage therefore indicates a daily mileage that simply cannot be explained by his normal duties. Over the entire period, the gas consumption when he exclusively worked at Winneconne and used the truck is two to three times greater than when another employee was exclusively assigned to Winneconne and truck P-33.

The County's belief that Miller was taking the truck on non-work related drives is supported by the various sightings of him and his truck at locations around the County which are not on the route between his work assignment and any legitimate destination. He admitted at the arbitration that he would take the truck on diversions, to relieve the stress of working in the park, and would take roundabout routes between the park and the Shop. The inference that he was driving around for no good reason during work hours may also be drawn from the very poor condition of his park during the summer of 1995. Garbage was not emptied and the grass was not cut. Clearly the grievant was not spending his time at his assigned duties. The only reasonable conclusion from the excess mileage, the various sightings of the grievant away from his work area and the condition of his work area is that he was shirking his duties during the summer of 1995, accepting pay for work not performed, and using the County's truck for his personal expeditions.

Coming on the heels of the insubordination to Lohry, the County could have reasonably concluded that he would not modify his behavior if its disciplinary response was limited to a written reprimand. Thus another suspension was merited, and the arbitrator should sustain the County's action.

The bleacher incident in November was the last straw with respect to Miller, and also resulted in Christensen's suspension. The two men were assigned as a team to assemble metal bleacher segments over a three day period. They did not complete any units and could not account for more than three hours of time over the three days. Their explanation of their activities during those three days included both of them going to the hardware store, once to price bolts and again to buy bolts, both of them going to the office to return change after making a purchase, both of them warming up pizza on non-break time while waiting for a battery to charge, and Miller taking a 90 minute nap because he had a headache. The men also complained that a heater was not working in the garage, but did not explain how that prevented them from doing any work. The only conclusion is that they were loafing. In light of the suspensions imposed on Miller earlier in the Fall of 1995, the County was entitled to discharge him as the final step in the discipline procedure. As for Christensen, a written reprimand would have rewarded him, by leaving him with three days of pay he had not earned. A three day suspension was a more appropriate and measured act of discipline, and the arbitrator should not upset the County's decision in this regard.

Since Miller's misconduct in each case was proved by the preponderance of the evidence, and Christensen's loafing was likewise proved, the County had just cause for discipline. In each case, the discipline was reasonably related to the seriousness of the offense. Thus the grievances should be denied.

## B. The Union's Initial Brief

The Union takes the position that the discipline was not imposed for just cause, and that both employees should be made whole for their losses. Addressing the charge of insubordination against Miller, the Union argues that any problem on September 14th was largely the County's own doing. Lohry confronted Miller at his work site and badgered him about his reasons for being at the intersection of County Highway "X" and Oak Ridge Road earlier in the day. The badgering continued even after Miller insisted on having a witness present, in clear disregard of his Weingarten rights. Lohry took these actions knowing that Miller was being treated for anxiety and depression. Miller was upset by Lohry's conduct, repeatedly saying "no" in response to the continued questioning, a stress management technique that he had been taught as part of his treatment. Even if Lohry took this as insubordination, it was not intended that way and in any event must be viewed in the context of his known anxiety problems. As for the claim that the grievant spit in Lohry's direction, Miller denies this and there is no evidence that any spittle was directed at or hit Lohry. The Union finds Lohry's claim that he was calm throughout this entire sequence to be incredible, and suggests that a certain amount of latitude should be granted for the tone of voice and even the possibility of profanity in the midst of an argument. At a minimum, the context of this interaction shows that a three day suspension is completely uncalled for. In sum, Lohry initiated the confrontation, knowing that the grievant would probably have an adverse reaction. He could easily have avoided this by simply giving Miller some warning of the interview and allowing him a witness when he asked for one.

The five day suspension for misuse of a County vehicle is completely unsupported. Miller did not have exclusive use and control of this vehicle during the period from June 2nd through September 19th. Even though the County conducted a secret investigation from August 19th to September 19th, it failed to monitor daily mileage or compare his usage to that of other employees. Thus there is nothing to show that Miller was responsible for the "excess" miles on truck P-33. Neither is there evidence that the miles on the truck during the summer of 1995 really were excessive. There was testimony to the effect that employees made multiple trips back to the shop during the day for hauling garbage, getting equipment and other legitimate purposes. Further, the grievant sometimes used an indirect route for traveling to the shop, a route that requires somewhat greater mileage than the alternate proposed by the County, but which is not greatly different in terms of time, and which avoids traffic. The grievant's use of this route had been on-going for a period of years, and was not something that he hid from management. He was never ordered to use a particular route for going to and from the shop, or for travel between the park and the hardware store on the south side of Oshkosh. He was never warned to reduce his mileage on the truck, or given any direction at all to change his methods of doing his work. The County's claim that the condition of Winneconne Community Park somehow proved that the grievant was not spending his time at the park is absurd. The Union notes that the County never counseled or disciplined Miller for the condition of the park, and if this was truly a concern the County would have taken some action.

