BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

COLUMBIA COUNTY EMPLOYEES, LOCAL 995, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

and

COLUMBIA COUNTY, WISCONSIN

Case 233
No. 63355
MA-12560

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing for Columbia County Employees, Local 995, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Jonathan T. Swain, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing for Columbia County, Wisconsin, referred to below as the County, or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement, which provides for the final and binding arbitration of certain disputes. The Union requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Nathan Price, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin as Arbitrator. Hearing on the matter was conducted in Wyocena, Wisconsin on August 16, 2004. No transcript was made of that hearing, and the parties elected to make closing statements at the close of the hearing rather than filing written, post-hearing arguments.

ISSUES

The parties stipulated the following issues for determination:

Was the verbal warning of October 2, 2003 issued with just cause?

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 . . . discipline or discharge for just cause . . .

BACKGROUND

The grievance form states that "while attempting to free a chain from the tailgate latch, employee accidently broke his finger" and that the discipline was "unwarranted". The form requests, "Employee to be made whole with no disciplinary records on his file of this incident." The County recorded the discipline on a form headed "Progressive Discipline Notification System For Employees." The form consists of four separately headed sections: verbal counseling verification; written warning notification; second written warning or work suspension; and employee termination notification. T.O. Boge, the Grievant's immediate supervisor, filled out the "verbal counseling verification" section thus:

> (the Grievant) caused himself bodily harm by pulling on chain on the tailgate of his vehicle. Tailgate came open and caught his finger between tailgate and chain breaking his finger.

The form dates the incident, "10/1/03". References to dates are to 2003, unless otherwise noted.

The balance of the background is best set forth as an overview of witness testimony.

T. O. Boge

Boge is the County's Assistant Highway Commissioner. He has served in a supervisory role for roughly two years, and prior to that was a member of the bargaining unit.

On October 1, the Grievant reported to the Operations Manager's office holding his finger and stating that he thought he had broken it. The finger was bleeding slightly at the time. Before going to the hospital, the Grievant began to fill out an injury report form. He completed the entry headed "Describe the Accident" thus: "Chain was caught in tailgate latch, removing the chain finger got smashed." Under the heading "Corrective Actions", the Grievant stated that the cause of the injury was "Pulling on tailgate chain." Under the "Corrections" heading, the Grievant stated, "I should not have pulled on the chain." The Grievant turned in the completed form on October 2. Boge then filled out the "Supervisor's Comments & Corrective Actions Taken" thus: "Received a verbal counseling verification."

The Grievant did not work on October 2, but did return to work on October 3. Boge spoke to the Grievant on that day to try to get a better understanding of what had happened. As Boge understood it, the Grievant raised the bed of his truck to dump a load, then found the chain, which controls the amount the tailgate will open, had become stuck. He attempted to free it with his right hand. The chain is roughly two feet long, and is 3/8 inch thick. It connects the tailgate to the fixed portion of the dump truck box, and controls the amount the tail gate can open. On October 1, the Grievant lowered the box, to discover that the chain had somehow gotten stuck where the tailgate latches to the box.

Boge stated that he decided he would issue the Grievant a warning on October 1, as a "heads up" for the Grievant regarding future conduct. He informed the Grievant on October 2 that the warning would "probably be a verbal." Boge did not see the discipline as serious or job-threatening. The Grievant responded, "whatever, it was stupid." Boge stated that the warning was to encourage the Grievant to think ahead and to avoid unnecessarily putting himself in dangerous situations. He felt the Grievant could have called for help regarding the stuck chain; could have blocked the chain before prying it with a tool other than his hand; or could have raised the bed a bit to take pressure off the chain.

Boge noted that the County emphasizes the significance of safe behavior. It conducts an annual safety rodeo, which involves a full day of hands-on road safety courses. The County uses outside personnel to give instruction, and also conducts morning training sessions including video instruction. At least one of those videos, which the Grievant viewed, concerned the avoidance of hand injuries. It did not include specific instruction on how to free a tailgate.

The County maintains a document entitled "Personnel Policies and Procedures Manual", which includes the following provision:

Sec. 7.18 Misconduct-Unacceptable Performance

The requirements of this Section shall apply to all County employees:

. . .

(b) **Violation of County Rules of Conduct.** The continued employment of County employees shall be contingent upon . . . compliance with the rules and regulations set forth in this Personnel manual . . . Failure to display acceptable job performance or the violation of these rules and regulations shall be cause for disciplinary action including reprimands, suspension without pay or dismissal. The exact form of discipline shall depend on the seriousness of the offense committed. An employee shall be considered to have engaged in misconduct if he/she violates any of the following listed reasons . . .

(8) The employee has endangered his/her own safety and/or safety of others through carelessness in the performance of his/her job and/or non-compliance to established safety procedures.

Boge acknowledged that the Grievant was unclear on precisely how he injured his finger, but Boge decided that it was the consequence of his placing his hand where it should not have been.

