

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CITY OF RACINE, Wisconsin**

and

**AFSCME LOCAL 67**

Case 517

No. 54972

MA-9846

(Gerald Highman -- 5 day suspension)

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Appearances

**Mr. John Maglio**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, WI 53401-0624, appearing on behalf of the Union and Grievant.

**Mr. Guadalupe G. Villarreal**, Assistant City Attorney, City of Racine, 730 Washington Avenue, Room 201, Racine, WI 53403, appearing on behalf of the City.

**ARBITRATION AWARD**

The Union requested that the Wisconsin Employment Relations Commission designate an arbitrator to hear and decide a dispute concerning the above-noted grievance, arising under the parties' 1995-97 Agreement (Agreement). The Commission designated the undersigned Marshall L. Gratz as the Arbitrator.

The grievance was heard by the Arbitrator at Racine City Hall on May 28, 1977. The proceedings were transcribed. The parties' post-hearing briefs were exchanged on July 16, 1997, marking the close of the hearing.

**ISSUES**

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Did the Employer violate the Collective Bargaining Agreement when it disciplined Gerald Highman for his actions on October 31, 1996?
2. If so, what is the appropriate remedy?

**PORTIONS OF THE AGREEMENT**

Article II

Management and Union Recognition

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E. Management Rights. The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of his contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

...

To hire, promote, transfer, assign and retain employes in positions with the City and to suspend, demote, discharge and take other disciplinary action against employes for just cause.

**PORTIONS OF CITY WORK RULES**

...

D. Parking, Driving and Operating Vehicles and Equipment.

6. Employees shall exercise extreme care at all times when driving and/or operating any vehicles or equipment. (See Safety Manual for further details)

...

F. Check Location of Nearby Persons and/or Obstructions

1. Prior to operating any vehicle or equipment, the operator shall check to make sure all persons and/or obstructions are safely clear of the vehicle and/or equipment.

...

L. Vehicular and Property Damage Accidents

1. Employees who are involved in any vehicular or property damage accident shall adhere to the following procedure:

- a. do not move the vehicle.

**PORTIONS OF THE CITY CODE OF ORDINANCES**

Chapter 102 VEGETATION

...

Sec. 102-59. trimming.

(a) <Trees> and shrubs standing <in> or upon any public right of way, public areas, or upon any private premises shall be kept trimmed by the owner or occupant of the property from which such <trees> or shrubs project so that the lowest branches projecting over the public <street> or alley provide a clearance of not less than 13 1/2 feet. The city forester may waive the provisions of this section for newly planted <trees> if the traffic engineer determines that they do not interfere with public traveling, obstruct the light of any <street> light, or endanger public safety.

(b) Trees and shrubs standing in or upon any public right-of-way, public areas, or upon any private premises adjacent to a public sidewalk shall be kept trimmed by the owner or occupant of the property from which such trees or shrubs project so that the lowest branches or foliage projecting over the public sidewalk provide a clearance for pedestrian traffic of not less than eight feet.

(c) the necessity of pruning trees under this article shall be subject to approval by the city forester.

[Code 1973, 7.08.050(b)]

**BACKGROUND**

The City and Union have for many years been parties to collective bargaining agreements covering a bargaining unit consisting of certain public works system employees of the City.

The Grievant, Gerald Highman, has been employed by the City since April of 1978, and as a public works Truck Driver since 1982.

The disciplinary notice giving rise to the subject grievance was issued by City

Superintendent of Public Works Joe Golden on November 6, 1996. That notice reads in pertinent part as follows:

On Thursday October 31, 1996, you were the operator of Solid Waste #11 when it struck and destroyed a large tree at the southwest corner of Saint Patrick Street and Michigan Blvd. The tree subsequently fell up against a house which resulted in what appeared to be minor damage to the house and Solid Waste #11. Solid waste trucks drive by this location on a weekly basis and to my knowledge there has been no previous incident of this nature.

Prior to deciding on the appropriate level of discipline in regards to this matter both myself and the Personnel Director reviewed your personnel file and in particular your driving record. You have received numerous disciplinary notices including a 3 day suspension for vehicle accidents. Therefore it has been determined that you will receive a 5 day suspension for violation of Work Rules "D. Parking, Driving and Operating Vehicles and Equipment Sec.6." and "F. Check Location of Nearby Persons and/or Obstructions, Sec.1." As I have stated in previous disciplinary notices your driving record is unacceptable and if at any time it is determined that you have become a hazard to your fellow employes or the general public I will take whatever steps are necessary to avoid a tragic situation from occurring. It appears to me that we have reached that point and following your suspension you along with your Union representatives will be meeting with the Personnel Director and myself in an attempt [to] remedy this most serious problem. Please be advised that any further violations of this nature will result in possible termination of your employment with the City of Racine.

