BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, WISCONSIN COUNCIL 40, LOCAL 1287

and

MARATHON COUNTY

Case 273
No. 58869
MA-11085

(Grievance dated January 7, 2000;
written warning for sleeping in the County's vehicle
during an unpaid break.)

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, WI 54476, appearing on behalf of Local 1287.

Ruder, Ware & Michler, S.C., Attorneys at Law, by **Attorney Dean R. Dietrich,** 500 Third Street, Wausau, WI 54402-8050, appearing on behalf of the County.

ARBITRATION AWARD

American Federation of State, County and Municipal Employees, AFL-CIO, Wisconsin Council 40, Local 1287, hereinafter the Union, with the concurrence of Marathon County, hereinafter the County, requested the Wisconsin Employment Relations Commission to designate a member of its staff to serve as arbitrator to hear and decide a grievance dispute concerning County employee C___ , hereinafter the Grievant, and in accordance with the grievance and arbitration procedures contained in the parties' collective bargaining agreement, hereinafter the Agreement. The undersigned, Stephen G. Bohrer, was so designated. On August 29, 2000, a hearing was held in Wausau, Wisconsin. The hearing was not transcribed. On October 24, 2000, and upon receipt of the last of the parties' written briefs, the record was closed.

On the basis of the record submitted, the Arbitrator issues the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties did not agree on a statement of the issues. The Union would state the issues as follows:

1. Did the County have just cause to discipline the Grievant on or about January 5, 2000?

2. If so, what is the appropriate remedy?

The County would state the issues as follows:

1. Did the County violate the collective bargaining agreement when it disciplined the Grievant for conduct on January 5, 2000?

2. If not, what is the appropriate remedy?

The Arbitrator frames the issues for determination as follows:

1. Did the County have just cause to discipline the Grievant for conduct which occurred on January 5, 2000?

2. If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited, in relevant part:

Article 5 – Management Rights

The County possesses the sole right to operate County government and all management rights repose in it but such rights must be exercised consistently with the other provisions of this contract. 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;

. . .

J. To determine the methods, means and personnel by which such operations are to be conducted;

. . .

L. To establish reasonable work rules. The County will notify the Union, through its authorized representatives, of any proposed rules at least two (2) weeks prior to the time the new rules will become effective. At any meeting held to consider such rules, the Union through its authorized representatives, will be allowed to make its position known on the proposed rules or changes. The County, however, reserves the right to establish reasonable work rules for day to day operations.

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this agreement, may be processed through the grievance and arbitration procedures contained herein.

Article 14 – Grievance Procedure

. . .

F. Arbitration:

. . .

5. Decision of Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance. The arbitrator shall not modify, add to or delete from the express terms of the agreement.

. . .

Article 22 – Break Periods

All employees shall receive a ten (10) minute paid break approximately midway during each four (4) hour work period with a thirty (30) minute unpaid break for the noon meal except when ten (10) hour days are worked when employees shall receive a ten (10) minute paid break approximately midway during the first five

(5) hour work period; a thirty (30) minute paid break for the noon meal. Breaks and noon meals shall be taken at the work site unless otherwise approved in the reasonable discretion of the Department Head. The exact time of the breaks will be at the discretion of the Crew Chief or Supervisor as governed by the nature of the ongoing work. Abuse of these break periods may subject the employee involved to disciplinary action.

WORK RULES

The County's Employee Handbook states in relevant part:

We strive to create and maintain a positive and productive work environment. To achieve this, we encourage courteous and respectful behavior, a responsible attitude toward work, and respect for employees, clients, and property.

Because we feel strongly about this, we have developed the following to clarity [sic] our views. This statement outlines the general principles on which you are expected to base your behavior and cites examples of unacceptable conduct. The examples are not meant to be all-inclusive.

In general, actions harmful to the public, another employee, or to the County are cause for disciplinary procedures, up to and including dismissal. You may be disciplined or dismissed for any of the following violations:

. . .

i.) Sleeping on duty.

. . .

Posted on a bulletin board at the shop where Department employees report to work and finish their work each day, is a document titled "MARATHON COUNTY PARK DEPARTMENT PARK OPERATIONS – WORK RULES AND EXPECTATIONS." Among those rules are the following:

. . .

4. Employee breaks shall be as follows:
   Morning break – 9:00-9:10
   Lunch break – 12:00-12:30

   Some break times may vary due to job circumstances

5. All breaks will be taken at work site. Use discretion when working in high visibility areas.

6. No sleeping in any Park Department vehicle or in public at any time.

. . .

BACKGROUND

The County's Park Department, hereinafter the Department, operates a park system for the County of Marathon and the City of Wausau, the only such joint park system in Wisconsin. The Grievant is a Park Maintainer II whose duties include the sweeping of outdoor ice rinks while operating a Model 590 Super L enclosed tractor. This tractor has windows on all four vertical sides of the cab where the operator sits and is equipped with a front-end rotating brush for sweeping the ice. The cab's heating system draws in outside air and blows warm air on the operator during the cold weather. The Grievant has been employed in the Department since July, 1995.

