

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**TEAMSTERS LOCAL UNION NO. 43 OF THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

and

**CITY OF LAKE GENEVA,
COUNTY OF WALWORTH, STATE OF WISCONSIN**

Case 43
No. 57805
MA-10750

Appearances:

Mr. Jonathan M. Conti, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local Union No. 43 of the International Brotherhood of Teamsters, referred to below as the Union.

Mr. Robert W. Mulcahy, and Mr. Jesus J. Villa, Michael, Best & Friedrich, LLP, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, appearing on behalf of City of Lake Geneva, County of Walworth, State of Wisconsin, referred to below as the City or as the Employer.

ARBITRATION AWARD

The Union and the City 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 grievance filed on behalf of Ron Carstensen, 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 November 16, 1999, in Lake Geneva, Wisconsin. A transcript of that hearing was filed with the Commission on November 30, 1999. The parties filed briefs and a waiver of reply briefs by February 4, 2000.

ISSUES

The parties were unable to stipulate the issues for decision. I have determined the record poses the following issues:

Did the City have cause to discipline the Grievant for his conduct on June 13, 1999?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2. MANAGEMENT RIGHTS

Section 1. The Employer possesses the sole right to operate the Department and all management rights to repose in it with the understanding that such rights of management will not be used for the purpose of discrimination against any employee or contrary to this to this (sic) Agreement. These rights include, but are not limited to the following:

- A. To direct all operations of the department;
- B. To establish reasonable work rules and schedules of work;

...

- E. To suspend demote, discharge and take other disciplinary action against employees for just cause;

...

ARTICLE 17. JOB SAFETY AND WELFARE

...

Section 8. Hazardous work shall be determined by a committee consisting of the Union Grievance Committee, the Department Superintendent involved, and the City Business Administrator. Employees shall not be required to perform hazardous work so determined unless all required and/or reasonable safety equipment is available to employees use.

...

ARTICLE 21. DISCHARGE OR SUSPENSION

Section 1. The Employer shall not discharge nor suspend any full-time employee, except probationary employees, without cause but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against the employee to the employee in writing and a copy of the same to the Local Union and job steward except that no warning notice need be given to an employee before they are discharged or suspended for the following causes:

...

(G) Insubordination

BACKGROUND

Daniel Winkler, the City's Director of Public Works & Utilities issued a memorandum, dated June 15, 1999 (references to dates are to 1999 unless otherwise noted), to the Grievant which states:

On Sunday, June 13, 1999, at approximately 8:30 AM, you were ordered by Mayor Spyro Condos to remove a broken and hanging limb on the corner of Wrigley Drive and Baker Street. The limb was, in the opinion of the Mayor, Police Chief and Fire Chief, a safety hazard to the general public in need of immediate abatement. He therefore wanted the limb removed that morning. The limb was not removed until approximately 5:30 PM that evening, after directed to by Superintendent Allen by myself.

In accordance with Article 21, Sub-section (G) of the Labor Agreement, your refusal to remove the limb at the Mayor's direct order is considered insubordination and grounds for disciplinary action. You are hereby issued a three (3) day suspension without pay effected the first working day following your acceptance of this action.

If this decision is challenged, said suspension will be delayed until a final disposition of any or all appeals available to you has been rendered.

The Union responded by filing a grievance, which asserts that the discipline violates Article 17, Section 8. In a written statement attached to the grievance, the Grievant stated that the memorandum constitutes “unjust disciplinary action” and that the Mayor, Police and Fire Chief had demonstrated “reckless disr(e)gard for the rights and safety of myself & other coworkers.”

A core of fact underlying the grievance is not disputed. The Grievant has worked for the City for roughly five and one-half years, and is currently classified as a Worker/Operator. The position description for Worker Operator states:

**I. WORK CHARACTERISTIC OF THE CLASS
NATURE:**

Under general supervision to perform a variety of semiskilled maintenance, machinery operation, and repair tasks of more than ordinary difficulty requiring certain techniques or special knowledge which generally are acquired through experience on the job; and to do related work as required.

EXAMPLES:

...

10. Trims, plants, sprays, and removes trees.

...

Prior to the incident at issue here, he had not received any discipline. The Grievant was, at the time of the incident posed here, part of an eleven man street crew. The direct supervisor of the street crew is Lynn Allen, the City’s Street Superintendent. Winkler is Allen’s direct supervisor. At the time of the incident the City employed a City Administrator as Winkler’s direct supervisor. That position is no longer part of the City’s table of organization. In any event, all City employes ultimately report to the Mayor and Common Council. Spyros Condos is the City’s Mayor. Winkler views the Grievant and Rex Greene as the street crew members most experienced in tree maintenance.

On the weekend of June 11, Winkler took vacation to attend a soccer game in Milwaukee and to attend his daughter’s soccer game in Appleton. He returned to Lake Geneva in the late afternoon of June 13. Allen was on vacation from June 7 through June 11.

Sometime late in the afternoon of June 11, a storm blew through Lake Geneva, bringing high winds and rain with it. Rain and wind blown debris blocked storm drains and flooded City streets. The City called the Grievant and other street crew members in on overtime to clear the storm sewers and roadways. The storm caused many trees throughout the City to drop branches. One of the trees damaged by the storm was located adjacent to a City sidewalk in front of the Hotel Meridian. The Hotel Meridian sits on a corner lot abutted by Highway 120, which is known within the City as Wrigley Drive. Coming from the south into the City, a car traveling on Wrigley Drive would descend a hill traveling west toward the lake, which the Hotel Meridian faces. At the bottom of that hill, the road makes a close to ninety degree turn to the north. The sidewalk parallels that course. The speed limit on Wrigley drive, at this turn, is twenty-five miles per hour.

The damaged tree stood roughly six to ten feet behind a curb opening through which the sidewalk slopes into Wrigley Drive. A City park, which includes a public boat landing, is located across Wrigley Drive from the west face of the Meridian. As noted above, following a route from the south into the City, Wrigley Drive curves sharply to the north. On the Hotel Meridian side of the road and after the curb opening, Wrigley Drive includes a passageway for pedestrians and cyclists, bounded by a white stripe. The damaged tree, a deciduous hardwood, forked into two major branches perhaps fifteen feet above the ground. The storm weakened one of those forks, causing it to break, falling northward, into the other fork. The falling branch split the other fork, wedging it between the split halves of the second fork, which remained attached to the trunk of the tree. The falling branch's crown fell to the ground, covering the adjacent sidewalk and spreading into the curb area of the pedestrian/cyclist passageway.

