BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DOOR COUNTY HIGHWAY EMPLOYEES LOCAL #1658, AFSCME, AFL-CIO

and

DOOR COUNTY

Case 150
No. 64492
MA-12916

(Merkle Grievance)

Appearances:

Mr. Neil Rainford, Wisconsin Council 40, AFSCME, AFL-CIO, 1311 Michigan Avenue, Manitowoc, Wisconsin, appearing on behalf of Local 1658.

Mr. Grant P. Thomas, Corporation Counsel, Door County, 421 Nebraska Street, P.O. Box 670, Sturgeon Bay, Wisconsin, appearing on behalf of Door County.

ARBITRATION AWARD

Door County Highway Employees Local #1658, AFSCME, AFL-CIO, hereinafter "Union," and Door County, hereinafter "County," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators to the parties in order to select an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on July 25, 2005, in Sturgeon Bay, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs and reply-briefs, the last of which was received on November 10, 2005, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute, but were unable to agree to the framing of the substantive issues.

The Union frames the issues as:

1. Whether the Employer violated the collective bargaining agreement when it suspended the Grievant, Allen Merkle, for five days for negligent abuse of County equipment and to delay the service of the suspension to November 29, 2004?

2. If not, what is the appropriate remedy?

The County frames the issues as:

1. Whether the County had just cause to discipline the Grievant?

2. If not, what is the appropriate remedy?

I cannot accept the Union's framing of the issue because it combines two separate and distinct issues; the discipline and the date on which the suspension was served. The County's framing of the issue does not address the Union's challenge to the timing of the suspension and therefore it is not acceptable. I frame the issues as:

1. Whether the County violated Article 21 when is issued the Grievant a one-week suspension without pay?

2. Whether the County violated Articles 1 and 21 when it delayed the start date for the Grievant to serve the one-week suspension without pay to November 29, 2004?

3. If so, what is the appropriate remedy(s)?

RELEVANT CONTRACT LANGUAGE

ARTICLE 1 – MANAGEMENT RIGHTS RESERVED

A. Lawful Authority: Nothing in this Agreement shall be construed as divesting the Employer of any of its vested management rights or as

delegating to others the authority conferred by the law on the Employer, or in any way abridging or reducing such authority.

This Agreement shall be construed as requiring employees to follow the provisions in the exercise of the authority confirmed upon the Employer by law.

B. Disciplinary Procedure: Suspension is defined as the temporary removal without pay of an employee from his or her designated position.

1. Suspension For Just Cause:

The Employer may for disciplinary reasons suspend an employee. An employee who is suspended, except probationary and temporary employees, shall be given written notice of the reasons for the action and copy of such notice shall be made a part of the employee's personal history record, and a copy of such notice shall be sent to the Union. No suspension for cause shall exceed thirty (30) calendar days. An employee who has been suspended may use the grievance procedure by giving written notice to his steward and his department head within five (5) working days after suspension. Such appeal will go directly to the third step of the grievance procedure.

2. Suspension During An Investigation:

During an investigation, hearing or trial of an employee on any civil or criminal charge, when suspension would be in the interest of the County, an employee may be suspended with pay by the Employer for the duration of the proceedings. The suspension shall terminate within ten (10) days after completion of the cause for which he was suspended, by reinstatement or by other appropriate action, by resignation or dismissal of the employee.

3. Dismissal:

No employee shall be discharged except for just cause. An employee who is dismissed, except probationary and temporary employees, shall be given a written notice of the reasons for the action, and a copy of the notice shall be made a part of the employee's personal history record, and a copy sent to the Union. An employee who has been discharged may use the grievance procedure by giving written notice to his steward and his department head within five (5) working

days after dismissal. Such appeal will go directly to the fourth step of the grievance procedure.

4. Usual Disciplinary Measures Shall Be:

a.) Oral Reprimand
b.) Written Reprimand
c.) Suspension
d.) Dismissal

C. Written Notice: The Union shall be furnished a copy of any notice of reprimand, suspension or dismissal. A written warning sustained in the grievance procedure or not contested, shall be considered a valid warning. No form of disciplinary action shall be used as the basis of suspension or dismissal after twelve (12) months. In the case of serious infractions, prior warnings are not a prerequisite for disciplinary action, which includes suspension or discharge.

