

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**PORTAGE COUNTY**

and

**PORTAGE COUNTY COURTHOUSE, HEALTH CARE CENTER,  
DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND LIBRARY  
SYSTEM EMPLOYEES, LOCAL 348, AFSCME, AFL-CIO**

Case 200  
No. 67296  
MA-13823

(Discharge of T. W.)

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**Appearances:**

**J. Blair Ward**, Deputy Corporation Counsel, 1516 Church Street, Stevens Point, Wisconsin, appeared on behalf of the Employer.

**Houston Parrish**, Staff Representative, 1547 Somerset Drive, Stevens Point, Wisconsin, appeared on behalf of the Union.

**ARBITRATION AWARD**

Portage County Courthouse, Health Care Center, Department Of Health And Human Services, and Library System Employees, Local 348, AFSCME, AFL-CIO, herein referred to as the "Union," and Portage County, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Stevens Point, Wisconsin, on February, 13, 2008. Each party filed a post-hearing brief, the last of which was received April 28, 2008.

**ISSUES**

The parties stipulated to the following statement of the issues:

1. Did the Employer have just cause for the discharge of Ted Woitczak?
2. If not, what is the appropriate remedy?

### FACTS<sup>1</sup>

The Employer is a Wisconsin county. The Union represents various nonprofessional employees in its Courthouse, Health Care Center, Department of Health and Human Services and other departments. Ted Woitczak is a member of the bargaining unit. Mr. Woitczak was an employee of the Employer and was employed as a Maintenance Technician Specialist. He was in that position for about ten years prior to his discharge for alleged financial conflict of interest. His duties included repairing and maintaining buildings, grounds and equipment. He remodeled offices. He repaired all of the electrical equipment of the County except at the Health Care Center, parks and highway buildings. A small part of his job was shoveling and plowing snow, but the actual work of shoveling was usually delegated to inmates of the jail who had Huber privileges. In that regard, he was responsible to follow the rules governing the supervision and use of inmates. This job has never entailed cutting down brush or trees. At all material times, Mr. Woitczak's supervisor was Dennis Kolodziej, Superintendent of Facilities/Maintenance. Mr. Woitczak usually worked with only limited indirect supervision. He supervises the department in the absence of his supervisor, but has not been trained as a supervisor or department head. Mr. Woitczak normally worked Monday through Friday, eight hours per day ending at 2:30 p.m. He was rarely assigned overtime.

Mr. Woitczak also operates a private sawmill in his off hours. The business has always been a sole proprietorship doing business as "Bargain Sawing" with a business address the same as Mr. Woitczak's personal residence. Mr. Woitczak's minor grandson, Zak Landowski, performs some work for the business and issues bills in his name under the same trade name and address. Mr. Woitczak's son, Daniel, also performs some work for the business. Bargain Sawing takes down diseased trees, trims trees and cuts under brush. It then transports them for disposal or other uses. It ordinarily cuts suitable trees it takes down into construction lumber or firewood. The business also makes some rough lumber products from trees it takes down or wood obtained from other sources. It maintains specialized tools and safety equipment for taking down trees, a truck and trailer for hauling trees, and a fixed stationary sawmill. The business-owned sawmill is physically located on property across the street from Mr. Kolodziej's home, property previously owned by him, but sold to another. Prior to being employed by the Employer, Mr. Woitczak had worked at a local tree service for more than a year doing work similar to the work he does as Bargain Sawing. The existence of this business is common knowledge among many of the Employer's department heads. Section 15.02 (F) of the Employer's personnel policy quoted below permits employees to have outside employment with restrictions. Mr. Woitczak never saw the Employer's written personnel policies and never was trained with respect thereto.

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<sup>1</sup> More facts are stated in the body of the award.

Mr. Kolodziej is also somewhat of a personal friend of Mr. Woitczak. He has helped Mr. Woitczak in the business on an as-needed-available basis. This has been without charge sometimes and other times he and Mr. Woitczak split the proceeds of a specific job. The “profits” are often just enough to buy a round of drinks at a local pub. This has gone on for many years. Until the facts in this case, the Employer has never interpreted its policies to prohibit a supervisor from participating in off duty hours in another business, even one maintained by an employee they supervise.

In 2005, Mr. Kolodziej asked Mr. Woitczak on a number of occasions to perform various tree and brush projects on the Employer’s property within the scope of Bargain Sawing and outside the scope of Mr. Woitczak’s normal work duties and hours.<sup>2</sup> One of these was a large project in early 2005 which involved removing a lot of wood, project 1. Mr. Kolodziej first tried to get other employees of the Employer to perform this job for no pay in exchange for the wood. He finally asked Mr. Woitczak to do it. This work was performed under the supervision of Mr. Kolodziej. The work was performed after normal work hours, on Saturdays and on Sundays. Mr. Woitczak was not paid for that job, but was permitted to keep the wood which was removed. The wood had no significant commercial value and was used for firewood by Mr. Woitczak. This project was completed on a Sunday. The next day, the Parks Department signed out a Huber prisoner, Darren Beacham to assist in cleaning up the project work site. They removed brush and other debris from the work site. Mr. Woitczak was aware that Mr. Beacham had been used by the Employer to complete the clean up. This use of a Huber prisoner was consistent with the correct use of Huber prisoners.

Another project was a minor project performed by Mr. Woitczak’s son on the Employer’s property for \$300 in mid-June, 2005. No Employer equipment or Huber prisoners were used in connection with that project (project 2).

In December, 2005, Mr. Woitczak frequently signed Mr. Beacham out for various projects for the Employer. It was the common practice for the Employer at this time to use Huber prisoners to perform work in aid of subcontractors in the same manner the Employer might use its own employees. It used its employees to perform the work which a contractor might not do; for example, site clean up as described above. It also used its employees to aid a

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<sup>2</sup> These are documented on Union exhibit 11 and referred to herein by date or the numbers listed on that exhibit. They are as follows:

#	approx. date	compensation	Description
1	early 2005	\$0	large project
2	June, 2005	\$300	remove 4 trees from new parking lot
3	late '05, early '06	\$0	cut up and remove blown down tree
4	Aug. '06	\$600	cut trees
5	Oct. '06	\$825	cut trees

These jobs are detailed as necessary in the body.

contractor when doing so would reduce the cost to the Employer of a sub-contract. A third project was performed at Mr. Kolodziej's request for no compensation except removing the wood in December, 2005. The wood had negligible commercial value. Mr. Woitczak performed the wood cutting on Sunday, December 11, 2005. The wood was not removed that day.

The following day, Mr. Woitczak signed Mr. Beacham out to do drywall work at the beginning of his regular work day and worked with him on that project all day. After the close of the work day, Mr. Woitczak went home to get his trailer to remove the wood from project 3. Mr. Woitczak took Mr. Beacham with him to his home briefly get the trailer because Mr. Woitczak was required to keep Mr. Beacham with him at all times while he was signed out and not because he needed his help to get the trailer. The two returned to the project site. Mr. Beacham, Mr. Woitczak and Mr. Kolodziej loaded the wood on the trailer. Mr. Beacham then accompanied Mr. Woitczak to deliver the wood to Mr. Woitczak's home and unload it. Mr. Beacham was properly supervised at all relevant times. Mr. Kolodziej was present at this time and did not disapprove any of the use of the Huber inmate. No equipment of the Employer was used in connection with this project.

Sometime after this job was completed, jail personnel complained to Mr. Kolodziej that inmates were not being used properly and instructed him in their proper use. Part of that instruction was that inmates were to be supervised at all times and that jail personnel were to know where they were being used. This correction was related to other events and not to the disputed occurrences.

