BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

AFSCME COUNCIL 40, AFL-CIO

and

IOWA COUNTY (HIGHWAY DEPARTMENT)

Case 88
No. 54408
MA-9671

Appearances:

Mr. David White, AFSCME, Staff Representative 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

Mr. Howard Goldberg, Brennan, Steil, Basting & MacDougall, S.C. P.O. Box 990, Madison, Wisconsin 53701-0990, appearing on behalf of the County.

ARBITRATION AWARD

On September 6, 1996 the parties filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint a member of its staff to hear and decide a grievance pending between the parties. The Commission appointed Debra L. Wojtowski to hear and decide the matter. A hearing was conducted on November 27, 1996 in Dodgeville, Wisconsin. No transcript of the proceedings was prepared. The parties waived their right to file post-hearing briefs.

This arbitration addresses the allegation that the County imposed disparate discipline for the same offense and improperly demoted John Willborn to the position of Highway Helper.

BACKGROUND AND FACTS:

John Willborn, the Grievant filed the following grievance on June 7, 1996:

> *"I was unjustly disciplined and was discriminated against in my return to work after completing my required counseling. Action lacks just cause. Another employe who was discharged for the same thing was given less severe discipline. Violation of Section 301, 302 and any another provision which may apply."*

The Grievant requested to be "made whole".

The Grievant was employed as a Highway Patrolman by Iowa County for approximately five years. He was based out of the satellite shop located in the Village of Hollandale, and assigned

to Highway Section 26. Prior to this, the Grievant had held other positions in the County Highway Department and has worked approximately eleven or twelve years for the County. In March of 1996, the County was informed that the Grievant's random drug test came back positive for cocaine. In a letter dated March 26, 1996, the County informed the Grievant that his was a dischargeable offense but that he would not be discharged if he agreed to the following conditions:

1. *You will immediately agree to be placed on unpaid leave of absence, until such time as you have fully resolved your substance abuse problems. During said leave, you will not be entitled to accumulate any sick leave, vacation, holidays, or seniority. Any accumulated sick leave that you presently have shall not be available to you until such time as you return to employment status.*

2. *During your leave of absence your health, dental and life insurance can be continued but you will have to pay the entire premium to the Iowa County Treasurer by the 10th of each month. Failure to timely pay the premium shall result in your being removed from Iowa County's health insurance group.*

3. *You will drop all pending grievances that you have filed against the County.*

4. *Before you will be allowed to return to duty, you must be evaluated by a substance abuse professional and you must be found to be fit to return to work. In the event no vacancy exists in the work force, then you will not have the right to bump any other employee who shall have less seniority than you.*

5. *Prior to returning to duty, you must have successfully passed the appropriate drug test that the substance abuse professional shall require and you understand that you will be subject to at least six (6) random tests during the twelve (12) month period following your return to duty. Thereafter, you will be subject to follow-up testing for an additional sixty months.*

6. *The Union also must agree, in writing, to all of these conditions.*

7. *A copy of this letter shall be permanently placed into your personnel file maintained by the County.*

The March 26, 1996 letter also instructed the Grievant to immediately discuss the matter with his Union. Prior to April 12, 1996, the Grievant and his Union Representative, David White, met with Annette Goldthorpe, the County Personnel Director, and Howard Goldberg, an attorney representing the County, to discuss the terms and conditions of the Grievant's return to County employment. The Grievant initially delayed signing the conditions because of his reluctance to drop certain pending grievances he had filed. Another meeting took place on April 12, 1996 with the Grievant, his Union Representative, the County Personnel Director, the Highway Commissioner, Leo Klostermen, and Jim Marn from the County Highway Commission. At that time, the County produced an additional condition, dated April 12, 1996, which the Grievant was requested to sign. The new condition dated April 12, 1996, read:

> *I, John Willborn, do hereby agree that when I return to work from my leave of absence to the Iowa County Transportation Department, that I will remain a County Helper for at least six (6) months.*

It appears "County Helper" means "Highway Helper" as set forth in the labor agreement of the parties and is a lower position than that of Highway Patrolman. The Grievant reviewed the documents and signed the conditions set forth in the March 26, and April 12, 1996 documents described immediately above.

