

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LA CROSSE COUNTY HIGHWAY AND PARKS EMPLOYEES UNION,
LOCAL 227, AFSCME, AFL-CIO**

and

LA CROSSE COUNTY

Case 224
No. 70724
MA-15035

Appearances:

Mr. Rob Wayss, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2024 Clearwater Drive, Onalaska, Wisconsin 54650, for the Union.

Weiss, Berzowski and Brady LLP, by **Attorney Anna M. Pepelnjak**, 700 North Water Street, Suite 1400, Milwaukee, Wisconsin 53202-4222, for the County.

ARBITRATION AWARD

The La Crosse County Highway and Parks Employees Union, Local 227, AFSCME, AFL-CIO (herein the Union) and La Crosse County (herein the Employer) were, at the time the events relevant hereto took place, parties to a collective bargaining agreement covering the period from January 1, 2008 through December 31, 2010, which provided for binding arbitration of grievances arising thereunder. On April 14, 2011, the Union filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission (WERC) over a grievance filed by the Union concerning the termination of bargaining unit member Allen Lueck, and requested a panel of WERC staff members from which to select an arbitrator. The parties selected John R. Emery to arbitrate the matter and a hearing was conducted on July 7, 2011. The proceedings were transcribed and the transcript was filed on July 21, 2011. The parties filed initial briefs September 16, 2011 and reply briefs by September 30, 2011, whereupon the record was closed.

ISSUES

The parties stipulated to the issues, as follows:

Did La Crosse County have proper cause for terminating Al Lueck from his position with the Highway Department?

If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

Article II – Administration

2.01 Except as otherwise provided for in this Agreement, the County retains the normal rights and functions of management and those it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to determine the construction, maintenance or services to be rendered, the materials and equipment to be used, the size of the workforce, and the allocation and assignment of work or workers; to schedule when work shall be performed; to contract for work services or materials, to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; and to adopt and enforce reasonable rules and regulations.

OTHER RELEVANT LANGUAGE

LA CROSSE COUNTY PERSONNEL ADMINISTRATIVE RULES

3.08 Standards of Conduct

(1) Certain standards of conduct are expected of all employees in the County service.

Charges of malfeasance or misfeasance shall be adjudicated in accordance with the applicable statute. Proof of commission of any of the following prohibited acts shall immediately subject a County employee to dismissal, suspension or other appropriate disciplinary action:

(a) Theft.

...

(e) Willful neglect of duties; disorderly or improper conduct which might degrade the public image of other employees of the County;

unsafe conduct, such as horseplay; and untreated or uncontrolled addiction to alcohol or drugs.

- (2) The violations enumerated in sub. (1) shall not be construed as all-inclusive; they shall, rather serve as guidelines in maintaining appropriate standards of conduct while in the County service.

BACKGROUND

Allen Lueck, the Grievant herein, was employed by the La Crosse County Highway Department from April 1986 until January 24, 2011, when he was discharged by the County. At the time of his discharge, Lueck was a Heavy Equipment Operator and also served as president of Local 227. During his employment, Lueck had no disciplinary history, with the exception for a reprimand received in 1991 for wearing headphones while operating a front end loader, and received generally positive performance reviews.

Tim Hammes is a Supervisor for the La Crosse County Highway Department. As a supervisory employee, Hammes is assigned a County truck, which he may drive to work from his home. On Tuesday, August 10, 2010, Hammes picked up two tri-fold ATV ramps, which he had owned for at least 15 years, from his brother's home and placed them in the back of his County truck because he was going on vacation that weekend and needed the ramps to load his 4-wheel ATV vehicles. The ramps are constructed of aluminum and plywood and are approximately 6 feet long. Upon his return home, Hammes did not remove the ramps at once, but left them in the back of the truck.

On Thursday, August 12, 2010, Lueck was working on a crew on Highway 33 filling cracks in the pavement, along with fellow Highway Department employees Steve Grafft and Mark Goyette. While they were working, Hammes arrived, along with an employee of the Wisconsin Department of Transportation, to check on the crew due to excessive heat that day. Hammes then left with the DOT employee to check another site, but left his assigned County truck behind. He returned 45 minutes to an hour later. While Hammes was gone, Lueck, Grafft and Goyette observed the ramps in Hammes' truck and speculated as to they were road find, that is, property found along county roadways which is collected and stored at the Highway Department shop in West Salem in case the owner inquires about it. At some point afterward, Lueck was observed by Grafft taking the ramps from Hammes' truck and carrying them away. Grafft assumed that Lueck was taking them to County truck 53, which was assigned to him. Hammes then returned and left with his truck, but did not immediately notice that the ramps were missing.

When he returned home, Hammes went to unload the ramps and noticed they were missing. He called Grafft and asked him about them, because he knew Grafft had been driving his truck. At that time he told Grafft the ramps were his. Grafft told him he did not take the ramps and stated that he had seen Lueck carrying them up the road. Hammes then called

Lueck, who did not answer, so Hammes left a message and told him to call back. Grafft later called Goyette to discuss the matter and also tried to call Lueck, but Lueck did not answer. The next day, Friday, August 13, Grafft spoke to Lueck. He told Lueck that the ramps belonged to Hammes and that if they were not returned Hammes intended to report the theft to the Sheriff and the Highway Commissioner. He advised Lueck to drop the ramps off at Hammes' home. Lueck, in turn, denied any knowledge that the ramps were missing or of their whereabouts.

