

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**IOWA COUNTY**

and

**IOWA COUNTY HIGHWAY DEPARTMENT  
EMPLOYEES, LOCAL 1266, AFSCME, AFL-CIO**

Case 96  
No. 57051  
MA-10498

*(Termination of B.S.)*

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Appearances:

**Mr. Michael J. Wilson**, Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Madison, Wisconsin, appeared on behalf of the Union.

Bell, Gierhart, Moore, S.C., by **Attorney Mr. Mark B. Hazelbaker**, 44 East Mifflin Street, Madison, Wisconsin, appeared on behalf of the County.

**ARBITRATION AWARD**

On December 2, 1998, Iowa County and the Iowa County Highway Department Employees Local 1226, AFSCME, AFL-CIO, requested that the Wisconsin Employment Relations Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Hearing on the matter was conducted on February 19, 1999, in Dodgeville, Wisconsin. A transcript of the proceedings was made and distributed by March 4, 1999. Post-hearing briefs were submitted and exchanged. Reply briefs were waived by letter dated May 7, 1999. Corrections to the evidentiary record were made on July 20, 1999.

This Award addresses the termination of employe B.S., for the circumstances surrounding the temporary loss of his Commercial Driver's License.

### **BACKGROUND AND FACTS**

B.S., the Grievant, had been employed by the Iowa County Highway Department for just under three years when he was discharged on August 25, 1998. S. regularly operated equipment, all of which required him to possess a driver's license, some of which required that he hold a Commercial Driver's License. S. obtained a Commercial Driver's License at the outset of his employment with the County.

Mr. S.' birthday is June 5. His license came due for renewal on June 5, 1998. Mr. S. testified that he was unaware that his license had expired, and further testified that he never received a notice of renewal. S. had a change of address and it appears from his testimony that whatever notice of license renewal was mailed was never forwarded to his new address. When Mr. S.' license expired on June 5, 1998, it was not then renewed.

On the evening of August 20, 1998, S. was a party to a domestic dispute. The Sheriff's Department was called, and the Grievant was arrested, and taken into custody. During a routine review of his driver's license, the Sheriff's Deputy, Daniel Carey, discovered that the Grievant's license had expired. He so informed the Grievant, and cautioned the Grievant not to drive with his expired license. Before the Grievant left the county jail, Carey reiterated his directive that the Grievant not drive with an expired license. The Grievant heard and understood Carey's directive.

The Grievant was released from the county jail at 2:30 in the morning. Notwithstanding the deputy's directive, the Grievant perceived a need to go to work the next morning, and did so. On Friday, August 21, the Grievant appeared for work at a starting time of 5:30 a.m. He told no one of his driver's license expiration. On Friday, the Grievant was assigned to operate equipment which requires a Commercial Driver's License, and was assigned work in Dane County. The Grievant worked a normal work day on Friday, August 21.

On Monday, August 24, Leo Klosterman, County Highway Commissioner, was approached by an employe, prior to the start of the workday, who advised Klosterman that that employe had had a conversation with Deputy Carey and been advised that S. was without an Operator's License. Klosterman talked with Don Bach, S.' supervisor, and advised Bach that he (Klosterman) believed that S. may be without a Commercial Driver's License. Bach responded that S. was assigned to work on the back of a paver, work which did not require S. to drive. Bach had given work assignments out before 7:00 a.m., and had so assigned the Grievant. The conversation between Bach and Klosterman occurred after that assignment was made, and the Grievant had left for the work site.

As it turns out, once the work crew arrived at the worksite, S. was reassigned to operate equipment. On Monday, August 24, the Grievant drove two dump trucks. Bach first discovered this fact on Tuesday morning when he reviewed employe time cards. Bach called

the Grievant at approximately 2:00 in the afternoon on Monday, August 24 to inquire as to the Grievant's Friday time card. The topic of the Grievant's driving license and/or restrictions was not raised.

Klosterman began an investigation into the matter. He called the Department of Transportation on Monday morning, and requested and received a printout of the Grievant's operator license status. That printout reflected that the license had expired on June 5. Klosterman thereafter talked with Deputy Carey, who confirmed that he had told B.S. that he had no license. It was at that point that Klosterman realized that B.S. had been without a driver's license and Commercial Driver's License endorsement for the entire summer.

