BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CALUMET COUNTY (HIGHWAY DEPARTMENT)

and

AFSCME LOCAL 1362, AFL-CIO

Case 110
No. 59335
MA-11254

(Christopher Fritsch – Suspension/Termination Grievance)

Appearances:

Corporation Counsel, by **Attorney Melody Buchinger**, 206 Court Street, Chilton, Wisconsin 53014, on behalf of Calumet County.

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

ARBITRATION AWARD

Pursuant to a joint request for the appointment of a staff arbitrator, the undersigned, Steve Morrison, was designated by the WERC as arbitrator to hear and to decide the instant dispute between the Union and the County in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. A hearing was held before the undersigned on January 12, 2001. The hearing was transcribed. Post hearing briefs and reply briefs were exchanged by April 4, 2001, marking the close of the hearing. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the issues and have left it to the Arbitrator to frame the issues to be decided.

The County would frame the issues as follows:

1. Did the Employer violate the collective bargaining agreement when it suspended Christopher Fritsch for ten days in a letter dated August 7, 2000 (Jt. Ex. 4)? If so, what is the appropriate remedy?

2. Did the Employer violate the collective bargaining agreement when it terminated Christopher Fritsch on August 24, 2000 in a letter of the same date (Jt. Ex. 5)? Is so, what is the appropriate remedy?

The Union would frame the issues as follows:

1. Did the Employer have just cause to discipline Chris Fritsch with a ten-day suspension and final warning on August 7, 2000? If not, what is the appropriate remedy?

2. Did the Employer have just cause to discipline Chris Fritsch with termination on August 24, 2000? If not, what is the appropriate remedy?

The Arbitrator states the issues as follows:

1. Did the Employer violate the collective bargaining agreement when it suspended the Grievant for ten days on August 7, 2000? If so, what is the proper remedy?

2. Did the Employer violate the collective bargaining agreement when it terminated the Grievant on August 24, 2000? If so, what is the proper remedy?

BACKGROUND

Calumet County and Wisconsin Council 40, AFSCME, AFL-CIO are parties to a collective bargaining agreement covering the period January 1, 1998 to December 31, 2000. The instant grievance was filed under the terms of that agreement. Pursuant to stipulation of the parties the grievance is properly before the Arbitrator.

Christopher Fritsch, hereinafter referred to as the "Grievant," was hired by the County as a mechanic in July of 1995. His term of service was free of discipline until October 20, 1998, at which time he received a verbal warning from Commissioner John Haase for failing to report to work on time and for failing to properly notify management of his absence. He was warned that further infractions of this nature would subject him to disciplinary action.

On November 16, 1998, the Grievant was given a one-day suspension without pay for failing to report to work on time. Commissioner Haase advised the Grievant that his work performance would be reviewed in 30 days and that, until the end of the year, he would be required to provide a physician's excuse for any use of sick leave. Commissioner Haase also invited Mr. Fritsch to avail himself of the help of the Employee Assistance Program in the event he felt that it would be beneficial.

On September 7, 1999 (roughly nine months later) Mr. Fritsch was given a five-day suspension without pay for once again failing to report to work on time. He was warned that any further tardiness or failure to call in properly would result in his "immediate termination" and he was, again, advised of the availability of the Employee Assistance Program to help him "correct his behavior."

On September 29, 1999, the Grievant failed a random alcohol test and was immediately suspended from his position. On September 30, Highway Commissioner Michael Ottery informed the Grievant, among other things, that he must be evaluated by a substance abuse professional and that such an evaluation had been scheduled for him on October 1, 1999. Further, as a pre-condition for returning to work, he must have a repeat alcohol test showing an alcohol level of below .02. The Grievant attended the assessment and also arranged for an assessment of his own. The two were contradictory and he was advised by the County that he could follow the terms of either. The record is unclear as to which one he followed or to the terms of either, but on October 12, 1999, he received a letter from the County advising him that he would remain off duty without pay until such time as he had started a treatment program of his choice "as recommended in the assessment." Once he started the program, he was to be placed on authorized leave of absence and was able to use any paid time available to him. Additional unpaid leave would be granted in order to enable him to complete the program. This was termed a "last chance" agreement by the County and the Grievant was advised that any further instances of misconduct would result in immediate termination.