On Friday, August 13, Hammes went to the Highway shop and checked the front area of the parts room, where road find is kept, and truck 53, but did not find the ramps. Lueck did not call him back, so he reported the theft to the Sheriff's Department and told them that he had reason to believe that Lueck had taken the ramps. Deputy Daniel Baudek was assigned to investigate the theft and met with Hammes on the morning of Friday, August 13, at which time Hammes filed a report regarding the missing ramps. Thereafter, Baudek spoke to Grafft and Goyette and obtained their statements corroborating Hammes' report that Lueck had taken the ramps. Baudek also went to the worksite with Grafft to search for the ramps, assuming that Lueck may have hidden them in the brush, but did not find them.

On Saturday, August 14, Baudek went to Lueck's residence to speak to him, but Lueck did not answer the door. Baudek thought he heard sounds in Lueck's pole shed, but did not go in. He then left the property and left a phone message for Lueck to call him. Lueck called Baudek later that morning, at which time Baudek informed Lueck that he was investigating the disappearance of the ramps, which belonged to Hammes, and asked Lueck whether he took them. Lueck vehemently denied taking the ramps or having any knowledge of who might have done so or where they might be. Lueck then changed the subject and became argumentative, accusing Baudek of trespassing on his property and conducting an illegal search and seizure.

On Monday evening, August 16, Lueck called the Highway Department Storekeeper, Dave Stark, who works in the Department Parts Shop in West Salem. Road find is usually kept in the front counter area of the Parts Shop where it is easily observed by members of the public looking for lost property. At that time, Lueck told Stark he had found ramps earlier that day in the back of Hammes' truck and had taken them and stored them in Room C of the Parts Shop. Room C is in a remote area of the shop and is where seasonal equipment, such as snowplow wings, is stored. It is not the area where road find is kept. Lueck told Stark he believed the ramps were road find and he hid them because he believed that otherwise Hammes would take them. Stark then looked in Room C and found the ramps where Lueck had said they were.

On Wednesday, August 18, Lueck went to the Sheriff's Department and met with Sgt. Bill Lubinski, at which time he gave the following written statement:

"On Thursday August 12, 2010 I took a folding ATV ramp [sic] out of a La Crosse County truck and turned them into the County parts Office. These ramps were picked up from along the highway on Tuesday August 10, 2010 by Tim

Hammes and not turned in as is proper procedure. My belief is that he was going to keep them for himself.

These ramps (folding ramps) are in the Highway Shop as they are supposed to be.”

The next day, Lueck was arrested for theft by Deputy Scott Sedevie. On December 16, 2010, Lueck accepted a plea agreement, which involved him pleading no contest to an ordinance violation of theft of movable property. At the plea hearing, Lueck denied his guilt, but the judge explained that a no contest plea was not an admission of guilt, although it would result in a finding of guilt by the court, so Lueck agreed to plead no contest and was adjudicated guilty and assessed a forfeiture.

After the completion of Lueck’s legal proceedings, an internal investigation was conducted by La Crosse County Deputy Corporation Counsel David Lange. Lange reviewed the documentary record on the incident and also interviewed Tim and John Hammes, Dave Stark, Assistant Highway Commissioner Keith Back and Deputy Baudek. He completed his investigation and issued a report on January 13, 2011, wherein he found that Lueck had committed theft of property while at work on August 12, 2010 and tried to cover it up by turning the ramps into the County shop after he learned the theft was being investigated.

On January 18, 2011, Back held a pre-disciplinary meeting with Lueck, which was attended by the Corporation Counsel, the County Personnel Director, and a local Union officer and Union Staff Representative. At the meeting, Back placed Lueck on administrative leave and issued a pre-disciplinary letter recommending termination and explaining the reasons therefore. Back afforded Lueck an opportunity to respond, but Lueck chose to stand mute. Thereafter, Back terminated Lueck on January 24, 2011 for theft, dishonesty and improper conduct which might degrade the public image of another public employee, all in violation of various County Administrative Rules. The termination was properly and timely grieved and the grievance was advanced to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Employer

The County asserts that it had proper cause for terminating the Grievant. It further maintains that the proper analysis is to determine initially whether the Grievant committed conduct in which the County had a disciplinary interest. The County maintains that, although the Union may seek to apply the seven tests articulated by Arbitrator Carroll Daugherty in *GRIEF BROTHERS COOPERAGE CORP.*, 42 LA 555 (Daugherty, 1964), these tests are not mandated by the contract, nor was their use stipulated to by the parties and are, therefore, precluded. *BROWN COUNTY (HUMAN SERVICES) MA-11535 (McLaughlin, 2002)*

The parties interpret the evidence differently. The County claims that the Grievant stole the ATV ramps from Tim Hammes' truck out of spite, in full view of his co-workers and hid them. When informed by a co-worker the next day that the ramps belonged to Hammes, the Grievant began a coverup. He lied to a Sheriff's Deputy investigating the theft and tried to divert him from the investigation by arguing with him. He then hid the ramps in the back of Room C in the parts shop, which is not where road find is kept. He later revealed the location of the ramps to the Department Storekeeper, Dave Stark. Two days later he went to the Sheriff's Department and met with a different deputy, with whom he filed a written report containing several false assertions. He was arrested for his crime and ultimately pled no contest to a reduced charge of theft. The matter was then investigated by the Assistant Corporation Counsel, who concluded that the ramps did, in fact, belong to Hammes and that the Grievant lied to Deputy Baudek about taking them. The Grievant was given an opportunity to explain his actions at a LOUDERMILL hearing, but chose not to do so. He was then terminated because the County values and expects honesty and trustworthiness from its employees.

