

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**WAUKESHA CITY EMPLOYEES' UNION, LOCAL 97
OF THE AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

CITY OF WAUKESHA

Case 177
No. 68397
MA-14227

Appearances:

John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 044316, Racine Wisconsin 53404-7006, for Waukesha City Employees' Union, Local 97 of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Donna Hylarides Whalen, Assistant City Attorney, City of Waukesha, 201 Delafield Street, Waukesha, Wisconsin 53188-3646, for the City of Waukesha, referred to below as the City or as the Employer.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, as Arbitrator to resolve a grievance filed on behalf of George Poniewaz. Hearing was held on February 10, 2009 in Waukesha, Wisconsin. The hearing was not transcribed, and the parties filed briefs by April 2, 2009.

ISSUES

The parties stipulated the following issues for decision:

Did the City have just cause to suspend the Grievant for three days based upon the events occurring on May 2, 2008?

If not, what is the appropriate remedy?

Did the City have just cause to suspend the Grievant for 7.65 hours based upon the events occurring on May 5, 2008?

If not what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 – MANAGEMENT RIGHTS

. . .

2.01 The Union recognizes that except as specifically limited by the Agreement, the City has the right to manage and direct the work force which includes but is not limited to the right to . . . discipline or discharge employees for just cause . . .

. . .

BACKGROUND

The grievance form is dated May 15, 2008 (references to dates are to 2008 unless otherwise noted) and challenges whether the City had just cause to suspend the Grievant for five days based on the events of May 2 and for 7.65 hours based on the events of May 5. The Grievant, at the time of these incidents, was classified as a Motor Equipment Operator II, working in the Streets Division of the City's Department of Public Works (DPW).

The DPW Streets Division is administratively split into work crews and includes three supervisors. Each of the supervisors has authority over the entire division, without regard to whether a specific work crew reports directly to a single supervisor. Jose De Leon and Don Roberts are two of the Streets Division's three supervisors. De Leon and Roberts authored the City's Step 1 response to the grievance, which is dated May 13 and states:

On May 2, 2008 you were given orders to help Danny Llanas with equipment (Camel WW #15) to suck water out of the ditch for the sewer relay project on Pearl Street. At about 8:15 A.M. both of you were asked if one of you could drive truck by Dave Halverson and both of you responded yes. After clearing it with me, Dave Halverson asked you to go into the garage to get a dump truck to bring out to Pearl Street and start hauling spoil from the contractor. You took the flusher #72 into the garage to get a truck to start hauling but did not return.

Don Roberts arrived on the job site on Pearl Street and saw that you were not there; he then called you on the two-way radio to see where you were. You

answered him by telling him that you were almost back to the job site except you were not bringing a dump truck, you were bringing the flusher #72 back. Don then directed you to bring a dump truck because we didn't need the flusher. You answered him by telling him that there was a safety issue with one man running the (Camel WW #15) alone, he then told you that we did not need the (Camel WW #15) and to bring a dump truck back. You disregarded his orders.

Upon hearing the conversation that took place over the two-way radio, I then gave you a direct order to go to the garage to get a dump truck and start hauling from Pearl Street. You responded back on the two-way radio about the safety issue again, I then said to you not to argue with me over the air and I would talk to you later. I again repeated the direct order to go into the garage and get a dump truck to haul from Pearl Street. You reluctantly finally obeyed the orders given to you.

On Monday, May 5, 2008 I told Bruce Wery (President local 97 AFSCME) that we wanted to speak to you and him with regards to the incident that happened on Friday, May 2, 2008. Both of you came in, Don Roberts asked you why you disobeyed the orders given to you on Friday, you responded to him about the safety issue of having one operator run (Camel WW #15) alone. Don Roberts told you again that there was no safety issue, when they needed the (Camel WW #15) either you or one of the other persons on the crew would help run (Camel WW #15) then go back to hauling when they were done.

You then began to argue in a loud angry voice with Don Roberts and I said to you to calm down. I then asked you how many times was (Camel WW #15) used on Friday, May 2, 2008, you responded by telling me that maybe six or seven times. I then asked you that in any one of those times was there ever only one person running (Camel WW #15) alone, you said no and began to argue in a loud angry voice and being disrespectful to the supervisors.

Don gave you another direct order to sit, listen and answer the questions being asked. I reinforced Don Roberts orders given to you by repeating them to you, again, you began to argue in a loud angry voice and being disrespectful to the supervisors. Because you were not being very cooperative with us and refusing to follow a direct order for the second time, Don Roberts and I sent you home seeing as you were angry and upset. We told you to report back to work the following day Tuesday May 6, 2008.

On Tuesday May 6, 2008 you returned to work. You came into our offices to apologize for the incident that happened on May 5, 2008, you stated that you were sorry and you should have conducted yourself in a more professional manner.

On Wednesday May 7; 2008 we met again for the second time to continue the investigation with regards to the incidents of May 2, and May 5, 2008, Union

representatives Bruce Wery, Richard Baczak and you along with Supervisors Don Roberts, Bob Foxx and myself. You apologized again for the incident that happened on the morning of Monday May 5, 2008 and stated that it should have never happened. You also made statements about going to the quarry to pick up stone and that the (Camel WW #15) was used six or seven times.

After investigating the two incidents that happened on May 2, 2008 and May 5, 2008, we have concluded the following.

Yes it was very commendable on your part to take full responsibility for your action with regards to the incidents that happened May 2, and May 5, 2008. However, we also found that you were not being truthful with regards to some of your statements, for instance, going to the quarry to pick up stone, operating the (Camel WW #15) six or seven times with only one operator and everyone yelling out orders at you. There was no yelling of work orders at you, you never went to the quarry at all and there was always two operators running the (Camel WW #15).

You are in violation of City work rules number 14 for the incidents that happened on May 2, and May 5, 2008 . . .

Because of your insubordination that took place on May 2, 2008, we are taking corrective action as discipline. You will be suspended from work for five (5) days . . . You will not be paid for these five (5) days. . . .

With regards to the incident that happened on Monday May 5, 2008, where you began to argue in a loud angry voice and being disrespectful to the supervisors, not answering the questions and not being very cooperative with us, you will not be paid for 7.65 hours for Monday May 5, 2008.

Overall, your job performance must improve. Any more incidents like these will not be tolerated and will result in further disciplinary actions.

There is no dispute that the Grievant received a copy of the City Work Rules, which include the following:

. . .

4. Employees will not fail to report . . . safety hazards.

. . .

14. Employees will not refuse to follow the direct order of a supervisor . . .

Fred Abadi is the City's Director of Public Works. He responded to the grievance at Step 2 in a four page letter to the Grievant dated June 25. Abadi generally affirmed the facts asserted in the May 13 letter, and stated his "**FINDINGS**" thus:

Based on our meeting of May 22, Step 2 Grievance, I have determined that:

1. Incident 1, May 2, 2008:
 - You did not follow a direct order given to you by Dave Halverson and Don Roberts on May 2, 2008. You did not present any convincing argument or evidence at the meeting as to why you did not follow the direct order given to you.
 - You argued with your supervisors, Don Roberts and Joe De Leon over the two-way radio regarding the direct order given to you.
2. Incident 2, May 5, 2008:
 - During the supervisors' investigation of the May 2, incident, you spoke in a loud angry voice repeatedly, refused to follow the supervisors' direction and were uncooperative to a point that the supervisors had to send you home. At our meeting you did not deny or provide any justification for your actions and bad behavior.

