BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

IOWA COUNTY EMPLOYEES, LOCAL 1266, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

and

IOWA COUNTY, WISCONSIN

Case 97
No. 57052
MA-10499

Appearances:

Mr. Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, for Iowa County Employees, Local 1266, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Bell, Gierhart & Moore, S.C., by **Attorney Mark B. Hazelbaker**, 44 East Mifflin Street, P.O. Box 1807, Madison, Wisconsin 53701-1807, for Iowa County, Wisconsin, referred to below as the Employer, or as the County.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute filed on behalf of Mitchell Zablotowicz, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on April 26, 1999, in Dodgeville, Wisconsin. No transcript was made of the hearing. At the close of the hearing, the parties mutually requested that I draft findings of fact, then contact them for the submission of their closing arguments. I issued draft findings of fact on May 3, 1999. By June 11, 1999, the parties submitted their closing arguments with a statement that my draft findings of fact were acceptable.

ISSUES

The parties stipulated the following issues for decision:

Did the County have just cause to suspend the Grievant, Mitchell Zablotowicz, for five days without pay for the incident which occurred on August 31, 1998?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 – 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 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 further, that the above rights shall be used fairly and reasonably.

ARTICLE 4 – DISCIPLINE AND DISCHARGE

4.01 Just Cause: No employee shall be disciplined or discharged without just cause.

4.02 Union Steward: A steward or officer of the Union may be present when an employee is being reprimanded by the Employer.

4.03 Limitations: Written reprimands will remain in effect for a period of time not to exceed eighteen (18) months; at the end of such period of time, it shall become null and void.

4.04 Personnel Files: Personnel files shall be open to employee and officers of the Union at all times. The Union shall indemnify and save the Employer harmless against any and all claims, demands, suits, and other forms of liabilities which shall arise out of any action taken by the Employer under this Section for the purpose of complying with the provisions of this Section.

BACKGROUND

The Union filed grievance 5-98 on September 22, 1998 (References to dates are to 1998, unless otherwise noted). The grievance form states the "Circumstances of facts" thus:

> Per mowing incident Aug. 31st 1998 in which employee received 5 days off without pay. Employee feels he was performing his duties as instructed per Hiway Superintendent.

The grievance form states "The contention – what did management do wrong?" thus:

> Local 1266 feels Art. 4 Sec. 4.01 was violated. In addition, per Employees Handbook pertaining to work rules page two, paragraph 3. Explaining purpose of disciplinary action is not intended to punish but to learn from mistakes and to

improve performance.

The Iowa County Highway Commission Employee Handbook states, under the heading "**WORK RULES**," the following:

> The purpose of disciplinary action is to correct problem situations. Disciplinary action is not taken with the intent to punish, but to learn from mistakes and to improve performance without diminishing an employee's self-esteem. . . .

The grievance form seeks that the disciplinary notice issued to the Grievant be withdrawn from his personnel file, and that the Employer make him whole for losses traceable to the suspension.

Leo Klosterman is the Employer's Highway Commissioner, and issued the Grievant the response of the Transportation Committee (the Committee) to Grievance 5-98. The Committee's response, dated October 26, states:

> . . .
>
> With respect to grievance #5-98, the Committee is satisfied, after hearing your appeal, that the County had just cause to suspend you without pay for one week. It is undisputed that you caused a rented tractor to roll onto its' side by backing the tractor so that its' rear wheel dropped off the shoulder into a ditch. Fortunately, the tractor had a roll cage and you were uninjured. However, the tractor was damaged and repairs will cost the County between $2,000 and $3,000. The Committee agrees with the Commissioner that this accident was completely preventable. If you could not see what you were backing into, as you said, you should have stopped the mower and got off to inspect the culvert area. You should not have been mowing in that manner in the first place. The Committee denied your grievance and found that the reasons stated in the letter imposing the suspension are valid.

The balance of the background to the grievance is best set forth as an overview of witness testimony.

Leo Klosterman

Klosterman was not present when the Grievant was assigned to mow a section of County Highway B on August 30 and 31. During the afternoon of August 31, however, he was informed that the mower the Grievant was using had turned over while the Grievant was mowing around a culvert. He spoke with the Grievant and the Grievant's direct supervisor, Donald Bach, on the afternoon of August 31.

