

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**IRON COUNTY HIGHWAY AND FORESTRY EMPLOYEES,
UNION LOCAL 728, AFSCME, AFL-CIO**

and

IRON COUNTY

Case 75
No. 67870
MA-14042

(Glonek Grievance)

Appearances:

John Spiegelhoff, Staff Representative, 1105 East 9th Street, Merrill, Wisconsin 54452, appearing on behalf of Local 728.

Michael K. Pope, Attorney, Dean & Pope, P.C., Woodlands Professional Building, 204 North Harrison Street, Ironwood, Michigan 49938-1798, appearing on behalf of Iron County.

ARBITRATION AWARD

Local No. 728, Iron County Highway and Forestry Employees, hereinafter referred to as the Union, and Iron County, hereinafter referred to as the County or the Employer, are parties to a Collective Bargaining Agreement (Agreement, Contract or CBA) which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. On March 24, 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 discipline issued to Gary Glonek, (Grievant) a member of Local 728. The undersigned was appointed as the arbitrator. The initial hearing was scheduled for June 17, 2008 and continued due to the unavailability of certain key witnesses and re-scheduled for December 16, 2008 in Hurley, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed and becomes the official record of the proceeding. The parties agree that this matter is properly before the Arbitrator. The parties filed initial and reply briefs by March 19, 2009 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 stipulated to the issue to be decided by the Arbitrator as follows:

1. Did the County violate the Collective Bargaining Agreement when it issued a five day suspension to the Grievant on March 3, 2008?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

. . .

ARTICLE 8 - DISCHARGE

SECTION 1. The Employer agrees to act in good faith in the discharge of any bargaining unit employee covered by this Agreement and employees who have completed their probationary period shall be disciplined or discharged for just cause only.

SECTION 2. The Employer and the Union both recognize the principle of progressive discipline when applicable to the nature of the misconduct giving rise to the disciplinary action.

SECTION 4. . . . After a written warning has been on file for one (1) year without any intervening disciplinary action, it will be removed from the employee's personnel file.

. . .

ARTICLE 24 - MANAGEMENT RIGHTS

The County possesses the sole right to operate County government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of the Agreement.

1. To direct all operations of County government;

. . .

3. To suspend, demote, discharge, and take other disciplinary action against employees;

...

5. To maintain the efficiency of County government operations entrusted to it;
6. To take whatever action is necessary to comply with state or federal law;
7. To introduce new or improved methods or facilities;
8. To change existing methods or facilities;

...

10. To determine the methods, means and personnel by which operations are being conducted;

RELEVANT JOB DUTIES (FORESTER II)

PURPOSE OF POSITION:

Position assists the County Forest Administrator in the management of the Forest and the timber sales program on County Forestlands, and performs advanced forester duties. In addition the position is responsible for developing current status reports, long-range strategies and goals, and research plans for the management of lands in the County Forest.

PREPARATION OF TIMBER SALES:

...

- Mark trees to be harvested in all-aged sivicultural harvest systems.

...

TIMBER SALE ADMINISTRATION:

- Visit and inspect ongoing and completed timber sales for compliance with timber sale contract conditions.
- Meet with loggers to discuss and resolve minor timber sale problems.

- Report major timber sale problems to Forest Administrator for further action.
- Prepare and record reports for timber sale inspections.

...

BACKGROUND

Iron County owns many tracts of forest land and, from time to time, harvests lumber from those lands. The harvesting is done by loggers who contract with the County and, pursuant to those contracts, cut and remove trees which are marked by the County. Typically the trees to be harvested are marked with orange paint and it is in this way that the logger knows which trees to cut and which to leave standing. The harvesting of this timber is subject to the practice of sound forest management as determined and enforced by the County and the Wisconsin Department of Natural Resources relating to its northern hardwoods management program. The DNR liaisons with Iron County through its forestry team leader, Darryl Fenner, who is primarily responsible for the enforcement of sound forest management. He works in conjunction with County employees, including the Grievant, in the Forestry Department.