The discipline against Miller and Christensen in November of 1995 is simply the final step in the County's effort to eliminate Miller's job. The men worked on a variety of tasks during the

three days, and managed to finish only one and a half bleachers. This may have been low production, but the two were never told to stop doing other tasks and work exclusively on the bleachers. Lohry was their immediate supervisor. He was in the area at all times, and checked their progress several times each day. He gave them no indication that he was displeased by their work, much less that he was thinking of having the Personnel Director come out and discipline them. The Union argues that Lohry's inability to manage should not be held against these two employees. They were at all times engaged in some sort of productive activities, and if he had concerns about the low priority they were giving to the bleachers, it was his responsibility to tell them so. The Union notes that there is less urgency about the work in the Parks Department in the winter months than in the summer, and the grievants had no way of knowing that the bleachers should be their sole concern. The Union also notes that the grievants' work on the bleachers was being done in a facility with a broken heater, and that this would explain their willingness to put other work ahead of the project. Further, the bleachers were missing some parts, as well as the assembly instructions. This led to time being spent on obtaining parts and calling manufacturers.

While they may not have been breaking their backs, the two grievants were not malingering, and the County has offered nothing to show that the problem was their lack of effort rather than Lohry's lack of management.

The harsh disciplinary response is attributable to Christensen's casual demeanor in responding to Bill Wagner, and the Personnel Director's anger at what he viewed as disrespect. This view is reinforced by the fact that Wagner initially suspended both men for one day and then, even though none of the underlying facts had changed, increased it to a three day suspension for Christensen and a discharge for Miller. The County's entire course of conduct, in first disciplining the men for failing to complete a project for which no deadline had been set, and then increasing the discipline after it had been imposed, is inconsistent with the principles of just cause.

The arbitrator should therefore set aside the discipline and make the grievants whole.

### C. The County's Reply Brief

The County denies that Lohry somehow created a problem on September 14th. Again, the preponderance of the evidence supports Lohry's account of events. The citation of Weingarten ignores the fact that he was not disciplined for the matter he was being asked about, i.e. his whereabouts that morning. Instead, he was disciplined for spitting at his supervisor and calling him an "asshole". His rights under Weingarten extend to refusing to participate in the interview if he has a reasonable belief that discipline might result, not to abusing the supervisor who is attempting to interview him.

The suspension for misuse of the truck P-33 was put in motion by complaints about the excessive mileage on the vehicle and the poor condition of Winneconne Community Park from other employees. One of the conditions complained of was the fact that trash barrels were overflowing when other employees reported to work the park on weekends. Park usage during the week, when Miller worked, was minimal. This refutes the Union's claim that Miller was making numerous trips each day to haul garbage back to the shop -- the volume of business did not justify the claimed trips, and the volume of garbage left to other workers indicated that he was not hauling the trash out. The County also rejects the Union's claim that there is no proof that Miller

ran up the excessive miles. This may be conceivable, but the fuel logs show that it was the grievant, not Dan Perry or Chris Christensen, who was using great quantities of fuel. The reasonable conclusion is that he was running up excessive miles, and the County reiterates its observation that this conclusion is consistent with the reports of the grievant being seen at various spots around the County.

The County points out that the Union's brief is misleading when it claims that Miller and Christensen assembled one and a half bleachers. One and a half bleachers were assembled before the job was assigned to them. They assembled no bleachers in three days. A group of temporary employees, by contrast, assembled three sets of bleachers in one day. Even by their testimony, it is clear that the two men did very little work of any kind during the three day period of November 6th, 7th and 9th. There is no reasonable explanation for their complete lack of productivity, other than that they were shirking.

