

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WAUPACA COUNTY HIGHWAY DEPARTMENT EMPLOYEES UNION,
LOCAL 1756, AFSCME, AFL-CIO**

and

WAUPACA COUNTY

Case 132
No. 61530
MA-11969

(Gene Mykisen Grievance)

Appearances:

Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 35, Plover, Wisconsin 54935 on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney James R. Macy**, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, on behalf of the County.

ARBITRATION AWARD

At all times pertinent hereto, the Waupaca County Highway Department Employees Union (herein the Union) and Waupaca County (herein the County) were parties to a collective bargaining agreement dated July 14, 1999, covering the period January 1, 1999, to December 31, 2001, and providing for binding arbitration of certain disputes between the parties. On August 26, 2002, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding a two-day suspension issued to Gene Mykisen (herein the Grievant) and requested the appointment of a member of the Commission's staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on October 22, 2002. The proceedings were transcribed and the transcript was filed on November 13, 2002. The County filed its initial brief on December 16, 2002, and the Union filed its initial brief on December 17, 2002. The County filed a reply brief on January 6, 2003, and the Union filed a reply brief on January 24, 2003, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the framing of the issues. The Union would frame the issues as follows:

Did the Employer violate the collective bargaining agreement by suspending Gene Mykisen for incidents occurring on October 15, 2001?

If so, what is the appropriate remedy?

The County would frame the issues as follows:

Did the County have just cause to give the Grievant a two-day disciplinary suspension for the incident of October 15, 2001?

If not, what is the appropriate remedy?

The Arbitrator adopts the County's proposed issue.

PERTINENT CONTRACT LANGUAGE

Article II – Management Rights

2.01 The Waupaca County Board of Supervisors, through its duly elected Highway Commissioner, possesses the sole right to operate the Highway Department and all management rights repose in it, except as otherwise specifically provided in this Agreement and applicable law. These rights include, but are not limited to the following:

- A) To direct all operations of the Highway Department;
- B) To establish reasonable work rules and schedules of work;

. . .

- D) To suspend, demote, transfer, discharge and take other disciplinary action against employees for just cause;

. . .

Article IX – Disciplinary Procedure

- 9.01. The following disciplinary procedure is intended as a legitimate management device to inform the employees of work habits, etc., which are not consistent with the aims of the Employer’s public function, and thereby to correct those deficiencies.
- 9.02 Any employee may be demoted, suspended or discharged or otherwise disciplined for just cause.
- 9.03 Suspensions shall not be for less than two (2) days, but for serious offense or repeated violations, suspension may be more severe. No suspension shall exceed thirty (30) calendar days.

OTHER RELEVANT LANGUAGE

WAUPACA COUNTY

Personnel Policies and Procedures

D. Grounds for Disciplinary Action. The following non-exclusive examples shall be grounds for disciplinary action ranging from a warning to immediate discharge depending upon the seriousness of the offense in the judgement of management:

. . .

9. Absence without authorized leave, or misrepresenting the purpose of an authorized leave.

. . .

11. Habitual tardiness

. . .

BACKGROUND

The Grievant has been employed as a grader operator by the Waupaca County Highway Department since July 15, 1998. He also maintains a farm, which he operates while not working for the County. Early on in his employment, while still on probation, the Grievant

had problems with tardiness, which is a violation of the County's published Personnel Policies, and was addressed on the subject by Patrol Superintendent Robert Carper. On May 9, 2001, the Grievant was issued a verbal warning by Patrol Superintendent Lance Penney for being nine minutes late to work on May 1. On June 21, 2001, Penney issued the Grievant a written warning for excessive tardiness. Neither of the disciplinary actions was grieved. At some point, the Grievant had conversations with both Carper and Penney about timeliness issues and he was told that in the future if he knew he was going to be late he should call in for permission and they would work with him.