On January 5, 2000, the Grievant was assigned to sweep the City's Tenth Street Park ice rink. At 12:10 p.m., the Grievant decided to take his 30-minute lunch break at that time and upon his arrival at the park. He faced the tractor into a snow bank at a corner of the rink and laid his head down on top of his arms and with his arms across the tractor's steering wheel. While in this bodily position, Grievant kept the tractor idling. Nearby, and also at the rink, was a heated public warming house commonly used by ice skaters.

Shortly after the Grievant had positioned himself, Parks Director William Duncanson was driving along Tenth Street to an appointment and noticed the idling tractor with a person in it. Duncanson is the overall administrator of the Department. There is a retaining wall which slopes downward from the street and toward the rink and at the point where Duncanson noticed the tractor. From Duncanson's vantage, he could see someone inside of the cab, but he could not identify the person. Duncanson had no prior knowledge that the Grievant would be there at the time that he drove by. Duncanson drove past the scene, circled his car back around the block and parked along an adjacent street to make further observations. Duncanson observed the scene from about 12:25 p.m. to 12:30 p.m. During this time period, the tractor's occupant made no movement, except for a slight motion from that person's right shoulder.

After making these observations, Duncanson got out of his car, walked over to the tractor and opened the tractor's passenger side door. The Grievant sat up startled. Duncanson told the Grievant that if he was too tired to stay awake then he should go home and get some sleep. The Grievant said that he was not sleeping and that he was not tired. Duncanson was unhappy with the situation and directed the Grievant to return the tractor to the shop. Duncanson then left for his appointment.

Following his appointment, Duncanson called the shop where the tractors are kept and spoke to Park Operations Superintendent Daniel Fiorenza. Fiorenza is the overall supervisor of the Park Maintainers, including the Grievant, and reports directly to Duncanson. Duncanson informed Fiorenza of what had happened with regard to the Grievant. During this conversation, Fiorenza informed Duncanson that the Grievant had been involved in a similar incident about a year ago. The facts relating to that prior incident are in dispute and are restated below in the parties' respective positions. Fiorenza further informed Duncanson that the Grievant had not yet returned the tractor to the shop and that the Grievant was out working. The conversation ended with Duncanson directing Fiorenza to go out and find the Grievant.

Following Fiorenza's telephone conversation with Duncanson, Fiorenza located the Grievant at another ice rink and questioned him about the incident. Fiorenza commented how the Grievant would have had been perceived by the public while at the park. The Grievant responded that if it was a busy area, then it was probably not a good thing to do because of the way it looked. The Grievant apologized for getting Fiorenza involved. Fiorenza instructed the Grievant to work the rest of the day. Following this meeting, and later that same day, Fiorenza spoke to the Grievant where it was discussed that the ice rink's warming house would have been a better place to take a break. Next, Fiorenza telephoned Duncanson and it was decided that the Grievant would receive a written reprimand.

On January 5, 2000, Duncanson wrote the following memorandum to the Grievant:

. . .

> On Wednesday, January 5, 2000, I observed you sleeping in the cab of an idling tractor at 10th Street Park from approximately 12:25 pm to 12:30 pm. At about 12:30 pm I woke you up. I informed you that I had observed you sleeping on the job.
>
> The Marathon County Employee Handbook lists sleeping on duty as unacceptable employee conduct that is cause for discipline up to and including dismissal. Based upon this incident and a prior incident for which Dan Fiorenza, Park Operations Superintendent, issued you a verbal warning, I am issuing you a written reprimand for sleeping on the job. This reprimand will become part of your permanent personnel record. Future incidents of this nature will result in an extended suspension or dismissal.

. . .

On January 6, 2000, the Grievant went to Duncanson's office and spoke to him about the incident. The Grievant said that the tractor cab's heat blower had made his eyes dry, that he was on lunch break and that he was resting his eyes. Duncanson replied that such conduct

was inappropriate even on the Grievant's lunch break because the public would conclude that the Grievant was sleeping. The Grievant said that he had made a mistake in judgment, but requested that the reprimand not be permanently placed in his file. Duncanson refused to put a time limit of keeping the reprimand in the Grievant's file.

On January 7, 2000, the Union filed the instant grievance stating that "Duncanson wrongfully reprimanded [the Grievant] for sleeping on duty when he wasn't sleeping as well as he was on unpaid break and therefore not on duty." The grievance seeks to dismiss the written reprimand and to expunge any reference to the reprimand.

On February 3, 2000, and in its decision to deny the instant grievance at Step 2 of the grievance procedure, Duncanson wrote the following on behalf of the County:

> The written reprimand given to [the Grievant] on January 5, 2000, will not be dismissed. During the five minutes that I observed [the Grievant] slumped over the steering wheel in the glassed-in cab of a tractor in 10th Street Park adjacent to the intersection of 10th and Forest Streets, the only way that I, or a member of the public, could describe what I observed, is that a person was sleeping in a tractor cab. With respect to the contention that [the Grievant] was on break and therefore not on duty, I would remind you that our rules of conduct and behavior are in force at all times in the workplace. In the case of the Park Department, the workplace includes the public lands and facilities we manage and the vehicles and equipment we use. Further, employees have been clearly notified of the need to present a positive appearance to the public during breaks and lunch periods.
>
> . . .

