

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**IOWA COUNTY HIGHWAY DEPARTMENT EMPLOYEES
LOCAL 1266, AFSCME, AFL-CIO**

and

IOWA COUNTY

Case 92
No. 55705
MA-10073

Appearances:

Mr. Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

Brennan, Steil, Basting & MacDougall, S.C., by **Attorney Howard Goldberg**, 433 West Washington Avenue, Suite 100, P. O. Box 990, Madison, Wisconsin 53701-0990, appearing on behalf of the County.

ARBITRATION AWARD

Iowa County Highway Department Employees Local 1266, AFSCME, AFL-CIO, hereafter Union, and Iowa County, hereafter County or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the County concurred, in the appointment of a Wisconsin Employment Relations Commission staff arbitrator to hear and decide the instant dispute. The undersigned was so designated. The hearing was conducted at Dodgeville, Wisconsin, on January 15, 1998. The hearing was transcribed and the record was closed on January 29, 1998, upon receipt of post-hearing written argument and the transcript.

ISSUE

The Employer presents the following issue:

Is the grievance arbitrable?

The parties stipulated to the following statement of the issue:

Did the Employer have just cause to issue a written reprimand to the Grievant, Mitchell Zablotowicz, on August 26, 1997, and/or discipline the Grievant, Mitchell Zablotowicz, as per the September 12, 1997 Iowa County disciplinary notice?

If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE III - MANAGEMENT RIGHTS

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:

- A) To direct all operations of the County;
- B) To establish reasonable work rules and schedules of work;
- C) To suspend, demote, discharge and take other disciplinary action against employees for just cause;
- D) To layoff (sic) employees;
- E) To maintain efficiency of County operations;
- F) To take whatever action is necessary to comply with State or Federal law;
- G) To introduce new or improved methods or facilities;
- H) To change existing methods or facilities;
- I) To determine the kinds and amounts of services to be performed as pertains to County operations; and the number and kind of classifications to perform such services;
- J) To contract out for goods and services subject to the following conditions: The County agrees that no work will be transferred out of the

bargaining unit while any unit employees are on layoff, nor shall any unit

employees be laid off as a result of a decision to transfer work out of the bargaining unit, provided the decision to transfer work out of the bargaining unit is a mandatory subject of bargaining.

K) To determine the methods, means and personnel by which County operations are to be conducted;

L) To take whatever action is necessary to carry out the functions of the County in situations of emergency.

3.02 The above rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Union, and provided further, that the above rights shall be used fairly and reasonably.

ARTICLE IV - GRIEVANCE PROCEDURE

4.01 A grievance shall mean any dispute concerning the interpretation or application of a provision of this Contract, and shall be handled in the following manner:

4.02 STEP 1: The Union Committee and/or Union Representative, shall present the grievance in writing to the Highway Commissioner no later than seven (7) working days after the grievance occurred or the employee or the Union knew or should have known of such occurrence. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later. The Commissioner shall within seven (7) working days, in writing, inform the employee and the representative of his/her decision.

4.03 STEP 2: If a satisfactory settlement is not reached as outlined in Step 1, the Union Committee and/or Union Representative may within seven (7) working days of the receipt of the Commissioner's decision, present the grievance to the Iowa County Highway Committee. Such a meeting shall be held within seven (7) working days of receipt of a written request by the other party unless a later date is set by mutual agreement. The Committee shall within ten (10) working days of the meeting, in writing, inform the Union and employee of its decision.

4.04 STEP 3: If a satisfactory settlement is not reached as outlined in Step 2, either party to this Agreement may request within ten (10) working days of the Union's receipt of the Committee's decision that the dispute be submitted to arbitration.

Arbitration Procedure: The parties shall attempt to select a mutually

agreeable arbitrator to hear the case. In the event the parties are unable to agree

on the selection of the arbitrator, either party may request the Wisconsin Employment Relations Commission to appoint an arbitrator from its staff. The Arbitrator shall make a decision on the grievance, which shall be final and binding on both parties. Only questions concerning the application or interpretation of this Agreement are subject to arbitration. Expenses for the arbitrator shall be borne equally by the Employer and the Union. The arbitration board shall have no power to modify, add to or delete from the express provisions of this Agreement.

BACKGROUND

On August 20, 1997, Mitchell Zablutowicz, hereafter the Grievant, was a Patrolman for the County. As Patrolman, the Grievant had primary responsibility for his assigned section. This responsibility included functioning as lead worker when crews were assigned to work on his section.

