

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 70

and

KENOSHA COUNTY

Case 241
No. 64802
MA-13021

(Prescott Reassignment Grievance)

Appearances:

Mr. Thomas G. Berger, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 044635
Racine, Wisconsin 53404-7013, appearing on behalf of Local 70.

Ms. Lorette Pionke, Senior Assistant Corporation Counsel, County of Kenosha, Courthouse,
912 - 56th Street, Kenosha, Wisconsin 53140, appearing on behalf of Kenosha County.

ARBITRATION AWARD

AFSCME Local #70, hereinafter "Union," and Kenosha County, hereinafter "County," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators 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 May 23, 2006, in Kenosha, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs, the last of which was received on August 18, 2006, 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 and framed the substantive issues as:

1. Was the level of discipline issued to Stan Prescott fair and with just cause?

2. If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE I – RECOGNITION

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Section 1.2. Management Rights. Except as otherwise provided in this agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work, services or materials; to schedule overtime work, to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

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ARTICLE III – GRIEVANCE PROCEDURE

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Section 3.5. Work Rules and Discipline. Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. When any employee is being disciplined or discharged, there shall be a Union representative present and a copy of the reprimand sent to the Union.

The foregoing procedure shall govern any claim by an employee that he has been disciplined or discharged without just cause. Should any action on the part of the County become the subject of arbitration, such described action may be affirmed, revoked, modified in any manner not inconsistent with the terms of this Agreement.

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ARTICLE VI – SENIORITY

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Section 6.3. Temporary Assignments. The County, in exercising its right to assign employees, agrees that an employee has seniority in a job classification, but may be temporarily assigned to another job to fill a vacancy caused by a condition beyond the control of management. Any employee so temporarily assigned shall be returned to his regular job as soon as possible. Temporary assignments shall not be consider transfers.

...

ARTICLE VIII – WAGES

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Section 8.5. Lower Rated Job – Bidding or Temporary. Employees going to a lower rated job through the job posting shall receive the maximum of the new range if lower, or on the step equivalent to his former wage. If temporarily transferred, he shall receive not reduction in pay.

...

BACKGROUND AND FACTS

The Grievant, Stan Prescott, was hired by the County on October 10, 1989 to the Public Works Department, Highway Division and worked in a Heavy Equipment Operator position. Prescott regularly operated the Cruz-air excavator/digger, had no disciplinary history and served on the Highway Department Incident Review committee and on the County-wide safety committee.

On August 13, 2004, the Grievant was involved in a motor vehicle accident. The Grievant was operating the Cruz-air, veered to the right and struck a bicyclist causing serious injury to the cyclist. The Grievant suffered from post-traumatic stress disorder as a result of the accident and was off work and received workers compensation for stress until he returned to work on a part-time basis in October 2004. The Grievant returned to work full-time on October 19, 2004.

As a result of its seriousness, the County Incident Review Committee evaluated the August 13 accident and issued a report on September 9 which read as follows:

Dear Mr. Prescott:

The Incident Review Committee (IRC) reviews accidents and incidents involving employees of the Division of Highways. The IRC is charged with the responsibility of determining whether or not each accident was preventable. The IRC takes into consideration the unique circumstances of each individual case when making this determination.

The information collected may be used in the following ways:

- 1) To identify safety hazards, as well as liability and property exposure. The identification of such hazards and exposures are shared with management, safety committee, and used to aid us in preventing the occurrence of future accidents/incidents.
- 2) Reviewed by the Administrative Review Committee for cases the IRC determines preventable. If warranted, the Administrative Review Committee may reverse the IRC determination or recommend appropriate disciplinary action (which may or may not include remedial training).

On August 13, 2004 you were operating a Badger 1085C Cruz-air excavator/digger northbound on Highway 45 approaching Highway 50 when you struck a bicyclist. You previously provided verbal explanation to two members of this committee: Jim Olson and Mark Montague. You expressed to both Mark and Jim that you felt this accident was preventable. You clarified your determination by explaining that there were numerous causal factors that led to the occurrence of this accident. The two significant factors being "blind spots" and traffic (i.e. vehicles passing or attempting to pass).

