

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LINCOLN COUNTY (HIGHWAY DEPARTMENT)

and

LINCOLN COUNTY HIGHWAY EMPLOYES,  
LOCAL 332, AFSCME, AFL-CIO

Case 152  
No. 54294  
MA-9614

Appearances:

Mr. John Mulder, Administrative Coordinator, Lincoln County, 1104 East First Street, Merrill, Wisconsin 54452-2535, appearing on behalf of the County.

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appearing on behalf of the Union.

ARBITRATION AWARD

Lincoln County (Highway Department), hereinafter referred to as the County, and the Lincoln County Highway Employees, Local 332, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request to initiate grievant arbitration, Edmond J. Bielarczyk, Jr., was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the suspension of an employe. Hearing on the matter was held in Merrill, Wisconsin on December 19, 1996. Post hearing arguments were received by the undersigned by January 23, 1997. Full consideration has been given to evidence, testimony and arguments presented in rendering this award.

ISSUE

During the course of the hearing the parties agreed upon the following issue:

"Did the County violate the collective bargaining agreement when it disciplined the grievant by issuing a one (1) day suspension on or about March 27, 1996?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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ARTICLE III  
MANAGEMENT RIGHTS

The Union recognizes that the management of the Highway Department and the direction of its working forces is vested exclusively in the County subject to the terms of this Agreement. These rights include:

- A. The right to hire, suspend, demote, discipline or discharge for just cause;

. . .

- C. To determine the type, kind and quality of service rendered to the County;

. . .

PERTINENT WORK RULES:

DISCIPLINARY ACTIONS

SECTION I - TYPES OF DISCIPLINARY ACTIONS

- A. Oral Reprimand:

- 1. This is an action taken by a department head (or supervisor) in which an employee is advised about an action or behavior which the department head or supervisor finds objectionable or wishes corrected.

- B. Written Reprimand:

- 1. This is an action taken by a department head (or supervisor) which he writes out the action or behavior which he/she wishes the employee to change, cease or begin. The written reprimand will describe in detail the behavior to be corrected, and

will give direct and concrete orders for the future and will point out the consequences of repeating the action which brought about the written reprimand.

2. A copy of each written reprimand given shall be placed in the employee's personnel file for 1 year. Removal upon request by employee after 1 year, only with Commissioner's approval.

C. Suspension Without Pay:

1. This is an action taken by a department head which removes an employee from employment within their department and from the County payroll for a definite period of time.
2. This action does not require the employee's consent to place him on such a leave without pay.
3. The employee does not accrue salary, annual leave credit or sick leave credit, during the time they are suspended, nor can they use such time while on suspension.
4. At the end of the suspension, the employee shall be returned to the payroll at the same department classification and salary as when they were suspended.

E. Dismissal:

1. This is an action taken by a department head which permanently removes an employee from employment and from the County payroll.
2. Dismissed employees need not be kept in employment or be paid for any time after the completion of their normal working day on the date they are dismissed.
3. Dismissed employees shall be treated the same as employees separated for reasons other than

retirement.

4. Dismissed employees will be paid a lump-sum amount for unused accumulated annual leave.

## SECTION II - METHODS OF NOTIFYING AN EMPLOYEE OF DISCIPLINARY ACTIONS

- A. A written notice of the action, giving specific reasons for the action and the effective dates and conditions of the actions, must be signed by the department head or his authorized subordinate and be presented to the employee in person by the department head or his authorized subordinate, or else sent to the employee's last known address by registered mail, restricted delivery, with return-receipt requested, on/or prior to the effective date of the action.
  1. If the written notice is presented to the person, the employee should sign all copies to acknowledge receipt. If he/she refuses, the presenter should note it on the form.
  2. A copy of the written notice shall be retained by the department and a copy shall be forwarded to the Personnel Department, if required, to be entered into the employee's file and record of employment.

