BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 323, AFSCME, AFL-CIO

and

ADAMS COUNTY

Case 98
No. 59897
MA-11450

Appearances:

Mr. Bill Moberly, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Nicholas Funkhouser, Corporation Counsel, Adams County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and Adams County, hereinafter referred to as the County or the Employer, are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the grievance of Carl Dostal, hereinafter referred to as the Grievant, regarding the imposition of a ten-day suspension which was followed by a twenty-day suspension. The undersigned was appointed by the Commission as the Arbitrator and held a hearing into the matter in Friendship, Wisconsin, on June 18, 2001, at which time the parties were given the opportunity to present evidence and arguments. The hearing was not transcribed. The parties filed post-hearing briefs by July 17, 2001, marking the close of the record.

ISSUE

The parties were unable to stipulate to the issue presented and left it to the Arbitrator to frame the issue in the award.

The Union would state the issue as follows:

> Did the County err when it issued the Grievant, Carl Dostal, two (2) separate disciplinary suspensions for the incidents that occurred on February 25, 2001? If so, what is the proper remedy?

The County would frame the issue as follows:

> Was the discipline given to Carl Dostal excessive given his past history and the facts of this case?

The Arbitrator adopts the Union's statement of the issue.

RELEVANT CONTRACT PROVISIONS

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SECTION 2 – MANAGEMENT RIGHTS

> It is recognized that, except as expressly stated herein, the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the County in all its various aspects, including, but not limited to the following: The right to . . . discipline employees for cause, . . .

BACKGROUND

The parties do not dispute the majority of the factual background in the case. On February 25, 2001, Carl Dostal, a ten-year employee of the County, was called to the scene of a barn fire near the "T" intersection of 10th Drive and Ember Avenue in Adams County. The Grievant was employed by the County Highway Department and was dispatched to the scene of the fire to spread sand on the roadway for the benefit of the emergency equipment located (and arriving) on the scene. The roads were icy and the vehicles were having trouble gaining traction. The Grievant was at the controls of a full sized dump truck which was equipped with a winter snow plow and wing blade on the right-front side. The wing blade extended some distance beyond the right front area of the dump truck.

When the Grievant arrived on the scene he encountered a Wisconsin State Highway Patrol Officer who had positioned his squad car in a way so as to block approaching traffic on 10th Drive located to the Grievant's left as he approached the intersection. A fire truck, which had stopped due to the icy conditions, was located beyond 10th Drive on Ember Avenue and on the same side of the road as the Grievant, i.e., the right side, and it was the Grievant's desire

to turn his truck around on 10th Drive so he could back up around the fire truck and drop his load of sand. In this way, the wing portion of his plow would have been on the opposite side of the roadway from the fire truck and he could have backed passed it relatively safely. However, the Highway Patrol declined to move his vehicle to allow the Grievant to make the turn-around and so he proceeded straight ahead toward the first fire truck on his right.

As he moved forward another fire truck arrived on the scene and pulled up some distance behind him. The Grievant spotted the Assistant Fire Chief who was standing on the roadway and who motioned him forward and past the first fire truck. The Grievant testified that he knew it was going to be close but thought he could clear the fire truck. As he moved forward the first collision occurred as his wing blade impacted the fire truck. At this time he placed his truck in reverse and began to back up.

It is at this point in the scenario that the parties differ slightly on the facts. According to the Grievant, he had barely begun to back up when he hit the second fire truck, which by that time had pulled up behind him. The Grievant testified that the second accident happened "within seconds." According to the testimony of the Highway Patrol on the scene, the distance between the Grievant's truck and the second fire truck he hit was about 450 feet prior to the Grievant beginning his rearward movement. However, the diagram the Officer drew the day after the accidents of the relative distance between the two shows the two vehicles (i.e. the Grievant's truck and the second fire truck) to be within one vehicle length apart. At the hearing, the Highway Patrol testified that this drawing was not to scale and that he had not meant for it to display the actual relative distance between the two.

The record reflects that the dump was in the "up" position which would have blocked the rearward vision of the Grievant from the cab of the truck as he backed up. The record also reflects that the Grievant only looked in the left rearview mirror and failed to look into the right side mirror. It also reflects that the Grievant has no depth perception and, to compensate, uses only "one eye at a time." The record also established that the air horn of the second fire truck was in full bellow before and at the time of the impact.

The Grievant had attended an annual safety function called the "snow plow rodeo" over the previous years and had "high scores," although he did not do "so hot" last year.