Klosterman learned that the Grievant had been assigned to mow the first swath along the highway as part of a two-man mowing team. The Grievant was using a four-wheel drive Zetor tractor, which the County had rented from an outside vendor. The tractor pulled a rear-mounted mower, which ran from the power take off (PTO) at the rear of the tractor. The mower unit was offset slightly from the right of the centerline of the tractor.

In the Spring of 1997, Klosterman reviewed State of Wisconsin mowing procedures with his management team, which consisted of himself, Bach, who is the Employer's General Patrol Superintendent and Roger Venden, who is the Employer's State Patrol Superintendent. They decided to adopt, with Committee approval, a procedure by which the County would mow right-of-ways to a height of five inches, using teams wherever possible. Under this approach, right-of-ways were to be mowed in two steps. The first swath would be from to the roadway's shoulder into the right-of-way to the width of the mower's blade unit. The second, and if necessary, further swaths would be cut from the first swath deeper into the right-of-way. Where possible, the County would use rear-mounted mowers only for the first swath. The following swaths would be cut by a tractor with a side mounted mowing unit. Such units typically have flail driven blade units, which add the advantage of being mounted on a unit run by hydraulics. The hydraulic system permits an operator to raise the unit over obstructions. A rear-mounted PTO driven unit, like the one operated by the Grievant on August 30 and 31, is fixed to the tractor, and must be driven around obstructions. The side mounting of a unit can also make the unit more stable on an incline. On August 30 and 31, the Grievant was assigned to mow the first swath, to be followed by Roger Parman, who was operating a wing-mounted mower. Klosterman felt the policy adopted by his management team in the Spring of 1997 had been communicated to employes through the instructions of their direct supervisors and through the repetition of work assignments.

Bach was responsible for investigating the incident on-site. Bach filed a written summary of his investigation with Klosterman on August 31. His statement reads thus:

> I received a call from (the Grievant) about 2:00 PM, that he wanted to see me. He stated that his location was on B about 1 mile east of 80. . . .
>
> Upon arrival, I saw that a rented (Zetor) was on its side in the ditch. First question asked of (the Grievant) was if he had any injuries. I asked (the Grievant) because he was the one who called me and he also appeared (agitated). The other (Zetor) and both Tigers were also there. The tractor was on (its) right side about 15 ft. from a 6ft culvert that had running water. The immediate area was (swampy) and the top 2ft of the cab was laying in mud. The top was about 1ft lower (than) the wheels. Immediately behind the mower, the weeds were about 5 ft high. The area between the front and rear tires was (very) steep and a large

depression could be seen. Tire tracks were very (visible) from the point he started backing to the area where the unit started sliding. . . . When I went down the bank to check the

unit, I stepped in a 12 to 18 in ditch just over the edge of the gravel. That ditch was not (visible) due to the tall grass. It led to the large depression that I saw between the tires.

I asked (the Grievant) what happened. He stated that he had made a cut along the blacktop and then was backing up to make a 2nd cut, as the weeds were very tall right there. The unit started to slide, hit the bottom, and rolled over.

Greg . . . was mowing in a Tiger mower behind (the Grievant) making the 2nd cut. There is a small hill about 5-600 yards from where the accident happened and Greg was on the other side of the crest. He said he did not see (anything until) he got closer.

I contacted Leo and advised him of the situation, and that a wrecker would be needed. Terry's towing was called. Tom Pratt was also contacted . . . I was concerned about starting the unit to get it . . . back to the shop. When Tom arrived, he started it and it ran OK. It was then loaded . . . and taken directly to (Mueller's).

Right side mirror, door window, rubber around window, (possible hydraulic) leak on back right side, and battery fluid leak. No estimate to total damage as of 3:00 PM on 9-1-98.

The next morning, Klosterman met with the Grievant. A dispute arose concerning what, if any, union representation the Grievant should have. That dispute has been resolved and plays no role here. Klosterman summarized the meeting in a memo, which he and the Grievant signed. That memo states:

(The Grievant) was mowing with a rented tractor . . . They were mowing on CTH B east of Hwy 80. (The Grievant) was mowing outside edge. There was a drop off about 15 to 20 ft. from culvert. There were tall weeds next to culvert. (The Grievant) backed into culvert area to get second cut and back wheel of tractor dropped into a ditch, gave away and slid down into hole and tipped over on right side. There was a lot of mud in area. Greg Parman was a little west of (the Grievant). (The Grievant) reported no injuries except like a paper cut on right forearm. (The Grievant) was wearing seatbelt and stated that it worked. This accident happened about 1 p.m. . . .