#### D. The Union's Reply Brief

The Union disputes the County's claims that circumstantial evidence supports a finding that Miller was insubordinate to Lohry on September 14th. The County asserts that there were numerous sightings of Miller's truck around the County, when only three instances were cited, and the grievant had an explanation for all three. The claims that he has a history of aggressive behavior is completely unsupported. The County is relying on a one day suspension for an incident with another employee, which predates this by six years and did not involve Lohry. Contrary to the County's suggestion that Lohry remained calm, he himself admitted to being in a "cool rage". The Union protests that the County ignores the fact that it knew very well that the grievant was suffering from an anxiety disorder, and that Lohry knew or should have known that questioning him would provoke a very strong reaction.

The County's arguments in support of the five day suspension are flawed and misleading. It contends that the measure of normal daily mileage should be the "normal and quickest route" between the Parks shop and the Winneconne Community Park. The route proposed by the County is only the "normal" route in an after-the-fact sense. The grievant was never told to use a particular route. The route he used was a rational way of going from one point to the other. The County's claim that 20.4 miles per day should be the norm for mileage on this truck completely ignores the need to make trips to the hardware store or back to the shop. The County's own simplistic and flawed calculations show that the other two employees who regularly used the vehicle "averaged" 34 miles per day, drawing into question their contention that there is any norm for mileage. The Union reiterates its primary contention about this charge, which is that there is simply no proof of who put what number of miles on truck P-33 and in the absence of such proof, there can be no discipline against the grievant.

The County's argument involving the bleacher incident is riddled with inaccuracies. The County claims that Miller admitted sleeping for 90 minutes on the job, while what he said was that

he sat down for 30 minutes because he had a headache. The fact that the two men went together to accomplish some tasks that would only have required one of them reflects the fact that they were working as a team, and that realistically one man could not work alone on assembling bleachers. The amount of time involved in these joint activities was minimal, and had little bearing on their productivity during these three days. The more salient fact is that the bleachers themselves had no assembly instructions and had missing parts. While temporary employees did assemble three sets, they had the grievants' bleachers to use as a guide, the heater was working in the building that day, and they still assembled them incorrectly.

The most glaring defect with the County's discipline in this case is that Wagner imposed a one day suspension on both men, and then changed it to a three day suspension for Christensen and a discharge for Miller. Enhancing discipline where there has been no material change in the facts violates the principles of just cause.

## **V. Discussion**

The issues in this case are whether each of the acts of discipline was supported by just cause and, if so, whether the discipline imposed was consistent with the tenets of progressive discipline recognized by the collective bargaining agreement.

### **A. Just Cause - September 14th Incident**

The charge of insubordination stands or falls on credibility. There is actually little dispute as to the events that occurred, but there is a substantial dispute as to the tone of the confrontation. According to Lohry, the grievant spit at his feet, called him an "asshole" and refused to speak with him about why he was seen driving his County truck in locations which Lohry felt could not have been work-related. The grievant testified that he may have spit during this incident, but denies spitting at Lohry. He also acknowledges that he might have called Lohry an "asshole", and admits that there came a time when he discontinued their conversation, demanded representation and ordered Lohry to leave the park. However, he characterizes this as a case of Lohry coming to the park in a very agitated state, and becoming furious as the conversation proceeded, while Lohry admits to a cold anger at the grievant's behavior but denies that he showed any anger or provoked the grievant in any way.

Miller and Lohry were the only two witnesses to the incident, and aside from their testimony there is no direct evidence of how events unfolded. However, I agree with the County that the circumstantial evidence favors Lohry's charges over Miller's denials. In particular, the fact that Lohry immediately reported the incident to Jeff Christensen, including the details about spitting and swearing, leads to the conclusion that either events took place as he described, or that he was deliberately trying to get Miller in trouble. The latter conclusion is nothing more than speculation. There is some history of tension between the two men, in that Miller and other employees grieved Lohry's return to duty after brain surgery several years earlier, but Lohry had not attempted to discipline Miller in the intervening time, and there is no reason to assume that he

simply chose this particular day to begin some sort of vendetta against Miller. Given this, and in light of Miller's admitted difficulty in dealing with stress and his aversion to meeting with his supervisor, I conclude that Lohry's description of the incident is more plausible than Miller's.