Abadi's letter stated his "**DISCIPLINARY ACTION**" thus:

1. **Incident 1, May 2, 2008:** Since you do not have a prior suspension in your file, I am reducing your 5 days of suspension without pay to 3 days of suspension without pay.

At the Step 2 Grievance meeting, the Union provided copies of 3 prior "insubordination" cases where the employee was given a written reprimand instead of suspension. I have reviewed all these three cases and determined that none of them are relevant in this case. None of these three cases involved an employee selectively and unilaterally not completing an assigned task during a field operation. In addition, none of these three cases involved an employee continuing his refusal to follow direct order when the supervisor repeated the direct order during a field operation.

Case 1, Rob Owens, 11/19/03: Written up for misbehaving during a meeting.

Case 2, Tim Schultz, 12/6/07: Written up for arguing with supervisors about a job assignment.

Case 3, Tyler Steffen, 1/29/08: Written up for arguing and disrespecting the crew leader.

1. **Incident 2, May 5, 2008:** Since you spoke in a loud angry voice repeatedly, refused to follow the supervisors' direction and were uncooperative during the investigation, the supervisors had no choice other than sending you home. I concur with the supervisors' decision; you will not be paid for 7.65 hours for May 5, 2008.

His letter concluded, "I am pleased you apologized for the Monday May 5 incident and stated it should have never happened."

The then incumbent City Administrator answered the grievance at Step 3, in a letter to the Grievant dated September 9, 2008. He affirmed Abadi's findings, noting:

In reviewing the other situations where a written reprimand was issued for disruptive behavior, it appears that none of those situations involved a refusal to follow a direct order such as occurred on May 2, 2008. Although the situation on May 5, 2008 is more closely related to those incidents, Mr. Poniewaz had engaged in insubordinate behavior on May 2, 2008 so the incident on May 5, 2008 merited more discipline than a written reprimand. Therefore he was told to go home without pay for the remainder of the day.

It is noted that the Department Director, Dr. Abadi, reduced the original five day suspension for the May 2nd incident to three days and that he upheld the decision not to pay Mr. Poniewaz for 7.65 hours on May 5th.

Based on my review of the facts and arguments presented, it is my determination that Mr. Poniewaz violated City Work Rule 14 and that the level of discipline, as adjusted by Dr. Abadi, was commensurate with the seriousness of the offense.

This denial set the stage for the arbitration.

The events underlying the grievance trace to a construction project that spanned late April and the first week of May. The Grievant did not report for duty at the work site until May 2. The project is referred to as Pearl Street and took place on the east side of the City, in an industrial area. The sewer that served the area was old and had experienced a number of leaks over time. When the leaks became a daily occurrence, major repair became required and urgent. The work site involved a pressurized system, which pumped sewage uphill. Because of the extent of the work required, the City brought in an independent contractor on a time and materials basis. City trucks and other equipment, including City operators, assisted wherever possible to reduce costs.

David Halverson served as the City's Project Supervisor. On May 1, the work caused a sewer main failure on another street, further complicating the project. City Operators and trucks were spread thinly at that time and on May 2 Halverson had only two City trucks at his disposal and he believed he needed five.

That morning, De Leon assigned two City Motor Equipment Operator IIs, Daniel Llanas and the Grievant, to work at Pearl Street. Llanas drove the Camel and the Grievant drove the Flusher to the site. The Camel is a piece of heavy equipment which sucks liquids and debris. The Flusher is a piece of heavy equipment designed to force water, under pressure, into a work area to permit the removal of liquids and debris. There is no dispute that the Camel requires two operators, whether it is used alone or in tandem with the Flusher.

Sometime fairly early in the workday of May 2, Halverson assigned the Grievant to return to the City shop to get a dump truck. The Grievant did so, but took between forty-five and sixty minutes to return to Pearl Street. The circumstances surrounding that period are the disputed portion of the events from which the grievance arose, and the balance of the background is best set forth as an overview of witness testimony.

David Halverson

Halverson has worked for the City for over thirty-three years. He is classified as an Engineering Technician V, and works in the Engineering Division of the DPW. He is a Mechanical Engineer who provides a variety of engineering services for the City. He served as Project Supervisor for Pearl Street due to the absence of the City Surveyor. Halverson has frequently served as a Project Supervisor and estimated that he had done so on at least fifty occasions.

Halverson spoke with De Leon early in the morning of May 2 concerning his need for more dump trucks. De Leon told him to have the Grievant or Llanas obtain a truck from the shop. Halverson sought the Grievant's assistance, sometime between 8:00 and 8:30 a.m., offering him his car or the Flusher to take him to the shop and informing him that De Leon had approved the assignment. The Grievant asked Halverson about the wisdom of leaving Llanas alone to operate the Camel. Halverson knew, however, that two other DPW employees were available to assist, even though they were driving the two City dump trucks then assigned to Pearl Street. Neither the Camel nor the Flusher were in operation at that point.

A long time passed after the Grievant left the site. Halverson estimated the span to be from forty-five minutes to an hour. During that span, he overheard a radio exchange between the Grievant and De Leon regarding the assignment. As Halverson recalled it, the conversation ended with De Leon directing the Grievant to get a truck and they would discuss it later.

Halverson did not know if the Camel was put in use on May 2, but he did not assign any employee to operate it and stated the City would never have put an employee at risk in its operation.

José De Leon

De Leon has worked for the City for roughly twenty-seven years. He has been a Supervisor for about five years, and prior to that was a Motor Equipment Operator I and III. While a unit member, he served the Union in a variety of roles including, for roughly twelve years, President. Roughly twenty employees report directly to De Leon, but he shares supervisory authority with two other Supervisors over the Streets Division. Roberts is one of those Supervisors and typically oversees the street maintenance work crews.

Halverson called De Leon on May 2, to determine if Llanas and the Grievant were qualified to operate dump trucks. De Leon confirmed their qualifications and authorized Halverson to assign them as needed. De Leon had no further role in the Pearl Street work until he overheard a radio conversation between the Grievant and Roberts. He estimated the conversation took place at roughly 8:00 a.m.