Your detailed explanation was shared with and discussed by this committee. The committee also reviewed police, accident, incident, and investigative reports, witness statements, and other related documentation in making its determination. The committee agrees that the Badger 1085C presents several unique blind spots. However, blind spots are inherent and common with most pieces of large equipment and vehicles. The operator has the responsibility to continuously check blind spots as necessary, depending on speed, direction of travel and/or change in position. It is also understood that operating this equipment in traffic presents additional challenges. Moving the equipment to the right to allow traffic to pass must be done with great care by checking blind spots, etc. as noted above.

With that being said, and all other factors taken into consideration the IRC unanimously determined this incident to be preventable. As stipulated in the policy, when the IRC determines an incident to be preventable the matter is referred to the Administrative Review Committee.

...

The Administrative Review Committee met and issued its determination on November 1, 2004. The ARC report concluded that:

Pursuant to the determination of the Incident Review Committee, September 9, 2004, that the accident August 13, 2004 was preventable by William Prescott as a county employee, the Administrative Review Committee has contemplated the following in determining the imposition of discipline.

The most essential job function of a Division of Highways employees is to be a professional driver. Each employee is required to hold a Commercial Driver's License and as such is held to a high standard with respect to operating motor vehicles and motorized equipment. The standard transcends an impatient motoring public that frequently disrespects our equipment, our work zones, and us.

A visibility study of the accident of August 13, 2004, has determined that Mr. Prescott, as the operator of the Cruz-Air, had an unobstructed view of the victim for nine or ten of the 11 seconds between the time the victim turned onto Highway 45 from 85th Street until the point of impact. Photographs confirm that the victim remained on his side of the fog line and it was the Cruz-Air which crossed the fog line and collided with the bicycle. Eyewitness accounts from motorists following Mr. Prescott confirm both the overall time element that the victim was in full view of traffic and the fact that the Cruz-Air veered right into the victim. The committee has concluded from all facts in evidence that Mr. Prescott has failed to meet the standard required by Kenosha County to drive professionally for the Division of Highways and discipline is appropriate.

The Administrative Review Committee considers the following criteria when determining appropriate discipline: extent of damage to property; injury or non-injury; weather conditions; exercise of reasonable care by the employee; results of the employee drug/alcohol test; and any other mitigating factors.

In light of the foregoing, the committee recommends the following:

- That Mr. Prescott be suspended from the Division of Highways for a period of one (1) year; effective November 1, 2004. He will be required to turn in his keys, fuel card and all other property of Kenosha County at his pre-disciplinary hearing pending your decision as department director;
- That the county exercise its right under the Worker's Compensation Act to recall Mr. Prescott to a work assignment that falls within his restrictions until he has reached "end of healing" or a full unrestricted release from his Worker's Compensation Claim resulting from the accident of August 13, 2004. Mr. Prescott is to report for work at the Public Safety Building at 7:00 a.m., Monday November 8, 2004 to begin training for the third-shift custodian position in the Public Safety Building;
- That once he has reached an end of healing plateau, or a full unrestricted release from his Worker's Compensation Claim, he may continue as a custodian under the contract and wages negotiated by SEIU Local 168, or post for other available county employment for which he qualifies, with the exception of positions within the Division of Highways; and
- That effective November 1, 2005, he will become eligible to return to the Division of Highways in any position open on that date or in the future, provided he can demonstrate the ability to operate the equipment necessary to hold said position, through an independent assessment arranged by the county. In addition, Mr. Prescott must successfully complete a probationary period once accepting a position.

The Grievant was issued a ticket by the Kenosha County Sheriff's Department and adjudicated guilty of Overtaking and Passing a Bicycle after a two hour jury trial on November 3, 2004. The Grievant was ordered to pay a forfeiture.

Following a pre-disciplinary conference on November 4, 2004, Fred Patrie, County Director, Department of Public Works, issued the following disciplinary memorandum to the Grievant:

Calvin J. Langmade, Psy.D. has determined through independent medical examination that you have fully recovered from the emotional trauma associated with the accident of August 13, 2004. In doing so, Dr. Langmade concurs with Jon P. Marschall, Psy.D., your treating psychologist, that you are able to return to work with the County of Kenosha. The consensus fulfills my commitment that you be permitted as much time as necessary to recover from the emotional trauma associated with the accident before pursuing action related to your employment.

