BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**ONEIDA COUNTY HIGHWAY EMPLOYEES UNION,
LOCAL 79, AFSCME, AFL-CIO**

and

ONEIDA COUNTY

Case 196
No. 70295
MA-14935

(Bradley Paddock Grievance)

Appearances:

Mr. Dennis O'Brien, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5590 Lassig Road, Rhinelander, Wisconsin 54501, on behalf of the Union.

Simandl & Prentice, S.C.**, by Attorney John J. Prentice**, 20975 Swenson Drive, Suite 250, Waukesha, Wisconsin 53186, on behalf of the County.

ARBITRATION AWARD

Oneida County Highway Employees Union, Local 79, AFSCME, AFL-CIO (herein the Union) and Oneida County (herein the County) have been parties to a collective bargaining relationship for many years. At all times pertinent hereto, the Union and the County were parties to a collective bargaining agreement covering the period December 27, 2008 to December 31, 2011, and providing for binding arbitration of certain disputes between the parties. On November 1, 2010, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the discharge of Bradley Paddock (herein the Grievant) and requested a panel of WERC staff members from which to select an arbitrator. The undersigned was selected to hear the dispute and a hearing was conducted on June 17, 2011. The proceedings were transcribed and the transcript was issued on June 23, 2011. The parties filed briefs by August 12, 2011, whereupon the record was closed.

ISSUES

The parties stipulated to a statement of the issues, as follows:

Did Oneida County violate the collective bargaining agreement when it terminated the Grievant?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

Article 21 – Miscellaneous Provisions

Section A – Rules of the Road/CDL: Employees shall observe the laws of the road and at all times strictly comply with the state and local traffic regulations. Employees shall practice driver courtesy at all times.

Oneida County requires all employees who may at any time during a given year drive a vehicle subject to CDL requirements, to obtain a CDL license within 30 days of employment or job change, in accordance with the Commercial Motor Safety Act of 1986 and the 1989 Wisconsin Act. This requirement includes all necessary endorsements. If the County requires that a current Highway Dept. employee obtain additional endorsements, the County will pay for one test, the license endorsement, and will provide a vehicle to be used in taking the test (if one is necessary), for obtaining the additional endorsement(s).

If an employee loses his CDL, or a necessary endorsement for a period of time in excess of seven months the employee will be discharged, and PTO will be paid out at current rate. For any time period less than seven months, due to events while on personal time and personal vehicle, or during working hours Oneida County will make every reasonable effort to assign the employee to non-CDL related work that is available as defined by the highway commissioner. The employee shall be paid the after probationary wage rate of a Highway Maintenance Worker. If non-CDL related work is not available the employee will be placed on non-FMLA unpaid leave. The employee will be reinstated within the seven month period, when the employee re-acquires his CDL license. Only two employees may be covered by this provision at a time.

All actions taken by the Highway Department and Oneida County in administering this section are not subject to seniority rights.

BACKGROUND

For a number of years the Union and the County have had language in Article 21 of their collective bargaining agreement covering the policies for employees who are required to have a commercial driver's license (CDL) in order to perform their work. This language

included provisions for how employees would be dealt with who, for any reason, lost their CDL for a period of time. Prior to the current 2009-11 contract, the language provided that if an employee lost his or her CDL for a period up to three months the County would attempt to assign the employee to duties which did not require a CDL. If an employee lost his or her CDL for more than three months, however, he or she would be terminated.

In negotiations over the 2009-11 contract, the Union sought to have the period within which an employee could lose his or her CDL without termination extended to thirteen months. The rationale was that first offenses for some traffic violations, such as driving while intoxicated, carry a mandatory one year suspension of a driver's license and the Union did not wish for employees to be terminated for such a non-work related offense. The County was unwilling to extend the grace period to thirteen months, but did agree that it should be extended to accommodate employees who might lose their CDL for a shorter period for non-driving offenses, such as failure to pay child support. Ultimately, the parties agreed to amend the language of Article 21, Section A, to extend the grace period for the suspension of a CDL to seven months.

Bradley Paddock, the Grievant herein, was employed as an Equipment Operator 1 by the Oneida County Highway Department from 1997 until June 21, 2010 and was a member of the bargaining unit represented by Local 76 throughout that time. As an Equipment Operator 1, he was required to have a CDL permitting him to operate the trucks and other heavy equipment used by the Department.