The conversation De Leon overheard started with Roberts asking the Grievant when he was coming back to Pearl Street. The Grievant responded he was then coming back, but with the Flusher rather than a dump truck. Roberts responded that he did not need the Flusher, but did need a dump truck to haul spoil. The Grievant said that a safety concern demanded his return with the Flusher. Roberts denied the existence of any safety issue and repeated that he should bring a truck. The Grievant made a response to the effect that, "if you think I'm getting in and out of two pieces of equipment, then you have another thing coming." At that point, De Leon intervened. He directed the Grievant to return to the garage and bring a dump truck back to Pearl Street. He could not specifically recall the Grievant's response, but did recall telling him that they would not argue over the radio, but would discuss the matter later. The radio then went silent and the Grievant complied. De Leon could not recall hearing Roberts tell the Grievant it was "okay" to return with the Flusher. He did not recall hearing Roberts use the term "order" during the conversation with the Grievant. He did not hear Roberts issue a direct order during the radio conversation. De Leon, however, did use the term and gave the Grievant "a direct order" to return to the shop and get a dump truck. He did not threaten the Grievant with the use of discipline.

This incident prompted De Leon and Roberts to summon the Grievant and the Union President, Bruce Wery, to a meeting on May 5. He viewed the meeting to be investigatory, to determine why the Grievant caused so much difficulty in complying with his work assignment on May 2. The Grievant responded with increasing anger to De Leon's questions. De Leon repeatedly instructed the Grievant to calm down and answer the questions. When the Grievant pointed his finger at them and stated, "If you fucking supervisors would get out on the job site, you would find out what's going on", De Leon and Roberts determined to send him home for the balance of the day, and then resume the meeting on May 6.

On May 6, the Grievant reported for work and acted responsibly. He apologized for his behavior.

The investigatory meeting continued on May 6 and May 7. None of the grievant's responses accounted for the one-hour delay between his leaving Pearl Street to get a dump truck and his return. De Leon and Roberts never accused the Grievant of anything. Neither swore at the Grievant. They did, however, confront the Grievant with weight tickets from the quarry for stone hauled on May 2, to underscore for the Grievant that none bore his signature in spite of his claim to have been at the quarry.

De Leon noted that he had served as the Grievant's supervisor for roughly five years and that he had issued the Grievant a "letter of warning" dated January 21, 2005 for "negligence in leaving your route unattended for over 2 hours without notifying myself and endangering public safety." That warning letter referred to a prior warning "on your performance" dated January 11, 2005 and issued by Roberts. The Grievant never satisfactorily explained his conduct on May 2 in either investigatory meeting. None of his comments regarding safety could be squared with his leaving Pearl Street.

De Leon estimated it is a ten minute trip between Pearl Street and the garage. The Grievant never informed him, prior to the May 6 meeting that he had to strip snow plowing equipment from the dump truck. Even if he had, it would take a single employee roughly twenty minutes to remove such equipment.

When recalled after the Grievant's testimony, De Leon stated that breaking down a snow plow is a two man operation that takes roughly twenty minutes. Proper removal demands the use of a fork lift. One employee cannot safely break a snowplow down. Truck CW10 is the truck the Grievant drove to Pearl Street and it had been broken down prior to May 2. De Leon believed two other trucks were available that day.

Don Roberts

Roberts has worked for the DPW for fourteen years, twelve as a Supervisor. De Leon asked Roberts to check the Pearl Street crew early in the morning of May 2. Roberts got to the site at roughly 8:00 a.m. and spoke to Halverson, who asked if he knew where the Grievant was.

Roberts then radioed the Grievant, who responded he was almost to Pearl Street, but had the Flusher, not a dump truck. Roberts responded that he needed a dump truck, not the Flusher. The Grievant responded that he had a safety issue, and Roberts denied there was any such issue. After the denial the Grievant made a comment to the effect that he had no intention of jumping from one piece of equipment to another all day. At this point, De Leon intervened, telling the Grievant not to argue over the radio; to return to the shop; to then return to Pearl Street with a dump truck; and to put any further discussion off until later. Roberts did not directly order the Grievant to get the dump truck. The Grievant did, however, question every statement Roberts attempted to make during the conversation.

At the May 5 meeting, the Grievant became angry, would not sit down and would not account for his actions on May 2. The Grievant would not calm down or sit down even when Wery asked him to do so. The meeting ended when the Grievant told the Supervisors, "You fucking supervisors better get your stuff together." They responded by sending him home and directing him to return on May 6. He did so, starting the second meeting by apologizing for his behavior on May 5.

Fred Abadi

Abadi noted that the Grievant never accounted for his actions of May 2 and never accounted for the one hour delay between leaving and returning to Pearl Street. The Union asserted at the Step 2 meeting that nothing beyond a written warning was appropriate for the Grievant's conduct on May 2. Abadi could not agree, given the seriousness of the offense as well as its uniqueness. No other item of discipline involved an ongoing field project. The Pearl Street project was an emergency being responded to on a time and materials basis.

On recall after the Grievant's testimony, Abadi testified that there was no May snowfall and that he knew of no reason a City truck would have snow removal equipment on it as of May 2.

Donna Whalen

Whalen is the City's Human Resources Director as well as its Assistant City Attorney. She is the custodian of the City's personnel records. The January 21, 2005 discipline is contained in the Grievant's personnel file. Only Whalen and her Administrative Assistant have access to City employee personnel files.

On recall after the Grievant's testimony, Whalen testified that if Fell shredded any part of a personnel file, he neither had, nor had he sought, approval to do so. He lacked the authority to do so without approval.

Peggy Kadrach

Kadrach has served the City as a Human Relations Specialist for fifteen years. The Grievant inspected his personnel file in the Spring of 2008. Kadrach was present while he reviewed his file, but she could not specifically recall if he noted that it contained no record of discipline.

John Cesar

Cesar worked on the Pearl Street site and retired from City employment sometime after its completion. He was part of the "Heavy Crew" which hauled soil and stone to and from Pearl Street. The crew used the Payne & Dolan quarry on May 2. Cesar saw the Grievant take a load of brown stone, then drive onto the scale. As he left the scale, Cesar noted that

some rock had lodged in the spreader pan, which sits below the bed on the rear end of the dump truck. It can be used to spread road salt, but caught some stone. He radioed the Grievant, advising him to remove the stone from the spreader and informing him that Cesar would sign the billing slip for the load while the Grievant attended to the stone. Cesar verified his signature on the billing slip, which notes the Grievant's truck as "CW10". Cesar's was identified on the billing slips as "CW65". Cesar did not advise either Roberts or De Leon that he signed the Grievant's slip. No supervisor asked him if he had seen the Grievant at the quarry on May 2.

George Poniewaz

The Grievant has worked as a Motor Equipment Operator II on the Sewer Crew since November of 2002.

On May 2, he punched in at 7:00 a.m., received his work assignment from De Leon, and then drove the Flusher to Pearl Street. He estimated it took twenty minutes to drive the Flusher from the shop to Pearl Street. Llanas drove the Camel to the site. They arrived around 7:45 a.m. Halverson was at the site, waving his arms. The Grievant responded to his gesture and Halverson then instructed the Grievant and Llanas to set up for operation "right away" and then left. Shortly after Halverson had left, a Foreman from the independent contractor told them to move the equipment. He and Llanas complied. Some time after this, Halverson returned, asked them why they had moved, and after learning why, responded, "where's my trucks?" The Grievant responded that he should call the Heavy Crew or a Supervisor. Halverson then left again.