## SECTION III - DISCIPLINARY ACTION MUST BE FOR "CAUSE"

- A. An employee shall receive disciplinary action, whether an oral reprimand, written reprimand, the suspension without pay, or a dismissal only for specific clearly described reasons or "cause" for the disciplinary action taken. An adequate reason or "cause" for a disciplinary action shall include, but not necessarily be limited to, each of the following conducts.

. . .

4. Conduct or performance on the job which demonstrates insubordination, which is defined as a

refusal to follow appropriate written or oral procedures, instructions or directions from a supervisory employee or department head.

. . .

8. Verbal or physical abuse, or improper conduct to any employee of the County or the public.

. . .

- B. In addition, disciplinary action may be taken for reasons or "cause" specifically defined by the department other than those listed here.
- C. The attached suggested code of discipline is used as a guideline for supervisors to appropriate penalties for violation of the foregoing rules. Supervisors may recommend a greater or lesser penalty in those circumstances which include a mitigation or aggravation of the offense.

SECTION IV - DISCIPLINE AND TERMINATION - SOME GUIDELINES

- A. General steps in progressive discipline

STEP 1: Oral warning or oral reprimand within 5 working days of violation or notification of violation.

STEP 2: Written warning or oral reprimand

STEP 3: Suspension without pay - never without a hearing

STEP 4: Discharge - never without a hearing

Considerations to keep in mind:

1. Allegations must be based on fact.

2. Accused has the right to hear the evidence against him/her.
3. The discipline should fit the offense.
4. View discharge as the capital punishment of employment.
5. Be patient - do not act hastily.

B. Termination/Discharge

1. Affirmative Discharge - where the employer takes action to relieve employee of a job.

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## BACKGROUND

Among its various functions, the County has employes snow plow roads. On March 27, 1996 County Crew Foreman Mark Sherfinski received a phone call from the Midway School principle questioning why the school parking lot had not been plowed. Sherfinski told him it would be done and contacted Hugh Gross, hereinafter referred to as the grievant, by radio. Sherfinski told the grievant he wanted the lot plowed and the grievant disputed the directive. The grievant told Sherfinski another employe, Gerald Smith, was on the side of town the school was and wanted Sherfinski to have Smith do it. Sherfinski testified he concluded the radio transmission by stating... "Just go do it." At the hearing the grievant testified he thought Sherfinski said... "Smith will do it." Sherfinski was then contacted by telephone by Patrol Superintendent Jerry Jagmin, concerning the radio transmission. Jagmin felt the grievant's responses were obstinate and rough and informed Sherfinski he did not have to take such responses from an employe.

On the next morning Sherfinski learned the parking lot had not been plowed. He confronted the grievant with the matter and an argument ensued. Thereafter the grievant was given a suspension of one (1) day for insubordination and use of abusive language. At the hearing Sherfinski testified the grievant had told him he did not know what he was doing, was loud, had grabbed his coat, and stated if you don't like it write me up. At the hearing the grievant acknowledged he had a radio transmission from Sherfinski, that he did not plow the school, that it was not uncommon to have radio transmission problems, that he pushed Sherfinski's hand away during their conversation, and testified that as a twenty-five (25) year employe he would not refuse to do work. After Sherfinski gave the grievant a one day suspension and the matter was grieved and processed to arbitration in accordance with the parties grievance procedure.

The record also demonstrates that the grievant had previously been disciplined for insubordination but by his request the matter had been removed from his personal file in accord with the County's Disciplinary Actions work rules.

At the hearing John Swarmer testified he had received a written warning for failing to follow Sherfinski's directive, including hanging up the telephone on Sherfinski during their conversation.