The Grievant's workday typically begins at 7:00 a.m. Each day, before leaving for work, the Grievant performs farm chores and tends his livestock. On October 15, 2001, when the Grievant went to tend his cattle, he noticed that one of his cows was down. The cow had recently given birth and the Grievant was concerned that she, and perhaps her calf, could die, at a substantial financial loss to him. At 6:30, the Grievant called the Waupaca shop and advised Penney of his situation. The evidence is unclear as to whether the Grievant asked Penney for permission to be late, or simply informed him he would be late, but in either event, he indicated he would be at work by 7:30 and Penney said "OK," and thanked him for calling in. When the Grievant arrived, the job foreman, Dennis Stibbs, asked him how to account for the half-hour between 7:00 and 7:30 on his time sheet and the Grievant said he didn't know, that the only available time he had to use was sick leave, but he didn't know if it qualified under these circumstances. Stibbs then recorded on the Grievant's timesheet that the half hour from 7:00 a.m. to 7:30 a.m. was to counted as sick leave. The Grievant ultimately worked until 6:54 p.m. on October 15 and was originally credited with 3.5 hours of overtime. Later, the sick leave entry was removed and .5 hours of overtime was deducted for the day.

On October 31, 2001, Highway Commissioner Dean Steingraber issued a two-day suspension to the Grievant, citing his tardiness on October 15 and an additional allegation of fraudulent use of sick leave on that date. A grievance was filed on the Grievant's behalf by Union Chief Steward Mark Pohl claiming a lack of just cause for the discipline. The grievance was denied and the grievance proceeded through the contractual steps to arbitration. On the day of the hearing, the County amended the discipline to eliminate the allegation of fraudulent use of sick leave, but did not reduce the suspension. Additional facts will be referenced, as needed, in the discussion section of the award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the Grievant should not have been disciplined because he had permission to come to work late. He called his supervisor, Patrol Superintendent Lance Penney, at 6:30 a.m., explained he had a sick animal and asked to come in at 7:30. Penney said "OK," thanked him for calling and asked if he needed more time. Had Penney refused

permission, the Grievant was prepared to get to work by 7:00, as scheduled. Penney's testimony indicated that he didn't have independent recall of the conversation, therefore, the Grievant was more credible.

The Grievant's action was in accordance with the call-in procedure for sick leave. There is no procedure for calling in when an employee is not sick, however, in the past the Grievant was told by both Penney and bob Carper that if he was going to be late he should call in and they would work with him. This testimony was unrefuted. On this basis, the Grievant concluded that he had Penney's permission to be late on October 15. Absent any evidence to the contrary, the Grievant was entitled to rely on his supervisor's authority to permit him to be late. Article XVI does provide for leave without pay with written permission, which Penney did not provide. The Grievant should not be penalized, however, for the supervisor's failure to note the authorized leave.

It should also be noted that the Employer originally also cited the Grievant for fraudulent use of sick leave, which was later withdrawn. This should be factored in when deciding whether the original level of discipline was appropriate. Had the discipline been lessened, however, the Union would still object to the tardiness charge.

The Grievant's previous excused absences should not be used against him. He had requested and received unpaid leave in the past and was not told that this would be held against him. Further, there is no evidence that the Grievant's late arrival on October 15 hindered the Department's operations. On the other hand, he had a substantial reason for his request, in that he could potentially have lost a valuable animal. For the foregoing reasons, the grievance should be sustained.

The County

The County asserts that it did not violate the contract in disciplining the Grievant. Management has the right to discipline employees for just cause under Section 9.02 of the contract, as well as the County's Personnel Policies and Procedures. Further, the Grievant testified that he was aware of the work rules prohibiting absence without authorized leave and habitual tardiness.

Timeliness of employees is an important goal because of the Department's efforts to improve the quality of its services. The Grievant has been counseled in the past about tardiness and he has received verbal and written warnings for this behavior. Clearly, he knew that he was expected to be to work on time. On October 15, he called his supervisor and told him he would be late. The supervisor acknowledged the call, but did not give him permission to be late or state that he would not be disciplined. The Grievant's conduct was a violation of the work rules and subject to discipline.

The contract does not define just cause, but this term has been the subject of much discussion by arbitrators [See: GRIEF BROTHERS COOPERAGE CORP, 42 LA 555 (DAUGHERTY, 1964.); ENTERPRISE WIRE CO., 46 LA 359 (DAUGHERTY, 1966); BLUE CROSS/BLUE SHIELD, 104 LA 635 (HOUSE, 1995)]. Under the standards set forth therein, the Grievant clearly committed the acts alleged and was subject to discipline.