The Union paints the Grievant as a "Good Samaritan" who acted to prevent Hammes from converting road find to his own use. He claimed that he put the ramps in his truck on August 12 and hid them in the parts room later that day to prevent Hammes from getting them, based on rumors he had heard that Hammes had converted road find to his own use in the past. He claimed that Steve Grafft did not tell him that Hammes owned the ramps and made excuses for his behavior toward Deputy Baudek and his delay in telling Stark about the ramps. He further claimed he pled no contest to the reduced theft charge because he was misled by the judge into believing that by doing so he would be maintaining his innocence. His refusal to speak at the LOUDERMILL hearing was based on the advice of his Union representative.

The case turns on the credibility of the Grievant, but his story is full of holes. He admitted to having a bad relationship with Hammes and having played pranks on him in the past. This may explain why he took the ramps, but does not justify it and the Grievant failed to offer a legitimate explanation for his actions. He had no basis for believing that Hammes would convert the ramps to his own use, but, even if so, had no right to take the ramps and hide them. His proper course was to inform the Highway Department administration or his Union. Lueck claimed he saw the ramps in Hammes' truck on Tuesday, August 10, but Hammes' own report was that he did not pick up the ramps from his brother until after work on Tuesday. Lueck claimed that he put the ramps in Room C on Thursday, August 12 to keep Hammes from finding them, but Hammes did not work Friday and Dave Stark would have seen him had he come in and taken the ramps, so there was no need to hide them. Further, if true, why did not Lueck tell Stark, or any of the other employees in the shop on Thursday afternoon, immediately, rather than wait until Monday night, after he learned the police were investigating the theft. Lueck was told by Grafft on Friday that the ramps belonged to Hammes, but Lueck denied any knowledge of the ramps' whereabouts. He made false statements to Deputy Baudek, claiming he knew nothing about the ramps. He made false statements to Stark, claiming he "found" the ramps on Monday, rather than taking them on Thursday. He made false statements to Deputy Lubinski, claiming that Hammes had found the ramps on Tuesday and failed to turn them in because he was going to keep them, against

Department policy, even though Lueck admitted at hearing that he had no basis for those assertions. The County proved its case of theft and cover-up against Lueck and has sustained its burden to prove conduct in which it had a disciplinary interest.

The County also proved that the degree of punishment was justified in light of the severity of the offense. Interim Highway Commissioner Keith Back terminated Lueck because there is a specific County policy against theft and the Department employees work in remote locations without direct supervision, so honesty and trustworthiness are important values. Further, the fact that Lueck took the ramps from his supervisor's truck in the middle of the day outweighs the relatively low value of the ramps. The County had evidence of theft, lying and disparaging the reputation of another County employee. These are sufficiently severe to justify bypassing the ordinary disciplinary progression and ignoring prior satisfactory performance. The Union may argue that Lueck was treated differently than other employees, but there is no evidence of another employee committing the same acts being treated more leniently by this decision maker. The County has sustained its burden of showing that the degree of discipline was appropriate to the severity of the offense, so the grievance should be dismissed.

The Union

The Union acknowledges that Allen Lueck made errors in judgment in how he handled the situation with the ramps, but denies that his conduct warranted termination. His decision to take the ramps, which he believed were road find, from Hammes' truck was a poor one, but was partly explained by the poor relationship between the men. Credible testimony from Mark Goyette that Lueck believed the ramps to be road find. Testimony from Lueck and Dave Stark indicates that Hammes had never turned road find into the Department shop in the past and had a reputation of keeping found items for himself. Hammes' own questionable testimony about when he bought the ramps and his description of them support uncertainty of his ownership of them. Lueck proceeded based on his beliefs, accurate or not, that the ramps were road find and that Hammes did not turn in road find items.

Lueck should have been more cooperative with the investigation of the Sheriff's Department. He is accused of lying, largely based on his conversation with Deputy Baudek on August 14, wherein he became belligerent and changed the subject from his own conduct to Baudek's. Taken in context, Lueck's behavior, while wrong, is understandable. Lueck also made an error when he failed to seek legal counsel to represent him in the theft charge. Without benefit of counsel, Lueck accepted a no contest plea, even though he insisted he was not guilty, and believed the judge that a non contest plea was not an admission of guilt.

Lueck is a 25 year employee of the Highway Department and long-time president of the local. He has received consistently positive performance evaluations and has a clean work record with only one minor discipline in the past for wearing a walkman while operating a piece of equipment. The is arbitral support for the proposition that a "bright line" rule is not

always appropriate in the case of an otherwise good, long-term employee. ONEIDA COUNTY, MA-14012 (Morrison, 2009). That logic should apply here, as well.

The County's basis for termination relied on a flawed investigation. The County contends that Lueck lied about stealing the ramps and storing them in the Highway Department Parts Shop on Thursday. Yet, when Deputy Baudek searched the area where the ramps were taken on Saturday he did not find them and when Hammes searched the parts shop on Friday he did not look in Room C, where Lueck stated he placed them. Further, after Thursday evening, Hammes made no attempt to contact Lueck to inquire about the ramps. The evidence shows that the ramps were seen in Hammes' truck on August 10, that Lueck took them from the truck on August 12 and was seen carrying them up the road and that the ramps were ultimately found in Room C of the parts shop, where he said he put them. It is not credible that someone committing a theft would do so in front of co-workers. Lueck did not steal the ramps. Rather, he took them and stored them in the shop where Hammes would not find them, because he thought they were road find and believed Hammes intended to keep them.