During the week of October 25, 1999, the Grievant was advised that he could return to work prior to finishing the treatment program if he received a work release from his counselor and passed a return to work alcohol test. No time limit was placed on his return to work. On November 3, 1999, at 7:10 a.m., he received a call from the Highway Commissioner advising him that he (the Commissioner) had tried to call the day before to advise of a return to work alcohol test the County had set up for that day (November 3) at 8:00 a.m. The Grievant had not been aware of the test until he received that call and he did not attend the test.

Mr. Fritsch was subsequently terminated on November 10, 1999, for his failure to attend the return to work test. This action was grieved and Arbitrator Burns found that the County had violated the collective bargaining agreement when it terminated the Grievant. CALUMET COUNTY (HIGHWAY DEPARTMENT), CASE 108, NO. 58564, MA-10995 (BURNS, 05/12/00). Arbitrator Burns found that the Grievant did not engage in misconduct when he did not make himself available for the return to work test, hence, his prior disciplinary record was irrelevant and the County had no cause to discharge him. He was returned to work.

On Wednesday, July 26, 2000, the Grievant called in sick. On the following two days, Thursday, July 27 and Friday, July 28, 2000, he was scheduled for vacation. On the following Monday, July 31, 2000, he called in sick again according to the testimony of Commissioner Michael Ottery. Since he had called in sick on the 26th, the day before a scheduled vacation, the Employer's suspicions were aroused. When he called in sick on the 31st he left a message on two different voicemails, one with the office manager and one with the stock room attendant, whereas the office policy required that he speak personally with a Superintendent. During the remainder of that day, Highway Commissioner Ottery called the Grievant at home on four occasions to ask him to provide "some type of documentation as to your sickness" when he returned to work the next day. Mr. Ottery failed to speak with him although he did leave the above message on the Grievant's answering machine. Later that afternoon, County Administrator John Keuler did talk with Mr. Fritsch and told him to bring a doctor's excuse to his office the following morning.

The Grievant phoned his doctor's office first thing the following morning, explained the situation and that he needed a doctor's certificate and was told to pick it up at 9:30 a.m. The excuse or certificate he was given indicated that the doctor had not seen him but it did indicate that he was ill on the dates in question. The doctor authorized his return to work. A meeting was held on August 2nd between management and union representatives at which time the Grievant was asked to explain the nature of his illness. Initially he refused but ultimately explained "under protest."

Partially on the strength of the foregoing record of disciplinary actions, and, according to the County's letter dated August 7, 2000, primarily on the basis of the Grievant's alleged abuse of sick leave privileges on this particular occasion, the County suspended the Grievant for a period of ten days without pay. He was further advised that the County would consider July 31st and August 1st as the first two days of his suspension with the balance of eight days to be served at the discretion of the Highway Commissioner to be determined as workload permitted. He was also issued a "final warning" that any future discipline for any misconduct would result in his termination.

On Friday, August 11, 2000, before the Grievant had served the remaining eight days of his suspension, an accident occurred which resulted in an injury to a fellow employee who was performing highway work in the County. This employee was well liked and respected by labor and management alike and the accident caused sensibilities at the shop to heighten. More than one employee, including the Grievant, made comments about the accident, which related to safety concerns including foggy conditions. Commissioner Ottery and the Grievant had brief words, which may be summarized as follows:

Fritsch: I hope you're happy now. You almost got somebody hurt or killed."

Ottery: Watch out. You're on thin ice.

Fritsch: What are you going to do to me? You can't do anything to me. Just do it.

Mr. Fritsch contends that Commissioner Ottery followed him around the shop for a brief period of time following this exchange taunting him and trying to provoke him into further action. The Grievant says he did not respond to this provocation. Commissioner Ottery notified Calumet County Administrator John Keuler of the encounter. Mr. Keuler instructed Ottery to send the Grievant home for the day so they could "check into this incident."

Superintendent Mischnick was assigned to walk the Grievant out of the building and during this event, words passed between the two and they may be summarized as follows:

Fritsch: Nice day for a motorcycle ride, for riding this afternoon.

Mischnick: You should be aware that Mike (Ottery) is going to try and contact you this afternoon to let you know the next step.

Fritsch: If I answer my answering machine.

At about eight o'clock that evening Administrator Keuler received a telephone call at his home from a woman threatening bodily harm if he did not return Mr. Fritsch to work on the following Monday. Subsequent investigation by the local police pointed to the Grievant's girlfriend as the caller. She was arrested and convicted of making the threat. The Grievant was not charged and no evidence pointed to his having had knowledge of the call.