At all times herein, the Grievant was employed by the County as a Forester II and was one of the people responsible for the practice of sound forest management in Iron County. He has been employed by the County for about 17 years. He was also responsible for marking the trees to be harvested on two tracts of timber land which were the subjects of two logging contracts and for the administration of those two contracts including compliance with the terms and conditions of those contracts. These two contracts were designated as 03-07 and 09-04 and were harvested during the summer of 2007. On each tract the Grievant had marked the trees to be harvested by painting orange markers on them. After the Grievant had marked the trees on these two tracts the DNR inspected the markings and determined that some of the trees the Grievant had marked should not be removed. Fenner, along with Joe Vairus, the County's Forest Administrator, then re-marked the trees which were not to be cut by painting over the orange paint originally applied by Grievant with black paint. This process is called "blacking out" and some "blacking out" occurred on both tracts. On the 03-07 contract the Grievant accompanied Fenner and Vairus when the "blacking out" was done. On some of the "blacked out" trees some of the orange paint was still partially visible.

During the period of October through December, 2007, the County determined that the two loggers had cut a number of the "blacked out" trees in addition to the orange marked trees. This caused an investigation into whether the harvesting of the "blacked out" trees constituted timber theft. Deputy Voyer, Iron County Sheriff's Department, conducted the investigation and determined that timber theft had not occurred. Rather, he concluded that the "blacked out" trees had been harvested at the direction of the Grievant. The County concluded that the Grievant's failure to prevent the harvesting of "blacked out" trees, and the statements by the loggers that he

had told them to cut all trees with paint on them constituted “inappropriate administration” of the contracts under his control and, on March 3, 2008, he was issued a five day suspension without pay. This grievance followed.

THE PARTIES’ POSITIONS

The Union

The burden of proof rests with the County to prove misconduct and the evidence demonstrates that it has failed to do so. The County has not issued discipline in past years because of the way Grievant had marked the trees for harvesting. The blacking out process had only begun recently, and at times without the knowledge of the forester who originally marked the trees. In prior years the County had had disagreements with the DNR regarding the proper harvesting of timber and disagreed on how the timber was to be marked. Because the County essentially disciplined the Grievant for the way in which he marked the trees and failed to discipline him for seventeen months indicates that the issue of inappropriate marking of trees is “simply and add on to bolster the case for suspension.” Employers must exercise full discipline within a reasonable time after it has convincing knowledge of an infraction and any unreasonable delay is a form of double jeopardy and should not be allowed.

The County has not offered any evidence that the Grievant violated policy or procedure regarding the appropriate marking of timber. It does not possess a firm policy concerning silviculture other than general guidelines in the ten or fifteen year plan. In the past the County has allowed the Grievant to mark trees as he saw fit and he has been doing that for seventeen years. It is only after blacked out trees were cut that the County issued discipline for “inappropriate marking” of timber. “This reason for discipline is clearly an attempt by the County to bolster their justification for disciplining (Grievant) despite the fact that he has been marking timber the same way for seventeen years without incident.” The County failed to produce any evidence which specifically delineated the policies of the County in relation to the marking of trees. “The County has, in essence, disciplined (Grievant) in March 2008 for allegedly mismarking (sic) timber in Spring 2007 and then turns around and codifies in writing some vague guidelines for marking timber in January 2008.”

Although the Grievant accompanied Fenner and Vairus during the “blacking out” process, “he (Grievant) testified he only marked some additional timber to be cut on these tracts with orange paint that were not previously marked.” Also, despite the fact that the loggers testified that some of the “blacked out” trees had been marked poorly, Fenner testified that he had done a thorough job covering up the orange paint. “The fact of the matter is that (Grievant) was not involved in the blacking out of the trees and had no knowledge of the intent of Vairus or Fenner whether the trees were supposed to be cut or not.”

Vairus, as the forestry administrator, assumes the responsibility of re-writing the contracts to inform the loggers what to do with blacked out trees and to inform the Grievant that he should inform the loggers that the contract has been re-written with these conditions. The loggers testified

that they had never encountered blacked out trees on County forest lands before, so Vairus has failed to convey pertinent information to both the loggers and his own staff as to what should be done with blacked out trees. Because of this, the County has failed to establish just cause for discipline.