There were numerous flaws in the County's investigation. Deputy Corporation Counsel David Lange conducted the investigation and issued his report on January 13, 2011, but never bothered to interview Lueck about the incident, concluding he was not credible without ever speaking to him. He also found that the ramps were clearly Hammes', although Stark testified that he thought they were road find. He also concluded that Lueck was not cooperative with the attempts to contact him, which was not true. He returned Hammes' call on August 12, and Hammes never called him back. Interim Commissioner Back relied on Lange's report in deciding to terminate Lueck, based on the severity of the theft, lying, the potential injury to relations between the Highway and Sheriff's Departments and degrading of Hammes' image. Back waited until January, however, because there was no urgency since Lueck was performing his duties adequately. Back, like Lange, never spoke to Lueck about the matter. Lueck never approached the Department about the matter after August because he had no idea he was facing discipline, or that his job was in jeopardy. When Lueck met with administration on January 20, he refused to make a statement on the Union's advice because the County would not sign a Garrity letter giving him immunity from further prosecution.

There is also no evidence that Lueck's conduct degraded the public image of other employees, or the relationship between the Highway and Sheriff's Departments. Lueck and other employees believe that Hammes has a history of keeping road find. Lueck gave specific examples of cases where Hammes did not turn in road find and Stark testified that he believed the ramps were road find and that Hammes was lying. There was also, no evidence of any public reporting of this incident, so the Union cannot see how Hammes public image was degraded by Lueck's actions. There is no evidence that returning Lueck to work will interfere with Department operations, nor is there any evidence supporting a contention that Lueck's actions have injured the relationship between the Department and the Sheriff's Office. Thus justification for Lueck's termination is not credible.

The termination was also excessive discipline and was inconsistent with discipline applied in comparable cases. The Union has shown that there was no County policy on how to handle road find, that the County's investigation was flawed, that Lueck was a 25-year employee with a good record and that he reasonably believed that the ramps were road find and that he was dealing with them properly. His actions, therefore, do not justify discharge. The Union also contends that Lueck was treated more harshly than another employee who engaged in egregious acts of dishonesty and theft. According to Starks credible, uncontroverted testimony, a Highway Department supervisor was caught red-handed stealing gasoline from the County gas pump, nevertheless he was not terminated. Stark witnessed the theft and reported it and the Department Superintendent later informed Stark that he also had caught the employee stealing. The fact that this occurred under a different "decision-maker" does not relieve the County of the just cause standard, which requires that discipline be administered in a consistent manner. The fact that the employee remained with the County until retirement also discredits the argument that reinstatement would irreparably harm Hammes' ability to manage his employees. There is arbitral support for the position that where an employee has a log work history without discipline and where the employer does not immediately address the situation, termination is inappropriate. See: EAU CLAIRE SCHOOL DISTRICT, MA-10968 (Houlihan, 2000); WAUSHARA COUNTY, MA-8009 (Bielarczyk, 1993)

Employer Reply

The County contends that it has proved that Lueck committed acts in which it has a disciplinary interest. Lueck's claim that he thought the ramps were road find must be rejected. The Union relies on the testimony of Goyette and Stark, but Goyette did not express an opinion as to whether the ramps were road find, nor whether Lueck believed they were. Further, Deputy Baudek believed that Goyette was not being completely forthcoming and was holding information back to "cover his own hide." Stark was likewise unhelpful. He claimed that he believed the ramps to be road find, but his opinion was based on hearsay about Hammes supposedly converting road find in the past and overhearing other employees saying they had seen the ramps before Thursday. This evidence is not credible and has no evidentiary value whatever. Nothing in Stark's testimony proves that Hammes ever actually converted road find. Stark also offered dubious testimony about a prior case of an employee allegedly stealing gasoline. He claimed to have had suspicions about a supervisor stealing gas, which he reported to then Road Superintendent Dennis Osgood, which was the proper response, compared to the Grievant taking the ramps from Hammes' truck. Stark also claimed that the employee only had the use of his truck restricted, but later admitted that discipline records are confidential and he would not know what additional discipline the employee might have received.

Lueck also claimed that he thought the ramps were road find, but he never asked Hammes, or anyone else, about the ownership of the ramps, but acted on his own unsupported assumption. Further, any validity for his belief ended on Friday, August 13, when Steve Grafft told Lueck that the ramps belonged to Hammes and that Hammes was going to report the theft to the Sheriff and the Commissioner. Any lingering doubt would have been put to rest by his

conversation with Deputy Baudek, who also told him the ramps belonged to Hammes. After that point, Lueck had no justification for claiming that the ramps were road find, but he continues to characterize them as such. Wrongful actions committed under a false assumption are nonetheless misconduct. Once the assumption was proved invalid, Lueck's responsibility was to return the ramps to Hammes. That is not what he did. After his belligerent exchange with Deputy Baudek, Lueck did nothing. He did not admit taking the ramps and did not return them to Hammes. Three days later he told Stark the ramps could be found hidden in a back room of the Parts Shop, then signed a sworn statement admitting the theft, but still claiming that the ramps were road find and that Hammes intended to convert them. Subsequently, Lueck pled no contest and was convicted of theft.