In August, 2006, Mr. Kolodziej asked Mr. Woitczak to remove some trees in the vicinity of the Ruth Gilfrey building for a new parking lot. Although Mr. Woitczak had done so for free in the past, he was unwilling to do so for free because it was not worth his time. Mr. Kolodziej offered to pay him to do the work in his off time which both understood to be through Bargain Sawing. Mr. Woitczak asked him to name a price which Mr. Woitczak did. The parties agree that the price was appropriate if not better than outside contractors in the same business would charge. Mr. Kolodziej had the authority to enter into contracts of less than \$1,000 without going through the Employer's bidding and purchasing procedure. Mr. Woitczak had never been trained in the Employer's purchasing policies and did not have authority to participate in any purchasing decisions even in his role as acting supervisor.

Mr. Woitczak performed the work entirely on weekends when he was not normally working. There is a dispute as to whether Mr. Kolodziej performed some of the work on this job in his off time and/or was paid for some of the work. The Employer maintains no rule prohibiting supervisors from having outside work. However, if Mr. Woitczak paid Mr. Kolodziej it was at a rate Mr. Kolodziej had performed other work for him. Mr. Woitczak never believed that he was paying anything of value to Mr. Kolodziej to be awarded the contract. Mr. Woitczak believed that he was awarded the contract because he had the equipment, the experience, a successful contracting history with the Employer and a price below market and for no other reasons. When Mr. Woitczak completed the project he got

ready to go home to get his equipment to load the wood. Mr. Kolodziej directed him to use the Employer's Skidster to save the time for going home. Mr. Woitczak loaded the wood into his trailer using the Employer-owned Skidster and hauled it to his home. This was the normal use of the Skidster and did not involve significant wear and tear or risks associated with the use of the equipment. He was aware at this time that the Skidster had been used in aid of contractors on other projects for the Employer. He used the wood as fire wood. No one else was offered the opportunity to buy the wood for firewood. Mr. Woitczak prepared an invoice under his name and Bargain Sawing and submitted it to Mr. Kolodziej. The invoice was paid by the Employer in the normal course of its business. There is a dispute in as to whether Mr. Woitczak signed out a Huber prisoner, Mr. Beacham, to assist in this project. He did not.

A similar situation occurred in October, 2006. Mr. Kolodziej asked Mr. Wotczak to remove some trees in the area near the same place the August project he had been done. Mr. Woitczak quoted a price of \$875. This job was to remove some oak and other trees. He did this on weekends and took the wood home in his own trailer. The price charged was less than a commercial tree services would have done. He billed this in the regular course of business under his name and Bargain Sawing. The invoice was paid in the normal course of business by the Employer. Mr. Kolodziej did not perform any work on this job and was not paid anything in connection with this contract. There is a dispute as to whether Mr. Woitczak signed out Mr. Beacham to work on this project. He did not.

Mark Maslowski is the County Executive. He has been recently elected as the County Executive and had never worked as an employee of the Employer. He testified that he ran for office on a platform which included eliminating self-dealing within the Employer.

The Employer's auditors found the disputed invoices, along with others involving work performed by the Employer's employees acting as outside contractors, in the Finance Department records in January, 2007. They referred the matter to Administrator Maslowski in a January 14, 2007, memorandum the substance of which state:

. . . I do not believe any competitive bidding was undertaken, or that disclosure of the relationship was made to the committee. Additionally it is not the policy of the County to hire our employees as third party contractors, as an employee, employer relationship can create problems with the IRS regarding taxable earnings. . . .

Executive Maslowski determined to conduct an investigation of the matter and in that regard, he arranged with a neighboring county to have one of its sheriff's deputies conduct the investigation.

Mr. Woitczak stated the following in the investigation. Mr. Kolodziej solicited him to do the work and approved the contract. He did the August job on his own time on weekends and did it a lot cheaper than other contractors would do it. He acknowledged that Mr. Kolodziej helped a little. He said that he trucked the wood in his own truck to his home

and used it as fire wood. As to the October job, he said he also did this job on weekends. Mr. Kolodziej helped him to some extent on his own time. He loaded his personal trailer by hand and obtained one load which he used for fire wood. The brush he cut was chipped by the Parks Department. He did not give money to anyone else, including his supervisor, from these jobs. He denied that he had any help from Huber-release jail inmates in either job.

Mr. Kolodziej confirmed most of the above. He said that he and Mr. Woitczak were doing business as Bargain Sawing, but later acknowledge that he only worked in Mr. Woitczak's business. He acknowledged that Mr. Woitczak paid him some money for the work that he did helping. He said that the Parks Department had chipped some of the brush in the second job and that he believed that Huber inmates may have helped the Parks Department in that function. He thought he obtained other quotes before giving the work to Mr. Woitczak. [He never produced the quotes, but produced an invoice from another tree service for \$600 to take down only one tree.]

When confronted with the differences, Mr. Woitczak denied paying Mr. Kolodziej at all for work he did on these jobs or for getting the contract. Both Mr. Kolodziej and Mr. Woitczak consistently took the position that what they did was open and above board and in the Employer's interest.

Based upon the investigation Executive Maslowski suspected that Mr. Woitczak and Mr. Kolodziej conspired to price the contracts below \$1,000 to avoid the bidding process, priced the contract on a no competing bid basis, and shared the proceeds. He also concluded that Mr. Woitczak used a Huber release inmate to load the cut trees on one of the jobs and also used an Employer-owned fork lift to load the cut wood.

On February 23, Executive Maslowski, determined to discharge Mr. Woitczak and sent him a letter notifying him that he was terminated. The substance of the letter was that there was "substantial" evidence that he and Mr. Kolodziej violated Sec. 13.02(4) and (15) and Section 15.02(a) of the Employer's Personnel Policy by having conducted the personal business as discussed above doing business as Bargain Sawing for profit. He concluded that the proceeds from the two contracts were "shared" between the two. He also concluded that by using Employer equipment and Huber inmates Mr. Woitczak violated Section 13.02(4) and (15) of the Employer's Personnel Policy.

The Union filed a grievance over the dismissal and the same was properly processed to arbitration.

#### **RELEVANT AGREEMENT PROVISIONS**

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### ARTICLE 3 – MANAGEMENT RIGHTS

- A) The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to the following:
1. To direct all operations of the work force;
  2. To establish reasonable work rules and schedules of work;
  - . . .
  4. To suspend, demote, discharge and take other disciplinary action against employees for just cause;
  - . . .
  6. To maintain efficiency of County government operations;
  7. To comply with state and federal law;
  8. To introduce new or improved methods or facilities;
  9. To change existing methods or facilities;
  10. To determine the kinds and amounts of services to be performed as pertain to County government operation; and the number and kinds of classifications to perform such services;
  11. To contract out for goods or services; however, it will be the policy of the County to first consider the impact on the employment security of its employees as the result of any such action and to notify and confer with the Union prior to taking such action;
  12. To determine the methods, means and personnel by which County operations are to be conducted;
  13. To take whatever action is necessary to carry out the functions of the County in situations of emergency.

The County agrees that it will not use these management rights to interfere with the employees' rights established under this Agreement or for the purpose of undermining the Union or discriminating against its members.

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure contained herein; however, during the pendency of any grievance or arbitration proceeding, the County can continue to exercise these management rights.