Miller's refusal to continue with the interview unless a witness was present is within his rights, under the Weingarten line of cases. This was an investigative interview, and he could reasonably have anticipated discipline if Lohry concluded that he had engaged in personal side trips with a County vehicle, during work hours. Thus he could decline to further participate in the interview. Weingarten rights do not, however, entitle an employee to abuse a supervisor. Raising one's voice in a discussion may or may not be insubordination, depending upon the tone of the discussion and other surrounding circumstances. Spitting at a supervisor and calling him a vulgar name are both blatant acts of insubordination. The grievant's testimony that he may have spat on the ground near Lohry but did not intend to spit at Lohry is rather hard to credit. While no one can know what another person subjectively intends by an action, spitting on the ground at someone's feet during an argument would be interpreted by most as an indication of contempt. In the context of this exchange, with a vulgarity following closely on the heels of the spitting, an objective observer would have to conclude that the grievant's action was not accidental or unintended.

Miller was guilty of insubordination on September 14th. The Union asserts that Lohry must share some of the blame, since he knew that the grievant suffered from anxiety and depression, and so should reasonably have foreseen a strong response to his attempted interrogation. Without attempting to articulate some broad doctrine on dealing with employees suffering from psychological problems, I conclude that a routine inquiry from a supervisor about a work performance issue is part and parcel of normal work life and that Lohry could not reasonably have expected the type of response that he received. There may have been better ways to approach Miller, but nothing in Lohry's behavior suggests that he was trying to provoke or torment him.

Insulating Miller from discipline in this instance would effectively exempt him from being supervised. While the County had sufficient information concerning his condition to be on notice that it should not place him in a position of extraordinary stress, the interview by Lohry was hardly remarkable. Thus I find that Lohry did not provoke or otherwise share in the blame for the grievant's misconduct, and that the County had just cause to impose discipline on Miller for his insubordination.

#### B. Appropriate Measure of Discipline - Insubordination

In Article 8 of the contract, the parties embrace the tenets of progressive discipline:

An employee may be suspended, discharged, demoted, or otherwise disciplined for just cause. The sequence of disciplinary action shall be written reprimands, suspension and discharge...

The contract also recognizes the usual principle that the progression of discipline is not absolute,

and that the penalty in a given case should reflect the seriousness of the misconduct:

The above sequence of discipline need not be followed in situations calling for immediate suspension or discharge.

The County takes the position that the grievant's insubordination is just such a situation, and that an immediate suspension was necessary to protect the authority of its supervisors. The County's judgment in this regard is not unreasonable. Miller's conduct was thoroughly insubordinate, in that he not only yelled at his supervisor and ordered him out of the park, but he also spat in his direction and called him an "asshole". Insubordination cases tend to be very fact specific, and there is no general standard that can be used to divide them into categories of seriousness. Given the degree of abuse Miller directed at his supervisor on September 14th, the County could reasonably have concluded that this case required more than a reprimand, and its decision to impose a three day suspension cannot be said to have violated the contract.

C. Just Cause - Excessive Mileage

The underlying reason for Lohry's questioning of the grievant on September 14th was his belief that excessive miles were being placed on the vehicle used for Winneconne Park, truck P-33. The truck averaged in excess of 60 miles per day between June 2nd and September 19th, while the round trip between Winneconne and the Shop by the most direct route is just over 20 miles. The grievant worked in the park and used the truck about 70% of the time between these dates:

Person Assigned to Winneconne Park	Dates Assigned 1/	Fueling Date	Amount and Initials 2/
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**Odometer Reading at June 2nd Oil Change - 49,324.6 miles**

Chris Christensen:	June 2nd - 5th	June 2nd	21.0 - CC
Paul Miller:	June 6th - 15th	June 9th	21.0 - PM
Chris Christensen:	June 16th - 19th	June 16th	24.1 - LC
Paul Miller:	June 20th - 29th	June 21st June 26th	20.3 - PM 29.4 - PM
Chris Christensen:	June 30th - July 2nd	June 30th	13.0 - CC

1/ Information drawn from County Exhibits #3, 5 and 8.

2/ Information drawn from County Exhibits #5 and 8.

