

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CHIPPEWA COUNTY

and

**CHIPPEWA COUNTY HIGHWAY DEPARTMENT LOCAL 736,
AFSCME, AFL-CIO**

Case 239

No. 64935

MA-13062

(Jim Hunt One Day Suspension Grievance)

Appearances:

Steve Day, Staff Representative, 318 Hampton Court, Altoona, Wisconsin, appearing on behalf of Chippewa County Highway Department Local 736, AFSCME, AFL-CIO.

Gerald F. Sazama, Assistant Corporation Counsel, 711 Bridge Street, Chippewa Falls, Wisconsin, appearing on behalf of Chippewa County.

ARBITRATION AWARD

Chippewa County, hereinafter County or Employer, and Chippewa County Highway Department Local 736, AFSCME, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement covering the period January 1, 2004 through December 31, 2006 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 August 31, 2005, in Chippewa Falls, Wisconsin. The hearing was not transcribed. The record was closed on October 17, 2005, upon receipt of all post-hearing written argument.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUES

The parties stipulated to the following issues:

Did the County have just cause to discipline the grievant? If not, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2-MANAGEMENT RIGHTS

The County possesses the sole right to determine the methods, means, and personnel by which County operations are to be conducted. The rights include, but are not limited to, the following:

. . .

B. to establish reasonable work rules:

. . .

D. to suspend, discharge and take other disciplinary action against employees for just cause;

. . .

RELEVANT WORK RULES

4.62 **WORK RULES.** An employee may be disciplined for just cause including, but not limited to, the following infractions of work rules:

. . .

(11) Sleeping on duty.

. . .

(17) Insubordination or refusal to comply with work orders of an authorized supervisor.

. . .

RELEVANT SECTIONS FROM CHIPPEWA COUNTY CODE

Sec. 48-62. **Work rules.**

An employee may be disciplined for just cause including, but not limited to, the following infractions of work rules. The following list provides examples. Individual departments may have additional rules. Discipline for violations varies according to degree, but may include verbal warning, written reprimand, suspension without pay, or discharge.

. . .

- (7) Noncompliance with county ordinances or written departmental rules or procedures.

Sec. 48-63. Discipline recommended.

For consistency in administering discipline county-wide, the following discipline is recommended for violation of the above rules:

. . .

- (3) For violations of sections 48-62(5), (6), (7), (8), and (12), the following steps are recommended:
 - a. First offense – one day off without pay.
 - b. Second offense – five days off without pay.
 - c. Third offense – discharge.

FACTS AND POSITIONS OF THE PARTIES

Grievant Jim Hunt has been employed by the Chippewa County Highway Department for 35 years as a state maintenance patrolman. His normal working hours are 7 a.m. to 3:30 p.m. He takes a 10 minute break in the morning and afternoon at his convenience, and has lunch from 12 to 12:30 p.m. In the winter, a regular part of his job duties includes maintaining an approximately eight and one-half mile section of State Highway 29 (STH 29) from about a mile and half west of the city limits of Chippewa Falls to the Dunn County line in good winter weather driving condition. Winter snow often requires him to report to work earlier in the morning to clear the roadway.

Louis Revoir is Hunt's immediate supervisor. Revoir has been employed by the Chippewa County Highway Department for more than 39 years. He has been a Patrol Superintendent for the past seven years and has supervised the grievant throughout that time. Prior to the events giving rise to this arbitration, Revoir had never disciplined Hunt and had generally given him positive annual evaluations. There is no history of "bad blood" between the two. Revoir's supervisor is Bruce Stelzner, Highway Commissioner.

It began snowing at approximately 2:00 a.m. on March 10, 2005.¹ Revoir called out Hunt and the rest of the crew at about 4:00 a.m. because the light snow fall had created slippery road conditions. Hunt left the shop in Chippewa Falls sometime between 4:00

¹ All references hereinafter are to 2005.

and 5:00 a.m. and began plowing and sanding his section. He did not take his morning break, but did eat lunch at the regular time. Around 1:15 p.m., about a mile east of the county line, Hunt pulled his truck onto the shoulder of Eastbound STH 29. Revoir, as part of his supervisory duty to observe the highway conditions, drove westbound in the passing lane of the four-lane divided highway. As he passed by, Revoir noticed Hunt's truck, saw Hunt sitting in the truck with the engine running and nothing apparently going on. Revoir then proceeded to the county line, turned around, drove to the location of Hunt's truck and pulled onto the shoulder. Revoir parked his Chevy Tahoe about ten feet behind the seven yard, ten ton capacity truck, exited his vehicle and approached the truck.

