

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**LABOR ASSOCIATION OF WISCONSIN, INC.**

and

**VILLAGE OF GENOA CITY**

Case 21  
No. 67864  
MA-14041

*(R.D. Grievance)<sup>1</sup>*

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**Appearances:**

**Benjamin Barth**, Labor Consultant, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, WI 53022, appearing on behalf of the Union.

**Linda L. Gray**, Oleniczak & Gray, 2847C Buell Drive, P.O. Box 911, East Troy, Wisconsin 53120, appearing on behalf of the Village of Genoa City.

**ARBITRATION AWARD**

Pursuant to the terms of the 2006-2007 collective bargaining agreement between the Village of Genoa City (Village) and the Labor Association of Wisconsin, Inc. (Union), the parties requested that the Wisconsin Employment Relations Commission appoint an impartial arbitrator to hear and resolve a dispute between them regarding the interpretation and application of the Agreement as they pertain to the discharge of R.D. (the Grievant) that took effect on February 15, 2008.

The Commission designated the undersigned, Commission Chair Judith Neumann, to hear and resolve the dispute. A hearing in the matter took place on Wednesday, June 11, 2008, at Genoa City Village Hall. The parties thereafter filed written briefs and reply briefs, the last of which was received on August 22, 2008, at which time the record was closed.

**STIPULATED ISSUE**

Did the Employer have just cause to terminate the grievant effective February 25, 2008? If not, what is the appropriate remedy?<sup>2</sup>

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<sup>1</sup> To protect the Grievant's privacy, he will be referred to throughout this award as "R.D."

<sup>2</sup> The parties stipulated to this statement of the issue, which was set forth on Union Exhibit 1. However, the record indicates that the grievant's termination date was actually February 15, 2008.

## RELEVANT CONTRACT PROVISIONS

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### ARTICLE II - MANAGEMENT RIGHTS

**Section 2.01:** The employees recognize the right of the Employer to operate and manage their affairs in all respects in accordance with the ordinances of the Village of Genoa City, the Constitution of the United States, the State of Wisconsin and the Wisconsin Statutes.

**Section 2.02:** The Village of Genoa City shall have the right to determine the kind and amounts of service to be performed as pertains to the department operations and the number and kinds of employees to perform such services.

**Section 2.03:** Employees shall comply with all reasonable work rules. Said rules and regulations shall be in writing and shall be posted on the Department of Public Works premises at a designated location where they shall be visible to all employees. A copy of said rules and regulations and any changes thereof shall be sent to the Association. Any changes in wages, hours, or working conditions contrary to the provisions of this Agreement or past practice shall be negotiated between the Village and the Association prior to implementation.

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### ARTICLE VII - DISCIPLINE

**Section 7.01:** Whenever an employee has reason to believe that discipline may result from a meeting with the Employer or their designee, the employee shall have the right to have an Association representative of his or her choice present if the employee so chooses. A local Association representative may be present at the settlement of any disciplinary matters without loss of pay.

**Section 7.02:** Any employee who receives a written warning or is demoted, suspended or discharged shall receive a written statement of the reasons for the disciplinary action, a copy of which shall be presented to the Association. All disciplinary matters shall be subject to the grievance procedure as outline (sic) in Article VI. At the request of the employee, written warnings or reprimands shall be reviewed by the appropriate Village authority and the employee after said written warnings or reprimands have been in the employee's personnel record for a period of one (1) year and may be removed after the review.

**Section 7.03 – Personnel Procedures:**

- A. An employee shall have the right to inspect the entire contents of his/her personnel file.
- B. An employee shall have the right to copies of any material placed in his or her file. The employee shall be responsible for the costs of copies of any materials.