On March 7, 2000, County Personnel Director, Brad Karger, denied the instant grievance at Step 3 of the grievance procedure and wrote the following:

> I have decided to deny the grievance submitted by [the Grievant] which appeals a written reprimand issued to him on January 5, 2000 for sleeping on the job.
>
> On 1-5-00 [the Grievant] was observed by Bill Duncanson, Park Director, slumped over a steering wheel of a tractor at 10th Street Park. [The Grievant] says he wasn't sleeping; he says he was resting his eyes because a fan had been blowing in this [sic] face that morning. However, there is no dispute that a reasonable person would assume [the Grievant] was sleeping and that he was positioned in full public view.

> [The Grievant] says that he was on break at the time. Bill Duncanson does not dispute this but points out that [the Grievant] is a public employee and that it is expected that an employee of the Park Department take reasonable action to prevent the public from getting the idea that its employees are "shirkers". Such a perception could erode public support for the department and adversely affect its ability to obtain approval of its projects and programs.
>
> I have decided to deny the grievance and sustain the written reprimand for these reasons:
>
> 1. The evidence indicates that the investigation of the facts was sufficiently complete and fair. [The Grievant] and Bill Duncanson met on a subsequent day and engaged in what has been characterized as a frank and open discussion.
>
> 2. The evidence is clear that there was no effort to "set-up" or exaggerate the facts with regard to this matter. The supervisors of the Park Department have high regard for [the Grievant] and his work.
>
> 3. [The Grievant] was issued an oral reprimand approximately 1 ½ years ago for sleeping on the job.
>
> 4. The Park Department has a legitimate business interest is protecting its reputation in the community and employees can legitimately be disciplined for actions contrary to this interest. Whether [the Grievant] was on break or not, the public perception of his behavior is damaging to the Park Departments [sic] business interests.

The parties thereafter advanced their dispute to arbitration. Additional background information is set forth in the positions of the parties.

POSITIONS OF THE PARTIES

The Employer

The grievance should be dismissed.

Although the Grievant contends that he was resting his eyes, an employer need not scientifically prove that an employee was sleeping, only that a reasonable person would conclude as much, citing GENERAL ELECTRIC CO., 74 LA 115 (KING, 1979). Further, the person observing has less motivation to be untruthful than the person alleged to be sleeping and who is under a threat of discipline.

In the instant case, Duncanson observed the Grievant's posture as that of a sleeping person. During Duncanson's five-minute observation, the Grievant only made a slight motion with his shoulder. The Grievant was startled when Duncanson opened the tractor's door as would be expected when waking up suddenly. Further, Duncanson's observation was coincidental to his traveling to a meeting and was not for the purpose of observing the Grievant. It was reasonable for Duncanson, or anyone else observing the Grievant, to conclude that the Grievant was sleeping. Moreover, the testimony of Duncanson and Fiorenza is more reliable because they have no motivation to be untruthful, unlike the Grievant who faces discipline. Although Grievant claims that he was resting his eyes due to some of the tractors fumes entering the cab, this testimony is suspect because the Grievant failed to mention it to either Duncanson or Fiorenza immediately following the incident.

The Union's claim that the County's rules are unreasonable is without merit. The test of reasonableness of an employer's rule is whether or not it is reasonably related to a legitimate objective of management. An employer has a legitimate business interest in protecting their public image, particularly where it offers services to the public. In this case, the posted work rules are reasonably related to the County's legitimate objective of fostering a positive image with the public. The public's perception of the Department is continually under observation by both the City and the County. Since there is no mandate that park services be offered, and if the citizens are dissatisfied with the Department's services, the Department's budget may be cut. Consequently, and as Fiorenza testified, Department employees are repeatedly informed at meetings about the importance of their public appearance. The Grievant understands the importance of public perception and, according to the testimony of Duncanson and Fiorenza, the Grievant twice admitted that he made a mistake in judgment and with regard to his conduct on January 5, 2000.

The Union's argument that the County's rules are unreasonable is untimely. This argument should have been raised when the rules were first established. Since they were not challenged at that time, an inference can be drawn that the Union considers the rules reasonable.

Duncanson took into account a prior verbal warning for sleeping on the job when deciding to verbally reprimand the Grievant. The facts of this prior incident show that on December 21, 1998, the Grievant had signed up for the early morning duty of filling an ice rink with water using a tank truck. At 4:30 a.m. that day, Fiorenza stood outside the truck's door, observed the Grievant sleeping and eventually woke up the Grievant, who was startled. Fiorenza told the Grievant how bad the Grievant's conduct looked and warned the Grievant that "this is never to happen again." Fiorenza further told the Grievant not to sign up for the duty if he could not stay awake. Fiorenza testified that the Grievant apologized for his conduct and that it was not necessary under the circumstances to explicitly tell the Grievant that that reprimand was "a formal discipline." Following this incident, Fiorenza made a note of the incident in his home computer. These notes are not placed in employee personnel files.