One August 20, 1997, Patrol Superintendent Venden met with the Grievant at 7:00 a.m. and gave the Grievant work instructions. At that time the Grievant was advised, *inter alia*, that he and a fellow employe, Mark Reynolds, were to go to the river hills section of Highway 133 to remove brush which lay along the north and south side of the highway; that a fellow employe would be joining the two at the work site after this employe completed another assignment; that the employes were to pick up the brush that lay on the south side of the highway, walk across the two lane highway, and throw the brush down the river bank on the north side of the highway; and that the employes were to pick up the brush that lay on the north side of the highway and throw it down the same river bank. The Grievant and Venden also had discussions concerning traffic signs and the method for removing brush which was adjacent to a blue house.

On August 22, 1997, the Grievant was called in to meet with his immediate supervisor, Venden, and Leo Klosterman, the Highway Commissioner. The Grievant was accompanied by a Union Steward. During this meeting, the Grievant was presented with the following:

EMPLOYEE DISCIPLINARY NOTICE

Name of Employee Mitch Zablutowicz

Job Title Patrolman Department

Oral Reprimand Written Reprimand X

Suspension for day(s) Discharge

If oral reprimand, give date, time, and place of reprimand

The above disciplinary action was taken against you today for one or more of the following violations:

Sexual Harassment	1									
Work Performance	1	2	3	4	5	6	7	8	9	10
Attendance & Punctuality	1	2	3	4	5	6	7	8	9	10
Use of Property	1	2	3	4	5	6	7	8	9	10
Personal Injury	1	2	3	4	5	6	7	8	9	10
Personal Safety	1	2	3	4	5	6	7	8	9	10

Other

Appear before the Highway Committee.

Statement of facts causing this action:

Aug. 20, 1997

Repeated objection to orders and directions given.

Refusal to start work before supervisor present.

Poor preparation for job signing - cones - traffic paddles.

I delivered a copy of this form to above named individual on

Aug. 22, 97 at Commissioner's Office at 8:45 AM.
date location time

The phrase "Work Performance" had been circled, as had the subsequent "8." After receiving this, the Grievant engaged in a discussion with Venden and Klosterman. Klosterman told the Grievant that he would take the matter under advisement. As the Grievant was leaving the area, Venden approached the Grievant and asked for the Grievant's copy of the "Employee Disciplinary Notice."

The Grievant was recalled to meet with Klosterman and Venden on August 26, 1997, and was provided with a second copy of the "Employee Disciplinary Notice." The document had been modified by altering the date from "Aug. 22" to "Aug. 26." Klosterman had initialed this modification. During this second meeting, Klosterman advised the Grievant that he was not able to make a decision and wanted the County Board's Highway Committee to intervene.

On August 29, 1997, written Grievance No. 38 was filed with the County at Step 1 of the

grievance procedure. This written grievance alleged that "Employee Mitchell Zablutowicz

was given a Disciplinary Notice Written Reprimand for poor performance" in violation of Sec. 3.01 and 3.02 of the contract and asked that the following corrective action be taken: "We ask that the reprimand be thrown out and removed from Mitchell's file." On that same date, a Grievance No. 39, which is not at issue in this proceeding, was also filed. By letter dated September 2, 1997, Klosterman advised the Grievant that "Grievance #38 shows no merit."

On September 8, 1997, the Grievant and his Union Representative met with the Highway Committee. On September 12, 1997, the Transportation Committee, A/K/A Highway Committee, issued the following:

Iowa County Disciplinary Notice

DATE: September 12, 1997

TO: Mitch Zablotowicz, Patrolman

On September 8, 1997 you appeared before the Transportation Committee with Mike Wilson, Wisconsin Council 40, AFSCME Representative to present your side of the August 20, 1997 incident which resulted in your receiving a written reprimand on August 26, 1997. After reviewing all the information presented the Transportation Committee supports the Written Reprimand issued to you on August 26, 1997 by Roger Venden, Patrol Superintendent which cited 1) your repeated objections to orders and directions given; 2) refusal to start work before supervisor was present; and, 3) poor preparation for job signing, cones, and traffic paddles. In retrospective, Mitch a simple job took many additional hours to complete due to your lack of cooperation and poor preparation. The Transportation Committee believes that your lack of cooperation and or inability to follow the Patrol Superintendent's instructions shows the need for an increased level of on-the-job supervision. In order that you receive this increased level of on-the-job supervision, the committee has made the following decision for the discipline to accompany your written reprimand:

effective **September 15, 1997**, you will be classified as a Group II - County Patrolmen Helper for a probationary time period of 90 days; as a Patrolmen Helper you will report to an immediate supervisor; your compensation will be at the hourly rate of \$12.16; to aid in monitoring your job performance during this time period you will be evaluated on a regular basis by your immediate foreman (e.g., every 30 days); the same evaluation information will be conveyed monthly to the Transportation Committee by Leo Klosterman, Highway Commissioner; at the end of the 90 day period your job performance evaluations will be reviewed by the Transportation Committee if you have successfully completed the probationary period you

will then be allowed to sign for posted openings for your prior position.

