

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**COLUMBIA COUNTY (HIGHWAY DEPARTMENT)**

and

**COLUMBIA COUNTY EMPLOYEES UNION LOCAL 995,  
AFSCME, AFL-CIO**

Case 226  
No. 62301  
MA-12230

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Appearances:

**David White**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, Oshkosh, Wisconsin 54903-1278, by **James R. Macy**, appearing on behalf of the County.

**ARBITRATION AWARD**

Columbia County, hereafter County or Employer, and Columbia County Employees Union Local 995, AFSCME, AFL-CIO, hereafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide the instant grievance. Coleen A. Burns was so appointed on May 22, 2003. A hearing was held on July 29, 2003, in Wyocena, Wisconsin. The hearing was transcribed. The record was closed on January 8, 2004, upon receipt of post-hearing written argument.

**ISSUES**

The parties stipulated to the following statement of the issues:

Did the County have just cause to suspend the Grievant for one day without pay for the incident of December 11, 2002?

If not, what is the appropriate remedy?

### **RELEVANT CONTRACT PROVISIONS**

#### **Article 3 – Management Rights**

3.01 The management of the Highway Department and direction of the working forces is vested exclusively in the Employer, including, but not limited to, the right to hire, suspend, or demote, discipline or discharge for just cause, to transfer or lay off because of lack of work or other legitimate reasons, to subcontract for economic reasons, to determine any type, kind, and quality of service to be rendered to the citizenry, to determine the location, operation and type of the physical structures, facilities, or equipment of the Highway Department, to plan and schedule service and work, to plan and schedule any training programs, to create, promulgate and enforce reasonable work rules, to determine what constitutes good and efficient County service and all other functions of management and direction not expressly limited by the terms of this Agreement. The Union expressly recognizes the prerogative of the Employer to operate and manage its affairs in all respects with its responsibilities.

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#### **Article 14 – Miscellaneous Provisions**

14.05 Entire Agreement. This Agreement constitutes the entire agreement between the parties and no verbal statements shall supersede any of its provisions. Any amendment supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.

### **RELEVANT BACKGROUND**

On December 11, 2002, James Hall, a road consultant for the Town of Pacific, had an encounter with Anne Deich, an employee of the County's Highway Department. Following this encounter, Hall prepared a written account of the encounter and provided the County with a copy of this account. This written account includes the following:

. . . about that time Annie came over to us; with a loud nasty voice; she was asking me a bunch of questions on just why I had turned her in last year about the crooked lines on the Patchin Road; I guess she had gotten written up for it. I told her; Annie that is between the supervisor and myself and I don't want to talk to you about it, she said you should have come and talk to me about it and leave the supervisors out of it. I can tell you what took place and why the lines are like that because of the people I had on the back of the machine. I told her; Annie just forget it, she said "no I'm not going to forget it, and further more you don't know a dam thing about paving or this paver and don't think that you do and don't tell me you do. And let me tell you something else, you don't know a dam thing about what we are doing today with the router or the crackfilling machine." . . .

By letter dated December 19, 2002, the Chairman of the Town of Pacific advised Kurt Dey, the County Highway Commissioner, of the following:

It has come to my attention that on December 11, 2002, a County Highway employee, Annie Deich, had confronted Jim Hall, an employee of the Town of Pacific, about some past roadwork that wasn't up to your and our usual standards. The verbal abuse directed at someone representing the Town of Pacific was uncalled for. By drawing your attention to this incident I hope this action will not be repeated.

On December 19, 2002, County Supervisor T.O. Boge issued a "Second Written Warning or Suspension" in which Ann Deich, hereafter Grievant, was suspended without pay on December 20, 2002. Prior to this suspension, the Grievant, on September 6, 2001, had received a "Verbal Counseling Verification" and, on January 1, 2002, the Grievant had received a "Written Warning Notification." Neither of these disciplines was grieved. On January 18, 2002, the Grievant was suspended for one day. After this suspension was grieved, the discipline was reduced to a written warning.

The "Summary" portion of the "Second Written Warning or Suspension" document states as follows:

On 12/11/02 Annie Deich has demonstrated conduct unbecoming an employee of Columbia County while on duty by showing abusive behavior/language towards an on duty representative of the town of Pacific.

Thereafter, a grievance was filed alleging that the suspension was without just cause. The grievance was denied at all steps of the grievance procedure and submitted to grievance arbitration.