When Halverson returned he asked the Grievant and Llanas if they could drive a dump truck and each responded in the affirmative. He told the Grievant to get a dump truck, and the Grievant then told Halverson that Camel operation required two operators. Halverson responded by waving his arms, indicating that there was plenty of help available. The Grievant took the gesture to mean the crew of the independent contractor.

The Grievant left the site in the Flusher to head back to the shop for a truck. While doing so, he used his cell phone to call Wery, who is the Grievant's Crew Leader as well as the Union's President. The Grievant voiced his safety concerns, insisting that leaving Llanas alone was a mistake. Wery told him that if he had such concerns he should return to the job site. The Grievant then started back to Pearl Street. While en route, Roberts radioed him and the Grievant informed him he was en route with the Flusher. Roberts told him that he needed a dump truck and the Grievant should get one. The Grievant acknowledged that he made a comment to the effect that he had no intention of bouncing between two pieces of equipment. Roberts said that he should get a dump truck and the Grievant repeated he was nearly there with the Flusher. Roberts grudgingly said, "OK." De Leon then intervened, telling the Grievant he was under a direct order to get a dump truck. The Grievant phoned Wery, who told him to follow De Leon's directive. The Grievant estimated that he received Roberts' radio call roughly one-half hour from the time he left Pearl Street and that he was roughly one-half way to Pearl Street when De Leon directed him to return to the shop.

When the Grievant returned to the shop, the only trucks available were still equipped with snow plowing equipment. The Grievant asked for a Mechanic and their Supervisor responded that none were available. It took him a little more than one-half hour to break down the snow plowing equipment. He then returned to Pearl Street, joining Kramer and Cesar, who were in line awaiting assignment. Shortly after the morning break, it began to rain. Llanas told the Grievant he would get rain gear from the shop. The Grievant spoke to Halverson, who told him not to return empty, but report to the quarry to get a load of brown stone. The Grievant had never been to the quarry and spoke to the members of the Heavy Crew then at Pearl Street. He learned where to go and then drove to the quarry.

When he arrived, he had to wait at a set of tracks for a train to pass. When it had, he encountered Kramer, who had waited for the same train and was leaving the quarry. Kramer instructed the Grievant on where to find the stone and how to check out. After having his truck loaded by quarry employees, Cesar radioed him to inform him that his spreader plate had caught some of the stone and the stone had to be removed before he took the truck back on the streets. Cesar offered to fill out the Grievant's ticket and did so. After dumping his load at Pearl Street, the independent contractor's Foreman instructed him to start up the Camel and the Grievant did not operate the dump truck again that day.

The Grievant was scheduled to work from 7:00 a.m. until 3:30 p.m. on May 2. He worked until 6:00 p.m. He complied with every work order issued him that day.

On May 5, he reported for work and was instructed to meet with De Leon, Roberts and Wery. De Leon and Roberts started the meeting by asking about his comments during the radio call. They repeated that he asserted no valid safety issue and insisted that the City had employees available to assist Llanas. They then handed him a series of papers to document that he never went to the quarry. They repeatedly asked how often he operated the Camel and denied the truth of his response that it was operated seven to eight times. They did not call him a liar, but it was evident they were treating him as one. Everyone at the meeting raised their voices and the Grievant insisted that if they had a Supervisor at Pearl Street, they would have known what was going on. Roberts gave him notice of a five-day suspension and when the Grievant objected that he had done nothing wrong, Roberts asserted that his work record argued otherwise. The Grievant insisted there was nothing in his file. At the close of the meeting, the Grievant said the meeting was going nowhere and he was going back to work. At that point, De Leon and Roberts informed him not to report for work, but to go home.

When they met again on May 6, the Grievant apologized for his conduct on May 5, noting it was unbecoming of an employee and a Christian. De Leon and Roberts appeared to be understanding, but made no apology for their own behavior.

The Grievant is the head of the Union's safety committee. The Camel cannot be operated safely by a single employee. He inspected his personnel file with Kadrich overseeing him. He did not find any evidence of prior discipline. Tom Fell issued the January 21, 2005 warning letter and assured the Grievant that if one year passed without incident, the letter

would be “erased off your file.” After a year, the Grievant spoke to Fell about the matter and Fell assured him that he would shred the letter. The Grievant acknowledged he could have missed the letter while inspecting the file, but he did not think the file included any discipline. He also acknowledged that Llanas could have sought assistance had anyone assigned him to operate the Camel during the Grievant’s absence, and that he did not need to hear a work assignment stated as an “order” to know he was obligated to perform it.

After De Leon’s, Whalen’s and Abadi’s recall, the Grievant stated that the pan De Leon discussed is actually an auger and employees frequently remove the auger alone. CW10 still had some winter equipment attached to it on May 2. The Grievant did not remove a wing or any piece of equipment requiring another employee. He did remove a salter and a plow. He also knocked down the tailgate. There were no other trucks available on May 2 and there was a late Spring snowfall.

John Kramer

Kramer has worked as a Motor Equipment Operator II since April of 1998. He is part of the DPW Heavy Crew. He worked at Pearl Street throughout the project. Prior to May 2, four to five dump trucks serviced the site. The Grievant was setting up the Camel when Kramer reported to Pearl Street on May 2.

Kramer heard the radio call between Roberts and the Grievant. The Grievant told Roberts it was unsafe to leave Llanas with the Camel alone after Roberts learned he was returning to Pearl Street in the Flusher. Roberts was not happy with the response, but said “c’mon back.” De Leon then intervened, and issued the Grievant a specific directive to return to the shop and return with a dump truck. Kramer confirmed the Grievant’s testimony regarding their passing at the quarry and regarding Cesar’s offer to fill out the Grievant’s loading slip while he cleaned the spreader plate. No member of management asked him about the events of May 2.

Daniel Llanas

Llanas has worked in the DPW since August of 2002. De Leon assigned the Grievant and him to work as a team on May 2. Halverson met them at Pearl Street and told them to set up the Camel and Flusher along a trench. After that, the independent contractor’s Foreman directed them to move the equipment from the trench area and await his signal to start work. Halverson returned sometime after this, and asked why they had moved and where were the trucks he needed. When Halverson asked if they could drive a dump truck, they responded in the affirmative, noting that their supervisor would have to approve it. Halverson then went to his radio and returned, advising them he had De Leon’s approval. The Grievant offered to go and took the Flusher. Shortly after that, the Grievant used his cell phone to call Llanas’ cell phone. The Grievant told Llanas he thought it was a mistake to leave Llanas alone; that he had discussed the matter with Wery; and that he was returning with the Flusher.

Sometime after this, Roberts appeared on site, asking about the Grievant. Llanas responded that the Grievant was on his way back, with a dump truck or the Flusher. Roberts seemed to get angry, then radioed the Grievant. Roughly one-half hour from this, the Grievant returned to Pearl Street in a dump truck. Llanas confirmed the Grievant's testimony regarding their trip to the quarry and return to Pearl Street. After the Grievant dumped his load of brown stone, he was directed to operate the Camel. The two of them operated the Camel and neither used a dump truck at any point after this. Llanas worked at Pearl Street for the entire project. The Grievant worked there only on May 2. At no point during the project did any City supervisor direct Llanas to operate the Camel alone. He estimated he operated the Camel on May 2 on six occasions, each of which took place after lunch. He estimated the Grievant was away from Pearl Street for about one hour during the morning of May 2.