The record further reflects that the Grievant had a history of progressive disciplinary measures taken against him for events stemming from the alleged misuse of County owned vehicles. On May 25, 1999, he received an informal/verbal warning for a safety violation which allegedly occurred while he was at the controls of a County owned truck. An anonymous call was received by the County from a citizen who identified the Grievant's truck as having passed another vehicle in a no passing zone. The Grievant denied the charge but did not grieve the disciplinary action. On November 29, 1999, he received a written letter of reprimand and a ten-day suspension without pay for his unauthorized use of a County vehicle. According to the letter of reprimand, he "entered the cab of a truck assigned to another

employee without speaking to that employee and without informing him of [his] intentions or obtaining permission to operate his vehicle. [The Grievant] then moved his truck forward without making sure that the way was clear, striking the other employee and injuring him in the process." The letter of reprimand also placed the Grievant on notice of the potential consequences of further acts of misconduct: "Any further acts of misconduct in your duties with the Highway Department will result in additional discipline, up to and including termination, pursuant to the county discipline policy." (See County Exhibit 3.) The Grievant did not grieve this disciplinary measure. On December 18, 2000 he received a written reprimand resulting from damage to a County owned truck which occurred when he backed the truck over pavement with the underbody in the down position. He agreed that he was responsible for the damage and that the accident was occasioned by his having been in "an extreme state of fatigue."

As a result of the events of February 25, 2001, the Grievant was suspended for ten days without pay for the first accident and for twenty days without pay for the second. Each suspension was accompanied by a written reprimand. This grievance followed.

THE PARTIES' POSITIONS

The Union

The Union agrees that the Grievant was at fault and that some measure of discipline is appropriate in this case. It says, however, that the County should view this incident as one accident rather than as two and that the second suspension of twenty days is excessive and should be reversed.

The Union argues that the testimony of Officer Wenzel, the Highway Patrolman, is contradictory in that he seems to give more than one estimate of the distance between the Grievant's truck and the second fire truck. A statement given on the day of the accident by the operator of the second fire truck places the Grievant's truck some 20 to 25 feet in front of the second fire truck and, says the Union, is therefore consistent with Officer Wenzels earlier recollections of the distance and casts doubt on his later recollection that the distance was some 450 feet. According to the Union, the fact that the trucks were closer together should lead to the conclusion that this was one accident rather than two.

The Union also argues that the County should have considered the emergency nature of the situation as a mitigating circumstance in its determination of the extent of discipline. The Union points out that the Grievant was merely following the directions of the two people he thought were in charge of the scene, the Highway Patrolman and the Assistant Fire Chief and, presumably, that if he had been able to do it his way the accident(s) may never have happened. In short, the Grievant was simply following orders. The Union reminds us that there were no traffic tickets issued as a result of this (these) accident(s).

Finally, the Union argues that the County failed to give the Grievant any training on how to handle emergency scenes and that this was the first such scene to which the Grievant had been called. The Union urges the undersigned to remove the second suspension and to make the Grievant whole for losses suffered as a result of it.

The County

The County argues that it has the authority to discipline employees for just cause and that the issue is whether it had just cause to do so in this case. It says that in making that determination we must look to two elements. The first is whether the County has a disciplinary interest and the second is whether the discipline was reasonable under the circumstances. The County argues that the answer to both questions is in the affirmative because it (1) clearly has an interest in its equipment being operated safely and responsibly and that it has an interest in its image to the general public and (2) because its use of progressive discipline in the Grievant's past cases placed the Grievant on notice that more severe disciplinary measures were forthcoming for future infractions and that the ten and twenty day suspensions back to back in this case were progressive in nature. The County contends that given the Grievant's disciplinary history and the philosophy behind the progressive disciplinary scheme, the discipline meted out in this case was not excessive.

Finally, the County argues that the analysis of this "accident" as being two accidents versus one turns on the fact that two separate vehicles were damaged at two different times, the first when the Grievant's truck was going forward and the second as it went backwards. The County distinguishes this scenario from the chain reaction type of highway collision involving multiple vehicles and multiple victims which results from one mistake. These accidents, says the County, resulted from two mistakes at two different times and should support two separate disciplinary measures.

DISCUSSION

The parties do not dispute the right of the County to discipline employees for cause. They do not disagree that the actions of the Grievant in this case merit discipline. They do not disagree that the use of progressive discipline has historically been employed by the County and that it is appropriate to employ it here. The real question in this matter centers on the events surrounding the damage to two separate fire trucks at the fire scene on February 25, 2001. If the events are construed to support the conclusion that each fire truck was damaged in a separate accident, then the actions of the County in imposing two separate disciplinary actions is appropriate subject to the prohibition against excessiveness in discipline. If the events are construed to support the conclusion that the totality of the damage occurred from only one accident, then the County's actions were wrong in dispensing two separate disciplinary actions.