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**FACTS**

The grievant, R.D., worked as a Public Works Operator for the Public Works Department of the Village of Genoa City for about seven and one-half years prior to his termination from employment effective February 15, 2008. He was one of four employees in the Department, all of whom worked full time and were expected to have and maintain a Commercial Driver's License (CDL) that would permit them to operate all of the seven vehicles/equipment owned the Village. All employees were responsible at various times for all facets of the Department's work, including (but not limited to) snow plowing, street repair, waste water treatment, sewer maintenance, and electrical repair. In the most recent three years, up to and including his termination date, R.D.'s supervisor was Todd Schiller, the Village's Director of Public Works.

At relevant times, the Village's Personnel Policy Manual has contained the following section:

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**SEC. 3.9 DRUG AND ALCOHOL ABUSE AND SCREENING.**

- (a) The Village prohibits the use of alcohol, illegal drugs or any controlled substance other than a prescription drug on Village time or on Village property. Possession or use of or being under the influence of any of the substances previously mentioned other than prescription drugs on Village time or premises is prohibited.
- (b) When circumstances warrant, the Village reserves the right under this policy to require an employee to undergo a blood test and/or urinalysis to determine the presence of alcohol or drugs in the system. This screening will be on Village paid time at Village expense, and will be mandatory. All test results will remain confidential.

- (c) Circumstances which would make such tests appropriate include, but are not limited to:
  - (1) Exhibiting behavior normally associated with persons under the influence of drugs or alcohol;
  - (2) Involvement in an on-the-job accident or other work-related incident where drug/alcohol abuse is suspected to be a contributing factor.
- (d) No final disciplinary measure will be taken until an employee who has tested positive has had an opportunity to discuss the test results with the Village. During the discussion, the employee will be told the test results and the measure(s) the Village is considering. The employee will have an opportunity at that time to explain or contest the positive results.
- (e) If a counselor determines that an employee is addicted to alcohol or drugs, the employee will be afforded the opportunity to enter a rehabilitation program. The costs of any rehabilitation program shall be paid by the employee to the extent such costs are not covered by the Hospital or Medical Plan in place at the time the employee enters the treatment program. The employee may return to work once it has been determined by a licensed health care (sic) provider that the employee is fit. A written release executed by a physician stating that the employee is able to perform in a productive and safe manner will be required. Any subsequent violation of this policy will be grounds for immediate dismissal.
- (f) Refusal to cooperate under this policy will be grounds for immediate dismissal.

R.D. had received a copy of the personnel manual and was aware of the above-quoted provision. On March 29, 2001, R.D. also signed a "Drug and Alcohol Screening Employment Agreement," which stated, "The undersigned understands and agrees that as a precondition to employment, and, if employed, as a condition of continued employment or promotion, they may be required from time to time to submit to drug and alcohol testing. Failure to cooperate with the testing program will be grounds for immediate discharge."

The Village participates in a consortium that conducts random drug and alcohol urinalysis tests on employees in connection with the maintenance of their CDL's. R.D. has been randomly selected for such testing on several occasions during his employment and has never tested positive.

Some time prior to June 2005, R.D. was terminated from employment with the Village. The record contains no evidence about the specific circumstances of that termination, but suggests generally that it was alcohol related. R.D. grieved the termination and, in June 2005,

the grievance was resolved through a Stipulated Settlement. The settlement reinstated R.D. to his employment effective June 6, 2005, with three week's back pay and no loss of seniority. It also provided, "That the Letter of Termination, and all other related correspondence, shall be expunged from R.D.'s personnel files."

On September 18, 2006, R.D. was suspended for three days without pay for reporting to work under the influence of alcohol. The suspension notice was signed by Director Schiller and stated as follows:

On September 1, 2006 the smell of alcohol was noticed on you when you came to work at 6:30 a.m. At 10:00 a.m. this same day you were asked to take a breathalyzer test, which you agreed to do. The result of this test was .026. This means that you had alcohol in your system and were under the influence during normal working hours. Be advised that this is not acceptable and because you have had prior verbal warnings and also prior written warnings. You are being suspended for 3 days without pay on Tuesday, Wednesday and Thursday September 26, 27 and 28.