Revoir pounded on the railing of the box² while proceeding towards the cab. According to Revoir, Hunt was sitting in the cab with his head back, eyes shut, the engine running, the windows shut and clear. Revoir observed Hunt for about 30 seconds, while standing two to three feet from the door, on the white line of the shoulder, with heavy traffic passing by. Revoir then pounded on the door two to three times, rather hard.

According to Revoir, Hunt was startled by the noise, opened his eyes and looked frightened. Hunt then rolled down the window and Revoir said "Jim, you're sleeping." In response, Revoir contends that Hunt said "No, I'm not." Revoir testified that he then told Hunt "I'll take care of this when you get back to the shop. I'll see you then. Better get going, get off the shoulder of the road." Revoir returned to the shop between 2:00 and 2:15 p.m., went to his office and entered a notation in his work log:

Wrote up Jim Hunt Written warning of disciplinary action. Will give to him Friday.

Revoir also looked at the county work rules and the county code regarding sleeping on the job. Revoir subsequently consulted with others. Highway Commissioner Stelzner was on vacation that day. A written disciplinary notice was typed the following day, March 11, when Stelzner was at work.

Hunt denies that his eyes were closed or that he was sleeping. Hunt says that he was on break and was calibrating the sander according to the road conditions.³ The controls are on the right side of the driver's seat. As there was a loose screw, and he is left handed, Hunt had to bend over to reach the controls, while using the screw driver attachment of his "Leatherman" tool.

² The parties have stipulated that Hunt would not have heard this banging under the conditions present.

³ Hunt had stopped earlier to adjust the gauges, when he was leaving Chippewa Falls. At the time Revoir stopped and contacted him, Hunt was returning the dials to zero and had to tighten the screw.

Hunt asserts that he saw Revoir as he was going westbound on STH 29 and saw him again when Revoir rapped on the cab of the truck. When Hunt saw Revoir he rolled down the window and asked Revoir, "What's up?" Revoir then stated "You've been sleeping" to which Hunt replied "No." Revoir then looked at him, turned around and walked away.

Later in the day Hunt returned to the shop at which time a co-worker asked him to go and get something. The Shop foreman, Paul Mohr, told him that he didn't want him [Hunt] in the shop and Mohr shoved Hunt.

The next day, March 11, Union President Matt Hartman and Archie Mooney, another Union representative, met with Stelzner. The meeting had previously been scheduled to discuss another matter, unrelated to Hunt. When Hartman came in to get Mooney, Mooney told Hartman about the incident involving Mohr allegedly shoving Hunt. Prior to meeting with Stelzner, Hartman was unaware of the allegation that Hunt had been asleep in his truck. According to Hartman, at the start of the meeting, Stelzner indicated that Hunt would receive a five day suspension for being asleep on the job. Hartman also indicated that Stelzner raised the issue of Hunt's being insubordinate to Mohr. According to Hartman, after he and Mooney made Stelzner aware of the alleged physical assault of Hunt by Mohr, the suspension suddenly became a one day suspension.

On the morning of March 15, Stelzner met with Mooney, Hartman, Revoir and Hunt regarding Hunt's allegedly being asleep in his truck and the incident with Mohr. The first discussions were regarding the Mohr incident, including the claims that Hunt had been insubordinate and that Mohr had physically attacked Hunt. After a number of caucuses, this matter was set aside and the sleeping incident was discussed.

Thereafter, according to Hartman, Revoir said that Hunt was sleeping and Hunt said he was not, and had the opportunity to tell his version of the event. Stelzner then handed Hunt a disciplinary letter dated March 11 which reads as follows:

This letter will serve as official notification to you of a one-day suspension, without pay and which will be placed in your personnel file. This disciplinary action is the result of your violation of Chippewa County Highway Department Work Rule Seven (7) Sleeping on Duty.

At approximately 1:20 P.M. on Thursday, March 10, 2005 you were found sleeping on duty in your patrol truck, by your supervisor on the shoulder of east bound STH 29. Your supervisor made several attempts to awaken you before you responded with the statement "what's the problem".

Your actions of March 10, 2005 violated the following work rule, as set forth in Chippewa County's Personnel Policy:

48-62 (7) Noncompliance with county ordinances or written departmental rules or procedures.