Paul Miller:	July 3rd - 13th	July 5th July 12th	13.1 - PM 25.0 - PM
Chris Christensen:	July 14th - 17th	July 14th July 17th	5.7 - CC 8.4 - CC
Paul Miller:	July 18th - 27th	July 20th	14.8 - PM
Chris Christensen:	July 28th - 31st	July 28th July 31st	27.7 - CC 9.3 - CC
Paul Miller:	August 1st - 10th	August 5th August 5th	12.0 - PM 9.0 - PM
Chris Christensen:	August 11th - 14th	August 11th	19.3 - DP
Paul Miller:	August 15th - 24th	August 16th August 24th	24.9 - PM 26.6 - PM

**Odometer Reading at August 19th Oil Change - 54,450.4 miles**

Chris Christensen:	August 25th - 28th	August 25th August 25th	5.7 - CC 10.1 - LC
Paul Miller:	August 29th - Sept. 7th	Sept. 1st	29.7 - PM
Dan Perry:	September 8th		
Chris Christensen:	September 9th - 10th	Sept. 9th	21.0 - CC
Dan Perry:	September 11th - 12th		
Paul Miller:	September 13th - 18th	Sept. 18th Sept. 18th	8.2 - PM 21.3 - PM
Dan Perry:	September 19th		

**Odometer Reading at September 19th Oil Change - 56,387.6 miles**

Totals

109 days worked  
 420.6 Gallons dispensed  
 Total Miles Driven - 7,063  
 16.8 miles per gallon  
 Average Daily Mileage - 64.8 miles

Percentage of Time Worked

Fuel Dispensed

Paul Miller - 78 days (71%)	255.3 Gallons (61%)
C. Christensen - 27 (25%)	111.8 Gallons (26%)
Dan Perry - 4 days (4%)	19.3 Gallons ( 5%)
Louie C.	34.2 Gallons ( 8%)

While Miller, Christensen and Perry were the primary users of the truck, other Parks Department personnel had access to the truck from time to time, and used it as well. No one was able to testify exactly who, other than these three men, used the truck between June 2nd and September 19th, or how many miles they accumulated. The fuel logs show who fueled the truck on particular days, but they do not show the time of day or who used the fuel that was being replaced.

Looking only at the time periods during which Miller was assigned to truck P-33 and fueled the truck more than once, from June 21st - June 26th, Miller worked every day. He filled the truck on the 21st, and added 29.4 gallons of fuel on the 26th. Depending upon when he

fueled the vehicle on those days, this represents a maximum consumption of 7.4 gallons per day (if it was fueled at the end of the day on the 21st and the start of the day on the 26th) and a minimum of 4.9 gallons per day (if it was fueled at the start of the day on the 21st and the end of the day on the 26th). If he fueled the truck at the same time on each day, the fuel consumption was 5.9 gallons per day, or 99 miles per day. He filled the truck on July 5th, and again on July 12th, adding 25.0 gallons. Again, the range of daily gas consumption is from a minimum of 3.1 gallons per day to a maximum of 4.1 gallons per day, with an average of 3.6 gallons, or 60 miles per day. From August 16th through August 24th, 26.6 gallons were used, with a range of between 3.0 and 3.8 gallons per day and an average of 3.3 gallon, or 56 miles per day.

Looking at the times that Chris Christensen had P-33 assigned to him and fueled it more than once, the fuel logs show that he filled the truck on July 14th and again on July 17th, adding 8.4 gallons. The range is between 2.1 gallons and 4.2 gallons with an average being 2.8 gallons per day, or 47 miles. When Christensen had the truck between July 28th and July 31st, however, the truck used 9.3 gallons, with a range of 2.3 gallons to 4.7 gallons, and an average of 3.1 gallons, or 52 miles per day. The average mileage for these two periods is roughly 50 miles per day, which draws into question the County's 30 mile per day estimate of what is normal for someone other than the grievant working at Winneconne Community Park.

The inference that the grievant was accumulating more miles than were necessary for someone using direct routes and making a single daily round trip to the Park with an occasional trip to a hardware store is not wholly unreasonable. He used truck P-33 about two-thirds of the time. However, the conclusion that he probably ran up the bulk of these miles is not sufficient in this case. There are several problems with the County's theory. First and foremost, the County's case is almost purely inferential. The truck was not within his exclusive control, and it cannot be said with certainty that it was he who accumulated the excess miles, only that it seems more likely than not. Once Lohry was notified of the concerns about mileage on truck P-33 on August 19th, he did not check the daily mileage on the truck when Miller used it, or even spot check it, relying instead on Vaughan to record the mileage at the next oil change one month later. This leaves open the possibility that someone else was contributing to the excess mileage during that 31 day period.