Bruce Wery

Wery has served as a Crew Leader for the Sewer Crew since May of 1975 and was the Grievant's Crew Leader on May 2. He has served as Union President for roughly sixteen years. The Grievant phoned him on May 2 to voice a safety concern regarding leaving Llanas alone on Pearl Street with only employees of the independent contractor to assist him if the Camel was needed. Even though Wery was unsure of the validity of the Grievant's fear on the point, he did tell him to return to Pearl Street in the Flusher if he felt he had a safety issue. At the time of the cell phone call, Wery, De Leon and another Supervisor were attending a Camel demonstration. The demonstration was so loud that he did not attempt to bring De Leon into the conversation. Roughly an hour after the cell phone call, at the completion of the demonstration, Wery informed De Leon of his conversation with the Grievant.

Wery stated that Union records show six instances involving five unit members being disciplined for insubordinate conduct. None involved a suspension. He acknowledged that none involved the deliberate refusal to follow a direct order.

The May 5 meeting was heated. De Leon and Roberts second guessed whether the Grievant had ever gone to the quarry. They stopped short of calling him a liar, but the implication was clear. They treated his estimate of Camel usage in the same way. They added that he had an extensive history of discipline. The Grievant responded that his record was clean and that any past discipline had been removed. He could not recall if any of the meeting participants swore.

Further facts will be set forth in the **DISCUSSION** section.

THE PARTIES' POSITIONS

The City's Brief

After an extensive review of the evidence, the City notes that I have used a two element test to define the application of "just cause" where "there are no stipulations between the

parties as to its application” citing IOWA COUNTY, DEC. NO. 5107, MA-8818 (McLaughlin, 8/95) AND KENOSHA COUNTY, DEC. NO. 6912, MA-12803 (McLaughlin, 11/05). The City also notes that I have, in prior cases, used the definition of “insubordination” found in Roberts’ Dictionary of Industrial Relations.

With that as background, the City notes that its work rules “specifically provide that employees will not refuse to follow the direct order of a supervisor or management.” The work rule reasonably polices the work site and avoids the “total chaos on the job” that would follow employee refusal to comply with orders. The reasonableness of the rule is not in issue and an examination of the evidence confirms that its application was reasonable. More specifically, the evidence establishes that the Grievant failed to return to Pearl Street with a dump truck as Halverson directed. It also establishes a second deliberate refusal to follow the directive when the Grievant argued with Roberts over the radio and “refused to bring the dump truck back to the Pearl Street work site”.

No less clear is that “The grievant understood a clear, work-related order”. He understood Halverson’s directive and the underlying basis for it. The need for an additional truck at the site was evident and directly communicated to the Grievant.

In spite of this, “The Grievant deliberately defied the order”. Rather than voicing a concern to Halverson regarding the Camel’s operation, the Grievant phoned “his Crew Leader (a non-managerial position)” to assert that Llanas was being asked to run the Camel alone. Whether or not Wery advised him to return to the Pearl Street if he had a safety concern, the evidence establishes the Grievant “not only failed to get the dump truck, he did not return to the work site.” Rather, “nearly an hour later” than his phone contact with Roberts, the Grievant advised Roberts he was returning to the site with the Flusher. The Grievant’s testimony that he spent time at the shop “breaking down” a dump truck affords no defense for his actions. If taken as true, the testimony undercuts any claim that safety was an issue and, if false, the testimony is no more than a belated attempt to “cover” an unexcused absence.

The evidence amply demonstrates the Grievant knew he was under orders from a known supervisor to return to Pearl Street with a dump truck. The Grievant acknowledged he obeys orders from Halverson and the evidence establishes that Halverson has supervisory authority and was functioning as Project Supervisor at the time he issued the order. The evidence also clearly establishes that Roberts “had the authority to order Mr. Poniewaz to get the dump truck.”

Arbitral precedent creates an “exception to the ‘obey now, grieve later’ doctrine . . . where obedience would involve an unusual or abnormal safety or health hazard.” The Grievant’s failure to return to the work site with the Flusher after his discussion with Wery belies any basis to invoke the “safety exception.” The Grievant’s testimony to account for his activity during the time he left and then returned to the Pearl Street work site is unpersuasive. The hearing was the first time he offered this account. Crediting his account poses the irresolvable issue of why he returned to the shop.

His actions are not reconcilable to a safety concern for Llanas. He took no action to protect Llanas. Even if he had, no one directed Llanas to operate the Camel alone. The Grievant's refusal to report the unsafe condition would, in any event, constitute a violation of "City Work Rule #4" which "requires employees to report . . . safety hazards." Against this background, the evidence establishes that the asserted safety concern "did not exist" and "has never existed."

Complicating this proven insubordination is the Grievant's conduct during the investigatory interview. The evidence establishes that "Mr. Poniewaz was loud, argumentative and uncooperative." His use of profanity is established and was unprovoked. His belated apology has no bearing here. Use of abusive language is, "Another form of insubordination."

The record establishes that the suspensions are reasonable. Insubordination in either or both of the forms proven here "is a serious offense." The Grievant had a written reprimand in his record prior to the incidents. Each suspension was reasonable. Evidence of past discipline did not involve "the refusal to obey a direct order."

It follows that the City has met both elements of its burden to prove insubordination and, therefore, "that the level of discipline is reasonably related to the offense(s) and the record of the employee." The grievance must be denied.

The Union's Brief

After an extensive review of the evidence, the Union notes, "The crux of the City's argument is that Poniewaz was insubordinate by refusing a work order." This argument cannot be accepted, however, because, "At no time did he refuse to carry out his assignment."

The City's case ignores that the Grievant "legitimately expressed to many individuals his concern for the safety of his partner by leaving him alone in the event the camel was needed on May 2." He voiced those concerns to Halverson, Wery, Roberts and De Leon. Even granting that every work assignment need not be voiced as a direct order cannot obscure that "the safety concern he had for his partner certainly mitigates the matter." The Grievant serves as the Union's representative to "the City-sponsored safety committee" and his training underscores the need for two operators on the Camel and Flusher. Further underscoring the legitimacy of the safety concern is that the use of the equipment "is sporadic", thus requiring "immediate and unplanned use." Against this background, the Grievant's fear of leaving Llanas alone was reasonable. That reasonable safety concern cannot be ignored, particularly in light of arbitral precedent.

Beyond this, the Grievant never refused an order on May 2. Rather, "he questioned the directive given him." Roberts understood the concern and "okayed" the Grievant's return to Pearl Street with the Flusher. Only when De Leon intervened, did the Grievant divert from that course, abandoning "any further attempt to reason out the situation." This cannot obscure that he "complied with the directive."