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## **ARTICLE 25 WAGES AND CLASSIFICATIONS**

Employees shall be paid at the wages set forth in Appendix A to this Agreement

### **RELEVANT PORTAGE COUNTY ORDINANCES**

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### **PORTAGE COUNTY PURCHASING ORDINANCE**

#### **3.7 COUNTY PURCHASING**

##### **3.7.1 PURPOSE**

The purpose of this ordinance is to secure for the county taxpayers the advantages and economies which will result from centralized control over the expenditures of county funds for supplies, materials, equipment and contractual services; to establish uniform purchasing procedures for Portage County; to provide for administration of the purchasing system; to promote efficiency and standardization of purchasing methods for county departments; to promote competitive bidding; to provide for administration, regulation, control and enforcement of the purchasing procedures and methods hereby established; and to improve budgetary control.

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##### **3.7.3 ADMINISTRATION**

The provisions of this ordinance and regulations duly adopted hereunder shall be administered, supervised, and enforced by the Finance Committee, the



Purchasing Manager, and such other officials or employees as the Board may hereafter designate or provide.

#### **3.7.4 DEFINITIONS**

- (a) “Supplies, Materials, Equipment and Contractual Services” shall mean all office supplies, standard office forms, printing, office equipment and furniture, audio visual equipment, lamp supplies, kitchen equipment, janitorial and sanitation supplies, and rental of photocopy machines. Surplus government equipment and furniture are excluded.
- (b) “Department or Agency” means any of the departments, offices, or other organization units of the county government whose affairs and funds are under the supervision and control of the Board of Supervisors.
- (c) “Vendors List” means a current file of sources of supply of articles for each category of commodities repetitively purchased for county use.
- (d) “Responsible Bid or Quotation” means an offer, submitted by a responsible bidder to furnish supplies, materials, equipment or contractual services in conformity with the specifications, delivery terms and conditions, and other requirements included in the invitation for bids or quotations.
- (e) “Responsible Bidder” means a bidder who submits a responsible bid or quotation; who has furnished, when requested, information and data to prove that his financial resources, production or service facilities, service reputation and experience are adequate to make satisfactory delivery of the supplies, materials, equipment or contractual service on which he bids; and who has not violated, or attempted to violate, any provisions of this ordinance.
- (f) “Responsible Bidder” means a bidder or prospective bidder who fails to furnish, upon written request, proof of his responsibility; or who has as a vendor or contractor with the County, repeatedly made slow or unsatisfactory deliveries; or who has violated, or attempted to violate, the provisions of this ordinance.

- (g) “Local Vendor” means a firm or individual who regularly maintains a place of business and transacts business in, or maintains an inventory of merchandise for sale in, or is licensed by, or pays business taxes to, the County of Portage.
- (h) “Board” shall mean the Portage County Board of Supervisors.
- (i) “Manager” shall mean the duly appointed Purchasing Manager
- (j) “Supervising Committee” shall mean the committee as identified in County Board Resolution #123 dated 4-15-75.
- (k) “Department Head” shall mean the head person in a department or designated person responsible to enter and control purchases.

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### **3.7.6 DUTIES AND RESPONSIBILITIES OF THE COUNTY PURCHASING MANAGER**

The County Purchasing Manager shall, subject to the provisions of this ordinance and applicable provisions of state law:

- (a) Purchase all supplies, materials, equipment and contractual services required by the agencies on a timely basis and provide the agencies with any new information, or alternative products or services to best fulfill their requirements.
- (b) Transfer between agencies supplies, materials and equipment which are no longer needed by a holding agency but which can be used by the receiving agency.
- (c) Exchange, trade in or sell those supplies, materials, and equipment which are surplus, obsolete or unused and which are found by the supervising committee not to be required for public use, the proceeds from these transactions to be credited to the common use equipment fund for the maintenance of common use items.
- (d) Develop, with the approval of the Corporation Counsel as to legal sufficiency, standard forms and conditions of invitations to bid or quote; purchase orders and contracts; develop and prescribe the use by agencies of other forms required in carrying out the

provisions of this ordinance; and amend or eliminate any such forms.

- (e) The Purchasing Manager shall perform all his duties under the general supervision of the Finance Committee. All Portage County department heads, shall cooperate with the Purchasing Manager in purchases for the departments which they administer, pursuant to the provisions of this ordinance.
- (f) The Purchase Manager shall have direct supervision, management and control of the purchasing system and be responsible for submitting an annual budget for the central purchasing system.
- (g) It shall be the duty of the Purchasing Manager to prepare bid specifications based on information furnished him by the department for which the purchase is to be made, and from such other sources as he may deem necessary, in order to meet the needs of the department, consistent with the purpose of this ordinance. The bid specifications shall contain sufficient information to fully describe the item or supplies to be purchased, and to clearly differentiate it from other similar articles or supplies. Such specifications shall be drawn so as to make competitive bidding reasonably possible in the interest of obtaining the best product at the most advantageous price to Portage County.
- (h) The Purchasing Manager shall be responsible to recommend to the Finance Committee procedural regulations (purchasing manual) which, if adopted by the Finance Committee, shall be circulated to all county departments, and the Purchasing Manager shall be responsible to ensure compliance by all concerned with such regulations.
- (i) The Purchasing Manager shall maintain a permanent inventory hereafter called "fixed asset inventory" to include all equipment, furniture, and assets, owned by Portage County. All departments shall cooperate with the Purchasing Manager in keeping accurate current inventories of these items under their control, and to notify the Purchasing Manager of any changes so they can be reflected on our insurance policies.
- (j) The Purchasing Manager shall be responsible to the Risk Management Committee for the following insurance coverages:

- (1) Buildings, Contents, and property in the open for fire and extended coverage, monies and Securities, Contractors Equipment, Automotive Collision and Comprehensive coverage, on all facilities and equipment owned or leased by Portage County and contents only on facilities not owned but operated by the County.
- (2) Boiler insurance for all County owned facilities.
- (k) The Purchasing Manager may at any time require information from departments where it deems it necessary for efficient purchasing for the County.
- (l) The Purchasing Manager will police the purchasing procedures and practice of all agencies on purchases outside this ordinance to assure compliance of the policies described herein.

### **3.7.7 DUTIES AND RESPONSIBILITIES OF THE COUNTY DEPARTMENT HEADS**

It is the responsibility of the department heads or designate to:

- (a) Key in the county's computer system (where possible) all requisitions for purchases covered by this ordinance.
- (b) Obtain approval by the appropriate governing committees for all purchases as required by state statute.
- (c) Insure that such purchase authorizations are forwarded to the Purchasing Manager.
- (d) Cooperate in the promotion and expanding use of central purchasing.
- (e) To verify that all purchases within the agency comply with the purchasing ordinance and to provide the Purchasing Manager with an explanation, if requested, on any purchase where a potential violation of policy may exist.

### **3.7.8 DUTIES AND RESPONSIBILITIES OF THE COUNTY MAINTENANCE DEPARTMENT**

The maintenance department shall be responsible for unloading of delivery trucks and the prompt distribution of equipment and supplies to

appropriate departments. Under ordinary conditions, this distribution service shall occur within a 24 hour period.