After interviewing the Grievant, Klosterman spoke with Bach, Venden, Pratt and Parman. He also reviewed the Grievant's personnel file. The file includes a disciplinary incident which resulted in a grievance arbitration award. That award, IOWA COUNTY, MA-10073 (BURNS, 4/27/98) states:

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?

. . .

AWARD

1. The grievance is arbitrable.

2. The Employer has just cause to issue a written reprimand to the Grievant, Mitchell Zablotowicz, 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.

The file included a written reprimand for "Unsatisfactory work performance" traceable to an incident which occurred on July 21. Roughly speaking, the alleged misconduct concerned the Grievant's failure to document the removal of County materials from its quarry and his time in using those materials to perform repair work on a State highway. Such material and work must be documented to bill to the State. The reprimand also concerns the conduct of the Grievant and another worker when the oversight was brought to their attention by management. The Union appealed that discipline to arbitration, which, as of the date of this decision, is still pending. Klosterman also reviewed the Employee Handbook, which he found included the following:

Work Performance

1. Insubordination, including disobedience, failure or refusal to follow written or oral instructions of supervisory authority or to carry out work assignments.

2. Neglecting job duties or responsibilities.

. . .

6. Failure to observe all safety rules and practices including, but not limited to, the use of protective equipment and clothing, or in the operation of vehicles and equipment.

. . .

8. Poor performance. . . .

Any violation of the above will be subject to the following disciplinary action:

1st Offense:	remainder of day off without pay
2nd Offense:	appear before the Transportation Committee and possible termination

. . .

On September 8, the Grievant appeared before the Committee to give an account for his actions of August 31. Klosterman did not make a specific recommendation of the appropriate response the Committee should take. He did, however, share with the Committee, the results of his own investigation. The Committee determined to suspend the Grievant for five days. Klosterman agreed with this conclusion and documented it in a memo headed "IOWA COUNTY EMPLOYEE DISCIPLINARY NOTICE." That memo is dated September 16. The form consists of a number of printed form entries with blanks to be filled out to detail the specific circumstances. One of the form entries is "Consequences should an incident occur again". That form entry contains no response. Another form entry is headed "Type of violation". Under this entry are the following specific form entries, with blanks to be checked where appropriate: "Attendance & Punctuality"; "Tardiness/Left Early"; "Rudeness to co-workers/customers"; "Unsatisfactory work performance"; "Carelessness"; "Use of material/equipment"; "Insubordination"; "Violation of safety rules"; "Working on personal matters"; "Abuse of sick time"; "Failure to follow instructions"; "Sexual harassment"; and "Other". Klosterman checked the following entries: "Unsatisfactory work performance"; "Carelessness"; "Use of material/equipment"; "Insubordination"; and "Failure to follow instructions". The notice also included the following narrative:

. . .

> You were to be the lead mower responsible for cutting the first swath with the rear-mounted mower. The second operator of the side-arm mower was to cut the second swath, which he could accomplish by remaining on the shoulder of the road. For some reason, you decided to cut the second swath with the rear-mounted mower. In deciding to cut the second swath, a wheel of the tractor fell off the edge of the road's shoulder, causing the tractor to tumble over. Fortunately, you were belted into the restraining harness on the machine, and the cab over the seat prevented you from having any serious injury. This decision to cut the second swath with a rear-mounted mower was beyond negligent, it amounted to you consciously and intentionally failing to follow the procedures that any person operating heavy equipment would deem necessary. You also disregarded your mowing instructions which was to cut the first swath. This conduct is parallel to and similar to the behavior, which was determined to have existed in the April 27, 1998 arbitration decision. . . . In this mowing incident, you have chosen to be unproductive, and to exhibit your lack of cooperation and failure to follow work instructions by handling your work improperly. You should not have tried to mow a second swath with your rear-mounted mower. Given this level of misconduct I

have issued a suspension for five working days off . . .

Klosterman stated that the suspension was "proportionate and fair" for the misconduct. He felt the accident was avoidable if the Grievant had followed the 1997 policy and made the first swath without backing into the culvert area. Once the Grievant had determined to ignore the policy, Klosterman thought his failure to look into the tall grass to gauge the soundness of the ground complicated the situation. He felt the Grievant had difficulty complying with departmental policy, and needed a strong wake-up call.