It cannot be determined when this damage occurred, although in all probability it occurred during the evening of June 11. In any event, during his normal rounds of the City, on June 12, Police Chief Richard Meinel noted the damaged tree. He concluded that the tree would force pedestrians onto Wrigley Drive to avoid its branches. Wrigley Drive is a particularly busy street during the summer, and Meinel thought the fallen branch posed a considerable safety issue. He decided to inform the Mayor. At roughly 11:00 p.m. Meinel and Condos took a drive around the City to view storm damage including the damaged tree. Meinel and Condos agreed that the tree posed a safety risk and that it should be removed. Condos directed Meinel to have the Police Department inform the Street Department to attend to it.

Sometime around 5:30 a.m. on June 13, Sergeant Richard Fritz informed the Grievant of the damaged tree. The Grievant and two other street crew members proceeded to the Hotel Meridian to view the tree. After pulling and kicking the fallen branches, the Grievant concluded that it "wasn't going anywhere" (Transcript [Tr.] at 192). The crew then proceeded

to perform other duties. At sometime around 8:00 a.m., on June 13, the Grievant phoned Condos. The two discussed the situation. Shortly after ending his conversation with the Mayor, the Grievant phoned Allen at his home.

Condos left the City shortly after his conversation with the Grievant, and returned at roughly 3:30 p.m. He drove by the Meridian, and noted that the tree branch had yet to be removed. Condos then phoned the Police Department and Allen. He then phoned the Chief of the Fire Department, and asked him to inspect the tree with him. The two agreed the limb posed a safety risk requiring immediate attention, and the Fire Chief started to call in fire fighters to perform the work. At roughly the same time, Winkler returned from Appleton, and noted that City parks still manifested the storm's aftermath. He phoned Allen to determine what was being done to clean up. Allen informed him that Condos had just phoned concerning the tree in front of the Meridian. Winkler and Allen ultimately joined the Mayor and the Fire Chief at the site of the damaged tree. Ultimately, the City street crew, including the Grievant, Greene and Hansen, removed the branch. The removal was completed using only City equipment and City street crew members.

The City has implemented an Employee Handbook, which states at Section 501:

. . . Each employee is expected to obey safety rules and to exercise caution in all work activities. Employees must immediately report any unsafe condition to the appropriate supervisor. Employees who violate safety standards, who cause hazardous or dangerous situations, or who fail to report or, where appropriate, remedy such situations, may be subject to disciplinary action, up to and including termination of employment. . . .

The City also has implemented a safety manual, which includes the following provisions:

100. CITY RESPONSIBILITIES

The City of Lake Geneva recognizes that the responsibility for safety is shared. The City accepts the responsibility for leadership of the safety program, for its effectiveness and improvement, and for providing the safeguards required to insure safe conditions.

. . .

102. EMPLOYEE RESPONSIBILITIES

. . .

D. Inform your supervisor immediately of any hazardous conditions which you may encounter or injury you may suffer.

The background set forth above is not disputed. The balance of the background is best set forth as an overview of witness testimony.

Richard Meinel

Meinel has served as the City's Police Chief for roughly three years. He noted the Mayor often accompanies him for a patrol of the City after the Mayor's restaurant closes. This happened on June 12, and about 11:00 p.m., he and Condos drove by the damaged tree in front of the Meridian. Meinel had observed the tree earlier during his rounds, and wanted to bring it to the Mayor's attention. It was raining at the time he and Condos viewed the tree, and they remained in the squad car. They agreed that the fallen branch seemed to be balanced precariously, and posed a risk to anyone passing near or beneath it. Beyond this, they agreed that the branch posed a traffic hazard since it blocked the sidewalk. They feared that pedestrians choosing to walk on Wrigley Drive to get around the tree might walk into the traffic lane. Because the branch had fallen across the sidewalk just to the north of the curb opening, they feared that northbound traffic could not get a good view of any pedestrian as the traffic rounded the ninety degree turn around the curb opening.

On Meinel's suggestion, Condos agreed that the work should be put off until the following morning. They concluded that traffic flow would drop by early Sunday morning, and that light conditions could only improve as day broke. They agreed that Meinel would instruct the night-shift sergeant, Richard Fritz, to contact the street crew to attend to the matter. Condos informed Meinel that any employee with questions should contact him at his restaurant up until 8:30 a.m.

Meinel relayed this information to Fritz thus:

I told Sergeant Fritz that the mayor wanted the tree taken down the following morning and that he should notify the Street Department when they come in. No one was sure who would be the street crew. . . . We just know there's people there early in the morning on weekends to do park clean-up and stuff. (Tr. at 32).

He detailed the specifics of the conversation thus:

- Q Did you tell Sergeant Fritz that the mayor issued a direct order that the tree be taken down Sunday morning?
- A Did I use those words?
- Q Yeah.
- A No. Not that I recall.
- Q Did you tell Sergeant Fritz, did you emphasize that the mayor was demanding that it come down immediately?
- A Not only did I tell him that the mayor was demanding it come down immediately, but also that if they had any questions or concerns, that they should contact him personally at his restaurant early that morning.
- Q But you didn't know who Sergeant Fritz was going to talk to, though?
- A I certainly did not know who was going to be at the Street Department that following morning.
- Q But you didn't know who was allegedly in charge either?
- A No. But even if I would have, that would not necessarily mean that the person left in charge would be on that early morning crew . . . (Tr. at 39).

Meinel next learned of the matter sometime after 5:00 p.m. on June 13, when Sergeant Stern phoned him at home to inform him that the Fire Department had been dispatched to the Meridian to take down the branch, and the Police Department had been requested to provide traffic control. Stern also informed Meinel that "the mayor sounded upset" (Tr. at 28). Meinel then proceeded to the Meridian. Within minutes of his arrival, the Fire Department reported for work, and within minutes of that, the street crew arrived. Shortly after the arrival of the street crew, Winkler arrived at the scene. After reviewing the traffic control provided by the Police Department, Meinel returned home.

Ralph Bauman

Bauman is a Captain on the City's Police Force. He testified that he has some experience with tree trimming and removal based on years of relying on wood to heat his home. His testimony tracked his written report of the incident. His written report reads thus:

On Sunday, June 13, 1999 shortly before 5:45 a.m., Captain Bauman reported to the police department for his shift. . . . Captain Bauman met with Sergeant Fritz, the off-going duty sergeant, who advised that he had been requested by Chief Meinel to notify the street department that a very large branch had to be removed from that tree in front of the Meridian.

Fritz advised that he had made contact with the driver of the truck vacuum, also a street department employee, and made the Chief's request known to them. That person advised he would notify (the Grievant), the person in charge, as soon as he arrived. He was scheduled to be in at 7:00 to clean the Riviera. Fritz also advised that he had made it known that the mayor had requested or ordered that this limb be removed and should the street department employees have any questions, they were to see him. He would be at the Harborside Cafe from 6:00 a.m. until approximately 8:30.