Fiorenza's account of the prior incident is more credible than the Grievant's account because Fiorenza has no reason to testify falsely and, unlike the Grievant, is not facing a written reprimand. Further, the Grievant's claim, i.e., that the prior incident does not constitute a verbal warning, is implausible. Fiorenza's statement to the Grievant on December 21, 1998, that "this is never to happen again" is reasonably construed as a verbal warning. The testimony by Union Steward Sislo that the Grievant never informed Sislo of the prior incident should not be given weight since Sislo conceded that employees do not always advise him of their oral or written warnings.

The County's written warning imposed upon the Grievant was appropriate and the Arbitrator should defer to the County's judgment absent an abuse of discretion. Since the County's determination in this regard was not arbitrary, capricious or discriminatory, there was no abuse of discretion and the discipline should stand. Further, in light of the prior verbal warning for sleeping on the job and the severity of the Grievant's conduct in the most recent incident, the written reprimand issued to the Grievant should be upheld.

The Union

The grievance should be sustained and the Grievant's record expunged.

The Union disputes or emphasizes certain facts which affect the outcome of the case. These include that the Grievant was reclining on the tractor's steering wheel, as opposed to sleeping, that Duncanson did not properly investigate whether the Grievant was sleeping and assumed it without asking the Grievant for an explanation, that the Grievant's conduct was during a contractually provided unpaid lunch break, that there is no rule against sleeping during breaks, that the tractor had a problem with exhaust fumes which may have caused the Grievant to become drowsy, and that the Grievant has maintained a good work record.

With regard to the investigation, there is not substantial evidence that the Grievant was guilty of the alleged misconduct and the County has not met its burden of proof that he was sleeping, citing MIDWEST TELEPHONE CO., 66 LA 311 (WHITNEY, 1976). Duncanson was acting upon an impression and ambushed the Grievant after observing him for just a few minutes. He then initiated a stern verbal reproach and launched into an uncontrolled tirade. The evidence supports an inappropriate investigation because Duncanson failed to ask whether the Grievant was sleeping and because Duncanson admitted that he could not see whether or not the Grievant's eyes were closed. The written reprimand itself shows that it was based upon an assumption where it states that "a reasonable person would assume that [the Grievant] was sleeping."

Sleeping on the job can be a relatively serious offense. Since there is not convincing evidence that this occurred, the discipline should not be sustained, citing COASTAL RESIN CO., 61 LA 686 (JENKINS, 1973) and PET INCORPORATED, 83 LA 468 (SCHEDLER, 1984). In

COASTAL RESIN CO., as in the instant case, the supervisor surmised that the employee was sleeping. In overturning the discipline, the arbitrator ruled that the employer had not met its burden of proof. Similarly, in PET INCORPORATED, the arbitrator determined that the employer failed to establish the grievant was actually asleep. The supervisor's approach in PET INCORPORATED was similar to Duncanson's approach in that the former made his determination based upon surreptitiously peeping through a crack in the stall. Likewise, in SCOTT PAPER CO., 99 LA 624 (BYARS, 1992), the arbitrator found that there was no evidence of negligence on the grievant's part or that there was work for the grievant to do when he was allegedly sleeping. Comparing the above cases to this case, it is apparent that the County failed to ask the Grievant whether he was sleeping and failed to properly investigate. Therefore, the County's actions were both unreasonable and nonsensical.

If it is determined that the Grievant was asleep, there is no rule prohibiting sleeping during unpaid lunch breaks. The time of the incident was between noon and 12:30 p.m. According to the parties agreement, this is an unpaid, duty free lunch period. In Duncanson's state of mind, this fact was something which Duncanson apparently did not know or care about. Furthermore, the Employee Handbook expressly describes sleeping "on duty" as misconduct. Since the Grievant was on lunch break and not on duty, he was not breaking any rule.

An employee's break period is usually considered a time to enjoy a respite from work. In a somewhat similar case, an employer was found to have improperly disciplined an employee for sleeping 8-10 minutes during a bathroom break, citing OSHKOSH TRUCK CORP., 81 LA 1009 (COX, 1983). In that case, the arbitrator reasoned since the employee had the right to take a toilet break and since there was no evidence that he had gone there for the purpose of sleeping or that his sleep was beyond a normal 10-15 minute bathroom break, that discipline was overturned.

