

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WAUPACA COUNTY**

and

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

Case 144  
No. 63671  
MA-12667

(Jerry Olson Verbal Reprimand Grievance)

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**Appearances:**

**Gerald D. Ugland**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of Waupaca County Highway Department Employees Union, Local 1756, AFSCME, AFL-CIO.

**Tony J. Renning**, Davis & Kuelthau, S.C., Attorneys at Law, appearing on behalf of Waupaca County.

**ARBITRATION AWARD**

Waupaca County, hereinafter County or Employer, and Waupaca County Highway Department Employees Union Local 1756, AFSCME, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement covering the period January 1, 1999 through December 31, 2001 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 Commissioner or member of the Commission staff to hear and decide the instant grievance. Susan J.M. Bauman was so appointed. A hearing was held on September 14, 2004, in Waupaca, Wisconsin. A transcript of the hearing was filed on September 28, 2004. The record was closed on December 7, 2004 upon receipt of all post-hearing written argument.

**ISSUES**

The parties were unable to stipulate to an issue or issues for resolution in this case. However, they agreed that the Arbitrator could frame the issues based upon the relevant evidence and argument, as well as the parties' suggested issues. The Union frames the issue as:

Did the employer violate the Collective Bargaining Agreement when it reprimanded Jerry Olson for activity on October 14 and October 20, 2003? If so, what is the remedy?

The Employer frames the issues as:

Did the County have just cause to issue Jerry Olson a verbal reprimand for his failure to start work on time for the second time in less than one week? If so, what is the remedy?

Based upon the relevant evidence and argument in this case, the undersigned adopts the following statement of the issue:

Did the County have just cause to issue Jerry Olson a verbal reprimand on October 24, 2003? If not, what is the appropriate remedy?

### **RELEVANT CONTRACT PROVISIONS**

#### **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:

. . .

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

. . .

2.02 Any dispute with respect to the reasonableness of the application of these management rights by the Employer shall be appealable by the Union or an employee through the grievance and arbitration procedure contained herein.

. . .

#### **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 offenses or repeated violations, suspension may be more severe. No suspension shall exceed thirty (30) calendar days.
- 9.04 Notice of discharge or suspension shall be given to the employee personally and written memorandum stating the cause thereof filed in the Commissioner's office with a copy sent to the Union.

Article XIV-Normal Work Week & Work Day

- 14.01 The normal work week and the normal work day of the Waupaca County Highway Department shall be as follows:
- 14.02 The normal work week shall be forty (40) hours per week to be worked in five (5) consecutive eight (8) hour days, Monday through Friday. The normal hours of work shall be 7:00 a.m. to 12:00 noon, and 12:30 p.m. to 3:30 p.m. daily.

. . .

STATEMENT OF FACTS AND POSITIONS OF THE PARTIES

Lance Penney is one of two Patrol Superintendents for the Waupaca Highway Department. In this capacity he is the supervisor of, and makes work assignments to, among others, Jerry Olson, the Grievant in this matter. The normal work day in the Highway Department starts at 7:00 a.m., though Penney is usually there earlier in the morning to review assignments so that he can begin distributing them at 7:00 a.m. Until some time after the events giving rise to this grievance, employees would be in various places in the Employer's facilities and Penney would have to walk around to hand out the assignments. Grievant, however, for the twenty years that he has worked for the Highway Department as a truck driver, has waited near the time clock by the main office door to receive his work orders. The normal procedure for the County's employees, after receiving their orders, is to get the truck that is needed for the particular job, perform a predriving inspection, get the materials needed to do the job, if any, and proceed with the job.

On both October 14 and October 20, 2003, Grievant received his work orders at his usual location, by no later than 7:05 a.m. Grievant does not dispute Penney's testimony that he was given his orders by that time on either day in question. At 7:20 a.m. on October 14 and at 7:18 a.m. on October 20, Penney observed Grievant engaged in conversation with other employees, rather than engaged in pre-work preparations or being on the road.