On August 24, 2000, the Grievant received a letter from County Administrator Keuler setting forth the details of the verbal encounter with Commissioner Ottery and concluding that the comments made by the Grievant were rude and discourteous and that they constituted insubordination. Consequently, he was advised that his employment with the County was being terminated. It also contained a description of the weather conditions at the time of the accident as being "clear driving conditions, not the foggy conditions that you encountered when driving to the shop." Administrator Keuler characterized the Grievant's comments as "more than the shop talk others might engage in" because of the "context" of his record and his "previous discipline." This letter also referenced the death threat Administrator Keuler had received and pointed out that the Grievant's girlfriend had been arrested and was "waiting to be charged by the District Attorney." The letter recapped his disciplinary history and referenced his failure to use the "appropriate call-in procedure by not speaking to a Supervisor." Finally, the letter advised the Grievant that the County has a zero tolerance policy for violence, actual or threatened, and that they were taking "appropriate precautions." These precautions included a caveat to the Grievant that because of the threat he would be allowed on the premises only after regular work hours and only while a representative from the Sheriff's Department was on hand to act as a peace officer. If he showed up at the Highway Shop or the Courthouse, the letter said, without first making an appointment, the "County will seek prosecution."

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE IV – SENIORITY

4.01 Application – In General

A. Seniority shall mean the continuous length of service with the County from an employee's last date of hire.

B. Employees shall lose their seniority only for the following reasons: Retirement, resignation, or discharge, if not reversed through the Grievance Procedure.

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ARTICLE VI – GRIEVANCE PROCEDURE

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6.05 The arbitrator shall not have the power to add to, subtract from, or alter the Agreement.

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ARTICLE VII – MANAGEMENT RIGHTS RESERVED

7.01 Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him for such period of time involved in the matter.

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ARTICLE X – LEAVES

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10.02 Sick Leave

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C. Sick leave can be used only in the case of illness on the part of the individual or required attendance on the part of his immediate family. Immediate family shall mean: mother, father, spouse, son or daughter (including step-parents and step-children).

D. After four (4) instances of sick leave usage for the employee, personal illness or injury in a calendar, a doctor's certificate may be required. The Employer shall pay the cost of said certificate if any.

. . .

POSITIONS OF THE PARTIES

The Employer

The ten day suspension: The County maintains that it strictly followed its rules, standards and policies when it disciplined (and, later, when it discharged) the Grievant and that these policies contain Arbitrator Daugherty's seven "just cause" standards which have been used to govern collective bargaining cases. It asserts that both parties agree that these standards apply to this case and that it complied with each and every one in the disciplinary process relative to this Grievant.

The County argues that it gave Mr. Fritsch proper notice of the consequences of failing to comply with County policies when it provided him with copies of its progressive discipline schedule and reminded him of his prior disciplinary record which contained verbal and written warnings. Thus, the County says, the Grievant knew he was subject to progressive discipline and knew that he was "approaching the termination step."

Regarding the rule requiring employees to speak directly with a supervisor when calling in sick, the County asserts that this rule is necessary for the effective operation of its department and the authority to promulgate such rule is provided in the collective bargaining agreement. This rule was properly noticed to the employees via memo and via posting. Additionally, the Grievant was personally given a copy of the rule shortly before this incident and, if that wasn't enough says the Employer, it was read to him. The Employer explains the reason for the rule is "to allow the Superintendents to schedule people in the place of the absent employee and to conduct business in an orderly fashion." The County points out that when the Grievant was first disciplined for failure to call-in his absence he was cautioned that "this kind of behavior is unacceptable" and "it disrupts work flow and results in reassignment of your duties and delays in accomplishing assigned work." The County argues that when the Grievant called and left a message he "caused a situation where the Superintendents did not know he was going to be absent until after the starting time."

The Employer argues that it has a legitimate concern in preventing sick leave abuse and may even have an obligation to guard against it. Further, it has a right to expect that its employees will be at work on time, it argues, and that this requirement is especially true in the case of the Grievant because he is a mechanic and hence, crucial to the operations of County business. The County asserts that simply because the Grievant had a right to paid sick leave this did not give him an unfettered right to take off work whenever he pleased and that when questioned about his illness the burden passed to him to prove he had been ill or had been attending a medical or dental appointment. In failing to produce a "meaningful" doctor's excuse; in failing to offer any explanation as to why he failed to offer such an excuse; in failing to divulge the nature of his illness upon initial inquiry by the Administrator; all of these, argues the Employer, show that he failed in this burden. In short, he failed to prove that he had been ill on the days in question.

