

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**MANITOWOC COUNTY HIGHWAY EMPLOYEES,  
LOCAL UNION 986, AFSCME, AFL-CIO**

and

**MANITOWOC COUNTY**

Case 433  
No. 68193  
MA-14150

(Siebold Grievance)

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**Appearances:**

**Mr. Joseph M. Guzynski**, Staff Representative, 2602 College Street, Manitowoc, Wisconsin appearing on behalf of Manitowoc County Highway Employees, Local Union 986, Wisconsin Council 40, AFSCME, AFL-CIO.

**Mr. James R. Korom**, Attorney, von Briesen & Roper, S.C., 411 East Wisconsin Avenue, Suite 700, P.O. Box 3262, Milwaukee, Wisconsin, appearing on behalf of Manitowoc County.

**ARBITRATION AWARD**

Manitowoc County Highway Employees, Local Union 986, AFSCME, AFL-CIO hereinafter "Union" and Manitowoc County, hereinafter "County," requested that the Wisconsin Employment Relations Commission assign Lauri A. Millot, staff arbitrator, to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The hearing was held before the undersigned on November 19, 2008 in Manitowoc, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs, the last of which was received by February 18, 2009 at which time the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

**ISSUES**

The parties stipulated that there were no procedural issues in dispute and framed the substantive issues as:

Whether the Employer violated the just cause standard of the collective bargaining agreement when suspending the Grievant? If so, what is the appropriate remedy?

**RELEVANT CONTRACT LANGUAGE**

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**ARTICLE 3 – MANAGEMENT RIGHTS RESERVED**

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

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**ARTICLE 5 – DISCIPLINARY PROCEDURES**

A. Employees may be disciplined for just cause. It is understood and agreed that just progressive discipline shall be followed. The Employer shall provide the employee and Union with a letter setting forth the reason(s) for the disciplinary action.

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**ARTICLE 8 GRIEVANCE PROCEDURE**

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**Step 4: Arbitration**

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e. Decision of the Arbitrator: The Arbitrator shall not modify, add to or delete from the terms of the Agreement.

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### BACKGROUND AND FACTS

The Grievant, Michael Siebold, was hired by the County in 2002 and currently holds the position of screed operator. At the time of the grievance, the Grievant held the position of mechanic in the highway shop. The Grievant is the vice president of the Union and a member of the safety board. The Grievant had two prior disciplinary sanctions, both counseling statements issued in 2004 and 2007, for personal protective equipment violations.

On July 16, 2007 Highway Commissioner Gary L. Kennedy issued a memorandum to all employees addressing "Personal Business". The memorandum was included in employee pay checks and reminded employees that the use of their personal cell phone was to occur during breaks, lunch or unpaid time and that cell phone use during work hours was only for emergency situations. This memorandum was issued because management observed highway department employees using their cell phones during work hours while performing work responsibilities causing safety concerns.

Between July, 2007 and October 30, 2007, employees continued to use personal cell phones during work hours. To remind employees of the need to conduct personal business during break times, the County posted the July 16 notice on a bulletin board in the highway department office.

On October 30, 2007 a bargaining unit member removed the memorandum from the bulletin board. That member, KJ, was questioned by the County, admitted to the removal and received a verbal disciplinary warning.

On October 31, 2007 the Grievant was taped by the County's security camera removing the cell phone memorandum from the County bulletin board.

The next day, November 1, 2007, was called into a meeting with Kennedy, Gregg Peterson, and Union employee, Gary Mueller. Kennedy informed those present that the County was having a problem with memorandums being removed from bulletin boards. He then asked the Grievant three times whether he had taken the memorandum off of the bulletin board. In all instances, the Grievant responded in the negative.

Later that same day, the Grievant was again called to meet with Kennedy and Peterson. Mueller was present. Kennedy informed the Grievant that he knew the Grievant was lying and that the Grievant had removed the memorandum from the bulletin board. Kennedy presented the Grievant with a verbal warning. The verbal warning read as follows:

*On October 31, 2007 you removed a management notice from the bulletin board without permission to do so.*

*This incident was discussed with you on November 1, 2007 and your response was:*

You denied 3 times that you didn't remove the management notice from the bulletin board.

*This conduct violated department rules and policies, including but not limited to:*

You are not authorized to remove management notices. This was not your property, and you had no right or need to remove the notice.

*You were aware of these rules and policies because:*

The requirement to follow work rules established by management is a fundamental part of the employer/employee relationship. Equally fundamental to an employer/employee relationship is the knowledge that you do not remove notices posted by management without authorization to do so.

*Your previous disciplinary record of similar offenses includes:*

None.

