

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**GENERAL DRIVERS, DAIRY EMPLOYEES, WAREHOUSEMEN,
HELPERS & INSIDE EMPLOYEES LOCAL UNION NO. 346**

and

DOUGLAS COUNTY (HIGHWAY DEPARTMENT)

Case 287

No. 67662

MA-13977

(Leslie Chandler Discharge Grievance)

Appearances:

Timothy W. Andrew, Attorney, Andrew & Bransky, P.A., 302 West Superior Street, Suite 300, Duluth, Minnesota 55802, appearing on behalf of Local 346.

Thomas Rusboldt, Attorney, Weld, Riley, Prenz & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Douglas County.

ARBITRATION AWARD

Local Union No. 346, General Drivers, Dairy Employees, Warehousemen, Helpers & Inside Employees, hereinafter referred to as the Union, and Douglas County, hereinafter referred to as the County, are parties to a collective bargaining agreement (agreement or contract) which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. On January 2, 2008 the Union filed a Request to Initiate Grievance Arbitration and asked the Wisconsin Employment Relations Commission to assign a staff arbitrator to hear and resolve the Union's grievance regarding the discharge of Leslie Chandler (Grievant). The undersigned was appointed as the arbitrator. Hearings were held on the matter on March 27, April 15 and April 17, 2008 in Superior, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. The hearings were not transcribed. The parties filed post-hearing briefs by June 6, 2008 at which time the record was closed. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The parties were unable to stipulate to a statement of the issue to be decided by the Arbitrator.

The Union frames the issues as follows:

1. Did the County violate the collective bargaining agreement when it disciplined Les Chandler by transferring him from a State plow route assignment to a County plow route assignment on December 7, 2007?
2. Is further discipline for the same conduct that led to the plow route reassignment double jeopardy?
3. Did the County discharge Chandler in retaliation for past union activity?
4. Was the last chance agreement still in effect on December 12, 2007?
5. If the last chance agreement was in effect, did Chandler's conduct violate that agreement?
6. If the last chance agreement does not apply, was Chandler's conduct just cause for discharge under the provisions of Article 3 of the collective bargaining agreement?
7. If the County did not have just cause to discharge Chandler, what is the appropriate remedy?

The Employer frames the issues as follows:

Issue 1: Did the County violate the last chance agreement when it discharged the Grievant on December 12, 2007? If so, what is the remedy?

Issue 2: Did the County violate the collective bargaining agreement when it transferred Chandler from a State snow plowing route to a County route on December 7, 2007? If so, what is the remedy?

The Arbitrator adopts the issues as set forth by the Union.

RELEVANT CONTRACTUAL PROVISIONS AND LAST CHANCE AGREEMENT

ARTICLE 3.

DISCHARGE: The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such employee to the employee in writing, and a copy of the same to the Union and Job Steward affected, except that no warning notice need be given to an employee before he is discharged if the cause is dishonesty, drunkenness, drinking on the job, recklessness resulting in serious accident while on duty. . .

ARTICLE 4.

MANAGEMENT RIGHTS:

The County possesses the sole right to operate the County Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

- A) To direct all operations of the County.
- B) To hire, promote, schedule and assign employees to positions with the County.

. . .

- D) To relieve employees from their duties, to change assignments or lay-off.
- E) To take whatever action is necessary to comply with State or Federal law.

. . .

- G) To determine the methods, means and personnel by which County operations are to be conducted.
- H) To take whatever action is reasonably necessary to carry out the functions of the County in situations and (sic) emergency.
- I) To establish work rules and schedules of work.
- J) To maintain efficiency of County operations.

ARTICLE 26.

. . .

Section 2. WINTER ROAD MAINTENANCE:

- a. Road maintenance is required on a call-out basis 24 hours per day, 7 days per week. The goal of the Department is to provide safe, uniform, and consistent winter maintenance service. To most effectively achieve these goals, it is imperative that the equipment operator assigned to a State Highway snow-plow route be the primary, and first, employee contacted for overtime, call-out activities related to winter maintenance of the involved snow plow route.
- b. Routes: Snow and ice removal routes shall be assigned through a process allowing operators to annually sign up for routes based on their preference. The actual routes will be assigned by awarding the preferred route to the more senior operator. The route assignments shall remain in effect for the entire snow removal season.

. . .

LAST CHANCE EMPLOYMENT AGREEMENT

This “Last Chance Employment Agreement” is entered into effective as of the 15th day of July, 2003, by and between Les Chandler (“Chandler”), and Douglas County, Wisconsin (“Employer”).

In order to maintain an on-going employment relationship with the Douglas County Highway Department, employee Les Chandler voluntarily enters into this last chance employment agreement with Douglas County in accordance with the following stipulations.