The investigation conducted by Deputy Voyer caused Stricker (one of the loggers) duress when he was questioned about possible timber theft. This duress caused him to place the blame on the Grievant because he (Stricker) had a lot to lose if he was charged with timber theft. Moreover, Stricker's testimony is suspect because he failed to obey a lawful subpoena to attend the first hearing. "Deputy Voyer as well as Vairus fail (sic) to investigate further a claim Stricker made to them that other loggers knew (Grievant) told them to cut all trees down regardless of whatever color was on them." "All of the cutters on that job said they knew (Grievant) instructed that the blacked out trees be cut." But the County failed to subpoena the "other cutters" to testify and, if it had done so, it would have been able to corroborate what the Grievant actually said to them and met its burden of proof. The Grievant testified that all he said to the loggers was to cut all orange painted trees and that "If it looks like it is orange paint to you, you can cut it." "The County failed to fully investigate before imposing the five day suspension on (Grievant)."

The fact that the County has lost grants or been fined as a result of the cutting of the blacked out timber is attributable to the actions of Fenner and Vairus for failing to properly black out the orange paint well enough. This is what ultimately led to the loggers cutting down the wrong trees.

Relating to the Grievant's interaction with the DNR in the past, the County has never taken any disciplinary action for that reason. The County knew the Grievant had had differences of opinion with the DNR relating to timber management or silviculture and there is no evidence that he was ever informed to stop writing to the DNR or State officials about his disagreements. It is therefore disingenuous for them to bring this up at the hearing inferring that the Grievant was a problem employee.

The County asserts that the Grievant had been previously disciplined for the events relating to the Mecca Ski Club but there is no evidence that this discipline was ever put into writing or that there is any reference to it in the Grievant's file. This incident should not be considered by the Arbitrator as constituting a "history" of discipline.

Vairus testified that the loggers would be remiss in cutting down the "blacked out" trees as they are shown in the photographs received into evidence. But if this is the case, why wouldn't they have received a citation for timber theft? The real culpability here lies in the failure of Vairus to properly mark the trees which were not to have been cut.

The Grievant has a long record of positive job evaluations indicating that he, among other things, "has consistently produced for the County." In addition, the County asserts that he was given a written warning on January 30, 2008 with reference to his relationship with the DNR

(even though the Grievant did not view the January 30, 2008 letter as discipline) and any attempt to discipline him again for the same thing constitutes double jeopardy.

Finally, the County has not followed the contractual requirements for progressive discipline. It failed to show the verbal “warning” relating to the Mecca Ski Club constituted discipline and failed to show that the January 30, 2008 letter constituted discipline. This leaves the Grievant with seventeen years of spotless record which is a mitigating factor in his favor and he should be made whole and any record of discipline should be expunged.

The County

A just cause analysis addresses two specific elements: employee misconduct in which the employer had a disciplinary interest and discipline which reasonably reflects that disciplinary interest. The County has met its burden on the first element. Timber sales and silviculture is big business for the County and the Forester II has a duty to assist in the management of the forests and, more importantly, visit and inspect ongoing and completed timber sales for the County. The County also has an interest in its fiscal responsibility. This has been affected by the loss of a \$10,000 grant, the payment of a \$1000 fine and the jeopardy caused to its future timber sales. Clearly the County has a disciplinary interest in how the Grievant manages timber sales.

The Grievant’s attitude relating to his disagreements with the DNR and his continued written correspondence to various state officials on the subject demonstrate a continuing effort contravening the DNR’s silviculture endeavors. Insubordination has been defined as “deliberate defiance of. . .supervisory authority” and the Grievant’s actions fit this definition. Thus, he is guilty of insubordination.

At the very least he was derelict in his duties. Dereliction means the negligent execution of assigned duties and since he was responsible for visiting and inspecting the tracts at issue to ensure compliance with the terms of the contracts involved, and failed to do so by not advising the loggers not to cut remarked trees, he was negligent in his assigned duties.

The discipline imposed reasonably reflects the disciplinary interest of the County. There is no dispute that the Grievant’s actions have cost the County thousands of dollars: a ten thousand dollar grant was lost and a fine of one thousand dollars was paid. His lost pay due to the suspension does not come anywhere close to recouping those monies.

The grievance should be dismissed.