## **POSITIONS OF THE PARTIES**

### **County**

By the Grievant's admission, she was aware: that Jim Hall was with the Town of Pacific, a customer of the Department; that Hall had some input as to whether or not the Department would receive work from the Town; that it was important to the County to have town work; and that it was not good to get into a negative conversation with a customer of the Department. At hearing, the Grievant admitted engaging in the type of negative conversation that she knew would be damaging to the County.

The Grievant's admissions establish that the Grievant had engaged in insubordinate dialog with a County client that upset the client and jeopardized County revenues. This incident jeopardized the County's working relationship with the Town of Pacific to the extent that the Town Chairman wrote a letter to the County expressing his concern.

The Union's attempt to place blame for the Grievant's inappropriate conduct upon Hall is ridiculous. As a representative of the Town of Pacific, Hall was entitled to be at the work site to monitor the work that was being performed by the County.

The labor contract vests in management the authority to discipline employees for just cause. The actions of the Grievant on December 11, 2002, standing alone, but also combined with her prior progressive discipline, provides the County with just cause to suspend the Grievant for one day. The grievance should be denied.

### **Union** 1/

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*1/ The arbitrator rejects the County's argument that the arbitrator should not consider the Union's brief because it was not filed in a timely manner.*

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In this case, the disciplinary notice states as follows:

On 12/11/02 Annie Deich has demonstrated conduct unbecoming an employee of Columbia County while on duty by showing abusive behavior/language towards an on duty representative of the town of Pacific.

The County bears the burden of establishing, by clear and convincing evidence, that the Grievant is guilty of the conduct of which she is accused and that the discipline is appropriate under the circumstances.

Hall claims that the Grievant spoke to him in a disrespectful manner. The Grievant denies that claim and Hall's account was contradicted on several significant points by other witnesses. Boge's claim that Kranz approached him upset about the incident, as well as Boge's claim that he came to the meeting with the suspension in hand, but without having already made the decision, is completely incredible.

Ultimately, this case involves a determination of credibility. The Grievant and her co-workers Paddack and Kranz testified consistently that it was Hall who initiated the conversation; that the Grievant did not interrupt Hall's conversation with Kranz; and that the Paver machine was operating quite loudly, interfering with normal conversation.

The County disregards all facts that discredit Hall's account. Given Hall's unreliability, discipline based upon such an account must lack just cause.

Assuming *arguendo* that the Grievant's conduct overstepped the line, there are several mitigating circumstances. In the Grievant's position, she is not expected to be engaging in a great deal of public contact while she is working and coarse language is used in the workplace. Given the fact that Hall had been a long-time management employee with the County, his relationship was not that of an ordinary "customer" in that there was a much higher degree of familiarity.

At all times, the Grievant was applying rubber crack filler, which work required her to be constantly moving with her head down. Hall had no business in entering the Grievant's work area and engaging her in conversation while she was working. If Hall found the conversation to be not to his liking, he, unlike the Grievant, could have removed himself at any time.

The County has failed to establish that the Grievant was in any way abusive. The County did not fairly and impartially consider the facts prior to imposing the discipline.

The County does not have just cause to suspend the Grievant for one day. The grievance should be sustained and the Grievant made whole.

### **DISCUSSION**

As set forth in the disciplinary notice of December 19, 2002, the Grievant was disciplined for demonstrating, on December 11, 2002, "conduct unbecoming an employee of Columbia County while on duty by showing abusive behavior/language towards an on duty representative of the town of Pacific." Certain material facts are not in dispute, *i.e.*, the referenced town representative is Jim Hall and, on December 11, 2002, the Grievant was on duty as an employee of Columbia County performing crack filling for the Town of Pacific

pursuant to a contract between the County and the Town. In dispute is whether or not the Grievant showed abusive behavior/language towards Hall.

As each party recognizes, there are inconsistencies in witness testimony. However, these inconsistencies are not of the type to warrant the conclusion that any witness is inherently incredible. Rather, the inconsistencies in witness testimony are more likely attributable to faulty memories; varying levels of excitement at the time of the incident; varying perceptions regarding the nature of relevant conduct; and varying degrees of attention paid to the relevant conduct.