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### **3.7.13 PURCHASING PROCEDURE AND METHODS**

- (a) All purchases where the estimated cost exceeds \$1,000.00 may be made only after obtaining at least three quotations, where possible.
- (b) All purchases where the estimated cost is under \$1,000.00 may be made on the open market and directly from a dealer or supplier without obtaining formal sealed quotations, but such contracts shall be made only after multiple quotations or proposals have been solicited where possible.
- (c) If in the opinion of the Purchasing Manager, bids or sealed quotations, multiple quotations or proposals are not obtainable, or in cases of immediate need for items or supplies due to an emergency situation, purchases may be made from an approved supplier. The Finance Committee may also authorize direct purchases without sealed quotations or multiple quotations under circumstances deemed justified and advantageous to Portage County.
- (d) The justification and reasons for awards of purchases made by the procedures authorized in paragraphs a, b, and c above shall be recorded and kept on file in the Purchasing Manager's office.
- (e) The Purchasing Manager reserves the right to accept or reject any or all opinions, bids or proposals; to waive any technicality or error in any bid or part thereof submitted, and to accept any bid or option, or combination thereof, in whole or in part, which is deemed to be in the best interest of Portage County, and the needs of the department for whom the purchase is made.
- (f) All things being equal, contracts for purchases shall be awarded to the lowest qualified and responsible bidder, and preference shall be given, under those circumstances, to local vendors.

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## **PORTAGE COUNTY PERSONNEL POLICIES**

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### **ARTICLE XIII - DISCIPLINE AND DISCHARGE**

#### **13.01 DISCIPLINARY ACTION:**

The purpose of discipline is correcting job behavior and performance problems of employees. Employees shall be informed of standards of conduct and performance. Rules and standards shall be consistently applied. Penalties shall be appropriate to the circumstances. Persons administering corrective discipline shall systematically document the case. Records of verbal reprimands shall be maintained in the employee personnel file. Copies of written reprimands, suspensions, and terminations shall be provided to the employee, the Personnel Director, the employee's personnel file, the employee's supervisor and union steward if appropriate. Suspensions and terminations shall be discussed with the Personnel Director before such actions are taken. In the event that the Personnel Director cannot be reached, the employee shall be suspended pending investigation.

#### **13.02 GROUNDS FOR DISCIPLINE:**

The following shall be grounds for discipline ranging from a verbal warning to immediate discharge depending upon circumstances and the seriousness of the offense in the judgment of management

- (1) Dishonesty or falsification of records;
- (2) Insubordination (refusal to obey reasonable orders, insolence, etc.);
- (3) Theft or destruction of County equipment or property;
- (4) Unauthorized use or abuse of County equipment or property;
- (5) Intoxication, including consuming intoxicants during working hours or being under the influence of liquor or drugs during working hours or bringing intoxicants or drugs into the work place;
- (6) Condition brought about from use of intoxicants away from work which interferes with job performance, efficiency, or discipline;

- (7) Fighting or creating a disturbance among fellow employees, resulting in an employee having an adverse effect on morale, production or maintenance of proper discipline;
- (8) Habitual tardiness or abuse of sick leave or unauthorized absence from work without substantiated reason, including violation of an approved department absenteeism policy;
- (9) Use of official position or authority for personal or political profit or advantage;
- (10) Disregard or repeated violation of safety rules and regulations;
- (11) Discrimination because of race, color, creed, national origin, ancestry, marital status, age, sex or disability;
- (12) Knowingly making false or malicious statements with intent to harm or destroy the reputation, authority or official standing of individuals or organizations;
- (13) Unlawful conduct defined as a violation of or refusal to comply with pertinent laws and regulations when such conduct impairs the efficiency of County service.
- (14) Failure to adequately perform assigned job duties;
- (15) Failure to follow duly established work rules, policies and procedures;
- (16) Professional unethical conduct or behavior;
- (17) Violation of the confidentiality requirements of the department.

Other circumstances may warrant disciplinary action and will be treated on a case-by-case basis.

## **ARTICLE XV – MISCELLANEOUS**

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### 15.02 ETHICS

#### A. Conflict of Interest

Purpose – The following policy is set forth because of the proper operation of democratic government requires that employees be independent, impartial and responsible to the people, and the public has confidence in the integrity of its government. Nothing in this section shall deny any individual rights granted by the United State Constitution, the Constitution of the State of Wisconsin, the laws of the United State and the State of Wisconsin or by labor agreements

negotiated with certified employees bargaining unit representatives. No County employee shall use his/her office or position for personal financial gain or the gain of his/her family. No employee shall engage in his own business activity, accept private employment or render services for private interests when such employment, business activity or service is incompatible with the proper discharge of his/her official duties or would impair his/her official duties would impair his/her independent or judgment or action in the performance of his/her official duties. No employee or elected official shall use or disclose "privileged or confidential information" gained in the course of by reason of his/her official position or activities.

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E. Purchasing Materials from the County, Use of County-Owned Equipment, Use of County Facilities for Personal Use

Employees of Portage County are not allowed to

- 1) Purchase materials from Portage County for personal use;
- 2) Borrow County-owned equipment from Portage Count for their personal use;
- 3) Use County facilities for their personal use.

F. Secondary Employment and Honoraria

Employees will be able to work for another employer outside of their normal work hours so long as this secondary employment does not interfere with their ability to perform the duties required of them by Portage County. . . .

When compensatory time or vacation is used for secondary employment employees may not perform such work at their regular work place. Furthermore, an employee may not interrupt his/her regular workday by taking vacation or compensatory time for secondary employment (i.e. an employee may not leave work to attend a consulting matter and then return to work for the County in the same day.)When a question arises over compensation or propriety of secondary employment, the Department Head and/or Governing Committee will determine whether the employee should continue and whether the employee would retain any fees involved.

**POSITIONS OF THE PARTIES**

**Employer**

The Employer had just cause to discharge Mr. Woitczak for each of the following three reasons:



1. Mr. Woitczak and his supervisor conducted personal business for profit by performing county work on county property on or about August 24, 2006, in violation of Portage Personnel Policy Sections 13.02(9) and (15), and 15.02(A)
2. Mr. Woitczak used county equipment and Huber inmates for personal work and profit, in violation of Portage Personnel Policy Sections 13.02(4) and (15), and 15.02(A and Sec. 303.08, Stats.
3. Mr. Woitczak lied during an investigation into the foregoing conduct., in violation of Portage Personnel Policy Sections 13.02(1) and (2)

Mr. Woitczak received a GARRITY warning prior to the investigation interview conducted by a Marathon County Sheriff's deputy. He was asked if anyone received any money from the two disputed jobs. He falsely said "no" when, in fact, he did pay some of the money to his immediate supervisor, Mr. Kolodziej, the person who had authorized the contract. Mr. Kolodziej admitted that he had received payment for working with Mr. Woitczak on at least one of the disputed jobs. He was re-interviewed after he had talked to Mr. Woitczak, and then denied that he was paid. He was also asked if he ever used any Huber inmates to assist him in "any wood cutting projects." He falsely stated that Huber inmates were only used to push brush in a pile on one corner of the Employer's property while doing work that he had performed as a Maintenance Technician. Inmate Beachman provided the Sheriff with a statement upon investigation that Mr. Woitczak signed him out of jail about a year earlier on one occasion on a weekend when he helped him cut wood, stack it on Mr. Woitczak's trailer, haul it to Mr. Woitczak and Mr. Kolodziej's house and unload it.

The Employer interprets the "just cause" to provide limited review of the Employer's decision. Arbitrators often consider Arbitrator Daugherty's Seven Tests of Just Cause. The arbitrator should apply these tests in this matter. Under those tests, the arbitrator should essentially limit his decision to reviewing the reasonableness of County Executive Maslowski's decision.

