BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CALUMET COUNTY HIGHWAY AND PARK EMPLOYEES LOCAL 1362, AFSCME, AFL-CIO

and

CALUMET COUNTY (HIGHWAY DEPARTMENT)

Case 108
No. 58564
MA-10995

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of the Union.

Attorney Melody Buchinger, Corporation Counsel, Calumet County, Courthouse, 206 Court Street, Chilton, Wisconsin 53014-1198, appearing on behalf of the County.

ARBITRATION AWARD

Calumet County Highway and Park Employees Local 1362, AFSCME, AFL-CIO, hereafter Union, and Calumet County, hereafter County or Employer, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the County concurred, in the appointment of a Commission staff arbitrator to resolve a pending grievance. The undersigned was so designated and an arbitration hearing was held in Chilton, Wisconsin on April 19, 2000. The hearing was not transcribed. The record was closed on April 25, 2000.

ISSUE

The County frames the issue as follows:

> Did the County violate the collective bargaining agreement when it terminated Chris Fritsch?
>
> If so, what is the appropriate remedy?

The Union frames the issue as follows:

> Did the Employer terminate Chris Fritsch for just cause?
>
> If not, what is the appropriate remedy?

The undersigned adopts the County's statement of the issue.

RELEVANT BACKGROUND

In July of 1995, Chris Fritsch, the Grievant, was hired as a Mechanic in the Highway Department. At all times material hereto, the Grievant was required to maintain a CDL.

On September 29, 1999, during a random test, the Grievant was found to have a positive alcohol test. Consistent with its understanding of Federal Motor Carrier Rules, the County immediately suspended the Grievant from his position.

By a letter dated September 30, 1999, County Highway Commissioner Michael Ottery advised the Grievant, inter alia, of the following:

. . .

> In addition, prior to returning to work in a safety-sensitive position you must be evaluated by a substance abuse professional. Arrangements for you to attend an assessment on Friday, October 1, 1999 at 12:30 p.m. have been made. However, you need to confirm this appointment for the assessment by phone as soon as possible. . . .
>
> This assessment is required under Section 382.605. You will remain off duty without pay until this assessment is completed. In addition, should you return to work in the future, a condition of that return is that you must have a repeat alcohol test that shows you have below a .02 level of alcohol prior to returning to duty. Arrangements for this test may be made after the assessment is completed and the results are known.

Subsequently, the Grievant was assessed by the substance abuse professional recommended by the County and a substance abuse professional selected by the Grievant. The two assessments differed. The County agreed that the Grievant could follow either assessment.

On October 12, 1999, the Grievant and Union representatives met with County representatives to discuss the Grievant's employment status. On October 12, 1999, the Highway Commissioner issued a letter to the Grievant that states, inter alia, the following:

. . .

> You will be required to remain off duty, suspended without pay, until you have enrolled in and started a treatment program of your choice as recommended in the assessment. You are required to notify the Personnel Manager with the date of your enrollment and the name of program you wish to use. You will then be placed on an authorized leave of absence and will be able to use any paid time you have available and any unpaid time necessary for you to complete the treatment program.
>
> After completion of the treatment program you may return to work. However, a condition of that return is that you must have a repeat alcohol test that shows you have below a .02 level of alcohol prior to returning to duty.
>
> . . .
>
> This is a last chance agreement. This means any further incidents of misconduct of any kind will result in immediate termination. Refusal to comply with the treatment program of follow-up alcohol tests will result in immediate termination.

During the week of October 25, 1999, the Grievant and the County Personnel Manager had a telephone conversation in which the Grievant was advised that, contrary to statements made in the Highway Commissioner's letter of October 12, 1999, the Grievant could return to work prior to completing his treatment program. At that time, the Grievant was advised that he could return to work after his first treatment session on October 28, 1999 if he received a work release from his counselor and passed a return to work alcohol test. Given these conditions, the earliest day that the Grievant could return to work was Friday, October 29, 1999.

It is evident that the County Personnel Manager had an expectation that the Grievant would return to work on October 29, 1999. It is not evident, however, that the County Personnel Manager directed the Grievant to return to work on October 29, 1999. Nor is it evident that, during the telephone conversation, the County Personnel Manager directed the Grievant to take the return to work alcohol test at any specific point in time.

On Friday, October 29, 1999, the Highway Commissioner had a conversation with the Grievant. During this conversation, the Highway Commissioner advised the Grievant that he had complied with all the requirements to return to work with the exception of the return to work alcohol test. The Highway Commissioner told the Grievant that he should "get there quickly to do the testing." The Grievant did not make any response to this statement.

In a letter to the Grievant dated Monday, November 1, 1999, the County's Personnel Manager confirmed her understanding of the telephone conversation that occurred during the week of October 25, 1999 and stated "You also have not, to my knowledge, obtained a breath alcohol test as required. You must do this immediately and return to work if it is negative." The Grievant was further advised that the County would attempt to reach the Grievant by telephone, but that if the County was unsuccessful in such attempts, the Grievant should contact the Highway Commissioner upon receipt of the letter.