The most reasonable construction of the record evidence leads the undersigned to conclude the following: Toward the end of the work day on December 11, 2002, Town representative Jim Hall walked past the Grievant on his way to return a piece of equipment that he had borrowed from the County. (T. at 99-100) At that time, the Grievant was operating the wand to fill cracks and made a remark to fellow employee Tim Paddack to the effect "Am I doing this right or am I going to get in trouble again." (T. at 158-59) Hall overheard this remark and laughed, which laughter prompted the Grievant to tell Hall that she "got wrote up" for that road. (T. at 159-60)

At the time of this conversation, the Grievant and Hall both understood that "that road" was a reference to a prior Town of Pacific job. It is undisputed that Hall complained to County management that the work performed on this job was not satisfactory and that the County disciplined the Grievant for her work on this job. ("Verbal Counseling" of September 6, 2001)

During the ensuing conversation, Hall indicated that the Grievant had been responsible for the fact that the previous work had been "crooked; the Grievant indicated that Hall should have discussed his dissatisfaction with the work with the Grievant, rather than her supervisors; and Hall indicated that he was not responsible for the Grievant's write-up, but rather, that was between the Grievant and her supervisors. The Grievant offered an explanation for why the work was "crooked." When Hall did not respond in a manner that demonstrated that he was accepting the Grievant's explanation, the Grievant remarked upon Hall's competency to judge the adequacy of the Grievant's work. (T. at 47-48; 152-56; Jt. #4) At the time of this remark, the Grievant's voice was loud enough to be heard over the machine. (T. at 155) Hall responded by telling the Grievant to shut up and then left the Grievant's work area. (T. at 155-56). Prior to leaving the worksite, Hall told County Temporary Foreman Gordy Kranz that Hall was not going to tolerate being spoken to like that and that Hall was going to contact Highway Department supervisor, Norm Dahl. (T. at 106)

The two employee witnesses whose work would have placed them in the vicinity of Hall and the Grievant, *i.e.*, Kranz and Paddack, each claimed to not have overheard the latter

portions of the conversation between Hall and the Grievant. Thus, the record contains only two versions of this portion of the conversation, *i.e.*, the Grievant and Hall's.

Hall's written statement, prepared on December 11, 2002, is a contemporaneous account. This statement claims, *inter alia*, the following:

. . . about that time Annie came over to us; with a loud nasty voice; she was asking me a bunch of questions on just why I had turned her in last year about the crooked lines on the Patchin Road; I guess she had gotten written up for it. I told her; Annie that is between the supervisor and myself and I don't want to talk to you about it, she said you should have come an talk to me about it and leave the supervisors out of it. I can tell you what took place and why the lines are like that because of the people I had on the back of the machine. I told her; Annie just forget it, she said "no I'm not going to forget it, and further more you don't know a dam thing about paving or this paver and don't think that you do and don't tell me you do. And let me tell you something else, you don't know a dam thing about what we are doing today with the router or the crackfilling machine." . . .

Hall's testimony at hearing confirms, in relevant respects, this written account.

On December 19, 2002, the Grievant was provided with the opportunity to read Hall's written statement. At no time prior to the arbitration hearing, did the Grievant deny making these specific statements.

The Grievant recalls that the conversation ended with Hall saying "Shut up" and walking away. When asked what prompted him to say that, the Grievant responded:

Probably because I told him if he knew a little bit more about paving, he could do his job better. (T. at 156)

The Grievant denies that she, or Hall, used any "swear words" during this conversation (T. at 157) and states that is "not even remotely possible" that she said "you don't know a damn thing about the paving." (T. *id.*)

The Grievant's testimony at hearing provides a reasonable basis to conclude that the Grievant became annoyed at Hall's laughter over an incident that lead to her discipline and that this annoyance increased as Hall failed to accept the Grievant's explanation of why the road was "crooked." The Grievant's testimony at hearing also provides a reasonable basis to conclude that the Grievant, who considers herself to know much more about paving operations than Hall, sincerely believes that the work that Hall considered to be "crooked" was, in fact, a

reasonable work product given the circumstances confronting the Grievant. Together, these factors make it likely that the Grievant (1) would have responded to Hall with a statement that was more forceful than “ if he knew a little bit more about paving, he could do his job better” and (2) that the Grievant was agitated to the point that she was not mindful of the statements that she made to Hall.

The record provides no reasonable basis to conclude that Hall had a grudge against the Grievant. Indeed, according to the Grievant, she always thought that she and Hall, who had previously worked for many years as a County Highway Department employee, had a good relationship. (T. at 148) Upon consideration of the record as a whole, the undersigned concludes that Hall’s written statement of the events of December 11, 2002 is credible.

At the time of the incident, the Grievant knew that Hall was the Town of Pacific representative who was responsible for monitoring the work being performed for the Town by the County Highway Department. The Grievant also knew that the County had a significant interest in maintaining good relationships with the Town, which interest included a need for the revenue generated by Town contracts.