On November 22, 2009, Paddock's regular driver's license and CDL were administratively suspended for six months as a result of a citation he received in September 2009 for operating his motorcycle while intoxicated. He informed the Highway Commissioner of his suspension and thereafter was assigned to non-CDL related duties pursuant to the provisions of Article 21, Section A. By May 24, 2010, when the administrative suspension lapsed, Paddock's traffic case had not yet been adjudicated and, therefore, his CDL was reinstated, at which time he was returned to his regular duties. One June 3, 2010, Paddock's case was finally adjudicated, at which time he pled guilty and was convicted of operating while intoxicated (first offense), which carries a mandatory one year driver's license (and CDL) suspension. In lieu of the previous administrative suspension, the court imposed an additional six month suspension, giving Paddock credit for the previous six month administrative suspension. The County was subsequently notified of the additional suspension and determined to terminate his employment. On June 21, 2010, Lisa Charbarneau, the County Employee Services Manager, called Paddock and informed him of his termination. At that time she also sent Paddock a termination letter, which stated, in pertinent part:

> Dear Brad,
>
> This letter confirms your termination of employment with Oneida County effective June 21, 2010. Any final payment to you will not extend the effective date of separation in any way.

> The decision is based on the information provided to the County regarding your pleading guilty to Operating While Under the Influence which resulted in the loss of your commercial driver's license for twelve months. Article 21, Section A clearly states that an employee who loses his CDL for a period of time in excess of seven months will be discharged.

After Paddock was terminated he was paid his accrued Personal Time Off (PTO) benefits according to the contract. In August 2010, he obtained employment with a local auto dealership.

On June 25, 2010, the Union filed a grievance over Paddock's termination, and asserted that he was terminated improperly inasmuch as his CDL was never suspended for more than seven consecutive months. The County denied the grievance on the basis that Paddock's suspension was for one year and that, therefore, Article 21, Section A applied despite the fact that there was a brief gap of time during which Paddock's CDL was reinstated.

On December 20, 2010, Paddock's suspension ended and his driver's license and CDL were reinstated. He then met with John Potters, the Oneida County Coordinator, at which time he requested to have his job back. Potters indicated that under Article 21, Section A Paddock's termination was final and that he would not be offered his job back, despite the reinstatement of his CDL. Subsequently, the grievance was advanced to arbitration. At arbitration, the parties stipulated that Paddock's termination was not disciplinary and, thus, did not involve a question of just cause for termination, but rather involved an interpretation of the proper application of the language of Article 21, Section A. Additional facts will be referenced in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Union that the clear and unambiguous language of Article 21, Section A states that an employee may only be terminated for a suspension of his or her CDL for a period in excess of seven months. It further maintains that the County ignored this language and violated the contract when it terminated Paddock because his CDL had never been suspended for any continuous period for more than six months.

The Union agrees that it was within the County's discretion to determine if there was sufficient non-CDL related work available for Paddock to do during his suspension. At hearing, the County argued that it would work a hardship on the employer to have an employee unable to drive for an extended period during the snowplowing season, during which time driving heavy equipment makes up the bulk of the available work. The Union notes, however, that the County continued to employ Paddock from November 2009 to May 2010, even though that was during the winter months, but terminated him in June, when the likelihood of snow in

the ensuing six months was small, if not non-existent. While the County could have sent Paddock home if there was no work, there was no justification for terminating him.

It is clear from the testimony that the County did not want to extend the grace period for a CDL suspension to thirteen months because it did not want to retain an employee who had been convicted for DUI/OWI. On the other hand, the Union wanted to extend the grace period for as long as possible. Ultimately, the parties agreed to extend the period to seven months, but the Union never conceded that an employee who lost his CDL because of a DUI/OWI conviction should automatically be terminated. It is unclear from the record who ultimately suggested or drafted the final language, but it is clear that it was agreed to by the County Labor Relations Employee Services Committee and the County Board. It is also clear that the County could have sought language provided for an automatic termination in the event of a DUI/OWI, but did not do so. The arbitrator should not now extend the County's authority to permit an action the contract does not authorize.