On October 14, Grievant was assigned to patch potholes on Highway 96, previously Highway 10, along with another employee. At approximately 7:20 a.m., Penney observed Olson and a couple of other employees, Roger Hansen and Don Grorich, leaning against the pickup truck, engaged in conversation. Penney told the individuals in questions that it was "time to get to work." In response to this, the group dispersed and went about their business.

The Grievant does not deny that he was engaged in conversation with these individuals. However, according to him, the discussion was about Don Grorich's work assignment for the day. After Penney told them to get to work, they got their shovels and "stuff" and took off in either a five-yard truck or a one-ton truck to do their assigned work.

On October 20, Grievant was assigned to paving for the Township of Weyauwega, which required hauling blacktop to the paver. Grievant was given orders to go to the hot mix plant, pick up the material, and deliver it to the paver. Penney's expectation was that Olson would start his truck, tri-axle number 1144, perform his predriving checkup and leave for the hot mix plant. The predriving checkup, according to all of the Employer's witnesses, takes about five minutes, and consists in checking the tires, lights, oil and antifreeze levels, and generally making sure that the truck is ready and safe to be on the road. At approximately 7:18 a.m., Penney went to the back of the shop and observed Olson sitting in his truck which was running, talking to another employee, Charles Whitman. Penney believes that the truck had been moved from where it was parked overnight. Penney walked up to the truck and again stated that it was time to get to work, and also said words to the effect that Jerry likes to follow the contract to a "T", so he should be on the road. Penney walked back to the shop with Whitman and determined that Olson and Whitman had been engaged in a conversation regarding the sale of a pontoon boat.

The Grievant, again, does not deny that he was engaged in conversation at the time in question. He, however, contends that his truck had not been moved from its overnight parking place, that it could not have been moved at that time, and that the tri-axle truck that he has been assigned since 1994, number 1144, requires at least ten (10) minutes to build up sufficient air pressure in order to drive the truck. Unlike other tri-axle trucks that retain air pressure over night, this truck loses it, and it must be built up again each day, taking ten minutes to do so. Grievant contends that he was sitting in the truck, waiting for the air to build, when Whitman came up and started talking to him.

Having talked to Olson twice in less than a week about the need to get to work immediately upon receipt of work orders, Penney talked to his boss, Dean Steingraber, Highway Commissioner, about the situation. Together they discussed the circumstances and Olson's past work performance and decided to issue a verbal reprimand to discipline him and to let him know that his failure to get to work immediately was not acceptable. In deciding to issue discipline in this matter, both Steingraber and Penney determined that they were unaware of any other situation where an employee had failed to start work immediately twice within a one week period.

On October 24, 2003, Olson was issued a verbal warning by his supervisor, Lance Penney, for the events of October 14 and October 20, 2003. The "Explanation of incident(s)" contained therein stated:

On two (2) different occasions, (October 14 and October 20, 2003) Jerry Olson had been given orders for the day and was not following through with them.

Mr. Olson was observed at 7:20 a.m. and 7:18 a.m. on the two occasions in group discussions in the Waupaca Shop yard. Mr. Olson was reminded that the contract states that the “normal workday” begins at 7:00 a.m., that he had been given his orders for the day and was expected to be on his way. Mr. Olson was not working after getting his orders and delayed beginning his workday beyond the “normal” starting time.

On November 16, 2003, a grievance was filed on Olson’s behalf. Therein, the Union contended as follows:

Often, people in the Waupaca shop are not given orders at 7:00 a.m. Nowhere in the “explanation of incident”, does it state what time Mr. Olson was given his orders, therefore the trucks may have been warming and building air at the time Mr. Penney observed the group discussion. And, on that matter, why is Mr. Olson being singled out for this discipline? Also, Mr. Olson requested and was denied union representation, a clear violation of article 1.01, and any and all other articles of the collective bargaining agreement that may apply.

Settlement of this grievance will be satisfied by recinding [sic] the verbal warning disciplinary report on Mr. Olson.

The Employer’s position is that only Mr. Olson was disciplined because he was the only employee involved in both incidents, on both October 14 and October 20. Penney testified that Olson never requested Union representation when presented with the written warning on October 24. Steingraber testified that, based on conversation with Penney, he believed Olson was given the opportunity for representation and did not ask for it.