On December 11, 2002, the Grievant inappropriately reproved Hall for reporting his dissatisfaction with the “crooked” work to County Highway Department supervisors and disparaged Hall’s competency to evaluate the work performance of the Highway Department paver crew at a Highway Department work site in the presence of other County Highway Department crewmembers. The Grievant’s remarks to Hall were personally insulting and disrespectful of Hall’s position as the Town of Pacific roadwork representative. In making reproving and disparaging remarks to Hall on December 11, 2002, the Grievant “demonstrated conduct unbecoming an employee of Columbia County while on duty by showing abusive behavior/language towards an on duty representative of the town of Pacific.”

As the Union argues, the Grievant knew Hall when Hall had been employed by the County Highway Department. It is not evident, however, that they were chummy, or that Hall had ever invited, or accepted, the type of criticism and/or comments that were made by the Grievant on December 11, 2002. Hall’s prior connection to the Grievant is not a mitigating factor.

Notwithstanding the Union’s argument to the contrary, Hall did have a business purpose for being in the Grievant’s work area. Additionally, Hall did not engage the Grievant in conversation while the Grievant was working, but rather, the Grievant engaged Hall in the conversation.

As the Union argues, Hall could have walked away at any time. However, it was reasonable for Hall to have listened to the Grievant’s explanations of why the road had been



“crooked”. As soon as the Grievant disparaged Hall’s competency, Hall walked away. Hall’s conduct on December 11, 2002 did not reasonably provoke, nor excuse, the Grievant’s misconduct.

To be sure, Assistant Highway Commissioner Boge prepared the discipline prior to discussing the incident with the Grievant. The record, however, provides no reasonable basis to discredit Boge’s claim that, in the past, he has prepared a discipline prior to interviewing the employee and, upon hearing the employee’s response, has elected to not impose the discipline. (T. at 34)

Prior to his preparation of the discipline, Boge discussed the incident with eyewitness Kranz; received Kranz’ written account; and received Hall’s written account. Prior to imposing the discipline on December 19, 2002, Boge asked the Grievant if there was any truth to the matter, if she had a confrontation with Hall and offered the Union a copy of Hall’s and Kranz’ written statements. (T. at 134-35) The Grievant read Hall’s written statement, but chose to not read Kranz’ written statement. (T. at 135-36)

Provided with an opportunity to respond to the written statements, the Grievant chose to make no response to Boge other than to deny that she had a confrontation with Hall. (T. at 31; 135) By denying that she had a confrontation with Hall, the Grievant denied only that the interaction between the Grievant and Hall was a confrontation. The Grievant did not deny that she engaged in the specific conduct related by Hall.

The testimony of Union President Borgkvist indicates that Boge did not issue the prepared discipline until after the Grievant had been given a copy of Hall’s written statement; had denied that there had been a confrontation; and had indicated that she did not want to see Kranz’ statement. (T. at 135-37) It may have been preferable for Boge to wait until the Grievant acknowledged that she had finished reading Hall’s statement and did not wish to make any further comment before he issued the discipline. The Grievant, however, did not request additional time to review Hall’s statement; to consult with Borgkvist; or to discuss the matter further with Boge. Neither the fact that Boge prepared the discipline prior to receiving the Grievant’s response, nor the fact that Boge issued the discipline directly after the Grievant denied that there had been a confrontation, warrants the conclusion that Boge had made the decision to discipline the Grievant prior to meeting with the Grievant.

The statements of Hall and Kranz that were considered by Boge when he prepared the discipline, if accurate, provided Boge with a reasonable basis to conclude that the Grievant engaged in the misconduct alleged in the discipline. The Grievant’s response did not provide Boge with a reasonable basis to conclude otherwise. Notwithstanding the Union’s argument to the contrary, the County’s investigation of the allegation of the Grievant’s misconduct was sufficient.

At the time that Boge investigated the incident, he was aware of and had considered the Grievant's prior disciplinary record. (T. at 19) Given the Grievant's prior disciplinary record, as well as the nature of the Grievant's misconduct on December 11, 2002, the County has just cause to discipline the Grievant by imposing a one day suspension without pay. Accordingly, the grievance has been denied and dismissed.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

**AWARD**

1. The County has just cause to suspend the Grievant for one day without pay for the incident of December 11, 2002.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 15<sup>th</sup> day of July, 2004.

Coleen A. Burns /s/

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Coleen A. Burns, Arbitrator

CAB/gjc  
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