Captain Bauman went out in his squad for routine patrol, during which he did drive past the location in front of the Meridian and did observe a very large tree branch that was lodged in the broken off portion of the trunk. The heavier, thick end of the branch was lodged probably 18 to 20 feet off of the ground. The branches, the small end of the tree limb was completely blocking the sidewalk. It was Captain Bauman's opinion that should any pedestrians wish to pass that location, they'd be forced to walk out into the street, which was very near or at a sharp curve or corner in the roadway at Highway 120. This would not allow any drivers who were north bound very much time to react should there be a pedestrian in the street. It was also Captain Bauman's opinion that should any wind pick up, it was quite possible that that branch could fall and either strike someone who may be walking underneath it or strike a car that was on Highway 120 and happened to be passing, or at least block the roadway partially and could cause an accident.

At approximately 8:15 a.m., Mayor Condos called Captain Bauman to advise him of the situation with the tree and also advise that he was going to be leaving the restaurant and going to church and requested that Captain Bauman do what he could to see that this tree was removed, as he considered this a very dangerous situation. Captain Bauman advised that he would do so and that he had checked the tree itself and agreed that it needed to be taken down. Also, Captain Bauman informed the mayor that Sergeant Fritz had passed his request on to the street department. The mayor advised that he had talked with (the Grievant) from the street department and discussed this issue with him.

At approximately 9:15 a.m., Captain Bauman received a phone call from (the Grievant) who advised that he had gone down and checked the tree branch that was to be removed. (The Grievant) expressed that in his opinion they did not have the expertise or equipment to remove the tree safely and that he did not want to do so. Captain Bauman advised that certainly did not want to order the street department to do anything that was dangerous or beyond their capabilities

and asked if he had contacted Lynn Allen his supervisor. (The Grievant) advised that he had contacted Lynn Allen and had explained the situation to Lynn Allen and Allen told him that the tree was not to be cut down if it was believed to be dangerous and they would take care of it on Monday. It should be noted that it had been raining hard and continuously for many hours and the ground was completely saturated.

Captain Bauman advised (the Grievant) that as long as his supervisor was aware of the situation and that he had told him not to cut the tree down and to go home, that that's exactly what they should do. (The Grievant) stated he had just gotten off the phone with Lynn Allen and that's exactly what was said. Bauman advised him that was Lynn's decision to make and as a supervisor he would have to take the heat for that decision on Monday. Captain Bauman thanked (the Grievant) for calling him and making him aware of the status of this incident and the conversation ended.

At 1:45 p.m. the same day, Captain Bauman held roll call with the on-coming shift officers and advised Sergeant Stem of the status of this tree and the fact that the street department was not going to remove it but they were aware of it. Lynn Allen had been notified by (the Grievant) and he advised that it would be dealt with on Monday. . . .

Bauman testified that he did not know if the Grievant was the Working Foreman for June 13, or if the Street Department had advised Police Dispatchers who should be called in the event of a problem during the weekend of June 11.

Daniel Winkler

Winkler has served as the City's Director of Public Works and Utilities for roughly four years. He also serves as the City's Safety Director. Winkler has distributed a list of street department personnel and their phone numbers throughout the City, including the Police Department. He considers himself available and on-call twenty-four hours per day. No one attempted to contact him, by phone, pager or voicemail, during the weekend of June 11.

When Allen is absent, he selects a street member to serve as Working Foreman. An employe serving as Working Foreman receives a straight-time premium of seventy cents per hour. Winkler testified that he, Allen or a Working Foreman can call street crew members in on overtime. In Winkler's opinion, the Grievant had been selected to serve as Working Foreman for the work-week including the June 11 weekend. In that position, the Grievant would assign street

crew members their daily and any overtime tasks. Allen left Winkler a phone message on June 4 that indicated that Greene would be “in charge” or Working Foreman on June 6, while the Grievant would be “in charge wk. of 7th.” A work week, from the perspective of the City’s payroll system, runs from Monday through the following Sunday.

Winkler testified that a review of the Grievant’s time cards shows that he was first called in for overtime on June 11 at 4:56 p.m., for four hours. He worked an additional two and three-fourths hours for the Water Utility on June 11. On June 12, he worked three and one-half hours of overtime at the Riviera, a ballroom and banquet facility owned by the City. On June 13, the Grievant worked three and one-half hours in the morning at the Riviera, then returned at 5:28 p.m., to remove the damaged tree in front of the Meridian.

Winkler testified that he returned to Lake Geneva shortly before 5:00 p.m. on June 13. The weather was sunny, with little wind. As noted above, after noting the storm’s effect, he phoned Allen. He thought the City parks should have been cleaned up by then, and phoned Allen to determine why they had not been. Allen then informed Winkler that Condos had called to complain about the tree in front of the Meridian. Allen also indicated that he was leaving to visit the site and that the Grievant had earlier informed him that the tree could wait until Monday to be cleaned up. Winkler then determined to view the scene himself. After viewing the tree, he told Allen to call a crew in to remove it. Winkler then took his wife and daughter home. He did not return to the scene until after the street crew had begun to remove the tree. Winkler noted he agreed with the Mayor’s assessment of the safety risk it posed.

On June 14, Winkler, the then-incumbent City Administrator and Condos met to discuss the street crew’s response to the tree removal. Condos stated that the Grievant should be summarily discharged for insubordination. Winkler attempted to mollify the Mayor’s view, and was successful in persuading the Mayor to accept a three-day suspension. Winkler assessed the level of discipline thus:

A Well, normally the progression is for a reprimand, written reprimand, suspension, termination. For insubordination, that placed the incident in a different category. Had poor judgment just been made of not doing anything about the limb hanging over the sidewalk all weekend at a very busy intersection, that would have been a different issue and there probably would have been either an oral or a written reprimand, something along that line pursued, but the fact that the mayor had stated very clearly that it was insubordination . . . that placed it in a completely different category in my mind . . .

- Q And did you agree with the three-day suspension based on your investigation of all of the facts regarding the insubordination and the poor judgment and not clearing the sidewalk?
- A Yes. (Tr. at 90)

Until June 13, Winkler had believed that the tree in front of the Meridian was not City property. He noted that the Mayor and Allen have a “less than good” (Tr. at 103) working relationship. He also noted that he believes the Grievant “is a very good worker” (Tr. at 114).