Relative to the Employer's duty to investigate the circumstances prior to initiating disciplinary measures, the County points to the fact that the Grievant called in and left messages instead of talking to a Superintendent. Also, the Grievant acknowledged receipt of a prior memo explaining the procedure. Further, his admission that the Commissioner had called him at home four times, says the County, is more evidence of a proper investigation. If that weren't enough, the County argues, the fact that the Grievant acknowledged that the County Administrator asked him to explain why he was ill coupled with the fact that the Commissioner made a trip past his house to check on him proves conclusively that an adequate investigation was undertaken and completed.

The County takes the position that its investigation was fair and objective given the facts as related above and that it was the Grievant who failed to cooperate by not answering his telephone when the Commissioner called and by not producing a "meaningful" doctor's excuse. By initially refusing to answer questions about his medical condition at the meeting with the Administrator and others, Mr. Fritsch further frustrated the Employer's investigative efforts. According to the County, it did everything in its power get to the bottom of the situation, the Grievant's uncooperative stance notwithstanding.

The County says it treats all employees equally on the issue of sick leave. It argues that a Department Head has a right to know why an employee is not at work and that there is nothing unusual or inappropriate about a Department Head calling an employee's home, or driving past his home to check on him, or requiring an employee to provide a doctor's excuse when there is a suspicion of sick leave abuse. The County says that it was reasonable to be suspicious in this case because sick leave was tacked on to the front and back of scheduled vacation time.

Turning to the discipline itself (the ten-day suspension), the County argues that this was the culmination of a regimen of progressive discipline issued to the Grievant. It says that each step provided notice or warning of unacceptable conduct adding "an element that is calculated to impress upon the employee the growing urgency of compliance and the risk of termination."

The County argues that the Grievant was given the opportunity to comply with the County's policies and that it (the County) communicated to him the likelihood of termination if he failed to do so. The County asserts that, in this particular case, this progressive discipline schedule had no effect on the Grievant. They were futile and he "failed to respond to more moderate disciplinary processes." The evidence of his failure to respond, says the County, is that he had "one verbal warning, four suspensions and two terminations within a five-year period."

The termination: The County asserts that abusive behavior, whether verbal or physical, towards an employer constitutes insubordination and grounds for termination. It argues that accusing the Commissioner of responsibility for the accident which resulted in injuries to a fellow employee "was clearly abusive, inflammatory and discourteous" and that it taunted and enraged the Commissioner to the point that it "negatively" affected his ability to manage the Department.

The County adds that the Grievant was also "discourteous and inflammatory" to Superintendent Mischnick as he was escorted out of the building when he said that it was "a nice day for a motorcycle ride." The implication from this comment, says the County, was that being suspended again was not important to him. The County argues that the needs of the Department were obviously not important to the Grievant as evidenced by his comment that he would be available to the Commissioner that afternoon, "but only if (he, the Grievant) answered his telephone." The County takes the position that this language served no legitimate purpose and that the only explanation for it was to make Superintendent Misting angry.

The County says that the ultimate penalty (termination) was based on seriousness and the number of incidents of misconduct and that it had proper cause for discharge.

Finally, the County asserts that in the event its disciplinary actions, or either of them, are overturned in this proceeding no back pay would be appropriate because the Grievant failed to mitigate his damages by not becoming employed elsewhere or by not applying for unemployment compensation.

The Union

The ten day suspension: The Union essentially argues that the Employer did not have just or proper cause to suspend the Grievant because he wholly or substantially complied with the policies of the Employer.

Relative to the Employer's allegation that Mr. Fritsch failed to properly call in sick on July 31st, the Union points out that he called the office on three separate occasions beginning at roughly 6:00 a.m. and that he left two messages on two separate voicemails when he was unable to locate a Superintendent with whom to speak. This action, says the Union, satisfied the primary purpose of the Employer's policy of speaking to a Superintendent because it placed

the Employer on notice that the Grievant was not coming in to work and gave the Employer sufficient time to make other work arrangements. In short, the Union asserts that the Grievant did the best he could in trying to comply with the sick leave call-in policy when presented with an unmanned office. The Union also argues that the notice of the sick call-in policy dated May 18, 2000 is vague and unreasonable. Vague because it does not contain any direction on what an employee should do in the event no one answers the phone (as in the instant case) and unreasonable because it may cause a sick employee to have to stay out of bed to keep trying to reach a Superintendent.