The Union’s Reply:

Just cause requires more than a two pronged test. It includes industrial due process which is composed of the concepts of fair and thorough investigation, lack of double jeopardy and timely action by the employer. The County’s investigation is flawed because it rests solely on the testimony of Stricker. His testimony is suspect because he had a lot to loose had he not blamed the

Grievant for the improperly cut timber. Also, Stricker referred to other witnesses which presumably could have corroborated his testimony but the County failed to call them at the hearing. The County was intent on disciplining the Grievant and did so despite overwhelming evidence that Vairus and Fenner were the ones who failed to properly mark the trees.

The County's argument that the Grievant was insubordinate because of the letters he wrote to various state officials concerning his disagreements with the DNR's silviculture policies cannot stand because they've known about this for years and have never disciplined him for it nor have they told him not to do it. Willful insubordination requires that the employer at least give the employee a direct order to do or not to do something and the County has not done so here.

Industrial due process requires that the employer not engage in double jeopardy and it is doing that, in essence, here.

The Grievant had no idea what the end product looked like after Vairus and Fenner finished "blacking out" the trees he had previously marked. The assertion that the Grievant allowed Pemble to cut blacked out trees is an oversimplification of the chain of errors made by the County. The record is clear that the Grievant was not involved in the blacking out of the trees on tract 03-07 (Pemble tract) and the County failed to revise the logging contract to prohibit the cutting of blacked out trees. If the Grievant had informed the loggers not to cut blacked out trees and they cut trees with orange paint showing, would the County have disciplined him? The County first realized Pemble was cutting blacked out trees when Vairus and the Grievant visited the site. It was at this time that Vairus realized he and Fenner had done a bad job blacking out the trees and instead of taking the blame as he should have, he blamed the Grievant without just cause.

The County's Reply:

The Union erroneously asserts that the Grievant was disciplined for his failure to properly mark the tracts. The 3/3/08 notice of discipline clearly states that the Grievant was disciplined for inappropriate administration. He knew the tracts had been remarked. Fenner testified that he told the Grievant of the remarking placing him on notice of it. The Grievant himself testified "And when we looked at individual trees, he pointed out trees that he thought were good crop trees that should be left to grow larger, rather than be cut and I disagreed."

There was no delay in discipline. The discipline rendered was for inappropriate administration of the sales and not the initial marking.

The photos in evidence are photos of trees on different tracts than the ones in question here. Fenner testified that these photos did not accurately reflect the trees he had marked and he personally inspected some of the trees which had been cut and found no evidence of orange showing on them.

Whether the County amended the contracts is irrelevant. The Grievant had the responsibility to make sure the County's intentions regarding the contracts were carried out. He

had the responsibility to make sure the blacked out trees were not cut and had a duty to inspect the different colored paints brought to his attention by Stricker and properly advise how Stricker should proceed.

Vairus appropriately relied on the testimony of Stricker during the investigation. He was with Deputy Voyer for the initial interview and (presumably) was able to judge his veracity. Even if the Grievant's version of the conversation with Stricker is believed that does not mean that misconduct did not occur. He still should have informed Stricker of the remarking of the trees and he should have inspected the trees and brought the problem to Stricker's attention. Regarding the Pemble tract, the Grievant had a duty to inspect the trees and to inform Pemble of the remarking.

The testimony regarding the Grievant's previous contacts with various state officials was provided for background only. He was not disciplined for those contacts, he was disciplined for inappropriate administration of his timber sales.

The actions of others (Vairus and Fenner) is not an excuse for the Grievant's misconduct in failing to administrator the tracts for which he was responsible.

The Grievant's past acceptable performance does not immunize him from discipline. His past interactions with the DNR provided insight into his motives, but did not play a significant role in the discipline rendered.

There is no double jeopardy issue because the written warning in January concerned matters other than the inappropriate sale administration on the subject tracts.

Regarding progressive discipline, the discipline imposed in this case was a reasonable reflection of the circumstances involved. The Agreement requires progressive discipline be recognized "**when applicable** (County's emphasis) to the nature of the misconduct giving rise to the disciplinary action." The gravity of the situation warranted the five day suspension.