The record contains no evidence regarding the verbal/written warnings referred to in the above-quoted suspension letter. R.D. did not file a grievance challenging the suspension.

On the morning of January 25, 2008, R.D. reported to work on time at 6:30 a.m. At 7:30 a.m., during the daily employee meeting for distributing the day's tasks, Director Schiller observed "boisterous" or "giddy" behavior on the part of R.D. and the odor of alcohol on his breath. Schiller directed R.D. to go out on assignment in a vehicle driven by another employee, pending Schiller's ability to discuss the situation with Village officials. At approximately 8:30 a.m., Schiller called R.D. in and asked him to take a Preliminary Breath Test (PBT). R.D. became upset and asked for and was given an opportunity to contact Ben Barth, his union representative. Barth was unavailable. Schiller then indicated he would not want to "wait all day" for Barth and told R.D. he could take the PBT or Schiller would have him transported to a medical facility in Elkhorn for a blood or urine test for alcohol. R.D. then agreed to submit to a PBT. Schiller contacted Village Police Chief Ralph Bauman to administer the PBT; Bauman advised Schiller that the PBT was a screening device that would not be "admissible in court," but nonetheless administered the test to R.D. at approximately 8:45 a.m. At the time, Bauman noticed an alcoholic odor emanating from R.D.. Bauman administered the test in a manner designed to protect its accuracy. The test indicated that R.D. had a breath alcohol concentration of 0.098%. With those results, Bauman could not legally permit R.D. to operate a vehicle. R.D. denied being intoxicated and stated that he had had four beers and "two shots" the previous night, all prior to 10 p.m. Bauman told R.D. that this version of events was irreconcilable with the PBT results, given the rate at which alcohol dissipates in the system. Schiller then directed R.D. to go home and not report for work until

further notice. Bauman drove R.D. home. During the ride, R.D. thanked Bauman for the ride, expressed remorse for the episode, and voiced concern about losing his job and the consequent effects on his marriage.

The Village Board met on February 14, 2008 to decide whether or not to terminate R.D.'s employment for the January 25, 2008 incident. R.D. was present as was Schiller, the Town's attorney, and R.D.'s Union representative. During the meeting, R.D. informed the Board that he was an alcoholic, was under medical treatment for alcoholism, and had entered into alcohol counseling with his pastor, a certified alcohol counselor. He also told the Board that he had not consumed alcohol since the January 25 incident and that he intended to maintain strict sobriety. R.D. offered to provide the Board with written confirmation of these assertions but the Board did not request same.

Board members forthrightly testified at the arbitration hearing that, during the Board's closed deliberations following R.D.'s presentation, Board members discussed R.D.'s previous alcohol-related incidents, including the 2006 suspension and the 2005 termination that had been the subject of the settlement and file redaction. Not all current Board members had been on the Board at the time of the 2005 termination and settlement. The Board considered those incidents, including the 2005 incident, in making its decision to terminate R.D.'s employment.

Prior to terminating R.D., the Village did not offer him access to an employee assistance program or the rehabilitation opportunity referenced in Sec. 3.9(e) of the Village policies.

By letter dated February 15, 2008, Village attorney Linda Gray informed R.D. about his termination, stating in pertinent part as follows:

After meeting with you last evening, the Genoa City Village Board of Trustees voted to terminate your employment with the Village Department of Public Works effective as of February 15, 2008. The decision was based upon the incident of September 18, 2006 when you received a three day suspension for reporting for work with an alcohol level of .026 and the most recent incident on January 25, 2008 when you reported for work again under the influence of intoxicants, with an alcohol level of .098 and were suspended without pay until today.

On February 15, 2008, the Union filed a grievance challenging R.D.'s termination, which was processed in a timely manner through all steps of the procedure and denied at each step prior to arbitration.