The subject grievance was timely filed asserting that the five-day suspension ". . . is a violation of Article 2 Section E and any other articles that may apply as well as a violation of the City's own ordinances." The grievance specifies the "Adjustment required" as follows: "Remove five day suspension from any and all personnel files of Gerald Highman and make said employee whole for any and all lost wages. (5 days plus overtime)."

The grievance was denied at the pre-arbitral grievance steps on the basis that "Grievant is being progressively disciplined for continued vehicular and/or equipment accidents and damage." The dispute was then submitted for arbitration as noted above.

At the arbitration hearing, the City presented testimony by Labor Supervisor Thomas Weber, Public Works and Solid Waste General Supervisor Jeffrey Fidler, Superintendent of Public Works Golden, and City Forester Charles Klimek. The Union presented testimony by Tree Trimmer Lee Schmidt, Solid Waste Collector Paul Reinhold, and the Grievant.

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The evidence establishes that Grievant was traveling eastbound on St. Patrick Street on his way back from a break to rejoin an end loader and operator with whom he was performing leaf

collections on a street some two blocks away. Grievant was approaching a stop sign at the intersection with Michigan Boulevard after which he would be making a right turn onto Michigan Boulevard. As he slowed approaching the stop sign, his truck came to a full stop unexpectedly. Grievant found that he was unable to move the truck forward despite stepping on the accelerator. Grievant got out of the truck and discovered that an inch or two of the curbside top corner of truck's back box was wedged under a heavy branch of a tree that was overhanging the street from near the stop sign. At or about the time when Grievant reentered his truck and attempted to free it by driving in reverse, the tree then fell such that some of its branches came to rest on Grievant's truck and some came to rest on the adjacent residence. (tr.16, 118)

Grievant then completed radio communications to his supervisor that he had initiated at some point after the truck had stopped. Weber arrived at the scene first and discussed what had happened with Grievant. Weber then passed along that information to Fidler and Golden when they arrived at the scene. Also responding to the scene were a City Police traffic investigator, the City Forester, and eventually other City personnel for removal of the tree and evening of the stump area.

Grievant was not issued a traffic citation in connection with the incident.

Additional background is set forth in the summaries of the parties' positions and in the DISCUSSION which follows.

### **POSITIONS OF THE PARTIES**

#### **The Employer**

The Grievant has a history of multiple violations of vehicle driving safety work rules for which he has been disciplined and warned, and because of which the City has provided him with extra training to help him deal with his driving problems. That record includes seven instances prior to the instant case, dating back to 1-14-92, in which Grievant was disciplined for vehicle accidents in which Grievant was determined to be at fault, not counting other accidents in which he was not determined to be at fault. The two most recent violations include a 4-7-95 property damage accident (hit ceiling with dump box) for which Grievant served a one-day suspension, and an 11-27-95 property damage accident (hit utility pole) for which Grievant served a three-day suspension.

On the date in question, Grievant operated his garbage truck on a public street in a careless fashion, violative of the Work Rules cited in the suspension notice. He failed to scan ahead in his direction of travel or he would have seen the low-hanging tree limb that was in his direct line of vision. He should have stayed in and turned from the travel lane as much as possible and not from the parking lane both to avoid the tree limb and to enable him to turn safely without entering the oncoming lane of the street onto which he was turning. Grievant

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admitted that there was no oncoming traffic that prompted him to be so close to the curb. His proximity to the curb was not related to the leaf collection function because he was simply in traveling mode on his way to the street where leaf collection was in progress when his truck came into contact with the tree.

The City ordinance requiring maintenance of a 13.5 foot clearance above the street does not excuse Grievant's carelessness in contacting the tree limb with his 11.5 foot high truck. The record establishes that thousands of trees are out of compliance with that requirement for various reasons (including because the trees could not survive compliance pruning) such that City truck drivers are trained to be alert for and to avoid low-hanging tree limbs.

The high winds of October 30 did not cause the tree to fall on Grievant's truck on October 31. Grievant did not testify that he heard the tree fall on his truck. Rather, he admitted that he drove under the tree limb and became wedged under it. At first he thought his truck was not moving because of a mechanical malfunction. He only realized that his truck was in contact with and wedged under a tree when he got out and saw the tree in contact with the truck.