D. Reasonable Rules: In keeping with the above, the Employer may adopt reasonable rules and regulations and amend the same from time to time, and the Employer and Union will cooperate in the enforcement thereof.

…

ARTICLE 5 – GRIEVANCE PROCEDURE AND ARBITRATION

It is hereby agreed that the Union shall be permitted to form a three (3) person grievance committee whose purpose shall be to meet with the Highway Commissioner at least once each month during working hours upon dates to be mutually agreed upon between the Highway Commissioner and Grievance Committee for discussing any problems affecting any normal working conditions in the operation of the Highway Department and for the presentation of pending grievances.

The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. If an employee has a grievance that cannot be settled between the Highway Commissioner and the Grievance Committee, it shall be handled as follows:

Step 1 If an employee has a grievance he or she shall first present the grievance orally to the superintendent in charge of the work being carried on by the employee. The grievance shall be presented within he first thirty (30) days after the date of the event or occurrence, which gave rise to the complaint. Said grievance may be presented by the employee or accompanied by one (1) Union representative.

Step 2 If dissatisfied with the result in Step 1, the grievance may be appealed to the Highway Commissioner. Such appeal shall be in writing and received by the Commissioner within fifteen (15) days after the decision in Step 1. The grievance may be presented by the employee and/or the Union. The Highway Commissioner shall meet with the employee and/or the Union in an attempt to resolve the grievance. The decision of the Highway Commissioner shall be in writing and submitted to the employee and the Union within fifteen (15) days following the date of such meeting as herein set forth. This period of time may be extended by mutual agreement of the parties involved.

Step 3: If dissatisfied with the result in Step 2, the employee, and/or the Union representative may appeal in writing to the Door County Highway Committee. Any sic appeal shall be made within fifteen (15) days after receipt of the decision of the Highway Commissioner in Step 2. The Highway Committee shall meet with the employee and the Union before making its determination. The Highway Committee shall notify the employee and the Union in writing of its decision within fifteen (15) days after meeting on the appeal. This period of time may be extended by mutual agreement of the parties involved.

Step 4: If the employee is dissatisfied with the result in Step 3 or if any grievance filed by the County cannot be satisfactorily resolved by conference with the appropriate representatives of the Union, either party may submit said grievance to arbitration by giving notice in writing to the other party. Within fifteen (15) days of such notice, the Union and the County shall each select one (1) member of an arbitration board to be composed of three (3)

disinterested members. The two (2) members of such bard so selected shall then select a third member. Should the two (2) members selected be unable to agree on its selection of a third member, the third member shall be appointed by the Wisconsin Employment Commission (sic). The Board of Arbitration shall, after hearing both sides, hand down its decision in writing, and if approved by not less than two (2) members thereof, such decision shall be final and binding on both parties to the Agreement. Each Party shall bear the cost of its chosen arbitrator and the cost of the third arbitrator shall be shared by the County and the Union.

. . .

ARTICLE 21 – SPECIAL PROVISIONS

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The Employer and the Union mutually agree that in order to further the efficient operations of the Door County Highway Department and to promote the welfare and safety of the employees, negligent abuse of equipment shall not be tolerated. It is further agreed that penalties for negligent abuse of equipment committed by an employee shall be as follows:

1. First offense: One (1) week suspension without pay;
2. Second offense: Two (2) weeks suspension without pay;
3. Third offense: Termination from employment.

Grievance procedures previously set forth in this Agreement are available to the employees on any questions involving negligent abuse of equipment. It is further agreed that the penalties provided above for failure to use safety devises shall apply along with the same grievance procedures available to the employees.

The above provisions are intended to cover the various situations and conditions that normally occur or exist, however, special conditions may arise which are not covered, in which even the Highway Commissioner and

> the Union Bargaining Committee shall meet to discuss such conditions and reach such agreements as may be necessary to cover such conditions.
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> . . .