## POSITIONS OF THE PARTIES

### The Village

The Village emphasizes by way of introduction that the arbitrator is confined to interpreting and applying the terms of the contract, which in this case permits the Village to terminate R.D. with or without any prior disciplinary action, and does not require the Village to undertake any prior affirmative screening for alcohol abuse. The Village contends that the contractual Management Rights clause permits it to terminate an “at will” employee such as R.D. for any reason except one that is based upon race, sex, age, or other protected classification.

The Village further contends that it properly utilized a PBT, rather than a blood or urine test, to determine that R.D. had reported to work while under the influence of alcohol on January 25, 2008, as the Village policy permits but does not require the blood or urine testing methodology. Moreover, according to the Village, R.D. had refused the blood/urine test and had agreed to take the PBT.

As to any duty to forestall termination in order to permit alcohol counseling/treatment, the Village was not provided with any written evidence that R.D. was undertaking such treatment prior to his termination. After his 2006 suspension for the same infraction, R.D. had not acknowledged having a problem and had undertaken no efforts to seek treatment.

Since R.D.’s job required him to maintain a valid CDL and to operate heavy equipment, since R.D. gave “no thought to the risk and harm’s way he was placing not only himself, but his fellow employees and the general public, to say nothing of the potential liability exposure for the Village,” and since the Village and already given R.D. a second chance, the Village appropriately terminated R.D.’s employment when he showed up for work under the influence of alcohol on January 25, 2008.

In its reply to the Union’s arguments, the Village contends that, whatever alcohol testing procedure was used, it is plain that R.D. was under the influence when he arrived at work on January 25. Moreover, R.D. had refused to submit to the blood/urine test on that date and had consented to the PBT, which had also been used, with his acquiescence, in connection with the 2006 incident and suspension. The Village also argues that R.D., having had notice of the February 14 meeting and its purpose, should have brought written confirmation of his counseling/treatment, and that the Village was not required to make an affirmative request at that point. Finally, the Union has not established that “a majority of the Board,” some of whom were not on the Board in 2005, improperly relied upon the 2005 incident when deciding to terminate R.D. in 2008.

## The Union

The Union, noting that the Village bears the burden of proof to establish just cause, “failed miserably in its investigation, including violating their own drug and alcohol policy, considering expunged materials from the personnel file of [R.D.] and frankly, failing to conduct a thorough and complete investigation into other matter.” The Union argues that the Village’s policy prohibits being under the influence of alcohol at work, but does not define “under the influence” nor does it adopt a “zero tolerance” standard. Therefore, the Village has not established the requisite element of “notice” to the employee of what constitutes misconduct.

Moreover, according to the Union, the Village policy requires the Village to utilize a blood/urine test to determine level of toxicity, not the relatively inaccurate – and non-evidentiary – PBT that was utilized in this case. The Union disputes the Village’s assertion that R.D. had refused to take a blood/urine test and argues that R.D. submitted to the only test asked of him, i.e., the PBT. For these reasons, the Union contends that the Village has not met its burden to establish that R.D. was, in fact, “under the influence” when he came to work on January 25.

The Union also argues that the Village’s own policy requires the Village to afford R.D. “an opportunity to enter a rehabilitation program,” if, as here, “a counselor determines that an employee is addicted to alcohol or drugs.” Thus, the Union contends, only if the employee subsequently violates the policy is immediate dismissal permitted under the policy. Here, the Village took no steps to permit R.D. to undergo such a program, even though, before he was terminated, the Village was aware that a counselor had determined that R.D. was an alcoholic.

Finally, the Union argues that the Village improperly relied upon the expunged records of the 2005 incident in terminating R.D., based upon the express testimony of two Board members that this incident was discussed and relied upon during Board deliberations over R.D.’s termination.

In reply to the Village’s arguments, the Union contends that R.D. was never offered a blood test or urinalysis, but only the PBT, which is a “grossly inaccurate” test. Second, the Union challenges the Village’s view that R.D. was an “at will” employee, who can be fired “for any reason,” since the contractual just cause provision by definition requires the employer to have a just reason. Finally, the Union argues the Village Board seemed “uninterested” when R.D. informed the Board of his alcoholism and counseling, did not ask R.D. for “proof” – which could readily have been provided – and hence cannot evade its responsibilities under its own policy by claiming it lacked such “proof.”