During this time period of County Patrolmen Helper should any further incident(s) and or violation(s) connected with your employment with Iowa County occur, discipline up to and including discharge could result.

By letter dated September 15, 1997, Klosterman advised the Grievant of the following: "You may meet with the Transportation Committee on September 22, 1997 at 7:30 p.m. to discuss grievances #38 and #39." On September 18, 1997, the County posted a Patrolman position to replace the Grievant.

By letter dated September 18, 1997, Wilson advised the County Highway Commission as follows:

Re: Grievances 38 and 39

Pursuant to Commissioner Klosterman's letter of September 15, 1997, I wish to confirm the attendance of Mitch Zablutowicz and the undersigned at 7:30 p.m. meeting on September 22, 1997 with the Transportation Committee regarding Grievances 38 and 39.

Grievance 38 alleged that the discipline of August 20, 1997, was without just cause and had been processed at Step I prior to the September 12, 1997, Disciplinary Notice. Mitch Zablutowicz in addition to the original reprimand, was effective September 15, 1997, demoted and placed on a thirty (30) day probationary period to be evaluated "on a regular basis by your immediate foreman . . . reviewed by the Transportation Committee . . . if you have successfully completed the probationary period you will then be allowed to sign for posted openings for your position." Under the circumstances it would appear that grievance 38 be amended to include the discipline taken per the September 12, 1997 **IOWA COUNTY DISCIPLINARY NOTICE**.

The grievance alleges that the Employer did not have just cause for discipline, and that discipline of September 12 constitutes both double jeopardy and excessive discipline.

It is also noted that the Employer has put Mr. Zablutowicz on notice that:

During this period of County Patrolmen Helper should any further incident(s) and or violation(s) connected with your employment with Iowa County occur, discipline up to and including discharge could result.

Please be advised that the above not only is part of the alleged excessive discipline but also exceeds the employer's authority to unilaterally impose a disciplinary

probationary period. For the record you are notified that the conditions as announced are rejected.

Also please be advised that any and all of the disciplinary actions taken in this instance are not recognized as precedent for appropriate employee discipline in the future for Mr. Zablotowicz or any other bargaining unit employee.

The undersigned shall serve as Mr. Zablotowicz's representative and accordingly all correspondence and any other communications regarding the grievance should be directed to the undersigned. The Local Union grievance committee is by copy of this letter is (sic) notified of the meeting and their invitation to attend. It is my understanding that Mr. Zablotowicz has determined to pursue the grievance with or without the endorsement of Local 1266.

I herein request the following information for use in contract administration:

1. Copy of all employee disciplinary notices issued to bargaining unit employees within the approximate ten (10) year period, August 20, 1987, through and including September 12, 1997.
2. Copy of any and all department rules, regulations, guidelines, etc. regarding safety procedures, precautions and the like for traffic control of employee work sites.
3. Copy of any notes, records, minutes, memorandum or any other documents generated of any supervisory personnel regarding the work performance of Mr. Mitch Zablotowicz during the course of Mr. Zablotowicz's employment with Iowa County that were not included in Mr. Zablotowicz's personnel file as of September 12, 1997. {Mr. Zablotowicz should make a written request to review and inventory the contents of his personnel file.}

The Grievant and Wilson met with the Highway Committee on September 22, 1997, to discuss Grievances No. 38 and 39. On October 1, 1997, Wilson received a letter from Klosterman dated September 29, 1997, and which states:

Following the Sept. 8, 1997 meeting before the Transportation Committee, a letter was prepared and delivered to Mr. Zablotowicz which expressed the concerns of the Committee. It was, and still is, apparent to all that Mr. Zablotowicz requires more supervision and instruction while on the job. Based upon its own investigation, as well as the comments made to the Committee at the Sept. 8 meeting, the decision was made to affirm the discipline that was issued and the decision was also made to reassign Mr. Zablotowicz as a Group II -

County Patrolmen Helper so that better supervision can occur. Under his former job classification, Mr. Zablutowicz had only limited supervision

because of the nature of his duties in that classification. The Committee feels that the level of increased supervision contemplated by this re-assignment should help to obtain the desired remedial results. At the recent Sept. 22 meeting of the Transportation Committee, you again appeared with Mr. Zablotowicz. You indicated that you felt that Mr. Zablotowicz was being penalized twice for the same misconduct. That is not the case. Mr. Zablotowicz has been reprimanded for his misconduct and, in investigating the matter, the Committee has determined that it is necessary for Mr. Zablotowicz to be re-assigned so that he can be supervised more closely and can, hopefully, learn how his job is to be properly performed.