The past practice of the parties is also relevant. In the past, County employees have lost their CDLs for alcohol-related offenses, but have not been terminated. Lisa Charbarneau testified that this was before the law changed to prevent employees from obtaining an occupational license during a suspension. The record reveals, however, that several current County Board members oppose continued employment for any employee who has lost a driver's license due to a DUI/OWI conviction. Clearly, therefore, the County's current position is not based solely on the length of the suspension, but also on the nature of the offense. The contract, however, does not specify that employees may be terminated based on the reason for a license suspension. The Union, therefore, urges the arbitrator to scrutinize the County's actions and its justification for them. This is not a disciplinary matter and the County must be held to the contractual language. The County acted arbitrarily and without contractual authority. The Grievant never had his license suspended for more than a six month consecutive period. If the County has a dispute with how his traffic case was adjudicated, its dispute is with the court system, not the Union or the Grievant. To uphold the discharge in this case would require the arbitrator to modify the language of the contract, something he is expressly forbidden to do. The grievance should, therefore, be sustained.

The County

The County asserts that the Grievant was discharged pursuant to clear and unambiguous contract language when his CDL was revoked for a period in excess of seven months. When the Grievant's license was originally suspended, the County continued to employ him and found alternative work for him throughout the snowplowing season of 2009-2010, as it was bound to do under the language of Article 21, Section A of the contract. The County was aware that the final adjudication of the Grievant's case was pending, but. for some unexplained reason the case did not go to court until June 3, 2010, nine days after the original six month suspension expired. At that time the court convicted him of DUI/OWI (first offense) and, accordingly suspended his driving privileges for one year. This was confirmed on June 21, as follows:

Your privilege to drive a commercial motor vehicle is disqualified.
Effective: June 21, 2010
Time period: 1 Year reduced to 181 day(s) for the time already served.

The reduction was due to the fact that the Grievant had already served a six month administrative suspension.

Unambiguous contract language does not become ambiguous simply because one party does not like the way it is applied and grieves it. If the language is unambiguous, the arbitrator should apply it accordingly, even if the result appears harsh. Here, the language is clear, the County may terminate an employee who loses his driving privileges for more than seven months. The facts are also clear that the Grievant's license was suspended for one year. This is the mandatory suspension for a DUI/OWI, so there is no way the Grievant could have avoided it. The fact that the suspension was split into two six month periods, with a nine day gap in between, was an anomaly caused by the court schedule and in no way alters the fact that the total suspension was for a year.

Even if the language is considered ambiguous, however, the termination should still stand because the parties' intent in amending Article 21, Section A was clear. The Union's contention that the seven month grace period should apply where a one year suspension is divided into two six month periods would render the contract language meaningless, because potentially every employee could arrange to have a suspension split accordingly to avoid the consequences of the contract language. Further, such a construction would be contrary to the parties' intent in negotiating the language. The past practice and bargaining history of the parties indicates that the seven month grace period was intended to protect the County from situations where it would have to find alternate work for employees for extended periods of time. Thus, the termination was consistent with the intent of the language and the Union cannot meet its burden of showing a contract violation.

The seven month grace period was negotiated with the thought in mind that suitable work would be sought for employees who have their licenses suspended for less than seven months, but that in cases of longer suspensions which only occur in cases of DUI/OWI violations and certain felonies, the employee could be terminated. At the time the language was negotiated, the parties were well aware that a DUI/OWI conviction carried a mandatory suspension of one year. Neither party anticipated the present situation, where a one year suspension could be subdivided due to a mix-up in court scheduling. Neither party was happy with the resulting language, but for different reasons. The County sought to lessen the financial burden of having to continue paying an employee who was unable to drive for an extended period, whereas the Union sought to have the grace period extended from three to thirteen months. Union witness Lance John testified that the Union specifically wanted protection for employees who were convicted of a DUI/OWI first offense, which the County flatly rejected. The County was not only concerned about the financial implications, but also objected on public policy grounds to having to continue employing drivers who were convicted of

DUI/OWI, conduct which evinces questionable judgment, to operate County vehicles. In bargaining, the Union brought forward several scenarios whereby an employee could lose his license for more than three months for a non-driving related offense, to which the County was sympathetic. Thus, the County agreed to a compromise that would address the Union's concerns and still preserve its public policy interests. Rarely can language be adopted that addresses every possible contingency. Thus the seven month grace period was not intended to apply to DUI/OWI convictions, which both parties knew. Thus, the termination was consistent not only with the language itself, but also with the parties underlying intent.