On Tuesday, November 2, 1999, the Highway Commissioner made several telephone calls to the Grievant's residence, but was not able to contact the Grievant. The purpose of the telephone calls was to advise the Grievant that the County had arranged for the Grievant to have a return to work alcohol test conducted at a Chilton medical facility on November 3, 1999 at 8:00 a.m.

At approximately 7:10 a.m. on November 3, 1999, the Highway Commissioner telephoned the Grievant at the Grievant's residence and had a conversation with the Grievant. Subsequently, the County Personnel Manager scheduled a meeting with the Grievant and Union representatives for the purpose of evaluating the reasons why the Grievant had not shown up for the return to work test that the County had scheduled for November 3, 1999.

This meeting was held on Friday, November 5, 1999. At this meeting, the Grievant presented the County with a negative return to work alcohol test. This test had been performed on Friday, November 5, 1999. At the end of this meeting, the Grievant was told that he was discharged from his County employment. The Highway Commissioner confirmed this discharge in a letter dated November 10, 1999.

The Grievant's discharge was grieved. Upon denial of the grievance, the grievance was submitted to arbitration. Upon close of the County's case, the arbitrator issued a bench decision on the merits of the grievance. This bench decision on the merits is confirmed in the following:

DISCUSSION

The Highway Commissioner, after consulting with various County officials, made the decision to discharge the Grievant. According to the Highway Commissioner, the Grievant engaged in misconduct by refusing to take the return to work alcohol test that had been scheduled for November 3, 1999 without having a compelling reason for the refusal. In the Highway Commissioner's view, this "misconduct" together with the Grievant's four prior disciplines provided the County with the right to discharge the Grievant.

The Highway Commissioner recalls the following:

> The County scheduled a return to work alcohol test for 8:00 a.m. on November 3, 1999. On November 2, 1999, the Highway Commissioner made at least five unsuccessful attempts to telephone the Grievant at the Grievant's residence. On November 3, 1999, the Highway Commissioner telephoned the Grievant at 7:10 a.m. During the telephone conversation, the Highway Commissioner told the Grievant that he had "set-up" the return to work alcohol test for 8:00 a.m. at the Calumet Medical Center in Chilton. The Grievant responded that he was not available at 8:00 a.m. The telephone conversation ended without any further comment from the Highway Commissioner.

As the testimony of the Highway Commissioner demonstrates, the Highway Commissioner did not direct the Grievant to take the return to work alcohol test at 8:00 a.m. Rather, the Highway Commissioner advised the Grievant that a return to work test had been "set-up" for 8:00 a.m.

When the Grievant explained that he was not available to take the 8:00 a.m. test, the Highway Commissioner did not tell the Grievant that this explanation was not acceptable. The Highway Commissioner did not ask the Grievant if he had received the Personnel Manager's letter of November 1, 1999. The Highway Commissioner did not question the Grievant as to why the Grievant had not yet obtained a return to work alcohol test. Nor did the Highway Commissioner give the Grievant any instruction with respect to the return to work alcohol test. Rather, the Highway Commissioner remained silent. By remaining silent, the Highway Commissioner provided the Grievant with a reasonable basis to believe that his explanation for not reporting for the scheduled test had been accepted by the Highway Commissioner and that the Grievant retained the right to schedule his return to work alcohol test.

More importantly, however, the Grievant was provided with no more than fifty minutes notice of the scheduled test. At the time that the Grievant received this notice, he was not in work status and, thus, was not under the immediate control of the County. Moreover, the Grievant was located some twenty to thirty minutes away from the site of the scheduled test.

It was not reasonable for the Highway Commissioner to expect the Grievant to be available for a return to work alcohol test upon fifty minutes notice. Given the lack of reasonable notice, the Grievant did not engage in misconduct when he did not make himself available to take the return to work alcohol test that had been scheduled for 8:00 a.m. on November 3, 1999.

Article 7.01 of the parties' collective bargaining agreement provides the County with the right to "discharge for proper cause." Inasmuch as the Grievant did not engage in

misconduct when he did not make himself available for the return to work alcohol test that had been scheduled for November 3, 1999 at 8:00 a.m., the Grievant's prior disciplinary record is irrelevant and the County does not have proper cause to discharge the Grievant. By discharging the Grievant without proper cause, the County has violated Article 7.01 of the parties' collective bargaining agreement.

Based upon the record, and the arguments of the parties, the undersigned issues the following:

AWARD

1. The County violated the collective bargaining agreement when it terminated Chris Fritsch.

2. The remedy for this contract violation is set forth in the parties' settlement agreement in the matter of Case 108; No. 58564; MA-10995.

Dated at Madison, Wisconsin this 12th day of May, 2000.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

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