

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**PIERCE COUNTY**

and

**PIERCE COUNTY HIGHWAY DEPARTMENT EMPLOYEES,  
LOCAL 556, AFSCME, AFL-CIO**

Case 148

No. 70178

MA-14892

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**Appearances:**

**Mindy K. Dale**, Attorney at Law, Weld, Riley, Prenn, & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Pierce County.

**Lance M. Nelsen**, Staff Representative, AFSCME Wisconsin Council 40, AFL-CIO, 2408 Maryland Avenue, Superior, Wisconsin 54880, appearing on behalf of Pierce County Highway Department Employees, Local 556, AFSCME, AFL-CIO.

**ARBITRATION AWARD**

Pierce County (County) and Pierce County Highway Department Employees, Local 556, AFSCME, AFL-CIO (Union) are parties to a collective bargaining agreement covering contract years 2008-2010 (Contract). The Contract provides for final and binding arbitration of grievances arising under the Contract. On September 16, 2010, the Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission regarding the termination of Grievant's employment in January 2010. The Union further requested a panel of five Commission staff members and commissioners from which the Parties could select an arbitrator. The undersigned was selected from the panel.

Hearing was held on April 19 and April 20, 2011 in Ellsworth, Wisconsin. The hearing was transcribed by a court reporter and the Parties stipulated that the transcript, along with admitted exhibits, constitute the official record of the proceeding. The Parties submitted post-hearing written arguments in support of their positions, the last of which was received on July 22, 2011, thereby closing the record in the matter.

Now, having considered the record as a whole, I make and issue the following award.

**ISSUE**

At the hearing, the Parties stipulated to the following formulation of the issue:

Did the County have just cause to terminate Grievant; and if not, what is the appropriate remedy?

**RELEVANT CONTRACTUAL AND POLICY PROVISIONS**

**[CONTRACT]**

**APPENDIX B – WORK RULES**

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**DISCIPLINARY AND DISCHARGE PROCEDURE**

A. Disciplinary Action. It is the County's responsibility to offer and provide reasonable work rules. Disciplinary action may only be imposed on an employee for failing to fulfill his/her responsibilities as an employee. Any disciplinary action or measure imposed upon an employee may be appealed through the regular grievance procedure.

If the County has sufficient reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before other employees or the public.

B. Just Cause Notification. Employees shall not be disciplined or discharge [sic] without just cause. If the County feels there is just cause for suspension or discharge, the employee and his/her steward shall be notified in writing within twenty-four (24) hours following the discharge or suspension, that the employee has been discharged or suspended, and the reasons therefor.

C. Procedure. The normal procedure for discipline and/or discharge shall include only the following:

1. Oral reprimand;
2. Written warning;
3. Suspension;
4. Discharge.

D. Personnel Records. Personnel records, including remarks, warnings and disciplinary measures taken shall be dated. Employees may request to see their own personnel record and reasonable access to the same shall be made available.

## Pierce County Personnel Policy

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### Article XI. CONDITIONS OF EMPLOYMENT

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#### D. Work Rules

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Grounds for disciplinary action shall include, but not be limited to, the following:

1. Falsification of the job application; falsification of any county records.

. . .

11. Failure to provide accurate and complete information when required by supervising authorities or improperly disclosing confidential information.

12. Disobedience, insubordination, inattentiveness, negligence, or refusal to obey lawful written or verbal assignments, directions, or instructions.

. . .

14. Stealing or unauthorized use, neglect, or destruction of employer owned or leased property, equipment, or supplies.

### BACKGROUND

Grievant worked for the Pierce County Highway Department for approximately twelve years before being terminated on January 8, 2010. He served six years as heavy equipment operator and six years as foreman, the position he held at the time of his termination. Grievant is also self-employed at his own construction company and owns several pieces of heavy equipment. Grievant had previously been disciplined with a written warning on October 2, 2009 for taking and using County equipment for a personal project on one of his vacation days.