The decision to use gross mileage numbers over three and a half months as the basis for disciplinary action also raises questions about the grievant's ability to effectively defend himself. The discipline was imposed for "failure to provide a satisfactory explanation" of the excessive mileage on the truck. His description of his mileage and routes was general in nature, but given the nature of the charges, it could hardly have been otherwise. Had he been confronted with specific daily mileage numbers for the preceding week, he could have been expected to be able to account for his specific movements. Asked to justify mileage over a 109 day period, few persons could be expected to provide any clear accounting. This does not absolve him of responsibility for his actions during this period, but it does explain his inability to provide clear explanations of the possible reasons for the large number of miles on the truck.

Beyond the problems posed by the County's use of gross mileage, the discipline here assumes that if the grievant ran up more miles than were minimally necessary for his work, it was because he was out joyriding, rather than attending to County business. First of all, it is not clear that the reasonable daily mileage for Winneconne is 30 miles as claimed by the County. The grievant testified that he customarily took an indirect route to the Park to avoid traffic, and often made an extra run during the day to dump garbage at the Shop. Miller testified that the reduced traffic made the alternate route almost as fast as the direct route, but in terms of mileage the route he described is appreciably longer than the more direct route measured by the County for its argument, roughly 18 miles one way as opposed to the 10 miles estimated by the County. 3/ This would put the minimum mileage at 36 miles per day, before factoring in trips to the Shop or to hardware stores, any of which would have at least doubled the daily mileage. As noted above, in the two periods in which Christensen had exclusive access to the truck, he average 50 miles per day. This is 30 miles beyond the minimum round trip distance of 20 miles, approximately what Miller would have had to run up beyond his "normal" 36 mile route between the Shop and the park in order to average 65 miles per day.

Miller admitted sometimes taking indirect routes to the hardware store and the Shop. He also conceded that he sometimes went for a ride just to get out of the park. There is no rule governing the routes to be used in going from one point to another, but the County has the right to expect its employees to work productively, and to use routes that are reasonably direct and efficient. The County also has the right to dictate the use of specific routes or the shortest routes if it deems such an order appropriate. However, according to the grievant's testimony, the increased distance on his customary route was somewhat mitigated by the lower volume of traffic.

Given this, the route used by the grievant to go between the park and the Shop cannot be considered so far out of norm that merely using it rather than the more direct route would be grounds for discipline without some prior warning.

The discipline in this case assumes that all of the miles beyond what the County judged reasonable were due to time the grievant spent shirking his duties. The evidence does not establish that all of the "excess" miles were attributable to the grievant, nor that the mileage was as excessive as the County claims. Some of the mileage is attributable to the indirect route used by the grievant, and some of it can be explained by multiple trips back to the Shop or trips to the hardware store. Some of it may be attributable to the other employees who used the truck. The stated reason for this discipline is the grievant's failure to provide a satisfactory explanation of the mileage on truck P-33. Given the many problems of proof associated with this charge, I cannot conclude that the evidence proves that Miller misused the truck or the County's time over the period between June 2nd and September 19th.

#### D. Just Cause - November Discipline for Wasting Time

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3/ The estimate of distance is made from the map in evidence as County Exhibit #1.

Miller and Chris Christensen were suspended for failure to properly perform assigned tasks, wasting time and loafing on November 6, 7 and 9th. The basis of the discipline is their failure to make any substantial progress on their primary task for those days, assembling aluminum bleacher units. The County contends that they performed no work on the bleachers during these three days, while the Union argues that they completed one and a half units. This factual discrepancy reflects the state of the record, in that Lohry testified that they had completed one and a half units by the end of the day on Monday, November 6th, while neither grievant mentioned actually assembling any units in their accounts of these three days, aside from a very general reference to "working on the bleachers". The record is far from clear, but Lohry's testimony of his observation that one and a half were finished on Monday is more persuasive than the inferential evidence that none were completed. This conclusion is based in part on the fact that some of the parts needed for assembly were not purchased until Monday, and thus none of the units could actually have been completely assembled prior to that time. This leaves Tuesday, November 7th and Thursday, November 9th as days on which no bleacher units were completed.

Miller admitted sitting down for half an hour on Thursday with a headache, and both men spent a few minutes warming up a piece of pizza during work hours. Beyond this, there is no evidence of the grievants playing cards, reading the paper or otherwise loafing on Tuesday and Thursday. The basic evidence against them consists of the lack of progress on the bleacher project and their failure to fully account for their time on these days. It is obvious that the two employees were not giving the bleacher project a great deal of attention on Tuesday and Thursday.