Klosterman had a regularly-scheduled meeting of the County Transportation/Highway Committee scheduled for the evening of Monday, August 24. During the course of that meeting, the matter of S.' license expiration was brought to the Committee's attention. Following its review of the situation, the Committee determined to terminate the Grievant. According to Klosterman, the greatest concern among Committee members was over the fact that following his arrest, the Grievant knew that his license had been suspended, and determined to drive notwithstanding the Deputy's warning not to do so.

Klosterman met with the Grievant on Tuesday morning and terminated him by the following letter:

Dear B.

Due to your negligence of failing to renew your CDL, as required as a condition of employment, and by further gross negligence by putting Iowa County, Columbia County and Dane County at severe risk for wrongly and willingly operating illegally County-owned vehicles, your employment with Iowa County Transportation Department is terminated as of 7:30 a.m., Tuesday, August 25, 1998.

Respectfully yours,

Leo Klosterman

No one from the Transportation/Highway Committee or departmental management had talked with the Grievant prior to his meeting with Klosterman on Tuesday morning. The Grievant was afforded no opportunity to present his side of the story or to offer explanations into what occurred. The Grievant had intended to wait until the Department of Motor Vehicles came to Dodgeville on Thursday, August 27 to renew his license. It appears that the Department rotates its office location and that August 27 was the first time the DMV would be

in Dodgeville. Later on August 25<sup>th</sup>, following his termination, the Grievant had a friend drive him to Platteville, where he got his driver's license and CDL, renewed. He secured the renewal upon payment of a fee. There was no other impediment to the renewal of his license.

Prior to this incident, the Grievant had no discipline. A grievance was immediately filed protesting the Grievant's termination. The grievance points to Article 14 and requests the Employer to abide by that Article. The grievance was denied, and subsequently appealed. The October 26, 1998 response to the appeal, authored by Klosterman, outlines the Employer's perspective on this matter. That response provides:

This is in response to your grievance appeal concerning your termination from the County for failing to have the required Commercial Driver's License. Your license expired on June 5, 1998. You did not renew it until late August, 1998. You were terminated when we learned that you had been working for 81 days without a CDL. During the time you worked without a CDL, you drove Columbia County equipment into other counties. You used equipment of other counties. Had you been involved in an accident, your lack of a license would certainly have become a factor in determining liability of the County. Most troubling of all, you continued to report to work even after you learned that your license expired when you were stopped by police in August.

Under the collective bargaining agreement between the Union and Iowa County, an employee who loses his CDL for more than sixty days for any reason may be permanently replaced by the Employer, Section 14.01, Agreement. The Committee has determined to do so.

The Committee has determined that your negligence in seeking renewal of your CDL, together with your lack of candor on the issue, warrant your termination.

The Grievant was denied Unemployment Compensation benefits. An Examiner, in affirming the initial determination, found that the Grievant was terminated for misconduct.

### ISSUE

The parties stipulated to the following issue:

Did Iowa County have just cause on August 25, 1998, to discharge the Grievant, B.S., for failing to have a Commercial Driver's License, operating county vehicles without a valid license, and failing to notify the Employer that his CDL had expired? If so, what is the appropriate remedy?

**RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT**

**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:

...

C) To suspend, demote, discharge and take other disciplinary action against employees for just cause;

...

**ARTICLE 4 – DISCIPLINE AND DISCHARGE**

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

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**ARTICLE 14 – COMMERCIAL DRIVER’S LICENSE**

14.01 If an employee is required to have a CDL to perform his or her job and loses that CDL for any reason, then the employee shall be immediately placed on layoff status. If that employee is able to obtain an occupational CDL within sixty (60) days of the date that his/her CDL is terminated, then he/she shall be able to return to his/her former job within the limits of the occupational CDL. After sixty (60) days from the date that the CDL is lost, the Employer is free to seek a permanent replacement employee to perform the work. If a permanent replacement is hired, the employee who loses his/her CDL shall have no right to his or her former job if the CDL is subsequently returned or if an occupational CDL is subsequently obtained.

14.02 In the event an employee does not obtain an occupational CDL which permits him or her to return to his/her former job within the sixty (60) day time period, then the employee will remain on lay off status until such time as there is a vacancy in the bargaining unit which the employee is qualified to perform. (The Employer shall have the right to reasonably test the employee if he/she applies to perform a job which the Employer is not reasonably sure the employee is qualified to perform.