On March 1, 1999, Mr. Gary Sipsma, Director of the Division of Highways issued a memo to all employees in the division outlining the process for investigating employee related accidents and incidents. The memo identifies six criteria upon which a determination of prevention and suitable discipline are determined. They are: extent of damage to property; injury or non-injury; weather conditions; exercise of reasonable care by employee; results of employee drug/alcohol test; and any other factors that might apply. Each was considered when the Incident Review Committee labeled the accident of August 13, 2004 as preventable by you as a county employee and referred the matter to the Administrative Review Committee for action.

The ARC found you in violation of Kenosha County Uniform work Rule Work Habits, #3, Employees shall not demonstrate incompetence or inefficiency in the performance of job duties. The ARC recommended a one-year suspension from the Division of Highways and reassignment to another position within the Department of Public Works. Following extensive investigation, considering our testimony at the Pre-disciplinary Hearing of November 4, 2004, and with verification that you are psychologically prepared to return to work, I am prepared to impose discipline in consideration of the criteria presented in the March 1, 1999 memo

Exercise of Reasonable Care by Employee

- Eyewitness accounts taken at the scene from those driving behind you at the time of the accident provide no rationale for the driving decision to move the cruz-air into the fog lane. You report that you were illegally passed between CTH CJ and C, however there is no mention in any report that any vehicle was attempting to pass at the time of the accident. Each eyewitness account claims to have seen the victim bicycling on Highway 45.
- Your opportunity to see the victim is verified by the Time Distance Analysis performed by Captain Gary Preston of the Kenosha County Sheriff's Department. His conservative estimate is that you were able to see the victim for 11 of 13 seconds.
- Your explanation has consistently been that the boom of the cruz-air created a blink spot which prevented you from seeing the victim. There is no questions there are blind spots in the cruz-air, as there are in all county vehicles used at the highways division. Blind spots professional drivers compensate for. The blind spots on the cruz-air are not extended and there is no logical reason the bicycle could not have been observed prior to the decision to move the cruz-air to the right. The topography of the road should not have played a role. The road was straight from

the point of impact back 245 feet giving at least seven seconds of straight road view prior to impact. Even if all of the above were untrue, you violated one of the most basic rules of professional driving by inexplicably driving into your blind spots.

- The cruz-air has been operated in Kenosha County for 28 years without incident. Badger Equipment Company, which manufactures the cruz-air, reports no claims referencing that piece of equipment since it purchased the design in 1994.

Injury or Non-Injury

- The bicyclist injured in the accident remains in a coma to the date of this memo and as lost a leg as the result of the accident. Medical bills have surpassed \$200,000 and continued to care for the victim is predicted to be several hundred thousand dollars annually.

Any Other Mitigating Factors That Might Apply

- The attorney for the victim's family has made claim against Kenosha County basically asking the county to voluntarily waive the statutory immunity/damage limitations and to provide compensation to the injured sufficient to pay for all expenses related to the accident.
- The story of the accident and its effects has already come to the attention of local news media resulting in unneeded attention to the division and the country.

Results of Employee's Drug/Alcohol Test

- Negative

Weather Conditions

- No adverse.

Extent of Damage to (County) Property

- Not applicable.

After thoughtful consideration of the criteria and the evidence pertinent to each I am drawn to concur with the ARC that you have violated Kenosha County Uniform work Rule work habits, #3, *Employees shall not demonstrate incompetence or inefficiency in the performance of job duties.*

Balancing the impact of this violation on county government and a family of the public we serve with your employee record and safety conscious reputation I have reduced the discipline recommended by the ARC to the following:

Your Administrative Leave will end January 3, 2005. You will serve a four-day unpaid suspension from January 4 through January 7, 2005.