I hope this letter fully addresses your questions and your concerns.

On October 2, 1997, the County received a letter from Wilson which is dated October 1, 1997, and states, in relevant part, as follows:

Re: Consolidation of Grievances 38 and 39 Appeal to Arbitration

Dear Employer:

The Union herein serves notice of the appeal of the Zablotowicz disciplinary grievance to arbitration. As you will recall grievance 38 was amended to incorporate both the reprimand and the discipline dated September 12, 1997.

Under the circumstances, grievances 38 and 39 should be consolidated or grievance 39 should be held in abeyance until after grievance 38 is resolved. To determine the reasonable (sic) of discipline, the arbitrator will have to make some sort of judgement as to what was reasonable conduct at the work site on August 20, 1997. The parties could thus save the expense of a second arbitration proceeding.

The Union would be willing to stipulate that any one of the following should be appointed by the Wisconsin Employment Relations Commission from its staff to serve as arbitrator: Edmond Bielarczyk, Jr.; Colleen (sic) Burns; Peter Davis; Amedeo Greco; and, Raleigh Jones.

. . .

On October 14, 1997, Wilson received the following letter, dated October 10, 1997, from County Attorney Goldberg which states, in relevant part, as follows:

Re: Zablotowicz grievances #38 and #39

Dear Mike:

I have been provided with copies of your certified letters to the "Iowa County Highway Commission" which pertain to Mr. Zablotowicz. I also have been given a copy of your October 3, 1997, letter addressed to Jan Hollaway-Falk. In your October 1, 1997, letter you state that grievance 38 was amended. The County is unaware of any amendment that was made to that grievance. I am enclosing copies of grievances that we received. It is my understanding that grievance #38 pertains to a notice of reprimand that was given to Mr. Zablotowicz for poor performance, which is alleged to have occurred on August 26, 1997. Grievance #39 pertains to Mr. Zablotowicz' allegations that Roger Venden is supposed to have refused to provide proper safety flagmen of a job on Highway 133. That alleged refusal is supposed to have happened on August 20, 1997, or August 26, 1997; I am really not sure what is being alleged here as to the dates. Perhaps you can inform me.

As stated above, there is nothing in the file to indicate that grievance #38 was ever amended. Perhaps you can provide me with information as to that amendment. In your letter, you inquire as to the advisability of consolidating these grievances, or holding #39 in abeyance until #38 is resolved. These are your grievances, and we expect the Union to follow the grievance procedures set forth in the contract. Mr. Zablotowicz was informed that Grievance #38 was denied, at step two, on September 12, 1997. Step 3 requires that the matter be submitted to arbitration within ten working days after the time that the grievant is informed of the step 2 decision of the Committee. I calculate that this was to have been done not later than September 26, 1997. The ten day period has not been complied with, and the Employer considers the grievance resolved, unless you can provide to me any documents or other information which would shed further light on this point.

In your October 3, 1997, letter, you ask that the County agree that only certain individuals working at the WERC would be entitled to hear this grievance. The County is not willing to direct the WERC as to who it wants the WERC to appoint. The contract only specifies that the Wisconsin Employment Relations Commission is to appoint an arbitrator from its staff. If this matter goes to arbitration, then it will be before the person selected by the WERC.

...

Since we have been retained by Iowa County to defend these claims, please forward all future correspondence regarding any of these matters to the undersigned at the address set forth in our letterhead.

Wilson sent Goldberg a letter dated October 16, 1997, which states as follows:

Per your request be advised that the incident in question occurred on August 20, 1997. A written reprimand was issued to the grievant on August 26, 1997. Written grievances #38 (Discipline) and #39 (Safety) were submitted to Highway Commissioner Leo Klosterman on or about August 29, 1997. The Commissioner denied the grievances in letters dated September 2, 1997. Both grievances were appealed to the next step of the grievance procedure and on September 15, 1997, Commissioner Klosterman wrote to Mitch Zablutowicz "You may meet with the Transportation Committee on September 22 at 7:30 p.m. to discuss grievances #38 and #39." The Transportation Committee in a letter dated September 29, 1997, signed by Commissioner Klosterman denied the grievance regarding discipline. On October 1, 1997, written notice of the appeal to arbitration was mailed.

Grievance #38 Zablutowicz Discipline has been amended according to the circumstances. On September 8, 1997, the Transportation Committee reviewed the discipline, the written reprimand, and issued more severe discipline in the form of demotion, probation, etc. The grievance has been amended to include traditional aspects of "just cause" such as double jeopardy, disparate treatment, excessive discipline and also alleges that the discipline taken by the Transportation Committee, i.e. probation and loss of job posting rights is unauthorized discipline contrary to the terms of the collective bargaining agreement. Notice of the amendments were verbalized by the undersigned at the grievance meeting of September 22, 1997.