Please take notice that any further violations of County work rules will result in additional disciplinary action up to and including discharge. Your one-day suspension will be coordinated with the Patrol Superintendent and will be at his discretion. This letter will be placed in your personnel file.

Stelzner testified that the initial discussion of a five day suspension was related to Hunt's alleged sleeping in the truck and his being insubordinate to Mohr. According to Stelzner, this was based on the County code that recommends five days for a second incident.

A grievance seeking to expunge the letter from Hunt's file and to make him whole was timely filed on March 16, 2005. The grievance was denied at all steps of the grievance procedure and the instant arbitration proceeding was initiated.

Additional facts are discussed below.

DISCUSSION

The issue to be decided is whether the County had just cause to issue the grievant a one day suspension. The collective bargaining agreement does not define just cause, and neither side has defined the standard to be used. Accordingly, the just cause standard to be applied in this matter shall consist in a two-pronged analysis. First, the undersigned must address the question of whether the Grievant is guilty of the misconduct alleged. Second, if so, the arbitrator must determine whether the penalty is appropriate under the circumstances.

The County contends that Jim Hunt was asleep in the truck, while parked on the shoulder of State Highway 29, and the work rules and County Code mandate a one day suspension without pay for such conduct. This case is not quite that clear cut. The Union argues that Hunt was not sleeping, that Hunt's testimony is credible and Revoir's is not, that the investigation was inadequate, and that the discipline imposed resulted from reducing an initial five day suspension mentioned by the Highway Commissioner to one day if Hunt did not pursue a complaint over an alleged assault by Paul Mohr.

Louis Revoir observed Jim Hunt sitting in his truck on the shoulder of eastbound STH 29 shortly after 1:00 p.m. on March 10 as Revoir was driving westbound in the passing lane. Revoir drove to the county line, turned around, and pulled up behind Hunt's truck. Revoir exited his vehicle and looked into the cab of the truck. He watched for about 30 seconds without seeing any movement and then banged on the cab window. Hunt responded within a few seconds by opening the window. The two talked for a few moments, during which Revoir asked Hunt if he was sleeping and Hunt denied that he was. There were no witnesses to this event, other than the two participants who have divergent positions in this matter.

There has been no showing that Revoir has any reason to claim that Hunt was asleep if he did not believe that Hunt was asleep. Revoir's log of March 10 indicates that he believed that Hunt had done something warranting discipline. Hunt, of course, has good reason to contend that he was not asleep, since such a finding would sustain the grievance and he would not suffer a one day suspension without pay. While the Union raises numerous valid questions about Revoir's actions after finding an employee sleeping behind the wheel of a highway truck,⁴ I have no doubt that Hunt appeared to be asleep to Revoir when he saw him on March 10. The County need not prove, scientifically, that Hunt was asleep. AFSCME LOCAL 1287 AND MARATHON COUNTY, CASE 273 NO. 58869 MA-11085 (1/19/01). Accordingly, I find that the Grievant is guilty of the misconduct alleged, sleeping on duty.

The Union contends that the investigation in this matter was unfair, thus not meeting the just cause standard. While it is true that the disciplinary notice had been typed on March 11 in anticipation of providing the document to the Grievant, Hunt did have an opportunity to provide his version of the events to Stelzner before the document was given to him. The nature of the incident does not lend itself to a lengthy investigation. Unlike the specifics of the interaction with Supervisor Mohr that would have required interviewing all the witnesses to the event, the basis for the discipline issued to Hunt was the allegation that he was sleeping in his truck. There were two versions of the incident that Stelzner needed to consider: that of Revoir and that of Hunt. Stelzner had already discussed the incident with Revoir and was of the opinion that, if true, a one day suspension was warranted in accordance with the County code. Hunt's version of the event did nothing to dissuade Stelzner that Hunt had been asleep. Accordingly, the previously drafted letter was given to him.

Having determined that the Grievant engaged in the conduct alleged, the next inquiry is whether the penalty is appropriate under the circumstances. The County argues that the visibility of the Hunt truck could generate a "public perception" that the driver was asleep and was not earning the wages which the taxpayers provide. The County also points to the County work rules and County code as establishing a work rule prohibiting sleeping on duty. This demonstrates a policy decision by the County Board that sleeping on duty is not to be tolerated. The Code recommends a one day suspension for a first violation of that work rule so that discipline is applied consistently. These factors weigh heavily in favor of the County.