Richard Fritz

Fritz noted that Meinel spoke to him regarding the removal of the damaged tree branch sometime in the early morning hours of June 13. Meinel directed Fritz to personally advise street crew employees of the branch as soon as they reported for work on June 13 or to leave word with Dispatchers to convey the message. At roughly 5:30 a.m. on June 13, Fritz saw the Grievant, and approached him to convey Meinel’s message. Fritz described the conversation thus:

- A I said that there was a message to deliver to him from the mayor that the chief told me to deliver this message. . . . And the message was that there was a tree damaged in front of the Meridian, that the mayor wanted it taken care of first thing this morning before traffic started getting busy.
- Q And what, if anything, else was discussed?
- A There was some discussion on whether it was on city terrace or on private property. . . . I said I thought it was on city terrace but I wasn’t sure. It wasn’t my call. . . . (The Grievant) thought it was on private property. . . .
- Q Did (the Grievant) tell you that he was not going to remove the tree?
- A I think he said he would go down and take a look at it. (Tr. at 127).

Fritz noted that he understood the directive to be that the tree “needed attention or it could be checked . . . to do whatever it was needed to be done to it.” He added that “seeing it earlier that it probably should have come down.” (Tr. at 128). Fritz also informed the Grievant that Condos would be in his restaurant between 6:00 and 8:00 a.m. on June 13, if there were questions. Fritz could not recall if he contacted the Grievant because he thought the Grievant was the Working Foreman or simply because the Grievant was available.

Spyros Condos

Condos has served the City as Mayor for three terms, and has prior City service as a Fireman and a Reserve Police Officer. He noted that he and Meinel agreed the damaged tree posed a safety risk. Meinel asked Condos to issue a mayoral directive to remove the tree. Condos agreed, and asked Meinel to have the directive communicated to the street department. Condos agreed that the traffic would die down briefly in the morning, and pick up again after church services ended.

Condos received a phone call from the Grievant slightly before 8:00 a.m. They discussed the tree for a few minutes. Condos detailed the balance of their conversation thus:

- A . . . he had mentioned to me a bunch of reasons why he didn't want to take it down. He said it was dangerous, he said he didn't feel we had the right equipment, he wanted to know if I was concerned if they got hurt maybe a couple other ones. . . . He said what are we going to do if the tree is on private property? And I said that that wasn't his concern because I was directing him to take it down and we would worry about who was going to pay for it the next day, because of the danger of the situation.
- Q And when he got finished with indicating to you that he did not have the right equipment, it was potentially unsafe and did you have a concern about whether he would get hurt or not, did you say anything to him about any of those items?
- A I told him that that was their job, that that's part of their job. There's always a concern if they are going to be hurt . . .
- Q . . . do you recall how the conversation ended?
- A I told him to just do it and get it done. . . . I said: Ron, I would like you to take that limb down right away. And that's all I remember saying. (Tr. at 144-145).

Condos also informed the Grievant that he would be out of town to attend a service for the death of his sister, but would return later in the afternoon.

Condos returned to Lake Geneva at about 3:30 p.m., and saw the tree at the Meridian in the same position as when he had left. He then phoned the Police Department and spoke with Stern, who informed him that the Grievant had discussed the matter with Allen. Condos then phoned Allen, who informed him that the Grievant thought the limb could wait until Monday. Allen acknowledged directing the Grievant to leave the branch alone. Condos stated that he knew the Grievant was the Working Foreman for the weekend, and concluded that nothing would be done prior to Monday unless Condos got it done. He then phoned the

Fire Chief and met him at the Meridian. They agreed the matter should be attended to immediately, and arrangements were set in motion to get Fire Fighters, fire trucks and police personnel to the site to cordon off the area, pull the branch down and drag it across Wrigley Drive.

As noted above, street department personnel came to the scene, and eventually removed the fallen branch. The tree was City property, but in Condos' opinion its ownership was irrelevant since it blocked a public sidewalk.

The following morning Winkler and the then-incumbent City Administrator requested to meet with Condos to discuss the incident. Condos agreed to a three-day suspension because the Grievant had been, in his opinion, insubordinate. He acknowledged he did not warn the Grievant of the consequences of refusing to remove the tree, but stated he thought the Grievant fully understood the directive. He did not speak to the Grievant after his conversation with Allen because it would have been futile. He acknowledged he stated on June 13 that he wanted the Grievant terminated.

The Grievant

The Grievant noted that he agreed to serve as Working Foreman during the week from June 7 through June 11. Because he took a day of vacation on June 7, however, Greene served as Working Foreman for that day. Allen was on vacation from June 7 through June 11. The Grievant did not consider himself to be the Working Foreman on June 12 or June 13. He noted that June 12 and June 13 were days of scheduled overtime for the Riviera. As Working Foreman, the Grievant did no more than offer that work to unit employes by seniority. Because no more senior employe accepted the Riviera work, the Grievant took it. He did not consider himself to be in charge of the crew for the weekend work. Allen called in another unit employe to respond to street flooding late in the evening of June 12 or early in the morning of June 13.

The Grievant reported to work on June 13 at roughly 6:30 a.m. Hansen had been sweeping streets that morning, and informed the Grievant that Fritz had approached him regarding the damaged tree at the Meridian. As the Grievant and two other street crew employes scheduled to clean the Riviera left the shop, Fritz approached the Grievant. Fritz asked the Grievant if he was the man in charge. The Grievant informed Fritz that he did not know who was in charge for that weekend. Fritz then told the Grievant that "there was a tree branch hanging out of the tree in question here and that we needed to look at it and the - to let the mayor know whatever was going on so it would cover his ass" (Tr. at 191).

They then left for the Meridian to inspect the tree. It was, at that time, raining fairly hard. The Grievant stated that he concluded the branch could not be removed safely. It was

too dark, the ground was saturated, the crew lacked sufficient manpower, and the crew lacked the proper equipment. The Grievant felt that to properly barricade the road and remove the branch, he would need five people. Beyond that, he felt the crew would need a hydraulic pole saw to permit the split branch to be cut from a safe distance. He stated he also believed the tree was on private property.

The Grievant testified that he was not concerned that the fallen branch would dislodge from the trunk of the tree. He stated that the branches that had fallen to the ground were embedded, and that after vigorously pulling and shaking the branches, he concluded the fallen fork of the tree was not going to move. While he pushed and pulled at the fallen branch, Greene and the other crew member stood within a five foot radius of the tree. The Grievant assumed, as the senior member of the crew, responsibility for the decision not to remove the branch, but viewed the decision as a consensus of the crew.

The Riviera was to be used on June 13, so the crew left the Meridian to get the Riviera prepared. While at the Riviera waiting for the delivery of some tables, the Grievant phoned the Mayor. He noted that Condos griped to him about the condition of the parks. The Grievant responded that cleaning the parks was not, in his experience, done while on overtime and that he was not the man in charge. Condos then mentioned the tree at the Meridian. The two discussed whether it should come down, the safety risk it posed and whether it was a privately owned tree. The Grievant detailed the end of the conversation thus:

A After we talked a little bit more, whatever he had said, I told him that I could, if he wanted us to, I could -- would go back, we could probably chain it up just to make sure that it does not go anywhere, but that's about the best we could do, and if he wanted me to go back and look at it, we can, I can see if there is something I can do to remedy this or whatever, and he says: well, see what you can do, and that was the end of the conversation.