The Union tries to blame the victim by claiming that Hammes should have taken additional steps to contact Lueck and filed the police report prematurely. Presumably, the Union believes that if Hammes had spoken to Lueck he would have admitted taking the ramps. First, Hammes attempted to contact Lueck on August 12, but Lueck didn't respond. Nevertheless, it is not the victim's responsibility to contact the accused to obtain a confession. Further, Hammes was Lueck's supervisor and they had a poor relationship. A fair interpretation of the situation is that Lueck was not trying to prevent the conversion of road find, but wanted to create trouble for his boss, in which case he would not have admitted the theft. His conduct over the next six days established that fact.

Deputy Corporation Counsel Lange conducted a thorough impartial investigation. The Union claims the investigation was flawed because he didn't interview Lueck, didn't ask Stark if the ramps were road find, accepted John Hammes' description of the ramps at face value and concluded that Lueck was not cooperative with the investigation. Lange testified that he had Lueck and Grafft's statements so another interview would not change his conclusion. At the time, Lueck had already given statements to the Sheriff's deputies and been convicted of theft, so he could either stick to his story, or change it and dig his hole even deeper. Stark's opinion has already been shown to be irrelevant and Hammes' statement was relevant not for his description of the ramps, but his account of how Tim Hammes picked them up and his corroboration that Hammes owned them. As for Lueck being uncooperative, that was confirmed by the testimony of Hammes and Grafft.

The Union's attempt to minimize the significance of Lueck's misconduct is ineffective. The Union admits that Lueck "should have handled the situation better," and characterizes his theft of the ramps as a "poor decision." It admits that he "should have been more cooperative" with Deputy Baudek, and asserts that their argument should be placed in "context." The acknowledgement of these facts supports the County's case. Lueck outright lied to Deputy Baudek and treated him rudely. To overcome this, the Union says his actions must be placed in context, because Lueck was angry that the Deputy came to his home "illegally." In fact, Baudek did nothing wrong and Lueck was upset because his theft had been discovered. At hearing, Lueck made matters by becoming belligerent and refusing to answer questions. All of these facts argue against the Union's explanations for his conduct.

The County's case is based on strong circumstantial evidence, not speculation as the Union contends. The County assembled facts to support its case, the only missing piece being the whereabouts of the ramps from Thursday until Monday. During that time, Lueck alone knew the location of the ramps, but failed to reveal it to anyone, even though he had five opportunities to do so. The County cannot be faulted for failing to prove where the ramps were over that period of time.

Contrary to the Union's assertion, Commissioner Back considered carefully his decision to terminate Lueck. His rationale was that adherence to the Department's policy regarding theft was necessary because Highway employees are largely unsupervised. The theft was also more serious because it occurred on work time. Trust is an essential component of an employment relationship. Once destroyed it is hard to rebuild. PLYMOUTH SCHOOL DISTRICT, MA-11820 (Hahn, 2002) By violating his trust in stealing the ramps, Lueck exposed himself to the highest degree of punishment. There is also no merit to the assertion that Lueck's refusal to speak at the LOUDERMILL hearing was based on County misinformation. The Union claims the County failed to provide Lueck with GARRITY rights, which reveals a misunderstanding of the concept. The Union representative gave Lueck flawed advice at the LOUDERMILL hearing, as a result of which, Lueck lost his last opportunity to explain his actions. The County cannot be faulted for that.

The Union also claims that the County failed to show that Lueck's statements degraded Hammes' public image. This ignores the fact that virtually all the documents in this case are public records. In Lueck's police statement, he charges Hammes with intent to convert property, and Stark's testimony was offered to that effect at hearing. Nothing could be more devastating to a supervisor than to have a supervisor accused of wrongdoing by a subordinate.

The County reasserts that it also proved that termination reasonably reflected its disciplinary interest in discouraging inappropriate employee conduct. The Union argues that Lueck's 25-year employment history outweighs the gravity of the offense. The County does not dispute that Lueck has a long work history and a satisfactory record, but asserts that the seriousness of the offense outweighs those factors. The negative effects of his conduct are difficult to overstate. Department employees often work independently and unsupervised. It is essential to trust them and Lueck's acts have made it impossible for the County to ever trust him again. Termination is the only reasonable outcome. It also sends a necessary message to the other employees that dishonesty will not be tolerated. The cases cited by the Union are distinguishable on their facts. In ONEIDA COUNTY, MA-14012 (Morrison, 2009), the arbitrator acknowledged the importance of trust in the workplace, but modified the discipline for an employee who had taken a letter from his supervisor's desk because the employee had since retired and so trust was no longer an issue. In EAU CLAIRE AREA SCHOOL DISTRICT, MA-10968 (Houlihan, 2000), the employee was convicted of felony theft for an incident outside the workplace. Since the offense occurred off the work site, the arbitrator applied a different standard than that applicable here. In WAUSHARA COUNTY, M-8009 (Bielarczyk, 1993), the arbitrator did not dispute the reasonableness of the penalty, but upheld the grievance due to the delay in the investigation. Here, however, the delay was caused by the criminal investigation,

during which time the Grievant was entitled to a presumption of innocence. After he pled no contest and was convicted the investigation was concluded and Lueck was terminated.