DISCUSSION

Neither side in this matter suggests that the Agreement requires any standard other than one of just cause and, indeed, this case hinges on an analysis of just cause as it applies to the actions of the County in issuing discipline to the Grievant. This Arbitrator has, on past occasions when called upon to consider discipline assessed under agreements requiring just cause, embraced the reasoning of most arbitrators, recently set forth by Arbitrator Jones in GREAT LAKES CALCIUM CORPORATION, A-6289, (Jones, 1/22/080), that just cause is composed of two elements, both of which must be established. First, did the employer prove that the employee committed the conduct for which he is being disciplined and, second, if the conduct has been proven, was the discipline imposed commensurate with the offense under all the circumstances. Stated another way, 'Did the punishment fit the crime?'

As the Union correctly argues the burden of proof rests with the County to prove the two elements of the analysis. The first prong of the analysis is primarily fact driven and often is determined by the arbitrator's view of the veracity of the witnesses and the sufficiency of the other evidence submitted at hearing. The second prong, while also fact driven, is more subjective in that it requires the arbitrator to consider the core concepts of due process which include, among other things, a fair and thorough investigation, a lack of double jeopardy and timely action by the employer. (See *Discharge and Discipline in Arbitration*, (BNA, Brand,).

I begin the analysis then with a consideration of whether the Grievant was guilty of the charges placed against him. On March 3, 2008 the Grievant was charged with the "inappropriate administration" of two tracts of timber land (tracts 9-04 and 3-07). The basis for this charge, according to the disciplinary letter, was:

- > These tracts were established by the Grievant and were not approved by the County and the DNR because the Grievant had not marked the trees to be harvested properly. "Corrective marking" (blacking out with black or brown paint to tell the loggers not to harvest these trees) had to be done on each tract.
- > Although the Grievant was charged with the proper administration of the sale and cutting of both tracts, some of the trees which had been blacked out were harvested on Tract 9-04.
- > Undesignated timber (blacked out timber) had also been harvested on Tract 3-07. As a result the DNR informed the County that it was not in compliance with certification standards or the forest law and the DNR was considering charging the County with a penalty.
- > The County's investigation concluded that the Grievant had told the loggers involved to cut all trees with paint, regardless of color (i.e. including the blacked out trees).
- > On January 8, 2008, the Grievant denied wrongdoing and made insulting remarks about the DNR and accused them of harassment.

The Grievant's supervisor, Vairus, concludes that:

"There are several problems with this situation. First of all, your inability to get many of your northern hardwood sales approved has cost the county a great amount of time and money. Second, your continued hostility toward the DNR has eroded Iron County's relationship with this organization. Third, your inappropriate administration of timber sales shows that you have no concern for the policies and procedures pertaining to northern hardwood management developed and accepted

by the Iron County Forest Administrator. Fourth, your written statement shows that you do not find you have done anything wrong, nor do you intend to change. Lastly, your actions have directly cost Iron County one sustainable forestry grant, could potentially cause more grant money to not be awarded, and could cost us a hefty fine for any undesignated (sic) timber that was cut.

Iron County is bound by law to have a working relationship with the Wisconsin DNR. It has been my goal since taking the position as forest administrator to rebuild this relationship. We have made great strides toward doing this, and in the meantime we have built our timber program to a respectable level. Your recent actions have done a great deal to erode this work that has been done. With all of this in mind, the Forestry Committee and I find just cause to discipline you, and we have determined that you shall be suspended for 5 days without pay starting immediately. Upon your return to work, you will review the policies and procedures pertaining to your job description with management. At that time, you will resume your duties as a forester for Iron County.”

No one disagrees that the Grievant and the DNR had had an ongoing disagreement with the silviculture procedures utilized in Iron County. The Grievant had written many letters and notes to the DNR criticizing its methods, and had been quite vocal in this regard. There is no question in my mind that the Grievant disagreed with the DNR on the trees the DNR and Vairus had blacked out on the two tracts involved here. Grievant admits as much.

The answer to the question ‘Was the Grievant guilty of the inappropriate administration of these two tracts?’ rests with the testimony of the two loggers and that of the Grievant himself. Logger Stricker testified credibly that he had a conversation with the Grievant relating specifically to which trees he was to cut given the fact that he had seen two types of paint on some of the trees.