If it is determined that the Grievant was sleeping and if it is also determined that there was a rule against sleeping on an unpaid lunch break, then such a rule is unreasonable and, therefore, is a violation of the parties' agreement. An employer retains the inherent right to exercise reasonable control over employee conduct, but that right is for conduct during scheduled work hours, citing BROWN-GRAVES CO., 43 LA 465 (STOUFFER, 1964). It is unreasonable for an employer to impose rules that directly affect an employee's use of break time, particularly where there is no evidence that breaking the rule would interfere with the employer's production, citing ROSS CLAY PRODUCTS CO., 41 LA 1095 (KABAKER, 1963), or where the employee is not trying to hide anything, citing KAWNEER CO., 30 LA 1002 (HOWLETT, 1958). In this case, the rule against sleeping during a contractually provided duty free lunch period is unreasonable because it seeks to control an employee's behavior during an unpaid break and without compensation. The County effectively wants to "have their cake and eat it too" and to secure a change in the contract through this grievance process.

If it is determined that the rule against sleeping is reasonable, then there are mitigating circumstances that should be taken into account. At the time of the alleged misconduct, the Grievant had recently requested service of the tractor due to the tractor's outside exhaust fumes entering the inside of the tractor's cab. It is well recognized that even low levels of such fumes can cause drowsiness. Therefore, the Grievant's recent request for service of faulty equipment is a mitigating factor.

With regard to the appropriateness of the penalty, the discipline here was too harsh and was inconsistent with the County's past practice of progressive discipline. Contrary to the anticipated argument of leniency by the County, the fact that the discipline was not more severe is more of a reflection of the County's known problems with the discipline than any claimed spirit of leniency on the part of the County. Notwithstanding the significant aforementioned points raised on brief, and if it is a legitimate offence to be either napping or reclining on a break, the Grievant's alleged conduct should be considered a minor infraction and subject to a progressive level of discipline, citing INTL. HARVESTER CO., 12 LA 1190 (MCCOY, 1949).

The evidence shows that the County has accepted a progressive level of discipline, starting with a verbal warning and then advancing to a written warning. With regard to the prior incident about one year ago, it did not result in any oral reprimand. Rather, the Grievant was advised by Fiorenza that it may be hazardous to sit in a particular truck with the engine idling due to the potential for exhaust fume contamination. Contrary to Fiorenza's claim, the Grievant was not warned for sleeping on the job and the Grievant was not told that he was being disciplined. There was no reference made by Fiorenza about the incident in the Grievant's personnel file. According to Union Chief Steward Sislo, the County's practice is to record verbal warnings and place them in the employee's file. The omission of this documentation supports the Union's contention that the prior incident related to safety and was not disciplinary.

If it is determined that the January 5, 2000 incident warrants discipline, then such discipline should be reduced to an oral reprimand.

The County's Reply Brief

The Union's characterization that Duncanson "ambushed" the Grievant, that Duncanson "launched into an uncontrolled tirade," or that Duncanson was "flying off the handle" after observing the Grievant on January 5, 2000, is not supported in the record. In addition, the Union's claim that the County has a practice of recording it verbal warnings, is incorrect. The Grievant's testimony challenges Sislo's statement when the Grievant received a prior verbal warning for not wearing a seatbelt, but did not receive anything in the Grievant's personnel file verifying this warning. In fact, it is not the Department's practice to record verbal warnings in an employee's personnel file. It should be noted that Fiorenza's reference to a computer is actually a reference to one in Fiorenza's office at the Department.

The three cases cited by the Union concerning whether an employee is found sleeping are inapplicable. In COASTAL RESIN, CO., the arbitrator refused to infer the fact that the employee was sleeping under circumstances where the employee's eyes were open, he was lucid and he responded to conversation. In the instant case, the County's evidence that the Grievant was sleeping was based upon facts, i.e., Duncanson observing the Grievant laying across the steering wheel with arms on the wheel and his head face-down on his arms, not inferences. In PET INCORPORATED, the discharge was overturned because the employer failed to identify the person viewed sleeping through a crack in the bathroom stall door as the grievant. In the instant case, the identification of the grievant is not an issue and, therefore, is inappropriate to compare. In SCOTT PAPER CO., the grievant was not accused of sleeping, and so the arbitrator did not address that issue. Further, the grievant was discharged for negligent job performance. This was overturned because of the employer's failure to introduce evidence regarding that allegation.

With regard to the Union's assertion that it is inappropriate to discipline an employee for conduct occurring during an unpaid break, the case of OSHKOSH TRUCK CO., is factually distinguishable in that the grievant was found sleeping in a private place, i.e., a bathroom stall, as opposed to the Grievant sleeping in a public park. As previously asserted on brief, it is important for the Department to maintain a positive public image, one that is tarnished when employees are observed sleeping in public. Further, unlike the employee in OSHKOSH TRUCK CO. who had a right under plant practice to be in the bathroom, the Grievant in the instant case violated a rule by sleeping in a Departmental vehicle in public.

The Union's Reply Brief

With regard to the incident in December of 1998, the Grievant was not warned for sleeping and that incident was not disciplinary in nature. Rather, and as the Grievant testified, that was more of a cautionary statement with respect to potentially hazardous exhaust fumes. Further, the Grievant's account of the prior incident is more credible because there was not a formal record made and the County has a past practice of recording such discipline. In addition, the County has the burden of proof and it has not met its burden with respect to the incident in December of 1998.