The Employer on September 18, 1997, (sic) posted the State Patrolman position to replace Zablutowicz. All of the above events are incorporated into the amended grievance.

Regarding Grievance #39, the matter is being held in abeyance because it would be unnecessary to duplicate a hearing on the events of August 20, 1997. Zablutowicz's defense of the discipline is in part is (sic) grounded in the contention that he acted reasonably on the basis of legitimate safety concerns regarding the August 20, 1997 work assignment.

Upon receipt of a check in the amount of \$125 from Local 1266 payable to the Wisconsin Employment Relations Commission (WERC) I will file the paperwork for appointment of an Arbitrator from its staff. As per your admonition, the appointment will be left to the WERC.

The request I made for records of prior employee discipline will be enforced pursuant to 111.70 (3) (a) 4. and 1. Wis. Stats. The reason for requesting a ten (10) year span is in part because of the unusual nature of the discipline as administered in the instant case.

On October 21, 1997, the WERC received the Union's Request to Initiate Grievance Arbitration, with an accompanying letter requesting the appointment of a staff member to serve as arbitrator of a grievance regarding the discipline of Mitch Zablotowicz.

POSITIONS OF THE PARTIES

The parties agreed to file written argument on the issue of arbitrability. These arguments are as follows.

Employer

The Grievant is required to comply with the grievance procedure which has been negotiated by the parties. The Grievant did not comply with this grievance procedure because the Grievant did not file a Step 1 grievance on the September 12, 1997 notice; the County did not agree to amend Grievance No. 38 to include the September 12, 1997 notice; and, despite notification from the County's Attorney that the County expected the Union to comply with the time limits set forth in the contractual grievance procedure, the Union did not request grievance arbitration within ten working days of the Union's receipt of the Committee's decision.

Union

On September 18, 1997, by certified mail, the Union notified the Iowa County Highway Commission that Grievance No. 38 was "amended to include the discipline taken per the September 12, 1997, Iowa County Disciplinary Notice." On September 22, 1997, the parties met to consider Grievance No. 38, as amended. On September 29, 1997, Klosterman responded to Grievance No. 38, as amended. The County did not object to the Union's amendment of Grievance No. 38 during the meeting of September 22, 1997, nor in Klosterman's letter of September 22, 1997. The grievance was processed in accordance with the requirements of the contractual grievance procedure.

Notice of appeal to arbitration was mailed to the Highway Commission on October 1, 1997. This notice is adequate for the purposes of Sec. 4.04, Step 3. The Grievant complied with the provisions set forth in the grievance procedure and Grievance No. 38, as amended, is arbitrable.

DISCUSSION

Arbitrability

Grievance No. 38, as filed at Step 1, challenges the County's right to discipline the Grievant by issuing the Employee Disciplinary Notice which was provided to the Grievant on August 26, 1997. Inasmuch as this Step 1 grievance was presented, in writing, to the Highway Commissioner within seven working days of the date that the Grievant was provided with this Employee Disciplinary Notice, Grievance No. 38 was filed in compliance with Article 4.02.

When the Highway Commissioner, the Union, and the Grievant met on August 26, 1997, the Grievant was advised that the Highway Commissioner could not make a decision and that the matter would be referred to the Highway Committee. Despite the fact that the Highway Commissioner had not reached a final decision on the discipline to be imposed on the Grievant, the Highway Commissioner denied Grievance No. 38 on September 2, 1997.

The Grievant appeared before the Highway Committee on September 8, 1997. This meeting was not the Step 2 meeting with the Highway Committee provided for in Sec. 4.03 of the grievance procedure. Rather, this meeting was for the purpose of acting upon the Highway Commissioner's referral of the disciplinary decision to the Highway Committee. Following this meeting, the Highway Committee finalized the discipline to be imposed upon the Grievant when it issued the Employee Disciplinary Notice dated September 12, 1997.

On September 15, 1997, the Grievant was advised that he could meet with the Highway Committee on Grievances No. 38 and 39 on September 22, 1997. By letter dated September 18, 1997, Union Representative Wilson confirmed that he and the Grievant would appear before the Highway Committee to discuss the two grievances. Wilson also placed the County on notice that the Union wished to amend Grievance No. 38 to include the Employee Disciplinary Notice dated September 12, 1997.

The Union's request to amend Grievance No. 38 was received by the County within seven working days after the County had finalized the discipline of the Grievant. Since the claim that was the subject of the requested amendment was presented to the County within the time limits set forth in Sec. 4.02 of the grievance procedure and the Highway Commissioner was provided with a copy of the request to amend Grievance No. 38, the County was not prejudiced by the Union's decision to request an amendment of Grievance No. 38, rather than to file a second grievance at Step 1 of the grievance procedure.