14.03 While on layoff status, the employee shall not lose seniority but the employee shall not be entitled to use or accrue any benefits under the contract other than death benefits. While on lay-off status, the employee shall be entitled to remain in the Employer's health insurance plan that exists at that time; however, the employee shall pay the full amount of the premium, on a monthly basis, in such manner as shall be reasonably required by the Employer. Failure to tender the premium, in full, at such time and in such manner as shall be required by the Employer shall result in the employee being removed from the Employer's health insurance group.

14.04 Any employee who loses his or her CDL who has not obtained an occupational CDL within the sixty (60) day period described above may, at the sole option of the Employer, be placed in another job in the bargaining unit which does not require a CDL as a condition of that job. The assignment may be made without prior posting. Any employee so assigned shall be paid at the start rate of that job classification, as set forth in the contract, and shall be entitled to the ninety (90) day increase, if he/she is still working in that capacity for that period of time.

14.05 Any employee who permanently loses his or her CDL shall be terminated at that time without being placed on layoff Status. Any employee who has been on layoff status for a period of two (2) years shall be terminated.

14.06 At no time shall the Employer be required to have more than two (2) employees in the bargaining unit with occupational licenses. If there are two employees in the bargaining unit with occupational CDL licenses, then any subsequent person who loses his or her CDL shall be placed on layoff status and may not return to work at any job in the bargaining unit that requires a CDL unless there shall be less than two (2) employees in the bargaining unit with occupational CDL licenses at the time of return.

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#### **RELEVANT PROVISIONS OF THE WISCONSIN STATUTES**

Section 343.20(2), Wis. Stats. The Department shall mail to the last known address of the licensee at least thirty (30) days prior to the expiration of the license a notice of the date upon which such license must be renewed. Failure to receive notice to renew such license shall not be a defense to a charge of operating a motor vehicle without a valid operator's license.

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Section 345.245(2)(b), Wis. Stats. Notification of suspensions, revocations and cancellations. An employe whose Commercial Driver's License is suspended, revoked or cancelled by a state, loses the privilege to operate a commercial motor vehicle in any state for any period, including being disqualified from operating a commercial motor vehicle are subject to an out-of-service order, shall notify his or her current employer of that fact before the end of the first business day after the day on which the employee receives notice of the suspension, revocation, cancellation, disqualification or out-of-service order.

...

Section 343.245(3m) Employer Notification Program.

- A) The Department shall establish by rule an Employer Notification Program to permit an employer to register the name of an employee and be notified by the Department whenever a conviction or suspension, revocation, cancellation, disqualification or out-of-service order is recorded on the operating record of the employee. An employer may withdraw an employee's name from the program at any time.

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## **IOWA COUNTY HIGHWAY COMMISSION EMPLOYEE HANDBOOK**

### **WORK RULES**

#### **IOWA COUNTY HIGHWAY COMMISSION, EMPLOYEE HANDBOOK, revised 8/96**

Work rules are defined as and limited to rules designated by the Iowa County Highway Transportation Dept. within its discretion which regulate the personal conduct of employees. Work rules are not intended to limit the rights of employees, but rather to define those rights so the Highway Transportation Dept. can obtain its objectives in an orderly manner.

The Highway Transportation Department expects employees to perform their assigned duties at or above satisfactory levels; to conduct themselves according to established policies and procedures; to follow generally accepted standards of business behavior and to comply with all laws, rules and regulations applicable to their activities.

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.

Discharge will be used only as a last resort when reasonable efforts have failed to remedy those situations outlined under the following:

Employees of the Iowa County Highway Department are prohibited from committing any of the following acts during assigned working hours, including but not limited to:

### **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.
3. Loafing, loitering, sleeping, visiting, or engaging in unauthorized personal business.
4. Disclosure of confidential information and/or records.
5. Falsifying records or giving false information to other employees responsible for record keeping.
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.
7. Failure to report accidents or injuries, including traffic accidents.
8. Poor performance.
9. Conduct which disrupt work activities, including but not limited to, conducting union activities during working hours.

