BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 35

and

OZAUKEE COUNTY

Case #87
No. 68809
MA-14351

Appearances:

Richard Saks, Hawks, Quindel, Ehlke & Perry, S.C., 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee Wisconsin 53201, appearing on behalf of the Office and Professional Employees International Union Local 35.

Ronald S. Stadler, Smith Amundsen, LLC**,** 4811 South 76th Street, Suite 306, Milwaukee, Wisconsin 53220, appearing on behalf of Ozaukee County.

ARBITRATION AWARD

Ozaukee County, hereinafter County or Employer, and the Office and Professional Employees International Union, Local 35, hereinafter OPEIU or Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to provide a panel of seven Commissioners or Commission staff from which to select an arbitrator to resolve a dispute between them regarding the termination of P.S. Commissioner Susan J.M. Bauman was selected. A hearing was held in Port Washington, Wisconsin on July 28, 2009. The record was closed on October 22, 2009, upon confirmation that all written argument had been submitted by the parties.

Prior to hearing in this matter the County filed a motion to dismiss the instant arbitration hearing, questioning the arbitrability of the grievance, based on the existence of a last chance agreement between the Grievant, the Union and the County in which the parties agreed that if the Grievant violated any court-imposed conditions he would be immediately terminated and the termination would not be grieved or contested in any manner. The Union did not contest the existence of such a last chance agreement but contended that the County terminated P.S.'s employment after he had complained about a contractual violation resulting in a County investigation into whether P.S. had violated any court-imposed conditions. The Union contended that the complaint unlawfully triggered a discriminatory investigation, resulting in subsequent concerns about violation of the court-imposed driving conditions. The Union grieved the discharge and filed a prohibited practice complaint with the Wisconsin Employment Relations Commission. The Union contended that the County should be estopped from challenging the arbitrability of the grievance based on the position it took on June 26, 2009 before the Examiner in the prohibited practice case where the County asked the WERC to defer a hearing on the prohibited practice complaint and permit the matter to proceed before the arbitrator.

The Examiner memorialized the content of a conference call in an e-mail to the parties on June 26, 2009 wherein he stated, "I am holding that matter in abeyance. The parties are arbitrating the underlying discharge. The parties agree that the Union is free to litigate the issue of discrimination 111.70(3)(a)3, Stats. to Arbitrator Bauman."

After the Motion to Dismiss was fully briefed, the parties were advised by the undersigned, via e-mail on July 24, 2009, that the motion to dismiss was denied:

> I write to advise that I am denying the Employer's motion to dismiss the pending grievance arbitration. From a review of the petition filed in this matter, including the grievance itself, the motion and the supporting documentation provided, as well as a brief discussion with Hearing Examiner Michelstetter regarding his e-mail message of June 26 to the parties, it appears that dismissal of this matter without a hearing is inappropriate. While there appears to be agreement that there was a last chance agreement which was violated by the Grievant, the grievance contends that there was no just cause for the termination. There appear to be a number of issues brought forth by the Union which cannot be decided absent an evidentiary hearing. Accordingly, the motion is DENIED.

The matter proceeded to hearing and has been fully briefed by the parties. Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUES

The parties were unable to stipulate to the issues to be decided by the arbitrator, but have agreed to allow the undersigned to frame the issues. The Union frames the issues as follows:

1. Whether Mr. S's inadvertent violation of his occupational license hours constitutes just cause to terminate his employment under the MOU embodying the last chance agreement.

2. Whether the County's investigation into the hours Mr. S. worked on December 19th, 2008, and the subsequent disciplinary action, was impermissibly motivated by Mr. S's filing of a grievance?

If the answer to either issue is in the affirmative, what is the appropriate remedy?[1]

The County frames the issue as follows:

Did Mr. S violate the last chance agreement?[2]

The undersigned frames the issues as follows:

1. Did P.S. violate the last chance agreement? If not, what is the appropriate remedy?

2. Did the Employer terminate P.S. in violation of the Municipal Employment Relations Statute (MERA)? If so, what is the appropriate remedy?

BACKGROUND

The Grievant, P.S., was a long term employee of the County, serving as an equipment operator for approximately 25 years. Unfortunately, P.S. also has a history of drinking and driving. His first conviction for driving under the influence of alcohol occurred in 1989. His second occurred sometime between 1989 and 2006 when a

[1] At hearing, the Union stated the issue as: Did the County lack just cause to terminate the grievant? And if so, what is the remedy?