It was reasonable for Mr. Maslowski to conclude that Mr. Woitczak deliberately lied in the investigation. There were numerous inconsistencies between Mr. Kolodziej's statement and that of Mr. Woitczak's statements. Further, Mr. Maslowski could, and did, reasonably rely upon Mr. Beacham statement. Mr. Beacham had no reason to lie. Further, there are other circumstances surrounding Mr. Beacham's statement which corroborate its truth. First, as Officer Ciulla testified, Mr. Beacham and another inmate had previously reported prior to this inquiry that he had been taken out on a weekend to cut and haul wood privately, haul it to Mr. Woitczak's house and help him unload it. Mr. Beacham had recounted to Officer Ciulla facts about Mr. Woitczak's house which he could have only known had he been there.

Officer Ciulla also testified as to a hearsay situation in which other officers questioned why Mr. Woitczak was trying to take an inmate out on a Sunday. Records reveal that

Mr. Woitczak signed Mr. Beacham out on Sunday, December 11, 2005. When confronted at the hearing herein, Mr. Woitczak stated that the record was wrong and that he had signed him out on Monday, December 12, 2005.

Further, the fact that Mr. Woitczak lied on these points and the fact that he paid Mr. Kolodziej money with respect to the disputed projects means that it was reasonable for Mr. Malowski to believe Mr. Woitczak was untruthful in other material respects.

The use of Huber inmates for personal profit is a serious violation of state law. The lies were not related only to a collateral matter with little importance. The lies were designed to cover a Class 1 felony and Class A misdemeanor acts. The fact that the activities which were being investigated could amount to felonious criminal activity goes to the importance and the seriousness of the investigation.

The Employer has met the seven tests. Mr. Woitczak was given notice of his obligation to be truthful when he was given a GARRITY warning on two separate occasions. Further, he was directly told by Mr. Maslowski to cooperate with the investigation. The rule was reasonably related to the efficient and safe operation of the Employer. Taking a Huber inmate out and to an undisclosed location violates Sec. 303.08, Stats, and interfered with the safe and lawful operation of the jail. Finally, using an inmate to do work for Mr. Woitczak is a clear conflict of interest and abuse of his public position. The Employer's investigation was fair and objective. The investigation produced substantial evidence that Mr. Woitczak had been untruthful throughout the four interviews. This is based on the inconsistent statements of the two people involved and Mr. Beacham. Mr. Beacham was reliable because he had no reason to even give a statement or lie. By contrast Mr. Woitczak's explanation was that Mr. Beacham had heard the two talking about the mill and had fabricated his story. It is difficult to believe that Mr. Beacham could make up so detailed a story. The Employer applied its rules without discrimination. The level of discipline imposed, discharge, was reasonably related to the seriousness of Mr. Woitczak's offense of being untruthful throughout the investigation even though Mr. Woitczak has an admittedly good record of service with the Employer. The seriousness of the investigation is demonstrated by the fact that an offender could be convicted of multiple crimes. Even though there were numerous other employment misconduct allegations against Mr. Woitczak in this matter, it is likely that he would have received the same discipline a fellow employee did for similar allegations, a one-day suspension, if he had not lied.

The Employer had just cause to discharge Mr. Woitczak for conducting personal business as Bargain Sawing for profit on the Employer's property and using the Employer's equipment to do the work. The allegation concerns Mr. Woitczak having engaged in a contract for tree cutting operations with the Employer which was approved by his supervisor and then sharing the proceeds with his supervisor. Even though Mr. Woitczak denied paying his supervisor any money, Mr. Maslowski was justified in relying upon the statements of his supervisor that he had been paid. The fact that Mr. Kolodziej changed his story between interviews is not surprising since the two employees who had engaged in wrong doing had had

an opportunity to consult with each other between interviews (even though they had been instructed not to do so).

The next basis was the fact that Mr. Woitczak used Employer equipment and Huber inmates to assist him in his operations as Bargain Sawing. This is a clear abuse of his position as an employee. It is clearly inappropriate to use Huber inmates for personal profit. A recent Manitowoc County case demonstrates this fact. An employee of that county was fired from his position for signing out a Huber inmate to cut and stack wood on his private property. That employee was charged with criminal violations of Sec's. 946.41(1), 946.12(2), and 946.46, Stats. The testimony by Mr. Woitczak that it was not uncommon for the Employer to use Huber inmates and equipment to help outside contractors working on the Employer's premises is irrelevant. Mr. Woitczak, however, had the inmates work at his home in his for-profit business.

### Union

The Employer has failed to demonstrate that it had just cause for discharging Mr. Woitczak. Newly elected County Executive Maslowski's letter of February 23, 2007, states the reasons for the termination. They are based upon an alleged violation of the Employer's personnel policy. However, Mr. Woitczak never received a copy of that policy. The allegations of "self-dealing" are not supported by the evidence. It is based upon his having obtained a contract with the Employer. Mr. Woitczak had no authority to grant a contract to himself. Neither the collective bargaining agreement, nor the Personal Policy prohibits an employee from doing contracting work with the Employer outside his or her normal work. Mr. Woitczak had previously performed work for the Employer in his outside business as Bargaining Sawing and had been paid for it with the approval of his Employer. The services he provided in each case were services which the Employer actually needed and which were performed outside of his normal work duties and outside normal work hours. The main reason the Employer entered into the private contract is that the services involved equipment the Employer did not have. There is no evidence that Mr. Woitczak had any agreement to share the proceeds with his supervisor or that he did. In short, the allegation of self-dealing is nonsense because he had no authority to award contracts. Employees are entitled to know in advance what is required of them. In this case, Mr. Woitczak had successfully performed contracts for the Employer and he had no reason to believe he was doing anything wrong. A primary reason to discipline employees is to correct inappropriate behavior. Does the Employer think that he would have entered into any more contracts with the Employer if the Employer told him that doing so would lead to discipline?

The Employer has failed to demonstrate just cause for discipline in using the Employer's Skidster in performing one of the contracts. Mr. Woitczak credibly testified that he had volunteered the use of his own equipment for Employer business and the Employer had accepted this. In this specific case, he credibly testified that while finishing the disputed job, he went to go home to get his own equipment to load the cut wood, but that his supervisor authorized him to use the Employer's Skidster instead rather than wasting time to go home and

get his own equipment. This is consistent with testimony that the Employer routinely uses its equipment in aid of contractors performing work on the Employer's premises. Again, the Personnel Policy upon which the discipline rests was never furnished to Mr. Woitczak. In any event, the actions taken were within that policy and the Employer's own past practice. The actions were taken were directed by the Employer. In any event, Mr. Woitczak was not given progressive discipline, but merely fired.

Mr. Woitczak freely admitted to using a Huber inmate on the project in 2005. Huber inmates were used by the Employer on various projects. He believed that it was appropriate to use Huber inmates on that project. In any event, the use of the Huber inmate was at the Employer's direction, primarily for the benefit of the Employer. It was not uncommon for the Employer to use Huber inmates to assist contractors doing work for the Employer. Mr. Woitczak had never been told otherwise. It is unreasonable to conclude that he would have used Huber inmates if he had been told not to do so.

The Employer has failed to show just cause for discharging Mr. Woitczak for lying. The allegation about lying about using Huber inmates is without merit. Mr. Woitczak had no reason to lie about using Huber inmates. In fact, he admitted using them previously. The Employer is just upset because he did not admit to using them in the disputed contracts; something which did not occur. The Employer alleges that he lied about using Mr. Beacham on the 2005 project. This project occurred more than 13 months before he was asked the question concerning using Huber inmates. The evidence is insufficient to demonstrate that he had not merely made a mistake in the answering questions in the investigation. Even Mr. Maslowski had difficulty remembering much during his testimony at the arbitration hearing. Mr. Maslowski admitted in his testimony at tr. Pp. 173-4 that at the time he made his decision, he did not know if Mr. Woitczak had lied intentionally or had merely been inconsistent. The Union notes that the Employer never attempted to check the credibility or criminal history of Mr. Beacham.