It is clear to the undersigned that the damage to the two fire trucks occurred as a result of two separate accidents. The Grievant arrived on the fire scene and surveyed the area. He made mental plans as to how he would approach the area he was to sand and when these plans had to be modified due to the refusal of the Highway Patrol Officer to move his vehicle, he modified them. Instead of backing up the hill toward the first fire truck, he would now have to pass by the fire truck in forward motion. He realized that his plow protruded beyond the right front fender of his dump truck and realized that "it was going to be close." Instead of leaving the cab of his truck and arranging for someone to guide him by the fire truck, he moved ahead and struck the fire truck with his wing blade. That impact was accident number one. It resulted in damage to the fire truck and was occasioned by the Grievant's error in judgment.

At this point in time, the Grievant was faced with an opportunity to make a judgment as to his further actions. Common sense and prudent practice dictate that following a motor vehicle accident, a driver stop the vehicle and exit to assess the damage and to take the measure of the situation; a respite to regain one's composure and to consider future action. In this case, the Grievant did not do so. Instead, he put his vehicle into reverse gear and backed up. The distance from his dump truck to the next fire truck with which he collided is not clear. The distance from his dump truck to the next fire truck is irrelevant. Regardless of the distance, the Grievant never saw it. He never saw it because he was backing his dump truck with the dump in the up position and he failed to look in his right side rear-view mirror, which, according to the evidence, is where he would have seen the second fire truck. He may also have seen it if he had exited his vehicle after the first accident and looked around him to take stock of his situation. This, then, was accident number two, which caused damage to the second fire truck and was occasioned by the Grievant's imprudent actions.

Both accidents give rise to just cause and support the imposition of discipline. The question then centers on the issue of excessiveness. To be sure, a ten-day and a twenty-day suspension without pay are substantial economic penalties and must be measured against the severity of the infraction giving rise to them. Both parties make legitimate arguments. On the one hand, the Union urges the Arbitrator to consider the fact that the County never considered the emergency nature of the situation and the lack of training provided to highway department employees for dealing with such emergencies. Also, the Union says that the Grievant was only following the orders of Highway Patrol and the Assistant Fire Chief "despite his (the Grievant's) own inclinations." These things should act as mitigating circumstances, it says, and should work to reduce the severity of the disciplinary actions. On the other hand, the County points to its disciplinary interests in the areas of its concern for the safe and responsible use of its vehicles and its image to the community, and to the Grievant's history of unsafe use of those vehicles and the progressive discipline employed as a result.

The Arbitrator is generally not inclined to substitute his judgment for the Employer's regarding the extent to which discipline is imposed (so long as just cause exists) unless the penalty is excessive, arbitrary, capricious or constitutes an abuse of management's discretion. The Grievant was entrusted with the use of the County's vehicle and implicit in that entrustment is the reasonable expectation that the driver will use common sense in its operation

and that he or she will exercise basic principles of safety. In emergency situations, common sense and basic principles of safety dictate that one might use additional caution and employ a heightened sense of awareness of the conditions surrounding the operation. The Grievant failed to do so in this instance. The Grievant knew, better than anyone else at the scene, the parameters of the safe operation of his vehicle and yet he attempted to pass the first fire truck when he "knew it would be close" without help and he backed the vehicle up with the dump in the up position blocking his view to the rear and he failed to look into the right side rear-view mirror as he did so. The lack of "emergency scene" training was not the cause of these unsafe acts.

The record supports the notion that less severe discipline may not have been effective in accomplishing the objectives of progressive discipline. A ten-day suspension of this Grievant in the past did not prevent future abuses. The County has a right to correct its concern with progressively more intense discipline until it reaches a point where reasonable persons could conclude that further discipline would not be effective. At that point, termination would become a viable alternative. The County did not reach that point as a result of these two accidents.

For the reasons stated above, I find that the County had just cause to discipline the Grievant for each of the two accidents occurring on February 25, 2001. I further find that the penalty of ten days of suspension and the accompanying reprimand for the first accident and twenty days of suspension and its accompanying reprimand for the second accident were reasonable and appropriate under the circumstances of this case and in light of the Grievant's disciplinary history.

AWARD

The County did not err when it issued the Grievant two separate disciplinary suspensions for the incidents that occurred on February 25, 2001.

Dated at Wausau, Wisconsin, this 18th day of September, 2001.

Steve Morrison /s/
Steve Morrison, Arbitrator

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