1. In consideration of the promises of Chandler and Local #346 as set forth in this Agreement, the County agrees to return Chandler to an Equipment Operator #1 position in the Highway Department. In consideration for the promises of the County as set forth in the Agreement, Local #346 and Chandler agree that the terms of this Agreement supersede any collective bargaining agreement or Chandler’s rights under any other County Ordinance or policy.
2. Chandler relinquishes future eligibility for any Foreman position for the Douglas County Highway Department.
3. Chandler accepts Hawthorne as his permanent reporting location with no future transfer eligibility.

4. Chandler accepts that his access to Forestry Department facilities are permanently restricted, excepting those that are available to any member of the general public and under the same terms and conditions as apply to members of the general public.
5. Chandler will comply with Highway Department and County policies and there will be no incidents of personal use of County equipment or property.
6. There will be no incidents of dishonesty in his actions related to employment as a Highway Department employee.
7. There will be no incidents of Chandler using his position as a County employee to acquire personal gain.
8. If Chandler breaches any of the provisions of this Agreement, the County will discharge Chandler. If there is a dispute or disagreement over whether Chandler has committed a breach of this Agreement such question shall be resolved through the grievance and arbitration procedure of the Collective Bargaining Agreement between Local 346 and the County. In the event the Arbitrator finds Chandler has committed a breach of this Agreement, the Arbitrator shall not have the power to reduce the County's penalty imposed for the breach.
9. By his signature Chandler acknowledges that he has read this Agreement, and has had the opportunity to consult with Local #346 or his representative and that he enters into it voluntarily and with full knowledge of its significance.

Dated and signed this 15th day of July, 2003. . .

BACKGROUND

At all times material hereto, Les Chandler was employed by Douglas County as an Operator 1 and was a member of the collective bargaining unit represented by the Union. As an Operator 1 his winter duties included plowing and clearing ice and snow along a portion of State Highway 53 to the South of the City of Superior. His snow plow route is designated MS-1 and was assigned to him pursuant to a seniority-based route selection process provided for by the collective bargaining agreement.

On July 7, 2003, the Grievant and the County entered into a "Last Chance Agreement", hereinafter LCA, following Grievant's conviction for disorderly conduct as a result of the theft of

County property. That agreement is set forth herein and provides for, among other things, the discharge of the Grievant in the event of his dishonesty on the job or of his failure to follow County policies relating to his employment. The LCA, by its terms, supersedes any existing collective bargaining agreement.

On December 6 and 7, 2007, a winter storm occurred which included snow and freezing mist conditions. The record is unclear on the exact amount of precipitation resulting from this storm but does indicate that it was relatively light. Temperatures ranged from 3 degrees F to 21 degrees F. By 5:30 p.m. on December 6, Patrol Superintendent Keith Armstrong determined that Grievant's assigned roadway was ice covered and slippery. At this time the Grievant had returned to his assigned "portal" (his County garage) and was in the process of clocking out. Armstrong ordered him to return to his route and apply salt because of the glare ice.

On the morning of December 7 Armstrong was again patrolling the various snow plow routes and found Grievant's route to be ice covered and slippery. Armstrong determined that Grievant had been salting the passing lane in favor of the driving lane, contrary to policy. There were three reported incidents of motorists sliding off of the highway along Grievant's route and he was contacted on more than one occasion that morning regarding the poor conditions along his route. Armstrong found that the driving lanes along the Grievant's route were glare ice while the passing lanes were wet and showed evidence of salt having been recently applied. There was no such evidence of salt having been applied in the driving lanes. The other routes that morning, maintained by other Highway Department snow plow operators, were in good driving condition according to Armstrong. Upon further investigation, Armstrong found Grievant in a "crossover" (between the northbound and southbound lanes). Grievant told Armstrong that he (Grievant) had been clearing a salt jam in the auger of his salt spreader but Armstrong could not find any evidence of that being true. While at the crossover, Armstrong observed Grievant changing bungee cords in order to change the directional plate from the passenger side to the driver's side. It was apparent to Armstrong that the Grievant had been dispensing salt from the passenger side and not from the driver's side in violation of Department policy and procedure. The importance of this alleged violation, and others, will be examined in more detail under the **DISCUSSION** section below.

Armstrong reported the Grievant's apparent untruthfulness and his concerns about the road conditions along the Grievant's assigned snow plow route to his (Armstrong's) supervisor, County Highway Commissioner Paul Halverson. Halverson concluded that public safety had been compromised and transferred the Grievant from the State highway to a County route. Halverson also decided to consider discipline consequential to the Grievant's actions. Grievant filed a grievance on December 10, 2007 relating to his transfer to a County snow plow route. Following

Halverson's investigation into the circumstances of December 6 and 7, and discussions with Human Resources and other County officials, the decision was made to terminate the Grievant. Halverson issued the termination letter on December 12, 2007, in which he set forth a detailed description of the reasons for the decision. Grievant's termination took effect on December 12, 2007. The grievance relating to this termination followed.