Q Was it your understanding that the mayor was giving you a direct order?

A No, it was not. . . .

Q Did the mayor ever say to you that the branch had to come down immediately?

A No, he did not. (Tr. at 200).

The Grievant then relayed the conversation to Greene, and then decided to call Allen "because I was not the man in charge on the weekend, and I thought I should probably call my supervisor and let him know what was going on" (Tr. at 201).

The Grievant detailed his conversation with Allen thus:

. . . I believe I probably woke him up, and I told him that the mayor had called and was complaining about the parks and stuff, and Mr. Allen says: Well, what the hell does he know about it, we don't pick up parks or whatever on the weekend after a storm like this. And then I told him about the tree branch being down, and Mr. Allen's words to me were: Leave the fucking tree alone. It is a fucking private tree. If there is any heat to be taken, I will deal with it and take care of it on Monday. (Tr. at 201).

The Grievant did not, during this conversation, describe to Allen the condition of the tree in front of the Meridian. The Grievant testified that he called Allen because another crew member had once been warned about bypassing the departmental chain of command to speak with elected officials on issues of departmental concern. The Grievant did not call the Mayor after the 8:00 a.m. conversation because he did not want to get into the middle of a dispute between Allen and Condos.

After finishing work at the Riviera, the Grievant phoned Bauman to advise the Police Department of the status of the Meridian tree. He did not hear of the incident again until roughly 5:10 p.m. on June 13, when Allen phoned him to come in to remove the branch. The Grievant objected that it could not be done safely, but agreed to come in when Allen said he could show him how to safely do it. The street crew removed the branch, using its lift truck. Fire engines and police cars blocked off Wrigley Drive to permit the bucket truck access to the tree from Wrigley Drive. Greene worked from the bucket with a chain saw. The Grievant, Hansen and Allen assisted from the ground. Allen directed Greene to tie a cable around the fallen branch and attach it to the bucket truck. Greene then worked from the bucket to sever the fallen branch from the tree trunk.

The Grievant testified that after he received his suspension on June 15, he asked that he be paid the Working Foreman premium for June 12 and June 13. He reasoned that if he was being disciplined for failing to exercise the authority of a Foreman, he should at least be paid for it.

Rex Greene

Greene noted that he and the other crew member waited about five feet behind the Grievant while he tested how solid the fallen branch was. Greene agreed with the Grievant that the branch should not be removed at that time since "it was pouring rain, it was dark, the tree was solid, the branch was solid in the crotch, it was not going anywhere, it was safer at that time to leave it alone than to mess with it" (Tr. at 256). The branch was not, in his opinion, removed safely. He felt he was too close to it while cutting the tree trunk with the chain saw to free the fallen branch. He stated his view of the situation preceding the removal thus:

We weren't given the time. This had been blown so much out of proportion, it just had to be done. I didn't like it, I did not feel safe. (Tr. at 261-262).

Greene did not view the Grievant to be a Working Foreman for the weekend work of June 11. Greene noted that unit members do not typically volunteer to serve as Working Foreman, and that Allen never explicitly informed the crew that Allen would be back on duty for June 12 and June 13.

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

THE PARTIES' POSITIONS

The City's Brief

The City states the issues posed thus:

Was (the Grievant) appropriately disciplined for his actions on Sunday June 13, 1999, relating to a fallen tree incident in downtown Lake Geneva?

If not, what is the appropriate remedy?

After a review of the evidence, the City contends that the Grievant's conduct constitutes insubordination. Under Article 21, the City could appropriately suspend the Grievant for this conduct without having to issue a written warning. A review of the evidence establishes, according to the City, that it has proven each element required to establish insubordination. Testimony, the City's organizational chart and Wisconsin Statutes establish that the Mayor is the City's chief operating officer, and that as such he has the authority to issue a direct order to subordinate employees. Beyond this, the evidence establishes that the Mayor clearly directed the Grievant to remove the limb and that the Grievant understood the direction. That the order was directly related to the Grievant's work duties is indisputable. The City's Employee Handbook and the Collective Bargaining Agreement highlight that the Grievant should have understood the disciplinary consequences of failing to carry out the order. Any possible doubt on this point is addressed by the Grievant's conduct in contacting Allen at home. Finally, the evidence establishes that the Grievant had ample time to comply with the order on Sunday morning, since the actual removal took less than one-half of an hour.

The City then contends that Allen's conduct affords the Grievant no defense for his insubordination. Initially, the City asserts that "common sense dictates that the Mayor's authority supercedes the authority of any lower-level supervisor." Even if the Grievant was confused about what to do, his failure to ask either supervisor for clarification makes him

personally accountable. Beyond this, the City notes that Allen's instruction not to remove the limb was based on inaccurate information supplied by the Grievant.

The Grievant's contention that the City lacked the necessary resources to remove the limb cannot be credited. This "argument is discredited by the simple fact that the tree limb was removed later that Sunday using all City workers and all City equipment that were all available to Grievant earlier that morning." Even if it is assumed the Grievant sincerely doubted the sufficiency of City resources, his own involvement in past City use of independent contractors establishes he should have acted to bring in outside help. Similarly incredible are assertions that the Grievant lacked the authority to call in other City employees, particularly in light of his status of serving as Working Forman on the weekend of June 13.

Nor can assertions that the limb removal was unsafe be credited. Whatever risk was involved cannot overcome the applicability of the "work now, grieve later" principle. In any event, the assertion that the work was unsafe is belied by the Grievant's conduct. The actual removal of the limb, including the Grievant's involvement, establishes this. Beyond this, whatever risks were posed, "such risks were inherent to Grievant's job in the Streets Department." The City adds that "it is questionable whether Grievant's alleged safety concern was the primary motivation for his refusal to carry out the Mayor's directive." That the Grievant did not advise Allen of a significant safety risk and that the Grievant tested the limb by "pulling and kicking the fallen limb 'real hard' to see if it would dislodge while his co-workers were standing within five feet of the limb" undercut any persuasive basis to the assertion that the limb removal posed hazardous work.

Viewing the record as a whole, the City concludes that "the Arbitrator should find that the City appropriately disciplined the Grievant, and deny the present grievance."

The Union's Brief

The Union states the issues posed thus:

Did the City have just cause to suspend the grievant . . . for insubordination, and if not, what is the appropriate remedy?