[2] At hearing, the County stated the issue as: Did the employee violate the last chance agreement which provides termination with no recourse?

condition of his employment required him to have a valid commercial driver's license (CDL). At that time, P.S. reported the conviction to Robert Dreblow, Highway Commissioner. P.S. expected the County to terminate his employment because he did not have the required license. However, P.S. was able to get an occupational CDL at the time, and the drunken driving conviction did not affect his employment status. He was not disciplined following either of these convictions.

On Sunday, October 1, 2006, while off-duty, P.S. was, again, arrested for operating under the influence. He reported this fact to Dreblow, and again expected the County to terminate his employment. Between his second and third convictions, the federal law regarding CDLs had changed. Additionally, as this was a third offense, the court-imposed penalty was significantly more stringent. Even before sentencing, P.S. knew that he would not have a driver's license for at least a year, and that he would not have a CDL for longer than that. Dreblow, recognizing that P.S. was a long term employee with a clean record, worked with the Union to enter into an agreement such that P.S. would remain employed.[3] The memorandum of understanding that memorialized the last chance agreement (LCA) for P.S. reads as follows:

Memo of Understanding

> This agreement is made by and between the Ozaukee County Highway Department and the Ozaukee County Highway Employees Association OPEIU Local 35 and P[] S[], collectively referred to hereafter as "OPEIU." This agreement shall take effect upon execution. The parties agree to on the following terms:
>
> **Whereas** P[] S[] is employed by the County as an Equipment Operator for the Ozaukee County Highway Department;
>
> **Whereas** as a condition of employment S[] is required to hold a driver's license and a commercial driver's license;
>
> **Whereas** S[]'s driver's license and CDL has been suspended and/or revoked; and
>
> **Whereas** the parties desire to accommodate S[] during the period in which he cannot perform all of the essential function [sic] of his job.
>
> **Now, therefore, it is agreed:**
>
> A temporary position in the Highway Department shall be created and classified as "Temporary Laborer". This position will be for a limited term and involve only non-CDL required work for the Ozaukee County Highway Department.

[3] The parties acknowledge that the County had no contractual obligation to enter into such an agreement under the terms of the collective bargaining agreement in effect at that time.

Mr. P[] S[] will be assigned to this position. The length of the term of the position shall be reviewed and revised in accordance with the upcoming suspension of his driving privileges and his CDL endorsements. The length of time in this position will be determined in the County's discretion but it shall not exceed three years and one month from the date of revocation of his driving privileges. If there is no work available within this position, S[] is subject to being laid off without regard to his seniority.

During the time that S[]'s driving privileges are suspended or revoked and he is not eligible for an occupational driver's license, he will be paid $16.00 per hour. He would be ineligible for any premium pays in addition to the hourly rate. All other provisions of the labor agreement will remain the same.

Upon obtaining an occupational driver's license that allows S[] to drive a vehicle during working hours, his rate of pay will be raised to $17.00 per hour. S[] would be ineligible for any premium pays in addition to the hourly rate. All other provisions of the labor agreement would apply.

Upon reinstatement of the required CDL endorsements, S[] would return to his former Equipment Operator position at the wage rate in effect at that time, and this memo of understanding terminates.

During the time of this temporary assignment, if there are disciplinary actions of any type taken against P[] S[], or if he violates any of the conditions imposed on him by the Court, immediate termination shall occur. The Union agrees that it will not grieve or contest in any way, the resulting termination.

Mr. S[] will also be required to seek counseling through the Employee Assistance Program, or from a similar qualified counselor to help him deal with his use of alcohol. Mr. S[] will not be allowed to operate a County vehicle until he has successfully completed this counseling program.

The Union agrees that this memo of understanding constitutes a 'last chance' agreement for Mr. S[]. It further agrees that due to the unique nature of this matter, this agreement and the terms contained there do not have any precedential effect and do not constitute a practice of any sort and it will not use this agreement as a precedent for any future negotiations.

Dated this 2nd day of November, 2006.

Approved By:

/s/	/s/
Robert R. Dreblow 11/2/06	Judy Burnick 10/30/06
Highway Commissioner	OPEIU Local 35

I have read and understand the conditions of this memo of understanding.