Similarly, the Employer has failed to establish that Mr. Woitczak lied about not paying Mr. Kolodziej with respect to the disputed projects. The matter should be dismissed because Mr. Woitczak was not given an opportunity to cross examine the alleged accusing witness. In any event, the evidence of the alleged contradiction between him and Mr. Kolodziej is inconclusive. Mr. Kolodziej was always unsure if he had been paid on the disputed jobs. The two had a history of working together in the Bargain Sawing business. There were times that Mr. Kolodziej was paid and there were times that he was not. It is not unreasonable to believe that either of the two could be wrong.

County Executive Maslowski testified that he made campaign promises to stamp out "ethical" problems in County government. His zeal to show that he was doing so is the primary motivation in his decision to precipitously discharge Mr. Woitczak. Fairness was not part of the occasion. The Union requests that the arbitrator order that Mr. Woitczak be reinstated and be made whole for all lost wages.

### **Employer Reply**

The Union's assertion that Mr. Woitczak "freely admitted" to the same conduct for which he is alleged to have been lying about is not true. Mr. Woitczak consistently asserted throughout the investigation that he never had used Huber inmates in tree cutting operations as Bargain Sawing. The use of Huber inmates for Maintenance Department operation is allowable, but it is not allowable for Bargain Sawing operations. The only admission he made was that the maintenance department used Huber inmates to clear brush during the week. In fact, he consistently denied using Huber inmates to assist him in his tree cutting operations at the Ruth Gilfry Building. He denied using them on weekends or after his hours at all. He denied it again when he was asked later in the investigatory interview of February 16, 2007, at which he denied having any help. The Union's brief states that Mr. Woitczak did "not recall" using Huber inmates. He did more than not recall. See, tr. p. 333 at which he stated that Mr. Beacham may have gotten his story from a discussion between Mr. Woitczak and Mr. Kolodziej.

The Union brief states that Mr. Woitczak testified that Huber inmates at the direction of Mr. Kolodziej assisted with cleaning up brush. This was a permissible use on the Monday after he worked as Bargain Sawing.

On page 3 of the Union's brief the Union states that Mr. Woitczak intended to use Huber inmates at the direction of Mr. Kolodziej is inaccurate in that Mr. Kolodziej was an employee of Bargain Sawing at the time and not directing Mr. Woitczak. In any event, the average person should know or should have known that using a Huber inmate for personal business was improper.

The Union discusses at great lengths that Mr. Woitczak did not engage in self-dealing. Mr. Woitczak paid his supervisor from the same contract he was awarded. It is impossible to not come to the conclusion that he was engaging in self-dealing. Similarly, it is impossible to come to the conclusion that he did not use Employer-owned equipment. It is impossible to come to the conclusion that he did not use Huber inmates in Bargain Sawing.

The Employer made reasonable credibility judgments and it should be sustained.

### **Union Reply**

The Employer argued that Mr. Woitczak was fired for the serious misconduct of using the Skidster in conjunction with one of the disputed contracts. However, it failed to address any argument toward that point. The Union objects to the Employer's citation of the MANITOWOC case as "new evidence." The two situations are dissimilar because here Mr. Woitczak used the inmate at the direction and with the approval of his Employer. The Employer claims that Mr. Woitczak would have received a one-day suspension had he not lied. It relied on an analogy to the Kollock case. But Mr. Kollock left employment rather than grieve. The Employer attempted to introduce evidence in its brief for the first time about

Mr. Karch's job responsibilities. The Union objects to that and also argues that this evidence is irrelevant. The Union notes that Mr. Beacham was available for the hearing and was not subpoenaed.

In reply to the Employer's allegation of lying, the Union notes that the Employer admitted that Mr. Woitczak was consistent in his own statements. The Employer just chose to believe other statements which conflicted with his. This contradicts Mr. Maslowski's own testimony that Mr. Woitczak's statements were inconsistent. Mr. Woitczak could not have been this consistent if he were deliberately fabricating his testimony.

The Employer failed to note inconsistencies in Mr. Beacham's statement. It also failed to note that Mr. Beacham stated that Mr. Kolodziej was with him when he did the work at Mr. Woitczak's home. Thus, the evidence is that the Employer authorized this action. Beacham admitted in his testimony that his statement about taking wood to the home was untrue. Beacham also said that he was unsure if he ever helped Mr. Woitczak on a weekend. The only record from the jail that shows he was out on a weekend, was contradicted by a record showing that was a Monday instead. The record showed him being signed back in on a Monday, not a Sunday.

The evidence does not demonstrate any significant inconsistency between Mr. Woitczak's statements and those of Mr. Kolodziej. Similarly, there is no evidence of misconduct involving the use of Huber inmates.

Finally, the Union notes that the parties have litigated a previous case concerning "just cause" and that the contract provision was interpreted to require the Employer to prove that misconduct occurred and that the penalty was appropriate.

## DISCUSSION

### *I. Just Cause*

The just cause doctrine has been long recognized by collective bargaining parties, arbitrators and the courts as a basic principle of industrial justice. The just cause doctrine essentially requires that an employee is entitled to a hearing *de novo*. The Employer is required to prove at that hearing by a clear and satisfactory preponderance of evidence that the employee engaged in misconduct and that the penalty imposed is appropriate.<sup>3</sup>

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<sup>3</sup> PORTAGE COUNTY COURTHOUSE, MA-12281 (Mc Gilligan, 8/1/5), Sec. 111.07, Stats, provides the burden of proof in similar cases of violation of collective bargaining agreement under Sec. 111.70(3)(a)5, Stats. See, also, National Academy of Arbitrators, The Common Law of the Workplace, Sec. 6.5, (BNA, 2d. Ed.), Sections 6.9 and 6.10.

Under just cause “an employer may discipline an employee for violation of stated or generally known and reasonable work standards.”<sup>4</sup> Ordinarily, an employer is free to adopt reasonable work rules, but the reasonableness of the work rules is subject to challenge under the just cause doctrine.

The Employer has heavily relied upon the “seven tests of just cause” articulated by Arbitrator Carroll Daughtery in *GRIEF BROTHERS* 42 LA 555 (1964). The “seven tests” are a major contribution to the development of concepts of discipline. They were developed by Arbitrator Daughtery in his service as a Referee under the Railway Labor Act. Hearings in that context are held on the property of the railroad by the railroad and the Referee’s function is limited to reviewing the record developed by the railroad. The seven tests have their best application in that type of setting.<sup>5</sup> They are not controlling in *de novo* proceedings.

The basic principle of just cause which is implicated in this case is that an employee has the right to know what is expected of him or her and an opportunity to comply. It goes without saying that an employer is not free to change the meaning of its rules between the date of the alleged offense and the date of the decision to impose discipline. This basic concept of the right of an employer to discipline an employee for misconduct was eloquently stated by the National Academy of Arbitrators as follows:

It is unfair to punish an employee for conduct the employee has no reason to know would be unacceptable. Normally that elemental requirement of justice will mean that the employer must announce the rules it expects the employees to follow and must give some indication of the penalties that will follow a breach. Some rules and expectations are so obvious, however, that employees are presumed to know them. . . .<sup>6</sup>

These principles are so basic and such wise personnel policy that they often appear in the personnel policies of many employers. Indeed, these principles are stated in the Employer’s own Personnel Policies, Section 13.01.