BACKGROUND AND FACTS

The Grievant, Allen Merkle, has been employed by the County Highway Department for eleven years in the position of truck driver. He currently drives truck 034 which is a 3000 Sterling tri-axle with an automatic load box for sanding and salting. The Grievant has driven this 65,000 pound vehicle since 2003. Prior to the accident of August 23, 2004, the Grievant had a clean driving record with the County.

On August 23, at approximately 10 a.m., the Grievant was involved in a single vehicle motor vehicle incident with truck 034. He was driving Southbound with a load of gravel on County Highway U enroute to Johnson's Pit where he was scheduled to drop off the gravel. The Grievant had begun his workday at 6 that morning and this was the third time on August 23 that the Grievant had hauled a load of gravel to that location. The Grievant's truck left the paved roadway and ultimately turned on its side in the ditch leaving the Grievant suspended from the ceiling of the cab of the truck by his seat belt. The Grievant released the seatbelt and fell to the seat/floor of the cab area and sustained injuries as a result of this fall. Truck 034 sustained greater than sixty five thousand dollars in damage excluding loss of the vehicles' use costs due to the accident. The Grievant was off work for ten days due to his injuries and received workers' compensation benefits.

On September 20, 2004, the County issued the following letter to the Grievant:

> RE: Disciplinary Suspension
>
> Dear Mr. Merkle:
>
> The County's investigation is complete. It has been determined that you engaged in negligent abuse of County equipment arising from the August 23, 2004 motor vehicle incident. Specifically: you were operating a County owned vehicle in the scope of your employment, you veered off the traveled portion of the road and rolled the vehicle over, which resulted in a substantial amount of damage to the vehicle. Your careless operation of the vehicle is the sole explanation for this motor vehicle incident. This conduct is not acceptable and will not be further tolerated.

> Just cause exists for disciplinary action. You are being placed on disciplinary suspension without pay for five (5) work days. The disciplinary suspension will commence November 29, 2004. Further deficiencies or problems will lead to additional disciplinary action up to and including discharge.
>
> The purpose of this disciplinary action is three fold. First, it serves the interest of fairness by alerting you to the misconduct and offering you an opportunity to avoid further misconduct. Second, it should impress upon you the inappropriateness of your conduct. Finally, it provides you notice of the consequences of continued unsatisfactory behavior.
>
> A copy of this letter has been furnished to Neil Rainford, Staff Representative, AFSCME. This letter will be placed in your personnel file.
>
> Please contact me if you have any questions or comments.
>
> Sincerely,
>
> /s/
> John Kolodziej
> Door County Highway Commissioner

The facts regarding the incident of August 23, 2004 are in dispute and following is the relevant testimony of individuals that were present at the accident site.

The Grievant

The Grievant testified at hearing that as he came around the curve on Highway U, his passenger side front tire was half on the paved highway and half on the shoulder at which time the shoulder "gave way" causing the truck to pull to the right. The Grievant explained that "gave way" does not mean that the shoulder moved, but rather the shoulder was lower than the paved highway and the truck "dropped off" and slid into the shoulder. The Grievant testified that the uneven height of the gravel shoulder caused the truck to leave the paved highway. The Grievant acknowledged that he knew and had seen the depression in the gravel shoulder prior to the accident.

Paul Keddell

Deputy Sheriff Paul Keddell testified at hearing. Keddell was the first officer on the scene and conducted an investigation of the accident. Keddell testified that the Grievant lost control of the truck he was driving which resulted in it leaving the paved portion of the roadway and traveling onto the gravel shoulder. The Grievant continued to drive on the shoulder until he encountered a depression in the shoulder. The depression was a foot by six include hole in the shoulder which contributed to the vehicle and the Grievant going into the ditch. Tr. P. 30-31. Keddell testified that he believed the depression in the shoulder hindered the Grievant's ability to bring the truck back onto the highway. Keddell testified that the Grievant did not attempt to steer the vehicle back onto the highway after depression. Keddell did not issue a citation to the Grievant because it was a one-vehicle accident and he "believed the pothole was that contributing factor that – it appeared to me that it was the point of no return of being off on the shoulder. There was no way back on to the roadway." Tr. P.46. Keddell did not investigate why the vehicle left the paved roadway.