Q. Okay. And what did you understand a tree that was marked black or purplish, what was to be done with that tree?

A. What do you mean?

Q. Were you to cut the tree or not?

A. Well, yes, we were.

Q. Okay. Did you have any discussions with any county employees as to whether or not those trees were to be cut?

A. Yes, I talked to the forester that set the sale up.

Q. Okay. Who is the forester?

A. Gary Glonek.

Q. Okay. What did you say to Mr. Glonek?

A. I asked him, I noticed two different colored trees, two different colored paint on the trees. Do we cut one or the other or leave them or cut them both? He says: For my part, he says, you cut them both.

According to Stricker, the Grievant did not tell him that various trees had been remarked:

Q. Okay. Were you aware at the time that you were in there that (the) tract had been remarked at any time?

A. No.

Q. Mr. Glonek didn't inform you of that?

A. No, maybe with North Country, but North Country did not discuss it with us.

The Grievant was aware that trees on these tracts had been re-marked by the DNR and he was aware of why they had been re-marked but he failed to tell Stricker not to cut the re-marked trees. Grievant testified:

A. . . . He (Stricker) did mention to me, he says: You know, he says: I have seen some odd colored orange paint. Is there some old orange paint on this sale? Because it looks like there is some older orange and some newer orange.

I said: I believe the DNR went in there and blacked - out some of the trees, but there probably is some older paint from when I marked it originally and there probably is some fresher paint if they marked some additional trees more recently.

It would have been very easy for him to have advised the logger not to cut trees which had obviously been marked over, even if not completely. There was much testimony at the hearing to the effect that the re-marked trees had not fully covered the orange paint previously marked by the Grievant. This fact, argues the Union, would allow the loggers to cut the tree because it had *some* orange still showing. Pemble, the second logger, testified that his contract allowed him to cut trees with orange paint and he cut trees with orange paint even though some had been painted with another color. He testified:

Q. Sorry. It is your testimony that this is a lousy attempt to cover up orange then?

A. Yes, it is. I would fire the man myself.

Q. Even though orange is barely visible in a lot of these photographs?

A. To me it is a lousy job.

Q. Were you told by anybody from the county that you shouldn't be cutting these trees?

A. No, never.

. . .

Q. Okay. Mr. Glonek never told you not to cut these trees?

A. No.

Pemble testified that his contract said he was to cut trees with orange paint on them and that, even if the Grievant had told him not to, he would have done it anyway. The testimony is clear that he saw trees which had been marked with a different color, even though the marking was "lousy" and some orange was still visible. The Undersigned questions whether, if the Grievant had told Pemble not to cut those trees, he would have done so in the face of being told not to. The Grievant did not tell him not to cut those trees, though, so we will never know, but he could have done so as easily as he could have told Stricker. He (Grievant) certainly knew that the Pemble tract contained blacked - out trees. He testified:

A. . . .On Mel's sale, when I was, I mean when I was walking out of the stand, I mean I would look and I could see where there is black paint on a tree or where the tree had been intended to be marked out, and I would look at the tree and I said: Well, I can't believe why they would want to black that tree out, you know, or something like that. But not walking up specifically looking so close at the tree to see how much orange paint remained or anything like that, that was not anything I looked for at that time.

And he testified that during a visit to the Pemble site with Vairus:

A. . . .I asked Mel if he cut any blacked - out trees. I just basically said: Mel, you didn't cut any of those blacked - out trees, did you? Mel basically said:

Yes, I did. Whoever tried to black-out those trees didn't do a very good job, and I seen orange paint sticking out of those trees and so I cut them.

This testimony convinces the Undersigned that the Grievant knew very well that Pemble was not to cut the blacked-out trees.

There is no question that the County has a disciplinary interest in maintaining a good relationship with the DNR and in practicing good silviculture in its efforts to properly manage its northern hardwood forests. The Grievant, however convinced he may be of the value of his forestry techniques and of the lack of value of the DNR's and of the County's, is nonetheless an employee of the County and is obliged to follow its practices and procedures, including its silviculture practices, as long as he remains an employee of the County. His failure to do so in his administration of the tracts of forest land under his control is inappropriate.

I find that the first four allegations against the Grievant are supported by the evidence. The fifth, that "On January 8, 2008, the Grievant denied wrongdoing and made insulting remarks about the DNR and accused them of harassment," is not supported by the evidence. The evidence, however, does support the conclusion that he did so on January 30, 2008 following the imposition of a written warning imposed against him. To the extent that the use of the wrong date in the disciplinary letter is technical and *de minimis* I find that the County has proven this allegation too.