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

- 1<sup>st</sup> Offense: remainder of day off without pay
- 2<sup>nd</sup> Offense: appear before the highway Transportation Committee and possible termination



**Attendance & Punctuality**

1. Failure to report promptly at the starting time, leaving before the scheduled quitting time, or failure to notify management of impending absence or tardiness. (Note: A 5-minute leeway will be given for tardiness. If an employee does not call in ½ hour before his/her assigned starting time that he/she will be unable to be at work that day, he/she will not be paid for that day.)
2. Any employee working in or from an outlying shop must check in 5 minutes before his/her scheduled starting time and be in radio contact at all times after check-in. (Note: All radios are to be on and operating loud enough to hear from a distance of 10 feet during working hours.)
3. Unexcused or excessive absenteeism. (Note: Definition of excessive will be 3 times in 18 months.)
4. Leaving the place of duty during scheduled working hours with a county vehicles. No employee shall leave the place of duty before quitting time unless for repairs, maintenance, the job is completed, or he/she is called away by management. This includes, but is not limited to, using a county vehicles without permission and leaving the work area to go for lunch or at break time.
5. No one should return to the shop more than 20 minutes before quitting time unless maintenance on unit is required. (Note: Examples of maintenance would be the greasing of all fittings, changing of tires or lights, and washing of your vehicle. If a unit is already in the wash area, then you should be greasing your unit.) Do not stand around waiting for another unit to be cleaned.
6. Failure to observe the time limits of lunch, break, or wash up periods. (Note: one 15-minute break is allowed in the morning.)
7. Engaging in any outside activities which may improve the employees' independence of judgement or his/her ability to perform duties as an employee of the county. (Note: This includes, but is not limited to, working at an outside job when requested to work at or for the county.)
8. All overtime will be authorized by the foreman, supervisors, or commissioner when deemed necessary.

9. Anyone who leaves work for any reason must inform his/her foreman, superintendent, the commissioner, and/or the parts room, that he/she will be leaving prior to his/her departure.
10. Smoking shall be done in designated areas only.

Any violation of the above will be subject to the following disciplinary action, except as noted above:

- 1<sup>st</sup> Offense: verbal warning
- 2<sup>nd</sup> Offense: written warning
- 3<sup>rd</sup> Offense: one day off with no pay
- 4<sup>th</sup> Offense: dismissal

### **Use of Property**

1. Theft (Note: Employee will be terminated and turned over to proper authorities for prosecution.)
2. Abuse or misuse of county or private property, equipment or materials.
3. Any employee involved in any type of accident while using county owned, rented, or leased equipment will be required to appear before the highway Transportation Committee.
4. Unauthorized possession of county and private property, equipment, including vehicles, telephones, or mail service.
5. Unauthorized use of county or private equipment, including vehicles, telephones, or mail service.
6. Unauthorized entry to county property outside of assigned working hours.
7. Unauthorized lending, borrowing or duplicating of keys.
8. Soliciting or accepting any unauthorized compensation, reward or gift from outside sources for any matter related to the employees' job as an employee of the county.

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

- 1<sup>st</sup> Offense: written warning
- 2<sup>nd</sup> Offense: 1 day off without pay
- 3<sup>rd</sup> Offense: dismissal

**Personal Injury**

1. Threatening, attempting or inflicting bodily injury.
2. Threatening, intimidating, or interfering with other county employees.
3. Unauthorized possession of weapons.
4. Making false or malicious statements concerning other employees, supervisors, or the highway Transportation Dept.
5. Possession of or use of alcoholic beverages or unauthorized drugs during working hours.
6. Reporting for work in an unsafe condition or under the influence of alcoholic beverages or unauthorized drugs.
7. Sexual abuse (Note: Proof thereof will be subject to termination.)

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

1<sup>st</sup> Offense: 3 days off with no pay

2<sup>nd</sup> Offense: termination of employee (if he/she does not agree to treatment)

**Personal Safety**

1. When fueling equipment, the engine will be shut off and there will be no smoking allowed around the unit.
2. All vehicles will be brought back to the highway shop or outlying shops and will be fully fueled up at the end of each working day.
3. All units will be checked by the operator as to the condition of the lights, oil, tires, water in radiator, and cleanliness of the unit before it is taken out of the shop. Each employee is responsible for keeping his/her truck, piece of equipment, or work area clean. If any of these areas are to be found in an unsafe or unclean condition, it should be reported to the shop foreman or the superintendent immediately.
4. No one but employees of the highway Transportation Dept. may ride on or in any county vehicles except in an emergency or when approved by management.