Regarding the doctor's excuse requested by the Employer, the Union argues that the Grievant did his best to comply considering the fact that the Employer's request was not communicated to him until late on the afternoon of July 31, and that the Employer demanded the excuse on the following day. The Union points out that the Grievant contacted his doctor's office at 8:00 a.m. the next morning and was told by the secretary or receptionist to pick up the certificate at 9:30 a.m. He did so and presented it to the Employer who, according to the Union, neither rejected it nor asked the Grievant to supply another one more to the Employer's liking. On a related topic, the Union argues that the Grievant had over 280 hours of sick leave banked at the time, had used sick leave in the past for many acceptable reasons, did not have a pattern of sick leave abuse and had never been warned about any such pattern.

The fact that Mr. Fritsch failed to answer his telephone during the day on July 31st is, according to the Union, consistent with the assertion that he was ill. The answering machine allowed him to stay in bed and take care of himself while still allowing him to return important calls when he felt better. The Union points out that the Grievant did answer Administrator Kueler's call later that day when he felt better, even though he had no obligation to do so, and thereafter "jumped through all the hoops" to provide the doctor's excuse to his employer.

As for the doctor's excuse, the Union asserts that, contrary to the Employer's characterization of it as "meaningless," it does refer to the Grievant being ill on the dates in question (even though that reference was merely a recitation of the Grievant's own explanation to the doctor) and, in any event, asks the Union, what more could the Employer expect when making a demand for an excuse after the fact?

Finally, the Union argues that the penalty assessed (ten-day suspension) was excessive in that it failed to reasonably relate to (a) the seriousness of the Grievant's proven offense and (b) the record of the Grievant's service with the Employer. The Union takes the position that since the Grievant had never been disciplined for failing to talk to a supervisor when calling in sick, a ten-day suspension for failing to do so is contrary to the objectives of progressive discipline.

The termination: The Union asserts that Friday, August 11, 2000, the day of the accident which injured a co-worker, was a stressful one for all of the County Highway Department employees. The injured co-worker was a long-term employee, well liked by all and the other

employees were excited and upset about the incident. It claims that the verbal exchange between the Grievant and Commissioner Ottery was benign and born of this excited atmosphere and did not rise to the level of "insubordination" as claimed by the Employer. In support of this argument, the Union points to the lack of any reference in the record indicating that the Grievant used profanity and that his words were overheard by anyone else (implying that they were not uttered loudly or in a threatening manner). The Union further argues that it was the Commissioner, not the Grievant, who escalated this encounter by "taunting" him and following him through the shop area reminding him that he was "on thin ice." It says that the Grievant attempted to withdraw from the encounter because he knew it was escalating and he wanted to end it but was prevented from doing so by the Commissioner.

The Union argues that the investigation into the incident at the shop following the accident lacked due process, was unfair and was void of objectivity due to the fact that Administrator Keuler was involved. Because he signed the termination letter he was not a "disinterested" third party, argues the Union, and this bias eliminated the necessary element of due process. The Union points to the language of the termination letter dated August 24, 2000, written by Administrator Keuler, as evidence of the Employer's flawed and biased investigation. This letter prominently references the "death threat" telephone call and the Union suggests that this reference suggests that the Employer was anticipating that the police investigation would turn up evidence that Mr. Fritsch was involved. It failed to do so, and by referencing the threat in the letter, argues the Union, the Employer tipped its hand to a predisposition to terminate the Grievant.

As to the burden of proving that the discharge was proper, the Union argues that the Employer a) has the burden of so proving, and b) failed to meet that burden because (1) Mr. Fritsch's language never reached the level of insubordination, (2) the exchange was precipitated by the excitable circumstances of the accident, (3) the exchange was not unique between supervisors and employees on that day, and (4) both parties were equally at fault.

DISCUSSION

The ten day suspension: The first question raised in this proceeding is whether or not the Employer's imposition of the ten-day suspension of Mr. Fritsch violated the collective bargaining agreement. The agreement provides management with the right to suspend or discharge an employee for "proper cause" but does not define that term. The parties jointly assert that this case should be determined by the application of Arbitrator Daugherty's seven tests. However, these questions have been criticized as being too mechanistic. They are objective and require "yes" or "no" answers and Daugherty himself admitted that "The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guide lines [sic] cannot be applied with slide-rule precision". GRIEF BROS. COOPERAGE CORP., 42 LA 555, 557 (DAUGHERTY, 1964). With this caveat in mind, and in deference to the parties mutual request, I will apply the facts here to the seven questions.