Any future misconduct may result in continued progressive discipline, up to and including termination of employment.

The following day, the Grievant was called to a third meeting with Kennedy, Peterson, and Charlie Behnke. Also present was Union member John Yost. Kennedy again asked him three times whether he had removed the memorandum from the bulletin board. The Grievant twice denied having taken the memorandum, but in response to the third inquiry, acknowledged that he had seen the memorandum and thought it was on the table or counter in the lunch room. Thereafter, the meeting became confrontational and ended, although the Grievant and Peterson went to the lunch room to investigate whether the memorandum was in that area.

Shortly thereafter, the Grievant was called to a fourth meeting with Kennedy, Peterson and Yost. The County issued the Grievant a 30 day suspension to be served from November 2 through December 13. The County discipline read as follows:

On November 1, 2007 I spoke with you in Wayne Sleger's office regarding removal of a management notice from the bulletin board. Gary Mueller was your union representative. Gregg Peterson was also in attendance. I asked you if you had removed the management notice, and you denied removing it or seeing the notice. I asked again and you repeated your initial response. I told you that I wanted you to tell me the truth because lying during the course of an

investigation is a serious matter. I asked you a third time, again you repeated the same response. I told you that I was going to now begin an investigation into the fact that I told you I know you had removed the notice, and that you were lying during the course of an investigation. I then directed you to return to work. I asked you later to return to Wayne Sleger's office, and you did so. Gary Mueller was again with you as your representative, and Gregg Peterson was also in attendance. I handed you a verbal warning for the removal of the notice. You reviewed it, signed it, and your union representative did the same. I told you I was very disappointed in your lying to me about removing the notice, and I asked you again if you had removed the notice. You stated that you did not remove it, but thought you saw it on the lunch room table. I asked you again, for a final time, please tell me the truth. You denied removing the notice again, and thought that perhaps you had picked up the notice from the ledge by the bulletin board. You then said "why are you worried about little things like this? You are always worried about us getting to work and you bring little things like this to our attention." I then asked Mike to stop speaking at that point because the conversation was getting too heated. I then told him that I would be informing him of the disciplinary action I would be taking as a result of his lying to me, and that this is a serious offense, and significant disciplinary action would be taken. You then asked "should I stay here or go back to work?" I told you to return to work.

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*This conduct violates departmental rules and policies, including but not limited to:*

Lying during the course of an investigation is a very serious offense. Honestly is a quality that is essential to the employment relationship.

*You were aware of these rules and policies because:*

This is a fundamental requirement of every employment situation.

*Your previous disciplinary record of similar offenses includes:*

None.

Any future misconduct may result in continued progressive discipline, up to and including termination of employment.

The Union timely grieved the suspension which was denied at all steps and is properly before the Arbitrator.

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

### ARGUMENTS OF THE PARTIES

#### County

The County maintains that just cause existed to discipline the Grievant.

The Grievant was well aware of his obligation to be truthful when questioned by the County. Not only is every County employee aware of their obligation to honest and truthful, but arbitrators have regarded honesty in employment to be a normal and widespread expectation of employees and no written rule or order is required. This is evidenced by KJ's immediate and forthright response to the County's questioning him regarding the very same infraction as the Grievant was initially questioned.

The County has a history of imposing lesser disciplinary penalties when the employee is open, honestly admits wrongdoing and either apologizes or shows remorse for his actions. The record disciplinary sanctions imposed on RE, PE, KG, TE, and KJ show this trend and tradition in the County. In contrast to these employees that accepted responsibility for their actions, the Grievant adamantly and repeatedly lied to the County. In fact, even after the Grievant was informed by his Union representative that there was evidence that he had been untruthful, he refused to reconcile his false statements. Moreover, the Grievant's demeanor during the hearing demonstrates that he has yet to learn that he had done something seriously wrong and that his job was in jeopardy.

The Arbitrator is cautioned to refrain from substituting her judgment for that of the County unless there is clear evidence that the County's penalty was excessive. The County was well within the parameters of reasonableness when it imposed a 30-day disciplinary suspension. If a reasonable person would conclude that 30 days was appropriate, the penalty must be upheld without interference. The County has imposed lesser penalties to employees that reflected and apologized. The Grievant has not recanted and it would send the wrong message to the workforce if his disciplinary penalty was reduced.

The County requests the Arbitrator deny the grievance.

#### Union

The Union maintains that the County did not have just cause to discipline the Grievant.