The County was also justified in the level of discipline imposed. The County follows a policy of progressive discipline. The Grievant had already received verbal and written warnings for tardiness and a suspension was the next step. Section 9.03 specifies that a suspension may not be for less than two days. Therefore, the County imposed the least onerous level of discipline it could within the scheme of progressive discipline. Whether or not the Arbitrator agrees, however, he should not substitute his own judgment for that of the County as to the appropriate level of discipline (citations omitted). Thus, once just cause to impose discipline is established, the level of discipline imposed should not be disturbed. The grievance should be denied.

The Union in Reply

The Employer argues that the Grievant merely told Penney he would be late, but, in fact, he asked if he could come in late and was told “OK.” Penney’s version of this conversation was flawed by his poor recall in that he refreshed his memory by reviewing the grievance, which wasn’t even drafted by the Grievant, but by a Union Steward. The Steward simply wrote down a short statement of the grievance based on hearsay. It is not evidence and should have no weight. The Grievant’s version was more credible and should be credited.

The Employer also based its original discipline decision on a supposition that the Grievant had fraudulently claimed sick leave, which later was withdrawn, although the discipline was not reduced. Thus, both the Employer’s original contentions – that the Grievant did not have permission to be late and that he wrongfully claimed sick leave – were false.

The Employer did not have just cause to discipline the Grievant. He was never told that he could not call in if he was going to be late. In fact, Penney told him to call in and they would work with him. The Grievant reasonably believed that meant if he had an emergency, the County would work with him on it. Unexcused tardiness is subject to discipline, but the Employer led the Grievant to believe he could get permission by calling in. If this was not the case, he should have been told so. Had he been told, he could have been to work on time. Penney was aware of the previous discipline, yet gave the Grievant permission to be late on October 15. Clearly, this was a different case. In a previous arbitration, Arbitrator Lauri Millot sustained discipline issued to an employee for unexcused absence on the basis that he was informed and knew that he was required to obtain prior permission from the Highway Commissioner [WAUPACA COUNTY, WERC MA-11456, (MILLOT, 1/9/02)]. The absence in that case was excusable, but unexcused, thus the discipline was upheld. Here, the absence was

also excusable, but the Grievant was not given a directive to get permission from the Commissioner, as he should have. Instead, the Commissioner denied the permission and imposed the penalty after the fact.

The County in Reply

The Grievant had a long history of tardiness, for which he had been previously counseled and disciplined. The contract gives the County the right to discipline employees for just cause and habitual tardiness is an explicit violation of the County work rules. The County used progressive discipline and the minimum suspension allowed under the contract was two days. The Union does not deny that unexcused tardiness would be just cause for discipline, but instead argues that the Grievant did not violate the rules. Thus, if the County establishes a violation, the Union can have no objection to the discipline.

The facts demonstrate that the Grievant did not have permission to be late. Penney did not approve his absence, but merely acknowledged his call. Further, the Grievant would have been late regardless of whether he had permission in order to care for his animal, placing his interests ahead of the County's. Penney could not authorize him to be late, which he knew from previous disciplines he had received. Thus, there was just cause for the suspension.

It is irrelevant that the County withdrew the charge of fraudulent use of sick leave. The Grievant's past history of discipline made it clear that another reprimand would be inadequate. The contract mandates that a suspension be for at least two days. Therefore, the County imposed the least severe discipline it could under the circumstances, even with the withdrawal of the additional charge.

It is also irrelevant that the circumstances of this incident were not identical with previous tardiness by the Grievant. It does not matter that the Grievant called in this time, or that he did or did not do so in the past. What is important is his record of habitual tardiness, which hinders the County's highway operations, and for which he was properly disciplined.

DISCUSSION

In a case such as this, where the issue is whether there was just cause for imposing discipline, the burden of persuasion is on the Employer. The Employer must establish that there was just cause to issue discipline to the Grievant. That is, it must show that the Grievant committed the acts complained of and that the acts alleged justify the imposition of discipline.