Based on the foregoing, I am convinced by a clear and convincing preponderance of the evidence, that the County has met its burden to prove the first element of just cause. The Grievant committed the conduct for which he was disciplined.

I now turn to the second prong of the just cause analysis; Was the discipline imposed commensurate with the conduct for which the Grievant was disciplined? In analyzing this prong, the threshold question is "What was the discipline imposed?" Another question which must be considered is "Was the discipline imposed fair and equitable?" Of course, in any just cause analysis, the concept of due process lies at the core of any action taken. Fully embraced in the concept of due process is the consideration of whether the disciplinary action taken constitutes double jeopardy. If it does, the action taken is fundamentally unfair and fails to afford the employee due process. The double jeopardy doctrine prohibits employers from attempting to impose multiple punishments for what is essentially a single act. CROWN CORK AND SEAL CO., 111 LA 83, 87 (Harris, Jr., 1998). This concept has been explained as follows:

The key to this arbitral (double jeopardy) doctrine is not the Constitution but rather fundamental fairness, as guaranteed by the contractual requirement of 'just cause' for discipline. Thus when an employee has suffered a (disciplinary action) for an offense it would be unfair . . .to (discipline) him (for the same offense) before he has committed a second offense. UNITED INT'L INVESTIGATIVE SERV., 114 LA 620, 626 (Maxwell, 2000) (quoting U.S. POSTAL SERV., 87-2 ARB 18490, at 5952 (Nolan, 1987)

The action taken in this case is the 5 day suspension without pay issued on March 3, 2008. This action was taken for the “inappropriate administration” by the Grievant of the two tracts mentioned above. The specific acts which constituted “inappropriate administration” are outlined above and essentially relate to 1) the fact that the Grievant had not marked the trees to be harvested properly, resulting in the need for the DNR/County to re-mark them prior to the certification of the sale; 2) the fact that some of the trees which the DNR/County had re-marked were harvested; 3) the DNR was considering charging a penalty to the County because it was not in compliance with certification standards; 4) the investigation conducted by the County concluded that the Grievant had told the loggers to cut all trees with paint, regardless of color; and 5) the Grievant’s denial of wrongdoing and making insulting remarks about the DNR and accusing them of harassment. The Union argues that the Grievant had already been disciplined for essentially these very things on January 30, 2008 and disciplining him again for the same things constitutes double jeopardy and as such must be set aside.

The action taken on January 30, 2008 clearly constitutes discipline. The Party’s Agreement, in Article 8, Sec. 4, clearly recognizes written warnings to constitute discipline. The written warning follows at least one conversation between the Grievant and Vairus and clearly states that the Grievant is to “Consider this a written warning cautioning you to follow the policies and procedures of this department.” Vairus pens the body of this disciplinary letter by referring to 1) submitting proper paperwork when administering timber sales and a reminder that his (Grievant’s) job “is to set up timber and run lines, and that is what I want you to do.” 2) certification, 3) relationship with the DNR as it relates to certification and confirms that “You also stated you did not intend to cooperate with the DNR at all.” “I stated that your position requires you to deal with the DNR from time to time and you will be expected to do so in a professional manner.” 4) Timber sale approvals: “We talked for awhile about the approval and disapproval of timber sales being reviewed jointly by the forester administrator and the liaison (DNR) forester. I told you that your last hardwood sale passed our inspection and showed much improvement over previous sales. You stated that you did not understand this because you did not do anything different.” and 5) they considered policies and procedures which Vairus “will expect you (Grievant) to follow...” Those policies and procedures were set forth as:

- Fill out appropriate paperwork as directed by the forester administrator.
- Stick to your primary job functions (setting up timber sales, administering timber sales, running lines) along with other duties as assigned.
- Maintain a professional relationship with the DNR.
- Continue to set up timber in a manner consistent with what I saw on sale #1-08. (i.e. reserving quality timber for future harvest and removing poor quality timber).

- Start initiating conversations with people about third party certification so we can take a closer look at what it does for our county forest.