The Grievant

The Grievant has worked for the County for roughly three and one-half years. On October 1, he was spreading gravel on a roadway. He dropped the last of his load, then discovered that the chain had become stuck between the box and the tailgate latch and pin. He did not attempt to pull the chain in the latch area, but reached above it, at the point where a small enclosure permits a chain link to be locked in place to regulate the size of opening the tailgate can open to when the box is raised. He pulled on the chain, and does not know what happened next. His finger was not caught in the chain, but got smashed by either the chain or the tailgate. He received a small cut on the fourth finger of his right hand. The cut was not, however, the problem. The finger had broken above the top knuckle. The tailgate is heavy, weighing perhaps seven hundred pounds.

Boge told him on October 1 that Boge considered the accident preventable, and that some discipline would follow. The Grievant could not recall saying it was stupid, but he did realize that the accident could have been far worse and that he should not have pulled on the chain. He thought lifting the box might have hurt him worse, and did not see how he could have moved the tailgate if he had blocked the chain. He had lowered the box to reduce the

chance of injury. The chain is welded to the tailgate and loops below the tailgate to a small enclosure where it is hooked to the side of the box. Somehow the chain slid behind the latch and pin. He did not reach between the gate and the box, but did reach between the chain and where it is locked to the box. Without much effort, the chain came free, but he has no idea how it struck his finger. He has performed this action on dump trucks in the past and has seen other employees do the same thing. He acknowledged seeing the instructional video on hand injuries, but that concerned grinders, and watching where your hands were during tool operation. In hindsight, he did not see what he had done wrong on October 1, although he has not pulled on tailgate chains since the accident. The chain was not taut when he pulled on it, and was loose enough to pull on.

John Stott

Stott has worked for the County for roughly nine years. He is currently the Assistant State Patrolman, and has served as the Union's Steward/Vice-President for roughly four years. He processed the grievance and is familiar with employee discipline. In the winter of 1996-97, after loading a dump truck with salt prior to salting, he attempted to free a chain from the salter, without checking the tailgate. The tailgate was shut, but not latched. When he pulled on the chain, the tailgate opened, cutting his finger, which required fifteen stitches. He was on worker's compensation for a month, but received no discipline. He testified that other employees have breached safety procedures without receiving discipline, including Wayne Thomas, who had a finger smashed when he inserted it in a hole in a tailgate while aligning its pins. Stott acknowledged that the County has disciplined employees for unsafe conduct, and that he did not learn of disciplinary incidents unless the affected employee informed him.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The County's Position

At the start of the hearing, the County argued that the discipline was simple and straightforward, posing the lowest level of discipline possible. The Grievant injured himself in violation of County policy, and was issued a verbal warning, which is the first step of the progressive discipline system. The Grievant attempted to pull a chain to free the tail gate of a dump truck, and broke his finger. There were obvious ways to do this without posing a risk of injury, such as blocking the tail gate open. The warning did no more than to counsel the Grievant to "be careful."

At the close of the hearing, the County emphasized that it asserted the Grievant acted carelessly rather than intentionally, and that the warning highlighted to the Grievant how

bad an idea it was to pull on the chain. Because the Grievant acted carelessly discipline was appropriate. He has acknowledged his own carelessness, and there is little evident reason for the grievance. In any event, the warning's purpose is simply to serve as a reminder to step back and think carefully before taking a dangerous act. If he was in doubt on how to proceed safely, he should have asked for assistance.

That the County has no specific work rule on handling a chain has no bearing on the discipline. It trains personnel extensively and maintains a general work rule encouraging safe behavior. The discipline is addressed to a matter of common sense in the workplace. The Union has, in the past, encouraged the County to put discipline into writing, as it did in this case. Since the County is attempting to send a fundamental message on the importance of safety, the warning should be upheld.

The Union's Position

At the start of the hearing, the Union contended the discipline suffered from several flaws. First, it should relate to a work rule, and there is no work rule on point. Second, the Grievant simply had an accident for which he cannot be held responsible. Sometimes accidents happen, without regard to the care taken by an employee. Finally, the County has disciplined inconsistently regarding this type of conduct. The discipline is sufficiently flawed that it should be removed from the Grievant's file.

At the close of the hearing, the Union contended that an employee cannot foresee every hazard. That the Grievant was hurt does not demonstrate carelessness. Nor will the evidence establish that he acted carelessly. The Grievant viewed the chain carefully before acting, and pulled only what he saw as slack in the chain. He has done this many times in the past, without injuring himself. This time, an accident occurred. The accident was not a reflection of his carelessness but of an understandable miscalculation for which no one can be faulted. More significantly, the County's approach to accidents has been haphazard at best, and sends no clear signal on safety. That the Grievant completed a form in which he said he should not have pulled the chain establishes no more than the "20/20" nature of hindsight.

Nor does sustaining the grievance send any clear message on safety, for a work rule that says "be careful" says nothing at all. Since the Grievant acknowledges he will not pull on slack chain again, the discipline is nothing more than punishment.