## ***II. Credibility of Witnesses. Deliberate False Information, Use of Huber Prisoners***

A main issue in this case is whether Mr. Woitczak was a credible witness. One of the Employer’s main reasons for disciplining Mr. Woitczak was its belief that he deliberately misled the Employer with respect to using Huber inmates. Its other point is that he lied about sharing the proceeds with his supervisor. The essence of the Employer’s case is that they are so incredible that it must assume that their actions were nefarious and improper.

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<sup>4</sup> National Academy of Arbitrators, *The Common Law of the Workplace*, Sec. 6.5, (BNA, 2d. Ed.)

<sup>5</sup> See, Sec. 62.13(5)(em), Stats., which generally applies the seven tests.

<sup>6</sup> *The Common Law of the Workplace*, *supra*, p. 178

A. Credibility of Beacham

The Employer heavily relied upon the testimony of Mr. Beacham to contradict and impeach Mr. Woitczak. Mr. Beacham's testimony was filled with situations in which he had recollections different from the information he had provided to the Employer. In some cases, this appears to be contradictions of statements given to Employer representatives only the day before hearing. Mr. Beacham has been incarcerated a number of times. It is not likely he was happy with the experience. It is very likely he resented authority (the Employer). I conclude that his evasive and contradictory testimony was intended to appear to cooperate with the Employer while undermining his usefulness. I have credited his testimony only where there are sufficient circumstantial indicia of trustworthiness.

From that evidence, I conclude that he did do work on project 3 as described in the "Facts" above. In the course of the investigation, jailers interviewed Mr. Beacham on February 19, 2007, more than a year after the disputed facts. The jailers wrote a summary of what he related to them and Mr. Beacham signed it. He told investigators he had worked on projects with Mr. Woitczak and then:

. . . I worked with Ted and Dennis at the Ruth Gilfrey Clinic and Portage County Nursing Home, cutting wood and loading the wood on a trailer and taking it to Dennis's and Ted's house. . . .

While this statement suggests that he did this on more than one occasion, he testified that he only did this once. The jail sign-out records are ambiguous. The record indicates he was not signed out by Mr. Woitczak on the weekend the cutting was done, but the following Monday, December 12, 2005. The actual sign-out signature card shows December 11, 2005. I am satisfied that this date was in error because the jail sign-out sheet shows the work to be performed was the same type of drywall work Mr. Beacham had been helping with on weekdays. The jail would have questioned this if he had been signed out on a Sunday. Mr. Beacham's statement indicates that he helped cut the wood. His testimony indicates that he was only involved in getting the trailer, loading it and delivering the wood. Mr. Woitczak's testimony is unclear as to whether the wood was cut and delivered on a Sunday or over several days.<sup>7</sup>

B. Credibility of Woitczak

I have extensively reviewed Mr. Woitczak's testimony. I believe he was entirely surprised that the investigation occurred and never believed he had done anything significant wrong. I am satisfied that his testimony at the hearing was forthright and honest, but it was understandably very defensive. I have given heavy weight to the version of the events which

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<sup>7</sup> Mr. Woitczak believes he intended to sign Mr. Beacham out for this project on Saturday, December 17. His testimony occurred more than a year after the event. The records provide the most trustworthy clues.



he gave to the extent that they were not contradicted by believable direct testimony. I conclude that after he corrected his various statements to his Employer, he told his Employer the following:

1. He never signed Mr. Beacham or any Huber prisoner out as, and for, Bargain Sawing.
2. Mr. Beacham was never at his house.
3. That he did not remember the situation in fall, 2005 (project1) very well.
4. That he might have checked Beacham out at times and possibly once on a weekend.
5. That he did not check him out for the purpose of cutting wood on a weekend, but that he may have used a Huber for clearing brush.

Mr. Woitczak's statements to the Employer were largely accurate, but were inaccurate in some significant respects, most particularly, that Mr. Beacham helped unload the wood on project3. Further, the statements misled the Employer to some extent because the Employer did not understand the full nature of the work performed at the time it questioned Mr. Woitczak. Mr. Woitczak was defensive, but did not intend to mislead the Employer. It is not uncommon for different witnesses to remember past events differently from each other. This is particularly true when the events occurred more than a year before the time they were questioned. I am satisfied that at the time Mr. Woitczak was questioned by the Employer he honestly did not remember that Mr. Beacham had gone with him to get the trailer and had participated in the loading and delivery of the cut wood. I conclude that to the extent that the foregoing had the effect of misleading the Employer to a limited extent, it was solely a result of an honest, but mistaken point of view of past events.

Similarly, there is disagreement in the record as to whether Mr. Woitczak paid Mr. Kolodziej anything in connection with the jobs 4 and 5. This, too, was an honest difference of recollection. The Employer's real concern about inquiring about the payment was whether the reason that Mr. Kolodziej granted the contract was because he expected to share in the proceeds. The evidence is clear that both believed that the contract involved a minor amount and was beneficial to the Employer because it was less than the market price for those services. It was less than the market price. I am satisfied that Mr. Woitczak did not intend to pay Mr. Kolodziej anything of value for entering into the contract and he correctly believed that the sole reason that Mr. Kolodziej came to him is because he knew Mr. Woitczak could do the work, would do the work promptly, efficiently, correctly and inexpensively. At the time he entered into the contract, he did not expect Mr. Kolodziej to participate in the work for wages. He may have paid him for work on one occasion and the amount paid was consistent with wages paid to him for other work in the Bargain Sawing business.<sup>8</sup> In short, the Employer has failed to meet its burden of proof to show that Mr. Woitczak intentionally made false statements to the Employer or at hearing or that Mr. Woitczak paid Mr. Kolodziej anything of value to induce him to enter into the contract.

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<sup>8</sup> He did not, however, share the proceeds evenly.

It is also important to note that the assumption underlying the Employer's position with respect to project 3 is incorrect. The assumption that the Employer made was that the work performed was Mr. Woitczak's private work. I conclude that all of the work, including the delivery of the wood, was work of the Employer under the collective bargaining agreement. The undisputed evidence establishes that Mr. Kolodziej asked Mr. Woitczak to perform that work in exchange for the wood and no pay. This work was primarily in the interest of the Employer and was productive work.<sup>9</sup> It is undisputed that Mr. Woitczak was not paid money for this work. Whenever the Employer asks an employee to "volunteer" to perform productive work without proper wages, Article 25 and other provisions<sup>10</sup> are potentially implicated. Mr. Woitczak's testimony and actions in refusing subsequent similar assignments establish that what he received was not of value comparable to what he would have received had he been paid overtime. Under the circumstances, I conclude that the removal of the trees in project 3 and their removal from the Employer's premises and delivery to Mr. Woitczak's mill constituted work of the Employer done in violation of Article 25. While the delivery of the wood might have technically violated Huber rules by taking a Huber prisoner off site without proper documentation, it was done pursuant to Mr. Kolodziej's supervision and he was solely responsible for the decision to do it.<sup>11</sup> I, therefore, conclude that Mr. Woitczak's use of Huber prisoners was under the direction of the Employer and within the scope of his employment.

### *III. Use of Skidster*

The only evidence in support of the Employer's allegation that Mr. Woitczak used Employer-owned equipment was the incidental use of the Employer's Skidster on project 4. I conclude that he did do so and did not otherwise use Employer equipment in any of the other the disputed projects.