Despite their claim that missing instructions slowed them, this should not have been a problem after they assembled the initial one and a half units and could use them as patterns. Their complaint that the heating unit in the new shop was not working and may have been unsafe on Tuesday may explain a reluctance to work in the new shop, but there is no evidence that they told Lohry when they met with him that they were suspending work on the bleachers, or that he told them to suspend this work. To the extent that they redirected their efforts to other tasks, it was done on their own initiative.

Contrary to the County's assertions, there is evidence that the grievants performed productive work on Tuesday and Thursday. On Tuesday, they met with Lohry for a time to discuss the heater and the implications of changes in opening times for the parks. They also transported a vehicle to the local dealership, fueled another vehicle at the Highway Department shop, and sought fasteners for the bleacher project. On Thursday morning, the men claim to have worked for a time on the bleachers, moved a trailer out of the shop, and moved some trucks for Bob Vaughan. They then spent an hour going to a hardware store for fasteners. They broke for lunch, and afterwards they charged a truck battery so that they could move the truck to make room for bleacher construction. The grievants' account of their time leaves little doubt that while some productive work was performed, they were, at best, working at a languorous pace on Tuesday and Thursday.

While the evidence strongly indicates that Miller and Christensen were not working very

hard, it also raises substantial questions about their supervisor's role during these three days. Lohry was on-site each day, and intermittently observed both employees and their progress, or lack of progress, on the bleacher project throughout this period of time. He was with them when they met with him to discuss the heater and the change in schedules, and he was present when they volunteered to transport the truck to the dealership and fuel the propane powered truck. He never cautioned them or gave them additional instructions until Thursday afternoon, when he and Wagner imposed the initial one day suspension on them. In short, Lohry was of the opinion that the two men were not performing much work and knew they were doing things other than work on the bleachers, yet did nothing to discover what if anything they were doing, or to redirect them to the bleacher project. This is an exceptionally passive approach to supervision.

The County has a right to expect its employees to put forth a reasonable effort for their pay, and the grievants must have known that they were not working very hard on Tuesday and Thursday. At the same time, there is always some variation in the intensity of effort that workers put forth from day to day, and if the purpose of having a supervisor is to monitor work, correct behavior and avoid problems, a supervisor has some responsibility to tell employees when their performance is not up to par. Lohry stood silent for at least two full days in the face of the grievants' lack of progress on the bleachers.

It appears that neither party completely lived up to what the other might reasonably expect. The employees failed to give the effort the County expected. The supervisor imposed discipline without first warning the employees that their level of productivity was unacceptable. It is axiomatic that an employee cannot be disciplined without some knowledge that he or she is engaging in misconduct. However, this knowledge need not come about as the result of a direct caution from the supervisor. There are some things that are matters of common sense, and the duty to give a fair day's work is one of these. The problem comes in judging where the line falls between not working hard, but still giving what one believes to be a minimally acceptable effort, and putting in so little effort that the employee must know the conduct constitutes loafing. As discussed above, there are always variations in the intensity of work. The autumn and winter months are the off-season in the Parks Department, and there was no deadline on the bleacher project. Lohry was on-site, and intermittently observing the grievants. The burden of proof lies with the County, and I cannot conclude, on the state of this record, that these two employees should have understood that their lack of effort had crossed the line to the point of exposing them to formal discipline, without some prior warning or comment by their supervisor.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

#### AWARD

1. The County had just cause to suspend Paul Miller for three days for insubordination;

2. The County did not have just cause to suspend Paul Miller for failing to provide an acceptable explanation of the mileage on Truck P-33 between June 2nd and September 19th;
3. The County did not have just cause to discharge Paul Miller for failure to complete assigned tasks, loafing, and wasting time on November 6, 7 and 9th;
4. The County did not have just cause to suspend Chris Christensen for three days for failure to complete assigned tasks, loafing, and wasting time on November 6, 7 and 9th;
5. The appropriate remedy in the case of Paul Miller is to reinstate him to employment, make him whole for his losses as a result of the five day suspension and the discharge, and to remove any reference to those disciplines from his personnel file;
6. The appropriate remedy in the case of Chris Christensen is to make him whole for his losses as a result of the three day suspension, and to remove any reference to the discipline from his personnel file;
7. The arbitrator will retain jurisdiction over this case for a period of thirty days from the date of the Award for the sole purpose of clarifying the remedy if requested.

Dated at Racine, Wisconsin this 11th day of September, 1996.

By Daniel Nielsen /s/  
Daniel Nielsen, Arbitrator