Klosterman did not seek to determine whether the Grievant had mowed this section prior to August 31. His familiarity with the terrain was, Klosterman noted, irrelevant to the flawed judgment manifested by the accident. He felt that the Grievant operated the mower safely until he decided to back into tall weeds to mow around the culvert. The disciplinary form includes an entry for "Violation of safety rules," but Klosterman felt that the entries he checked were sufficient to cover the misconduct.

Klosterman acknowledged he rolled a County tractor in 1989 or 1990. He was operating a mower with a side mounted mower on a State highway section. The side mower was on the low side of an incline when its rear wheel sank into some loose fill, causing the unit to roll. He was called before the Committee to explain the incident. He did so, and received no discipline.

Dave Gollon

Gollon is a County Board Supervisor and a member of the Committee. Gollon uses tractors regularly in his bait and fish farming enterprise. The Zetor unit rolled by the Grievant was, in his estimation, superior to his own equipment. He noted he has watched the Grievant operate County mowers in the past. In an incident occurring last June or July, he confronted the Grievant concerning what he viewed as careless operation of the equipment. He assumed the Grievant would forward the incident to County management, but learned after the incident posed here that the Grievant had not done so. Gollon acknowledged it affected his own view of the severity of the conduct questioned here, but could not specifically recall if he brought the matter to the Committee's attention prior to the implementation of the five day suspension.

Donald Bach

Bach was the Grievant's immediate supervisor on August 31. He noted that County policy calls for a rear mounted mower to make an initial swath before additional swaths are taken by a mower with a wing mounted unit.

When Bach arrived on County B on August 31, he found the Zetor on its side, with the top of the cab stuck three to four inches in mud. He hesitated to offer his own opinion regarding whether the Grievant had failed to exercise proper care. He noted his role in the matter was

investigative. He did not express to the Committee an independent opinion on the level of discipline, if any, to be meted to the Grievant. Rather, he put the results of his investigation into their hands. It would not, he noted, be unusual for an operator of a rear-mounted mower to make a second swath at a right-of-way. This would not, however, be standard procedure, and was not necessary on August 31.

Greg Parman

Parman was assigned on August 31 to follow behind the Grievant. He did not think it was unusual for the lead mower to back up to a culvert to alert him to its location. He noted it was up to the Grievant to determine whether to make a second swath to cut around a culvert.

The Grievant

The Grievant noted that he and Parman cut as a team on the same road section on August 30 and 31. On August 30, he cut the first swath and then made a second cut around signs and culverts. He stated he believed Bach had watched him cut around signs. He noted that he has four years of experience mowing grass for the Employer, and that he routinely backs up to cut around culverts. He has neither been instructed on how to cut around culverts nor been warned not to back up to do so. Neither he nor Parman had any experience mowing this section of road prior to August 30.

On August 31, he and Parman first cut the side of the road opposite the accident site. He noted he backed up to mow around the end of the same culvert on the opposite side of the road before moving across the road. After he and Parman had crossed the road, he noted that he pulled quite a distance ahead of Parman, and decided he could do some additional cutting to permit Parman to stay within sight. He acknowledged that he was not able to see far down the incline leading to the culvert, and that he chose not to inspect the area. He noted he did not, as a rule, get out of the mower to check out terrain. Rather, he put it in low gear at low idle and slowly backed into the area to get a feel for the terrain. He was, throughout the day, strapped into a safety harness. As he backed into the incline, he felt the rear wheels start to slide, and then held on while the unit tipped. Only the harness and good luck prevented serious injury. Only after he was able to crawl from the cab, did he see the terrain which he had fallen into. There had been a washout roughly fifteen feet from the culvert. As a result, a sinkhole had been created, which had been overgrown with tall grass.

He testified that he had never been informed that Employer policy was to have the lead

mower make only one swath. He did not willfully disobey any instruction, and although he was not surprised to be disciplined, he was shocked to be suspended for five days. He was not sure the Committee cared to learn his side of the incident. He noted he did not view the July incident to be finally decided, nor did he view the 1997 arbitration award to be fully resolved.

Randy Kitelinger

Highway B is typically assigned to Kitelinger for maintenance and mowing. He is familiar with the road, but on August 31 was assigned to work on a paving crew. Kitelinger noted that when he mows, he typically mows a first swath, and routinely backs up to culverts. He has never been instructed not to do this. He added that he rarely, if ever, gets off of his mower to inspect a roadway before mowing it. Kitelinger, as the Grievant, did not view sinkholes to be unusual in the roadways the County mows.