John Kolodziej

Highway Commission John Kolodziej testified at hearing. Kolodziej is a registered professional engineer and civil engineer with the State of Wisconsin. Kolodziej has twenty-five years experience in road construction and road maintenance including the last five years with the County in the position of Highway Commissioner. Kolodziej arrived at the accident site before the ambulance. Kolodziej first checked on the Grievant to determine his condition. Kolodziej then looked at the accident site including weather and road conditions, the roadway, and the path of the vehicle. He walked up and down the road observing the roadway, shoulder and tire tracks. Kolodziej concluded that the Grievant was traveling southbound on Highway U with a load of gravel in his truck, negligently lost control of the vehicle causing it to leave the paved roadway approximately 40-45 feet before the depression. Kolodziej followed the tire tracks from the overturned vehicle back to the location where the Grievant left the paved road area to reach this conclusion and photographed the site. Kolodziej viewed the depression, concluded it was caused by rainfall and described it as approximately one foot wide beginning right of the edge of the paved highway at a depth of four inches and increasing to six inches when it was two feet off the edge of the paved roadway.

John Haen

John Haen testified at hearing. Haen is an eighteen-year employee of the Highway Department. Haen has experience operating the grader that is utilized to do shoulder work. Haen indicated that working on the shoulder includes putting gravel alongside the asphalt to create a two foot wide gravel shoulder and building up the

gravel to the height of the asphalt in the same contour as the asphalt road. Haen indicated that the location of the Grievant's accident is a tricky area in the road due to the curvatures on both the right and left. Haen testified that the shoulder is relatively narrow compared to most, that there is a ditch immediately off to the right and as a result, he uses more caution in this area.

Other Evidence

The total width of the paved roadway at the location of the accident was 21 feet and 3 inches. Each lane is therefore ten feet and six inches. The wheel base of truck 034 is approximately 102 inches thus leaving one foot and 6 inches of paved road space available for driving.

No County Highway employee has been involved in an accident at the same location on Highway U as the Grievant. A review of County Sheriff's Department accident records indicated that three accidents, including the Grievant's, were reported in the vicinity of the Grievant's accident on Highway U since January 1, 1989.

The day after the Grievant's accident, County Highway employees were directed by management to add gravel to the shoulder area along Highway U including the area where the incident occurred.

Approximately four or five years ago, County employee D.H. received a citation from law enforcement after he drove his County vehicle into an intersection in the pathway of an oncoming vehicle. D.H. received a written reprimand from the County for the incident.

ARGUMENTS OF THE PARTIES

The Union

The Union argues that the Highway Commissioner's decision to suspend the Grievant was harsh and unwarranted. The County has failed to meet its burden of establishing just cause for discipline and has failed to uncover any evidence which would support a finding that the Grievant was guilty of *negligent abuse* of County equipment in violation of the parties' labor agreement.

The Grievant is a long term employee of the County with an impeccable driving record and no history of discipline. Although an accident occurred which resulted in damage to the County truck and harm to the Grievant, there were numerous physical factors that created unsafe conditions including a winding road, narrow shoulders, washed-out gravel on the shoulder and steep ditches. The County's failure to maintain the roadway and the washed out portion caused the accident. Witnesses testified that

the shoulder was in need of repair and the hazardous condition of the road caused the County to order its repair the following morning. There is no evidence that the Grievant acted maliciously or attempted to abuse his truck and he was seriously hurt in the accident. For these reasons, operator error is mitigated and the need for discipline invalidated.

The County violated the progressive discipline measures of Article 1 of the labor agreement when it skipped the oral and written reprimand. This was the Grievant's first offense of this nature. The parties have negotiated the disciplinary progression and that progression limited the County to issuing a reprimand given the circumstances. Harsh discipline will not dissuade the Grievant from further damaging the County's trucks or hurting himself because he was acting in good faith and driving to the best of his ability.

The County subjected the Grievant to disparate treatment when it issued discipline. County trucks slip off the road four or five times each winter and the drivers are not disciplined and there have been three or four accidents during the summer months. This includes one incident where a truck driver "proceeded into the path of an oncoming car" and was issued a citation. Union Br. P. 20. The Highway Commissioner testified that no one has ever been suspended in connection with any of these accidents or incidents in his five year tenure.