Against this background, the “three-day suspension was without just cause.” Past examples of discipline for insubordination produced levels of discipline below a suspension. There can be no argument that the Grievant’s conduct merited worse, because “Poniewaz was not insubordinate nor did he refuse a legitimate directive.”

The events of May 5 will not support a suspension. Roberts and De Leon summoned him to a meeting to investigate the events of May 2, but the “investigation” involved no more than their insistence that he had been insubordinate coupled with their insistence that he had not driven to the quarry as directed and that he lied regarding the usage of the Camel. That, “Things got heated” cannot be considered surprising. Both sides raised their voices, and Roberts asserted the Grievant had an extensive disciplinary record.

Evidence adduced at hearing will not bear out the City’s view of the May 5 meeting. Two witnesses confirmed that the Grievant drove to the quarry as instructed and fully complied with all of his work orders. No member of management even bothered to question Llanas regarding the Camel’s usage on May 2. The unsupported nature of management’s allegations provoked unnecessary conflict. Had management acted on fact rather than impulse, “this entire charade could have been avoided.” Alone among the participants of that meeting, Poniewaz apologized for his conduct on May 5, even though “less than professional” conduct was engaged in “by all participants.”

Thus, neither suspension had just cause. The Union concludes by seeking “a ruling that upholds our grievance by expunging the matter from (the Grievant’s) personnel file and makes him whole for all lost wages and benefits. There is no persuasive support for any discipline based on the prior written reprimand because, “a) there is a question as to whether or not it was in his file and; b) the accusations contained do not draw a nexus to the instant matter; c) even if it existed it is arguably stale.”

DISCUSSION

The two issues are stipulated and, as preface, it is appropriate to note the standard common to each. The City is correct that I follow a two element test to define “just cause” in the absence of a stipulation by the parties of the applicable standards. As the City points out, I stated the standards thus in DEC. NO. 5107 AT 13:

First, the Employer must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Employer must establish that the discipline imposed for the conduct reasonably reflects its disciplinary interest.

The City also correctly notes that I have used the following definition of “insubordination” from Roberts’ Dictionary of Industrial Relations, Third Edition, (BNA, 1986):

A worker's refusal or failure to obey a management directive or to comply with an established work procedure. Under certain circumstances, use of objectionable

language or abusive behavior toward supervisors may be deemed to be insubordination because it reveals disrespect of management's authority. DEC. NO. 5107 AT 15.

Here, the two issues pose different aspects of this definition, with the events of May 2 highlighting the “refusal . . . to obey a management directive” and the events of May 5 highlighting the “use of objectionable language or abusive behavior toward supervisors.”

I addressed the “refusal” aspect of the definition in prior cases thus:

Arbitrators have stated the elements to proving insubordination in a variety of ways. In my opinion, to establish insubordination, the (Employer) must demonstrate that the Grievant understood and deliberately defied a clear, work-related order issued by a known supervisor. See, for example, Roberts' Dictionary of Industrial Relations, (BNA, 1986); and Bornstein, Gosline & Greenbaum at Section 16.04.

This underscores that insubordination is a serious offense, distinguishable from negligence. It can support sanctions outside of the progressive discipline used to modify negligent conduct. The basis for this is the presence of willful conduct undermining work place management. LAKE GENEVA, MA-10750, DEC. NO. 6043 (4/00) AT 21, and MONROE COUNTY, MA-14176, DEC. NO. 7405 (3/09) AT 9.

With this as background, it is necessary to apply the two elements of just cause to each suspension.

As the City aptly notes, the evidence leaves no doubt that the Grievant understood that Halverson, Roberts and De Leon acted in a supervisory capacity; that each assigned him to get a dump truck; and that the assignment was work-related. The factual dispute is when, if at all, the Grievant deliberately defied a clear order.

Application of the first element, like the City's case, focuses on Roberts' and De Leon's conduct, and specifically on whether either or both issued a direct order. There is no dispute that De Leon closed the May 2 radio conversation with a direct order. The evidence will not, however, support the assertion that Roberts issued the Grievant a direct order to return to the shop and get the dump truck.

The most significant evidence on this point is Roberts' testimony. He declined to characterize his conduct to the Grievant as a direct order. It is evident that he and Halverson thought that the Grievant wasted time by returning to Pearl Street in the Flusher. This falls short of establishing a direct order. Beyond this, the Grievant's and Kramer's testimony indicates that Roberts ended the radio conversation with some sort of statement to the effect that the Grievant should continue to Pearl Street. While it is not clear what Roberts said, this credible testimony

establishes that the radio conversation, prior to De Leon's intervention, had not produced a direct order for the Grievant to turn the Flusher around. Neither Roberts' nor De Leon's testimony rebuts this. De Leon could not recall Roberts making a statement to approve the Grievant's continuing to Pearl Street. Under either Roberts' or De Leon's version of the radio conversation, however, it is evident that Roberts did not issue the Grievant a direct order to turn around. Viewed as a whole, the testimony establishes that De Leon intervened in the radio call when he did to cut off what he viewed as unnecessary and inappropriate dialogue and to clarify beyond question that the Grievant was under a direct order to turn the Flusher around, proceed to the shop and get a dump truck.

The Grievant complied. At most, the evidence establishes that he complied "reluctantly." This cannot obscure that he complied. The evidence does not support the assertion that the Grievant deliberately refused to follow a direct order on May 2.

To treat Halverson's and Roberts' assignment to the Grievant to get a dump truck as a direct order overstates the evidence. Halverson first assigned the Grievant and Llanas to set up the Camel and the Flusher next to a trench. If any supervisory assignment to perform a duty constitutes a direct order and a failure to complete the assignment constitutes insubordination, then Llanas and the Grievant were insubordinate when they moved the Camel and Flusher in response to the contractor's Foreman's request. If that move was an error and complicated Halverson's job, the City's concern would be less in their defiance of his authority than in their judgment in acting before consulting him. The Grievant's concern for Llanas' safety may have been misplaced, but his return to Pearl Street reflected questionable judgment, not the deliberate defiance of supervision.

This reduces the objectionable conduct at issue to either a lesser type of willful insubordination by which the Grievant's conduct is viewed to undermine authority, or negligence in complying with the assignment to get a dump truck. The former turns on the Grievant's questioning Roberts regarding a safety issue. The evidence fails to support a finding of insubordination. Whether or not the Grievant articulated a true safety consideration is debatable. That he did not articulate it well is evident. His comment to the effect that Roberts should not expect him to jump between two vehicles was poorly chosen and, if a statement to defy Roberts' authority, even worse. The evidence on this point is weak, however. Under any view of the conversation, Roberts did not even consider the safety issue the Grievant was trying to bring. Against this background, the statement is far less likely to be a statement of defiance than an ill-spoken attempt to highlight how pointless it would be for the Grievant to run between being a truck's sole operator and the Camel's second operator. In my view, the statement was a flawed attempt to highlight a safety issue. It may have wasted time, but the record does not show defiance of authority. That the Grievant did not repeat the statement or defend it when De Leon intervened establishes that something less than insubordination was involved.