### County's Position

The County contends the grievant was directed to perform work on March 27, 1996 over the radio, the work was not performed as directed, and when confronted by his supervisor, the grievant became abusive toward his supervisor. The County acknowledges that there can be times when it is difficult to understand radio transmissions. However, the County asserts the grievant heard enough to argue with his supervisor to a degree to prompt Jagmin to call Sherfinski telling him he did not have to put up with obstinate and rough language on the radio. The County also asserts the grievant's claim the work should of been performed by another employe is not relevant. The County points out it has the right to assign work, the employe should of performed the work than grieved, and the employe's opinion as to who should perform the work does not excuse verbally abusing or physically grabbing his supervisor. The County concludes the grievant did not do the work he was directed to perform and when confronted, the employe became both verbally and physically abusive.

The County points out it has very specific work rules. The County argues its rules define the types of disciplinary actions, the type of conduct which may result in discipline, and contains guidelines for discipline for various types of conduct. The County argues Section III, of the County's work rules, Number 4 and 8, and Paragraph C., support its position.

The County also argues that the grievant was aware of the work rule about insubordination because he had previously been warned about such conduct. The County also contends the previous disciplinary action of the grievant is not stale and is a part of the progressive discipline in the instant matter. The County argues the rules concerning insubordination and verbal and physical abuse are both reasonable and necessary. The County argues the matter was fairly and objectively investigated with the grievant, his Union representative, the Highway Commissioner and the grievant's supervisor before the disciplinary action was taken. The County argues the grievant was allowed to be heard and to explain his actions prior to the discipline. That the supervisor had first hand knowledge of the verbal and physical abuse and knowledge that the work had not been performed. The County argues the discipline was consistent with discipline given to other employes as well as to the grievant. The County also asserts the grievant's suspension was reasonably related to the seriousness of the offense he committed.

The County concludes the grievant failed to perform work he was assigned to do because

he thought another employe should have been assigned the work, and, when confronted about his failure to perform the work he acted inappropriately toward his supervisor. The County asserts it acted in a reasonable, restrained and appropriate manner. The County would have the undersigned deny the grievance.

### Union's Position

The Union acknowledges many of the important facts in the instant matter are not in dispute. The County must have just cause to discipline the grievant. The County maintains a series of work rules with progressive discipline from "oral reprimand" to "discharge" for repeated or more serious acts of misconduct. The Union points out the County identifies insubordination first offense as written warning with no identified level for "abusive language". The Union also argues such language is commonplace in the work shop.

The Union does assert there is a dispute as to the extent of physical contact between the grievant and his supervisor. The Union points out that the only observer to the full dispute, John Slewitzke, testified he did not believe there was any physical contact between the men.

The Union contends there was no just cause to discipline the grievant and, in the alternative, if there was misconduct on the part of the grievant, the penalty imposed by the County was too severe. The Union contends the matter escalated because of a simple misunderstanding. The Union submits that the exact words of radio traffic can be difficult to understand. The Union points out it was undisputed by the County that radio reception can be difficult to discern, that the vehicles are quite loud, and geographic location can impact on transmission. The Union also points out that at the time of the incident the radio in the grievant's vehicle was mounted in such a manner that vibrations could render transmissions difficult to understand. Under such circumstances it was quite easy for the grievant to conclude that someone else would do the task in dispute. The Union concludes there was therefore no willful failure or refusal to obey a management directive.

The Union also contends that given the grievant did not commit insubordination there was no reason for Sherfinske's unruly verbal attack on the grievant the following morning. The Union points out that it was undisputed that management and employes regularly exchange profane terms in the workplace without any discipline being applied and notes use of such is not identified in the County's work rules. The Union also points out that Sherfinski wrongfully instigated the verbal exchange. The Union suggest that had Sherfinski approached the grievant in a less threatening manner the instant matter could have been avoided.

The Union also argues that the discipline, if warranted, was too severe. The Union contends that suspensions should only be resorted to when minor misconduct cannot be corrected by oral and written warnings. The Union also asserts that the instant matter must be deemed a first offense as the grievant's previous disciplinary action was removed from his personal file. The



Union also suggest that Sherfinski's credibility is in question for alleging the grievant had assaulted him because he did not make any note of it in the disciplinary notice.

The Union would have the undersigned sustain the grievant and make the grievant whole.