## DISCUSSION

The stipulated issue in this, i.e., whether the Village had just cause to terminate R.D., implicates both procedural and substantive questions.<sup>3</sup> Substantively, the classic formulation is whether the Village has established that R.D. engaged in the alleged misconduct and, if so, whether termination was an appropriate penalty in light of all the circumstances, including his prior employment record. Procedurally, the relevant inquiries (in this case) are whether R.D. had adequate prior notice that his conduct was a dischargeable offense, whether the Village followed its own established policies in investigating and responding to the alleged misconduct, and whether the Village improperly relied upon expunged records in making its decision to terminate. In this case, certain of the procedural issues are dispositive, as explained below.

Turning first to the “notice” issue, i.e., whether R.D. knew or should have known that he could be discharged for arriving at work with the amount of alcohol in his system that he had on January 25, 2008, the Union contends that the Village did not have a clear standard, much less the “zero alcohol” standard that the Village relied upon at the arbitration hearing. I agree with the Union that it would be better for the policy to clearly prohibit a specific, reasonable alcohol concentration, rather than the ambiguous phrase “under the influence.” However, R.D. holds a CDL, which subjects him to random alcohol testing to ensure that he is not in a position to operate heavy equipment while intoxicated. Presumably, although not clearly established in this record, the CDL regulations and testing companies employ an ascertainable standard for determining what is the prohibited threshold of alcohol concentration. Absent a different written standard, the Village presumably holds its employees to the prevailing CDL standard and R.D., who has been tested several times, is at least generally aware of that standard.

More problematic is whether the Village has offered sufficient proof that R.D. failed to meet the standard. Although the record does not provide the CDL maintenance requirements regarding alcohol, the CDL standard most likely is expressed in terms of a set measure of blood or urine alcohol content, rather than in terms of a breath alcohol level that is measured by a PBT. Consonant with the CDL standard, the Village’s policy reserves to the Village the right to subject an employee to a blood or urine alcohol test. The record offers no basis for comparing the 0.098% results of the PBT to the results of a blood test or urinalysis. The Union contends that the Village, by the reference in its policy to blood and urine tests, has precluded itself from relying upon PBT results to establish alcohol impairment. The Union also argues that the PBT is a “grossly inaccurate” test. For these reasons, the Union contends that the PBT results have no probative value and that the Village therefore has not established that R.D. was “under the influence” on January 25, 2008.

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<sup>3</sup> Contrary to the Village’s characterization of R.D. as an “at will” employee who may be terminated for any lawful reason, R.D. is protected by a contractual just cause standard that restricts the Village from terminating him except for reasons that meet the substantive and procedural prerequisites of “just cause.” As the Village points out, the Arbitrator’s duty is to apply and implement the contract – in this case, the just cause provision.

Again, as with the ambiguity in its standard, the Village would be better positioned if it had required R.D. to undergo blood or urine alcohol tests on January 25, regardless of his consent to the PBT. Clearly, the blood/urine tests are more reliable than the PBT. However, I do not read the language of the policy permitting blood and urine testing to thereby limit the Village to that proof. Because blood and urine testing are more invasive than breath testing, it is important for the Village to notify employees that such invasive tests may be required; absent evidence suggesting otherwise, I surmise that this notification is a primary purpose of the policy's reference to those tests.