The grievance procedure neither prohibits an amendment of a grievance, nor prescribes a procedure for amending grievances. By discussing the "amended" grievance at the meeting of September 22, 1997, and responding to the "amended" grievance in Klosterman's letter of September 29, 1997, without advising the Union that it had any objection to the amendment, the County gave de facto approval to amend the grievance as requested by the Union.

It is not evident that the County raised any objection to the Union's request to amend Grievance No. 38 until County Attorney Howard Goldberg issued his letter dated October 10, 1997, which was received by the Union on October 14, 1997. Under the facts of this case, Goldberg's objection to the amendment of Grievance No. 38 is not timely.

The Step 2 meeting on amended Grievance No. 38 was held on September 22, 1997. The Highway Committee's written Step 2 decision, i.e., Klosterman's letter dated September 29, 1997, was received by the Union on October 1, 1997. Prior to that time, the Union could not have known whether or not a satisfactory settlement had been reached at Step 2. Thus, it is the receipt of Klosterman's letter by Wilson which triggers the ten working days time limit contained in Step 3 of the contractual grievance procedure.

By letter dated October 1, 1997, Wilson placed the County on notice that it was appealing amended Grievance No. 38 to arbitration. The County received this letter on October 2, 1997.

Wilson's letter of October 1, 1997, constitutes a request to submit amended Grievance No. 38 to arbitration. This request was made within ten working days of the Union's receipt of the Highway Committee's Step 2 decision. The Union and the Grievant have complied with the requirements of Sec. 4.04.

As the Union argues, the parties have a contractual duty to attempt to select a mutually agreeable arbitrator prior to requesting the Wisconsin Employment Relations Commission to appoint an arbitrator from its staff. In the letter dated October 1, 1997, Union Representative Wilson offered to stipulate to one of several named arbitrators. The County refused this offer in Attorney Goldberg's letter of October 10, 1997, which was received by the Union on October 14, 1997.

As the County argues, the Wisconsin Employment Relations Commission did not receive the Union's "Request to Initiate Grievance Arbitration" until October 21, 1997. However, the language of Step 3 of the grievance procedure neither expresses, nor implies, that the party requesting grievance arbitration must file a "Request to Initiate Grievance Arbitration" with the Wisconsin Employment Relations Commission within ten working days of the Union's receipt of the Highway Committee's Step 2 decision, or within any other time limit. By filing the request to the Wisconsin Employment Relations Commission on October 21, 1997, which is one week after receiving notice that the County would not stipulate to a specific staff arbitrator, the Union did not violate any term of the contractual grievance procedure, or unreasonably delay the arbitration process.

In summary, amended Grievance No. 38 was processed through the grievance procedure and submitted to arbitration in a manner which is consistent with the requirements of the parties' contractual grievance procedure. Accordingly, the undersigned concludes that the grievance is arbitrable.

Merits

Under the facts of this case, the Grievant was not disciplined twice for the same offense. The reason being that, at the time that the Grievant finally received the initial "Employee Disciplinary Notice" on August 26, 1997, the Grievant was advised that the Highway Commissioner could not make a final decision on the discipline and that the matter would be referred to the Highway Committee. The decision on the discipline was not final until the Highway Committee issued the "Iowa County Disciplinary Notice" dated September 12, 1997. As set forth in that notice, the Grievant was disciplined for a lack of cooperation and or inability to follow the Patrol Superintendent's instructions as evidenced by repeatedly objecting to orders and directions; refusal to start work before the supervisor was present; and poor preparation for job signing, cones, and traffic paddles.

As the testimony of Patrol Superintendent Venden establishes, the conduct which gave rise to the decision to discipline the Grievant occurred on August 20, 1997. According to Venden, the Grievant's repeated objections to orders and directions on August 20, 1997, were in response to Venden's decision to not assign flagmen.