Other Evidence

The Union and the County stipulated that two other unit employes, Mark Olson and Cliff Dobson, would have given testimony to the same effect as Kitelinger. The parties also stipulated to the submission of a decision of the Labor and Industry Review Commission, dated February 25, 1999. In that decision, a two person majority found that "in week 38 of 1998 the employe's work was suspended, but not as a disciplinary action for good cause connected with his work, within the meaning of Wis. Stat. (sec.) 108.04(6)."

The parties also submitted evidence concerning prior accidents involving unit employes. It is undisputed that the Employer reviews accidents on a case by case basis to determine what, if any, discipline to impose.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Employer's Position

The Employer notes that the grievance does not pose "an open and shut case" and that the facts will not support a conclusion that "this discipline was excessive and the County conducted its operations improperly." Noting that this "is not a case where the employee involved is incapable of doing the work," the Employer asserts that the difficulty it faces with the Grievant is that "his need for attention is so great that he chooses to seek it by engaging in foolish, risky behavior." More specifically, the Employer argues that the Grievant took the "simple, routine work task" of cutting the first swath, and turned into the high risk endeavor to back a rear mounted mower into a depression, hidden by tall weeds. Nor is this a case where the Grievant "was simply trying his best to get his job done." Rather, he "simply didn't care what happened," and put himself and his

equipment in danger.

Against this background, the five day suspension cannot be considered "harsh." Rather, it "is actually quite consistent" with his work record and the prior arbitration decision. In each case, the Grievant "is acting out his inability to get along with supervisors and authority by engaging in self-destructive behavior." This is demonstrated by the evidence, which manifests that there "was absolutely no reason why (the Grievant) needed to back up the tractor." The discipline imposed is an appropriate response to an employe "who consumes (a) vastly disproportionate amount of management time." It sends the appropriate signal that he will "either . . . learn to do his job and do it in a manner which is not calculated to gratuitously seek attention, or he will wind up without a job."

That the employe handbook is need of revision can supply no defense for his action. The Employer concludes that "the grievance should be denied and the discipline sustained."

The Union's Position

The Union contends that "(j)ust cause requires the Employer to prove the charges against the grievant by 'clear and convincing proof.'" Noting that arbitrators hold different views on this point, the Union concludes that the 'clear and convincing proof' standard has been adopted by many arbitrators "as a compromise between the criminal standards of proof 'beyond a reasonable doubt' and a mere 'preponderance of the evidence.'" More specifically, the Union argues that the evidence establishes "that the grievant and other Iowa County Highway Department employees have the discretion when assigned the first cut along the right-of-way to also make a second cut around culverts." Testimony establishes that other employes operate mowers in the same fashion as the Grievant did on August 31. Since there is "no policy or rule or direction communicated by management to the grievant or other department employees forbidding a second cut, around culverts, by the mower operator assigned to a rear-mounted mower," it follows that the Employer has failed to demonstrate cause for its discipline.

Beyond this, the Union argues that the September 16 notice of discipline "is totally unsupported by the evidence." A review of the evidence establishes that it "is more than ironic that the grievant was not charged with a violation of safety rules but instead was alleged to have committed insubordination and a host of other offenses." A more reasoned view of the evidence is that "the employer has subjected the grievant to unfounded and excessive discipline," and has consistently failed "to live up to the philosophy of its own employee handbook."

In the Grievant's line of work "accidents do happen . . . particularly when mowing the treacherous right-of-way along county highways." The evidence shows no negligence, much less

insubordination, by the Grievant. Since he acted "in good faith" and "was not guilty of misconduct," the Union concludes that the grievance should be sustained and that the "Arbitrator should order a make whole remedy including the purging from the grievant's personnel file any and all references to the mowing incident of August 31, 1998."

DISCUSSION

The stipulated issue is whether the County had just cause to suspend the Grievant for five days. Because the parties have not stipulated the standards defining just cause, the analysis must, in my opinion, address two elements. First, the County must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the County must establish that the discipline imposed reasonably reflects that interest. This does not state a definitive analysis to be imposed on contracting parties. It does state a skeletal outline of the elements to be addressed and relies on the parties' arguments to flesh out that outline.