The Union submits that the County cannot prove that the Grievant was guilty of lying. The County must show not only that the Grievant was inaccurate when responding to the County questions, but also that he did so with the intent to deceive. The evidence shows that the Grievant was not intending to be dishonest or untruthful during the interview. The Grievant was forthright with the County. He admitted to having the memorandum in the lunch

room. He further admitted that he took it to the lunch room. It is unlikely that the Grievant would admit to the having the memo in his possession if he intended to deny any involvement in the removal of the memo from the bulletin board. There is no evidence that the Grievant had any knowledge of the County's alleged concern with items being removed from the bulletin board therefore he had not reason to place significance in the County's questions regarding where or how the memorandum was removed from the bulletin board. There is no evidence to support the County's conclusion that the Grievant intended to the deceive the County when responding to Mr. Kennedy's questions.

There is no question that the County has a right and obligation to investigate wrongdoing, but in this instance, the County's investigation was not intended to ascertain whether the memorandum was removed from the bulletin board. The County questioned the Grievant under the guise of determining who had removed the memo from the bulletin board. If that was the County's purpose, then the County had all of the facts it needed to conclude that the Grievant had removed the memo and there was no reason to question the Grievant. The County's purpose when questioning the Grievant was neither legitimate nor proper. Even after the County had issued the Grievant a written verbal warning for removing the memorandum, it continued to ask him whether he removed the memorandum from the bulletin board. The County's action was in bad faith and solely designed to trap the Grievant into providing an answer that the County could use against him.

The County denied the Grievant his due process rights. Not only was the investigation flawed, the Grievant was never informed of the County's evidence against him and was not offered the opportunity to present his side of the story. As a public sector employee with a property interest in his employment, he was entitled to know what he was being accused of and the basis for that accusation. The County denied the Grievant due process.

The County failed to follow progressive discipline when it administered a 30 work day suspension. Article 5 of the parties' agreement states, in pertinent part, "[i]t is understood and agreed that progressive discipline shall be followed." There is no evidence in this record that required the County to implement such a harsh penalty upon the Grievant.

Finally, the County has treated the Grievant more severely than other employees who have been disciplined for similar or more serious offenses. To bargaining unit members, RE and PD, were caught stealing from the county in 2001. Both men sought to personally profit from the theft. For their criminal offense, they received just a ten work day. The Union submits that the Grievant's alleged conduct does not come close to reaching the level of theft as RE and PD.

Employee KG was disciplined for defaming the Highway Commissioner. KG's "injurious misleading or false report" resulted in a written warning. KG's dishonesty mirrors the Grievant's.

Employee TK was disciplined for violating the County's policy on harassment in 2000 and received a week suspension. The disciplinary letter lauded TK for being "relatively honest." Contrast this to the Grievant who admitted to having the memorandum. TK's conduct was both illegal and far more egregious, especially since he reoffended in 2002. That reoffense resulted in a 30 work day suspension that was modified to 20 days. TK was again untruthful during the investigation and that was considered when deciding his penalty for the underlying offense. The Grievant was not treated fairly when contrasting his long suspension with the discipline received by others for similar offenses.

The Union requests that the Arbitrator grant the grievance and that the Grievant be made 1 for any and all losses.

### DISCUSSION

The Union is challenging the County's decision to impose a second disciplinary sanction on the Grievant. The County maintains the discipline was just.

The Grievant was disciplined for:

Lying during the course of an investigation is a very serious offense. Honestly is a quality that is essential to the employment relationship.

There is no question that the Grievant lied during the County's investigation, including during the November 2 investigatory interview.<sup>1</sup> The video feed establishes that the Grievant did, in fact, remove the memorandum from the bulletin board. The Union challenges the discipline asserting due process violations and an excessive and disparate sanction. I start with the due process arguments.

Due process is a fundamental part of just cause. In the context of a just cause analysis, industrial due process contains five elements: "(1) timely action by the employer; (2) a fair investigation, (3) a precise statement of the charges, (4) a chance for the employee to explain before the imposition of discipline, and (5) no double jeopardy." Brand, *Discipline and Discharge in Arbitration*, Ed. (1998) p. 37. While there are five elements, they are not treated as a strict set of rules, but instead the rights of the employee are balanced against the interests of the employer. Id. at 36, 37.

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<sup>1</sup> The Union argues that the Grievant was not guilty of lying to the County in as much as he may not have known or remembered that he had removed the memorandum from the bulletin board. I am not persuaded for two reasons. First, less than 24 hours had transpired between when the Grievant removed the memorandum and when he was asked. This is a sufficiently short period of time within which to recall what had occurred. Second, and more importantly, the Grievant's denials on November 1 and the first two denials on November 2 were emphatic and without hesitation. A reasonable accused person would consider whether his memory was accurate in this instance.



