

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

COLUMBIA COUNTY

and

COLUMBIA COUNTY EMPLOYEES UNION LOCAL 995 AFSCME, AFL-CIO

Case 228

No. 62686

MA-12397

(Paske Discipline)

Appearances:

Mr. Gary Paske, personally, and **Mr. David White**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, on behalf of Gary Paske and Local 995.

Mr. Jonathan Swain, Attorney at Law, Lindner & Marsack, S. C., 411 East Wisconsin Avenue, Milwaukee, WI 53202, on behalf of the County.

ARBITRATION AWARD

The County and the Union are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and 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 and Arbitrator to resolve a grievance filed on behalf of Gary Paske, who is referred to below as Paske or Grievant. The commission appointed Paul Gordon, Commissioner, to serve as the Arbitrator. Hearing on the matter was held on August 3, 2004 at the County Highway Shops in Wyocena, Wisconsin. 1/ A transcript was prepared. The Union made oral arguments and summations at the hearing. A briefing schedule was established. The County filed a brief and argument on October 12, 2004. The Union did not file a brief or further arguments and the record was closed on October 26, 2004.

1/ The hearing was a joint hearing with another grievance arbitration between the parties, Case 229, No. 62687, MA-12398, involving another employee besides Grievant herein. Both Grievants were involved in the facts and circumstances in both cases.

ISSUES

The parties stipulated to the following issues to be decided:

Did the County have just cause for the discipline issued to Gary Paske for the incident which occurred on May 20, 2003?

If not, what is the appropriate remedy? May the remedy include both the discipline imposed and the order for counseling and the attendant costs?

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.

BACKGROUND AND FACTS

The County had in effect at all material times herein the following personnel policy which states in pertinent part.

Sec. 7.02 Sexual Harassment

Harassment, Discrimination, and Retaliation

Statement of Policy

Federal and state law prohibits employment discrimination on the basis of race, color, religion or political beliefs, creed, sex, age, disability, national origin or sexual preference. Among these prohibitions is the harassment of fellow

employees. Columbia County is committed to maintaining a place of employment and a work environment that is free from discrimination and any form of harassment whatsoever.

Harassment is unlawful and is conduct that exposes both Columbia County and individuals engaging in harassment to significant liability under the law. Employees at all times should treat other employees respectfully, with dignity and in a manner so as not to offend the sensibilities of a co-worker. Accordingly, Columbia County is committed to vigorously enforcing this Harassment, Discrimination and Retaliation policy at all levels within the Columbia County.

No employee should be subjected to behavior that is personally offensive, which lowers morale or interferes with productivity in the workplace. Each employee has a duty to help maintain a workplace free from harassment. This duty involves refraining from any insulting, degrading, demeaning, or exploitative behavior toward other employees, including sexual harassment.

...

Examples of conduct that would be considered harassment or regarded as retaliation are set forth in the Statement of Prohibited Conduct below. These examples are provided to illustrate the kind of conduct prohibited by this Policy and the list is not exhaustive.

...

Other Acts

The above lists do **not contain all** acts prohibited under this Policy....

...

Schedule of Penalties for Misconduct

...

The following schedule of penalties applies to all violations of Columbia County's Harassment policy. Where progressive discipline is provided for, each instance of conduct violating the Policy moves the offending employee through the steps of disciplinary action. In other words, it is not necessary for an employee to repeat the same precise conduct in order for more severe discipline to be imposed.

A written record of each action taken pursuant to the Policy will be placed in the offending employee's personnel file. The record will reflect the conduct (or alleged conduct) and the discipline imposed.

Assault

Any employee's first proven offense of assault or threat of assault, including assault of a sexual nature, will result in dismissal.

Other Acts of Harassment by Co-Workers

Acts of harassment, other than assault, will result in non-disciplinary oral counseling for an alleged first offense. A written warning, suspension, or discharge will be imposed for the first proven offense, depending upon the nature or severity of the misconduct. Suspension or discharge will be imposed for the second proven offense, depending on the nature and severity of the misconduct.