The Union admitted that its goal in seeking a thirteen month grace period was to protect employees who were convicted of DUI/OWI, but was unsuccessful in achieving it. The County was adamant that it did not want to extend the language to cover employees convicted of DUI/OWI and the Union knew it. Effectively, therefore, the Union is now trying to gain through arbitration what it could not get through negotiations. It is well settled that an arbitrator should be hesitant to award a party in arbitration what it failed to obtain at the bargaining table. The bottom line is that a conviction for DUI/OWI carries a mandatory one year license suspension and the Union accepted an agreement to extend the grace period to only seven months. Thus, the County did not violate the contract when it terminated the Grievant and to hold otherwise would only serve to chill future mediated settlements.

Relevant past practice also favors the County's position. Lance Johns and Scott Tromp both testified that the Union was motivated by previous termination of two Union members who were convicted of DUI/OWI after the enactment of the new traffic regulations. This establishes an existing County practice of terminating employees convicted of DUI/OWI. The Union's reliance on three other cases where employees were not terminated is irrelevant because they occurred under the former contract which only provided a three month grace period and the law had changed during the interim to eliminate an employee's ability to obtain an occupational license. The adoption of the seven month grace period was specifically intended to correct this situation and clearly evinces an intent to exclude DUI/OWI convictions form the grace period. To the contrary, there is no evidence of any practice of retaining employees who were convicted of DUI/OWI. The grievance should, therefore, be denied.

DISCUSSION

As the parties have agreed, even though this grievance involves the termination of an employee, it is not disciplinary in nature, but involves a question of interpreting the contract language regarding the commercial driver's license (CDL) requirement for Highway Department employees. As such, it does not require analysis or application of the just cause standard for discharge. Rather, Article 21, Section A of the contract purports to establish a "bright line" rule, which states that any employee requiring a CDL whose license is suspended or revoked for a period in excess of seven months is subject to termination. Employees whose privileges are suspended or revoked for up to seven months are eligible to be assigned

alternative duties, if available. If alternative work is not available, the employee will have his or her accrued personal time off (PTO) paid out and will be on, in effect, an unpaid leave of absence until his or her driving privileges are restored.

In this case, the Grievant, Bradley Paddock, was arrested for Operating a Vehicle While Intoxicated (OWI) while driving his personal vehicle in September 2009. Conviction for a first offense OWI carries a mandatory one year suspension of driving privileges. In November 2009 his regular driver's license and CDL were suspended administratively for six months, pursuant to Wisconsin Statutes and Department of Motor Vehicles regulations, before his traffic case was adjudicated. At that time, the Department assigned him to alternative duties, which he performed until his driving privileges were restored in May 2010, which again occurred prior to adjudication of his traffic case. At that time he returned to his normal duties. In June 2010, shortly after restoration of his driving privileges, Paddock pled no contest and was thereupon found guilty of OWI - first offense. At that time, the court assessed the required one year suspension of his driving privileges, but reduced the suspension to an additional six months, in lieu of the previous six month suspension. The Department was informed of the additional suspension and, on June 21, 2010, terminated Paddock based on its interpretation of Article 21, Section A. The question before the arbitrator is basically whether the gap in Paddock's suspension "reset" the seven month calendar under Article 21, Section A, or whether the one year suspension attaching to his OWI conviction is to be applied as a whole, despite the intervening gap.

Both parties place great weight on the bargaining history behind the current language in Article 21, Section A, which was changed in negotiations over the current contract. Previously, the contract had provided for a three month grace period. The Union was concerned, however, over changes in the traffic laws in recent years, which imposed the mandatory one year suspension for OWI convictions and eliminated the ability to obtain an occupation driver's license, feeling that termination for a first time non-work related traffic offense was too harsh. The Union, therefore sought to expand the grace period to thirteen months. The County, on the other hand, was adamant that it did not want to have to retain employees who were convicted of OWI, based on policy considerations. It also felt that a requirement of having to retain employees and provide them with non-driving duties for thirteen months placed an onerous financial burden on the County, especially considering the fact that the vast majority of the assigned duties of Highway employees involved driving, especially during snow plowing season. The County was willing to give consideration, however, to employees who might lose their driving privileges for less than one year, but for more than three months, for non-driving offenses. Consequently, through the assistance of a mediator, the parties ultimately agreed to the current scheme, which expanded the grace period to seven months. Both parties concede that they never envisioned the current fact situation arising while they were negotiating the language change.