The parties negotiated in Article 21 that a severe penalty was warranted when an employee was guilty of negligent abuse of equipment. This severity is contrasted with the usual disciplinary measures contained in Article 1 of the labor agreement. In looking to the definition of negligence, it contains the theme that there is an habitual failure to be careful or attentive while abuse occurs when there is a wrong or bad use of a thing for one's own advantage. These definitions suggest that there must be a conscious misuse on the part of the employee to treat a piece of equipment badly, whether prompted by anger or self-interest. Negligent abuse is set apart from the normal schedule of discipline and is reserved for intentional offenses and is not applicable to the instant accident because it was neither intentional nor the result of habitual careless behavior.

Finally, the County waited to impose the Grievant's suspension. This delay changed the nature of the discipline from corrective to corporal. The County violated the intent of the disciplinary provisions and should be prohibited from delaying the service of corrective discipline in the future.

The County Brief

The County was justified in disciplining the Grievant and there is specific language in the parties' labor agreement that was created to address the precise issue in

this case. This language is clear and unambiguous and has been part of the labor agreement since 1977. Although the term negligent abuse is not defined in the labor agreement, its meaning can be resolved through recognized dictionary and case law analysis.

Negligent and negligence have essentially the same meaning according to Black's Law Dictionary. Both terms involve the failure to exercise the degree of care or standard of care that an individual of ordinary prudence would have in the same circumstances. These definitions, when read in concert with case law, support the County's actions.

Wisconsin case law has acknowledges that "the existence of negligence is a mixed question of fact and law," MORGAN V. PENNSYLVANIA GEN. INS. CO., (1979) WIS.2D 723 AT 732 and that the "test for negligence is the failure to exercise ordinary care under the circumstances". MAROLLA V. AMERICAN FAMILY MUT. INS. CO., (1968) 38 WIS.2D 539 AT 546. The Grievant had a duty to maintain control of his vehicle. The fact that the passenger side tires were off the paved road surface and on the gravel shoulder allows for the conclusion that the Grievant was operating the vehicle in an unreasonable manner. This caused the truck to go into the ditch and roll over.

Abuse is defined as "to damage (a thing)..." Black's Law Dictionary 7th Ed. at p. 10. The truck suffered extensive damage and therefore, the Grievant's negligent driving abused the truck.

The doctrine of *res ipsa loquitor* supports the County's position. The County has presented evidence to allow the arbitrator to conclude that the accident was an "event that does not occur in the absence of negligence" and that "the instrumentality causing the damage..." was within the exclusive control of the Grievant. County Brief p. 4 citing multiple cases. A single vehicle accident does not occur without negligence. The Grievant was in control of the vehicle. Therefore, the circumstantial evidence establishes that the Grievant was negligent.

The Union in Reply

The County mischaracterizing the testimony of the only witness to the accident. The Grievant testified that his tires were on both the paved roadway and on the gravel shoulder at the time he encountered the depression. This is significantly different than the County's belief that the passenger side tire was off the paved roadway when it reached the depression. Moreover, even if the Grievant's tires were off the paved roadway, an experienced driver testified that he occasionally uses the shoulder of a well-maintained road without incident. The shoulder and depression caused this accident. The County's failure to maintain the roadway should not be blamed on the Grievant.

The Grievant's operation of the truck did not constitute abuse. The word abuse, in the term *negligent abuse* is a noun. The noun is defined as "a departure from legal or reasonable use; misuse." Citation omitted. There is no evidence that the Grievant's conduct was illegal and there is insufficient evidence to conclude that the Grievant's operation of the truck departed from that which is reasonable or which can be termed misuse.

The County's application of the legal term *res ipsa loquitor* does not support the County's position because in the cases cited, the courts were addressing negligence and not *negligent abuse*. The parties included *negligent abuse* in the labor agreement three times and juxtaposed it to the just cause standard. Its meaning is limited to egregious and intentional violations which require severe penalties. The Grievant's conduct does not rise to this definition and the County's attempt to rely on court decisions is not relevant.

