BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LINCOLN COUNTY HIGHWAY EMPLOYEES
AFSCME, AFL-CIO LOCAL 332

and

LINCOLN COUNTY

Case 218
No. 62348
MA-12249

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, for the labor organization.

Mr. John Mulder, Administrative Coordinator, Lincoln County, 1104 East First Street, Merrill, Wisconsin 54452-2535, for the municipal employer.

ARBITRATION AWARD

Lincoln County Highway Employees Local 332, AFSCME, AFL-CIO and Lincoln County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to discipline. The Commission appointed Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in July 31, 2003; it was not transcribed. The parties filed written arguments on August 18; the County filed a reply brief on September 10, while the Union waived its right to do the same.

ISSUE

The Union frames the issue as:

> "Did the employer violate the collective bargaining agreement when it disciplined the grievants? If so, what is the appropriate remedy?"

The County frames the issue as:

> "Did the County have just cause to issue verbal reprimands to the grievants on December 27, 2002 for their conduct on December 23? If not, what is the appropriate remedy?"

I frame the issue as:

> "Did the County violate the collective bargaining agreement when it issued a permanent oral reprimand to the grievants for their conduct on December 23, 2002? If so, what is the appropriate remedy?"

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 3
MANAGEMENT RIGHTS

The Union recognizes that the management of the Highway Department and the direction of its working forces is vested exclusively in the County subject to the terms of this Agreement. These rights include:

A. The right to hire, suspend, demote, discipline or discharge for just cause;

. . .

BACKGROUND

Lincoln County is a municipal employer in north-central Wisconsin. Among its general government responsibilities, it maintains a highway department whose non-exempt employees are represented by AFSCME Local 332. Pursuant to its management right to set reasonable work rules, the County has adopted a work rule that a copy of all discipline, including reprimands, be placed permanently in the employee's personnel file.

On Monday afternoon, December 23, 2002, four highway department workers – Philip Haring, Mark Voermans, Les Yanda and Tim Sarazin – were assigned to cut brush on County Road "B" in the Town of Harrison. As they were talking over lunch, they realized that Sarazin was unfamiliar with new aspects of his route, particularly along the rural Turtle Lake Road. The men were aware that in order for Sarazin to operate his snowplow safely in the imminent winter, he would have to become familiar with the road and its turnaround. They decided that since they were nearby, and winter was coming soon, and cutting brush was an assignment they felt had only modest priority, that they should go for a ride after lunch and show Sarazin the turn-around on Turtle Lake Road. Because it would have violated safety policy for just two employees to remain behind cutting brush with power tools while Sarazin and the fourth worker drove off to the turnaround, they all went off in the truck together. They did not attempt to contact any supervisor before they undertook their new self-assignment a little after one o'clock.

A little while later, shop foreman Scott Gabrich went out to check on the crew, and found that they weren't where they were supposed to be. After he finished driving the length of "B" without finding the men, he called them on his radio and found that they had returned to their worksite to resume their brush-cutting. Gabrich then had only a brief encounter with the men before reporting the matter to Highway Commissioner Peter Kachel, who on December 26 issued the following letter to the four:

> It has come to my attention that you were absent from your assigned work area on December 23, 2002.
>
> Your assigned work was brushing on County Road B. When Scott checked in the afternoon, no one was working on County Road B. When a Supervisor assigns work, he expects the men to be in that work area.
>
> This is a violation of our work rules. As a result of this behavior, I am issuing an oral reprimand. This letter will suffice as the reprimand and will be placed in your personnel file.

The Union filed a timely grievance, contending the discipline was without just cause. On January 30, 2003, Kachel wrote the four as follows:

> I have reviewed your grievance regarding the failure to be at an assigned work area. At our meeting of January 13th, we discussed the situation thoroughly. The men admitted they were not at their assigned work area (County Road B) when Scott checked at 1:30 p.m.

> Article Three of the Union contract provides that management has the right to discipline employees. Your grievance states we violated management rights because we disciplined employees.
>
> I feel we were acting within the scope of the Union contract with the reprimand.
>
> You have not proved to me that the reprimand was not warranted.
>
> I deny this grievance based on there was no violation of the Union contract.

From 1992-1997, County personnel policies provided that a copy of each written reprimand would be placed in the employee's personnel file for 1 year, with removal thereafter upon Commissioner's approval. It was general practice that all such reprimands were routinely expunged after a year.