THE PARTIES' POSITIONS

The Union

The County violated the collective bargaining agreement by disciplining Grievant when it transferred him from his State plow route to a County plow route. According to Halverson the reason for the transfer was poor work performance on December 6 and 7, 2007. The collective bargaining agreement, under Article 26, grants employees the right to receive snow plow routes based on seniority. Grievant had bid for this route and had been assigned to it pursuant to Article 26. The County may not transfer an operator from his route because the Union has negotiated strict seniority for snow plow routes and should receive the benefit of its bargain.

Because Grievant had been disciplined for his actions on December 6 and 7, 2007 by being transferred to a County route, the County is now barred from discharging him for the same actions because such a discharge constitutes double jeopardy. In the employment context double jeopardy means that if discipline is imposed and accepted it cannot be increased. WAUPACA COUNTY, Case 120, No. 59513, MA-11316 (Morrison, 2002) citing GENERAL SERVICES ADMINISTRATION, 75 LA 1158, 1162 (Lubic, 1980). Armstrong and Halverson both agreed that they were aware of all the facts regarding Grievant's conduct on December 6 and 7, 2007 when they made the decision to transfer him to the State route and a comparison of the reassignment memo and the discharge letter set forth the same conduct. Also, because Grievant would have lost overtime potential by being transferred to the State route this constitutes discipline. The double jeopardy argument is even more compelling in this case because the facts suggest that the discharge decision was motivated by the grievance over the route reassignment. This conclusion may be fairly drawn because Grievant wrote in his grievance "I told him that I would be filing a grievance over this." Faced with no contractual justification for the reassignment and a meritorious grievance, the County terminated the Grievant.

The County terminated the Grievant in retaliation for his past Union activities. Immediately prior to his discharge the Grievant had received full payment for a grievance he had filed. Also, Halverson admitted disdain for the grievance procedure and arbitration process, especially when used by the Grievant. In the Fall of 2002 Grievant had grieved the selection of Armstrong as a working foreman. Arbitrator Mawinney (WERC Staff) found that the County had violated the agreement by not taking into consideration Grievant's seniority and ordered the County to offer Grievant the position and to make him whole for the County's failure to promote him. Halverson was upset about the decision and made a statement that he did not agree with the system, referring to a grievance and arbitration system which would allow his decision to be overruled. On July 11, 2007 Grievant filed a grievance because he had not been called out for an overtime assignment on the basis of seniority. This grievance was paid by the County just prior to hearing. Because Grievant "knew who he was dealing with" he specifically wrote on the grievance, "[d]on't want any repercussions from this grievance by Paul Halverson or Keith Armstrong." Less than two weeks after he received his payment and only five days after he told the County he would grieve the route transfer he was terminated.

The Last Chance Agreement does not apply in this case because it was signed nearly five years ago and it does not specify an expiration date. This is a “long time and an employee cannot have summary discharge hanging over his head for that long of a period of time where the agreement is silent as to its duration.” The Union cites KENOSHA COUNTY, Case 178, No. 56229, MA-10213 (Gratz, 5/17/99) standing for the proposition that a well drafted LCA will specify an expiration date and if not, the Arbitrator should find that the parties intended it to last a “reasonable time”, depending on the nature of the offense, the parties’ practices, and other relevant factors. The LCA cannot stand for another reason. One of the key terms of the agreement would have the Hawthorne Portal as Grievant’s permanent reporting location with no future transfer eligibility. On June 6, 2007 the County accepted Grievant’s request to be transferred to the Gordon Portal. Because this constitutes a deviation from the explicit terms of the agreement and because the Gordon Portal transfer document does not specifically contain a reference to the fact the LCA would remain in effect following the transfer, the County is barred from further enforcing it. By their actions the parties have essentially established that the LCA’s term reasonably ended when they disregarded its terms.