. . .

Grievant has been employed in the Columbia County Highway Department for approximately seven years and now works as a Machine Operator II mowing grass, doing lawn keeping, and similar duties. His work activities and duties are somewhat limited due to a prior work related injury.

On May 20, 2003 he was mowing grass at the Department shops using a mower which is 61 inches wide. He was mowing in an area that had some telephone poles and was by a larger parking area. The parking area at that spot did not have any designated parking spaces. There were designated parking spaces in a different part of the parking lot. In the past there had occasionally been employee vehicles parked in or near the area he was mowing. On May 20th a pickup truck owned by another employee, Ann Deich, was parked in a non-designated area near where Grievant was mowing. The pickup was two feet from the grass area. The keys were left in it. Deich had left the windows open and left the keys in it so that in case it rained someone could close the windows. She had not discussed this with Grievant prior to that. Grievant's method of mowing was to have the grass blowing out away from where he has to cut to avoid blowing the grass into an area that yet needs to be cut. He also avoids blowing the grass into obstructions, such as the telephone poles, so that grass does not get deflected back and hit him in the face. When he approached the pickup there was not enough room to cut the grass area in that manner without blowing grass or possibly debris at the pickup. Without asking permission from Deich or his supervisor, Grievant moved the pickup between 10 to 25 feet, changing its direction. The vehicle was not damaged. He completed his mowing without blowing any grass or debris into or onto the pickup. He did not see Deich that day after moving her pickup.

On several prior occasions when a vehicle had been parked in or near that area Grievant has asked his supervisor for permission to move it, and had received permission if the keys were left in it. But that was not always the case. Sometimes he moved vehicles without asking permission from his supervisor or the owner. Sometimes employee vehicles are moved without

specific permission to get equipment in or out of sheds and to keep snow and ice off them. And sometimes vehicles are moved or driven to other work locations where work crews have finished for the day. Those end of day moves are with direction from Grievant's supervisor. When Grievant first joined the County he was informed that if an employee did not have a problem with leaving the keys in their vehicles there would be times when the vehicles may have to be moved. It was Grievant's understanding that it was acceptable to move other people's vehicles without getting individual permission.

The following morning, May 21, 2003, Deich confronted Greivant in the County Shops about him having moved her pickup. She was concerned that it was moved without her permission and had had an initial fear that it could have been stolen. That confrontation led to Deich making a complaint to her supervisor about Grievant having pushed her - which he denies. Deich and Grievant have had difficulty with each other in the past. Deich has expressed dissatisfaction with Grievant being hired by the County and Grievant has complained to his supervisors about how he was treated by Deich. He sometimes tried to avoid her presence. The County investigated the matters of May 20 and 21, 2003 and thereafter issued disciplinary letters on June 16, 2003 to both Grievant and Deich under section 7.02 of the work rules.

The Paske discipline letter states in pertinent part:

From the investigation performed by the counties [sic] Risk Manager, Marc Playman, on May 28, 2003, it has been determined that Gary Paske did move Ann Deich's vehicle without permission. On May 21 a confrontation between Gary and Ann took place, causing disruption among co-workers. Discipline for these actions will be as follows:

Gary Paske will:

1. Receive a written warning for moving Ann Deich's personal vehicle without permission.
3. Receive a 1-day suspension without pay
4. Seek counseling through the Employee Assistance Program at the Pauquette Center located at 2901 Hunters Trail Portage, Wisconsin. Phone # 608-742-5518 to work on his people skills. Gary must show proof of compliance in the program along with a doctor's slip showing she [sic] was present for each session.

Any violations under Section 7.02 of the Personnel Manual [sic] will result in further disciplinary action and may result in discharge.