After a review of the evidence, the Union asserts that the City failed to demonstrate just cause for suspending the Grievant. Initially, the Union asserts that the City "accused the grievant . . . of insubordination" and must "therefore prove that (he) disobeyed a direct order, not merely that he . . . handled the events of June 13, 1999, negligently, or incompetently, or improperly." A review of the record establishes that "there is no evidence that (the Grievant) was guilty of insubordination." The evidence offered by the City will meet no generally

accepted definition of the term. More specifically, the Union contends that Condos “never clearly gave (the Grievant) direct orders to remove the tree on the morning of June 13, 1999.” Nor did the Mayor clearly indicate that the tree had to be removed immediately, nor did the Mayor indicate to the Grievant that “he would be subject to discipline” for not removing the tree. The evidence supports the Grievant’s view that he had been issued not “a direct order, but . . . an open-ended instruction to see what other options he might have to resolve the problem.”

That the Grievant responded by verifying that the limb would not move, and then by calling Allen cannot be characterized as anything other than following the appropriate chain of command. Past action by supervisors to require unit employees to follow departmental chain of command when issued requests for work from elected officials only underscores the reasonableness of the Grievant’s response. That he informed the police department of his conversation with Allen further underscores the reasonableness of the Grievant’s response. City assertions that the Grievant could have called in an independent contractor for the work ignores that the Grievant was unaware of his authority to do this until after the suspension. The Union summarizes the record regarding insubordination thus:

Missing from any charge of insubordination in this case are the key requirements of a direct order, an unequivocal refusal to follow the order, and notice of the consequences for failing to follow the order. At the very most, (the Grievant’s) actions constituted a failure to carry out an order, as opposed to insubordination.

Even if the Grievant failed to follow a direct order, his conduct was appropriate since he “was reasonably and sincerely concerned for his safety and the safety of his fellow workers.” Application of a “reasonable person standard” to the evidence affirms this. Weather conditions on Sunday morning precluded safe removal of the tree. The location of the work would, in addition, have required additional help to block the road and to perform the actual removal. Significantly, Condos paid “no heed” to the Grievant’s professed safety concerns. That the limb was taken down without incident cannot obscure that tying a branch to the truck holding the bucket in which an employee is sawing up through a limb violates known safety procedures.

That the Grievant was not serving as Working Foreman on June 13 is established by the evidence. He requested such pay for the time spent removing the limb, and only after he had learned he would be suspended for his conduct.

Nor can City assertions that the limb constituted a safety hazard to the public be credited. That it extended into the street can be granted, but this ignores that pedestrians could safely cut across the hotel's lawn, cross the street, or walk in the shoulder strip not obstructed by the fallen limb. Weather conditions kept potential pedestrians inside on Sunday morning. More significantly, the City's professed concerns are belied by the fact that the limb fell, in all probability, no later than Saturday afternoon. Thus, the police and many citizens were aware of it well before Meinel and Condos viewed the tree late Saturday night. That no one prior to that time sought action undercuts the City's professed concern, as does the failure of Meinel and Condos to take immediate action on Saturday night. That the Grievant tested the limb's branches does not establish anything more than a higher level of care than that of Meinel and Condos who chose to view the scene at night from within a squad car.

There is no dispute the Grievant is a good employe, with no history of discipline or difficulty working with supervisors. Thus, there is no basis to believe he fabricated his safety concerns or that he deliberately defied Condos' supervisory authority.

Viewing the record as a whole, the Union concludes that "the arbitrator should order the City to rescind (the Grievant's) suspension and make him whole for all wages lost while attending the arbitration hearing."

DISCUSSION

The parties have not stipulated the issue on the merits of the grievance, and this poses the threshold point for determination. The Union's statement of the issue, unlike the City's, states the just cause standard, but restricts it to the issue of insubordination. My statement of the issue broadly questions the propriety of disciplining the Grievant for his conduct on June 13, and expressly states the cause standard.

The labor agreement and the parties' stipulation of the issue of remedy make it unpersuasive to restrict the statement of the issue to insubordination. Article 2, Section 1, E, grants the City the right to "suspend . . . and take other disciplinary action against employees." Article 21, Section 1 governs discharge or suspension, and specifically addresses levels of discipline preceding suspension or discharge. More specifically, the section states that, with listed exceptions, "in respect to . . . suspension" the City "shall give at least one (1) warning notice of the complaint against the employee." These provisions raise the possibility of cause to discipline short of suspension, and my statement of the issue is thus stated broadly to incorporate that possibility. The parties' mutual submission of potential remedial issues underscores the need to state the issue on the merits broadly.

Although Article 2, Section 1, E refers to “just cause,” and Article 21, Section 1 refers to “cause,” there is no reason to conclude these references establish distinguishable standards for assessing the propriety of discipline. “Just cause” and “cause” are commonly treated as synonymous: "The term 'just cause' is generally held to be synonymous with 'cause,' 'proper cause,' or 'reasonable cause.'" Hill & Sinicropi, *Management Rights*, (BNA, 1986) at 99. See also Bornstein, Gosline & Greenbaum, *Labor and Employment Arbitration*, (Matthew Bender, 1999) at Section 14.01. My statement of the issue thus turns on whether cause exists to discipline the Grievant for his conduct of June 13.

Where the parties have not stipulated the standards defining just cause, the analysis must, in my opinion, address two elements. First, the Employer must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Employer 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.

In this case, specific contract provisions temper these broad considerations. Article 21 governs suspension, and Section 1(G), demands that a “warning notice” precede a suspension unless the suspension is caused by “(i)nsubordination.” Thus, the initial determination must be whether the Grievant was guilty of insubordination on June 13. If he was, then Article 21, Section 1(G) establishes that the City has met both elements of the cause analysis. The subsection need not be read to preclude a lower level of discipline for insubordination, but does establish summary suspension as an appropriate sanction. If the Grievant was not guilty of insubordination, the issue becomes whether the cause analysis supports any discipline.

"Insubordination," is the "deliberate defiance of . . . supervisory authority." Bornstein, Gosline and Greenbaum, at Sec. 20.04. As Article 21 underscores, insubordination is not uncommonly treated as a capital offense in labor relations. The severity of the sanction is rooted in the willful nature of the offense, which connotes the deliberate undermining of work place management. Insubordinate behavior, under Article 21, must be distinguished from negligent behavior. The former is routed to summary suspension or discharge, while the latter is routed to progressive discipline.

Arbitrators have stated the elements to proving insubordination in a variety of ways. In my opinion, to establish insubordination, the City must demonstrate that the Grievant understood and deliberately defied a clear, work-related order issued by a known supervisor. See, for example, *Roberts' Dictionary of Industrial Relations*, (BNA, 1986); and Bornstein, Gosline & Greenbaum at Section 16.04.