Grievant's efforts to move his truck after he discovered that it had become wedged under the tree constituted an additional violation (of Work Rule D.1.a.), and an aggravating factor regarding the subject violation. He should have waited for his supervisors or the City Forester to determine whether and how to free the truck while avoiding or minimizing damage to the adjacent house.

For those reasons, the five-day suspension was an appropriate imposition of progressive discipline which should be upheld in all respects.

### **The Union**

The City lacked just cause for imposing the instant suspension, such that the suspension violated Art. 2.E.2 of the Agreement. The following factors all mitigate in Grievant's favor.

The City has an ordinance which requires trees to clear the roadways by a minimum of 13.5 feet, which is two feet higher than the highest point on the truck Grievant was driving. The City cannot deny the ordinance' existence by contending that a large number of trees are allowed to remain out of conformance with its requirements. For, as Golden admitted in his testimony, the existence of that ordinance would prompt him to feel that he was not at fault if he were to have, hypothetically, impacted a non-complying tree branch with a private vehicle that was less than 13.5 feet in height. Because the City ordinarily disciplines for vehicular accidents only where the employee is at fault, it is unfair, disparate treatment for the City to discipline Grievant in circumstances the Superintendent views as free of fault on the driver's part.

The weakened condition of the tree played a role in the incident. The evidence shows the tree involved was severely rotted at its base; that it had been improperly planted too deep, constricting root development and causing fungal disease and root rot; that its root support was

also constrained by its location between the street and sidewalk; and that the stump was so rotted that it did not require any grinding and was simply pushed in with a loader and tilled with covering soil. Klimek testified that the tree was sufficiently rotted that it could have toppled over on its own or by reason of a vehicle merely brushing it, whereas a normally rooted, healthy tree would not be so

easily felled.

According to Grievant, for all he knew the tree fell on top of his truck. The truck's forward motion came to a halt. He attempted to put the truck in reverse to free it. Management witnesses Weber and Fidler both admitted that it was possible the tree fell on the truck. Grievant appears simply to have been in the wrong place at the wrong time; a victim of a fluke for which he was not at fault.

Windy conditions also added to the weakening of the tree. Newspaper accounts establish that there were high winds and downed trees and branches in the Racine area over the two days preceding October 31, 1997; various witnesses confirmed that it was also windy when they arrived to the scene of the accident; and the City had two crews out on October 31 cleaning up from the wind damage to trees. A tree as rotted as the one involved here could have been weakened by the high winds on the two days preceding the incident and toppled by the winds on the day in question. For that reason, again, it cannot be determined that the incident was Grievant's fault.

Grievant's driving on the day in question was no different than that of other employees. City employees bring a Vac-All about the same height as Grievant's truck as close to the curb as Grievant's truck was, to clear the catch basin at the intersection in question; yet there has been no instance in which the tree in question was struck in that process. City employees also plow snow with garbage trucks in such a way that their plow blades cover the street curb to curb; yet, none of those trucks ever previously hit the tree in question. Union witness Paul Reinhold also testified that he has often driven the same kind of truck as Grievant was using, to perform the solid waste runs that includes pickups on St. Patrick Street. Reinhold further testified that, when driving on the same street, he has operated the same distance from the curb as Grievant did on October 31, without incident.

Grievant was eastbound on St. Patrick Street, ready to make a southbound turn onto Michigan Boulevard. The pictures in evidence show the truck to be about three feet from the curb. Grievant testified he felt he was in the correct location. He felt that if westbound traffic were to appear, the truck would obstruct such traffic if he were to have driven it in the middle of the road.

In addition, damage to the truck was minor and damage to the house, if any, was not determined or shown. If the tree was, in fact, uprooted by the force of Grievant's truck hitting it, then it stands to reason there would have been more significant damage to both the truck and the house.

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Grievant's prior work record cannot be the basis for finding him at fault for an occurrence that has not otherwise been shown to be his fault. The Racine Police investigated the incident and did not issue Grievant a citation finding him at fault for the incident. The Arbitrator should reach the same conclusion.

For those reasons, the Arbitrator should grant the grievance and the relief requested in it.

## **DISCUSSION**

This case turns on whether the impact between the tree and Grievant's truck was Grievant's fault.