Even if the LCA has not ended, the Grievant didn’t violate it anyway. He complied with all Highway Department and County policies, as required by the agreement, and did not engage in incidents of dishonesty. On December 6, 2007, at about 6 p.m. he finished up his route on the north end and passed Solon Springs Airport about 5 minutes before the end of his shift. At about 6:07 p.m. he received a call from Armstrong asking him how long it had been since he salted near the Airport. The Grievant told him that it had been 5 minutes ago. This was a figure of speech and he did not actually mean 5 minutes. Thus, when the County accuses him of lying about the 5 minute time period, he wasn’t actually lying but using a general figure of speech. If Armstrong had wanted precise times he should have asked for them. Also, when Armstrong observed the roads to be icy at or near the Solon Springs Airport at about 6:00 p.m. he concluded that the Grievant must have finished his route at the south end of his route rather than the north end as the Grievant said he had, and thus had lied to him about his routing. This conclusion is rebutted by the testimony of Rick Smith who testified that when he arrived at the north end of the Grievant’s route at around 6:30 p.m. he noted that the roadway was wet as a result of Grievant’s recent salt application. Armstrong’s second allegation of the Grievant having lied about his activities relates to the salt jam episode which occurred at 10:30 a.m. or so on December 7, 2007. Grievant said he had been clearing a salt jam at the crossover but Armstrong observed no pile of salt on the ground which would have been present if a jam had been cleared. Grievant explained that he had already cleared the jam before Armstrong arrived and that the salt went into the non-moving spinner instead of going on the ground. Because Armstrong never left his truck he didn’t have a good view of the scene anyway. The third allegation of lying relates to the number of crossovers remaining to be done at 1:49 p.m. on December 7 when the Grievant requested permission to work through his 10 hour break. The discharge letter states that he only had 2½ crossovers remaining at this time but he actually had 16 remaining. These allegations of dishonesty are fabrications by the County to pigeon hole the Grievant’s conduct to fit within the four corners of the LCA.

The County had no just cause for discharge. Just cause is required by Article 2 of the collective bargaining agreement. In the present case there was no prior written warning notice

required under Article 2. It is true that such notice is not required by the collective bargaining agreement in cases of dishonesty but, as has been shown, the Grievant did not engage in dishonest behavior. Just cause must also fail because the County failed to question the Grievant before the discharge decision was made. One of Carroll Daugherty's seven questions for just cause (any one of which resulting in a "no" answer defeats just cause) is: "did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?" This is the employee's "day in court" principle and it means that he has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior. Since the County failed to interview the Grievant and understand his version of the events it failed to give him just cause.

Weather conditions were tough on the two days in question. The Grievant worked hard and did the best he could have done under these difficult conditions. It was the weather which resulted in the roadway's bad condition on those days, not the actions of the Grievant. Other employees reported slippery conditions and the re-freezing of the roadways. Armstrong himself gave everyone a heads up at 5:29 p.m. on the 6th telling the employees that the roadways were "starting to freeze up with ice." On the 7th, at 9:20 a.m., Jeff Maki said "looks like this froze up, doesn't it Johnny?" to which John Autio replied "yea, it's got a shine to it." Armstrong was concerned enough about it that he instructed Rick Smith to drive to Highway 38 and see if the concrete was re-freezing or glazing over. When salt gets diluted the brine runs off the crown of the road and mixes with snow or ice. What likely happened is that the Grievant applied enough salt to wet the roadway in the driving lane and as he drove back in the passing lane the brine in the driving lane froze behind him.

The County failed to prove the conduct of the Grievant was so negligent or careless so as to meet the requirements of just cause. The only witness to opine that the Grievant had failed to do his job was Armstrong. While the County relies on the fact that Shane Begley had gone into the ditch. Begley himself testified that he had been going too fast for the wet conditions. And Deputy Long's report that the roadway was slippery is tempered by his testimony that the driving lane appeared to be wet. Of course, the driving lane would only be wet if the lane had been salted. Armstrong is alone in his assertion that the driving lane had been neglected in favor of the passing lane.

Finally, the Grievant worked hard on December 6 and 7. The record supports that conclusion. Also, the Grievant has no motive to neglect the driving lane over the passing lane. The County's Snow and Ice Control Policy states that melting action of salt is only effective when combined with magnesium chloride. Despite this, Armstrong told the Grievant not to unplug his magnesium chloride system but instead to "worry about the liquids later." Of course, the Grievant can't be blamed for the roadway conditions if Armstrong takes away a critical tool for clearing the roadway.

The District

Grievant was at all times subject to the LCA. In CITY OF MADISON, MA-10553 (Houlihan, 12/27/99) the grievant committed an act of dishonesty just as the Grievant did here. In that case the Arbitrator found that the LCA (six years old at the time of hearing) continued to exist even though it had no termination date. It was not a contract without end, i.e. running in perpetuity, because it will end one day. It will end when the grievant quits or retires. Her severance from service will end the agreement. Although six years is a long time, fraudulent behavior on the part of the grievant supported its lengthy tenure. Here, the Arbitrator must abide by the terms of the agreement fairly negotiated by the employer and the employee. If the LCA fails to state a termination date, the Arbitrator should find that the parties intended it to last a 'reasonable' period of time. In this case about four and one half years is reasonable. In fact, an agreement covering the duration of Grievant's employment in this case would not be unreasonable.