For all of the above reasons and the record as a whole, the Union respectfully request that the Arbitrator sustain the grievance and order the County to rescind the discipline and make the employee whole.

The County in Reply

The parties' labor agreement utilizes the ordinary terms, negligence and abuse. These are uncomplicated, well-understood and long established concepts. The phrase negligent abuse is neither ambiguous nor susceptible to more than one meaning. It is entirely reasonable to presume that the parties knew, understood, and mutually agreed upon the usual meaning ascribed to the terms *negligent* and *abuse* when drafting *negligent abuse*.

The Union's assertion that negligent abuse requires a showing that the employee "acted …intentionally" in a manner that would be "improperly to his/her advantage" and that he did so "with an intent to harm or destroy" and "out of malice" is incorrect. Such a requirement is inconsistent with common-sense, the contract language, and jurisprudence.

The Union is seeking to repudiate the parties' collective bargaining agreement by creating an ambiguity where one does not exist. The Union's definition is not plausible and would lead to a nonsensical result. The Union is requesting that the Arbitrator ignore the language of the parties' agreement and legislate new meaning.

There is no evidence to support a finding of disparate treatment. Although the Union has asserted the Grievant was treated disparately, the record is void of any evidence to establish a prima facie case. No bargaining unit member has ever engaged in the same type of conduct as the Grievant and therefore, there is no precedent from which the County deviated.

As to the Union's assertion that the delay in issuing the discipline violated the labor agreement, it lacks evidential support and legal authority. The County has broad management rights, including determining when to impose discipline. The County chose the time for the suspension based on the volume of work and efficient use of County resources.

For all of the above reasons, the grievance should be dismissed.

DISCUSSION

The Grievant was disciplined for "negligent abuse of County equipment arising from the August 23, 2004 motor vehicle incident." Article 21 states that an employee may be disciplined by the County when and if he or she engages in conduct that the parties have characterized as *negligent abuse of equipment*. The County did not reference a specific contract section in the disciplinary letter, but the imitation of language establishes that the County was applying the specific disciplinary sanctions of Article 21.

The Union argues that the County lacked just cause and deviated from the progressive discipline model when it issued the Grievant a five-day suspension. The Grievant was disciplined pursuant to Article 21 and there is no language in Article 21 that indicates the just cause standard is applicable when issuing discipline. This language is contrasted with the Article 1, Disciplinary Procedures, which recognizes suspensions for "cause" and discharges for "just cause". Article 1 is the general section that addresses disciplinary sanctions and the disciplinary procedure, while Article 21 is the specific section that addresses unique circumstances in which the parties agreed that discipline was warranted. Since the parties bargained language that imposes a penalty for *negligent abuse of equipment* that places the welfare and safety of employees at risk, they have agreed that just cause exists should an employee engage in such behavior. Therefore, the question is whether the Grievant was guilty of *negligent abuse of equipment*?

This result is no different than if a traditional just cause analysis is applied. Just cause requires a finding that first, there is conduct by the Grievant in which the County has a disciplinary interest, and second, that the discipline imposed reasonably reflect that interest. The County has an interest in protecting the welfare and safety of its employees, as well as, furthering the efficiency of its operations, thus the County has a disciplinary interest in the Grievant's conduct. The parties have already established the sanctions for Article 21 violations, therefore the discipline imposed is reasonable and reflects the parties agreed upon penalties for infractions. The question remains, was the Grievant guilty of *negligent abuse of equipment*?

The parties disagree as to the meaning of *negligent abuse of equipment*. The Union asserts that in order to find that the Grievant was guilty of *negligent abuse of equipment*, it must be concluded that the Grievant intentionally abused County equipment. Additionally, it argues that the term negligent abuse applies to situations where "an employee knowingly and intentionally *neglects* and *abuses* equipment so as to damage it." (emphasis in original) Union Br. p. 21. In contrast, the County maintains that the commonly accepted meanings of negligence and abuse are applicable.