The Grievant's conduct on August 31 is the focus of the Employer's disciplinary interest. Klosterman's September 16 disciplinary notice states the interest to extend to "Unsatisfactory work performance; Carelessness; Use of material/equipment; Insubordination; and Failure to follow instructions." As detailed in testimony, these stated reasons form three distinguishable bases for the discipline. The categories "unsatisfactory work performance," "carelessness," and "use of material/equipment" are essentially different ways of stating the Grievant acted negligently on August 31. This asserts the Grievant failed to generally exercise judgment which could reasonably be expected of an experienced patrolman. The category "failure to follow instructions" is similar, but distinguishable from the category "insubordination." "Failure to follow instructions" states the conduct is gross negligence, since the Grievant failed to follow specific work instructions. "Insubordination" states that his failure was a willful disobedience of those instructions.

The evidence supports only the assertion that the Grievant acted negligently on August 31. This conclusion can be based on the Grievant's testimony standing alone. He acknowledged that he routinely backs a rear mounted mower to trim around culverts; that he had no clear view of the incline of this culvert or the quality of the ground around it; and that he did not check the culvert before backing his mower toward it. He acknowledged that when he felt the ground give beneath one of the rear wheels, he experienced the sickening sensation of the tractor tipping beyond its center of gravity. From that point on, the severity of damage to the Grievant and to the tractor was out of his hands. The judgment that placed the tractor in that position cannot be characterized as anything other than flawed.

That the Grievant or other unit or non-unit employes may have acted similarly does not defeat the County's disciplinary interest in this conduct. It is undisputed that the Grievant's conduct unnecessarily put his equipment and, more significantly, his safety at risk. Any equipment operator is employed not simply to operate machinery but to exercise the discretion which makes the equipment valuable. It cannot be persuasively asserted that an employer's history

of assigning unnecessarily unsafe work creates a right to assign unsafe work. It can no more persuasively be contended that employe exercise of flawed judgment creating unsafe work creates an employe right to exercise flawed judgment. The Grievant's personal interest in avoiding discipline cannot defeat the overriding unit-wide interest in the enforcement of safe working conditions.

The remaining bases for the discipline have not, however, be proven. The asserted "failure to follow instructions" has no persuasive evidentiary basis. Klosterman noted that his management team set the policy on mowing right-of-ways in two swaths in the Spring of 1997. This policy had, he noted, been communicated to workers through his Patrol Superintendents and through the repetitive nature of the mowing process. That the unit understood the two swath process falls short, however, of establishing that the policy included a strict prohibition against backing the first swath mower around obstructions. There is no evidence that either Patrol Superintendent communicated this to unit employes. More specifically, Bach was the Grievant's supervisor on August 30 and 31. There is no evidence he specifically instructed the Grievant not to back the mower to cut around obstructions. The record shows, at most, that the Grievant was assigned to cut the right-of-way, and was generally expected to exercise good judgment in doing so. This falls short of establishing any County supervisor gave the Grievant a specific instruction which he failed to follow.

Insubordination is the most serious allegation made against the Grievant. "Insubordination," is a "deliberate defiance of . . . supervisory authority." Bornstein and Gosline, Labor and Employment Arbitration, (Matthew Bender, 1996) at Sec. 20.04. Insubordination is not uncommonly treated as a capital offense in labor relations, because it connotes the willful attempt to undermine the management of a work place. To establish insubordination in this case, the County must demonstrate that the Grievant was issued, and understood, a clear, work-related order given by a known supervisor. See, for example, Roberts' Dictionary of Industrial Relations, (Third Edition, BNA, 1986).

As noted above, however, there is no persuasive evidence that the Grievant was specifically ordered not to make a second cut to mow around obstructions. Bach noted that the second swath attempted by the Grievant on August 31 was unnecessary and not standard procedure, but this falls short of establishing the clear work order necessary to demonstrate insubordination.

In sum, the County has established that the Grievant failed to exercise proper judgment when he backed down the grass-covered incline on August 31. This flawed judgment manifests negligence, but not gross negligence or willful misconduct.

This poses the second element of the cause determination. The issue thus becomes whether a five day suspension reasonably reflects the County's proven disciplinary interest. While it is apparent the Employer uses a system of progressive discipline, the components of that system are

unclear. The Employee Handbook specifies, on its face, a two-step system, starting with "remainder of day off without pay" as the sanction for a first offense of work rules. The second step may encompass further steps since it puts the employe before the Committee, but states no limit to Committee discretion, which extends to "possible termination." The September 16 notice ostensibly states a five-step system, ranging from oral reprimand to discharge, but the fourth step is the Committee, which exercises discretion over "possible discipline up to and including discharge."