Daugherty's first question essentially asks whether the employee was placed on notice that his behavior was objectionable. Actual communication, orally or in writing, of the rule and of the penalty for violating the rule, must be made to the employee. Employer's Exhibit #2 is a memo dated May 18, 2000, which sets forth the call-in procedure. It reads:

> If anyone wishes to call-in sick for a day of sick leave before the 7:00 a.m. starting time or your scheduled start time, (in the event of starting early). You [sic] are reminded that you need to call the office and speak to a superintendent no later than ½ hour prior to 7:00 a.m. or your starting time to advise them you will be absent for the day.
>
> Thank you for your cooperation regarding this matter.

This memo was given to the employees, including the Grievant, on that date and was also posted at all County shops. Daugherty requires notice of the rules and of the penalty or penalties for violating them: "Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof." and " There must have been actual oral or written communication of the rules and penalties for violation thereof." GRIEF BROS. COOPERAGE CORP., 42 LA 555, 558 (DAUGHERTY, 1964). There is no mention in this memo of any potential penalty in the event an employee fails to comply with it nor does the record contain any other evidence of such notification. The Grievant was advised on prior occasions that discipline could result for failing to call in at all. Assuming that this advice could be construed to satisfy the notice requirement here, it referred to failures to call in, not to failures to actually speak to a Superintendent when he called in. In other words, ignoring the policy altogether versus doing it incorrectly. Hence, no notice of the potential penalty for failing to physically speak to a Superintendent was communicated to the Grievant.

This does not fully address the issues relating to question one, however. Commissioner Ottery testified that the Grievant was suspended not only for incorrectly calling in but also for 1) not providing a doctor's excuse, 2) attaching sick leave to vacation days, and 3) failure to respond to calls he made to the Grievant on that day. Relative to the "doctor's excuse," Commissioner Ottery testified to the message he left the Grievant regarding the need for such documentation and presented Employer's Exhibit #10, a hand written document he testified was the exact message. It reads:

> Thought I would try again to see if you were around. Its 8:20 Monday July 31. As I requested in the first message you need to provide some type of documentation as to your sickness when you return to work. Thank you.

Even though the Grievant did not receive this message until later in the day and even though he did not speak with anyone from the County until the end of that workday, he did call his doctor the following morning and he requested an excuse. Obviously he did not see the doctor

personally so the doctor provided the only thing he could have provided – a note certifying that Mr. Fritsch told him he had been ill on the previous Wednesday, July 26th and on Monday, July 31st. In short, Mr. Fritsch complied with his employer's request for "some type of documentation" to the best of his ability under the circumstances.

As for number two, the Grievant did attach sick leave to vacation time. This is suspicious and the County had reason to suspect that he may have been abusing the sick leave policy and reason to investigate. Their investigation, however, did not produce any evidence that the Grievant was not ill on those days and the record does not support such a conclusion. A hunch or a suspicion is insufficient support for discipline.

Reason number three does not support it either. The fact that the Grievant failed to answer his phone during the day on July 31st has been fully and adequately explained. First, he was ill and testified that he was in bed asleep. Second, he testified that he had turned his phone off and left it in the answering machine mode so he could retrieve messages later and not be disturbed. Third, he was not under any obligation to answer his telephone. There was no policy or rule directing the Grievant to answer his telephone when off duty and, consequently, no rule violation that could support disciplinary action.

In light of the above discussion the answer to Daugherty's first question is "no."

Daugherty's second question asks whether the rule is reasonably related to the efficient and safe operation of the business. There is no question that a work rule requiring employees to notify the employer one-half hour in advance of absences is reasonably related to the efficient operation of the business. The real question here is whether the Employer reasonably applied the rule to the situation. Commissioner Ottery testified that the purpose of the call-in rule was "to allow the superintendents to schedule people in (your) place if need be and do business in a orderly fashion and it's consistent." He also testified that Employer's Exhibit 2, the memo dated May 18, 2000 outlining the procedure, was generated because Mr. Fritsch had called in the previous day at 6:43, only 17 minutes before he was scheduled to start work. Therefore, it is clear that the primary importance of the procedure is to ensure timely notification of absence, not that one personally speak to a Superintendent. In this case, the Grievant called in first at 6:00. No one answered and he got a voicemail, so he left the following message:

> Yeah, this is Chris. I won't be coming to work today. I'm sick. Six o'clock. Monday morning. August 31st.