Looking to Article 21, *negligent abuse of equipment* begins with the term *negligent* which is a generally accepted word that describes the duty of care or manner in which something is to be used and is characterized by inadvertence, thoughtlessness, or inattention. Black's Law Dictionary, 5th ed. p. 931 (1979).[1] More specifically negligence in the workplace as "the failure to do what a reasonably prudent person would have done under the same or similar circumstances, or, the doing of something which a reasonably prudent person would not have done under the same or similar circumstances." BORNSTEIN, BOLSINE AND GREENBAUM, LABOR AND EMPLOYMENT ARBITRATION, 2ND ED. VOL. 1 P16-2 (2002). The Union is in error when it imposes knowledge and intent to the meaning of negligence.

Moving to *abuse of equipment,* the Union in its brief provides two dictionary definitions of abuse. The cited Cambridge dictionary defines it as "when someone uses or treats someone or something wrongly or badly, especially in a way that is to their own advantage" while the Merriam-Webster dictionary defines it as "1. a corrupt practice or custom; 2. improper or excessive use or treatment; MISUSE …" (citations omitted). Regardless of whether these definitions are utilized or the definition contained in Black's Law Dictionary which reads as "to make excessive or improper use of a thing, or to employ it in a manner contrary to the natural or legal rules for its use." are utilized, all of the definitions require a finding that there was either wrong, bad, improper or excessive use. Black's Law Dictionary at 10. Applying this to Article 21, the plain language of the agreement makes it a disciplinary offense for an employee to negligently misuse or improperly use County equipment.

The County specifies in its disciplinary letter that the Grievant was being disciplined because when he was "operating a County owned vehicle in the scope of your employment, you veered off the traveled portion of the road and rolled the vehicle over, which resulted in a substantial amount of damage to the vehicle. Your careless operation of the vehicle is the sole explanation of the motor vehicle incident." The

[1] The Union takes issue with the County's use of legal dictionaries and requests that the Arbitrator apply common meaning to the phrase negligent abuse of equipment. I accept that the parties when negotiating the labor agreement chose their words wisely and understood their meaning and regardless of which dictionary is utilized, the base word for negligent remains neglect which is commonly understood to encompass a failure to give attention or care.

County therefore concluded that the Grievant's veering off the paved roadway and thereafter rolling the vehicle constituted the negligent abuse in this matter.

There is some dispute as to what caused the vehicle to end up overturned in the ditch. The Union argues that it was the depression in the shoulder that caused the Grievant to leave the roadway and further, that the depression prevented the Grievant from returning the vehicle to the roadway. If this is the case, then the failure of the County to properly maintain the roadway mitigates the Grievant's responsibility.

In support of its position, the Union relies on the Grievant's testimony wherein he explained that the depression caused his truck to be "sucked into" the shoulder area and that it caused the truck to overturn. The Union further points out that the Grievant was the only individual on-site when the incident occurred and therefore his testimony should be given the greatest weight. It is true that the Grievant was the only individual with first-hand knowledge of what transpired but, the Grievant's knowledge is tainted by the speed at which the events occurred and his desire for redemption. That isn't to say that I disbelieve the Grievant. Rather, it is simply an acknowledgement of factors that must be considered when making a credibility determination.

In direct conflict with the Grievant's testimony that the front passenger-side tire was simultaneously on the paved road way and over the depression are the conclusions reached by Deputy Keddell and Kolodziej. Keddell is an experience law enforcement officer who has conducted numerous accident scene investigations during his eight-plus years of road officer employment. Keddell viewed the scene, took pictures and concluded that the Grievant had been driving with the passenger-side front tire off of the paved roadway and on the shoulder prior to encountering the depression. Kolodziej reached a similar conclusion. I credit Keddell's testimony. The Grievant lost control of the vehicle which resulted in the passenger-side front tires deviating from the paved roadway onto the gravel shoulder where they traveled for some time period until the tires hit the depression. The depression did not "suck" the vehicle off the paved roadway.

The County issued discipline for both veering off the roadway and overturning. It is therefore necessary to address whether the Grievant's negligence caused the vehicle to overturn. Deputy Keddell testified that "the hole in the shoulder had something to do with the vehicle not being able to be brought back onto the highway." Tr. P. 35. The question is whether the depression mitigates the overturning of the vehicle.