Venden's testimony and written account of the events indicate the following: at the time that Venden assigned work to the Grievant on the morning of August 20, 1997, the Grievant knew that he was not being assigned any flagmen; that the Grievant did not raise any issue with respect to flagmen until 7:30 a.m., when the Grievant radioed in that he needed a couple of guys to flag; that Venden reiterated the procedure that had been explained previously to the Grievant, *i.e.*, that a flagman was not needed unless the work crew was loading brush on the truck parked on the highway and, at that time, one man could flag and the other two could load the brush on the truck; Venden also reiterated that, at other times, if there were to be a problem with traffic, one man could watch and listen, while the other two carried the brush across the road and threw it over the side of the river bank; that the Grievant replied in a sarcastic manner, but that Venden could not recall exactly what the Grievant said; that approximately one hour later, the Grievant again radioed an objection to having to work without flagmen; that Venden reiterated the procedure for using one of the crew to flag when the truck was being used; that the Grievant belligerently responded "well you better come down here then and show me how to protect both ends of the truck with one man"; that Venden responded that he would be there when he could; that Venden arrived at the Grievant's work site at approximately 9:40 a.m.; that the Grievant again objected to doing the assigned work without flagmen; that the Grievant stated "Roger if you would do your job we wouldn't be here like this" and "You know you really ought to think about the safety of your men"; that the Grievant asked Venden to look at the work site; that Venden walked the roadway for about five minutes, without observing any problem; that Venden returned to the Grievant and asked what was the problem; that the Grievant objected to doing the work without flagmen; and that Venden told the Grievant to do the job as he had been instructed or he could go home for the rest of the day; and that, thereafter, the Grievant made no further objection regarding Venden's decision to not assign flagmen.

The Grievant's testimony and written statements dispute the above in the following respects: the Grievant maintains that, when he initially received his instructions from Venden, the Grievant asked about flagmen; the Grievant maintains that his second radio call occurred 35 to 40 minutes after the first, rather than one hour; and the Grievant denies that he was sarcastic during the first radio call, that he was belligerent during the second radio call, or that he made the statements "Roger if you would do your job we wouldn't be here like this" and "You know you really ought to think about the safety of your men."

The Grievant acknowledges that he said "well you better come down here then and show me how to protect both ends of the truck with one man," but denies that he was belligerent. However, the statement is belligerent because the Grievant is not asking his supervisor for assistance, but rather, is issuing an order to his supervisor. The Grievant recalls that when Venden returned from walking the work site, he asked Venden "what he was trying to prove"; made a comment about Venden not wearing a vest; and told Venden that he (the Grievant) did not care what Venden did.

The record does not provide a reasonable basis to conclude that Venden would fabricate his testimony that the Grievant said "Roger if you would do your job we wouldn't be here like this" and "You know you really ought to think about the safety of your men." These statements are recounted in a written statement which Venden prepared shortly after the event and are the type of statement that a supervisor is likely to remember. The Grievant's own testimony confirms that he made other statements to Venden which were of the same ilk, i.e., disrespectful and sarcastic. Accordingly, the undersigned is persuaded that the Grievant made these statements to Venden.

The Grievant was the crew lead worker. The Grievant and his crew were asked to work along a rural roadway which was in a 55 MPH speed zone and which was curvy, hilly, and, at times, had a narrow shoulder and was bordered by a guard rail along a river bank. The Grievant and his crew were asked to carry brush across two lanes of traffic. Given the terrain and the nature of the work task, it was not unreasonable for the Grievant to raise a safety concern by questioning Venden's decision to not assign flagmen.

The other employees who were at the work site did not testify. While Venden and the Grievant each claim that these employees made comments to them which support their viewpoint on the appropriateness of Venden's work instructions, their testimony concerning these comments has been disregarded on the basis that it is unsubstantiated hearsay.

The Grievant's claim that it was unsafe to work without two flagmen is not corroborated by any other witness. Venden's claim that two flagmen were not necessary is corroborated by the testimony of Robert Regan, a member of the County's Highway Committee. Moreover, the flagging booklet issued by the DOT does not indicate that flagmen are required for any work performed by the Grievant and his crew on August 20, 1997, other than the task of loading

brush onto the truck in the vicinity of the blue house. Since that task, as recommended by Venden, involved a short section of one-lane traffic where vehicles can be seen approaching from both directions and the obstruction was only a single piece of equipment, the DOT booklet recognizes that one flagman may be utilized.

In summary, the record fails to establish that Venden's work instructions to the Grievant and his crew created any unsafe working conditions. While the Grievant may have had a reasonable basis to question whether or not there was a need for two flagmen, upon receiving his supervisor's opinion that two flagmen were not necessary, the Grievant did not have a reasonable basis to continue to protest this decision of the supervisor, nor to protest such decision in a belligerent, sarcastic and disrespectful manner.

Venden's testimony and written account of the events of August 20, 1997, indicate that, when Venden first gave the Grievant his work instructions, Venden told the Grievant that he would need a "full set of signs." The Grievant's testimony, however, establishes that he understood Venden to have given the Grievant discretion to pull the truck off the highway and onto a driveway as it was being loaded. Given this misunderstanding, and the fact that a Patrolman is generally able to exercise discretion over the manner in which work is to be performed, the Grievant had a reasonable basis to conclude that he was not required to load the truck while it was parked on the highway and that he would not need cones, paddles, or the other signs.