In 1997, the County's Personnel Committee revised the work rules to provide that a copy of all discipline, including reprimands, be permanently placed in the employee's personnel file. In 1998, a WERC staff arbitrator denied a grievance challenging the policy because he found the new policy was a "not unreasonable" exercise of the County's right to set work rules. LINCOLN COUNTY (HIGHWAY), DEC. NO. 55895 (Shaw, 8/98). As I understand the policy, the County will keep the December 26 letter as a permanent disciplinary record (along, I assume, with maintaining all related correspondence as a separate grievance file).

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

> The grievants committed no acts of misconduct, but were instead exercising their judgment to perform duties that may not necessarily have been formally assigned by their supervisor. Arbitrators have long recognized that employees who leave an assigned work site on a good faith basis should not be disciplined. Nor does misconduct exist if improper activities were not willful and/or negligent.
>
> Here, the grievants' actions were justified based upon safety considerations, namely the need to show one employee the proper "turnaround" spot for his winter snowplowing route. There can be no dispute that leaving the work site briefly to address a safety concern is legitimate, and arbitrators have recognized that leaving an assigned work site for safety reasons should not result in discipline. Highway supervisors testified that had employees observed a dead

deer outside their work area, they would have been justified leaving the area to address the concern. Arbitrators have also set aside discipline where employees left work areas for short periods, even if safety considerations were not a factor.

Further, the employer should have advised the employees immediately that they had engaged in misconduct. But supervisor Gabrich himself was unsure if they had done anything wrong, and it was only after further deliberations with other supervisors that he determined the actions questionable and worthy of discipline.

The discipline should be overturned due to its being overly harsh, due to the county policy of maintaining disciplinary matters in an employee's file indefinitely. The actions the grievants took were of a minor nature, which could have been addressed by informal counseling or issuance of a policy statement. Instead the employer chose to "burn" the grievants for a good faith act that was consistent with its mission and prior expectations of the employees. Worse yet, in Lincoln County the policy on keeping files effectively requires them to "burn forever."

Accordingly, the grievance should be sustained, at least to the point where the discipline shall be expunged from the grievants' records after a reasonable period of time. The grievants should also be made whole for all loses as well.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

The seven tests of just cause are satisfied. It certainly is a reasonable expectation for employees to be at the worksite completing their assigned work. The fact that employees were not out loafing mitigates further action other than the oral reprimand.

There was a fair investigation that provided necessary proof of the violation of the work rule. The employees readily admit that they left the work place without authority. There is no evidence that the investigation was in any way biased.

The discipline was applied fairly and was reasonably related to the seriousness of the conduct. The employees admitted leaving their worksite without authority, which requires some action by the County. The only way for the discipline to have been less severe than the oral reprimand was for there to be no discipline at all. The County cannot allow employees to leave the worksite at their own discretion without any communication with their supervisor.

If a finding is made that the discipline was imposed without just cause, the remedy sought by the Union – removal of the written record "from all files" – is too broad and conflicts with the County's right and duty to maintain files with all necessary documentation of labor relations disputes. If the discipline is found to be with just cause, there should be no further remedy offered, argued or considered, and the County's standard work rules or procedures should apply.

The expectation for employees to remain at their worksite is reasonable. The oral reprimand was a way for management to convey that the employees' actions were inconsistent with that reasonable expectation. The discipline should stand and the grievance be denied.

The Union did not file a reply brief. In its reply, the County further posited as follows:

The Union mischaracterizes the work assigned on the day in question; describing the work cutting brush as "fill-in" duties in an effort to minimize the offense of leaving the worksite by making it appear the duties disregarded were not important. The Union's impression of the importance of the brush-cutting work is irrelevant; the work was assigned and employees left the site without notification or authority.

The Union errs in the comparisons it draws in citing other instances where employees who deviated were not disciplined.

The Union errs in the comparisons it draws, because the instances it cites were not employees who left their assigned work zone, but employees who changed tasks while remaining at the proper area. It also errs in its cased citations, because four of the five cases cited involved suspension, not relevant in consideration of an oral reprimand.

The main Union argument is that maintaining even an oral reprimand indefinitely is overly harsh. The Union continues to refuse to accept an arbitration award it lost. This refusal to accept the award is itself a prohibited practice. Here, by stating its remedy as expungement after a "reasonable" period of time, the Union is blatantly refusing to accept the arbitration.