The transfer back to the Gordon Portal did not terminate the LCA. If anything, it breathed new life into it because the parties verbally acknowledged that the LCA would still be in effect.

The Grievant violated the LCA on December 6 and 7, 2007. The specific nature of those violations are set forth in Exhibit 4, Halverson's Notice of Intent to Release From Employment memo dated December 12, 2007. Stipulation #5 of the LCA was violated when the Grievant failed to follow the County's Snow and Ice Removal policies for maintaining the driving lanes in a "passable" condition, and Stipulation #6 was violated when the Grievant lied to Armstrong about his activities on December 6 and 7, 2007. Although some of the witnesses testimony tended to support the Grievant's position, it is the testimony of Armstrong which is of paramount importance because he is the only person charged with the duty to observe the roadways and to analyze their condition in light of the Grievant's actions. He is trained and experienced in observing the manner of ice removal procedures.

The Arbitrator is required to affirm Grievant's discharge and dismiss the grievance. The LCA itself requires it and the Grievant knowingly and willingly agreed that he would be discharged for failure to comply with the policies and for dishonesty and that he would not have recourse to the grievance procedure other than to make the determination as to whether he had violated the LCA. This is in keeping with other grievances determinations based on last chance agreements. For instance, in CHIPPEWA COUNTY (HIGHWAY), MA-8587 (Greco, 4/7/95) the arbitrator narrowed the issue to one question:

This language, in my mind, means that no grievance can be filed or heard over whether discharge is an appropriate penalty and that the only question left open under this language is whether Wellsandt, in fact, was guilty of a "serious breach of County/Highway policies/work rules (i.e., a breach that would normally lead to a formal letter of reprimand or more severe discipline. . . ." In other words, any such grievance must be narrowly focused on whether a letter of reprimand is warranted, rather than the broader question of whether discharge is appropriate.

The only question to be answered here is whether Grievant breached the LCA.

If the Arbitrator finds that the LCA is void, Grievant's conduct still warrants discharge under Article 3 of the CBA. Also, the County did not waive its right to discharge the Grievant by transferring him to the State route. The transfer was not discipline and the County has every right to discharge the Grievant for the same reasons it transferred him to the State route. In addition, the transfer was not a violation of the collective bargaining agreement. Management has the right to make such transfers on the grounds of emergency and public safety notwithstanding the existence of a seniority based route bidding system.

DISCUSSION

There are two grievances to be decided in this matter. The first relates to the transfer of the Grievant from his State plow route to the County route following the events which ultimately led to his discharge. The second, of course, is the discharge itself. Headings in the body of this discussion set forth the issue to be decided and each will be considered individually.

Did the County violate the collective bargaining agreement when it disciplined Les Chandler by transferring him from a State plow route assignment to a County plow route assignment on December 7, 2007?

The Union argues that by virtue of Article 26, Section 2.b the County may not transfer an employee from his or her assigned route once that employee has bid on it and has been assigned to it based upon seniority. It says that the collective bargaining agreement does not contain any exception to this seniority requirement. Article 4, the agreement's management rights clause, provides the County with the right to direct all operations of the County and to maintain efficiency of County operations. It also gives the County the right to take whatever action is reasonably necessary to carry out the functions of the County in situations of emergency. Article 4 is not modified by Article 26. Article 26 simply recognizes that the County will honor seniority in making assignments but it is not a guarantee that the employee will retain the position. Seniority protects an employee's rights relative to the rights of other employees in his or her seniority group but does not protect him in relation to the job itself. (See REYNOLDS METALS CO., 25 LA 44 (Prasow, 1955)) In this case the County determined that efficient operation and public safety would be better served by transferring the Grievant to the County route and putting another snow plow driver on the State route. Because the record supports the County's decision, this action fell well within the County's rights.

Is further discipline for the same conduct that led to the plow route reassignment double jeopardy?

The Union correctly asserts that double jeopardy in the employment context means that once discipline has been imposed and accepted it cannot be increased. If the transfer of the Grievant from the State route to the County route had constituted discipline the County would have been barred from further discipline for the same offense. The undersigned has found that the actions of the County in transferring the Grievant from the State route to the County route were justified under the terms of the collective bargaining agreement. Halverson judged that a public

safety issue had been created by the poor performance of the Grievant and that an emergency situation existed. He took steps to respond to that emergency by removing the Grievant from the State route. Once he had dealt with the emergency he considered disciplinary measures and after consultation with other County personnel made the decision to discharge the Grievant. It follows that the termination of the Grievant did not constitute double jeopardy since the transfer was not made for disciplinary reasons but to combat an emergency. The fact that the Grievant lost some speculative overtime potential in the process is irrelevant. This loss, if any, resulted from the Grievant's own failure to perform his assigned duties.