He didn't stop there, though. At 6:05 he called the stockroom attendant in the shop area. He testified that he knew Superintendents sometimes gathered in that area in the morning. Once again no one answered the telephone and he got the voicemail. He left the same message once more, turned his phone to the answering machine mode and went back to

bed. So, technically, the Grievant violated the rule even though he believed he had complied with it and his efforts were made in good faith. Even so, the answer to Daugherty's second question is, technically, "yes."

Arbitrator Daugherty's third question asks whether the employer made an effort to discover whether the employee violated or disobeyed a rule or order of management. The answer is "yes."

Question four asks whether the employer's investigation was fairly and objectively conducted. In order to pass the threshold test the management official may be both "prosecutor" and "judge" but may not also be a witness against the Grievant. In this case Administrator Keuler acted in all three roles from time to time and so the answer to this question is clearly "no."

Arbitrator Daugherty's fifth question inquires whether the "judge" obtained substantial evidence or proof at the investigation that the employee was guilty as charged. Here again, from a technical point of view, the investigation revealed that the Grievant did violate the rule by not speaking with a Superintendent. The issue that no one answered the phone on the two occasions the Grievant called in, and that he left messages on two voicemails well in advance of the one-half hour before start time (but not too early so as to try to avoid a personal conversation) as required by the rule was given short shrift by the "judge." The record does not reflect that it was given any consideration in mitigation at all, as it properly should have. "Just cause" requires that the degree of the alleged offense bear a reasonable relationship to the penalty imposed. SCHNEIDER'S MODERN BAKERY, 44 LA 574 (HON, 1965); LINCOLN INDUSTRIES, INC., 19 LA 489 (BARRETT, 1952). "The essence of 'just cause' is that the Employer, in carrying out its inherent or express right to discipline employees, must do so in a manner that is not unreasonable, arbitrary, capricious or discriminatory." INDIANA CONVENTION CTR. & HOOSIER DOME, 98 LA 713, 719 (WOLFF, 1992). Applying this test flexibly, as did Arbitrator Daugherty, I conclude that the answer to it is "no."

The sixth test or question asks whether the employer has applied its rules, orders and penalties evenhandedly and without discrimination to all employees. The record is silent on this point and so I am unable to apply this test.

The final question asks if the degree of discipline administered by the employer reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee's service. I do not believe that the proven offense in this case, i.e. the Grievant's failure to speak directly to a Superintendent, was a serious offense given the Grievant's good faith attempt to comply and given the fact that the purpose of the rule, as stated by the Employer, was served through the efforts of the Grievant himself. As for the employee's service record, the County argues that it is dismal and that it fully supports the conclusion that Mr. Fritsch is deserving of severe punishment. A close look at his record, however, does not support this position. His first warning, given for failure to report to work

on time and for failing to notify management of his intended absence, occurred in October, 1998, after over three years of trouble free service. One month later he was given a one-day suspension for, again, failing to report to work on time. In addition to the suspension, he was told that his work performance would be reviewed in 30 days and that he would be required to provide a doctor's excuse for any use of sick leave until the end of the year. His record was clean for the next nine or so months when, on September 7, 1999, he was given a five-day suspension for failing to report to work on time. Later that month, the Grievant failed a random alcohol test that led to a period of leave during which time he started a treatment program. Thereafter followed what may best be described as a misunderstanding relating to the Grievant's failure to attend a return to work alcohol test. The Grievant was discharged and filed a grievance. Arbitrator Burns found that he had not engaged in misconduct and absent misconduct on the part of the Grievant his prior disciplinary record became irrelevant and just cause for discharge did not exist. So, when viewed as a whole, the Grievant's disciplinary history consists of four incidents over a period of five years. Not a stellar performance, perhaps, but not the bleak picture painted by the Employer. In consideration of the above, I find the answer to question seven to be "no."

The seven test analysis of the ten-day suspension tallies four "no"s and three "yes"es. In Daugherty's view, if the answer to any one of the test questions is "no" then just cause for discipline does not exist. Accordingly, I find that just cause for the ten-day suspension of the Grievant in this case did not exist.

The termination: On August 24, 2000, the County terminated the Grievant's employment. As grounds the County cited (1) the verbal exchange between the Grievant and Commissioner Ottery following the accident involving another employee, (2) the Grievant's disciplinary history, and (3) last, but by no means least, the threatening telephone call Administer Keuler received on the evening of August 11, the day of the accident.