While the Village's policy does not necessarily limit the Village to proving a violation through blood tests or urinalysis, that kind of evidence would be more persuasive than the less accurate PBT results and the related observational evidence that the Village has relied upon here. Nonetheless, on this record, I am persuaded that R.D.'s systemic alcohol content was over the acceptable threshold when he came to work on the morning of January 25, 2008. For one thing, the PBT results were so high that they required Chief Bauman, by law, to prevent R.D. from operating a vehicle, which makes the PBT results probative of R.D.'s alcohol content and also of his inability to perform his duties (which may require driving). In addition, both Schiller and Bauman credibly testified that R.D. emitted a strong odor of alcohol from his person that morning. R.D. himself also acknowledged having consumed alcohol in substantial quantity the night before, and made comments to Chief Bauman that morning consistent with a sense of remorse and acknowledgement of wrongdoing. This combination of evidence yields the conclusion that the Village has established that R.D. was under the influence of alcohol to a degree that violated the Village's work rule.

Absent other mitigating factors, primarily the procedural flaws discussed below, I would conclude that discharge was an appropriate penalty for R.D., in light of his previous suspension for the same misconduct and the importance of sobriety in performing the work he does for the Village. The Village possesses an entirely legitimate concern about the risks R.D. could pose to his coworkers, the citizenry, and the Village's financial resources, in even a single instance of operating heavy vehicles while under the influence of alcohol.

Nonetheless, the Village's own policy implicitly recognizes that alcoholism is a disease – an exceedingly gripping and dangerous disease, but one that is treatable. The Village rightly notes that R.D. only belatedly recognized this illness in himself and, in particular, did not seek help even after his 2006 alcohol-related suspension. Be that as it may, the Village has also clearly and compassionately committed itself to allowing employees with a recognized alcohol addiction an opportunity to obtain treatment that, if certified as successful by a licensed health care provider, will permit the employee to return to work. Prior to his discharge, R.D. informed the Village that he was under treatment for alcoholism. While the Village argues that R.D. should have produced written confirmation of this assertion at the hearing, and while that would have been to his advantage, the Union persuasively argues that, had the Village doubted R.D.'s assertion, the Village could have requested an immediate written confirmation. The Village did not express such doubt nor request such confirmation. Instead, as the Union argues, the Village appears to have viewed R.D.'s rehabilitation efforts as irrelevant, given his prior misconduct. While the Village's frustration with R.D.'s repeated misconduct is

understandable, I conclude that its own policy required the Village to offer R.D. an opportunity at that point to overcome his now-acknowledged addiction and keep his job.

The Village's reliance during its deliberations upon the 2005 incident also undermines its position in this case. Pursuant to a written settlement agreement with the Union, the Village had agreed to expunge this incident from its records; presumably, the Village received something of value in exchange for this commitment. To their credit, two Village Board members acknowledged during their testimony that the 2005 incident had been discussed during the Board's closed meeting deliberations regarding the instant matter; one member expressly admitted that he viewed the 2005 incident as part of R.D.'s "past practice." The Village argues that this testimony falls short of demonstrating that the 2005 incident affected the outcome of the instant case, contending that the Union should have established that a majority of the decision-makers were influenced by the expunged incident. Given the direct testimony regarding the role this incident played in the group deliberations, the difficulty of segregating the proper from the improper considerations when reviewing a group decision, and the lack of countervailing evidence, I think it reasonable to conclude that the 2005 incident did indeed affect the Board's decision to terminate. Such an effect is inconsistent with an agreement to expunge R.D.'s record and reinforces my conclusion that the Board lacked just cause to terminate R.D.

#### AWARD

The grievance is sustained. The Village of Genoa City lacked just cause to terminate the grievant.

To remedy this violation, the Village shall immediately reinstate R.D. to his employment, conditioned upon R.D.'s submission of evidence that he has completed an alcohol rehabilitation program and has been determined by a licensed health care provider to be fit to return to work. As to back pay, the Village shall compensate R.D. for his lost wages and benefits retroactive to the date on which he has or does complete an alcohol rehabilitation program and is (or was eligible to be) certified to return to work.

I will retain jurisdiction over this matter for 60 days to resolve any issues that may arise in connection with implementing the foregoing remedy.

Dated at Madison, Wisconsin, this 17<sup>th</sup> day of December, 2008.

Judith Neumann /s/

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Judith Neumann, Arbitrator

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