This discipline was later modified by the County Human Resources Committee to maintain the

situations of interpersonal relation conflicts will require counseling. Grievant was made whole for the suspension he had served, but he was not reimbursed for mileage to attending the counseling sessions nor did he receive call pay for his time. He had attended two counseling sessions about 45 miles from his home on days he otherwise would have had off. The County, at hearing, clarified that he was not disciplined in connection with the incident which occurred on May 21st. His discipline was for moving the Deich's vehicle without her permission. In imposing the discipline it was the understanding of the Highway and Transportation Commissioner that permission was always secured before moving vehicles. He also felt, as to the counseling requirement, that Grievant had been avoiding Deich and had him go to counseling to deal with conflict in the workplace, not take issues to heart, and how to avoid certain situations. It wasn't for anger management, but to keep the employe productive so he is going from point A to point B on its shortest route.

Other matters appear as in the discussion.

THE PARTIES' POSITIONS

The Union

To summarize, the Union contends the discipline related to moving a vehicle is unfounded. Grievant's supervisor had given him blanket permission to move vehicles when necessary to complete mowing tasks and he understood everybody did that. The appropriate action to stop that practice would be to put him on notice to cease. Disciplining him for it lacks just cause. Because he was ordered to attend counseling as part of discipline he had to utilize some of his personal time, which the employer should pay for and mileage.

The County

To summarize, the discipline was solely the result of moving Deich's vehicle to another part of the parking lot without her permission, which conduct is not in dispute. Paske and others have moved employee cars within the parking lot or to other locations. But this was only to be done with the supervisor's permission. Paske did not have permission to move Deiche's vehicle. He had repeatedly asked the supervisor, who would respond that if the keys are in it, move it. There is no evidence the County was aware that he had perhaps moved vehicles without his supervisors permission. Paske's motives were honorable.

The counseling was to help him understand his own conduct and how others might view it, and to help him deal with the hostile encounter between Deich and himself. The written warning is now more than a year old and would not now be used for progressive discipline going forward. The discipline was reasonable, warning him not to move other employees' vehicles without permission or direction. Attending counseling was not a great inconvenience and was not unreasonable in light of the incidents involved in this matter.

DISCUSSION

Because this is a discipline matter the County has the burden of proof. The contract requires that there be just cause for discipline. The issue is did the County have just cause for the discipline issued to Gary Paske for the incident which occurred on May 20, 2003? If not, what is the appropriate remedy?

The contract and the Personnel Policies of record do not define just cause, and the parties have not stipulated to a definition of just cause. The policies and procedures manual sets out in chapter 7 a non-exhaustive list of misconduct and a schedule of penalties. It is appropriate to use the just cause definition which has been applied in prior, recent, discipline grievance arbitrations between the parties. See, COLUMBIA COUNTY (HIGHWAY DEPARTMENT), CASE 233, NO. 63355, MA-12560 (MCLAUGHLIN, 10/7/04). 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.

There is no dispute as to the immediate facts surrounding Grievant's moving of the pickup truck. Grievant was using a mower 61 inches wide to cut grass in a safe and efficient manner by blowing the grass away from obstacles, such as the telephone poles, and away from areas yet to be mowed. The pickup truck was parked in a non-designated parking spot where it would have had grass or other possible stones or debris blown onto it. Other employee vehicles have been parked in that same area before and had been moved in order to mow grass. The keys were in the Deich vehicle and the windows were down. Grievant did not ask anyone for permission and moved the pickup between 10 and 25 feet out of the way without damaging the vehicle.

It is less clear as to what expectations there were for the necessity to get permission to move an employee's vehicle. The Highway and Transportation Commissioner testified on cross examination to the effect that permission was always received prior to moving personal vehicles. He also testified on direct examination that generally if a vehicle is to be moved usually the employee has permission. Generally and usually are not always. And Grievant did testify credibly that he has moved other vehicles without permission and other vehicles were moved in and out of sheds without permission. The statements attributable to Grievant's immediate supervisor that if the keys are in a vehicle, move it, are ambiguous and the declarant did not testify. There has not been a prohibition or notice put out against moving vehicles without specific permission. The fact that keys are left in a vehicle carries with it at least the implication that there is permission to move the vehicle under some circumstances. Here, even Deich anticipated the possibility of someone entering her pickup truck to put up the windows in case of rain by leaving the keys in it. There is no evidence that she told this to anyone. Under these circumstances it is not unreasonable for Grievant to think it would be all right to move the pickup truck out of the way.