As outlined in the disciplinary notice and detailed in Golden's testimony, the City concluded that Grievant was at fault by failing to avoid a low-hanging branch and by driving too close to the curb in the circumstances. For the following reasons, the Arbitrator finds that the evidence persuasively supports both of those conclusions, and that the various factors cited by the Union are not sufficient to overturn or reduce the discipline imposed in this case.

It is undisputed that there are numerous branches overhanging City streets at levels below the top of the truck Grievant was driving on the date in question. It is also undisputed that watching for and avoiding such below-truck-top-level branches is a basic and important responsibility for any City Truck Driver, especially when driving a truck as tall as the Grievant's was in this case. Grievant acknowledged those facts in his testimony and acknowledged that they had been covered in the training provided to him by the City. (tr.122-23) Grievant testified that he saw the branches of the tree "waving," not "whipping," in the wind as he approached the stop sign. He further testified that he was quite sure he had cleared those branches.

However Grievant also testified that his truck came to an unexpected stop before he got to the stop sign. (tr.118) Notably, Grievant did not describe hearing or feeling an impact on the top of his truck at that point; rather he recalled at first attributing the truck's immobility to a mechanical problem of some kind. Thus, Grievant's own description of the incident makes it quite unlikely that the tree fell on the truck without first being impacted by the truck.

Other evidence making it quite unlikely that the tree fell on the truck without first being impacted by the truck includes the following: Klimek's persuasive and expert opinion -- with the benefit of viewing the broken tree trunk and of feeling the extant winds first hand -- that the tree would likely have stood 5-10 more years but for being impacted by the truck; the absence of any other whole trees being felled by the wind that day (tr.76,98); the fact that the winds were, by Grievant's estimate, only 25-30 mph at the time of the incident; and the fact that the upper branches of the tree had lost most of their leaves, somewhat reducing the potential effect of the wind on the tree. In the face of that evidence, the testimony of various witnesses, that it was possible that the tree fell without first being impacted by the truck, is not a persuasive basis on which to conclude that that is what, in fact, happened.

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It is also undisputed the City has trained its drivers, including Grievant, that making right turns on City streets with trucks requires positioning the truck at the start of the turn farther from the curb than would be appropriate when making the turn in a passenger car. (tr.122) Grievant's testimony that it was necessary, appropriate and safe for him to position his truck as close to the curb as he did in advance of making the right turn onto Michigan is squarely contradicted by the opinions of supervisor witnesses Fidler and Golden, both of whom are accredited defensive driving instructors. While Union witness Reinhold agreed on direct-examination that it "would be possible" that he would get as close as Grievant did to the curb in advance of a right turn onto Michigan from eastbound St. Patrick during solid waste pickup operations (tr.109), on cross-examination Reinhold



also agreed that "For safety purposes, yes," he would make that turn from a point "Probably no -- four feet away from the curb." (tr.111) The Arbitrator finds the supervisors' opinions more persuasive than Grievant's in the instant circumstances because: Grievant was not making a pickup or performing any other operation that might have warranted his getting as close as possible to the curb; St. Patrick street is wide enough to permit him to position his truck farther from the curb without crossing the center line and without unduly risking a collision with a possible oncoming vehicle making a turn off of Michigan onto westbound St. Patrick; there was, in fact, no oncoming vehicle making such a turn onto St. Patrick from Michigan; and turning a truck as long and wide as Grievant's from as close to the curb as his was would likely have taken Grievant's truck into a portion of the oncoming northbound traffic lane of Michigan Boulevard in order to complete the turn. (tr.38-39 and 123) By being unnecessarily close to the curb and tree, Grievant unnecessarily increased the risk that his truck would impact an overhanging limb as it did.

While the City has imposed on itself and other property owners a City Code obligation not to allow branches to hang lower than 13.5 feet over the street, the evidence shows that compliance by the City and other property owners is very much a matter of circumstance or happenstance rather than certainty. As a result, the City has trained its drivers to be alert for low-hanging (and hence out of compliance) branches and to avoid or work around them. While the ordinance might well prompt a person in the sort of hypothetical presented by the Union to Superintendent Golden to feel not at fault if that person's privately-owned truck struck an out of compliance low-hanging branch, City employes cannot avoid responsibility, under the City's published Work Rules, for failing to avoid impacting such branches with their vehicles in the context of the realities of the streets of Racine on which they work and of the training concerning such hazards which they have received.