On January 10, 2005 you will accept assignment as a third-shift custodian in the Public Safety Building. You are to report for work at the Public Safety Building at 7:00 a.m. on January 10 to begin training. You will be transferred to third shift once your training is complete. While training, you will earn \$18.29/hour and increase to \$18.56/hour when you move to third shift. Your county benefit levels, including vacation, casual days, health insurance, etc., will remain unchanged. On May 9, 2004 (sic) you will become eligible to return to a position in the Division of Highways provided you can document completion of remedial driving class. You may determine the location and nature of the class with my approval. Failure to complete remedial education by May 8 will delay our return to highways and may impact future employment with Kenosha County.

Should you choose you may grieve this action as provided in the Local 70 Collective Bargaining Agreement while you serve the imposed discipline.

. . .

The Union filed a grievance on January 10, 2005 challenging the discipline issued to the Grievant and sought his return to his position in the highway department, make whole for any lost wages and benefits due to the discipline, and that the County cease and desist any further discrimination against Prescott. The grievance was denied at all steps.

Additional facts, as relevant, are contained in the **DISCUSSION** section below.

POSITIONS OF THE PARTIES

Union

The Union challenges the discipline issued to Prescott on the basis that it does not meet the proper cause provisions of the labor agreement.

The Grievant was not aware or warned that being involved in a personal injury accident would lead to his suspension and transfer. The Grievant did not violate or disobey a County work rule. A tragic combination of a judgment call to move closer to the shoulder of the road and a bicyclist hidden from the Grievant due to a blind spot in the Cruz-air resulted in the accident.

The County failed to conduct a complete and thorough investigation. Not only did the County refuse to cooperate with a consultant hired to investigate the accident, the County imposed discipline before the Sheriff's Department had completed its investigation into the accident. There is no evidence that shows that the Grievant was incompetent or inefficient.

With regard to the discipline imposed, the Grievant is the only employee in over 20 years that has been involved in a personal injury accident that has been disciplined. Furthermore, the discipline imposed, suspension and transfer, is inconsistent with the County's discipline policy which requires progressive discipline.

The reassignment/transfer of the Grievant violated Recognition clause, the Work Rules and Discipline clause, the Temporary Assignment clause and the Seniority clause of the parties' labor agreement. While it may be that Personnel Director Riedl believed he needed to remove the Grievant from the highway department to protect the County, the labor agreement does not grant the County the right to make this transfer. The transfer was neither fair nor equitable and it was discriminatory. Additionally, the transfer of the Grievant from one bargaining unit to another when there was no vacancy is inappropriate and was deemed so by Arbitrator Jay Grenig in KENOSHA COUNTY, DEC. NO. A/P M-05-160 (Grenig, 2006) wherein he stated "the Employer violated Section 1.1 of the [custodians] collective bargaining agreement by temporarily assigning a regular County employee in one bargaining unit to a custodial position in a different bargaining unit represented by a [different] Union."

The County's decision to transfer the Grievant deviated from the County's progressive disciplinary system and negated the Grievant's seniority rights. The County Board has a disciplinary policy and procedure which provides that employees will be disciplined pursuant to a progressive discipline system. The system includes verbal warning, written warning, suspension and dismissal. It does not contain a transfer to another bargaining unit position at a lower rate of pay.

Finally, the County's decision to transfer the Grievant caused the Grievant to suffer indignity and humiliation. The County had never before imposed this type of discipline on an employee and in doing so in this instance, violated the labor agreement.

County

The County maintains that it has the contractual right to discipline and discharge members of the bargaining unit for proper cause. The County, after careful consideration, in accordance with department and County procedures and with proper cause, disciplined the Grievant for his incompetence.

The Grievant was careless. His momentary carelessness resulted in severe injury. The Sheriff's Department, witnesses at the scene, and a jury all concluded that the Grievant moved to the right into the no passing zone without a reason and overtook a bicyclist. The IRC and

ARC investigated the accident and concluded the Grievant was responsible for the accident and that he should be disciplined.

The Grievant was aware of the County work rules. He served on the IRC and therefore understood the importance of safely operating heavy equipment and was aware that incidents deemed preventable would subject the driver to disciplinary action.