It is significant that the County has not met its burden of proving that the Grievant was sleeping on January 5, 2000. The County's repeated assertions to the contrary is an indication of an inherent weakness in their case.

The Union disputes that the County had "just cause" to discipline the Grievant for conduct on January 5, 2000. Duncanson did not know whether the Grievant was sleeping, rather he assumed it. Further, this assumption was based upon a limited observation and Duncanson admitted that he could not see whether the Grievant's eyes were closed. Duncanson merely observed the Grievant, drove around the block and saw the Grievant in a

position that he believed to be the same. Moreover, Duncanson's alleged investigation was almost nonexistent due to Duncanson's failure to ask the Grievant whether or not he was sleeping.

The County's use of cases, in support of its argument that an employer need not scientifically prove an employee was sleeping, is misleading. In PHELPS DODGE, 107 LA 175 (BRISCO, 1996), the employer's discipline was without just cause, was overturned, and the grievance was sustained. Similarly, in ARCH OF ILLINOIS, 107 LA 178 (FELDMAN, 1995), the arbitrator sustained the grievance finding that there was not just cause despite there being no question that the grievant was sleeping. In BASIN ELECTRIC POWER COOPERATIVE, 91 LA 443 (JACOBOWSKI, 1988) the discharge was overturned based in part on the fact that the grievant's duties included a drowsiness-inducement factor and that the grievant had not neglected his duties. Further, the discipline was reduced from a discharge to a one-day suspension. In CONTICO INTERNATIONAL, INC., 93 LA 530 (CIPOLA, 1989), the discharge was overturned where the grievant was working more than 60 hours per week and he was sleeping during some slack time following an electrical outage. In MANLEY BROTHERS, 106 LA 442 (COHEN, 1996), the discipline was sustained; however, the supervisor was close enough to observe the grievant's face and eyes so as to assure a correct conclusion that the grievant was asleep. These facts are in contrast to the instant case's facts regarding Duncanson's conduct and support the Union's position.

In addition, the County's reference to MAUI PINEAPPLE CO., 86 LA 907 (TSUKIYAMI, 1986) is questionable. In that case, there was no dispute that the grievant's eyes were closed; however, and unlike the present case, the grievant had been previously discharged and was under a "last chance" agreement. Therefore, it is distinguishable. Moreover, the reasoning in MAUI PINEAPPLE CO., i.e., where testimony conflicts the employer's version is more reliable because they have no motivation to be untruthful, is faulty. It conflicts with the longstanding principle that in discipline cases, the employer bears the burden of proof. Following the line of reasoning in MAUI PINEAPPLE CO. to its unavoidable result, in discipline cases where the facts are in dispute, the employer is always telling the truth and the grievant is always lying.

It is significant that none of the County's cited cases deal with a grievant being disciplined for allegedly sleeping during an unpaid break. This strongly suggests that it is highly unusual for an employee to receive discipline for such conduct during an unpaid break. It should also be noted that the work involved here is a blue-collar type and is often physical. Thus, such work can lead to a degree of exhaustion. Since breaks are negotiated to serve a respite from work, they are intended to provide employees time to briefly relax. This is what the Grievant was doing. The lack of similar cases regarding employees allegedly sleeping on breaks attests to the fact that most rationally thinking employers recognize the purpose for which breaks are intended.

Duncanson's testimony that the Grievant was "startled" on January 5, 2000, is not significant. Duncanson acknowledged that he basically slinked-up on the reclining Grievant

and ambushed him. Under these circumstances, it was not unusual for the Grievant to respond this way. This falls far short of any "smoking gun" that the Grievant was sleeping.

The County's allegation that the Union is untimely challenging the reasonableness of the County's work rules is unsupported. No evidence was advanced at the instant arbitration hearing of whether the rule was challenged prior to the hearing. Further, the Union does not challenge the reasonableness of a work rule prohibiting an employee from sleeping on duty since the Grievant was reclining and not asleep and since he was on an unpaid break.

The County's use of cases, in support of its argument that off-duty employee conduct can result in legitimate employee discipline, are dissimilar, extreme, and/or do not support its position. INDIANA BELL TELEPHONE, 93 LA 981 (GOLDSTEIN, 1989) involved a grievant who was convicted of patronizing a prostitute. INDIANA BELL TELEPHONE CO., 99 LA 756 (GOLDSTEIN, 1992) involved a grievant who violated a substance abuse policy; her discharge was reduced to a suspension. PITTSBURGH PLATE GLASS CO., 49 LA 370, 374-375 (DWORKIN, 1967) involved an intoxicated grievant who drove a motorcycle through the plant while off-duty. CITY OF CEDAR RAPIDS, 95 LA 1119 (COHEN, 1990) involved a grievant who left her job duties and her equipment to discuss private business and who falsified a work log. CITY OF RACINE, WERC MA-9994 (NIELSEN, 1998) involved the challenge of a work rule that was the result of a negotiated change in language relating to coffee breaks.