The Union's first due process challenge relates to element two above, specifically the County's investigation. The Union uniquely challenges the investigation asserting that the County's intent when conducting the November 2 meeting was to investigation was "illegitimate," had an "improper objective" and was not designed to obtain information, but rather the intent was to "trap" the Grievant.

The Grievant was questioned on October 31 by the County to determine whether he removed the memorandum from the bulletin board. The County asked the Grievant the same question three times, "Did you remove this memorandum from the bulletin board?" Three times the Grievant denied having removed the memorandum and he was subsequently disciplined for the removal. Two days later, while ostensibly conducting a second investigation - to determine whether the Grievant had lied to management - the Grievant was asked the exact same questions that that he was asked during the first investigation, "Did you remove this memorandum from the bulletin board?" Two times the Grievant denied removing the memorandum and in response to the third question (sixth question total), he responded that he had seen the memorandum in the lunch room.

I concur with the Union that the County's investigation was flawed. Had the County been conducting a "new" investigation, designed to obtain "new" information, then it would not have asked the Grievant the very same questions it asked him just two days prior. Moreover, since there was undeniable evidence that the Grievant had removed the memorandum, it was unnecessary to continue to question the Grievant's truthfulness.

The Union next challenges the notice of charges provided to the Grievant. I start by pointing out the County has a legitimate interest in expecting honesty from its employees and the Grievant will be held to this expectation. Notice in an industrial due process setting is not the same as the Sixth Amendment right to "be informed of the nature and cause of the accusation." But, an employee is entitled to a sufficient amount of information regarding the offenses for which they are being accused such that they can reasonably and completely respond. The facts are slim on this issue, but certainly in dispute.

The Grievant testified that during the interview on November 1, he was not told that the County had unequivocal evidence that he had removed the memorandum. Kennedy testified that he repeatedly informed the Grievant that "he knew he was lying" during the course of their conversation. Peterson testified that no one explained to the Grievant during the investigatory meeting that the County had evidence that he had taken the memorandum down. I credit Peterson's testimony, but the events of the three preceding days must be acknowledged.

On October 30, a co-worker whom the Grievant regularly communicates with was disciplined for removing the very same memorandum from the bulletin board.<sup>2</sup> The next day,

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<sup>2</sup> While the actual date in which the Grievant and KJ spoke is not contained in the record, it can be surmised that that conversation occurred prior to the Grievant's November 2 discipline.

the Grievant was disciplined for the very same thing. If I accept the Grievant's testimony that he understood that the first discipline he was issued was for removing the memorandum and for being untruthful, then it is reasonable to conclude that the Grievant was fully aware that the County was concerned with his lack of honesty. This, coupled with the fact that he was called in to speak to management a second time, in two days, and asked the very same questions, leads me to conclude that the Grievant was fully aware of the County's belief that he was being untruthful. The County has met this element.

I now move to element five, double jeopardy. Double jeopardy in the employment context means "that once discipline has been imposed and accepted, it cannot be increased". WAUPACA COUNTY, WERC MA-11316 (Morrison, 1/4/02) citing GENERAL SERVICES ADMINISTRATION, 75 LA 1158, 1162 (Lubic, 11/11/80). The Grievant was disciplined the first time for:

You are not authorized to remove management notices. This was not your property, and you had no right or need to remove the notice.

In reaching this conclusion, the County noted in its disciplinary documentation that he "denied" three times removing the memorandum. The County knew due to the video surveillance that the Grievant's initial denial during the first interview was a lie. Thus, the County had at its disposal on November 1 undisputable evidence that the Grievant had removed the memorandum and that he had lied about removing the memorandum. With this information, the County chose to impose a verbal warning which the Grievant accepted on that same date.

The County attempts to differentiate the two disciplines explaining that the Grievant lied about the underlying misconduct and that his failure to admit untruthfulness justified the discipline. This is a distinction without a difference. Lying about the misconduct and failing to admit that you lied are one in the same - lying. This is not two different acts of untruthfulness or two different offenses, but rather a continuation, however long and drawn out, of one incessant instance of untruthful conduct. The County's decision to impose a second disciplinary sanction on the Grievant amounted to double jeopardy and cannot be upheld.