5. Safety guards and shields on all equipment shall be kept in place except when removed for repair work. At no time shall machine be operated without proper safety equipment in place.
6. Employees shall wear the proper safety equipment recommended for the type of work they are performing. Safety vests must be worn at all times when working within the road right-of-way. (Note: Due to most working conditions for a highway Transportation Dept., tennis-type shoes are not allowed and long pants, (not shorts) and a shirt or t-shirt are required to be worn during scheduled working hours.)
7. Hard hats must be worn when working in the quarry, cutting brush or trees, snowfencing, when doing any construction work, and any type of ditching, when not being the actual operator of a motorized machine. (Note: One example is the operator of the backhoe while digging a ditch need not have a hard hat on as long as he stays in the machine. Anyone working outside around that area must wear a hard hat.)
8. Any gas, grease, fuel oil, or other fluids spilled on shop floor or at work site should be cleaned up immediately. (Note: If a large amount of gas, fuel or oil is spilled in an outside work area, the commissioner or superintendent must be notified immediately.
9. When vehicles are equipped with safety restraints, they must be worn at all times.

Any violation of the above, except as noted, will be subject to the following disciplinary action:

- 1<sup>st</sup> Offense: verbal warning
- 2<sup>nd</sup> Offense: written warning
- 3<sup>rd</sup> Offense: one day off with no pay
- 4<sup>th</sup> Offense: termination

**ANY EMPLOYEE WHO VIOLATES ANY COMBINATION OF ALL 3 OF ALL OF THE PREVIOUSLY LISTED RULES WILL BE GIVEN 3 DAYS OFF WITH NO PAY. ONE MORE VIOLATION OF ANY TYPE WILL RESULT IN TERMINATION.**

**PROGRESSIVE DISCIPLINE CONTAINED IN THE EMPLOYEE'S HANDBOOK SHALL BE DEEMED TO BE MERELY GUIDELINES. THE EMPLOYER MAY IMPOSE MORE HARSH, THE SAME, OR LESS HARSH PENALTIES DEPENDING ON THE FACTS, CONSISTENT WITH THE STANDARDS OF JUST CAUSE.**

### POSITIONS OF THE PARTIES

The Union contends that the County lacks just cause to discharge B.S. The parties have negotiated the loss of the CDL driving privilege in Article 14. In accordance with 14.01, the Grievant should have been placed on layoff status for up to one day. The Grievant renewed his CDL on Tuesday, August 25 (the same day he was discharged). Under the circumstances, the grievant was entitled to return to his former position on or about August 26. An employee on layoff is entitled to recall. The Grievant's position was vacant and unfilled at the time he obtained his CDL. The County had not at that time hired a permanent replacement. The 60-day period referenced in Article 14 is the period of time an employee has to obtain an occupational license before the Employer can seek a permanent replacement. Even in cases where the employer might actually fill a position with a permanent replacement, the incumbent remains on layoff. The employee is not discharged.

The Union acknowledges that the period following the August 21 notice of expiration of license from Officer Carey is troubling. Whatever the Grievant's tortured reasoning may have been, he did not make the right choice. The Union notes that the Employer imposed the harshest penalty possible. The Union reviews the work rules and notes that the discharge penalty is more severe than is contemplated for positive tests for drug or alcohol, reporting for work in an unsafe condition or under the influence of alcoholic beverages or unauthorized drugs, threatening, attempting or inflicting bodily harm and a failure to report accidents or injuries including traffic accidents, or falsifying records.

The Union acknowledges that the Grievant should assume responsibility for the timely renewal of his license. However, the Union contends that the lack of notice from the State to the County is meaningful. The lack of notification implies that the State of Wisconsin does not consider the lapse in renewal of a CDL as serious as revocation, conviction, etc., because it apparently did not monitor expired licenses. This does not excuse the Grievant's behavior, but serves to highlight the difference between revocation based on driving record, drug screens and the like as opposed to forgetting to renew a license otherwise unrestricted and easily obtainable. The Union points to Section 343.245(3m), Wis. Stats., and notes that the Employer did not advantage itself of the statutory Employer Notification Program.

The Union contends that the Employer permitted the Grievant to work on Friday, August 21 and Monday, August 24. The Union contends that the Highway Commissioner was not sufficiently concerned to take reasonable measures that would ensure the Grievant did not operate equipment requiring a CDL at that time. The Union acknowledges that the Unemployment Compensation Administrative Law Judge found to the contrary, but contends that the ALJ was wrong.