As foreman, Grievant would monitor job sites throughout the County, direct work crews, and resolve problems at job sites. Sometimes he would monitor multiple job sites on a single day. Examples of the types of projects overseen by Grievant included building roads, stripping quarries, installing culverts and removing brush. The projects required use of the County's fleet of construction vehicles, heavy machinery, and other equipment that run on diesel fuel. As described below, the County utilizes methods of accounting for fuel inventory and usage from the time the fuel comes into the County's possession until it is utilized on a job. Each gallon of fuel in turn carries a dollar value that is eventually attributed to a specific piece of equipment or job as a cost in the County's accounting system. The costs of running the equipment or performing a job are accounted for in an annual financial report and the results can affect future State reimbursements, fuel tax refunds and equipment buy-backs.

The County maintains a central shop in Ellsworth, Wisconsin. The shop includes a fuel pump for the purpose of dispensing fuel into County vehicles and equipment. The pump is operated by a computerized system referred to as FuelMaster. The pump is activated from a control unit where the employee swipes a card and enters a PIN and information related to the vehicle or piece of equipment being fueled, including the current reading of mileage or hours. After that information is entered, the pump is available to dispense fuel by removing the fueling nozzle and sliding a lever down. Once the fuel is pumped, the employee then slides the lever up, deactivating the pump and completing the electronic fuel transaction, and replaces the nozzle.

Grievant was assigned a County-owned pickup truck for use on the job - truck number 17 (Truck 17). The bed of Truck 17 contains various pieces of equipment, including, as relevant to this matter, a diesel fuel holding tank. The tank holds between 110 and 120 gallons of fuel.<sup>1</sup> Attached to the holding tank is a meter to record how much fuel is dispensed from the tank. The tank is used to replenish fuel in other pieces of equipment at job sites. Before dispensing fuel from the holding tank, the meter is manually reset to zero. Unlike the electronic transaction record generated when fueling from the FuelMaster system at the shop, paper fuel slips must be manually filled out to record transactions of fuel dispensed from Truck 17's tank. As is relevant here, the fuel slip requires the following information be documented for each transaction: 1) the identification number of the tank dispensing the fuel, 2) the equipment identification number of the vehicle or piece of equipment receiving the fuel or job number for which the fuel was being used, 3) the number of hours or miles on the vehicle or piece of equipment at the time of the transaction, 4) the number of gallons dispensed, 5) the date of the transaction, and 6) the employee's name. Approximately four years ago, the County started requiring that fuel slips be turned in at the end of each day. Prior to that requirement, employees would accumulate fuel slips over time before submitting them.

On September 16, 2009, Grievant completed a fuel slip for fuel dispensed from Truck 17's holding tank to another piece of equipment at a job site. An employee noticed that the number of gallons Grievant reported on the fuel slip was ten gallons more than the fuel meter indicated was actually pumped. The employee reported the incident to Grievant's supervisor. On September 30, 2009, the supervisor learned from another employee's report and a review of Grievant's fuel slips for that day that Grievant added ten gallons to another transaction. The supervisor learned of similar incidents occurring on October 20, 2009 and October 22, 2009 from a third employee. Sensing a pattern, the supervisor reviewed fuel records, fuel slips and time sheets going back to April 2008 and created a spreadsheet documenting discrepancies he found. The supervisor in turn reported his findings and concerns to the highway commissioner.

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<sup>1</sup> There was testimony that the County listed the holding tank on inventory sheets as having a capacity of 120 gallons, however, there was no record of a fuel transaction involving the holding tank for more than 110.85 gallons.

On November 12, 2009, the County had Truck 17's fuel meter calibration checked for accuracy. On that date, the tank was off by 10% - meaning that for every 5 gallons pumped, the meter reflected an amount that was off by ½ gallon. The record is not clear as to whether the meter reported ½ gallon more or ½ gallon less than was actually pumped.