Did the County discharge Chandler in retaliation for past union activity?

Aside from the Grievant's bare accusations of retaliation, this record is completely void of any inference, let alone any clear evidence, of retaliation being a factor relating to the discharge of the Grievant. The fact that Halverson voiced displeasure at the results of a prior grievance arbitration which went against the County; that he "admitted sensitivity to having his decisions challenged through the labor contract;" and the fact that the County had recently paid the Grievant some back overtime does not prove retaliation as a basis for this discharge.

Was the last chance agreement still in effect on December 12, 2007?

Last chance agreements are agreements outside the collective bargaining agreement and they are strictly construed and enforced by arbitrators. The LCA in this case confirms that it is intended by the parties to be outside of the collective bargaining agreement with one exception not uncommon to LCAs: any alleged breach or violation of the LCA is to be resolved through the grievance and arbitration procedure established by the collective bargaining agreement.

The Union first argues that the LCA should not be upheld because to enforce it at this late date would be unreasonable. In other words, because the agreement does not contain a specific termination date the undersigned should impose a reasonable time limit and find that the roughly five years from the time the LCA was negotiated and the time of the events giving rise to this discharge was too long and "the enforceability (sic) of the Last Chance Agreement is long past a 'reasonable time.'" It is true that in those instances where the parties fail to include a termination date applicable to an LCA the arbitrator is charged with the task of determining whether the agreement is reasonable under the circumstances taking into consideration the nature of the offense and the practice of the parties. It is not axiomatic that in those cases the arbitrator is required to find a date certain for termination. It may very well be that reasonableness supports the durability of the LCA for the entire duration of the employee's tenure with the employer. The effect of this is to consider that the LCA runs, not in perpetuity, but until the separation of the employment relationship between the employer and the employee. The undersigned embraces the language of Arbitrator Houlihan and adopts it here:

I believe the last chance agreement continues to exist, and controls the disposition of this proceeding. That agreement has no termination date. Had the parties wanted a terminal date, they were in a position to insert one at the point of the document's

creation. The Union claims this could be a contract without end, i.e., running in perpetuity. That is not the case. This grievant will someday quit or retire. Her severance from service will terminate the agreement. In the alternative, circumstances may dictate that these parties, or an arbitrator, declare it at an end. Such circumstances are not present here. Six years passed since the creation of the document. That is admittedly a long period of time. . . I do not believe it to be particularly onerous or oppressive to hold the grievant to that standard six years after execution of the last chance agreement. CITY OF MADISON (MADISON METROPOLITAN TRANSIT SYSTEM), MA-10553 (Houlihan, 12/27/99)

The Union asserts that the County effectively terminated the LCA when it allowed the Grievant to change his reporting location from the Hawthorne Portal, where, according to the LCA he was to be permanently located, to the Gordon Portal, a location closer to his home and more convenient for the Grievant. This was a modification of the LCA and since LCAs are to be strictly enforced, and the County failed to strictly enforce it, it is now kaput. The argument is not persuasive. In the first place, the County allowed the move to the Gordon Portal at the request, and for the benefit, of the Grievant. It is disingenuous at best to now assert that because of the County's willingness to be somewhat flexible for the benefit of the Grievant it is barred from enforcing the LCA. The Union argues that the County may not "pick and choose" which clauses of the LCA it will follow, and the failure to follow paragraph 3 (the reference to the permanency of the Hawthorne Portal reporting location) constitutes a recognition on the part of the County that the agreement did not continue indefinitely and, thus, the Grievant "was again subject to the same contractual rules and procedures, including the right to transfer portals and the same disciplinary rules as other employees." This argument not persuasive either. The agreement reached between the Douglas County Forestry Department and the Grievant allowing him to return to the Gordon Portal contained certain conditions which must be met prior to the Forestry Department's agreement to allow the Grievant back on its property. That agreement did not effect the LCA in any way. The Forestry Department owns the Gordon Portal. It was Forestry Department property which was stolen by the Grievant from Forestry Department land. This theft, and subsequent conviction, led, at least in part, to the LCA. It was, therefore, necessary for the Highway Department to obtain permission from the Forestry Department to allow the Grievant back on to Forestry Department property. Here were two County Departments making a concerted effort to accommodate the Grievant which, the Arbitrator notes, they had no duty to do. The undersigned will not penalize them for their efforts. Lastly, the Grievant testified that he was not aware that the LCA was to be continued beyond his move back to the Gordon Portal. The credible testimony of Halverson was that the parties specifically agreed that the LCA would continue in force following the move to the Gordon Portal and the undersigned finds the testimony of the Grievant to the contrary to be incredible. In any event, as noted above, the transfer to the Gordon Portal had no effect on the LCA. Try as it has, the Union has failed to persuade the Arbitrator that this last chance agreement was somehow terminated at the time of the incidents giving rise to this grievance, or that its failure to provide for a date certain for termination renders it unreasonable. In addition, the Arbitrator does not view the Grievant's transfer from the Hawthorne Portal to the Gordon Portal as a breach or modification of the LCA. The LCA restricts the *Grievant* from *obtaining future transfer eligibility*. It does not restrict the *County* from exercising its legitimate