It is instructive to view this conversation and disciplinary action in light of the pertinent chronological events which lead up to it. That chronology is as follows:

- 10/29/07: Zinsmaster advises Vairus that he had to re-mark tract #09-04 (one of the two tracts administered by the Grievant) and referenced the fact that he had to re-mark other tracks in October and November (presumably including the second tract administered by the Grievant) at the request of DeRosso (Iron County Board Chairman) because the sales had been un-approved. He notes two problems, 1) The logger is in violation of the contract by cutting un-designated trees, and 2) Sale administration has not prevented un-designated trees from being cut, piled and, presumably shipped.
- 12/17/07: Letter from Fenner (DNA) to DeRosso advising, among other things, that the two tracts administered by the Grievant had been improperly marked and had to be re-marked. Subsequently the loggers cut down re-marked trees. He advises that unapproved cutting will result in fines.
- 12/20/07: Deputy Voyer and Vairus investigate possible timber theft by Pemble and Stricker. They determine that timber theft did not occur because the Grievant had authorized the loggers, in so many words, to cut re-marked or blacked out trees.
- 1/3/08: Stricker pens his statement for Voyer and Vairus as follows:

I was fixing axces (sic) rd into Iron County Line Road job when I asked Gary (Grievant) about two different color (sic) paint. Gary said fore (sic) my part cut all trees with paint.

- 1/9/08: Letter to Vairus from Jeff Barkley, Division Forest Specialist, DNR, advising Vairus that the unauthorized harvest of trees on some of the remarked/corrected sales violates the ICF (Iron County Forestry) Plan (830.1.1) and consequently makes ICF ineligible for funding until that is rectified. As a consequence a grant in the amount of \$10,404.00 was denied. It also confirms that "ICF's challenges in northern hardwood management relate to quality and individual tree selection."

- 1/29/08: Conversation between Vairus and Grievant discussing “paperwork, certification, our relationship with the DNR”, the status of timber sale approvals, the methods used to approve timber sales, and the policies of our department pertaining to all of the above.”
- 1/30/08: Written warning issued to the Grievant following the 1/29/08 conversation cautioning him “to follow the policies and procedures of this department.”

The written warning was not grieved. Nothing of significance relating to improper harvesting of these two tracts occurred between January 9, 2008 and January 30, 2008. It is clear that Vairus’s investigation was completed by January 9, 2008 and that he had been informed of the denial of the grant in the amount of \$10,404.00 and of the fact that unapproved cutting would result in future fines. The record contains no evidence, nor did anyone argue, that the County had any criticism of the Grievant *other* than the administration of these two tracts which might result in discipline. The Grievant was not told, following the issuance of the written warning, that the matter was not finished or that he might be subject to further discipline relating to these events in the future. The most reasonable construction of the plain language of the Vairus letter of January 30, 2008, along with the discipline which accompanied it, and in consideration of the chronological events leading up to it, is that Vairus disciplined the Grievant for the events surrounding the Pemble and Stricker sales and that that was to be the end of it. The County’s argument that the second discipline was for “inappropriate administration”, whereas the prior discipline was for an entirely different matter, is not persuasive. The elements of the first discipline essentially form the basis for the second charge of “inappropriate administration” and thus are *essentially* the same as the second discipline.

The record supports only speculation as to the reasons the Grievant was disciplined again on March 3, 2008.

By suspending the Grievant for misconduct for which he had previously received a written reprimand the County has attempted to punished him twice for essentially the same offense. The doctrine of double jeopardy prevents punishment for the same offense twice because it is fundamentally unfair and, as such, deprives the Grievant of his right to due process. Therefore, the County has failed to meet its burden of proving the second prong of the just cause analysis.

This award should not be construed as an indication that the five day suspension would not have been appropriate under the circumstances had it not constituted double jeopardy. A prudent employee such as the Grievant should carefully consider avoiding any further actions similar to the events giving rise to this discipline. Double jeopardy will not shield him from discipline for future conduct which mirrors the conduct addressed herein.

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

AWARD

1. The County did violate the Collective Bargaining Agreement when it issued a five-day suspension to the Grievant on March 3, 2008.

2. Any reference to the discipline administered on March 3, 2008 shall be expunged from the Grievant's personnel record and the Grievant shall be made whole.

Dated at Wausau, Wisconsin, this 19th day of May, 2009.

Steve Morrison /s/

Steve Morrison, Arbitrator

SM/gjc
7427