The Union argues that the language should be interpreted literally and that, therefore, since Paddock never was suspended for more than seven consecutive months, under Article 21, Section A he should not have been terminated. The County argues that, but for the anomalous gap in his suspension due to the scheduling of his court case, Paddock would have been suspended for one consecutive year due to his OWI conviction. It maintains that the arbitrator should give effect to both the intent of the law and the County's clear position in bargaining that employees convicted of OWI should not be entitled to retain their employment. Under its reasoning, therefore, it was entitled to terminate Paddock because his conviction mandated suspension of his license for a full year, albeit in two six month installments under the particular circumstances of the case. This is a unique situation and both arguments require consideration.

At first glance, the pertinent language of Article 21, Section A appears to be clear and unambiguous: "If an employee loses his CDL or a necessary endorsement for a period in excess of seven months the employee will be discharged..." Looked at in that light, the Union's argument has merit because, as it points out, Paddock's CDL was never suspended for a consecutive period in excess of seven months. Looked at more closely, however, the language becomes problematic, specifically because it does not state that the seven month period must be consecutive, nor does it specify that the seven months may be accrued in increments. The question is further complicated by the fact that, by the admission of both parties, this fact situation – a year long suspension broken into two six month increments – was never contemplated by either when the language was added. Under the circumstances, therefore, I find that the language is ambiguous and requires resort to standard tools of construction to interpret it, the two most common of which are past practice and bargaining history.

In this instance, I find past practice to be unhelpful. The record reveals that two employees were terminated for losing their CDLs due to OWI convictions under the prior contract, which provided a three month grace period, but three other employees lost their CDLs in the past due to OWI convictions and were not terminated. This discrepancy was explained by the fact that those occurrences took place under different contract language and also under different state law. There is no previous case arising under current law and this contract language, so I find no binding past practice that applies to this situation.

Bargaining history, however, is more instructive. It is clear that during the last round of negotiations the Union sought to have the grace period extended to thirteen months specifically to protect employees who lost their CDLs because they were convicted of OWI. It is just as clear that the County would not agree to this because it did not want to retain employees who were convicted of OWI, both for policy reasons and because of the financial burden involved in finding alternative employment for employees who could not drive for extended periods of time. It is clear, therefore, that during the negotiations both parties were proceeding under the assumption that an OWI conviction carried a mandatory one year license suspension and the Union was aware that by agreeing to a seven month grace period it was conceding that employees who were convicted of OWI could be terminated.

In this case, Paddock was arrested for OWI and had his driving privileges initially administratively suspended for six months by operation of law. Had his case been adjudicated during that initial six month period with the same outcome, and had the court then extended the suspension for an additional six months to fulfill the one year suspension mandated by law, the County would have been within its rights to terminate him and this grievance would have had no merit. It is only because there was a delay in scheduling Paddock's final hearing that the administrative suspension lapsed, thereby creating this unusual situation. I do not believe that the parties intended that decisions regarding whether or not an employee should or should not retain employment should be determined in such an arbitrary manner, where different outcomes could arise under the same circumstances for different employees simply because of the manner in which their court cases were scheduled. Further, to find otherwise would create an incentive for employees charged with OWI to deliberately try to extend their cases in order to manipulate the application of the contract language to their advantage and create an exception the parties did not intend. I find, therefore, that the intent behind the revised contract language was to provide a longer grace period for employees whose driving privileges were suspended for less than seven months, but not for employees whose privileges were suspended for longer than seven months, but whose suspensions were subdivided into shorter increments. As applied to this situation, therefore, I find that the County was within its rights under the contract language to consider the entirety of Paddock's suspension and did not violate the contract by terminating him. Having said that, however, I also find that the language does not permit "piggybacking" of suspensions, such that multiple suspensions for separate offenses, with a gap in between, may be consolidated in order to justify termination. My ruling is specifically limited to the situation where an employee commits an act for which a total suspension in excess of seven months is imposed, but for various non-contract related reasons the suspension is broken into shorter increments.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

Oneida County did not violate the collective bargaining agreement when it terminated the Grievant. The grievance is, therefore, denied.

Dated at Fond du Lac, Wisconsin, this 6th day of October, 2011.

John R. Emery /s/
John R. Emery, Arbitrator

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