Condos occupied a known supervisory position, authorized to give work orders to unit employees. Whatever the statutory authority of a mayor may be under Wisconsin statutes, it is apparent that City employees knew that Condos occupied the top position in the City's administration. The Grievant's June 13 call to Allen manifested his own and Allen's understanding that the Mayor was a supervisory force to be reckoned with regarding the assignment of work. Meinel's, Bauman's and Fritz's responses underscore this. That the Mayor could direct the street crew to remove a tree branch to remove what he reasonably perceived as a public safety hazard must be viewed as a work-related order. The street crew trims and removes tree branches as a function of its normal duties. Whether the order to remove the branch poses a safety issue under Article 17 is addressed below, and plays no role in determining insubordination. Rather, it asserts that Article 17 establishes a defense for what would otherwise be insubordinate conduct. While the parties dispute the degree to which the removal needed to be performed on June 13, the labor agreement affords no evident basis for arbitral review of the Mayor's determination of the priority appropriate to City work.

Thus, the parties' dispute focuses on whether the Mayor issued a clear order that the Grievant understood and deliberately ignored. The existence of a clear order to remove the branch is the crucial factual issue. Viewed as a whole, the record fails to establish such an order and thus fails to support the allegation of insubordination.

As preface to a discussion of this conclusion, it is necessary to note that the evidence does not make this issue resolvable as a credibility determination. Although Condos and the Grievant spoke directly to each other at roughly 8:00 a.m. on June 13, the order had, by the time of that conversation, passed through at least two other people. Meinel, with whom Condos spoke directly, understood that the Mayor wanted nothing other than the removal of the branch. By the time Fritz relayed the message, however, the order had lost some of its definition. Fritz testified he understood the order to be that the branch "needed attention or it could be checked," but "that it probably should have come down." He and the Grievant engaged in some of the discussion that would underlie the Grievant's later conversation with the Mayor. At the time the Grievant was first informed of the order, then, he could have reasonably perceived the order as a request to check out the branch to determine what, if anything, needed to be done. This is apparent in Fritz' testimony, without regard to the Grievant's. Significantly, Fritz noted the Grievant's final response regarding the order to be that he would "check it out." In sum, without regard to either the Grievant's or Condos' testimony, at the time the Grievant arrived at the Meridian, he regarded the damaged trunk as a potential job, not as a direct and pressing priority.

Condos and the Grievant thus approached the 8:00 a.m. conversation from radically different perspectives. Condos viewed the branch removal as a direct order, and the Grievant viewed it as a debatable point. This is apparent under either view of their testimony

concerning the 8:00 a.m. conversation. Under Condos' view, the conversation ended with a clearly stated request that the limb be removed right away. There is no reason to doubt Condos' sincerity or credibility to note that even under this view, the evidence surrounding this work order is an insufficient base to support insubordination.

The context and the content of the 8:00 a.m. conversation make it unpersuasive to treat it as the clear communication of a direct order. Condos' and the Grievant's testimony establish that the conversation wandered over points beyond a simple order to remove the branch. Absent from both accounts of the conversation is any discussion of the specifics of removing the branch. At least in the early morning hours, weather conditions were a serious consideration. Thus, it was open to question when the work would be performed. Who would perform the work was also open to question. The work at the Riviera had to be done in addition to the branch removal. Thus, under any view of the conversation, the asserted direct order to remove the tree was, in effect, a communication of a work priority. The Grievant could plausibly view this conversation more as an argument over the priority to be given the branch than a direct order to remove it immediately. Underscoring the probability that Condos and the Grievant never shared a common understanding of the content of their 8:00 a.m. conversation is that no testifying witness asserted the order was communicated with an "or else" attached to it. It is not necessary to assert the communication of disciplinary consequences is a necessary element of proving insubordination to note that the absence of such a communication makes misunderstanding of the order more likely. That Condos chose not to communicate with the Grievant after the 8:00 a.m. conversation may well have been prudent in light of his anger on returning to the City to view the branch in the same position. It also, however, foreclosed any opportunity to address their competing views of the earlier conversation.

The context of the 8:00 a.m. conversation further underscores the ambiguity of the order. As noted above, the Grievant received from Fritz something less than a clear communication of a direct order to remove the branch. The branch had, in all probability, been down since Friday evening, and had, at a minimum, been observed by patrolling police throughout the weekend. It is not necessary to doubt Meinel's or Condos' assessment of the public safety risk posed to note that no attempt was made to block off a pedestrian passageway. This does not connote fault, but underscores that the nature of the threat to public safety was less than self-evident. No City official who viewed the tree found it necessary to cordon off a walkway for pedestrians. This lends plausibility to the Grievant's stated view that once he determined the branch would not move, he had addressed the potential safety hazard.

In sum, the evidence indicates that Condos and the Grievant started and ended the conversation on June 13 with two diametrically opposed views. Condos viewed the conversation as the communication of a direct order to remove the branch. The Grievant viewed it as an argument over a number of points, including the priority to be given to the

removal of the branch. The plausibility of both views in light of surrounding evidence makes it impossible to conclude the Grievant deliberately disobeyed a direct order. The competing testimony manifests not a credibility dispute, but an ongoing argument regarding the priority to be given the removal of the branch. The existence of two competing and plausible views of the 8:00 a.m. conversation precludes finding the Grievant's response to the conversation a deliberate defiance of a direct order. Because deliberate defiance of an order is crucial to a finding of insubordination, the evidence will not support a finding of insubordination.

As noted above, under Article 21, this conclusion means that there was no cause to suspend the Grievant without a prior warning. The issue now becomes whether cause exists for discipline short of suspension.

The Union forcefully asserts that the Employer cannot assert any disciplinary interest in the June 13 incident other than the insubordination noted in the letter of suspension. I do not, however, believe Article 21, Section 1 can be persuasively read to extinguish the City's disciplinary interest in arguably insubordinate conduct. Rather, that section routes that interest away from summary suspension and toward "at least one (1) warning notice." The issue thus becomes whether the City had a disciplinary interest in the Grievant's conduct.

The evidence manifests no more apt characterization of the circumstances surrounding the removal of the tree in the late afternoon of June 13 than Greene's testimony that "(t)his had been blown so much out of proportion, it just had to be done." The issue remaining is whether the City has a disciplinary interest in the Grievant's role in the process by which the job blew out of proportion. The evidence establishes that it does.

The Grievant's response to the removal of the branch manifests flawed judgment. While the clarity of the order to immediately remove the branch can be doubted, there is no doubt that the Grievant knew he had been directed to attend to the branch's removal. It is no less apparent that the Grievant did not want to have the crew do the work. His conduct following his conversation with Condos, however, manifests only his desire not to perform the work. He thus inserted himself into the priority given the branch's removal. While this falls short of insubordination, it demonstrates flawed judgment contributing to the rushed removal of the branch in the late afternoon of June 13.