Applying the seven tests to the facts of the termination as the parties have requested, I find that the answer to the first question as set forth above would be "yes" if one concludes that the comments of the Grievant constitute insubordination, as the County does. I do not consider them to constitute insubordination, however. The Grievant's comments may have been insensitive and rude but they were not insubordinate. The comments were not made in public and did not denigrate the Commissioner's authority to lead or to exert supervisory authority. They were not vial or profane. They did not indicate that the Grievant refused to follow orders or to do work assigned to him. Consequently, they failed to rise to the level of seriousness which would justify termination. While the record is unclear on the exact words used, other comments of a similar nature were made by other employees that day. All were concerned with safety and for the injured employee. Everyone's sensibilities were heightened and in such an atmosphere it is to be expected that words will sometimes fly and that they may be taken wrongly. So, if the rule allegedly violated was the rule prohibiting insubordination, as the County seems to say, and since the Grievant's behavior did not constitute insubordination, the answer to the first question is "no."

A rule prohibiting insubordination is certainly one reasonably related to the orderly, efficient and safe operation of the business and, once again, if the Grievant had been guilty of insubordination the County would have been justified in meting out some form of substantial discipline. But he wasn't. So, the answer to this question is technically "yes" but it is meaningless since the Grievant is not guilty of a violation of this rule.

The third question relates to whether the employer made an adequate investigation. While the County did investigate the nature of the conversation between Commissioner Ottery and the Grievant, as well as the one between the Grievant and Superintendent Mischnick, the evidence suggests to me that the County was predisposed to discharge the Grievant. With such a biased mindset virtually guaranteeing the outcome, I must conclude that the investigation was not adequate and answer this question "no."

The fourth test is whether the investigation was conducted fairly and objectively. Clearly it was not. The County's recitation of the Grievant's disciplinary history in it's termination letter of August 24, 2000 includes past infractions which were overturned by an arbitrator and the ten-day suspension grieved here which had yet to be heard. Also, the County placed great weight on the threatening telephone call received by Administrator Keuler for which the Grievant's girlfriend was eventually found guilty. This certainly raised legitimate concerns that the Grievant was involved and one can hardly fault the County for so concluding, but the fact of the matter is the Grievant was never charged or convicted nor was there any evidence that he was aware of the call. The tone of the letter leads me to conclude that the County anticipated that he would eventually be charged and that that anticipation was a contributing factor, if not the primary factor, in its decision to terminate him. The answer to test four is "no."

The fifth question, "did the investigation produce substantial evidence that the employee was guilty," must be answered "no" for the reasons stated above.

With respect to the sixth test, "Had the Company applied its rules, orders, and penalties without discrimination," the record does not contain, and the parties did not point to, any prior proceedings parallel to this one and, therefore, I have no way to apply it to these facts.

The seventh test asks "Was the degree of discipline administered in the particular case reasonably related to a) the seriousness of the offense; and b) the employee's record of service?" The answer is "no." I do not believe this was a serious offense. I do believe it was an isolated incident brought on by the circumstances of an accident involving injury to a friend and valued co-employee and aggravated by the recent events leading to the ten-day suspension viewed by the Grievant as being unfair. The comments made to Superintendent Mischnick as the Grievant was walked out of his place of employment were *de minimis*.

In short, I do not believe that the Grievant did that with which he was charged. Had another form of analysis been applied to these facts rather than Daugherty's seven tests, the results would have been the same.

AWARD

1. The County did violate the collective bargaining agreement when it suspended the Grievant for ten days on August 7, 2000. The remedy for this violation is set forth under Article VII – MANAGEMENT RIGHTS RESERVED, Sec 7.01: "If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him for such period of time involved in the matter." The suspension is vacated and any time served thereunder is vacated and the Grievant shall receive all back pay and benefits lost as a result of the period of suspension.

2. The County did violate the collective bargaining agreement when it terminated the Grievant on August 24, 2000. The remedy for this violation is set forth under Article VII – MANAGEMENT RIGHTS RESERVED, Sec. 7.01: (See no. 2 above.) The termination is vacated and the Grievant is returned to work and the Employer is directed to make the Grievant whole pursuant to the terms of Article VII, Sec. 7.01 of the parties Collective Bargaining Agreement.

The Arbitrator will retain jurisdiction for the purposes of the implementation of this award.

Dated at Wausau, Wisconsin this 4th day of June, 2000.

Steve Morrison /s/
Steve Morrison, Arbitrator

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