The Grievant was the first employe to test positive for drugs in County-administered tests. Subsequently, at the Dodgeville shop, another employe of the Highway Department tested positive for marijuana in a random drug test. This employe, a janitor, also agreed to certain conditions in order to avoid discharge, including suspension from employment during substance abuse treatment, certification by a substance abuse professional of fitness to return to duty, and ongoing testing. These listed conditions were identical to those offered and accepted by the Grievant. In the case of the subsequently disciplined employe, however, the County did not require that the employe take another position, but returned him to his previously held job as janitor upon his satisfaction of the pre-conditions of treatment and certification.

The conditions precedent to the Grievant's return to work were met, and in March he began working as a Highway Helper, a position which was located in the main highway shop in Dodgeville and which paid six cents less per hour than his previous job. At that time the Grievant also inquired about another vacant position called State Auxiliary, a position he had held previously in the Highway Department and of the same pay grade as that of Highway Helper. Both are one grade lower than Highway Patrolman. The County told the Grievant he would not be allowed to take that vacancy because the Auxiliary position was not located in Dodgeville. The County's justification for its condition of a Dodgeville placement was that the Grievant should be

located where he could be observed and where tests could be easily administered for a certain minimum period. In June of 1996, the County posted and filled the Grievant's former position as Patrolman in the Hollandale shop while the Grievant was still in his initial six months as a Highway Helper. On June 6, 1996, the Grievant filed this grievance. The wording of the Grievant's complaint refers to the disparate treatment he believes was accorded him in not getting his previous position in contrast to the subsequently disciplined janitor who did. Both the occupants of the Highway Patrolman position and the janitor position are drug tested under the Transportation Department's 1991 Omnibus Drug Testing Bill because they are considered to be in safety-sensitive jobs. The Grievant operates heavy machinery on an on-going basis. The janitor is on call for snow removal. The Grievant testified that he did not recollect having been promised his previous position back. The County has testified that no such assurances or promises were made.

ISSUES

The parties were unable to agree to a statement of the issues. Therefore, the Arbitrator defines the issues as follows:

1. Is this grievance properly before the Arbitrator?

2. If so, did the County violate the just cause of the collective bargaining agreement by placing the Grievant in a position at a lower pay grade and requiring him to remain in that position for a minimum of six months under the disciplinary provisions of the collective bargaining agreement?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

> *"3.01 The County possesses the sole right to operate the County and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:*
>
> *… C) To suspend, demote, discharge and take other disciplinary action against employees for just cause; …"*

POSITIONS OF THE PARTIES

At the outset, the County contends that the Grievant did not indicate the nature of his claim and that it is inappropriate to consider it for the first time at the grievance arbitration hearing. It points out that the grievance itself only discusses the County's obligation to comply with a future practice in imposing discipline and does not notify the County that it is the Union's position that

the Grievant is entitled to his former job. Secondly, the County maintains that this matter is not one appropriate for an arbitration hearing in that it does not arise under the contract. Should the arbitrator find the matter to be appropriate for arbitration, the County argues that there is no support for the Union's theory that a disciplinary action must conform with future disciplinary practices. The single difference between the Grievant's discipline and that of the janitor who subsequently committed the same offense, was the requirement that the Grievant return to a vacant Highway Helper position; this difference is entirely justifiable because of the County's reasonable interest in placing the Grievant in the Dodgeville shop where he could be more readily observed and tested.

The County contends that it was within its rights to fill Grievant's former position and that and it would have been unduly disruptive to County operations to keep the Grievant's former position vacant. This is especially true since the County had no guarantees that the employe would successfully complete and pass the agreed upon random tests. The record does not show, and the Union cannot accurately allege, that the employe was promised either that his job would be held open for him or that he would have bumping rights to his former position at any future time. The documents and conditions were reviewed, discussed, signed, and ultimately agreed to by both the Grievant and the Union. These documents do not evidence any agreement to restore the Grievant to his previous Patrolman position. The existence of the offense is not in dispute. The offense is one which permits summary discharge. The County, in lieu of discharge, having agreed to restore the Grievant's employment conditionally, has no obligation to modify its discipline because of subsequently imposed discipline in another incident. This is particularly true where, as here, the discipline varied only in part, the variation was entirely reasonable, and the Grievant accepted re-employment subject to the conditions.