The Union contends that the Grievant should be given credit for the sense of obligation he felt to his job. At a time of enormous stress in the Grievant's life, his job was an anchor. While his actions were inappropriate, his work ethic should be acknowledged.

The Union contends that the Grievant deserved an opportunity to tell his side of the story at the time, in an effort to retain his position. The County denied him that opportunity. The Union contends that the Employer did not follow its own written work rules involving progressive discipline in reserving discharge as a last resort in its dealings with the Grievant. The Union characterizes the County's attitude in this matter as hypocrisy. The Union cites arbitral authority in support of its contention that the Grievant was entitled to be heard prior to the determination to terminate him, for the lack of fundamental due process and investigation, and for the failure to utilize progressive discipline in an appropriate circumstance.

It is the position of the Employer that Iowa County had just cause to discharge the Grievant because his conduct was contrary to law and public policy. It is the view of the Employer that federal and state law regulating the CDL are not external laws, which may or may not be applied under the agreement, but rather, they are a part of the Agreement. Article 14 was drafted and included in the Agreement in response to the CDL legislation. In the Employer's view, the Grievant had notice of the expiration of his license. The County contends that while Article 14 creates rules to implement the CDL, it does not modify the law applicable to CDLs or license renewal in general. Under the law, and the contract, if an employe loses his CDL, that employe cannot work. The County contends that Wisconsin Statutes, specifically 343.20(2), flatly rejects the Grievant's excuse that he did not receive notice of his license renewal. The burden of a timely renewal is statutorily placed on the licensee. It is the licensee's obligation to notify the DOT within 10 days of a change of address. The driver's license has its date of expiration on its face.

Both federal and state law required the Grievant to notify the County of the loss of his license. The Employer cites both federal law and Section 343.245, Wis. Stats. The Employer contends that the Grievant did not bother to inform the DOT of his current address, ignored the expiration date on his license, and defied the direction of Deputy Carey not to drive without a license. In the Employer's view, sustaining the Union's grievance would send the worst possible message to CDL holders. It would tell them that the mandate of federal and state government is invalidated by the just cause standard of the labor agreement. It would indicate that an employe can utterly fail to attend to his duty to maintain a valid license, and intentionally drive without a license after learning of its expiration.

The Employer contends that it had just cause to discharge the Grievant under the terms of the collective bargaining agreement. Pointing to Article 14, the County contends that the CDL is a *bona fide* job qualification for the Highway Department. Article 14 represents an agreement by the parties to mitigate the severity of the consequences of loss of a CDL. The employe has 60 days to regain his or her position by obtaining an occupational or permanent license. Following 60 days, the employe may be permanently replaced and loses his or her job. Had the Grievant acted honestly and come forward when his license expired, or when he was personally notified of its expiration this would be a different case. However, he did not. He chose instead to ignore his duty to keep the DOT informed of his current address, to disobey a law enforcement officer who told him not to drive, and to drive heavy equipment into and out of the county without a license. The Employer regards his conduct as beyond negligent.

In the Employer's view, the Grievant's lack of honesty serves to forfeit any expectation of Article 14 forbearance. His actions which began as reckless disregard of licensing procedures culminated in willful defiance of the law and the County's interests. He should not be allowed to hide behind the savings provision of Article 14 when he made no attempt to honestly invoke them. His actions should be analyzed as a discharge for lack of qualifications.

The Employer contends the same conclusion results under an analysis of Article 14. The Grievant lost his CDL on June 5, 1998. He was without a driver's license from June 5 through August 25, the date of his termination, a total of 81 days. He did not obtain a new license within 60 days of the date the license was lost. The County had a right to permanently replace him. The County did. He had "no right to his or her former job".

### DISCUSSION

There are two provisions of the collective bargaining agreement operative in this dispute; Article 4 and Article 14. Article 14 regulates the parties' understanding relative to the possession and loss of a commercial driver's license. Under Section 14.01, loss of a commercial driver's license results in immediate layoff. The provision contemplates employer awareness that the employe has lost his or her license. The employer's ignorance of the fact that the grievant lost his CDL is a direct product of the grievant's failure to so notify the County. As a consequence, the grievant was not placed on immediate layoff. The provision goes on to allow an employe to obtain a provisional CDL within sixty days and return to the job. Given the sequence of events, this provision never came into play.