The County took the least amount of disciplinary action against employees who admitted leaving the worksite without authority. The issue is just cause for an oral reprimand, not the reasonableness of the rule. The Union should not be allowed to challenge the prior adverse award.

DISCUSSION

It is unusual for a grievance over an oral reprimand to be taken to arbitration. But it is the unusual oral reprimand that has a permanent written record.

Clearly, the employees are subject to sanction for leaving the worksite and deviating from their assigned tasks. Consistent with its Article 3 management right to "plan and schedule ... work ...," the County had the right to assign the four grievants to brush-cutting duties on County Road "B", and the right to expect that the employees would remain at their assigned work site and perform their assigned tasks. The County had the right to expect that if the employees needed to leave their assigned work-site, they would use their radio to consult with a supervisor. When the employees knowingly and willingly and without notice left their brush-cutting duties on "B", they did so at risk of discipline.

But because there is no evidence their motive was malicious or corrupt, their discipline should be slight. The unrebutted testimony was that the employees were still engaged in a manner of work activity when they left the site, namely showing Sarazin the turnaround on the Turtle Lake Road route he just learned he had. Given the imminence of winter, the very serious safety concern for Sarazin to know where to turn his plow around, and the comparative general need for cutting brush, this new activity was one which could have been done as a normal work assignment. Indeed, had the group called a supervisor, he might have agreed and approved the re-assignment, or suggested they do it at the end of the day.

But they didn't call in. Rather, they left their brush-cutting duties on "B" without notifying anyone. For that, discipline is obviously appropriate.

I do accept the Union's assertion that the alternate duties the employees assigned themselves had a legitimate safety aspect. But I reject the Union's contention that the safety consideration herein is any way remotely like that in COMMONWEALTH OF PENNSYLVANIA (PUBLIC WELFARE), 86 LA 1032 (Spilker, 1986). In that case, the arbitrator overturned the suspension of employees who left work in the aftermath of a ceiling collapsing. That situation had a far more immediate safety issue than this case, where the safety issue involves addressing a future danger by making sure Sarazin knows where to turn around when snow-plowing his new route.

Nor are the other comparisons the union draws, either hypothetical or from experience, completely on point. Again, a dead deer in the roadway requires immediate attention; while there was a need for Sarazin to learn where the Turtle Lake Road turnaround was, there was no urgency for that training to be undertaken precisely at 1 p.m. on December 23.

The Union asserts that employees are routinely authorized or even expected to use judgment in responding to situations. It cited four specific instances between April 2001 and

March 2003 where employees who called in for advice on such matters as assisting colleagues or whether or not to start salting were told to use their judgment. And that, the Union contends, is precisely what the employees before me did in determining to assume the new assignment of showing Sarazin the turnaround.

But as the County correctly notes, there is a significant difference between the four instances that Union witness Al Fox testified to and the occurrence of December 23 – namely, whether or not the employees contacted a supervisor in the first place, or even at all. On the four occasions that employees were told to use their judgment, they were given that direction *after they had contacted a supervisor to discuss the matter*. But on December 23, they undertook their self-assignment without any such communication. Yes, employees should use their judgment in performing their duties – but the expectation that employees will use their judgment does not authorize employees to abandon their worksite and commence alternate duties of a non-urgent nature, without any notice, simply because they feel it would be reasonable to do so.

As the Union hopes and the employer fears, the real issue before me is the duration of that discipline. In assessing just cause, an arbitrator must weigh the discipline in all its details against the offense; the duration of that discipline is one of these details that figures into an evaluation of whether the punishment fit the offense.

The employer correctly notes the lawfulness of its 1997 work rule making all written disciplinary records permanent; in a clear and convincing award, Arbitrator David Shaw found that rule to be a "not unreasonable" exercise of the County's contractual management right to set work rules. LINCOLN COUNTY, DEC. 55895 (Shaw, 8/98). While I firmly reject the employer's argument that the Union has committed a prohibited practice by challenging the effect of that award, I agree with the County that I should not entertain a wholesale reversal of the earlier award.

In his award, arbitrator Shaw found the rule "not unreasonable" because he knew that future arbitrators would understand that an old instance of discipline would have little weight in determinations of just cause for future discipline. As he explained:

> As to the reasonableness of the new rule, both parties offer examples of possible outrageous results under the other's position. Both examples ignore the contractually required application of the just cause standard under Article III, A, of the parties' Agreement, and the role an employe's work record necessarily plays in applying that standard. While the new rule is not as favorable to employes, it is not necessarily unreasonable to have an employe's personnel file contain his/her entire disciplinary record. An employe has the right to challenge any discipline imposed through the grievance procedure, including to

> arbitration. Such a work rule does not preclude an arbitrator from finding past discipline to be stale or otherwise lacking in relevance in considering the appropriateness of the discipline under challenge. Such a work rule also would not preclude an arbitrator from ordering the removal of discipline from an employe's personnel file where the arbitrator has found it was not for just cause.