The Union argues that the grievance is appropriately in arbitration in that it arises as a contract matter related to "just cause" for discipline and that the language of the grievance is sufficient to apprise the County of its substance, namely that the Grievant asserts he was treated disparately from another subsequently disciplined employe because his discipline involved a permanent demotion and pay loss. The Grievant is not an attorney, and his request that he be "made whole" communicates his claim with sufficient clarity that after six months he should be restored to his former position. The permanent demotion of the employe was not contemplated by the parties at their April 12, 1996 meeting, and, given the severe nature of this penalty, it deserves explicit expression. The Grievant and the Union were justified in understanding that the Grievant's acceptance of the Highway Helper position job was temporary and that at or around six months he would return to his previous position and the evidence and documents support this contention or are at least ambiguous. Given this ambiguity, the usual rules of contract interpretation require that the documents be construed against its drafter, here, the County. As the five months are over and the employee has continued to comply with the conditions, he should now be permitted to return to his previous position.

DISCUSSION

The Employer has alleged that the subject is not appropriate for arbitration as it is not governed by the contract. This contention is not persuasive as the grievance on its face directly relates to the Employer's right to discipline, including its right to suspend, demote and discharge for just cause under Section 3.01 (c) of the collective bargaining agreement. The documents signed on April 12, 1996 arguably specifies the discipline imposed in this matter, the just cause for which the employe grieves. The Employer has not identified any contract provisions that would preclude the arbitration of this dispute.

I further find that the grievance states the matter in dispute with sufficient particularity. As the Union notes, the Grievant is not a lawyer; nevertheless his grievance, as written, clearly encompasses the concerns addressed at previous steps of the grievance and presented at hearing. In substance, the Grievant alleges that a subsequently disciplined employe was given a less severe penalty for committing the same offense, maintains that this was unjust and discriminatory, lacks just cause, and requests that he be "made whole". Because the record shows that the disciplinary actions were identical in every particular save that the subsequently disciplined employe returned to his former job, it follows that the Grievant seeks to be treated likewise. It has been noted in arbitration that "It has never been required that grievances be submitted in language comparable to that used in formal court proceedings." 1/

There is no dispute that the offense for which the Grievant was disciplined took place. Although in his testimony the Grievant seemed to allege his having to take a lesser grade position for any amount of time lacked just cause and was discriminatory, he did not deny that he had agreed with the condition of taking initially the Highway Helper job. Neither did he file his claim when the second offender was disciplined on May 6, 1996. The June 6 date of his grievance supports a view that his predominate dissatisfaction originated when his vacant former job was filled and that his complaint relates chiefly to what he characterizes as his resulting permanent demotion.

There is no evidence in either the documents or the testimony to support the contention that the Grievant was promised his previous position. The March 26, 1996 and April 12, 1996 documents are unambiguous concerning the Grievant's need to accept the Highway Helper position as a condition of County employment. With respect to his return to work, the March 26 document states, in pertinent part, in Article 4:

> *Before you will be allowed to return to duty, you must be evaluated by a substance abuse professional and you must be found to be fit to return to work.* ***In the event no vacancy exists in the work force, then you will not have the right to bump any other employee who shall have less seniority than you.*** (emphasis added.)

1/ American Bosch Arma Corp., 243 F. Supp. 493, 59 LRRM 2798,2800 (N.D. Miss. 1965).

In fact, although his former position was vacant, another condition, dated April 12th, specified that the Grievant fill the Highway Helper vacancy. The Grievant believes this was discriminatory. The second offender was also returned to a position in Dodgeville, but it happened to be his former position as janitor; the only other available vacancy in the Dodgeville shop was clerical, for which he was not qualified. The Union's objection to the disparity between this Grievant's discipline and the discipline subsequently imposed on the janitor, accords with the traditional view that discipline for the same offense generally merits the same penalty. Often quoted in this regard is Arbitrator J. Charles Short, who stated:

> *The term "discrimination" connotes a distinction in treatment, especially an unfair distinction. The prohibition against discrimination requires like treatment under like circumstances.* 2/