management rights to direct the operations of the County efficiently. The County determined, for whatever reason, that a transfer from Hawthorne to Gordon was in its best interests and enhanced the efficient operation of County business. The LCA did not prevent that action. In short, the County did not relinquish its rights to run the business when it entered into the LCA with the Grievant. The testimony of Douglas County Director of Forestry John Harris is irrelevant.

If the last chance agreement was in effect, did Chandler's conduct violate that agreement?

The Union strongly argues that the LCA required the Grievant to comply with Highway Department and County policies and not to engage in incidents of dishonesty and that at all times herein he complied with those two requirements. The undersigned does not agree. At 6:01 p.m. on December 6, 2007, he signed off for the evening. After putting his loader away and going inside he received a phone call from Armstrong asking him how long it had been since he salted near the Solon Springs Airport. Grievant replied that he had salted that area "five minutes" before. The evidence clearly fails to support the Grievant's response. Armstrong had been in that area at approximately 6:00 p.m. and discovered that the northern section of the driving lane of Grievant's route was glare ice and the passing lane showed evidence of having been salted fairly recently. Armstrong determined that the driving lane had not been salted for one to one and one half hours prior to his inspection. The reference to the "five minutes" may not be shrugged off as a "figure of speech" as the Union argues. When coupled with Armstrong's credible testimony regarding his observations of the roadway and the fact that the road conditions to the north of Grievant's route were in fairly good condition, and the fact that the plow operators, including Grievant, were required to work beyond 6:00 p.m. if the road conditions required it, the "five minute" comment looks more like an attempt to cover up the true condition of his route rather than a figure of speech.

On the following day, December 7, 2007, the Grievant began his plowing activities at about 4:00 a.m. At about 9:22 a.m. Deputy Larry Long, a Douglas County Sheriff's Deputy, was on duty patrolling his assigned sector which included the Grievant's route. As he made a U-turn to head southbound on Highway 53 at Solon Springs he noted that the passing lane showed evidence of salt. As he moved to the driving lane his tires spun and he lost traction. He reported this condition to Armstrong who then made contact with the Grievant. The Grievant told Armstrong that he had just applied a heavy dose of salt in that area. This comment, when coupled with the credible testimony of Deputy Long, cannot be true. He may have applied a dose of material to the passing lane, as the Deputy's observations would support, but he obviously failed to apply any material to the driving lane. This failure constitutes a violation of the policy and procedures required by the Department. That policy requires that the plow operators clear the driving lanes first, not the passing lanes. Armstrong testified that the road surfaces to the north of the Grievant's route were in fairly good condition but when he reached the Grievant's route he noted that the passing lanes were wet and showed evidence of salt but the driving lanes were icy. The fact that the evidence supports the conclusion that the Grievant failed to salt the driving lane in favor of the passing lane begs the question of why he would favor the passing lane over the driving lane. The answer lies in the crossover incident.

At about 10:30 a.m. on the 7th, Armstrong found the Grievant's plow vehicle in a crossover. His plow was configured to plow crossovers and it was evident to Armstrong that the Grievant had begun the process of plowing the crossover. Crossovers are not to be plowed until the roadways are clear and the failure to clear the roadways before plowing the crossovers constitutes a violation of Highway Department and County policy and procedure. As Armstrong approached the Grievant's vehicle the Grievant told him that he (Grievant) had stopped in the crossover to clear a salt jam in the chute. While salt jams are not uncommon, it was clear to Armstrong that the Grievant had not cleared a jam because there was no salt pile on the ground below the chute and because Armstrong observed that the cover of the chute had remained closed. He knew this because the ice and snow on the cover had not been disturbed which would have been the case if the Grievant had opened the cover to clear a jam as he said he had. But Armstrong observed something else in the crossover which sheds light on the failure of the Grievant to salt the driving lane in favor of the passing lane. Armstrong observed the Grievant changing the directional plate for the flow of salt to a position which would allow salt to flow into the left chute rather than the right chute. This is important because it leads to the conclusion that before 10:30 a.m. on that day the Grievant was spreading salt from the right chute, not the left. This is meaningful because the proper procedure for salting the driving lane is to apply salt from the left chute as the operator drives in the driving lane. This allows the material to be applied near the "crown" of the roadway thus allowing the salt to run down over the sloped surface of the driving lane which, in turn, melts the ice and snow in that lane. If the operator applies the material from the right chute, as the evidence shows the Grievant did here, the material would go onto the side of the road and be of no value, assuming he drove in the driving lane. If, on the other hand, the operator drives in the passing lane (driving in the center of the highway would block traffic), and uses the right chute hoping the material will cover both the driving lane and the passing lane, he may be able to save some time and clock out earlier. In the present case, though, the evidence supports the conclusion that the Grievant's material, when applied to the center of the roadway as he drove in the passing lane, migrated behind him into the passing lane only, thus resulting in the conditions observed by Deputy Long and by Armstrong and answering the question of why the Grievant favored the passing lane over the driving lane. The evidence leads the undersigned to conclude that he really didn't favor one over the other; he simply failed to follow proper policy and procedure which resulted in the poor condition of his route; a condition which jeopardized the safety of the traveling public using that stretch of highway.