/s/
P[] S[]

As a part of his court-imposed sentence, P.S. lost his ability to drive for a period of one year. After that, he was eligible to apply for an occupational license, although he could not get a CDL for 27 months. P.S. applied for an occupational license which limits driving to no more than 60 hours in a week. Upon receipt of his occupational license, P.S. provided a copy to his Employer, including the hours during which he was eligible to drive. P.S. modified his hours around Memorial Day to comport with the County's four ten-hour day schedule, and revised it again after Labor Day to return to the initial schedule. P.S. did not advise the County that he had changed his hours at either time, nor did he provide a copy of the revised hours to the County. P.S. and all County representatives agree that it was P.S.'s responsibility, not the County's, to ensure that P.S. drove only during hours that he had a valid driver's license. All agree that for P.S. to drive during a time he did not have a valid license constitutes a violation of a work rule.

FACTS

P.S. is normally assigned to work out of the Cedarburg shop. Due to large quantities of snow, on December 19, 2008 P.S. was asked to go to the Port Washington shop and operate the wing on a snow plow driven by another Equipment Operator, Paul Weidert. P.S. left his vehicle in the shop in Cedarburg and drove a County truck to Port Washington. At approximately 5:00 p.m., Weidert and P.S. returned to the Port Washington shop to refuel the truck. P.S. had a discussion with Patrol Superintendent William Tackes about how late they would be working, as it was clear that they were going back out to plow again. P.S. requested that Tackes deliver P.S.'s keys to the Port Washington shop so that P.S. could return to Cedarburg and get his own vehicle to drive home after they were done plowing for the day.

At approximately 6:30 p.m., foreman Bill Janeshek directed P.S. and Weidert to work their way back to the Port Washington yard. They returned shortly after 7:00 p.m. at which time P.S. retrieved his keys and started back to Cedarburg in the County truck. En route, P.S. realized that he was driving between 7:00 p.m. and 7:30 p.m. a time slot during which he was not supposed to drive on any day of the week. P.S. clocked out at the Cedarburg shop at 7:30 p.m. and his wife and daughter arrived to drive him and his vehicle home.

P.S. did not report this situation to any representative of the County, but continued to work in accordance with his schedule and any overtime requested/required as a result of the heavy snow in December. On December 26th, P.S. learned that a seasonal employee had been called to work overtime on December 23rd and December 24th before he had been offered the work. P.S. asked Assistant Foreman Don Schommer if he would contact Mr. Tackes, the Patrol Superintendent in charge of scheduling overtime, so they could discuss the matter. About an hour later, Tackes arrived at the shop whereupon P.S. asked why a seasonal employee had been called for overtime instead of him. Tackes initially told P.S. that he didn't know what he was talking about, but then advised P.S. that he would look into the situation.

Later that afternoon, Tackes called P.S. and admitted that he had made a mistake. Tackes also reminded P.S. of an overtime opportunity that Tackes had provided P.S. in the past. Tackes left on vacation after work that day.

In accordance with the grievance procedure, on December 30th, P.S. met with the Union President/Steward Dan Zuellsdorf and Commissioner Dreblow and Construction Superintendent Mark Banton[4] to express concerns about this apparent contract violation. Dreblow agreed to look into the matter and told P.S. and Zuellsdorf to return to work.

In essence, the grievance contended that seasonal employee Casey Frey had been offered overtime on December 23rd and December 24th prior to P.S. being offered the work. Dreblow's investigation included looking at all the overtime during the snowy period of December 2008 during which Mr. Frey had worked. This included December 19, the day that P.S. had driven in violation of the terms of his occupational license. In looking at the December 19 hours that P.S. had worked, Dreblow initially was concerned that P.S. might have driven outside his restricted hours. Dreblow reviewed the copy of P.S.'s occupational license that was on file with the County and found a conflict. Knowing that an individual with an occupational license can change the hours by contacting the Division of Motor Vehicles of the Department of Transportation, Dreblow checked with the Sheriff's Department to obtain a printout of P.S.'s current restrictions. Dreblow also researched emergency situations under which

[4] Banton is not usually involved in such matters, but he filled in for Tackes who was on vacation.

an individual with an occupational license is permitted to drive outside of his or her restricted hours. No exceptions applied to P.S. during the time that he had driven a county truck on December 19.

Dreblow concluded that P.S. had driven a country truck without a valid driver's license, an act subject to disciplinary consequences and a violation of the last chance agreement. On January 2, 2009, P.S. was called to a meeting with Dreblow, Banton and Foreman Bonjean at the Cedarburg shop. Dreblow questioned P.S. about the December 19th incident. P.S. acknowledged that he made a mistake and drove a county truck from Port Washington to Cedarburg without a valid driver's license. Dreblow then advised P.S. that he had no choice but to terminate him.

Additional facts are included in the **DISCUSSION** below.

DISCUSSION

Issues

The parties do not agree on the issues to be decided in this matter. In its statement of the issues, the Union acknowledges that P.S. violated his occupational license hours and contends that the action was inadvertent and does not rise to just cause under the terms of the last chance agreement (LCA) which clearly states that "[d]uring the time of this temporary assignment, if there are disciplinary actions of any type taken against P[] S[], or if he violates any of the conditions imposed on him by the Court, immediate termination shall occur." The Union statement of its first issue presupposes that the action taken by P.S. was inadvertent and, therefore, does not constitute a basis for finding that P.S. violated the LCA. The Employer simply asks whether P.S. violated the LCA. The undersigned finds the Employer's statement of the issue in this regard as the more appropriate.

The Union also raises the question of whether the County's investigation into the hours that P.S. drove on December 19th, and the ensuing termination, was impermissibly motivated by the filing of the grievance concerning overtime offered to a seasonal employee on December 23 and December 24, rather than to P.S. The Employer objects strenuously to consideration of this issue, arguing that such is a question more appropriately decided in the context of a prohibited practice hearing before the Wisconsin Employment Relations Commission. As a general rule, the Employer is correct in this argument. However, in this instance the Union has filed a prohibited practice complaint, a matter which has been held in abeyance pending the outcome of this arbitration. According to the Hearing Examiner's e-mail message regarding this issue: "I am holding that matter in abeyance. The parties are arbitrating the underlying discharge. The parties agree that the Union is free to litigate the issue of discrimination 111.70(3)(a)3, Stats. to Arbitrator Bauman." Given that the parties agreed to litigate this matter before the undersigned, the matter is properly before me. Thus, the second issue to be decided is whether the Employer terminated P.S. in violation of the Municipal Employment Relations Statute (MERA).

The Last Chance Agreement

By its terms, the LCA provides:

> During the time of this temporary assignment, if there are disciplinary actions of any type taken against P[] S[], or if he violates any of the conditions imposed on him by the Court, immediate termination shall occur. The Union agrees that it will not grieve or contest in any way, the resulting termination.

There is no question that P.S. drove a County vehicle on December 19 during a period of time during which his occupational license was not valid. That is, he had no legal right to drive a vehicle of any sort, yet he drove a truck owned by Ozaukee County. P.S. argues that he had worked a long day operating the wing on the plow truck and was confused about the day of the week and whether he was able to drive under the terms of his occupational license at the time. It is uncontested that P.S. had worked long hours during an extended snow plowing operation that was to continue for many days. It is also uncontested that P.S. drove during the period 7:00 p.m. to 7:30 p.m., a time period during which he was never permitted to drive. While P.S. might have been confused as to the day being a Thursday (when he was able to drive between 7:30 p.m. and 8:00 p.m.) and a Friday (when the latest he was able to drive was 5:30 p.m.), there was never a time that P.S. could drive during the time that he drove the County truck from Port Washington to Cedarburg. P.S. was in violation of a County work rule and a disciplinary action could properly be taken by the County, particularly in light of the potential liability to the County in the event that P.S. was involved in a vehicular crash of any kind.

On the way from Port Washington to Cedarburg, P.S. realized that he was driving outside the hours permitted by his occupational license. Rather than stop the truck and contact somebody from the County, or return to the Port Washington shop[5], P.S. decided to continue on to Cedarburg and call his wife and daughter so they could pick him up and drive his truck home. P.S. never reported to his Employer that he had violated the terms of his occupational license or that he had driven a County vehicle without a valid driver's license.

The Union characterizes P.S.'s violation of his occupational license as "inadvertent" based on the apparent confusion between Thursday and Friday hours. The Union does not address the fact that P.S. never had the ability to drive between 7:00 p.m. and 7:30 p.m. The Union also fails to address the fact that at several points during the course of events leading to P.S.'s driving of the County vehicle without a license, other employees either asked if he was able to drive (since they were aware that he had limited driving privileges), or asked if he needed a ride back to Cedarburg. At each opportunity to consider whether he could actually drive, P.S. made short shrift of the concerns and offers and indicated that he was able to drive.

[5] It is unclear how far P.S. was from Port Washington when he realized his situation.

Having been offered numerous opportunities to review whether he had the ability to drive during the time period in question, on the day of the week in question, it can hardly be said that P.S. acted inadvertently. He made a mistake. He drove in violation of the terms of his occupational license. He committed an act for which the County could properly take disciplinary action. He violated the Last Chance Agreement.

The Union argues that this "inadvertent" act on P.S.'s part does not meet a just cause standard so as to warrant termination. The LCA does not require the Employer to prove that it had just cause to terminate P.S. The LCA provides that if any disciplinary action is taken against P.S., termination shall occur. Absent the LCA, termination under these circumstances may not have been appropriate. The LCA clearly calls for termination if and when P.S. engages in activity, such as driving without a valid license, that warrants discipline. The County invoked the express terms of the LCA in terminating P.S.[6]

Discrimination Based on Union Activity

P.S. claims that he was terminated at least in part because he filed a grievance questioning the failure of the County to offer him overtime on December 23rd and 24th when it was offered to a seasonal employee and out of the County's hostility toward his union activity. He contends that there was an illegal motive, hostility and retaliation against P.S. due to his filing of a grievance.

The uncontested facts are that P.S. was advised by a co-worker that a seasonal employee had worked overtime on the two nights in question. P.S. asked to speak with Mr. Tackes about the situation. Tackes agreed to look into the matter and phoned P.S. later the same afternoon and acknowledged that an error had been made. During the course of this conversation, Tackes reminded P.S. that he had been allowed a prior overtime opportunity, and asked P.S. what he wanted to do about the situation. P.S. indicated that he did not know, at that time, whether he wished to proceed. Tackes acknowledged at hearing that he did not want P.S. to grieve the error.

P.S. determined that he wanted to pursue the grievance which required a discussion with Commissioner Dreblow at the first step of the grievance procedure. P.S. and the Union President met with Dreblow and Mark Banton on December 30. Banton was present because Tackes had left for vacation after the discussion with P.S. on December 26. According to P.S., he wanted Dreblow to look into the question of whether he had been improperly denied overtime on December 23rd and 24th.

[6] The Union argues that the LCA is invalid because it does not terminate. The clear terms of the LCA provide for a starting and ending date.

According to Dreblow, P.S. wanted Dreblow to look into a more general question of whether overtime was being offered to seasonal employees prior to being offered to eligible regular employees, including P.S., in violation of Article V, Section 1.[7]

Regardless of how P.S. and Zuellsdorf framed the question during the meeting of December 30, Dreblow had a duty to investigate the general question of assignment of overtime, and properly did not confine his investigation to looking at the two days brought to his attention by P.S. Dreblow looked at all days that the seasonal employee in question had worked overtime to determine whether he had been called in ahead of bargaining unit members, in violation of the collective bargaining agreement. In the course of that review, Dreblow determined that P.S. had worked overtime on December 19, and had in fact driven a County vehicle in violation of the terms of his occupational license. After reviewing all available information regarding occupational licenses, contacting the Sheriff's department to ascertain the current hours that P.S. was permitted to drive (rather than relying on information that P.S. had initially provided to the County and changed at least twice without advising the County), looking at exceptions to the occupational requirements (whether P.S. was driving at an inappropriate time but it could be construed as an emergency), Dreblow concluded that P.S. had violated the terms of the LCA and that there were no options other than to terminate his employment.

The Union argues that the investigation performed by Dreblow went outside the facts of the grievance and was done out of hostility to P.S. and the fact that he had filed the grievance. The Union contends that in essence Dreblow was seeking to find a reason to terminate P.S.' employment. This argument cannot be sustained.

In MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1967), and again in EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985), the Wisconsin Supreme Court affirmed that a violation of Sec. 111.70(3)(a)3, Stats., is to be found where the complaining party establishes the following four elements: (1) that a municipal employee engaged in lawful concerted activity; (2) that the municipal employer, by its officers or agents, was aware of said activity; (3) that the municipal employer was hostile to the lawful concerted activity; and (4) that the municipal employer took action against the municipal employee based at least in part upon such hostility.

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[7] Article V, Section 1 of the collective bargaining agreement reads as follows:

> . . . It is agreed that the nature of highway maintenance requires that employees be available for emergency situations during unscheduled hours. An employee called to work during said unscheduled hours shall receive not less than two (2) hours' pay, but that in any event if said employee is scheduled to work on any such day, the employee shall not be guaranteed hours in excess of the total hours the employee is scheduled to work. All employees, called to work unscheduled hours shall be compensated at one and one-half (1-1/2) times the regular rate of pay for those hours worked other than scheduled hours. (Seasonal employees shall not be utilized unless such work has been offered to Union members). . . .

As to the first two elements, there is no question that they are met. Filing of a grievance is the essence of lawful concerted activity, and the Employer was clearly aware of the filing of the grievance. As to the last two elements, P.S. and the Union have utterly failed to demonstrate that the County was hostile to the filing of the grievance or that the termination was based in part upon such hostility.

As the WERC has frequently noted, establishing improper motive is seldom aided by direct evidence and instead usually depends upon an experienced and knowledgeable assessment of surrounding circumstances. CLARK COUNTY, DEC. No. 30361-B (WERC, 11/03), EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D at 143; WISCONSIN RAPIDS SCHOOL DISTRICT, DEC. No. 30965-B (WERC, 1/09). Here it is understandable that P.S. views his termination to be a direct result of his filing of a grievance. However, the termination was caused by his violation of the LCA, not by his filing a grievance. P.S. argues that Dreblow's investigation exceeded the bounds of what was required to determine if a contract violation had occurred – all Dreblow should have looked at was who worked what hours on the specific days enumerated by P.S., December 23 and December 24. While such a narrow investigation of the grievance would have revealed that the seasonal employee worked instead of P.S. on December 24th, it would not have been sufficient for the Employer to have stopped its investigation with such a narrow purview. Dreblow needed to determine the past practice of the Department under such circumstances[8] and he needed to establish whether any other violations had taken place during the fifteen day window prior to the filing of the grievance. Additionally, from a management perspective, it is entirely reasonable to review all of the assigned overtime during the period in question and to establish that it is being done in the appropriate manner.

The Union argues at pp. 13 -14 of its Brief:

> Filing a grievance to enforce a contract should not subject an employee, even one under a last chance agreement, to investigative scrutiny which exceeds the scope of information reasonably related to what is required to resolve the grievance. Commissioner Dreblow's investigation clearly exceeded the scope of what was required to resolve the discreet issue as to whether a seasonal employee was called in on December 23rd and 24th ahead of Mr. S[]. The Commissioner's conduct in this regard evinced an effort to obtain information unrelated to the grievance which could be used to punish Mr. S[].

[8] Indeed, the County denied the grievance based on past practice and the Union subsequently did not pursue the matter but, instead, withdrew the grievance.

Dreblow most appropriately reviewed the days that the seasonal employee worked. This included December 19th, the day that P.S. worked overtime and drove when he should not have been driving. It was entirely appropriate for Dreblow to be looking at days beyond December 23rd and 24th. When he discovered the hours that P.S. worked, knowing that P.S. had restricted driving hours, he appropriately looked into the situation. This is not an attempt to obtain information unrelated to the grievance that could be used to punish P.S. This is an attempt to manage the County Highway Department. Had an employee other than P.S. brought the grievance, and the circumstances of December 19th were reviewed because the seasonal employee worked overtime that day, the same result would have ensured: P.S. violated the terms of his occupational license.

It is true that but for the filing of his grievance, it is unlikely that his violation of the LCA would have come to light. That fact, however, is insufficient to establish that the Employer was hostile to the filing of the grievance[9] or that the termination was a direct result of hostility.[10] The termination was the direct result of P.S.'s actions on December 19th, not the filing of a grievance on December 30th. The circumstances as a whole simply do not add up to the conclusion the Union seeks.

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

AWARD

1. P.S. violated the Last Chance Agreement.

2. The Employer did not terminate P.S. in violation of MERA.

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 7th day of December 2009.

Susan J.M. Bauman /s/

[9] Although Tackes might have preferred that P.S. not file the grievance, this does not establish animus to P.S.'s concerted activity. Tackes processed the matter as far as he could and then left for vacation. He was not involved in, or present at the time of, the termination. P.S. decided to initiate the Step 1 discussion with Dreblow who exhibited no hostility to the grievance but simply said that he would look into it.

[10] Although not actionable under MERA if it were shown, the Union has failed to show Dreblow was, in any way, hostile to P.S. In fact, on at least two occasions, the second and third time P.S. was found guilty of driving while intoxicated, Dreblow went out of his way to ensure the P.S. kept his position and did not suffer any County-imposed discipline.

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Susan J.M. Bauman, Arbitrator