The conduct supporting insubordination turns solely on negligent behavior in securing the dump truck. There is no persuasive evidence that would support a conclusion that the Grievant willfully delayed his return to Pearl Street. There is nothing in the record that offers any insight

into why he would. There is no dispute he called Wery and Llanas regarding his safety concern and no evident reason why he would stay away from the site he sought to return to. In any event, his absence from Pearl Street was between forty-five minutes and one hour. The most conservative estimate of the time necessary to get between the shop and Pearl Street was ten minutes and there is no dispute that he traveled from Pearl Street back, or close, to the shop and then returned at least half-way to Pearl Street before having to return again to the shop to secure the dump truck for his return to Pearl Street. Standing alone, this accounts for roughly one-half hour. The Grievant testified that the trip between Pearl Street and the Shop in the Flusher could be expected to take closer to twenty than to ten minutes. Depending on which version of the events is credited, this means the Grievant spent somewhere between fifteen and thirty minutes securing truck CW10.

Whatever is said of this block of time affords no support for the allegation of insubordination. More to the point, the inferences that can be drawn regarding this period of time rest on weak evidentiary support. The assertion that he lied regarding removing snow plowing equipment is unsupported. It runs against the evidence regarding his course of conduct on that day, which shows a fairly determined effort to return to Pearl Street. The evidence affords no clarity on why he added an additional half hour or more to his effort to return, knowing that he had already angered two Supervisors. As weak as the City asserts the Grievant's testimony to be, it fits within a core of proven fact and can account for his conduct. The alternative it offers does not. If the Grievant delayed his return, he put Llanas at risk under the Grievant's account. Under the City's account, he abandoned Llanas. If the City's view is correct, then Llanas has no reason to support the Grievant and clear reason to distance himself from a fabrication. Llanas' testimony was, however, balanced. He did not uncritically support the Grievant's testimony, since he estimated the period of absence at one hour, which is the high end of the estimates. He did not defend the Grievant's safety concern, beyond noting the need for two Camel operators. The balance in Llanas' testimony is difficult to square with the City's account. In Llanas' view, nothing remarkable happened between the Grievant's departure from and return to Pearl Street on May 2. The difficulty with the City's view is that it demands the conclusion that the delay was so egregious that the Grievant made a series of bold and bald lies to cover it. The absence of a solid basis for this inference cannot be held against the Grievant.

The City has persuasively questioned why the Grievant chose to call Wery, a non-management employee, to voice a safety concern that had already been voiced to and rejected by Halverson. Wery is a Crew Leader and the contact is not improper even if it was to Wery as a Union official. What is questionable about the contact is how poorly the Grievant communicated his concern to Supervisors in a position to address it. The Grievant took Halverson's sweep of the arm around the work site to mean that Halverson thought he could use untrained workers from the independent contractor to assist Llanas. What is remarkable about the Grievant's response is his failure to communicate this concern in any meaningful sense to Halverson before leaving the job site or calling Wery. His conduct past that point complicated the situation. Whatever is said of his interaction with Roberts on the radio, it was unproductive at best and combative at worst. To complicate this, it took place "in public" in the sense that it could be heard by any employee with radio access. That he chose to phone Wery again to see if he should

follow De Leon's directive underscores the difficulty with this course of conduct. No one the Grievant contacted, including Wery, saw the safety issue the Grievant did. His course of conduct unnecessarily delayed work at Pearl Street and did nothing to protect Llanas. This course of conduct had an adverse impact on the work then in progress. All of it is traceable to the Grievant, and his course of conduct supports a disciplinary interest on the City's part.

The second element of the just cause analysis is whether the three day suspension reasonably reflects the proven disciplinary interest. The suspension rests on insubordinate conduct which the evidence fails to establish and thus cannot be considered reasonable.

This conclusion is best applied to Abadi's Step 2 answer to the grievance rather than to Roberts' and De Leon's Step 1 answer. The evidence at hearing poses a tension between those two responses. The "**DISCIPLINARY ACTION**" section of Abadi's response is a reasonable and measured response that directly flows from the "**FINDINGS**" section. The tension is traceable to a factual, not logical difficulty. That difficulty is the absence of "a direct order" that the Grievant defied. The assertion of the direct order regarding Halverson and Roberts flows from Roberts' and De Leon's characterization of the facts in their May 13 letter. The evidence at hearing does not support that characterization. Halverson assigned the Grievant to get a dump truck and the Grievant complied. The intervening call to Wery sent the Grievant back to Pearl Street, in the belief he was addressing a safety issue. Roberts did not order the Grievant to get the dump truck, even under his own testimony. Rather, he reconfirmed that He and Halverson wanted the dump truck, not the Flusher. He, like Halverson, summarily dismissed the Grievant's safety concerns, but the evidence establishes that he acquiesced to the Grievant's return to Pearl Street. De Leon's intervention in the radio conversation is the first direct order issued the Grievant. Had the Grievant returned to Pearl Street, his insubordination would be proven and Abadi's conclusions would stand. He did not, however, return to Pearl Street. Rather, he complied with the order and returned to the shop.

The second bullet point in the "**FINDINGS**" section is more firmly rooted in the evidence. The radio argument is well established and is traceable to the Grievant. The reference to the "direct order given you", however, overstates Roberts' involvement. De Leon issued the direct order. Roberts and the Grievant "discussed" the wisdom of the Grievant's return in the Flusher and the validity of his safety concern. Abadi was rightly concerned about the quality of the Grievant's response to the work assignment, but the suspension rests on insubordination, which is unproven, not poor judgment, which is. Abadi's "**FINDINGS**" follow directly from De Leon's and Roberts'. The difficulty with this finding is that the evidence at hearing will not support it. Thus, even though Abadi's distinction between the Grievant's discipline and those prior disciplines is logical, it lacks a factual basis. With insubordination unproven, the distinction between the Grievant's conduct and the conduct posed by prior disciplines becomes unpersuasive. The Grievant did not deliberately defy a direct order. Rather, as other employees before him, the Grievant chose to argue "with a supervisor about a job assignment" (Employer Exhibit 9 at 3). Thus, the proven disciplinary interest reasonably supports a written warning, not a suspension.

The second suspension requires less discussion. Abadi's "**FINDINGS**" are supported by the evidence. The Grievant does not seriously question that he was "uncooperative"; that he "spoke in a loud angry voice repeatedly"; and that he "refused to follow the supervisors' direction" to sit down and to speak more calmly. De Leon and Roberts testified that the Grievant swore during the meeting. Wery and the Grievant could not recall any swearing, but there is no persuasive reason to doubt the Supervisors. By the Grievant's own admission, he rose to leave the meeting to return to work on his own motion. It is evident he was upset and evident his actions manifested his anger. The course of his conduct on May 5 constitutes "use of objectionable language or abusive behavior toward supervisors (which) may be deemed to be insubordination because it reveals disrespect of management's authority." The evidence establishes that the City proved insubordinate conduct in which it has a disciplinary interest.