That the Grievant phoned Allen at all demonstrates that he understood his conversation with the Mayor was something other than an academic dispute on when or how to remove the branch. His account of his conversation with Allen underscores that he sought something other than to communicate a passing difference of opinion on removing the branch. Significantly, the Grievant opened the conversation not by describing the branch, but by noting the Mayor was upset with the condition of City parks. This may have predisposed Allen to viewing the

removal of the branch unfavorably, but did nothing to accurately convey even the Grievant's view of his 8:00 a.m. conversation with the Mayor. The Grievant's failure to describe the branch in any detail to Allen is unexplained and inexplicable in light of any view of the 8:00 a.m. conversation. By the end of his conversation with Allen, the Grievant had successfully pointed Allen away from a serious evaluation of the priority to be attached to the branch's removal. This served no end but the Grievant's desire not to perform the work that day.

The Grievant's subsequent conversation with Bauman similarly manifests something other than concern for the chain of command. Rather, the Grievant further insulated himself from the Mayor through that phone call. By the end of the Grievant's work day, Allen had no idea how contentious the 8:00 a.m. conversation had been or how much of it dealt with the safety hazard posed by the fallen branch. He had, however, been placed in a position to assume responsibility for the delay in attending to the branch until Monday. The Grievant's subsequent call to Bauman did little more than put Allen, rather than himself, in the path of the Mayor's anger.

In sum, the Grievant determined that the street crew should not remove the branch on June 13, and acted throughout the day to further that end. This falls short, on this record, of deliberate defiance of a clear order. However, the evidence establishes he sought to further his own view of the priority to be given the branch's removal at the expense of the Mayor's. Whether or not he was the Working Foreman on that day, he bears responsibility for obstructing the implementation of Condos' decision to have the branch removed.

Article 17, Section 8 affords no defense for the Grievant's actions. That section places the determination of "hazardous work" in the hands of a committee, and shields employees from performing "hazardous work so determined" in the absence of "all required and/or reasonable safety equipment." There is no evidence the committee acted regarding work of this type.

Nor will the evidence support an inference that the work was so hazardous to shield the Grievant. Under the labor agreement, the safety manual or arbitral inference, workplace safety is an obligation shared by the City and its employees. The Grievant failed to clearly define a safety issue for Condos, Allen or anyone else. Had the Grievant accurately described the branch and the risk it posed to Allen or Condos, he could have undercut or eliminated the City's disciplinary interest in his conduct. However, he never clearly specified his safety concerns. Rather, he sparred with the Mayor about this and a series of other points. If the Grievant doubted that the branch could be removed safely, what difference did it make whether it was a publicly owned tree, or whether it was removed on overtime? No less tenuous a basis for his safety concerns is shown in his conversation with Allen. He failed to detail either the condition of the branch or his specific concerns with its safe removal to Allen. No one but the

Grievant can bear responsibility for the failure of potential safety issues to be aired prior to its removal in the late afternoon on June 13.

In sum, the evidence does not establish that the Grievant deliberately defied a clear order from the Mayor to immediately remove the tree branch. Thus, the evidence fails to establish insubordination. The evidence does, however, establish that the Grievant failed to communicate to any supervisory personnel an accurate summary of the condition of the fallen branch or the priority the Mayor attached to its removal. This failure furthered the Grievant's view of that priority, but undermined the Mayor's. Because this failure contributed to the rushed removal of the tree in the late afternoon of June 13, the City retains a disciplinary interest in it.

The nature of the City's disciplinary interest does not require extensive discussion. Under Article 21, conduct not warranting summary suspension warrants a disciplinary warning. The Award entered below authorizes the City to issue a written warning to the Grievant for his failure to accurately describe the condition of the branch and the Mayor's concern with its removal to supervisory personnel. The June 15 letter of suspension indicates the Grievant has not yet suffered financially for the suspension, and thus the Award does not state any make-whole relief.

Before closing, it is appropriate to tie the conclusions reached above more tightly to the parties' arguments. The Grievant's status as Working Foreman cannot play a determinative role in this case. There is no persuasive evidence to undercut the Grievant's testimony that he was not going to be paid as Working Foreman on the weekend of June 11 until he insisted on it after learning of the suspension. Any lack of clarity on his status as Working Foreman undercuts the asserted insubordination. The Grievant should not have to guess whether he occupies a quasi-supervisory position or whether a particular position he took put his job at risk.

Similarly, his status as Working Foreman has no determinative bearing on the warning authorized in the Award. For whatever reason, the Grievant served as the conduit between the Mayor and the chain of command in the street department. His failure to accurately convey the condition of the branch or the Mayor's view of it to Allen manifests flawed judgment. No employe, supervisory or not, can work without exercising judgment, and no employe can escape responsibility for the exercise of judgment. Whether a Working Foreman or not, the Grievant's desire to prevent the street crew from removing the branch on June 13 played a significant role in creating the "last-minute" environment surrounding its removal.

Analogous ambiguities in the Grievant's and Condos' views of the 8:00 a.m. conversation preclude adopting the extreme arguments of either the City or the Union. Condos' view that the conversation ended with an unambiguous order cannot account for the context preceding and surrounding it. His command, no matter how clearly conveyed to Meinel, arrived at the Grievant in a less compelling form. The conversation itself strayed widely from the command, thus obscuring the compelling force the City seeks to give it. The Grievant's view of the conversation similarly fails to account for events surrounding it. A mere difference of opinion would not warrant either the call to Allen or to Bauman, and fails to account for the Mayor's response. Beyond this, the assertion of a significant safety issue presumes that the conversation came to a definitive conclusion. The evidence cannot simultaneously support the assertion that the conversation came to no definitive conclusion and the assertion that it posed a significant dispute regarding workplace safety. Viewed as a whole, the evidence establishes that the Grievant and Condos approached and left the conversation with two diametrically opposed views of it. That they failed to mutually understand its conclusion precludes finding insubordination, but not the exercise of flawed judgment by the Grievant.

AWARD

The City did not have cause to suspend the Grievant for his conduct on June 13, 1999, but did have cause to issue him a written warning.

Because the City did not have cause, under Article 21, Section 1(G), to suspend the Grievant for insubordination, the City shall expunge from the Grievant's personnel file(s) any reference to a suspension for insubordinate conduct on June 13, 1999. The City may, however, amend the Grievant's personnel file(s) to reflect the issuance to the Grievant of a written warning, under Article 21, Section 1, for poor judgment in his failure to accurately report to street department supervision the condition and public safety implications of the fallen branch in front of the Meridian Hotel.

Dated at Madison, Wisconsin, this 4th day of April, 2000.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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