Given these facts, it must be considered whether the employer had a disciplinary interest in this conduct. The original letter of discipline referred to both the moving of the vehicle and the confrontation. The discipline was for these “actions”, plural. The letter also referred to Section 7.02 of the personnel manual. This original discipline was revised and reduced with reference to “future situations of interpersonal relation conflicts”. The hearing proceeded on the matter of moving the vehicle without permission, not the confrontation. What remains is the question of the employer’s interest under Section 7.02 of the Personnel Manual as applied to the moving of the vehicle.

The contract gives the County the right to create, promulgate and enforce reasonable work rules and Section 7.02 contains such rules. The County certainly has an interest in the working environment and interpersonal relationships among the employees. Section 7.02 recognizes and reflects this. Although the Section is captioned “*Sexual Harassment*”, the content of the Section clearly includes conduct beyond sexual harassment. As a statement of overall policy, Section 7.02 states in pertinent part:

Employees at all times should treat other employees respectfully, with dignity and in a manner so as not to offend the sensibilities of a co-worker...

No employee should be subjected to behavior that is personally offensive, which lowers moral of interferes with the productivity in the workplace. Each employee has a duty to help maintain a workplace free from harassment. This duty involves refraining from any insulting, degrading, demeaning or exploitative behavior toward other employees, including sexual harassment.

There is a statement of prohibited conduct which lists many types of conduct, but nothing that would relate specifically to moving a vehicle without permission. The list is not exhaustive. Thus, whether the conduct here violates the policy must be considered in terms of the general policy. Doing so, there should be nothing inherently offensive to the sensibilities of a coworker in moving their vehicle under these circumstances. Indeed, to have blown grass and possibly other debris onto a vehicle may very well be considered offensive and disrespectful. The circumstances are very important. The vehicle had the keys in it and it was not parked in a designated parking spot. Sensibilities do not mean hyper-sensibilities. Moving the vehicle should not lower morale, given the isolated nature the event. The action was not insulting, degrading, demeaning or exploitative. Certainly respect for the property of others in the workplace is an interest of the employer and would fit within the general policy statements of Section 7.02. But moving the pickup truck without specific permission does not show a lack of respect, particularly in these circumstances. Grievant generally tried to avoid Deich rather than antagonize her. The conduct did not violate this policy. The County has not established a disciplinary interest in the conduct at issue here.

It its true that these facts can be placed in the broader context of the difficult personal relationship which Grievant and Deich were experiencing. Arguably, that context would

truck near an area that Grievant needed to mow could be seen as disrespectful or inviting an incident. Arguably the moving of the pickup could be viewed as an attempt by Grievant to have a better relationship with Deich. These considerations become too speculative to draw conclusions from in the absence of a pattern or course of conduct on the part of Grievant which would be offensive. The County could have made a specific rule or policy requiring permission to move any vehicle any time. It has not established such a rule or policy. That is a generality that has been subject to exception.

Without a disciplinary interest in the established conduct here, the County does not have just cause for the discipline given to Grievant. Without just cause for discipline it follows that the second element, whether the discipline imposed reasonably reflects the disciplinary interest, need not be considered.

Accordingly, based upon the evidence and arguments in this case, I issue the following

AWARD

The grievance is sustained. The employer will remove the warning letter and make Grievant whole. The parties stipulated at the hearing that the Arbitrator would retain jurisdiction over the remedy matters of time and mileage if the parties are not able to agree on those items. Accordingly, the Arbitrator will retain jurisdiction for 60 days after issuance of this Award for those purposes.

Dated at Madison, Wisconsin this 6th day of January, 2005.

Paul Gordon, Arbitrator