Despite the Union's arguments to the contrary, the Grievant bears responsibility for the incident. The fact of the matter is truck 034 did not drive itself off the paved roadway, the Grievant did, with the knowledge that there was a depression in the shoulder. This is a difficult case. I do not find it to be a negligent act to drive on the shoulder rather than the paved roadway for a short distance on a curvy road, especially

if the Grievant was reducing his speed. Given the existence of the depression and the testimony that once the Grievant hit the depression it was highly unlikely or virtually impossible to return the vehicle to the roadway, I find the Union's position persuasive.

The problem with this result is it ignores the Grievant's admission that he knew of the depression prior to the accident. The Grievant testified that earlier that morning he had observed the depression in the shoulder. A reasonable person who has knowledge of a hazard does his best to avoid encountering the hazard. The Grievant did not do this. The Grievant, with full knowledge of the depression, allowed his vehicle to deviate from the paved roadway and hit the depression. Once it hit the depression, the Grievant did nothing to attempt to maneuver the vehicle back onto the roadway. The Grievant was expected to operate his vehicle in a safe manner. Inherent in safely operating a motor vehicle is driving it in the prescribed area, in this case on the paved roadway and stay out of the ditch. Although it may be that experienced drivers occasionally leave the paved roadway onto the shoulder, it is neither recommended or prudent and they do so at their own peril. The Grievant was obligated to drive his vehicle on the paved roadway and prevent it from overturning in the ditch and his failure to do so constitutes misuse or improper use.

The Grievant was an experienced driver. He was driving a vehicle that he had consistently driven for greater than two years on a road that he regularly traveled including two times earlier that day. It is unknown what caused the Grievant to drive his truck off of the paved roadway. The road was dry, the day was clear, and no evidence was offered indicating an intervening event. The Grievant did not exercise **a** reasonable and proper care while driving, to which resulted in him losing control of the vehicle, the vehicle leaving the paved roadway and overturning resulting in substantial damage to the vehicle and injury to the Grievant. The County has established that the Grievant failed to exercise proper judgment when he drove truck 034 off the paved roadway onto the shoulder, was unable to return the vehicle to Highway U and it overturned. This constitutes negligent abuse of equipment.

Having found that the Grievant negligently abused County equipment in violation of Article 21, the disciplinary sanction of a one-week suspension without pay is not subject to review. My role is limited by the negotiated language of the labor agreement. The parties bargained and agreed that negligent abuse of equipment carries with it severe penalties, therefore it is immaterial whether I believe this penalty reasonably relates to the severity of the offense.

As to the Union's assertion that the Grievant has been treated disparately, there is no evidence to support this conclusion. The Grievant was disciplined pursuant to very specific contract language. The parties did not offer any evidence that this language has been utilized to discipline any employee in the past. Moreover, it is undisputed that no employee has engaged in conduct similar to the Grievant.

The Union challenges the delayed imposition of the Grievant's suspension on the basis that it violates the disciplinary section of the labor agreement in as much as the section adopts a progressive discipline model and delayed serving of discipline is inconsistent with progressive discipline. Both the management rights clause and the disciplinary procedures are contained in Article 1. Nowhere in Article 1, Section B is there language that addresses or limits the County's determination of when disciplinary suspensions are to be served in relation to when the discipline was issued. Section D creates a reasonableness standard for the County when adopting "rules and regulations", but whether the dates upon which an individual serves a suspension constitutes a rule or regulation is unknown. Regardless, all employer actions are subject to a reasonableness review. The incident for which the Grievant was disciplined occurred on August 23, 2004. The Grievant was issued a letter of discipline on September 20, 2004 wherein he was informed that his five (5) work day suspension would begin on November 29, 2004. The County delayed the Grievant's suspension date until November based on its workload. This is reasonable.

AWARD

1. No, the County did not violate Article 21 of the collective bargaining agreement when is issued the Grievant a one-week suspension without pay for the August 23, 2004 incident with his truck.

2. No, the County did not violate Articles 1 and Article 21 of the collective bargaining agreement when it delayed the start date for the Grievant to serve the one-week suspension without pay to November 29, 2004.

3. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 3rd day of February, 2006.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

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