The County creatively imposed the disciplinary sanction of thirty days without pay by moving the Grievant to a lesser paid and less stressful position in the Public Works Department. The County did not demote the Grievant, rather it reasonably responded to its concern that the Grievant was not competent to return to his prior position and therefore his move allowed him to continue to work and earn money. The County was presented with an employee that suffered from a lack of competence and transferred the Grievant in lieu of discharging him. The County's decision is supported by labor law and while the parties' labor agreement does not address placement of the Grievant at a lower rate of pay, it does not deny the County the right to make this transfer.

DISCUSSION

This case is one in a series of grievances that arose following an incident which occurred on August 13, 2004. The facts are not in dispute. The Grievant was involved in a traffic accident while operating a Cruz-air excavator/digger on a highway that resulted in bodily harm to a bicyclist, civil forfeiture by the County to the bicyclist's family, and the Grievant was found guilty of overtaking and passing a bicycle. As a result of the accident, the County disciplined the Grievant and the Union questions whether the County had proper cause to discipline the Grievant.

There are two components to a just cause or proper cause determination. 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 must reasonably reflect that interest. The County has an interest in protecting the welfare and safety of the public and its employees, as well as, furthering the efficiency of its operations, thus the County has a disciplinary interest in the Grievant's conduct.

Was the Grievant guilty of the offense for which he was disciplined?

The Grievant was disciplined for violating Work Rule #3 and, more specifically, the County concluded that his actions on August 13 constituted "incompetence". Incompetence is "a basic lack of ability by the employee carry out the tasks and duties of the job." *Labor and Employment Arbitration*, Bornstein and Gosline, 2nd. Ed. (Matthew Bender & Co., Inc., 2000) P. 16-7. When presented with an incompetent employee, management's decision to demote, transfer or reassign is generally supported. Id. at 16-8.

The Grievant was qualified, trained, and experienced in operating the Cruz-air. The evidence establishes that the Grievant made a decision to steer the Cruz-air from the legal lane of traffic to the right onto the shoulder to allow traffic behind him to pass. In doing so, he placed himself in a position where the known blind spots of the equipment made viewing the area where the bicyclist was riding impossible for at least 2 seconds during a window of 11 seconds when the bicyclist was in a visible position. It was this action that caused the accident and the Grievant is responsible for his decision. But, it is inaccurate to characterize the Grievant's lapse in decision-making as incompetence.

This case is essentially a question of fault or negligence. It is acceptable to discipline an employee for carelessness on the job so long as the punishment is consistent with the seriousness of the offense. Patrie testified that he believed the Grievant's behavior to have been both negligent and careless and he indicated in his letter of December 17 that he was affirming the conclusion of the ARC that the Grievant violated Work Rule #3. The ARC did not conclude that the Grievant had violated Work Rule #3. The ARC concluded that the Grievant had:

... failed to meet the standard required by Kenosha County to drive professionally for the Division of Highways and discipline is appropriate.

The ARC and Patrie considered six factors when determining whether discipline was warranted. Employees were placed on notice of the six factors in a 1999 memorandum and the memorandum stated that discipline may result if the employee was involved in a motor vehicle accident. The Grievant served on the IRC committee and therefore understood, most likely better than most of the employees in the highway division, that preventable accidents are subject to disciplinary action. I conclude that the County placed employees on notice that a motor vehicle accident deemed preventable may result in discipline and informed employees what factors it would consider in accessing preventable.

Looking to those factors, the County found that the Grievant did not exercise reasonable care and the evidence supports this conclusion. Factor two addresses whether an injury or no-injury occurred and the incident resulted in very serious injuries to the bicyclist. Regarding factor three, four and five – results of employee drug/alcohol test, weather conditions and damage to County property – these were negative or not applicable. As to the final factor, any other facts of relevance, the County identified the legal ramifications to the County and the publicity generated by the accident as relevant.

Except for the other facts of relevance noted above which I further discuss below, I concur with the County's conclusion. While it is true that the Grievant challenged certain facts which led to the County's determination that the accident was preventable, none of the Grievant's factual challenges eliminate or negate the County's conclusion. The Grievant asserted that the time analysis was flawed, but offered no evidence as to why or how the analysis was erroneous. It may be that the Grievant does not believe the conclusion, but that belief alone does not displace the credibility of a report generated by trained professionals.