The Employer has failed to establish just cause for discipline Mr. Woitczak's use of the Skidster. This action is premised on rule E. 2 which provides that employees are not allowed to "[b]orrow County-owned equipment from Portage Count (sic) for their personal use. Mr. Woitczak was never shown this rule and was unaware of its existence. The rule is

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<sup>9</sup> "Productive" is used here as opposed to arranging social events, blood drives or other non-work activities. It may be that this was not bargaining unit work and it may be that this is work out of Mr. Woitczak's classification. Nothing in this decision addresses whether the Employer had the right to assign this work to Mr. Woitczak or to direct him to work on overtime outside of his classification.

<sup>10</sup> For example, Article 19's overtime provisions

<sup>11</sup> I note that the Employer had several options in getting any of the disputed work done. First, it could have hired an outside contractor. Second, it could have rented equipment and used its own employees. The third option was to take advantage of having an employee who happened to be in a position to do the work with his own equipment. If it hired a contractor, it could have paid the contractor to remove it, chipped it on its own premises, given the wood to others, or attempted to sell it on the open market. If it tried to sell it, it would have been faced with the choice as to sell it delivered to the buyer at the Employer's expense or for the buyer to pick it up at the buyer's expense. There is no evidence in the record that the Employer ever investigated whether it would have had to deliver the wood at its own cost if it had used another option. I also note that, in any event, project 3 was primarily in the interest of the Employer, including without limitation the delivery of the cut wood. It is impractical and somewhat pernicious on the part of the Employer to attempt to bifurcate this work between that part which was in the "Employer's interest" and that part which was in the "employee's interest."

ambiguous in many respects. Does it apply to work done on the Employer's premises? Does it apply to the minor use of the equipment in accordance with its intended purposes? Does it apply to the use of equipment which may be personal but furthers the Employer's interests (such as saving time)? May an employee use equipment for personal use in the same manner as the public or non-employee contractors might be permitted to use it? There is no reason that Mr. Woitczak should have known to not use the Skidster absent being told about the rule or being told not to do so.

Second, he did not violate the rule as it was interpreted by the Employer at the time. The Employer's rules provide no real guidance in this situation. In practice, the Employer routinely allowed contractors to incidentally use Employer-owned equipment in the performance of contracts on the Employer's premises. Mr. Woitczak credibly testified that his supervisor directed him to use the Skidster rather than waste everyone's time while he went home and got his equipment. The use of the Skidster incidentally to the work was in the Employer's interest, and not solely Mr. Woitczak's. The use was minor and it was consistent with the way the Employer's equipment was used with other contractors. Third, the use of the equipment was authorized by Mr. Woitczak's immediate supervisor. The Employer's reasoning in this regard is entirely fallacious. Because it believed that Mr. Woitczak and his supervisor colluded in securing the subcontract, it attributes all of the misconduct to both the supervisor and Mr. Woitczak. Mr. Koldziej was responsible for applying the rules and, if he authorized this use. This is true irrespective of Mr. Kolodziej's relationship to Bargain Sawing. The Employer lacks just cause to impose discipline on Mr. Woitczak without having first informed him of its rule.

#### ***IV. Conflict of Interest***

The main reason the Employer discharged Mr. Woitczak was its belief that he had a conflict of interest in engaging in the disputed contracts and/or violated Personnel Policies Section 13.02(9) an (15) and 15.02(A). Mr. Woitczak did not ever see these rules and was never trained with respect to them. It is an essential element of the just cause doctrine and Section 13.01 of the Employer's disciplinary policy that an employee is entitled to know what the Employer's expectations are and an opportunity to comply. The Employer lacks just cause to discipline Mr. Woitczak for them unless he knew, or should have known, that his conduct was improper.

Every employee owes his or her employer a duty of loyalty and honesty. Using one's position as an employee to bribe a supervisor to grant a contract would be that type of conduct an employee should know is wrong. The assumption behind the Employer's position on this issue is that Mr. Woitczak used his personal relationship with Mr. Kolodziej to secure these valuable contracts and/or intended to use the proceeds to improperly bribe Mr. Kolodziej into giving him these contracts. As noted above, if this had been true, the result in this case might well be different because that is an expectation of which he should have known. The better view of the evidence is that Mr. Kolodziej used his position to get services needed by the Employer and acted in the Employer's interests. Specifically, the history of the earlier jobs

indicates that Mr. Kolodziej came to Mr. Woitczak because he knew he had the skills and equipment to do the work in question. Mr. Woitczak was not paid money and I don't believe that the Employer could have obtained the services commercially without paying someone money. It was also easier for Mr. Kolodziej to do this without expending much of his time in securing these minor services. Finally, he knew Mr. Woitczak to be reliable, efficient and honest. The Employer has failed to show that obtaining three bids for each of these projects was at all practical under these circumstances. The Employer obtained these services at a reasonable price. However, even if the Employer could have obtained the services cheaper, the purpose of the authority to contract under \$1,000 was to get the work done without extensive procurement procedures. It is possible that Mr. Kolodziej intended to offer the later jobs to Mr. Woitczak in order to earn extra money himself. This appears unlikely since he first sought to have Mr. Woitczak do them for nothing. However, even if Mr. Kolodziej's motivation was to share in the proceeds, I am satisfied that Mr. Woitczak did not contemplate paying Mr. Kolodziej anything at the time he entered into the disputed contracts and could not have foreseen that that was part of Mr. Kolodziej's motivation. It was Mr. Kolodziej's responsibility, and not Mr. Woitczak's, to check with the purchasing committee in situations which might appear to be a conflict of interest. There is no way Mr. Woitczak could have known whether or not that was done. Accordingly, I conclude that Mr. Woitczak could not have foreseen any conflict of interest.

The Employer's position is also separately predicated upon a position that an employee is not allowed to contract with the Employer under any circumstances, at least for physical services. This is a rule which does not specifically appear at all in the Employer's purchasing policy. As noted, Mr. Woitczak never was trained with respect to the Employer's rules. It is the responsibility of the contracting authority (Mr. Kolodziej) to understand the Employer's policy. After performing services for no pay, Mr. Woitczak was entitled to rely on Mr. Kolodziej's conduct in interpreting the rules. In any event, these rules are at least ambiguous on this subject. The Employer's practice as of the time of these contracts was to enter into contracts with employees as subcontractors and Mr. Woitczak was aware of that practice.

The specific policy the Employer relied upon in discharging Mr. Woitczak was the general provisions of its conflict of interest rules, namely, that the ". . . business activity or service is incompatible with the proper discharge of his/her official duties or would impair his/her independent judgment or action in the performance of his/her official duties." The Employer believed that Mr. Kolodziej had a conflict of interest or did not exercise the full range of his independent judgment. For the reasons discussed above and under the circumstances, Mr. Woitczak did not intentionally induce that lapse (if any) and he was entitled to at least one disciplinary warning before the imposition of discharge. The Employer has failed to show that these contracts interfered with Mr. Woitczak's duties or judgment over matters within the scope of his authority. Accordingly, the Employer has failed to show just cause to discharge Mr. Woitczak for any of the reasons it has offered herein.

**AWARD**

The Employer has failed to show just cause to have imposed discipline on Mr. Woitczak in this matter. It shall immediately offer him reinstatement and make him whole for all lost wages within sixty days of the date of this award. I reserve jurisdiction over the calculation back pay if either party requests in writing that I do so, with a copy to opposing party, within sixty days of the date of this award.

Dated at Madison, Wisconsin, this 13th day of June, 2008.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