Union Reply

The Union reiterates its position that Lueck used poor judgment and did not handle the situation with the ramps properly, but his conduct does not merit termination. It would be extreme to characterize his conduct as egregious or beyond redemption, inasmuch as he worked from August 2010 until his termination in January 2011 without incident or disruption to Department operations. As a 25-year employee, Lueck does not deserve to be terminated over this incident. The Union does not concede that the “7 tests of just cause” are not applicable in this case, but agrees with the opinions of arbitrators that each case must be decided on its unique circumstances and that the purpose of progressive discipline is correct rather than punish. Here, corrective discipline, not termination, was the proper course.

It should be noted that there is no official Department policy on road find. Lueck criticized for things he didn't do and was grilled at hearing for not leaving a note or making additional phone calls or checking in with a supervisor when he dropped the ramps off at the shop on August 12, but the County cannot require or expect an employee to follow such procedures when they are not communicated in advance. He acted as he did because he believes that the ramps were road find and that Hammes intended to wrongfully convert them.

The County contends that Lueck engaged in a cover up and hid the ramps, after taking them in plain sight of other employees, some time between August 13 and August 16. The County maintains that Lueck's motive was the poor relationship between himself and Hammes, based on the previous “banana peel” incident, but this is an unlikely motive for theft. It is more likely that it was Hammes who used the ramps incident to cause trouble for Lueck. Hammes went to the West Salem shop on August 13 to look for the ramps, but he did not return Lueck's call on Friday, nor did he apparently speak to Stark. If he was sincerely looking for the ramps, why would Hammes not speak to Lueck or the employee responsible for road find? Had he done either, the ramps would have been located where Lueck put them.

The County contends that Lueck is a thief, but in reality he is merely an employee who made a poor decision regarding road find and who had a poor relationship with his supervisor. His conduct was not egregious and is correctible. He did not steal the ramps or engage in a cover up. Although he had a contentious conversation with Deputy Baudek, he later gave a statement to the Sheriff's Department in which he did not, as the County alleges, “tell four more lies.” In his view, the statement was truthful.

The County maintains that termination is the only appropriate discipline because the County has a policy against theft and the Department employees sometimes work on their own, so there cannot be a suspicion of dishonesty. The County claims it has a “zero tolerance” policy, but in the past a line supervisor, in a case involving a more clear cut and egregious instance of theft, received a slap on the wrist, kept his employment and only had his vehicle

privileges restricted. Consistent discipline is an essential component of just cause. SCHOOL DISTRICT OF RIVER FALLS, MA-14435 (Levitan, 2010) The County's position that termination is the only appropriate penalty is clearly untrue and inconsistent with its position in the past in a more serious case.

DISCUSSION

This case involves a dispute over whether the County had just cause for terminating Allen Lueck's employment. The Union argues that the appropriate analysis for making this determination is to apply the "7 tests of just cause" articulated by Arbitrator Carroll Daugherty. Cf: ENTERPRISE WIRE CO., 46 LA 359 (Daugherty, 1966) The County argues that the proper analysis is a two-prong test which determines, first, whether the County had a disciplinary interest in the Grievant's conduct and, if so, whether the discipline imposed was appropriate in light of the County's disciplinary interest. The Daugherty tests have lost some of their cachet among arbitrators over the years, and I tend not to use them unless they are mutually accepted by the parties, which is not the case here. Ultimately, the two-prong test adequately addresses the salient issues in most just cause cases and, as a practical matter, touches on most of the factors set forth in the Daugherty tests.

There is no dispute that Lueck noticed the ATV ramps in the back of Tim Hammes' truck sometime during the week of August 9, 2010 and that, on Thursday, August 12, he took the ramps from Hammes' truck, apparently believing them to be road find. What Lueck did with the ramps initially is open to debate, but what is known is that on the evening of Monday, August 16, he called the Department Storekeeper, Dave Stark, and told him he had found the ramps earlier that day and had put them in Room C of the Parts shop, ostensibly to hide them from Hammes. Ultimately, Lueck was arrested and convicted of theft as a result of his actions. After the conviction, the County conducted an investigation, which resulted in Lueck's termination for theft, dishonesty and degrading the public image of other County employees, in contravention of County Personnel Administrative Rules 3.08(1)(a), and (e) and 3.08(2). The questions before me, therefore, are whether the record supports the County's charges and, if so, whether the conduct warrants termination.

The first charge is that Lueck committed theft, which is, essentially the wrongful taking of the personal property of another with the intent to deprive him of it. One could make a finding of theft based on Lueck's conviction, alone, but the Union contends that the conviction was based on a no contest plea that Lueck agreed to, not because he believed he had done something wrong, but because he wanted to get the matter concluded and apparently believed that a no contest plea would allow him to continue to maintain his innocence. Assuming, arguendo, that this assertion is true, I will consider the underlying evidence, as well. There is no question that Lueck, by his own admission, took the ramps from Hammes' truck and hid them from Hammes. That conduct satisfies the definition set forth above, but the Union maintains that it wasn't a theft because Lueck believed, and in fact still believes, that the ramps did not belong to Hammes, but were road find that Hammes intended to keep for himself.

Lueck's belief that the ramps were road find was based on the fact that the ramps were in Hammes' work truck and appeared scratched up, as they might be if they had fallen from a vehicle. His belief that Hammes intended to keep them was based on the fact that they had been in Hammes' truck for two days without being turned in, as well as shop gossip that Hammes had supposedly kept road find in the past.