The Step 1 denial of the grievance, signed by Patrol Superintendent Robert Carper on November 18, 2003, provides the information requested by the Union as to the time the orders were given to Olson. This document reiterates the fact that Olson did not request Union representation when given the reprimand. The Step 2 denial of the grievance, signed by Highway Commissioner Dean Steingraber on November 20, 2003, reiterates that Olson did not request representation.

The issue of representation was not pursued by the Union at hearing and will not be considered by the undersigned.

Additional facts are discussed below.

## DISCUSSION

The issue to be decided is whether the County had just cause to issue a verbal warning to Jerry Olson. Where the parties, as here, have not stipulated to the standards defining just cause, the analysis must address two elements. First, the County must establish the existence of the conduct by the Grievant in which it has a disciplinary interest. Second, the County must establish that the discipline imposed reasonably reflects that interest.

The complained of conduct is the alleged failure of the Grievant to commence work immediately after receiving his work orders on October 14 and again on October 20. On each of these occasions, he was verbally told by his supervisor, Lance Penney, to, in essence, get to work at once. In each instance, Olson did so, without making any attempt to explain to Penney any reason for why he was engaged in conversation with other employees at the time rather than being actively engaged in his work assignments.

The Employer did not discipline the other employees with whom Olson was talking on October 14, nor did the Employer discipline the employee with whom Olson was talking on October 20. The Employer is quite clear that Olson was disciplined because he was the only person engaged in conversation with other employees on two different occasions, in a one week period. In fact, both Penney and Steingraber testified that they could not remember any other instances of an employee having acted in such a manner throughout the course of their employment with the Employer.

The Union argues that Penney never bothered to ask Olson why he was not working, or what he was doing, on either of the days in question. While the better practice would have been for Penney to request an explanation of Olson, there is nothing in the record to indicate that Olson ever bothered to provide an explanation of his actions, not on October 14 or October 20, when he was told to get to work, not on October 24 when he was given the verbal warning, nor at the first or second steps of the grievance procedure. It was only at the arbitration hearing that Olson, apparently for the first time, had an explanation for why he was talking to others, rather than working at 7:20 a.m. on October 14 and at 7:18 a.m. on October 20.

With respect to October 14, Grievant explains his conversation as a discussion regarding Mr. Grorich's assignment for that day. Though knowing the work assignment of another employee might be valuable, such a conversation could take place while the employees are engaged in preparation for their work. Here, the clear and uncontroverted testimony is that Olson and the others were leaning against a pickup truck. To the undersigned, this does not constitute a valid reason for not working.

With respect to October 20, Olson argues that while he was sitting in his truck, waiting for the air to build so that it could be driven, Whitman approached him and the two engaged in conversation regarding the sale of a pontoon boat. Olson also contends, in his brief, that he

and Whitman discussed “necessary business” as well. This appears to be a rationale developed not only after the fact of October 20, but also after the hearing in this matter. There is no testimony to support Olson’s statement that these two individuals discussed “necessary business” on the morning of October 20.

Olson’s main defense for not being on the road by 7:18 a.m. on October 20 is that he was waiting for the air to build. It is established that the air pressure must build to at least 60 pounds before the brakes will release and the truck will be able to be driven. Neither Olson nor Penney was able to testify with any certainty as to where tri-axle 1144 was parked on the morning of October 20. Penney thinks that the truck had been moved from its parking spot to the location where he observed Olson and Whitman engaged in conversation, while Olson states that the truck had not been moved, and could not have been moved, as insufficient pressure had built up.

If there were proof that the truck had been moved, it would be easy to determine that the Grievant’s conduct on October 20, combined with the events of October 14, was conduct in which the Employer had a disciplinary interest. Absent such proof, the undersigned must look at the other evidence presented about truck 1144 and Grievant’s actions upon being directed to get to work.

Grievant presented a document dated July 27, 2004 that purports to be a listing of work orders in the Waupaca County Highway Department for the period January 1, 2002 through June 1, 2004 for truck 1144, the tri-axle truck Grievant has driven on a regular basis since 1994. Entries dated January 25, 2002 as “Air Comp” and dated January 16, 2004 as “Air Compr” were presented by Grievant to indicate on-going problems with the air compressor on truck 1144, and the attendant difficulty of maintaining air pressure over night to operate the brakes. Grievant testified that after January 16, 2004, it was no longer necessary to wait 10 minutes to build up the air on the truck, as he contends it had been since 1994. After January 6, 2004, Grievant testified that five (5) minutes was sufficient to build the air, as it is for most trucks.

The part numbers for each of the above entries are different. Neither Grievant nor Michael Krueger, Equipment and Facilities Superintendent for the Waupaca County Highway Department, could testify with certainty that the same part was replaced on each of these two occasions. In addition, Krueger testified that, if indeed an air compressor had been installed on the two dates referenced, it could have been for numerous reasons including oil crank failure, rebuild failure, oil consumption, or any number of things.

Krueger also testified that in 1994 or 1995, when truck number 1144 was new, there were concerns about this truck and another bought at the same time. They were checked at the time and it was determined that it took three to five minutes for the air pressure to build in

those particular trucks, well within the normal range. Krueger had no recollection of any recent conversations with the Grievant regarding truck 1144, or that it took ten (10) minutes for air to build in this truck.

The Grievant testified that he had told Krueger about the problem since 1994. Olson admitted that the last time he told Krueger about the problem was years before October 20, 2003. Olson never complained in writing about the problem, nor did he fill out any written requests for repair on the truck, even though he had been instructed to do so. Further, Olson never told his supervisor, Penney, or the Highway Commissioner, Steingraber, that truck 1144 took ten (10) minutes to build air. Even when confronted with discipline for failing to promptly get to work, Olson did not tell Penney that he couldn't drive the truck yet or that he was waiting for air to build.

When, on October 20, Penney told Olson and Whitman that it was time to go to work, Olson was able to put his truck into gear, drive to the wash bay, wash his windows, and leave. Neither Penney nor Olson testified that there was any hesitation or any indication that Olson may have thought the air hadn't yet built up sufficiently. If the truck was ready to move when Penney told the Grievant to get to work, the logical question is: how much before 7:18 a.m. was the truck ready? Clearly, Penney would not know, but Olson knew it was ready when given the directive to start working.

It may well be that truck 1144 loses air over night, that it takes somewhat longer than other trucks to build air, that Olson had not moved the truck prior to being seen by Penney. However, the undersigned is not persuaded that Olson was engaged in a conversation for only as long as it took for the truck to build air. The Grievant did not commence his workday upon receipt of his work orders. Rather than receive his orders, perform the predriving inspection and leave for the hot mix plant, Olson engaged in a non-work related conversation with another employee.

Grievant's behavior in not commencing work immediately on the days in question is conduct in which the County has a disciplinary interest. It is important that employees start work on time as there is work to be done that the employees are paid to do. The Highway Department budget is based on getting work done on a timely basis. Paving work, in particular, is highly scrutinized by the towns for which the work is being done. In addition, contractors wait for the materials to be delivered as soon as possible. The Waupaca County Highway Department must provide service in as efficient and timely fashion as possible. Delays by employees in commencing their work assignments are detrimental to the Employer.

Having concluded that the Employer has a disciplinary interest in the conduct complained of, the undersigned turns to the question of whether the discipline imposed reasonably reflects that interest. In concluding that it does, I note that the level of discipline



imposed, a verbal warning, is the lowest level that can be imposed in a system of progressive discipline. It is appropriately imposed to draw the employee's attention to the fact that his conduct is unsatisfactory and calls upon him to correct the deficiency.

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

**AWARD**

1. The Employer had just cause to discipline Jerry Olson.
2. The grievance is denied.

Dated at Madison, Wisconsin, this 6<sup>th</sup> day of January, 2005.

Susan J.M. Bauman

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Susan J.M. Bauman, Arbitrator