I agree. I do not believe an arbitrator considering a discipline grievance in 2006 would give much weight, if any, to the written record of an oral reprimand from 2002. In its brief, the Union acknowledges that this is, in fact, a reasonable expectation. For the purpose of prospective progressive discipline, therefore, the County had just cause to issue these four grievants an oral reprimand with a permanent written record.

But the Union has here raised two arguments it apparently did not make before arbitrator Shaw, namely the impact of the permanent written record outside the disciplinary arena. The Union argues that, if permanent, this oral reprimand can improperly threaten future promotions and poison the employees' appeal to future prospective employers other than the County.

I do not believe the Shaw award prevents me from considering the duration of the discipline as a factor in evaluating just cause. Arbitrator Shaw considered the work rule on the policy level; I do not read his award as preventing future arbitrators from considering *in a particular grievance* whether just cause existed for a permanent record.

The Union is concerned that the employer will place improper weight on this record when considering any of these employees for future promotions. However, Article 8 of the collective bargaining agreement does not allow for that possibility, as it states that the employee "with the greatest seniority making application, who can qualify, will be given the job" whenever a vacancy is posted. The phrase "who can qualify" is generally understood as connoting the ability to operate the necessary machinery and perform the assigned tasks; it does not extend to the kind of comparative analysis of employee history that would be impacted by the existence of this record. The written record of this oral reprimand thus cannot be a factor in the County's administration of an Article 8 job posting. For the purpose of considering the grievants for future job postings, the County had just cause to issue the discipline herein.

The argument as to prospective outside employers, however, I find has more merit. I take arbitral notice of the fact that prospective employers check references in making hiring decisions, and that current/former employers answer such inquiries honestly but with limited detail. Thanks to the permanent-record policy, a prospective employer of one of the grievants who asked if there were any instances of discipline would be told "yes." In the modern economic and political climate, that may be enough to disqualify an applicant.

If the County were generous, it could explain that it was an oral reprimand with some mitigating circumstances; if it were unsympathetic, the County could either leave unsaid that the discipline was the mildest available or even imply the situation was more serious than it was.

In anticipating which attitude the County is likely to convey, parts of the record give me pause. In particular, I am troubled by the Commissioner's correspondence, which I believe fails to capture the complete narrative of the underlying events. I am not suggesting that the way Kachel wrote up the reprimand or responded to the grievance displayed malice or hostility, only that I believe the texts can be improved upon.

As noted above, the County does not challenge the Union's assertion that the grievants left the worksite for 15-20 minutes only to show Sarazin the safe and proper way to turn his plow around on Turtle Lake Road; the County makes no allegation the workers had abandoned their work entirely or were engaged in improper or illicit activity. In fact, County witness Gabrich testified that, if the re-assignment were to have been done, the crew did it the safe way by staying together. The Commissioner's letter, however, makes no mention of these factors but states only that the employees "were absent from your assigned work area on December 23, 2002," which is "a violation of our work rules." Likewise, Kachel's letter of January 20 declares "the men admitted they were not at their assigned work area" when Gabich "checked" on them at 1:30, but again does not explain what it was they were doing instead. At no time does Kachel add the mitigating factor of why the grievants left their assigned work area, and the rest of the circumstances. He doesn't say why they left or how long they were gone, thus leaving the impression that the employees were loafing or worse, possibly for an extended period of time. This would be an incorrect impression to leave, and one which should not be made permanent without amendment.

That amendment comes by way of this award, which is hereby incorporated into the official record of the discipline. Making sure that those who learn of the discipline in the future will know the full story beyond the summary statements in the Kachel correspondence is necessary for this permanent discipline to be with just cause.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

1. That the grievance is denied;

2. That this Award shall be incorporated into all County files which contain a copy of the discipline, and be provided to all third-parties who request and receive information about the disciplinary record of the grievants herein.

Dated at Madison, Wisconsin, this 10th day of December, 2003.

Stuart Levitan /s/
Stuart Levitan, Arbitrator

SDL/gjc
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