The evidence definitely supports the Union's contentions that the tree involved was severely rotted, at least in its trunk and probably in its roots, and that for various reasons the tree's root support was significantly limited relative to that of a similar tree planted at a proper depth free of concrete restrictions. Otherwise, the tree would not have been felled by the sort of contact it had with Grievant's truck. The evidence also establishes to the Arbitrator's satisfaction that there had been tree-felling winds in the Racine area on the day or two preceding October 31, but that the winds on October 31 more moderate. While the tree was weakened and the winds had blown hard and were still blowing at least to some extent, the Arbitrator is nonetheless persuaded, for reasons noted above, that the tree would not have fallen but for Grievant's truck coming into contact with it.

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The evidence does not support the Union's contention that Grievant's driving on the day in question was no different than that of other employes. While it is true that employes bring a Vac-All about the same height as Grievant's truck as close to the curb as Grievant's truck was, to clear catch basins like the one at the intersection in question, Golden testified that the City would nonetheless expect the employes involved to maneuver the Vac-All in such a way as to avoid contact with large low hanging branches, or that the catch basin involved would alternatively be cleaned by hand using a lower and more maneuverable 5-yard dump truck. (tr.55-56) While it is also generally true that the City plows snow curb to curb, the City obviously expects and trains its drivers to avoid parked cars and other obstructions such as large low-hanging branches; the City does not plow with its "big garbage trucks"; (tr.29) but rather it plows in residential areas such as at St. Patrick and Michigan using lower five-yard dump trucks. (tr.41) On the other hand, the big garbage trucks are used on

solid waste runs, and those runs do require the drivers to get close to the curb to facilitate pickups. However, as noted above, Reinhold's direct-examination testimony on that subject, when taken in the context of the related cross-examination, does not persuasively establish that Reinhold ever previously drove his solid waste truck as close to the curb as Grievant did, when Reinhold had occasion to approach the intersection in question eastbound in the course of his solid waste operations.

The fact that the Racine police investigated the matter and did not issue Grievant a traffic citation removes one of several factors that are potentially relevant in the City's decisions whether to impose discipline in connection with a vehicular accident; however the nonissuance of a citation, alone, is not sufficient to relieve Grievant of disciplinary consequences for the incident. The City Police traffic investigator would be applying statutes and ordinances, whereas the City applies to provisions of its Work Rules. Thus, as Golden testified without contradiction, in "many, many instances," employes have received discipline for vehicular accidents where no citation was issued (tr.61), and that the City has no policy conditioning its exercise of discipline in such cases to those in which a citation for violation of the law has been issued.

The fact that at most only minor damage was sustained by the truck and house neither precludes the City from imposing discipline if Grievant was at fault for causing that damage nor establishes that the tree could not have been felled by reason of Grievant's carelessness. A vehicular accident in which a 30-40 year old Norway Maple tree is felled in a residential neighborhood is both an unusual and a significant event. It is fortunate that the damage that resulted was not significantly greater. While the evidence makes it clear that the contact with Grievant's truck would not have felled the tree had the tree's internal structures not been significantly weakened by various factors beyond Grievant's control, that does not relieve Grievant of responsibility for carelessness in allowing his truck come into contact with the tree as it did.

While Grievant's prior work record cannot be the basis for finding him at fault for an occurrence that has not otherwise been shown to be his fault, the Arbitrator is persuaded in this case that Grievant was at fault in this case, for reasons noted above. The City therefore appropriately considered Grievant's prior work record in determining the appropriate level of discipline to be imposed. Golden took the time to make a calm judgement in that regard, with the benefit of a review of Grievant's past record and advice from the City's Personnel Director.

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The Arbitrator therefore finds no basis on the instant record to overturn or modify the five-day suspension imposed by the City in this case. The Grievant has been shown to have violated both of the Work Rules cited in the suspension notice. (The City's contention, raised for the first time in its brief, that Grievant also violated Work Rule D.1.a. has not been considered by the Arbitrator in this matter because it was not included in the suspension notice.)

Accordingly, the Arbitrator concludes that the suspension has been shown to have been for just cause and not violative of Agreement Art. 2 or of any Agreement provision.

### **DECISION AND AWARD**

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the ISSUES noted above that

1. The Employer did not violate the Collective Bargaining Agreement when it disciplined Gerald Highman for his actions on October 31, 1996.

2. The subject grievance is therefore denied, such that no consideration of a remedy is necessary or appropriate.

Dated at Shorewood, Wisconsin this 2<sup>nd</sup> day of December, 1997.

Marshall L. Gratz /s/

Marshall L. Gratz, Arbitrator

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