The proven conduct supports the suspension. Even though the May 2 suspension lacked just cause, the Grievant's May 2 conduct warranted a written warning. The warning rests, in significant part, on the Grievant's overreaction to his Supervisors. His conduct during the May 5 interview continued the overreaction and added to it. As Abadi put it, the conduct left the Supervisors with little choice but to send him home. The May 5 suspension was reasonable.

The Union asserts that the City provoked the Grievant's overreaction and cannot reasonably sanction conduct no worse than its Supervisors'. This assertion has force. At the May 5 "investigation", De Leon and Roberts asserted that the Grievant did not go to the quarry on May 2; that he had an extensive disciplinary record; and that he exaggerated the number of times he operated the Camel. These assertions came through the testimony less as questions than accusations. The accusations were unsupported and provocative. They show little concern on the Supervisors' part to seek proof rather than confirmation of already made conclusions. Probably not coincidentally, the Grievant showed no better restraint in reaching his conclusions on May 2. In any event, the Union's assertion that the May 5 "investigation" showed little concern for fact is well-stated.

This falls short, however, of defending the Grievant's conduct. He was less than forthcoming in accounting for his own actions on May 2. His belligerence, even if provoked, was unnecessary and disproportionate. De Leon's and Roberts' judgment cannot be brushed off lightly. Their response to the grievance does not call attention to the Grievant's language and they had reason to question the Grievant's conduct on May 2. The weakest point in their response is the lack of support for their questioning his credibility. The difficulty in the Union's defense of the Grievant's behavior is that he chose to answer the City's intransigence with his own. His rush to judgment affords no defense to theirs. If he had detail regarding his conduct that the City needed to form a reasoned judgment, his failure to supply that detail cannot be passed to them. There is no dispute that even if they were not receptive to his views, they at least sought them.

As with the first suspension, the "**DISCIPLINARY ACTION**" section of Abadi's response is a measured response that directly flows from the "**FINDINGS**" section. Unlike the first suspension, there is no factual flaw in "**FINDINGS**" section regarding the second

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suspension. Of particular note here, the "**FINDINGS**" and "**DISCIPLINARY ACTION**"

sections of Abadi's response do not rely on the credibility concerns stated in De Leon's and Roberts' Step 1 answer. Those concerns have no persuasive support. Beyond this, Abadi responded favorably to the Grievant's apology because it showed willingness to assume responsibility for his actions. Whether or not the Supervisors had reason to apologize, the contract permits the City to reasonably sanction inappropriate conduct and Abadi's Step 2 response confirms the reasonableness of the second suspension.

Before closing, it is appropriate to tie the conclusions stated above more closely to the parties' arguments. The "safety exception" plays no role in either suspension. The Grievant complied with the only direct order issued him on May 2. Had the Grievant chosen to continue on to Pearl Street after that directive, the safety exception would offer no defense. There is no proof that Llanas' safety was at risk at any point on May 2.

The safety issue plays a less direct role in the conclusions stated above. There is no indication Halverson, Roberts or De Leon ever meaningfully considered the Grievant's concern. That concern is traceable to his mistaken assumption that Halverson might assign untrained employees from the contractor to assist Llanas. That concern, if mistaken, was held in good faith and posed a potentially significant issue. That he misperceived what Halverson meant by indicating a second operator was available at Pearl Street cannot obscure that he had a good faith belief that a problem existed. No supervisor meaningfully responded to that good faith belief. Part of the responsibility for this lies on the Grievant, part does not. Halverson did not know if Llanas or the Grievant was qualified to operate a dump truck. Was the Grievant to assume Halverson knew that the members of the Heavy Crew assigned to Pearl Street were trained in Camel operation?

This point has contractual significance. That the Grievant poorly communicated the concern and reacted belligerently to being ignored cannot validate the safety concern. However, a rote dismissal of his concern poses a conflict between Work Rules 4 and 14. Had he done nothing to question the safety issue, it is evident he could face jeopardy under Work Rule 4. Work Rule 14 cannot be applied in a fashion that defeats the operation of Work Rule 4 and be made consistent with the just cause standard of Section 2.01. Treating Halverson's or Roberts' assignment to the Grievant as a direct order does so.

City concerns for order in the workplace have force, but overstate the evidence. The events of the early morning of May 2 reflect a fair amount of chaos, but that chaos is traceable to the nature of the work being performed. The absence of dump trucks and the presence of the Camel and the Flusher, including their initial placement, show that the work was rushed and that planning was ad hoc. This does not justify the Grievant's subsequent course of action, but underscores that the events of May 2 were fluid, and the assignment to get a dump truck was one of several assignments, none of which were direct orders until De Leon's intervention in the radio call. The types of insubordination posed by the grievance underscore the difficulty of drawing the line between the chaos caused by excessive deference to the exercise of employee discretion and that caused by excessive deference to the chain of command. By moving their

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equipment at the request of the contractor's Foreman, Llanas and the Grievant exercised discretion regarding work assignments. The City's interest in that act lies not with insubordination, but with

the quality of their judgment. The former is not well suited to progressive discipline, the latter is. The conclusions stated above note this in the tension between what constitutes a “work assignment” and what constitutes a “work order.”

The parties dispute the significance of the January 21, 2005 written warning, but nothing in this record puts it in issue. Whether or not the January 21, 2005 warning is appropriately in the Grievant’s personnel file has no impact on the conclusions stated above. Of the prior discipline put into evidence, one employee received two written warnings for misconduct traceable to interaction with supervisors. Recourse to the January 21, 2005 warning does no more than put the Grievant’s situation on the same footing. More significantly, the issue of just cause for the first suspension poses no issue of progressive discipline. The suspension lacked just cause because a necessary fact, deliberate defiance of a direct order, was unproven. Had it been proven, the suspension would stand whether or not the January 21, 2005 warning was in his personnel file. The second suspension stands based on the Grievant’s conduct on May 2 and May 5. Consideration of the January 21, 2005 warning letter underscores the reasonableness of the suspension, but the second suspension would stand even if the earlier warning did not exist. In any event, the Union’s assertion that the January 21, 2005 warning is stale could not be accepted without invalidating Union Exhibits 5 and 6, and the Union offered them as proof that the City’s response to the events of May 2 and May 5 was excessive.

AWARD

The City did not have just cause to suspend the Grievant for three days based upon the events occurring on May 2, 2008, because the Grievant’s conduct reflects poor judgment, not insubordination.

As the remedy appropriate for the City’s violation of Section 2.01, the City shall make the Grievant whole by compensating him for the difference between the wages and benefits he actually earned and the wages and benefits he would have earned but for the three day suspension based upon the events occurring on May 2, 2008. The City shall remove any reference to the three day suspension from his personnel file(s). Because the Grievant’s course of conduct on May 2 demonstrates poor judgment culminating in an argument with Roberts, the City may issue the Grievant a written warning to document its disciplinary interest in his conduct.

The City did have just cause to suspend the Grievant for 7.65 hours based upon the events occurring on May 5, 2008.

The grievance, as it relates to the events occurring on May 5, 2008, is denied.

Dated at Madison, Wisconsin, this 10th day of June, 2009.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator