BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KEWAUNEE COUNTY

and

KEWAUNEE COUNTY HIGHWAY EMPLOYEES, LOCAL 1470, AFSCME, AFL-CIO

Case 65
No. 63715
MA-12688

(R.V. Discharge)

Appearances:

Elma Anderson, Corporation Counsel, Kewaunee County, 620 Juneau Street, Kewaunee, WI 54216, on behalf of the County.

Neil Rainford, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1311 Michigan Avenue, Manitowoc, WI 54220, on behalf of Local 1470 and the Grievant.

ARBITRATION AWARD

According to the terms of the 2002-04 labor agreement between Kewaunee County (County) Kewaunee County Highway Employees, Local 1470, AFSCME, AFL-CIO (Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff as impartial arbitrator to hear and decide a dispute between them regarding the discharge of Truck Driver R.V. 1/ The Commission appointed Sharon A. Gallagher to hear and resolve the dispute. Hearing was held at Kewaunee, Wisconsin, on September 1, 2004. A stenographic transcript of the proceedings was made and received by September 16, 2004. The parties agreed at hearing to submit their initial briefs postmarked November 1, 2004, for the Arbitrator's exchange and they reserved the right to file reply briefs. The Arbitrator received the initial briefs on November 30, 2004, and exchanged them. By letter received on January 27, 2005, the County advised that neither party would file a reply brief, whereupon the record herein was closed.

1/ The Grievant's initials will be used throughout this Award.

ISSUES

The parties stipulated that the Arbitrator should determine the following issues in this case:

Did the County violate the collective bargaining agreement by terminating R.V. effective April 22, 2004? If so, that is the appropriate remedy?

REVELVANT CONTRACT PROVISIONS

ARTICLE 18: VESTED RIGHT OF MANAGEMENT

A. GENERALLY

Except as otherwise herein provided:

1. The right to employ, to promote, to transfer, discipline and discharge employees for just cause and the management of the property and equipment of the Highway Department is reserved by and shall be vested exclusively in the Kewaunee County Board of Supervisors through its duly elected Highway Committee and through the duly appointed Highway Commissioner. The Highway Commissioner through authority vested in him by the Highway Committee of the County Board shall have the right to determine how many men there will be employed or retained together with the right to exercise full control and discipline in the proper conduct of the Highway Department operations. The county through its Highway Committee and Highway Commissioner shall have the sole right to contract for any work it chooses, direct its employees to perform such work, wherever located in its jurisdiction, subject only to the restrictions imposed by this Agreement and the Statutes or the State of Wisconsin.

2. While it shall be the preferred practice of the County to have all work performed by County employees, when the efficient performance of the County's responsibilities require it, the County, through its Highway Committee and Highway Commissioner shall have the right to subcontract work normally performed by the bargaining unit. The Highway Commissioner shall notify the Union President and Grievance Committee when subcontracting becomes necessary. No work may be subcontracted if any member of the bargaining unit is on lay off at the time, nor shall such subcontracting result in reduction of hours or size of the work force.

3. The Board shall have the exclusive right to determine the hours of employment and the length of the work week and to make changes in the details of employment of the various employees from time to time as it deems necessary for the efficient operation or the Highway Department, and the Union and the members agree to cooperate with the Board and/or its representative in all respects to promote the efficient operation of the Highway Department."

B. INTOXICANTS

Intoxicating liquors, including beer and wine, shall not be consumed by any Highway Department employee during working hours, from the time the employee punches in to the time the employee punches out, either on or off county premises. Any employee found not abiding by this regulation shall be subject to one (1) week lay-off without pay for the first (1st) offense; one (1) month lay-off without pay for the second (2nd) offense; and dismissal without rehiring recourse for their third (3rd) offense.

C. THEFT

If any employee is caught stealing, the employee is automatically discharged,

D. PERSONNEL FILES

Employees may examine the contents of their personnel files upon reasonable notice. Copies of any requested materials from the personnel file shall be provided to employees by the Employer at no cost.

E. REPRESENTATION

Employees shall be entitled to Union representation at any time discipline is administered.

F. NOTICE OF DISCIPLINE

Employees and the Union shall be given written notice of the reason(s) for discipline at the time discipline is administered.

ARTICLE 19: COMMERCIAL DRIVER'S LICENSE

A. TESTING

The County will pay testing fees for any current employee to obtain the CDL and any endorsements required by his or her current job classification.

The County will permit time off with pay for any current employee to take the knowledge test and driving test, if required, and will permit the use of County owned equipment for such tests.

B. LOSS OF CDL

If an employee's driver's license is suspended or revoked, and an occupational license is not granted, the County shall make a good faith effort to place the employee in another position. If that position is at a lower pay grade than the employee is presently receiving, the employee shall receive the pay grade of the job, but in any event, no lower than Class Grade 2.

C. PHYSICAL EXAMINATIONS

The County will contract with a local physician or clinic to provide physical examinations to any county employees who are required to have them, for any employment related purpose. If an employee is disqualified by reason of a medical condition from obtaining any CDL endorsement, that employee may bid into any open position for which he or she is qualified, which does not require such endorsement. That transfer will be at the rate of the new job classification.

BACKGROUND

The Grievant, R.V. was employed by the County Highway Department (Department) as a Truck Driver for almost five years, from his hire on or about May 10, 1999, until his discharge on April 22, 2004. At the time of his hire, the County required Truck Drivers to possess a CDL 2/ or to be able to get a CDL within six months after their hire at their own expense. R.V. had a chauffeur's license (the predecessor to the CDL) prior to his hire into the Department. 3/

2/ The County gives all applicants a job description at the time they apply. Currently, Department job descriptions require that employees have a valid CDL. There is no specific question on the application form asking if applicants have a valid driver's license or a valid CDL. There is a place on the application to list special qualifications and some applicants have put license information in this space, but there are no instructions on the application directing applicants to do so.

3/ Since 2000, the County has placed the CDL requirement in its advertisements for openings for Truck Drivers. The County does not normally ask applicants if they have a valid CDL at interviews; the County only checks this detail after interviews are completed and just prior to making an offer of employment.

On November 4, 2000, R.V. was arrested for operating his personal motor vehicle in Door County while intoxicated (OWI). On December 4, 2000, R.V. plead "no contest" to the charge and he was convicted thereof in Door County Circuit Court. By notices dated November 30, 2000, and December 4, 2000, the State of Wisconsin Department of Transportation (DOT) notified R.V., as follows:

. . .

> Your privilege to operate a motor vehicle on Wisconsin highways is suspended by the Door County Circuit Court, effective December 4, 2000, for six months because of your conviction for operating while under the influence of an intoxicant or controlled substance. Refer to the reverse side of this order for assessment information.
>
> Under this withdrawal you are eligible to gain reinstatement on June 5, 2001. ANY INDEFINITE OR LONGER PERIOD OF REVOCATION, SUSPENSION OR DISQUALIFICATION MAY ALTER THE DATE OF ELIGIBILITY.
>
> SEE BACK FOR FURTHER INFORMATION INCLUDING REINSTATEMENT REQUIREMENTS AND FEES.

. . .

The reverse sides of both notices contained instructions concerning reinstatement, how to get an occupational license and information on OWI alcohol/drug assessments as well as a "Warning," as follows:

Order of Suspension Instructions

> **Important - Warning**
>
> **Surrender any suspended or revoked license you have. Do not operate a motor vehicle in Wisconsin until your period of suspension or revocation is over, you have paid a reinstatement fee and you have a valid operator's license.**
>
> The penalty for driving a vehicle while your operating privilege is suspended or revoked may include jail and a fine of $5,000. The penalty will vary with the number of convictions you have in a five year period. Not receiving an order of suspension or revocation is not a defense to the charge of operating while suspended or revoked.

While your operating privilege is suspended or revoked you may get a DOT Identification Card. Contact your nearest DMV Service Center to apply.

Reinstatement Information

If you have your Wisconsin driver license in your possession or you are an out-of-state resident, mail a $50 check or money order payable to Registration Fee Trust to the address below. Be sure to include your full name, birth date, Wisconsin driver license number, social security number, and current address.

Wisconsin Department of Transportation
Compliance and Restoration Section
4802 Sheboygan Ave., Room 334
PO Box 7983
Madison, WI 53707-7983

After the suspension period is over, you can confirm that your $50 has been received and your Wisconsin driving privilege is valid by calling 808-284-7133 between 8 am. and 12 midnight. You will need your social security number and birth date to access this information.

. . .

Occupational License Information
If your operating privilege is suspended under Chapter 343 or Section 767.303 or Chapter 961, you may be eligible for an occupational license. Complete an application at your local DMV Service Center. A $40 nonrefundable fee and proof of financial responsibility are required.

Applying does not guarantee issuance of the occupational license.

Operating While Intoxicated (OWI) Assessment Information
You must comply with an alcohol/drug assessment to be eligible to reinstate your operating privilege or to retain an occupational license. If you did not receive a referral, contact the court where you were convicted.

Noncompliance for Failure to Complete a Driver Safety Plan Suspension Information
You are entitled to a review of the driver safety plan. Your request for review must be in writing and postmarked within 10 days of the date of this order.

Mail to:
Wisconsin Department of Transportation
Alcohol/Drug Review Unit
4802 Sheboygan Ave, Rm 334
P O Box 7918
Madison WI 53707-7918

. . .

Also on December 4th, R.V. applied for an occupational license (which he apparently received). 4/ This license enabled R.V. to legally operate motor vehicles for the entire period of his 2000-01 suspension. R.V. did not notify County managers of the 2000-01 suspension of his driving privilege at any time.

4/ As of the date of this hearing, DOT had no record of the issuance of an occupational license to R.V. in December, 2000, but it had retained R.V.'s application therefor. DOT experts Beuhler and Warren stated that they believed R.V. had been granted an occupational license in December, 2000, for the period of his 2000-01 suspension.

On February 2, 2002, R.V. posted out of his Truck Driver position and into a position as a Turn-A-Pull (TAP) operator on the Department's construction crew. The TAP is essentially a scraper which is used off-road on constructions sites. A CDL is not required to operate the TAP. After posting into the TAP position, R.V. continued to drive County trucks frequently, as his TAP was not always needed on construction sites and truck driving is assigned by seniority. These assignments were made by the foreman asking employees (from the most to the least senior) if they wished to drive truck. As R.V. had relatively low seniority, he often ended up driving truck on these occasions.

Also in February, 2002, the County evaluated R.V.'s work at the County. R.V.'s work was rated, on a scale from 1 to 5, between "good" and "excellent" (the top rating being "outstanding" and the bottom rating being "poor"). This was the only evaluation R.V. received at the County. It is undisputed that R.V. was a good worker who had received no discipline prior to his discharge.

On December 27, 2002, R.V. hit an attended vehicle in Green Bay, while driving his personal motor vehicle and he was later arrested for the crime of hit and run. Ultimately, R.V. was charged with failure to stop/report an accident, a lesser non-criminal charge. R.V. was convicted of this lesser charge on April 18, 2003. On May 16, 2003, DOT sent R.V. the following notice, once again suspending his driving privilege for six months, as follows:

. . .

Your privilege to drive a motor vehicle is suspended.

- Effective: April 18, 2003
- Time Period: 6 Months
- Reason: Failure to report an accident
- Convicting Court: Brown County Circuit Court Br 1
- Court Telephone No: (920)448-4162

If you have any questions about the violation, contact the convicting court.

You may be eligible for reinstatement on October 19,2003. If you have other revocations or suspensions, your actual reinstatement date may be later.

Please see the back of this letter for reinstatement requirements and other licensing information.

The reverse side of this notice contained the following verbiage which was different from that on the reverse sides of the two notices R.V. had received in November and December of 2000:

Important Information For You
Do not drive until you confirm that you are legal to do so and you have a valid license in your possession.

A court order which vacates, appeals or reopens the conviction(s) referred to in this letter may change the status of this withdrawal.

The penalty for driving while suspended or revoked may include jail time and a fine up to $5000.

Reinstatement Information

Wisconsin and out of state residents must pay a $50 reinstatement fee. (If you have also been revoked, you must reinstate in person at a DMV Service Center, except express offices, when the revocation period is over. Do not mail in a reinstatement fee.)

- Mail a $50 check or money order to the address below (no earlier than 60 days prior to the date you are eligible to reinstate). Make the check or money order payable to Registration Fee Trust.

Wisconsin Department of Transportation
Compliance and Restoration Section
4802 Sheboygan Avenue, Room 334
PO Box 7983 Madison, WI 53707-7983

- Be sure to include your full name, date of birth, social security number, and current address. Please print your Wisconsin Driver ID number on any correspondence. After the suspension period is over, you can confirm that your $50 has been received and your Wisconsin driving privilege is valid by calling 608-264-7133 between 6 a.m. and 12 midnight. You will need your social security number and date of birth to access this information.

If your operating privilege is under revocation or suspension in any other state, you must satisfy the other state's reinstatement requirements before Wisconsin will issue a license.

Occupational License Information

You may be eligible for an occupational license. Complete an application at any DMV Service Center, except express offices. If your operating privilege is also revoked as a Habitual Traffic Offender, file a petition with a circuit court in your county of residence. A $40 nonrefundable fee and SR22 insurance certificate are required. Applying does not guarantee issuance of an occupational license.

R.V. never applied for an occupational license during the 6 month period of this suspension and R.V. never told County managers that his driving privilege had been suspended again. R.V. stated herein that he did not apply for an occupational license at this time and he did not believe he needed to tell the County his driving privilege had been suspended because his wife was able to drive him to and from work every day and because he believed that he still had a valid CDL for driving at work. 5/

5/ R.V. stated that he found out much later, in January, 2004, that suspension of his driving privilege for conduct behind the wheel of his personal vehicle meant that his CDL was also suspended for the period from April 18 through October 19, 2003.

R.V.'s driver's license was reinstated on October 22, 2003, just after the 6 month suspension for failure to stop/report an accident in Green Bay expired (Jt. Exh. 15). On November 4, 2003, R.V. filled out a County form requesting to return to a Truck Driver position from the TAP. On the form, R.V. affirmatively indicated that he had a valid driver's license and listed his driver's license number.

From April 18 to October 21, 2003, the period of his suspension, it is undisputed that R.V. drove County vehicles that required the driver to have a valid CDL, as follows:

May, 8 times
June, 10 times
July, 7 times
August, 1 time
September, 6 times
October, 4 times.

On November 30, 2003, R.V. was arrested again in Door County for OWI in his personal vehicle. 6/ At the January 5, 2004 hearing on the matter, R.V. was convicted of the OWI charge, his driving privilege was revoked for 13 months, he was sentenced to 20 days in jail, fined and ordered to get an alcohol assessment. For reasons unknown herein, the Court stayed the effective date of its judgment until April 19, 2004, but, the 13-month license revocation ran from the date of the conviction, January 5, 2004, despite the Court's stay.

6/ R.V. was also charged with deviating from his lane of traffic on November 30, 2003, and at the January 5, 2004 hearing, he was also convicted of this charge and he lost four points for this violation.

On January 8, 2004, DOT sent R.V. a notice suspending his driving privilege, effective January 8, 2004, based upon his blood alcohol content (BAC) having been over the legal limit at the time of his November 30, 2003, arrest. According to this notice, R.V.'s license could be reinstated on July 6, 2004. On March 3, 2004, DOT sent R.V. an amended notice of the six-month suspension of his driving privilege, which gave him a date for reinstatement of July 9, 2004. 7/

7/ The reverse sides of the January 8 and March 3, 2004, notices were identical to that sent to R.V. on May 16, 2003. However, these notices of suspension were trumped by the Door County Court's judgment, described above, which required, inter alia, the revocation of R.V.'s driving privilege for 13 months.

R.V. did not apply for an occupational license at any time during his 13-month revocation. On January 8, 2004, three days after his OWI conviction and the revocation judgment, R.V. requested in writing to leave his Truck Driver position and return to the TAP position. R.V. never notified the County that his driving privilege had been revoked. R.V.'s date for license reinstatement was February 7, 2005 (Jt. Exh. 15).

FACTS

On January 7, 2004, after employees had been assigned jobs for the day by Department managers, 8/ Patrol Superintendent Geier called Highway Commissioner Jandrain (who was at a meeting out of the office) and stated that he had heard on the radio and from some of the men in the shop that R.V. no longer had a driver's license. Jandrain consulted with the Sheriff (who was also attending the meeting) and told Geier that if this were the case, he (Geier) should immediately remove R.V. from the County truck he was assigned to drive that day. Geier called the Sheriff's Department to double check the status of R.V.'s license. The Sheriff's Department employee confirmed that R.V.'s license had been revoked as of January 5, 2004. Geier called Jandrain back and relayed this information. Jandrain told Geier to go out to the jobsite immediately and pull R.V. off the County truck he was driving that day.

8/ On January 7, 2004, R.V. had been assigned to drive a truck from the shop to the jobsite. A CDL was required to drive the truck.

Geier went to the jobsite and took R.V. out of the truck. R.V. asked why he was being removed from the truck. Geier responded that it was because R.V. no longer had a CDL. R.V. asked where Geier had gotten his information. Geier said that he had heard it on the radio and that he had called the Sheriff's Department and they had confirmed that R.V. did not have a driver's license. Geier told R.V. that he would not be assigned to drive County trucks "until we find out what's what."

When Jandrain returned to his office that day, he requested that that Department investigate R.V.'s situation. Jandrain also ordered that R.V. be given inside work and work not requiring a CDL pending the outcome of the investigation. 9/ It is undisputed that there was plenty of work to keep R.V. busy and he continued to work full-time from January 7, 2004, until his discharge on April 22, 2004.

9/ Jandrain stated that during his tenure as Commissioner, he had never had an employee lose his CDL before R.V.'s case arose.

Sheriff's Department Deputy McCambridge conducted the investigation into R.V.'s license situation beginning on January 9, 2004. McCambridge first spoke to Jandrain. He then he requested R.V.'s license history from the Wisconsin Circuit Court Access System (CCAS). The latter information showed that R.V. had had prior suspensions and that his license was suspended as of January 5, 2004. McCambridge then went through Highway

Department records (timecards) to determine whether R.V. had driven County CDL vehicles while suspended. It appeared to McCambridge that R.V. had driven during periods when his license had been suspended.

On January 17, 2004, McCambridge questioned R.V. R.V. freely agreed to the interview. McCambridge stated that he went over timecards with R.V. which showed that R.V. had driven vehicles requiring a CDL during periods when R.V.'s driving privilege had been suspended, from December, 2000, to June, 2001, and from April to October, 2003, as well as after January 4, 2004. During the interview, R.V. cooperated and confirmed the times that he had driven while suspended. However, R.V. also told McCambridge that he thought he had an occupational license during the 2000-01 suspension and that he thought his CDL was valid after January 4, 2004. R.V. also told McCambridge that he "kind of knew that he, through his classes and that that he couldn't drive, but he needed to get a paycheck" (Tr. 88). 10/

10/ R.V. never denied making the statement quoted above to Officer McCambridge. Therefore, it is credited. R.V. stated herein that he did not recall having to learn anything about rules/laws governing CDL's before he took the CDL test or in various classes he has taken. R.V.'s assertions on this latter point are incredible.

Officer McCambridge finished his investigation in February, 2004, but his report was not typed until early March, 2004. McCambridge recommended that R.V. be criminally charged for driving while suspended during 2003-04 but he found that R.V. had an occupational license during 2000-01 so he did not recommend any charge be brought against R.V. for the period of the 2000-01 suspension.

On March 8, 2004, the County District Attorney filed a complaint charging R.V. with operating a commercial motor vehicle while disqualified during the period of his 2000-01 suspension. 11/ The Complaint read in relevant part as follows:

. . .

> **Count 1: OPERATING A COMMERCIAL MOTOR VEHICLE WHILE DISQUALIFIED**
>
> The above-named defendant between December 4. 2000 until June 5, 2001 in Kewaunee County, Wisconsin, did operate a commercial motor vehicle while disqualified under 49 CFR 383.51. contrary to sec. 343.44(1)(d), 343.44(2)(b) Wis. Stats., a Misdemeanor, and upon conviction shall be fined not more than Twenty Five Hundred Dollars ($2,500), or imprisoned for not more than one (1) year In the county jail. or both.

And the Court may suspend the defendant's operating privilege not more than six (6) months.

PROBABLE CAUSE:

On 01/09/04 Deputy McCambridge was informed by Lt. Gulbrand that a driver for the county had been driving a county commercial vehicle while suspended. Deputy McCambridge was Instructed to conduct an Investigation on a date and time the operator was in violation.

Deputy McCambridge spoke with Kew. Co. Highway Commissioner Dale Jandrain who informed Deputy McCambridge that he had learned that one of his operators received an OWI in Door County and was convicted of the violation and suspended. He had asked information from the Sheriffs Dept. as to when the suspension took effect. While checking on this information it was learned that the subject involved, R.V., had prior suspensions. Commissioner Jandrain informed the Sheriff's Dept that he was unaware that V. had been previously suspended and had been operating their vehicles during those times of suspensions. Commissioner Jandrain stated as soon as he learned that V. was suspended he removed him from a truck.

On 01/17/04 R.V. was at the Kew. Co. Sheriffs Dept. meeting with the Kewaunee County Sheriff's Dept. Huber officer. Upon completion of that interview, Deputy McCambridge asked R.V. if he would speak with Deputy McCambridge. Deputy McCambridge informed him that Deputy McCambridge was investigating a traffic crime involving him. Deputy McCambridge informed V. that he did not have to cooperate with Deputy McCambridge but Deputy McCambridge would appreciate his assistance in resolving this incident. Deputy McCambridge informed V. he was free to go at any time during the interview and did not have to complete a statement with Deputy McCambridge. V. stated he would cooperate and would sit down with Deputy McCambridge in the squad room of the Sheriffs Dept.

V. stated he was operating a commercial motor vehicle for the Kew. Co. Highway Dept. between 12/04/00 and 06/05/01 and again on 04/18/03 and 08/21/03. V. said he was suspended on 01/05/04 and was not operating a commercial motor vehicle since that suspension. V. said he had operated while suspended the other times because he felt his CDL was still in effect and he needed to keep getting a paycheck. V. stated that he did not inform any supervisors of his suspension.

. . .

11/ The charge brought was apparently incorrect. However, on May 7, 2004, after being fully advised of his rights in open court, R.V. agreed to plead "no contest" and to be found guilty of the charge in the Complaint (Jt. Exh. 13).

Two informal, extra-contractual meetings were held between Local Union officials, R.V. and Department managers regarding R.V.'s situation. These meetings occurred on April 16 and 19, 2004. Both meetings were held before R.V. was terminated on April 22, 2004, and before the instant grievance was filed on May 4, 2004. At these meetings both sides shared information regarding R.V.'s situation. For example, R.V. shared information that showed that he would not have to lose his driving privilege forever as the County had initially believed, that he would be able to reinstate his privilege on February 7, 2005. During the April 19th meeting, Jandrain, in an effort to emphasize the seriousness of the situation, told R.V. that the County was considering terminating his employment for driving without a license. R.V. admittedly responded, "Gee, you think I'd killed somebody or something" (Tr. 66).

On April 22, 2004, the County called a meeting with the Union and R.V. to deliver the following termination letter to R.V.:

. . .

> This is to inform you that your employment with the Kewaunee County Highway Department is terminated effective April 22, 2004.
>
> You are not qualified to perform the primary duty of your position, in that your driver's license and CDL have been revoked as a result of a criminal conviction for operating a motor vehicle while intoxicated.
>
> Regardless of your license status, your record of traffic offenses, including two convictions for operating while intoxicated and a hit and run during the term of your employment by Kewaunee County, creates a risk which Kewaunee County finds to be unacceptable. The Kewaunee County Highway Department cannot permit you to operate any of its motor vehicles,
>
> After your recent conviction, you failed to notify the Kewaunee County Highway Department of the revocation of your license and CDL. On multiple occasions, you drove a commercial motor vehicle owned by the Kewaunee County Highway Department after your CDL was revoked, which constitutes further criminal offenses. This conduct exposes Kewaunee County and the Kewaunee County Highway Department to liability.

. . .

The Union filed the instant grievance on May 4, 2004.

Evidence Adduced at the Hearing

Jandrain stated that the County had no policy of regularly checking employee driver's licenses prior to January 7, 2004, and it had no written policy requiring employees to notify County management of a suspension or revocation of their driving privilege.

Union President LeGrave stated that there have been no terminations in the Department until R.V.'s; that the last serious discipline issued was a three-day suspension given to a Truck Driver who had had an accident in a County truck in which the truck was damaged and out of service for a time. 12/ LeGrave stated that in that case, the driver had had some history of accidents and he stated that the Union did not contest the discipline. LeGrave also stated that on a date unknown, another employee, Vaser, lost his license for driving drunk but LeGrave had no idea whether Vaser had notified the County of the loss of his license, whether he was given non-CDL work in the Department and LeGrave gave no details concerning Vaser's driving record or his employment record.

12/ No information was submitted to show whether the Truck Driver had been issued a traffic ticket regarding the accident.

DOT experts Kent Beuhler and Mitchell Warren were called by the Union. They testified telephonically herein with DOT Counsel Sobitik also present. The County did not object to this approach. Beuhler and Warren's testimony can be summarized as follows. Suspension of the driving privilege takes the entire driving privilege away: During suspension, the person is not able to legally operate a motor vehicle of any kind. Only if the law permits it can a person whose driving privilege is suspended get an occupational license. If a person whose driving privilege has been suspended does not apply for and obtain an occupational license during suspension, the person would have no privilege to drive either non-commercial or commercial vehicles.

R.V. made an application for an occupational license in December, 2000, and although the DOT does not keep a record of the license itself after a certain time period, Beuhler and Warren believed that R.V. had received such an occupational license as DOT had R.V.'s application therefor on file. This meant that during his suspension in 2000-01, R.V. could legally drive commercial and non-commercial vehicles, subject only to restrictions on the occupational license. R.V. could have gotten an occupational license for the time during the April to October, 2003 suspension of his driving privilege but he did not apply for one.

POSITIONS OF THE PARTIES

The County

The County argued that R.V. had a responsibility to inform it of the suspension/revocation of his driving privilege under Article 19, Section B. In this regard, the County noted that although the express terms of Article 19, Section B, do not require employees to notify the County of the suspension/revocation of their driving privileges, the language of this section implicitly requires such notification before the County's obligation to offer the employee work accommodation is triggered. Were this not the case, the County argued, it would be forced to run driver license checks on every employee prior to the start of each work day. Therefore, the County urged that the language of Article 19, Section B, requires that both sides act in good faith.

Here, the County noted that R.V. had been hired by the County on May 10, 1999; that his driving privilege was suspended for six months in December, 2000, for OWI; and that R.V. then applied for an occupational license for the period of that suspension. Although it could not be verified with the State DOT that R.V.'s application for an occupational license was actually granted, assuming that it was, R.V. had the right to drive County CDL vehicles despite the fact that his driving privilege had been suspended in December, 2000. However, the County argued that R.V. should have informed the County of his suspension even if he sought no work accommodation from the County during that suspension.

In April, 2003, R.V.'s driving privilege was again suspended for six months but he did not apply for an occupational license during the period of his suspension and he did not inform the County that his driving privilege had been suspended. As a result, County records showed that R.V. drove County CDL vehicles 36 times without a license and by law, each occasion constituted a separate criminal offense. On January 5, 2004, R.V. was convicted of OWI and the Door County Court revoked R.V.'s driving privilege for 13 months. Again, R.V. did not apply for an occupational license during the period of this revocation and he drove the County's truck, a CDL vehicle, on January 7, 2004, without informing the County that his driving privilege had been revoked.

In the County's view, the above facts showed that R.V. was properly discharged for misconduct, using County vehicles "to commit criminal offenses"—driving without a valid license. The County contended that R.V.'s actions over time demonstrated that he intended "to commit the same offense again"—to drive County vehicles (which require a valid CDL) at times when he did not have a valid license and without informing the County of the status of his license. The County urged that R.V. could not claim that he did not know the consequences of suspension/revocation of his driving privilege because the documents that he had received from DOT over the years (particularly the reverse sides of those documents) had clearly notified R.V. of the consequences of the suspension/revocation of his driving privilege.

In this case, R.V. did not act in good faith. He failed to inform the County of his loss of driving privileges on three occasions, leaving the County open to potential liability. The County argued that although R.V. was a competent employee at work, the County should not have to employ any employee who cannot be trusted to keep the County informed of their license status and who thereby subjects the County to potential extensive liability.

As Article 19, Section A provides that the County must help employees maintain their CDL's and any necessary endorsements, the County should receive in return the employee's honesty concerning the status of his/her license. R.V. failed in this duty to the County, which constitutes serious misconduct for which R.V. could be immediately discharged. The County therefore asserted that the grievance should be dismissed in its entirety.

The Union

The Union argued that in order to prove that R.V. engaged in misconduct it must prove that there was a clear, consistent work rule requiring employees to notify the County of the loss of CDL privileges and that the employee was aware of that rule. In this regard, the Union noted that in 1990, when the parties inserted the CDL language into the labor agreement, the County could have negotiated language requiring that employees inform the County of the loss of their CDL's but it did not do so.

The Union also pointed out that the County had originally based its discharge decision on incorrect information—that R.V. would lose his license for life due to his January 5, 2004 conviction for OWI. After this information was shown to be false, the Union asserted that the County's reasons for discharging R.V. "began to shift." Although the County argued herein that employing R.V. in a non-CDL position would be problematic, the Union noted that the County had employed R.V. in such a position from January until his discharge in April, 2004. The Union urged that the evidence herein showed that R.V. had separated his work and non-work lives, and as he had an unblemished work record, R.V.'s continued employment at the County did not represent an unacceptable risk, as the County claimed.

The Union disputed the County's assertions that R.V. had lied repeatedly about his license status. On this point, the Union contended that the record showed that R.V. did not understand the legal aspects of his CDL and private vehicle license status; and that the County failed to prove that R.V acted in bad faith or that he had intended to deceive or manipulate the County. In these circumstances, the Union argued that R.V. was not "unsalvageable" as an employee and he should not have been discharged without a prior warning.

The Union argued that the County did not have just cause to discharge R.V. The Union noted that R.V.'s statements to County managers showed that he acted in good faith and did not intentionally misrepresent himself. The Union asserted that R.V.'s statements to Geier and Jandrain in early January, 2004, showed that R.V. honestly believed that he still had a valid CDL. R.V.'s statements that he learned nothing about suspension/revocation of licenses

in his CDL course and that he thought he only needed to have an occupational license if he needed to drive himself to work supported the Union's assertions that R.V. did not understand his CDL privilege.

In addition, the Union urged that Officer McCambridge's report (Jt. Exh. 14, Addendum 1) failed to reflect McCambridge's testimony herein that R.V. told him that he (R.V.) knew that he no longer had a license but that he (R.V.) needed to get a paycheck. This conflicting evidence, the Union argued, should cause the Arbitrator to discredit McCambridge's testimony.

The Union also argued that the County was negligent in not educating employees about the obligations attendant with their CDL privileges and in not issuing work rules and educating employees thereon. The Union noted that there is no work rule requiring employees to inform the County of their license status and that R.V. specifically stated that he did not understand that he was required to inform the County of his license status.

The Union contended that the investigation of R.V.'s alleged misconduct was unfairly done. In this regard the Union pointed out that Jandrain actually terminated R.V. on April 16, 2004, (effective April 22, 2004), based upon the mistaken belief that R.V. would lose his driving privilege for life. In addition, R.V. did not get an opportunity to explain his position prior to his termination.

Indeed, there was no basis for the termination as DOT made a mistake in their paperwork and R.V. was actually eligible for an occupational license 3 days before his April 22nd termination, not ineligible for an occupational license for the 13 months of his suspension, as DOT documentation originally (wrongly) showed (Union Brief, p. 21). Therefore, R.V. was qualified to perform his job. Article 19, Section B, required that the County accommodate R.V. during the entire period of his revocation by assigning him non-CDL work, and as he should not have been fired.

The Union also argued that the penalty assessed against R.V. was not reasonably related to R.V.'s conduct. In this regard, the Union noted that Article 18, Section B, provides for a one-week suspension for consuming alcohol on the job and then progressive discipline is applied to subsequent offenses. Yet, in this case, where R.V. had not engaged in any misconduct at work, he was punished harshly and no progressive discipline was applied.

The Union argued that the record herein showed that the County had subjected R.V. to double jeopardy. In this regard the Union observed that the County had originally disciplined R.V. on January 7, 2004, by removing him from his truck and reassigning him to non-driving work. Months later and without any notice that it intended to take further disciplinary action, the County disciplined R.V. again for the same offense by discharging him. In these circumstances, the Union argued that the County had "saved up infractions" that it had taken too long to decide R.V.'s fate. The Union asserted that it had reasonably believed that the case was resolved after R.V. was removed from his truck on January 7th, and put on non-driving work.

In addition, the County disciplined R.V. for alleged statutory violations charged by the District Attorney which also constituted double jeopardy. The Union observed that the County's action against R.V. used stale misconduct, from 2000-01 and 2003. Finally, the Union argued that because the DA wrongly charged R.V., the County should help R.V. get his wrongful conviction reversed.

In all of the circumstances, the Union urged that the grievance be sustained and that R.V. be reinstated with full back pay and benefits and that his record be expunged of the discharge.

DISCUSSION

Several arguments made by the Union must be dealt with before turning to the ultimate question herein, whether the County had just cause to discharge R.V. The Union argued that in order to hold R.V. responsible for failing to notify the County of the suspension/revocation of his driving privilege, the County should have to prove that it had a clear, consistent work rule in place which required such notification, that R.V. was aware of the rule and that he chose to violate the rule. However, in cases of serious misconduct, where the employee's conduct is not only clearly tied or related to his/her work but also the conduct is so obviously wrong in the circumstances that the employee must have known that he/she could not remain employed after engaging in the wrongful conduct, a specific work rule prohibiting the conduct is not required. As shown by the following analysis, I believe this is a case involving serious misconduct.

The Union argued that it reasonably believed that R.V. had been disciplined when Geier removed him from the County truck on January 7, 2004, making the County's April 22, 2004 decision to discharge R.V. unfair and without due process. There is simply no evidence to support this argument. Rather, it is clear that R.V. was told that he was being removed from his truck on January 7, 2004, and that he would not be assigned to drive again for the County while the County investigated the status of his driving privilege. No one in County management ever told R.V. or the Union that R.V.'s removal from his truck constituted final discipline in his case. Indeed, local Union representatives were aware that the County intended to discipline R.V. after January 7, 2004, as demonstrated by the discussions held between the parties on April 16 and 19, 2004.

In addition, the Union's claim that the County used stale misconduct against R.V. in order to bootstrap its discharge decision is unfounded. The County only discovered the depth of R.V.'s misconduct during its investigation of the status of his license in January, 2004. It was not unreasonable for the County to use the results of its investigation in its discipline of R.V. herein.

The Union argued that R.V. was treated more harshly than others as evidenced by the case of Truck Driver Vaser. The lack of evidence regarding Vaser's case — when it arose,

Vaser's history of license suspension/revocation and whether he notified the County of the loss of his license — require a conclusion that Vaser's case is not sufficient to prove that R.V. was disparately treated. 13/

13/ The other Truck Driver example given by Union President LeGrave was factually distinguishable from R.V.'s case.

The Union also argued that Officer McCambridge's testimony must be found incredible because McCambridge did not recount R.V.'s entire statement, which McCambridge testified to herein, concerning R.V.'s admission that he knew he did not have a license but that he needed to work to get a paycheck. As the Union failed to successfully attack McCambridge's credibility in any way herein, the fact that McCambridge recounted R.V.'s statement in more detail herein is insufficient to discredit McCambridge's otherwise credible testimony.

The Union asserted that Article 19, Section B, requires the County to offer R.V. alternative employment and that this provision prohibits discharge in these circumstances. Section B states two conditions precedent — that an employee's license must first be suspended or revoked *and* an occupational license not granted. These conditions must be satisfied before the County is required to make a good faith effort to offer the affected employee non-CDL employment. The County's obligation (created by Section B) is based upon its receipt of reliable information regarding the employee's license status. However, the contract does not expressly state that employees must notify the County of the status of their licenses. Yet, if an employee wishes to avail him/herself of the provisions of Article 19, Section B, he/she must notify the County of the suspension/revocation of his/her license and the fact that no occupational license was granted before the County is obliged to make an effort to find the employee alternate (non-CDL) work pursuant to Article 19B.

In this case, R.V. never informed the County of the suspension/revocation of his license and he never indicated whether he had an occupational license. Therefore, the County had no obligation to make a good faith effort to give R.V. non-CDL work until it discovered R.V.'s license had been revoked on January 7, 2004, and that no occupational license had been granted to R.V. I note that the County employed R.V. full-time on non-CDL jobs during the investigation of his case from January 7th until his discharge on April 22, 2004, and that he lost no regular work hours. Therefore, the County met its Article 19, Section B, obligation to R.V.

It is important that Article 19, Section B, neither prohibits nor addresses the proper level of discipline to be applied to employees who lose their driving privilege. 14/ That decision is left to the County under the just cause provision of Article 18. I turn now to the central question in this case — whether the County had just cause to discharge R.V. for the reasons given in the April 22, 2004 termination letter. The Union argued that the County

treated R.V. unfairly, without due process, and it had subjected R.V. to double jeopardy. Specifically, the Union urged that the County's investigation and processing of R.V.'s case was unfair and that R.V. had not been given a chance to explain his position prior to his discharge.

14/ The Union points to Article 18B, which sets a penalty of a one-week suspension for an employee who consumes alcohol on the job and it argues that discharge is too harsh a penalty here. This Arbitrator notes that Article 18B is not involved in this case and specifically applies only to the facts described in that Section.

The record herein demonstrates that R.V. had a full opportunity to explain his position at the two informational meetings held on April 16 and 19, 2004. Furthermore, the record showed that Jandarain did not decide to discharge R.V. until after these meetings had occurred. The fact that, initially, the County (erroneously) believed that R.V. would lose his license forever does not mean that the County's reasons for disciplining R.V. shifted, as the Union claimed. On this point, it is significant that the County's April 22, 2004 discharge letter states the reasons for R.V.'s discharge. The County has stood by those reasons since the letter issued. The fact that since his discharge it has become clear that DOT miscalculated/misstated R.V.'s 2004 license revocation period in its notices does not detract from the fact that at the time of his discharge, R.V. was not qualified to perform the primary duty of his Truck Driver position.

The Union contended that the County's discharge of R.V. was too harsh a penalty for the conduct he engaged in. This Arbitrator disagrees. As the County noted in its April 22, 2004 termination letter, R.V.'s failure to notify the County of the status of his license subjected the County to potential extensive liability over a long period of time, 15/ from April 18 through October 19, 2003, and again from January 5, 2004, forward.

15/ The fact that R.V. did not have an accident in a County vehicle during the periods of the suspension/revocation of his license does not lessen the impact of the County's argument on this point.

In this case, it is undisputed that R.V. was required by his Truck Driver position description to maintain a valid CDL in order to perform his duties for the County. The record evidence showed that R.V. drove county CDL vehicles at least 37 times during periods when his driving privilege was suspended or revoked from April 18, 2003, through January 7, 2004. Each time R.V. drove a County CDL vehicle without a valid license constituted a separate offense under State law. 16/

16/ Even during the periods when R.V. posted into the TAP operator position, a non-CDL position, R.V. was regularly called upon to drive County trucks which required a valid CDL due to his relatively low seniority.

Although R.V. successfully applied for and received an occupational license in 2000 when his license was suspended, R.V. never attempted to get an occupational license in 2003 and 2004. R.V. claimed that he did not know he needed to apply for an occupational license in 2003 and 2004 because he had a ride to and from work and he believed his CDL was valid. 17/ However, R.V. obviously knew the licensing requirements well enough to obtain an occupational license in 2000. In addition, the record facts demonstrate that R.V. knew the ramifications of the suspension/revocation of his license. In this regard, this Arbitrator notes that in February, 2002, and on January 8, 2004, R.V. posted off his Truck Driver position and into the TAP position, each time shortly after his license was suspended/revoked; and that on November 4, 2003, R.V. posted back into his Truck Driver position a few days after his driving privilege was reinstated, listing his license as valid. This evidence supports the conclusion that R.V. was aware of the requirements of his CDL, contrary to his assertions herein.

17/ The Union argued that it was the County's responsibility to educate employees concerning their CDLs. This is not true. It is each driver's responsibility to educate him/herself regarding his/her driving privilege, as R.V. admitted herein.

In addition, the DOT documents R.V. received over the years, quoted at length above, showed that if at any point R.V. was confused about his rights/obligations regarding his driving privilege, he should not have driven until he clarified his right to do so by calling the numbers given on the DOT notices he had received. R.V.'s assertion herein that he learned nothing about his CDL rights/obligations during classes and examinations he took for his CDL is simply incredible.

Furthermore, this Arbitrator notes that State law prohibiting driving without a valid license does not require that the driver have actual notice that his driving privilege has been suspended for fines and penalties to attach. (Wis. Stats., Sec. 343.44(1)(a)). Although knowledge that license revocation has occurred is necessary under Section 343.44(1)(b), Stats., failure to receive a revocation notice is not a defense to a charge of driving after revocation under Sec. 343.44(3), Stats. Indeed, an employer who negligently allows an employee to drive while disqualified can be fined up to $2,500 under Section 343.315(1), Stats. In these circumstances, it was not necessary for R.V. to be fully aware of how to maintain his driving privilege. R.V. admitted herein that he knew that he was responsible to understand the

parameters of his driving privilege and to maintain it while in the County's employ. There is no question that R.V. received official notification from DOT each time his license was suspended/revoked.

Therefore, in the opinion of this Arbitrator, the facts of this case show that the County had just cause to discharge R.V. on April 22, 2004, for the reasons given. R.V. knew the status of his driving privilege at all times and he received all DOT documents thereon; R.V. failed to apply for an occupational license in April, 2003, and January, 2004; and the evidence showed that he knowingly drove CDL vehicles on 37 occasions while his driving privilege was suspended or revoked, subjecting the County to potential liability. The fact that R.V. was otherwise a competent employee and was not involved in any accidents in County vehicles does not detract from this fact. This Arbitrator, therefore, issues the following

AWARD 18/

The County did not violate the collective bargaining agreement by terminating R.V. effective April 22, 2004. The grievance is therefore denied and dismissed in its entirety.

18/ The Union cited DANE COUNTY, WERC A/P M-00-126 (ZEIDLER, 4/01) in support of R.V. However, the DANE COUNTY case is factually distinguishable from the instant case. There, the grievant, an 11-year employee of the County, applied in good faith for an occupational license after his driving privilege was suspended without notifying the County of his suspension. Due to an error, the grievant drove one day without a valid occupational license. In these circumstances, and as this was the grievant's first offense, Arbitrator Zeidler reduced the three-day suspension issued by the County to a one-day suspension.

Dated at Oshkosh, Wisconsin, this 8th day of March, 2005.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

SAG/anl
6803.doc