Contrary to the County assertions, the cases of MARATHON COUNTY, WERC MA-6492 (LEVITAN, 1991) and PEOPLES GAS LIGHT AND COKE CO., 73 LA 357 (GUNDERMANN, 1979) are not very similar to the instant case. In MARATHON COUNTY, a written warning was upheld where the grievant used a county vehicle for personal use and without permission. However, the discipline in that case was the grievant's second offense and was preceded by an oral reprimand over facts which were not in dispute. Further, and unlike the instant case facts, that conduct occurred during paid work time and the grievant admitted he took the vehicle to his personal residence. Moreover, the grievant's conduct was a deliberate act and arose from a public complaint. In addition, the grievant's damage to property and the grievant's negligence could have had dire consequences. Thus, the MARATHON COUNTY case is not comparable. In PEOPLES GAS LIGHT AND COKE CO., a one-day suspension was upheld where the grievant ignored a warning with respect to a rule regarding breaks. It is unclear whether that conduct, which occurred on breaks, was with or without pay. However, in that case there was no dispute that the grievant intentionally violated a work rule. In this case, the alleged misconduct is not only disputed, but also there was no intentional misconduct.

The County's other cases do not support its position and are not comparable. In PARK GERIATRIC VILLAGE, 81 LA 306 (LEWIS, 1983), the grievant was discharged for physically abusing a nursing home patient with a cane. In SAFEWAY STORES, INC., 78 LA 394 (JACKSON, 1982), there was no dispute that a checker did not record six separate transactions nor that the rule that she had broken was strict. In IRWIN-WILLET HOME PRODUCTS CO., INC., 77 LA 146 (MANISCALCO, 1981), the grievant was discharged for falsely reporting information relating to her absenteeism.

Finally, while the discipline in this case may be considered mild, it is nevertheless unjustified. The County has not met its burden of proof of the alleged misconduct. Further, the alleged rule against reclining while on unpaid break is inherently unreasonable and contrary to the intent of the parties' agreement providing a break. Alternatively, this is a first offense. Since the County failed to follow its past practice of recording oral discipline, the conduct which occurred on January 5, 2000, should have only constituted an oral warning.

DISCUSSION

The first issue is with regard to the Grievant's conduct on January 5, 2000. The Grievant's posture is not in dispute. His head was down and forward with his face on top of his arms across the tractor's steering wheel. It is also undisputed that the Grievant maintained this posture for 5 minutes, 1/ with the exception of some "slight" movement from the Grievant's right shoulder. Hence, the Grievant was, for the most part, inert during this period. The Union claims that the Grievant was "resting his eyes," as opposed to being asleep, and characterizes this conduct as "reclining." It asserts that the County has not met its burden of proof that the Grievant was actually sleeping. The County maintains that the inquiry is not whether the County has proved the Grievant was scientifically sleeping, but whether a reasonable person would conclude that the Grievant was asleep.

1/ Duncanson's testimony is that, while checking his watch, he observed the Grievant from 12:25 to 12:30 p.m.

I agree with the County. I am persuaded that it was reasonable for the County to conclude the Grievant was asleep and I adopt the general reasoning from GENERAL ELECTRIC CO., 74 LA 115 (KING, 1979). To adopt the Union's position would virtually require the presence of a physician and the use of sophisticated equipment to prove a person's state of mind during the period in question. It is more reasonable to determine whether someone is sleeping based upon the perceived conduct of the person in question. In this case, the evidence shows that Duncanson observed the Grievant essentially inert for a sufficient length of time and in a posture where it was reasonable to conclude that the Grievant was asleep.

I find it immaterial that Duncanson could not see the Grievant's eyes during his period of observation. During the hearing, Duncanson demonstrated what he saw and placed his forehead on top of his arms, covering any view to the eyes. Hence, the Grievant's eyes were obscured from Duncanson's view. Further, it is not uncommon for people to close their eyes when in this posture and when inert for this period of time. Therefore, I do not find it unreasonable for Duncanson to conclude that the Grievant was sleeping, despite not having a visual line of sight of the Grievant's eyes. Moreover, the fact that Duncanson failed to ask the

Grievant whether he was asleep when initially confronting him does not destroy the overall reasonableness of Duncanson's conclusion. Although such an inquiry may have been appropriate, such an omission does not undermine the reasonableness of Duncanson's determination.

I agree there is no evidence that Duncanson "ambushed" the Grievant. Duncanson was coincidentally driving to an appointment when he noticed, from a clear vantage, a curious scene, i.e., a Department vehicle idling and facing into a snow bank with a motionless operator inside. I do not find it suspect for Duncanson, the Department's head administrator, to inquire into this situation. In addition, there is no evidence that Duncanson was predisposed toward the Grievant. While Duncanson's reprimand could fairly be described as a stern verbal reproach, the evidence does not support a characterization that Duncanson launched into a tirade or that he acted irrationally toward the Grievant.