It is troubling, however, that in his testimony, Revoir stated that if a driver is tired, he can come into the shop or stop in a turnaround. Revoir testified that there was a turnaround about 100 feet from where Hunt had parked his truck. Revoir also testified that had Hunt been asleep, or appeared to be asleep, in the turnaround, no discipline would have ensued. While agreeing that it is not unusual for patrolmen to pull off to the side of the road to take their breaks, Revoir was nevertheless concerned about Hunt sleeping in the truck on the shoulder because such a position is hazardous. Thus, although Hunt was written up for sleeping, and not for the position of the truck, Revoir was clear that it was the position of the truck, combined with the activity, that resulted in the discipline.

⁴ The Union suggests that Revoir should have taken certain steps to determine that Revoir was fit to continue to drive, including ordering him out of the truck so he could be observed and engaging in a lengthier conversation than occurred in this instance.

Later in the day of March 10, Hunt and Paul Mohr were involved in a dispute of some kind. When Hartman and Mooney, the Union representatives, met with Stelzner on the morning of March 11, Stelzner indicated that Hunt faced a five day suspension because of sleeping on the job and being insubordinate. When Stelzner learned that Mohr had, apparently, physically attacked Hunt during this event, Stelzner indicated to Hartman and Mooney that Hunt would get a one day suspension for sleeping on the job. When Hartman, Mooney, Stelzner, Revoir and Hunt met on March 15, the incident with Mohr was a topic of discussion. Between the two meetings, Mohr had apologized to Hunt, and, according to Hartman, Stelzner wanted Hunt to drop the matter. Stelzner told Hunt that if he pursued it he would be facing additional discipline for insubordination. After discussions with his Union representatives, Hunt decided not to pursue the Mohr matter at that time.⁵ Stelzner then questioned Hunt about the sleeping incident and issued him the aforementioned disciplinary notice and one day suspension without pay.

The Union argues that Revoir's log shows that he intended to issue a written warning to Hunt but was somehow forced to impose greater discipline. There has been no showing of any intervening factor other than a review of the County code that recommends a one day suspension. It is unclear whether the log entry or the review of the code came first. In either case, the log notation cannot supersede the actual written disciplinary action without more to show that Revoir was subjected to some untoward outside pressure.

The Union contends that Stelzner reduced the originally proposed five day suspension to a one day suspension in order to persuade Hunt that he should not pursue the Mohr matter.⁶ The Union has not proven this to be the case. The undersigned is of the opinion that had the Mohr incident not occurred on March 10, the same day as the sleeping incident, there would never have been any discussion of a five day suspension in connection with the sleeping incident. Reviewing the Union representative's testimony and notes,⁷ it is apparent that the reference to a five day suspension encompassed two work rule violations: sleeping and insubordination. Once Stelzner became aware of other aspects of the Mohr incident, he had to conclude that he could not impose discipline upon Hunt for insubordination in connection with that event without dealing with Mohr's actions as well. It is also significant that Hunt had not yet been afforded an opportunity to discuss either event with Stelzner before the disciplinary action was defined and written up as a one day suspension for sleeping on the job. As noted above, the notice of discipline had been prepared prior to the March 15 meeting. From this, I conclude that Hunt would have received a one day suspension for sleeping on the job whether or not he pursued the Mohr matter.

⁵ Apparently the matter was dropped completely.

⁶ Evidence regarding the Mohr matter was admitted over the objection of the Employer as being irrelevant to the instant grievance.

⁷ The notes were also admitted over the objection of the Employer in order to ensure that the Grievant was afforded the opportunity to present his entire case.

The County code recommends that the penalty for the first offense of sleeping on duty is one day off without pay. Having found that the Grievant was sleeping on duty, a one day suspension without pay is the appropriate sanction, barring any mitigating circumstances. Although Revoir's testimony to the effect that he would not have disciplined the Grievant had the truck been found in a turnaround rather than on the shoulder is disturbing, I do not find that it negates the fact that Hunt was on the shoulder of a busy public highway, quite close to the roadway, and appeared to be sleeping. The public perception of such an action, as well as the potential danger that might befall Hunt or members of the public under such circumstances, support the discipline that has been imposed.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

The County did have just cause to suspend the grievant, Jim Hunt, for one day without pay. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 14th day of November, 2005.

Susan J. M. Bauman /s/

Susan J. M. Bauman, Arbitrator