The Union urges the Arbitrator to place significant weight on the testimony of Shane Begley and of Rob Ostrom. Begley slid off the highway into a ditch along part of the Grievant's route and testified that the accident was his fault because he was going too fast for conditions. At the time of his accident he testified that the roadway was wet and icy. His written statement, in part, says "...while I was in the ditch I saw a few other cars slipping in the same area." leading to the conclusion that someone had failed to properly salt at least that stretch of roadway. There were three accidents along the Grievant's route that day resulting in motorists sliding off the road. There were none along the routes of the other operators on that day. Ostrom was a tow truck operator who was called to the scene of slide-offs at about 6:00 p.m. on December 6th and again on December 7th. He testified, among other things, that on December 7th at about 10:00 a.m. he observed a snow plow driver spreading in the passing lane. He also testified that the roads were

slippery and wet and he thinks he saw some salt. He said that at his location the roads seemed to be in good shape. The undersigned does not place significant weight on the testimony of these two witnesses for two primary reasons: first, neither one inspected the Grievant's entire route with an eye toward making a determination, based upon experience and training, as to whether the Grievant was properly maintaining the road conditions according to the policies and procedures required of the County. Armstrong, on the other hand, was doing just that. Second, their testimony may in some respects be said to support the County's theory. In short, the undersigned is convinced that Armstrong's testimony was credible and constituted the most accurate and dependable assessment of the conditions of the Grievant's route on the days in question. County snow plow operator Rick Smith's testimony was inconclusive.

There is some confusion over an allegation that the Grievant misrepresented the number of crossovers he had remaining to be plowed in an effort to work through a ten hour break and collect additional overtime. The record supports the conclusion that this was not the case and that the County was simply confused by the number remaining. Hence, this allegation is unsubstantiated.

By reason of the above the undersigned concludes that the Grievant did engage in dishonesty and did violate policies and procedures of the County and of the Highway Department.

If the last chance agreement does not apply, was Chandler's conduct just cause for discharge under the provisions of Article 3 of the collective bargaining agreement?

As we have seen the LCA is applicable here. Once that has been determined, as it has been in this case, the Arbitrator's role is limited to determining whether the Grievant violated its terms. Arbitrators generally do not apply the same due process considerations or procedural protections as under normal discharge matters. See EATON CUTLER-HAMMER CORP., 110 LA 467, 470-471 (Franckiewicz, 1998). The undersigned agrees with Arbitrator Daniel:

Arbitrators encourage such progressive programs of salvage and rehabilitation by strict enforcement of such "last chance agreements" in accordance with the terms which the parties, including the employee, have been willing to accept. However harsh or strict such terms and even though the arbitrator might well regard such conditions as unfair, that cannot be his concern. KAYDON CORP., 89 LA 377, 379 (Daniel, 1987)

Here, the LCA provides that in the event the Grievant breaches any of the conditions of that agreement he shall be discharged. In the event the parties disagree on whether the conduct of the Grievant constitutes a breach, that disagreement shall be subject to the grievance and arbitration provisions of the collective bargaining agreement. That has been accomplished in this case. The undersigned has found that the actions of the Grievant do constitute a breach of the Last Chance Agreement.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The County did not violate the collective bargaining agreement by transferring Chandler from a State snow plow route to a County snow plow route.
2. Discipline for the conduct that led to the plow route reassignment was not double jeopardy.
3. The County did not discharge Chandler in retaliation for past union activity.
4. The last chance agreement was still in effect on December 12, 2007.
5. Chandler's conduct did violate the last chance agreement.
6. The last chance agreement does apply and Chandler's discharge was justified under the terms of that agreement.
7. The grievances, and both of them, are dismissed.

Dated at Wausau, Wisconsin, this 8th day of August, 2008.

Steve Morrison /s/

Steve Morrison, Arbitrator