The evidence posed here does not clarify which, if either, of these systems governed the August 31 incident. This ambiguity in the progressive discipline system complicates the application of the second element of the cause determination. Ultimately, the discipline must reflect that the County has proven a disciplinary interest in the August 31 conduct but has not proven the full interest alleged in the September 16 notice of discipline.

The evidence falls far short of the conduct noted in the memo to the September 16 notice. More specifically, the evidence does not establish his conduct was "beyond negligent." Nor does it establish he "consciously and intentionally" failed to follow procedure, or acted "parallel to and similar to the behavior . . . determined to have existed in the April 27, 1998 arbitration decision." Klosterman's memo repeatedly emphasizes the alleged willful aspects of the Grievant's misconduct, but the proven misconduct was negligent, not willful in nature.

In the absence of proof of deliberate conduct, the five-day suspension cannot be considered reasonable. The length of the suspension presumably reflected the severity of the misconduct, which in turn rested on the County's perception of a deliberate disregard of instructions.

The significance of the Grievant's negligence must not, however, be minimized. He placed himself and his equipment at considerable peril. As noted above, the actions of other employes cannot excuse this. Neither an employe nor the Employer can reasonably assert a right to unnecessarily put employe safety at risk. The Award entered below authorizes the County to issue the Grievant a written reprimand for the flawed judgment he exercised on August 31, when he failed to survey questionable ground prior to backing a mower onto it. This discipline, in my view, unpersuasively repeats a level of discipline affirmed in a prior arbitration award. I do so, however, because the significance of a suspension is unclear in light of the County's progressive discipline system. Because much of rationale for the five day suspension turns on the asserted, but unproven, willful nature of the misconduct, I am reluctant to permit a suspension. On this record, a single day suspension may be equivalent to a five day suspension, since either arguably puts the Grievant on the threshold of discharge. While this may be appropriate on another record, it would ignore that the alleged willful misconduct is unproven on this record. The written reprimand thus stands as the lesser of two evils.

The written reprimand has the virtue of permitting the County to clearly state its

mowing policy to the Grievant. If he is to be required to exercise reasonable discretion before backing the mower in the future, and to view questionable terrain before backing into it, the County may say so in the reprimand. If he is to be precluded from backing the mower at all in the future, the County may say so. The County is the policy making body, and the Award does not attempt to intrude in this area, except to require the County to clearly specify the inappropriate behavior committed by the Grievant on August 31 and how he is to modify that behavior in the future.

The Award does not attempt to address the broader arguments of the parties regarding the clearly fraying relationship between the Grievant and his supervisors. Whether, as the County asserts, the Grievant demands a disproportionate amount of supervision that will lead to his termination is too broad a point to be resolved here. The Grievant's unwillingness to unequivocally acknowledge the role of his own flawed judgment on August 31, however, lends troublesome support to the darker aspects of the County's assertion. Whether, as the Union asserts, a pattern of excessive discipline exists is too broad a point to be addressed here. The County's characterization of the August 31 misconduct as willful behavior, however, lends troublesome support to the darker aspects of the Union's assertion. In any event, the Award seeks no more than to make the broader issues raised by the parties manageable. The written reprimand should state specific behavior that, if repeated, will lead to further discipline. The quality of the Grievant's behavior in response to the reprimand will determine the broader implications of this proceeding.

AWARD

The County did not have just cause to suspend the Grievant, Mitchell Zablotowicz, for five days without pay for the incident which occurred on August 31, 1998.

As the appropriate remedy for the County's violation of Articles 3 and 4, the County shall make the Grievant whole by compensating him for the wages and benefits he would have earned but for the five day suspension noted in the September 16 Disciplinary Notice. The County shall expunge any reference to the suspension from his personnel file(s).

Because the County had just cause, within the meaning of Articles 3 and 4, to discipline the Grievant for his conduct on August 31, it may amend his personnel file(s) to note the issuance of a written reprimand to him for that conduct. The reprimand should state the specific behavior the Grievant committed on August 31 that prompted the reprimand, how he is to modify that behavior in the future, and may specify the consequence of repeating that behavior.

Dated at Madison, Wisconsin, this 1st day of July, 1999.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

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