The Grievant denies that he refused to start work before the supervisor was present. According to the Grievant, after he received his work instructions from Venden, he met Reynolds at the truck; drove to the Clyde Town hall to pick up two set of signs, i.e., road work ahead and be prepared to stop; set up the signs; and, beginning on the east side of the work site, Reynolds and the Grievant removed brush from the north side of the road until 9:00 a.m., when they went to meet Venden.

When Venden arrived at the work site, he did not ask the Grievant or Reynolds what they had been doing. When Venden walked along the roadway, he started at the west side of the work site, where he had met the Grievant, and walked for approximately five minutes. Venden did not walk the entire length of the work site. Nor is it evident that Venden otherwise inspected the entire work site to determine what work, if any, had been done.

Venden's testimony and written account indicate that his conclusion that the Grievant had refused to start work before his supervisor was present is based upon two facts, i.e., that the Grievant and Reynolds were not working at the time that Venden arrived at the work site and that when Venden then walked along the roadway, he did not observe that any work had been performed.

Reynolds did not testify at hearing. Venden, however, was surprised by the fact that all of the work was completed that day because the Grievant had such a "late start." The evidence

that Venden did not think that the time period from Venden's arrival at the work site until the end of the work day provided sufficient time to complete all of the work, supports the Grievant's claim that he and Reynolds had worked prior to the time that Venden arrived at the work site.

Neither Venden's testimony, nor any other record evidence, establishes that Venden had inspected that portion of the work site which the Grievant claims to have worked. The record does not provide a reasonable basis to discredit the Grievant's claim that he and Reynolds performed work prior to the time that Venden arrived at the work site.

In summary, the record fails to establish that the Grievant refused to start work before the supervisor was present, or that the Grievant had poor preparation for job signing, cones and traffic paddles. Since these allegations have not been proven, they cannot serve as a basis for disciplining the Grievant.

The Grievant exhibited a lack of cooperation and inability to follow the Patrol Superintendent's instructions when, after raising a safety concern regarding the lack of flagmen, the Grievant continued to protest this decision of the supervisor and protested such decision in a belligerent, sarcastic and disrespectful manner. The County has just cause to discipline the Grievant for engaging in such conduct.

It is not evident that any of the other employees engaged in the same type of misbehavior as the Grievant. Thus, there has been no disparate treatment. Having concluded that the County has just cause to discipline the Grievant, the undersigned turns to the issue of whether or not the discipline imposed upon the Grievant by the County meets the just cause standard.

Prior to the events of August 20, 1997, the Grievant has received only one documented discipline, *i.e.*, an oral reprimand issued on March 25, 1997, regarding failure to observe the time limits of noon lunch. Venden's other meetings with the Grievant were not documented as discipline and, thus, cannot be considered to involve prior discipline.

The Grievant has been employed by the County for approximately eight years. The Grievant's one prior discipline, *i.e.*, the oral reprimand, is for a rules violation which is unrelated to the misconduct which occurred on August 20, 1997. Contrary to the opinion of Venden, the principles of progressive discipline were not observed when the County disciplined the Grievant by issuing a written reprimand and the disciplinary notice of September 12, 1997, wherein the Grievant was demoted and placed on probation.

Under normal standards of progressive discipline, an oral reprimand would be followed by a written reprimand and a written reprimand would be followed by a suspension. While demotion is a more uncommon form of discipline, such a discipline is recognized by the parties in their collective bargaining agreement. Its juxtaposition between suspension and discharge, suggests that the parties intended demotion to be imposed if a suspension has not been successful in correcting employe misbehavior.

Given the Grievant's prior work record, and the severity of the misconduct which occurred on August 20, 1997, the County has just cause to issue a written reprimand to the Grievant, but does not have just cause to demote the Grievant and place the Grievant on probation. Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The grievance is arbitrable.
2. The Employer has just cause to issue a written reprimand to the Grievant, Mitchell Zablutowicz, for repeated objection to orders and directions given.
3. The Employer did not have just cause to issue a written reprimand to the Grievant for refusal to start work before a supervisor was present or for poor preparation for job signing - cones - traffic paddles.
4. The Employer does not have just cause to demote the Grievant to a Group II - County Patrolman Helper and to place the Grievant on a ninety-day probationary period.
5. The Employer is to immediately remove the Employee Disciplinary Notices dated August 26, 1997 and September 12, 1997 from the Grievant's personnel file and modify them in accordance with this decision.
6. The Employer is to immediately return the Grievant to the Patrolman position that he occupied on August 20, 1997, and to make the Grievant whole for any wages or benefits lost as a result of the unjust demotion and placement on probation.

Dated at Madison, Wisconsin, this 27th day of April, 1998.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

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