For a number of reasons, I find the Union's position to be unpersuasive. At the time he took the ramps, Lueck had no facts supporting his belief that the ramps were road find, only conjecture based on rumors. Even assuming he had a solid basis for his opinion, however, his proper course was not to take the ramps on his own initiative, but to ask Hammes about the ramps, or to raise the issue with the Highway Commissioner. The Union even concedes this point in its brief. After taking the ramps, Lueck testified that he put them in Room C of the Highway Parts Shop later on Thursday afternoon. This testimony is not corroborated by any other witness. No one, including Dave Stark, who works in the Parts Shop and is responsible for road find, saw Lueck bring in the ramps, even though there were many Department employees in the shop on Thursday afternoon, and Lueck told no one where the ramps were, or even admitted taking them, until Monday, August 16. The claim that Lueck immediately placed them in the parts room, therefore, rests entirely on Lueck's veracity, which, as will be seen, is dubious, at best.

Any claim Lueck had to a legitimate belief that the ramps did not belong to Hammes evaporated on Friday night, August 13, or Saturday morning, August 14, at the latest. On Friday night, Steve Grafft spoke to Lueck and told him that the ramps belonged to Hammes and that if they weren't returned Hammes was going to report the theft to the Commissioner and the Sheriff. In response, Lueck denied any knowledge of the ramps, apparently not realizing that Grafft had seen him take them, and he did not return them although Grafft advised that he do so. On Saturday morning he had a conversation with Deputy Baudek, who was conducting a criminal investigation into the theft, and who also told him that the ramps belonged to Hammes. In response, Lueck again denied knowing anything about the ramps and deliberately changed the subject to his complaints against the deputy for "conducting an illegal search" on his property. Lueck testified that he didn't recall either Grafft or Baudek telling him the ramps belonged to Hammes, but I find his testimony to be incredible. In the first place, neither Grafft nor Baudek had anything to gain by inventing a story about telling Lueck the ramps belonged to Hammes. Further, Deputy Baudek, as a law enforcement officer, constantly writes reports relating conversations and contacts with suspects and witnesses, in which accuracy and detail are necessary and there is no reason to believe he did not do so here. Finally, at hearing Lueck's testimony about his conversations with co-workers and law enforcement officers was vague, giving the impression that he either did not remember the specifics of the conversations or that he was deliberately avoiding giving direct answers. In any event, I find the testimony of Grafft and Baudek on these points to be more believable than Lueck's.

On Monday night, August 16, Lueck finally called Stark at his home and told him the ramps were in Room C of the Parts Shop, which Stark confirmed on Tuesday morning. Even then, however, Lueck only told Stark that he “found” the ramps earlier in the day and that he put them in Room C because they were road find and he thought Hammes would take them. By Monday night, Lueck had been informed that the ramps belonged to Hammes and he had no legitimate reason to not return them. Finally, on Wednesday Lueck went to the Sheriff’s Department and gave a statement wherein he admitted taking the ramps, but even then he continued to maintain that they were road find and that his actions were justified by his unfounded suspicions about Hammes. Whatever his beliefs at the time he took the ramps, there is no doubt in my mind that at some time over the course of the weekend Lueck learned that the ramps belonged to Hammes and failing to return them after that point was unquestionably theft. As it was, it seems Lueck only revealed the location of the ramps when he apparently became concerned about potential criminal liability and decided to cut his losses.

The allegation of dishonesty is well supported by the record, as well. On Saturday morning, Lueck lied to Deputy Baudek when he denied taking the ramps or having any knowledge of their whereabouts. His explanation that he was upset at the time is not credible. More likely is that he was not prepared to admit his actions until he had come up with an explanation that would hopefully protect him from liability. On Monday, he lied to Stark when he told him he had found the ramps earlier that day and that they were road find. At that point he had had the ramps for five days and knew through Deputy Baudek and Grafft that they belonged to Hammes. On Wednesday, he lied to Sergeant Lubinski when he gave him a written statement claiming that the ramps were found along the road on August 10, which they were not, and that he believed that Hammes intended to keep them wrongfully, which he did not. In each instance, Lueck falsifications served no purpose other than to protect his interests by hiding or justifying his actions in order to avoid the consequences for them.

The charge of improper conduct which might degrade the public image of other County employees is also supported by the record. Throughout the entire sequence of events, Lueck advanced the argument that Hammes had picked up the ramps along the road and intended to wrongfully keep them for his own use. He continued making this assertion even after he had been informed that the ramps belonged to Hammes and even gave a written statement to the Sheriff’s Department alleging wrongful conduct by Hammes. The records in this case are available to the press and the general public and would certainly have the possible effect of degrading Hammes’ public image if they became generally known. What is more, the record is replete with references to the fact that Lueck and Hammes had a bad relationship, and that Lueck had even played pranks on Hammes in the past. It is not unreasonable to suppose, therefore, that Lueck would have an interest in making Hammes look bad. Based on all the foregoing facts, therefore, I find that Lueck did commit actions in violation of the County Personnel Rules, and in which the County did have a disciplinary interest.

The second question is whether, having established the County’s disciplinary interest, termination was an appropriate level of discipline. In this regard, Union points to Lueck’s long, relatively clean, employment record as a mitigating factor. It also asserts that the County

conducted an inadequate investigation and that in the past the County has dealt with theft by employees much less severely. The County, on the other hand, asserts that honesty and trustworthiness are of paramount importance because the Department employees travel around the County and are frequently unsupervised. It argues that it cannot have employees who it cannot trust because of its obligations to the public.