The highway commissioner reported to the sheriff's department his suspicion that Grievant was stealing diesel fuel. On December 16, 2009, Grievant was instructed by the highway commissioner to report to the sheriff's department for the purpose of discussing signage issues. Instead of discussing signs, Grievant was interrogated by a sheriff's deputy for 2 ½ hours regarding his fuel usage.<sup>2</sup> Following the law enforcement interrogation and while still at the sheriff's department Grievant was questioned by the commissioner and supervisor regarding his fuel usage and record keeping. As will be summarized in the discussion section below, Grievant was asked about 51 specific incidents that had been documented in the spreadsheet prepared by the supervisor.

Grievant signed an admission during the December 16, 2009 investigatory meeting that stated:

Approximately 2 yrs ago I started adding 10 gal to each fuel charge to each machine I fueled to cover the excess fuel used on smaller projects and machines I had forgotten to charge fuel to[.]

The smaller projects referred to in the statement included spraying fuel on equipment to prevent asphalt from sticking to the equipment and using fuel as an accelerant when burning brush. Both of those uses were not approved by the County. However, Grievant could have filled out a fuel slip related to those uses by including the unit number for the equipment being sprayed, or a job number related to a brush burn.

Following the December 16, 2009 meeting, Grievant was placed on leave pending further investigation into the allegations. On January 8, 2010, the County sent a letter to Grievant informing him that the County had terminated his employment for violating four work rules. The letter provides as follows:

The following letter is Just Cause Notification for infractions with respect to the Pierce County Personnel Policy, Article XI, Part D, number 1, falsification of any county records; number 11, failure to provide accurate and complete information; number 12, disobedience and negligence and number 14, neglect of employer owned supplies.

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<sup>2</sup> Grievant was eventually criminally charged relating to some of the facts at issue here. He was cleared of those charges prior to the hearing in this matter.

Over the course of approximately two years, you have submitted 200 or more falsified fuel slips for diesel dispensed primarily from tank 9917, which is on your assigned pickup #17. This has been verified through the examination of documents and an employee interview with you on December 16, 2009. In submitting these slips, there was gross negligence in preparing and maintaining records and reports of supplies used on various projects, which is part of your job description as Grading Foreman.

During the course of the employee interview, you were unable to appropriately clarify where the unaccounted fuel was dispensed. When asked about several fuel records that did not reconcile, your responses to questions about where the fuel actually went were inadequate. It is of paramount importance that the Pierce County Highway Department has accurate, truthful and transparent record keeping. The falsified fuel slips that you submitted are none of the above.

The long duration over which this activity has occurred, the large quantity of falsified fuel slips, insufficient information provided at the employee interview and the gravity of the Personnel Policy violations have led us to a decision regarding your employment at the Pierce County Highway Department.

Effective upon receipt of this letter on Friday, January 8, 2010 your employment at the Pierce County Highway Department is terminated.

The Union filed a grievance related to Grievant's termination which was denied by the County, resulting in these proceedings.

### DISCUSSION

There is no dispute that Grievant engaged in misconduct when he falsified fuel slips over the course of two years. There is also no dispute that such conduct warrants the imposition of discipline. In its brief, the Union contends that "[s]ome discipline can be understood on these facts, and for these stated offenses, but termination for same cannot be upheld." Thus, the only remaining question is whether termination of Grievant's employment was excessive. I conclude that the extensive nature of Grievant's misconduct supports upholding the County's decision.

By his own admission, Grievant intentionally falsified each fuel slip he submitted over the course of two years by reporting an amount of fuel that was 10 gallons more than the amount of fuel actually dispensed. In his estimation, he falsified approximately 200 fuel slips over that period. This practice alone resulted in approximately 2,000 gallons of unaccounted for diesel fuel. In addition to falsifying every fuel slip that he submitted, Grievant failed to

submit any fuel slip at all for many transactions. Notably, there are nine instances where Grievant re-fueled Truck 17 on two dates, but did not submit any fuel slips to document fuel being dispensed on the intervening days.<sup>3</sup> During the investigatory meeting, Grievant stated that he must have forgotten to fill out fuel slips during the intervening periods.