The Grievant's remaining complaints to the ARC conclusions are similarly differences in opinion rather than factually grounded objections. Of significance is the Grievant's focus on the blind spots created by the boom of the Cruz-air and his desire to attribute the accident to these spots. The IRC identified the blind spots as a factor in the accident as did the ARC and Patrie. I find credibility in Patrie's conclusion that blind spots exist in many County vehicles used by the highway department and that professional drivers are expected to compensate for blind spots. Ultimately, the Grievant asserts that he was without blame in this accident. No driver of a motor vehicle is ever without blame because upon deciding to drive a motor vehicle, all drivers accept a certain amount of risk and liability.

Was the level of discipline imposed appropriate?

The County argues in its brief that "[d]iscipline should be serious enough that it acknowledges the seriousness of the offense" and then puts the level of discipline side by side with the seriousness of the injuries suffered by the bicyclist. County Br. 6. The County's reasoning appears to suggest that only those deviations by employees which result in grave harm to persons or property are subject to severe discipline. I disagree. An employee could engage in conduct deemed slightly careless or negligent and the impact could be great. Similarly, an employee could exercise gross negligence with little or no impact. Thus, I am unwilling to accept the County's reasoning and will focus on the Grievant's conduct and the totality of the circumstances rather than the impact.

The County's disciplinary letter indicates that the Grievant was suspended for four-days without pay and was to "accept assignment" to a custodial position for a period of 90 days. At hearing and in the County's memorandum response to the Grievant dated February 4, 2004, the County indicated that the Grievant's reassignment was the equivalent of the 30 days suspension when the difference in the hourly rate of the custodian position and the highway position for 30 days is calculated and added to the four-day suspension loss of income.

The County's Disciplinary Policy and Procedure adopts a progressive disciplinary system which takes into account the employee's disciplinary record and states the following regarding suspensions:

c. Suspension

A suspension is a temporary removal of the employee from the payroll. A suspension may be recommended when lesser forms of disciplinary action have not corrected the employee's behavior. Suspension may also be recommended for first offenses of a more serious nature.

Suspension may be imposed on an employee for repeated offenses when verbal reprimands and written reprimands have not brought about corrected behavior, or for first offenses of a more serious nature.

Examples of some of the more serious infractions (but not limited to those listed) are:

- ❖ major deviation from the work rules, including a violation of safety rules
- ❖ being under the influence of alcohol
- ❖ falsification or misuse of time sheets or records
- ❖ fighting
- ❖ theft of another employee's property
- ❖ disobedience of an order

The number of days recommended for suspension will depend on the severity of the act. Commission of the above offenses may also result in a recommendation for dismissal.

Looking first at the four-day suspension, the County clearly had the right to pass over the lesser disciplinary sanctions of verbal and written warning in this instance. Not only does the County's discipline policy indicate that it will impose a more severe sanction if presented with a serious infraction, the policy further indicates such a serious infraction includes safety violations. The Grievant's accident of August 13 deviated from the safety obligations and responsibilities of a highway department employee and a suspension is grounded in policy.

Moving to the 30 day suspension configured by the County in the Grievant's transfer to another position, this is not a disciplinary sanction that the County has adopted. The County's policy defines suspensions as "temporary removal of the employee from the payroll". The County did not remove the Grievant from its payroll between the time period of January 10 and May 9, 2005. Additionally, it was not until February 4 that the County labeled the Grievant's loss of income due to the assignment to Public Safety as a suspension. Prior to that time and in the Grievant's letter of discipline, the County stated that the totality of the Grievant's suspension was four-days. While I concur that the County was creative when it labeled the economic impact of the Grievant's reassignment as a "suspension", that economic loss was not a suspension.