## DISCUSSION

The record demonstrates the grievant was contacted by radio by his supervisor, and the supervisor transmitted a work directive. The directive was not followed. The record also demonstrates that the grievant disputed the work directive, argued that another employe should perform the task, and believed the last transmission from his supervisor directed the other employe to perform the duty. The record also demonstrates that the County was aware that radio transmissions can be disrupted and interfered with by road noise and equipment problems. Thus the grievant's claim that he did not receive a directive to perform the task of snow plowing the school parking lot can not be refuted. It is the County's burden to demonstrate that the grievant received the directive and having received the directive, failed to perform it. However, the County has not refuted there can be transmission problems because of geographic locations and the County has not refuted the manner in which the radio in the grievant's truck was mounted could cause reception problems. Therefore, the County has not demonstrated the directive transmitted by the supervisor was actually received by the grievant. Absent such a showing the County cannot demonstrate the grievant committed insubordination. Therefore, the undersigned concludes the County did not have just cause to discipline the grievant for insubordination.

The record also demonstrates the grievant used language over the radio that was deemed rough and obstinate. The undersigned notes here that there was no tape record of the radio transmission. Thus there is no way to review the content or context of the discussion between the grievant and his supervisor. However, the matter was overheard by another supervisor who immediately brought his concern to Sherfinski. The undersigned finds the County does have just cause to place the grievant on notice that the manner in which he responded to his supervisor over the radio was inappropriate.

The record also demonstrates that when Sherfinski confronted the grievant with the failure to perform his directive a heated argument ensued. Following the confrontation and meeting with the Highway Commissioner Sherfinski immediately wrote up the matter. In explaining the nature of the violation Sherfinski wrote... "I told Hugh Gross to Plow Midway School and he became argumentative and did not do it." While Sherfinski did check on the form that the grievant was insubordinate and had used abusive language, there is no indication on the form that the grievant had done anything that was physically threatening to his supervisor. The undersigned notes here that there is a location on the form to indicate if an employe had been involved with an assault or fighting. No employe who observed the matter saw any physical contact between the grievant and his supervisor. The undersigned concludes that had the supervisor written the matter at the time of the incident as part of the disciplinary action the undersigned would review the matter, however, because the supervisor did not note any physical assault on the disciplinary notice to the grievant the actions of the County are limited to those cited on the March 27, 1996 employe warning.

The record also demonstrates that some time ago the grievant had received a written warning for insubordination. This warning was removed from the grievant's personnel record

upon his request by the Highway Commission one (1) year after the issuance of the written warning. The undersigned finds that the County can rely on the previous written warning as an acknowledgement the grievant knew that insubordination would result in discipline. However, as the matter had been removed from his personnel file in accord with the County's own procedures, the County can not then use a removed discipline in progressing discipline to the next step. Further, the grievant's testimony that he knew what insubordination was and would not knowingly refuse to perform a work directive is supported by the County's removal of the old warning from his work record.

Based upon the above and foregoing, and the arguments, evidence and testimony presented the undersigned concludes that the County did not have just cause to discipline the grievant for insubordination. However, the County did have cause to discipline the grievant for his manner in discussing the matter with his supervisor, particularly for his discussion of the matter over the radio. Had the County been able to demonstrate there was insubordination in this matter a suspension of the grievant would be justifiable. However, as the County was unable to do so, the undersigned concurs with the Union that given the grievant's cleansed work record a one (1) day suspension is too severe. Therefore the undersigned directs the County to reduce the discipline to a written notice to be placed in the grievant's personnel file and to make the grievant whole for any lost wages and or benefits.

#### AWARD

The County violated the collective bargaining agreement when it disciplined the grievant by issuing him a one (1) day suspension on or about March 27, 1996. The County is directed to reduce the discipline to a written warning to be placed in the grievant's personnel file and to make the grievant whole for any lost wages.

Dated at Madison, Wisconsin, this 2nd day of July, 1997.

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