DISCUSSION

The stipulated issue concerns whether the County had just cause to issue a warning to the Grievant for his conduct on October 1. In my view, unless the parties stipulate otherwise, two elements define just cause. The first is that the employer must establish conduct by the

Grievant in which it has a disciplinary interest. The second is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest.

The parties dispute the application of the first element. The discipline is the lowest level available, and thus the dispute is whether the County has any disciplinary interest to assert. The County asserts an interest under Section 7.18(b)(8) of its Personnel Manual. The provision governs "carelessness in the performance of his/her job and/or non-compliance to established safety procedures". There is no "established safety procedure" governing the Grievant's attempt to free the tailgate, and thus the County's disciplinary interest turns on "carelessness".

On balance, the County's view of the asserted interest is more persuasive than the Union's. This conclusion is fact-driven. On a general level, the Union argues that the Grievant's injury cannot be considered a basis for discipline, and that the Grievant was not careless when he acted to free the chain.

On the broadest level, the Union's arguments have considerable persuasive force. An injury can be evidence of carelessness, but does not, standing alone, prove carelessness. Beyond this, discipline which does not isolate what is improper behavior and how to modify it is punitive. These broad propositions, however, do not eliminate the County's disciplinary interest.

In this case, the evidence shows the Grievant took some care prior to attempting to free the chain. He lowered the box, and sought to keep his hands free of the latch area of the tailgate. This cannot, however, obscure the significance of the acts he took. He placed his hands in the area of the small enclosure where an individual link is locked into the box to set the amount the tailgate can open. There was little space to move in this area, and thus no margin for error if or when the chain moved. Even if not taut, the chain was under strain. When it moved, it moved faster than the Grievant could hope to, and with potential force that could have done worse than break a finger. In sum, the situation was a dangerous one from the time the Grievant first viewed it.

Without more, however, this establishes only a potential County interest. The Grievant's act of putting his hand in this area and pulling the chain constitutes improper behavior only if there was something else he should have done. Boge's testimony establishes that alternatives existed. Whether the Grievant should have blocked the chain or tailgate or whether he should have raised the box is debatable. It is thus not dispositive here. Most significantly, Boge's testimony establishes the willingness of management to permit the Grievant to avoid putting his hands on the chain prior to calling for assistance. This has two important effects regarding the implementation of safety procedures. The first is that the Grievant was being counseled not to use his hands as a tool to free a chain on a seven hundred pound tailgate without prior thought. The second is that he could stop working to get help prior to using his bare hand as a pry bar.

These effects establish that the County was telling the Grievant to err on the side of safety. The Union's arguments understate the significance of this point. The message sent by the County makes adequate safety a significant part of the pace of work. More specifically, the warning alerts the Grievant that the risk he subjected himself to outweighed the significance of keeping the truck in operation. The message is that work pace should not overwhelm adequate safety procedures. As the Union points out, this is a difficult message to send an employee who experienced considerable pain. The alternative is, however, less palatable. Should the Grievant be encouraged to use his hand as a pry bar in a tight enclosure surrounded by potentially moving steel so that the truck could remain in operation? The County's view of the situation is reasonable, and supports the existence of a disciplinary interest.

Before closing, it is appropriate to tie this conclusion more closely to the parties' arguments. The Union persuasively contends that the low level of discipline cannot obscure that it is one of four steps ending in termination. The degree of the Grievant's carelessness must not be overstated. The County contends that there is no reason to believe that the Grievant is a careless employee. The record supports this. The Grievant was candid in his testimony, and acknowledged he understood, at least in part, the message Boge sent. Under the County's view, the warning is only a reminder, rather than the thin edge of a wedge designed to separate the Grievant from his job. To accept the Union's argument presumes that each level of the progressive discipline system must, standing alone, be conduct on which a discharge can rest. This argument, persuasive in the abstract, is not persuasive on this record. As established in Boge's testimony, the carelessness on the Grievant's part is analogous to tardiness. A single instance is not fatal. Rather, it is the cumulative weight of repeated conduct that can make a final instance of tardiness the one which supports a termination. There is no reason to believe the County contends anything other than that the risk the Grievant shouldered outweighed the benefit to the job of grabbing the chain and yanking it. The Grievant has acknowledged he no longer does it. The message has been sent and received.

The asserted inconsistency in discipline plays no role here. This conclusion rests on the County's statement of alternatives available to the Grievant. In the absence of those alternatives, the warning is no more than adding insult to the Grievant's injury by holding him accountable for nothing beyond getting injured. As noted above, the message is that the Grievant should have taken time before acting to use his hand to free a jammed chain, up to and including seeking help. As he testified, there were no tools on hand to use. The warning sends the signal that he should have sought the tools before resorting to the use of his hand. Whether or not Stott and Thomas could have or should have been disciplined cannot act to preclude the Employer from sending the reasonable signal it argues in this case.

AWARD

The verbal warning of October 2, 2003 was issued with just cause.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 7th day of October, 2004.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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