The County's disciplinary letter dated December indicates that the Grievant was "to accept assignment" to the Public Safety custodian position. The parties have bargained regarding assignments. Article 6.3 states that:

The County, in exercising its right to assign employees, agrees that an employee has seniority in a job classification, but may be temporarily assigned to another

job to fill a vacancy caused by a condition beyond the control of management. Any employee so temporarily assigned shall be returned to his regular job as soon as possible. Temporary assignments shall not be consider transfers.

The County is constrained by the language of Section 6.3. The parties bargained regarding the circumstances under which the County may exercise its rights to assign employees to a job different from his/her regular job. The record is void as to how the custodian vacancy arose. Even assuming that the circumstances that led to the vacancy in the custodian position were such that the parties would have considered "caused by a condition beyond the control of management", the fact that the County failed to return the Grievant to the highway department "as soon as possible" makes application of this language given the circumstances surrounding the Grievant's move incongruent. Nowhere in this language is there a contractual right for the County to temporarily assign employees for disciplinary purposes.

The Grievant did not terminate his employment with the County nor did he apply for a transfer to the custodial position. By reassigning the Grievant and moving him out of the highway division and local 70 to the Public Safety Building and a position represented by another bargaining unit, the County effectively created a lapse in his employment.

The County maintains that the Grievant's move was a reasonable response in light of the County's apprehension as to his competency. The County also buttresses its decisions to transfer the Grievant with the County's concern for the financial well-being of the Grievant and his family. While these may very well have been the rationale that the County employed, there is no contractual authority that allows the County to act as it did.

The County next asserts that its decision to move the Grievant from the Highway Department to the Custodial position was prompted by its concern that the Grievant was not competent to operate heavy equipment. The County has a legitimate right and obligation to ensure that employees are competent to perform their job responsibilities, but in doing so, the County comply with commonly accepted procedures which protect the employee and the County. The County did not follow these procedures. Rather, the County, once it identified its concerns, sent the Grievant to Dr. Langmade for a second opinion. On December 20, 2004 Dr. Langmade affirmed the Grievant's treating psychologist's opinion that the Grievant had reached his maximum medical improvement and was released, without limitation, to operate heavy equipment and to perform the essential functions of his position. Once the County requested and received Dr. Langmade's opinion, it was not in a position to substitute its subjective judgment over that of the professionals.

The Union argues a violation of Article 8.5 wherein the parties bargained that employees who were "temporarily transferred" would not receive a reduction in pay. Noting that the parties specifically stated in 6.3 that temporary assignments are not transfers and that temporary transfers are addressed in section 8.5, it becomes somewhat confusing to ascertain exactly what the parties intended. At a minimum, it appears that those movements

contemplated by 8.5 are voluntary. The Grievant's move from the highway division to Public Safety was not voluntary, therefore I do not find 8.5 helpful.

As to the Union's assertion that the County discriminated against the Grievant when it imposed the discipline pointing out that there has been only one comparable accident and the employee was not disciplined. This incident involved an employee who struck a motorcyclist after the motorcyclist defied the order of a flagger and entered a construction zone. This is not a comparable accident. Not only was it the motorcyclist and not the employee that was determined to be negligent, but the employee was not adjudicated guilty.

In conclusion, the Grievant deviated from the acceptable standards for a professional driver on August 13, 2004 which resulted in a preventable accident. The County's decision to impose a four-day suspension was with just cause. The County lacked the contractual authority to temporarily assign the Grievant to a position in another bargaining unit at a lower hourly rate as a form of discipline. The Grievance is upheld in part and denied in part.

AWARD

1. No, the level of discipline issued to Stan Prescott was not fair and with just cause.

2. The Grievant's four-day suspension was fair and with just cause and is therefore upheld.

3. The Grievant's temporary assignment to the custodian position in the Public Safety Building was not fair and lacked just cause and the appropriate remedy is as follows: the County shall immediately expunge all references to Prescott's assignment to the Public Safety Building from its personnel files and shall make him whole without interest for all money and benefits, including overtime, that he otherwise would have earned, but for his temporary assignment.

4. I shall retain jurisdiction for at least (60) days to resolve any questions involving application of this Award.

Dated at Rhinelander, Wisconsin, this 17th day of November, 2006.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

LAM/gjc
7067