The employer is free to permanently replace the employe who fails to secure a CDL within sixty days. If the employer elects that option, the employe has ". . .no right to his or her former job. . ." The parties dispute the meaning of these words. The employer contends that these words mean the individual is fired. The Union believes the words to not be applicable due to the facts. I believe the meaning of that clause is found in paragraph 14.2.

Section 14.02 provides that the employe who is unable to get a license to return to the job within sixty days remains on layoff until such time as there is a vacancy. Reading 14.01 and 14.02 together, there is no discharge; just a layoff until such time as the individual is relicensed to work, and work becomes available. If 14.01 is read to result in a discharge, 14.02 has no meaning.

The Union contends that the grievant got his license back on August 25, and so had a right to return to the job at that point. The Union notes that at that point no permanent replacement had been hired. The Union is right on the facts, but the context of the Union's analysis is that the grievant drove for 81 days without a license, and that he never provided the employer with the notice required by law, and implicitly required by the contract. Given the grievant's behavior in this regard, he is estopped from making such a claim. That is, given his own behavior, the grievant is in no position to insist upon a return to the job effective August 25 or so. The County has a disciplinary interest in the grievant's behavior.

Paragraph 14.03 addresses an employe's seniority and health insurance status while on layoff. The paragraph is not relevant to the analysis in this proceeding, other than that it supports the idea that an employe on layoff for loss of a CDL is not treated as a terminated employe. Similarly, Section 14.04 describes an employer option not exercised in this proceeding. As such, it is not immediately relevant to this dispute, other than that this paragraph continues to treat an employe who has been without a CDL for more than sixty days as having some ongoing relationship with the employer. That is in contrast to treating the individual as having been terminated.

Paragraph 14.05 is directly relevant to this dispute, and to the construction of Article 14 as a whole. Article 14.05 specifically addresses the circumstances in which an employe who loses his or her CDL is terminated. The paragraph describes two situations; one, permanent loss of the CDL, and two, layoff status for two years. Neither of those events occurred. The grievant regained his CDL. Even if June 5, 1998 is considered the constructive date of layoff, two years have not passed. The existence of Article 14.05 confirms that the paragraph 14.01 reference to "no right to his or her former job" is a reference to the particular job, not a declaration that employment rights summarily terminate.

I do not believe that Article 14.06 is relevant to the analysis in this proceeding.

It is my conclusion that Article 14 does not lead to the termination of the grievant. If the analysis is limited solely to Article 14, the grievant is entitled to be placed on layoff status without a CDL. Article 14 does not support a termination of the grievant's employment.

However, the analysis is not limited to Article 14. Article 4 permits the County to terminate an employe for just cause. Here, the grievant allowed his driver's license, and CDL to expire. These licenses are necessary to the performance of his job. He drove all summer without required licenses. Upon being starkly confronted with the fact that he had no license, the grievant decided to take a chance that he could slide for a week. This, in the face of a deputy directing him not to do so. There is little analysis necessary to conclude that the grievant's behavior in this regard was seriously misguided. He placed himself and his employer at risk. The Union urges that his domestic troubles contributed to his bad judgment, and further cites his work ethic. The Union is no doubt right. However, workers who display extraordinarily poor judgment typically do so for a reason. There are limits as to what the employer must tolerate.

Here, the grievant engaged in behavior that he reasonably knew could lead to his discipline. Once confronted, he knew that he had been driving without a license for 80 days. He had been warned by a deputy not to drive. If his actions on Friday were the product of muddled, confused thinking, he thereafter had the weekend to contemplate. Saturday and Sunday provided the grievant with the opportunity to put some distance between himself and the troubling events of Thursday night. It further gave him the opportunity to reflect on the fact that he had spent Friday operating a piece of equipment which required his Commercial



Driver's License. Notwithstanding this opportunity, he worked Monday. But for his termination, the grievant would also have worked on Tuesday and Wednesday. His was a conscious decision to drive and operate equipment without a license. His misfortune was that he got caught.

The decision of the Unemployment Compensation division that the grievant was terminated for misconduct is not binding on an arbitrator construing the terms of the parties' collective bargaining agreement. However, I have no quarrel with that conclusion. The grievant did engage in misconduct. His actions expose him to discipline. The sole question in this proceeding is whether the employer overreacted by summarily terminating him.