Some incidents identified by the County could possibly be explained by the 10% calibration error in Truck 17's fuel meter or "shrinkage" of fuel related to temperature changes.<sup>4</sup> However, I conclude that those incidents that are attributable to Grievant's intentional falsification of fuel slips or failure to submit fuel slips are sufficient to support termination.

The County has an interest in maintaining an accurate accounting of its fuel use and inventory beyond just keeping good records. Data generated from fuel records are submitted to the state to determine reimbursement rates for the following year, are used by the County in relation to equipment buy-back contracts that allow the County to sell back equipment to vendors after certain mileage or hours milestones are reached and to calculate fuel tax refunds. Grievant's unilateral decision to falsify each fuel slip that he submitted and failure to submit fuel slips for other fuel transactions essentially nullified the record keeping and accounting value of the fuel slips.

Further aggravating the matter, Grievant falsified fuel slips to hide the fact that he was using fuel in ways that he knew were unapproved, i.e., to spray equipment and accelerate brush burns. Also exacerbating the nature of Grievant's misconduct is the fact that he served as foreman at remote job sites and had a duty to model appropriate conduct to work crews he oversaw. He violated that duty as demonstrated by the fact that at least three subordinate employees observed Grievant falsifying fuel slips and reported him to the supervisor.

The Union argues that the County's belief that Grievant was stealing fuel formed the true "shadow" motivation for his termination. The Union points to evidence that the supervisor and commissioner believed that Grievant's falsification of fuel slips was intended to cover up his theft of fuel for use in his personal business. The Union further argues that, because the County was unable to prove theft, it puffed up the record keeping violations to justify not following progressive discipline and thus terminating Grievant.

There is no doubt that the commissioner and supervisor suspected Grievant stole fuel and falsified fuel slips to cover up the theft. Grievant owns a company that uses heavy equipment and had been previously disciplined for improperly using a piece of County

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<sup>3</sup> An example of this occurred when Grievant fueled Truck 17 on September 24, 2009 and September 29, 2009 but did not submit any fuel slips between the two dates.

<sup>4</sup> No evidence was presented that would allow me to quantify fuel shrinkage.

equipment on a personal job. Grievant was provided a County owned truck with a portable fuel tank that he was permitted to take home at night and weekends. With that background, when the County discovered that Grievant was falsifying fuel slips to prevent proper accounting of fuel in a way that resulted in significant quantities of undocumented fuel, it was not unreasonable to suspect an ulterior motive. It is also not surprising that the County's investigation focused on whether theft was occurring. However, despite the suspicions of theft, the County ultimately concluded that the evidence resulting from the investigation did not support a conclusion that Grievant stole fuel.

The County did not terminate Grievant for theft. The fact that the County drew an inference that theft was occurring does not diminish the severity of the misconduct that was proven and cited in the letter of termination. It is that misconduct, as described above, that supports the County's decision to terminate Grievant.

The Union further argues that the County tolerates the "widespread practice" of altering records to balance the books and that the County engaged in disparate treatment when it chose to terminate Grievant for engaging in similar conduct. In support, it cites documents and testimony that Grievant's supervisor altered billing codes on work slips after they were submitted by employees. However, I do not find the supervisor's conduct to be similar in nature to Grievant's conduct. The supervisor is charged with reviewing records and properly allocating County resources to various accounts. Such conduct is not similar to Grievant's misconduct of intentionally falsifying fuel slips, and no evidence was presented that other employees engaged in that kind of conduct.

It is also because of the intentional nature of Grievant's misconduct, as well as the lengthy period of time during which the misconduct occurred and the large number of individual instances of misconduct that I do not believe the County was required to follow progressive discipline before terminating Grievant.

### CONCLUSION

For the foregoing reasons, I conclude that the County had just cause to terminate Grievant's employment. The grievance is denied.

Dated at Madison, Wisconsin, this 10<sup>th</sup> day of November, 2011.

Matthew Greer /s/

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Matthew Greer, Arbitrator

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