The criticisms of the County's investigation are that it took several months after the events, that Assistant Corporation Counsel Lange did not interview Lueck and that Lange accepted the information he received about the ramps from John Hammes uncritically. The Union asserts that these deficiencies denied Lueck due process and militate against termination. I disagree. As noted by the County, Lueck's criminal prosecution was not resolved until he pled no contest on December 16, 2010. Thereafter, Lange conducted his investigation and issued his report on January 13, 2011, less than a month later. In my view, it was reasonable for the County to await resolution of the criminal case before it considered the consequences of Lueck's acts on his employment. I find there was not excessive delay under the circumstances. The failure to interview Lueck is also not fatal to the investigation in my view. As Lange testified at the hearing, when he conducted his investigation he had copies of the reports and statements written by all the participants, including Hammes, Grafft, Baudek and Lueck, himself and felt those, along with information obtained from Stark and John Hammes were sufficient. Notably, at the LOUDERMILL hearing prior to his termination, Lueck was afforded an opportunity to explain his actions or correct any mistakes in the record and Lueck chose to remain silent apparently because the County would not provide him with GARRITY rights.¹ If he had concerns about not being able to speak to Lange, or had additional information he wanted to offer, this was the time to correct that deficiency.

I also see no problem with Lange's interview with John Hammes, or the inferences Lange drew from it. Lange wanted to corroborate that the ramps belonged to Tim Hammes and that he had picked them up on Tuesday, August 10. John Hammes confirmed this for Lange and in a way that Lange testified seemed to be authentic recollection and not rehearsed. He deemed Hammes to be believable and nothing in the record suggests that Hammes was not credible. In short, therefore, I find no deficiencies in the investigation such that Lueck's discipline should be reversed.

¹ See: GARRITY v. NEW JERSEY, 385 U.S. 493 (1967). GARRITY provides that under the 5th and 14th Amendments an employee cannot be compelled to answer potentially incriminating questions in an internal investigation by the employer under threat of discipline for refusal to do so. Here, Lueck was not being compelled to answer questions as part of an ongoing investigation. The investigation was complete and the County was prepared to discharge him on the basis of its findings. Prior to doing so, however, the County was required to provide Lueck with an opportunity to hear and respond to the charges against him, pursuant to CLEVELAND BOARD OF EDUCATION v. LOUDERMILL, 470 U.S. 532 (1985) Here, because the investigation and the criminal proceedings had already been completed and the County was not seeking to question Lueck, no GARRITY protections were offered or required.

The Union also contends that Lueck was a victim of disparate treatment. This is based on testimony from Stark that sometime in approximately 1995-96 a former Department employee was caught stealing gasoline from the County pump. According to Stark, this employee was not terminated, but only had his use of County vehicles restricted. In the Union's view, this undercuts the County's argument that theft is so serious a matter that termination is the only appropriate consequence and also supports its view that Lueck was treated more severely than other similarly situated employees. I find this evidence insufficient to establish an argument for disparate treatment. In the first place, it is evidence of a single incident that occurred approximately 15 years before the ramp incident and is too far removed in time to be meaningful. Beyond that, however, Stark's testimony lacked significant details that would be needful for an objective comparison of the incidents. For one thing, the details of the employee's disciplinary file are confidential, so Stark had no knowledge of what, if any, other discipline may have been imposed. Also, since he did not participate in the investigation, Stark was unaware of any mitigating circumstances that might have affected the outcome in the other case.

I also take note of the Union's argument that Lueck is a long-time employee with little record of discipline in the past and that this ought to merit a lesser degree of discipline, and I have read the cases cited by the Union where the arbitrator took an employee's past service into account in reducing a termination to a lesser degree of discipline. In my view, that argument is inapplicable here. The primary case cited by the Union on this point is ONEIDA COUNTY, MA-14012 (Morrison, 1/21/09). In that case, a County employee was terminated for falsely claiming an additional hour's wage by failing to record on his timecard a paid lunch received while at a workshop. In reversing the termination, the arbitrator noted the employee's long and positive service record, but also his willingness to own up to what he had done when confronted. Further, the employee retired after the incident, so the employer was not confronted with the prospect of having to take back an employee it could not trust. In that regard, Arbitrator Morrison cited with approval the opinion of Arbitrator Paul Hahn in PULASKI SCHOOL DISTRICT, MA-11820 (Hahn, 2002): "Once an employer has reason to no longer trust an employee where honesty is involved, there is little that can be done to regain that trust." I concur, and note that in this case it appears that Lueck was motivated, at least in part, by animosity toward Hammes and never acknowledged that his actions were anything more serious than evidence of "poor judgment." At hearing, Lueck still maintained, in spite of all the evidence, that the ramps were road find that Hammes was planning to keep wrongfully and his continuing ill will toward his supervisor was palpable. It does not seem to me that this Lueck's behavior or attitude is remediable and that the County was within its prerogatives to conclude that termination was the appropriate level of discipline.

For the foregoing reasons, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

La Crosse County had proper cause for terminating Al Lueck from his position with the Highway Department. The grievance is dismissed.

Dated at Fond du Lac, Wisconsin, this 16th day of December, 2011.

John R. Emery /s/

John R. Emery, Arbitrator