Although discipline should be imposed consistently and equitably: "Where reasonable basis for variations in penalties does exist, they will be permitted, notwithstanding the charge of disparate treatment." (Alan Wood Steel Co., supra.) In this case the County required that the Grievant would return to work at the main Dodgeville shop in order to permit him to be tested and monitored for an initial period. The Grievant's previous position involved working out of a satellite shop near his home and performing most of his work "on site" on a segment of a county highway for which he was responsible. The same location requirement was made of the second offender, who was however already working as a janitor position in Dodgeville where he could readily be observed and tested. As a result, the latter returned to his former position whereas the Grievant did not. Although the County conceivably could have allowed the Grievant bumping rights after some period of time to permit him to return to his former position, the documents appear to evince an intent to avoid such a disruption and specifically preclude that consequence as a condition of the Grievant's return to work. Nonetheless the County's contention is also credible that the Grievant's assignment to the Dodgeville shop was not intended as a further penalty. There is no evidence of an ulterior motive or animus. As the County's justification for such an assignment was reasonable, I conclude that the variation is not discriminatory.

Neither can Section 4 be read to say that the County was required or willing to keep the Highway Patrolman position available for the Grievant. The position involves clearing the road of debris, animals and other obstructions. The County convincingly maintains that it would be unduly disruptive to County operations and responsibilities to keep this position vacant for even six months.

The Union contends the disciplinary document should or could be read to say that the Grievant had a right to return to his former position after six months. Given this ambiguity, created by the drafter, it must not be interpreted in such a way as to favor the County by creating a

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2/ Alan Wood Steel Co. 21 LA 843, 849, quoted in How Arbitration Works Elkouri & Elkouri, Fifth Edition, at page 935. See also Best Food Baking Group, 92 LA 1055, 1058.

permanent demotion.

The Union's theory of the agreement could only prevail if the April 12th language is interpreted as nullifying the March 26th language, either by establishing a right to his old job, in opposition to the prior language that he merely return to "a vacancy", or by way of sunsetting the language denying bumping rights. Even if the subsequent language might be construed so as to nullify earlier parts of the agreement, the rules of contract construction require that where clauses can be read together to give effect to all, they must be.

> *[A] primary rule in construing a written document is to determine the parties' intent not from a single word or phrase or paragraph, but from the instrument as a whole. Each paragraph must be determined in relationship to the contract as a whole…In other words, a section of the contract cannot be isolated from the rest of the agreement and given free standing construction.* [Citations omitted.] City of Highland Park, 76 LA 811, 815.

The April 12th language can readily be read as to harmonize with the other provisions. Reading the conditions cumulatively, pursuant to the March 26th language, the Grievant had no particular claim to his former position, could return to any generic vacancy and had no bumping rights to any occupied position. The subsequently drafted language narrows the Grievant's options from "a vacancy" to one particular vacancy. If all conditions remain in effect there is no need to read them as nullifying any other part of the document nor is there a need to resort to a construction against the drafter, a rule of last resort in interpretation.

Further, the documents are unambiguous that the Grievant would not be permitted to have any other position except Highway Helper for six months. Logically, it follows that the Grievant cannot exercise any rights to another position he may otherwise have under the contract whether by transfer, posting, promotion or any other means, for "at least" six months. It seems equally clear, however, that the Grievant is not locked into the Helper position forever, but may avail himself of contractual remedies to seek an improved position following a successful six month employment experience as a Highway Helper.

The Union also argues that demotion is severe and traditionally disfavored as a penalty. There is no evidence indicating however that the Grievant's placement in the Highway Helper vacancy was devised as a penalty and, in fact, the Grievant himself testified that the reason given to him was the County's desire to monitor him initially upon his return to work. Assuming, however, that the demotion could be characterized as a penalty, the contract section relied upon by

the Grievant indicates that the employer reserves disciplinary rights which include demotion for just cause. The Grievant concedes that the offense took place and that discipline was warranted. The Union has not disputed that the offense is one for which summary discharge is available. It cannot be that just cause exists for discharge but not for demotion, a lesser penalty.

AWARD

The grievance is properly before the Arbitrator. The County had just cause to place the Grievant in a position at a lower pay grade and require him to remain in that position for a minimum of six months under the disciplinary provisions of the collective bargaining agreement.

The grievance is therefore denied.

Dated at Madison, Wisconsin this 9th day of April, 1997.

By Debra L. Wojtowski /s/
Debra L. Wojtowski, Arbitrator