In reaching this conclusion, I have also considered the Union's argument that the Grievant was subjected to disparate disciplinary sanctions and the County's history of assessing and imposing discipline for misconduct in combination with employee honesty, or lack thereof, during the investigation process. The County has a practice of considering the employee's credibility during the investigation in concert with the underlying misconduct, but deviated from that practice in this instance. The record includes sufficient facts regarding five disciplinary sanctions imposed against four employees. The reasons for discipline and level of discipline are as follows:

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- RE received a two week suspension and the payment of restitution for theft in 2001. RE admitted to the theft during the course of the investigation and expressed remorse. RE had no prior discipline.
- PE received a two week suspension and the payment of restitution for theft in 2001. RE admitted to the theft during the course of the investigation and expressed remorse. RE had no prior discipline.
- KG received a written warning for writing a defamatory letter critical of the Highway Commissioner in 2005. KG had no prior discipline.
- TE was disciplined on two occasions for the same offense. The first occurred in 2000 when he received a one week suspension for engaging in sexual harassment. TE's letter of discipline includes the statement, "you have been relatively honest and forthcoming in your statement of events." TE expressed remorse and had no prior discipline.
- TE's second disciplinary sanction for sexual harassment was issued in March 2002. TE received a thirty day suspension that was later reduced to 20 days per a settlement agreement. The County's disciplinary letter included the following:

Based on all of this information, it is my conclusion that you have violated Manitowoc County's policy on Harassment in the Workplace. It is also my conclusion that you were not honest in your responses to me during the investigation. It is also my conclusion that you violated a direct instruction that you were not to contact witnesses directly during this investigation.

TE was the only employee who was less than honest with the County when he was disciplined. In both of instances, TE was not only found guilty of sexual harassment, but the disciplinary letters specifically stated that TE was dishonest during the investigation. The Grievant's 30 day suspension is excessive when compared to TE's 30 day suspension for second offense sexual harassment and dishonesty. Recognizing the County's caution to the Arbitrator to not substitute her judgment for that of the County, I find it inconceivable that the County would consider a single instance of dishonesty (since it imposed the first verbal warning for only the removal of the memorandum), to be equal to two transgressions of sexual harassment and dishonesty.

I acknowledge that the County imposed a similar second disciplinary sanction on employee MS, who also removed the memorandum. MS did so on November 3, 2007, four days after the Grievant had removed the memorandum and just two days after the Grievant's second disciplinary sanction. MS was questioned by Kennedy and just like the Grievant, three times denied having removed the memorandum. Kennedy met with MS a second time, gave him a written verbal warning and then asked MS three additional times whether he removed

the memorandum. MS denied having removed the memorandum the first two times, but admitted to removing it the third time during the second meeting. Thus, MS denied removing the memorandum five times before his admission. MS received a five day suspension following the second meeting with the County for a violation of County conduct rules and policies as described as, "Lying during the course of an investigation is a very serious offense. Honesty is essential in an employment relationship." MS's discipline was imposed after the Grievant's and therefore, it is reasonable to conclude that in ascertaining what amount of discipline to impose on MS, the County took into consideration the amount of discipline it imposed on the Grievant. As a result, it is unreliable to consider MS's discipline when evaluating disparity.<sup>3</sup>

Ultimately, the Grievant was given a 30-day disciplinary suspension. In doing so, the County violated the Grievant's due process rights and thereby the discipline lacked just cause. The County's decision to superficially separate the two offenses, removal of the memorandum and dishonesty, was to its peril. When just cause cannot be upheld, the appropriate remedy is to expunge the discipline and make the grievant whole. If I do that in this instance, then the Grievant's dishonesty will result in the same level of discipline, a verbal warning, as employee KJ even though KJ immediately admitted to removing the memorandum from the bulletin board when questioned. The terms of the labor agreement force this conclusion. When just cause has not been met, then it is inappropriate for discipline to be meted out.

The Grievant is admonished to not view this Award as an affirmation of his behavior. I am confident he was lying when he denied removing the memorandum. Further, his willingness to communicate his condemnation to Kennedy for the County's interest in monitoring the removal of items from a County bulletin board was unacceptable. The Grievant would be well advised to realize double jeopardy shall not shield him from future discipline.

### AWARD

1. The County violated the just cause standard of the collective bargaining agreement when suspending the Mike Siebold.
2. The County is directed to refund Mr. Siebold the monies he lost and to modify his personnel file to reflect this Award.

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<sup>3</sup> The Grievant denied removing the memorandum six times and then admitted to having seen the memorandum in the lunch room. After finding little to no distinction between five denials over six denials, I move to the severity of this discipline in comparison to other disciplinary sanctions imposed by the County.

3. The Arbitrator shall retain jurisdiction for at least sixty (60) days to address any issues over remedy that the parties are unable to resolve.

Dated at Rhinelander, Wisconsin, this 1st day of June, 2009.

Lauri A. Millot /s/

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Lauri A. Millot, Arbitrator