This termination is troublesome for two reasons. The first, is that the employer determined to terminate the grievant without ever talking to him. Fundamental notions of fairness suggest that the grievant should be confronted with the basis for his termination, and afforded an opportunity to explain and/or present his side of the story. (Cf. CLEVELAND BOARD OF EDUCATION V. LOUDERMILL, 118 LRRM 3041 (1985)). That concept is basic to our notion of due process and procedural fairness, and did not occur in this proceeding.

The severity of this discipline, measured against the employer's progressive discipline handbook, is a second basis of concern. The collective bargaining agreement contains a just cause standard. The County has adopted work rules which purport to construe and apply just cause, and to provide employees notice as to the consequences of certain behavior. Those work rules also contain a philosophy of discipline which the County purports to adhere to.

The discipline schedule is prefaced by the following provision:

"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.

Discharge will be used only as a last resort when reasonable efforts have failed to remedy those situations outlined under the following: . . ."

Against that philosophical background, the employer has laid out a lengthy list of behaviors, and potential sanctions for those behaviors, as a warning/notice to County employees.

Discipline for a first offense for work performance rule violations, including insubordination, job neglect, sleeping on the job, and falsifying records is one day without pay. Less serious violations involving attendance and punctuality are subject to a four-step progressive discipline approach. Abuse of property work rule violations are subject to a

three-step progressive discipline process. Personal injury work rule violations, some of which involve very serious matters, including inflicting bodily injury, possession of weapons, use of alcohol and/or drugs on the job, are subject to a two-step progressive disciplinary process.

There are two specific work rule violations, theft, and sexual abuse, which the handbook declares to be offenses that can lead to automatic termination. These are exceptions to an otherwise lengthy list of sins. They stand alone in the Employer's handbook. With the exception of these two offenses, all other behaviors described are subject to a progressive discipline schedule. This progressive discipline approach is consistent with the corrective philosophy expressed in the opening paragraphs of the discipline portion of the work rules.

The grievant is a young man who was functioning under considerable stress at the time of his termination. His behavior reflected very poor judgment. But the exercise of poor judgment is precisely the kind of behavior susceptible to a progressive discipline scheme. This grievant has no prior disciplinary record. There is nothing in this record that suggests that this man is an incorrigible, incapable of learning from his own prior mistakes. By all accounts, he is a willing worker.

This award does not seek to diminish the seriousness of the grievant's actions. What he did was wrong. I merely note that on its face, his behavior is not markedly worse than rank insubordination, falsifying records, bringing a weapon to the worksite, drinking or taking drugs on the job; all of which call for some form of progressive discipline under the Employer's work rules.

The summary paragraph of the work discipline code reserves to the Employer the right to modify the guidelines set forth in the disciplinary schedule. Specifically, the Employer reserved to itself the right to impose harsher penalties depending upon the facts. To the extent the decision in this proceeding reflects the Employer's determination that the facts involved in this matter require termination and that the grievant displayed incorrigible behavior, the Employer's failure to elicit and explore the facts from the grievant's perspective is inexplicable.

In summary, I do not believe the Employer had just cause, as that term is defined in the Employer's work rules, to terminate the grievant. I believe his poor judgment is potentially remediable. I believe the Employer has committed to a progressive discipline scheme in all but extreme cases. I do not believe the Employer is free to impose more harsh sanctions without minimally undertaking a thorough review of the facts.

### **AWARD**

The grievance is sustained.

**REMEDY**

I am not awarding backpay in this matter. It was the grievant's responsibility to find out and advise his Employer that his CDL, and his driver's license, had expired on June 5. He failed to do so. He is thus estopped from contending that the sixty-day period described by Article 14 should not begin to run on June 5. As of August 5, I do not believe that he was any longer entitled to his former job. While I do not believe the Employer was entitled to terminate the grievant, I do believe the Employer was entitled to put him on layoff status. This Award converts the August 25, 1998 discharge to a layoff (effective August 25, 1998) as that is described in Article 14.01 of the collective bargaining agreement. The grievant is entitled to the restoration rights described by Article 14. The grievant is not entitled to bump anyone hired between August 25, 1998 and the date of this Award. However, if such a person exists, the August 25, 1998 layoff date shall be adjusted to the start date of that individual.

Dated at Madison, Wisconsin this 6th day of August, 1999.

William C. Houlihan /s/

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William C. Houlihan, Arbitrator

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