The first step in the analysis is to determine whether the Grievant committed the offense charged, that is being tardy for work without permission. There is no question that the Grievant came to work at 7:30 a.m. on October 15, 30 minutes after his regular starting time.

Thus, the key event was the telephone conversation between the Grievant and his immediate supervisor, Lance Penney. According to the Grievant, on October 15, 2001, he telephoned Penney, a Patrol Superintendent, at 6:30 a.m., told him he had a sick cow and asked if he could come in at 7:30 instead of 7:00. Penney reportedly said "OK," thanked him for calling and asked if he needed more time. Penney's version is somewhat different. His recall, refreshed by the wording of the grievance itself, is that the Grievant called and told him he would be late, but did not ask for permission. His response of "OK," further, was intended to be an acknowledgment of the information, not permission to be late. He also stated that he didn't recall asking whether the Grievant needed more time and that the subject of discipline was never raised in the conversation. It is notable that the discipline was ultimately issued by Highway Commissioner Dean Steingraber, not Penney, although Penney was the supervisor directly involved and had issued the Grievant's two previous disciplines for tardiness. In his testimony, Steingraber indicated that his investigation revealed that Penney had not given the Grievant permission to be late and, in fact, did not have authority to do so.

Although the exact words of the conversation between the Grievant and Penney are in dispute, what is undisputed is that when Penney said "OK," the Grievant took that to be permission to be late and acted accordingly in reliance thereon. His reliance appears to have been based on several factors. First, there is the statement, itself. Whether the Grievant asked permission to be late or merely stated his intention to do so, Penney responded "OK. Thanks for calling." This statement could certainly have constituted permission and, at the very least, was an ambiguous remark that could have been interpreted that way. Then, there is what was unsaid. Given the Grievant's past attendance problems and discipline history, one could have expected Penney to either have ordered the Grievant to come in on time or warned him about the consequences of not doing so. He did neither and, even accepting his version of the conversation, never indicated that the Grievant's tardiness would be any problem. Finally, there are the Grievant's past discussions with Penney and Patrol Superintendent Bob Carper about his tardiness. According to his testimony, which was not contradicted by Penney, the Grievant was told by both men that if he had a problem and needed to be late he should call in advance and they would work with him. When he called Penney about his sick cow, absent any indication to the contrary, he assumed that he had complied with his responsibility and that Penney would, therefore, accommodate him.

The County argues against the reliance theory on two essential grounds. First, it contends that permission made no difference and the Grievant would have come in late regardless. The Grievant testified, however, that he could have and would have been at work on time had he been ordered to do so. Although the Grievant had previously had problems with tardiness, there is no evidence that the Grievant had ever willfully disobeyed a direct order in the past, or that he would have done so here. Nevertheless, because the Grievant was not told to come in, it is irrelevant to speculate as to what he would or would not have done in such a case.

Second, the County contends that Penney had no authority to permit the Grievant to be late, therefore his reliance was unfounded. Whether or not Penney had such authority is open to question. Steingraber denied that Penney had such authority. Nevertheless, neither the contract nor the County work rules specifically restrict the ability to grant unpaid leave to the Commissioner. Further, there is no evidence that the Grievant was ever informed that the Patrol Superintendent did not have any such authority. Indeed, the statements attributed to Penney and Carper that they would work with the Grievant in the event he had to be late in the future implies just such authority. Whether or not the authority existed in fact, therefore, becomes irrelevant because the Grievant's reliance on Penney's apparent authority was permissible and reasonable under the circumstances. In sum, therefore, I find that Penney's statement to the Grievant on October 15 could have been reasonably construed by him as permission to come to work late and, further, that based upon all the facts and circumstances the Grievant was permitted to infer that Penney had authority to grant the request. For the foregoing reasons, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The County did not have just cause to give the Grievant a two-day disciplinary suspension for the incident of October 15, 2001. Therefore, the County shall make the Grievant whole by expunging the discipline from his personnel record and paying him two days' backpay.

The Arbitrator will retain jurisdiction over this award for a period of sixty (60) days after issuance in order to resolve any issues regarding implementation of the Award.

Dated in Fond du Lac, Wisconsin, this 5th day of August, 2003.

John R. Emery /s/

John R. Emery