The second issue is whether there exists a rule against sleeping during unpaid breaks. The Union claims that there is no such rule. The evidence submitted, however, shows that there were work rules posted on the employee bulletin board which stated, among others: "No sleeping in any Park Department vehicle or in public at any time." I find that the phrase "any time" is broad in its scope and is clear in its meaning. It specifically prohibits sleeping in a Department vehicle at any time. This includes any and all break times. Therefore, the Union's assertion that such a rule does not exist is without merit. Further, the Grievant testified that he was aware of the posted sheet which contained these work rules. Thus, I also find that the Grievant had notice of the rule.

Breaks are a negotiated condition which serve an important purpose of providing employees a time to enjoy a respite from work. The parties' agreement, however, does not expressly prohibit how Department employees are to take breaks, only that the work rules be reasonable. Therefore, the next issue is whether or not the instant rule prohibiting certain conduct during unpaid breaks is reasonable.

The County asserts that the rule is reasonably related to a legitimate objective, i.e., a positive public perception. I agree that that objective is legitimate. As a public employer, the County is justifiably concerned with the public appearance of its employees sleeping inside Departmental vehicles, even when on breaks. A public employee sleeping in a vehicle paid for by taxpayers gives the impression that the public's resources are being squandered. The fact that such conduct may occur during an unpaid time does not lessen the County's exposure and legitimate concern of an adverse public reaction. Article 22 does not establish a certain time for breaks, thus making it possible, and perhaps probable, that Department employees take their breaks at nonuniform times. Since the public is usually unaware of when an employee is on break, it is not unreasonable for this rule to apply at all times.

I do not agree that the potential for exhaust fumes entering the Grievant's tractor cab is a mitigating circumstance. The Grievant testified that there had been an exhaust problem, but

he also testified that this problem was repaired one to two weeks before the incident. Had the exhaust problem still been a factor as of January 5, 2000, it would seem likely that such would have been at the forefront of the Grievant's mind as an explanation for the incident. However, the Grievant failed to mention this as a possibility to either Duncanson or his immediate supervisor, although he had several opportunities to do so, until the parties were well into the grievance procedure. Therefore, the Grievant's failure to timely notify the County is contrary to the Union's position.

Finally, the appropriateness of the penalty needs to be considered. Whether or not a written warning was too severe depends upon whether there was any similar conduct for which the Grievant was disciplined. The parties' version of the facts which occurred in December of 1998 were vastly different. Fiorenza testified that he found the Grievant not moving while inside of a Department tank truck, that he stood at the truck's door for some time, and that he awoke the startled Grievant. Fiorenza further testified that he told the Grievant how bad it looks, that the Grievant conceded he couldn't stay awake, and that he told the Grievant not to sign up for that duty if that was the case. Following this incident, the Grievant did not sign up for this particular duty using the tank truck. Finally, Fiorenza testified that he warned the Grievant this conduct "should not happen again." Conversely, the Grievant testified that Fiorenza found him resting and dozing in and out. According to the Grievant, Fiorenza said if the Grievant was to doze, to do it somewhere else because of the potential for fumes and that this exchange was more of a cautionary concern, as opposed to any kind of a disciplinary warning. In support of the Grievant's account, the Union asserts that since the County has a past practice of recording its verbal warnings, and since there was no written account of this alleged verbal warning, that the Grievant's version should be credited.

Union witness Sislo testified that he was verbally warned for smoking in a building by Fiorenza and that Sislo should take it as a such. However, there was no evidence that Sislo's warning was ever recorded. Further, as Chief Steward, other unnamed employees have informed Sislo that they were verbally warned. However, there was no testimony that those warnings were recorded. The Grievant also testified that he was once verbally warned for not wearing his seat belt and that he should consider it a verbal warning. However, there was no evidence that such warning was recorded. Therefore, there is insufficient evidence to find that the County has a past practice of recording verbal warnings.

I accept the County's version of the prior incident in December of 1998 and I am persuaded in general by the demeanor of the County's witness. In addition, and although much of Fiorenza's statements were disputed, it was undisputed that the Grievant no longer performed this particular duty of using the tank truck following his verbal exchange with Fiorenza. Fiorenza's testimony is consistent with the Grievant's change of duties and the Grievant did not explain this change. Moreover, and although I agree with the Union that Fiorenza could have stated "this is a verbal warning," the statement that the Grievant's conduct "should not happen again" is clear to this arbitrator that it was a verbal warning.

Given the finding that there was a prior verbal warning of the same nature within about one year's time, I do not find that the County's discipline of a written warning was too severe. However, the written warning should reflect that the Grievant's discipline was for sleeping in a Department vehicle while on an unpaid break, as opposed to sleeping on duty. Therefore, the Grievant's written warning should be amended.

AWARD

Based upon the foregoing, and the record as a whole, it is this Arbitrator's decision and the award that the County had just cause to discipline the Grievant for conduct which occurred on January 5, 2000. However, the written warning should be amended to show that the Grievant was disciplined for sleeping in a Park Department vehicle while on an unpaid break. The grievance is dismissed.

Dated at Eau Claire, Wisconsin this 19th day of January, 2001.

Stephen G. Bohrer /s/
Stephen G. Bohrer, Arbitrator

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