

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**THE CITY OF WAUSAU**

and

**CITY OF WAUSAU DEPARTMENT OF PUBLIC WORKS  
LOCAL 1287, AFSCME, AFL-CIO**

Case # 143  
No. 70489  
MA-14976

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**Appearances:**

**Mr. John Speigelhoff**, Staff Representative, AFSCME, Wisconsin Council 40, AFL-CIO, 1105 East 9<sup>th</sup> Street, Merrill, Wisconsin 54452, appeared on behalf of the Union.

**Mr. Samuel C. Hall, Jr.**, Crivello Carlson, S.C., 710 N. Plankinton Avenue, Suite 500, Milwaukee, Wisconsin 53203, appeared on behalf of the City.

**ARBITRATION AWARD**

On January 6, 2011, Local 1287, AFSCME and the City of Wausau filed a request for grievance arbitration with the Wisconsin Employment Relations Commission, and subsequently selected John C. Carlson, Jr., a member of the Commission's staff, to hear and decide a dispute pending between the parties. A hearing was conducted on May 16, 2011 in Wausau, Wisconsin. Post-hearing briefs were filed by July 29, 2011.

This Award addresses the termination of employee J.B.

**BACKGROUND**

J.B., the Grievant, had been employed by the City of Wausau for approximately 25 years as of the date of his discharge. He worked as an Equipment Operator II in the Department of Public Works. He was terminated following the events that occurred on the morning of November 3, 2010.

The Grievant prepared a written summary of the events, as he recalled them. That summary provides:

I was headed down 1<sup>st</sup> Ave. between Stewart and Bridge around 7:15 A.M. when I came upon a yellow school bus with its red lights on and about 6 cars behind it. I waited a little while but it looked like they were waiting for someone so since I was right by an intersection I took a left and turned on 2<sup>nd</sup> Ave. N. I saw a cop had a kid pulled over and slowed down because he had his lights on. When I got closer he was coming out on to the road with his hand up and I figured he was going to the passenger door but then he started walking out in the front of me so I hit the brakes. I remember him asking if I was in a hurry and I said yes I was. He asked me why and I told him I had to get to both high schools to pick up election equipment. Somewhere in the conversation I think at the beginning I said I wasn't speeding and the officer said yes I was. He then said I'm not going to give you a ticket or tell your supervisor but I had better slow down. I left.

The Grievant's testimony is consistent with his written summary. He acknowledged flooring the gas pedal but said he did not squeal his tires or hit another vehicle. He clarified that while he accelerated rapidly, he did not exceed the speed limit. He noted that there were no pedestrians in the area. After accelerating, the Grievant noticed Officer Kurtzhals flagging down his truck. The Grievant was surprised that the officer would cross the path of his moving truck on foot, and he braked quickly. The Grievant also was surprised that the officer was pulling him over, because he did not believe that he had done anything to warrant law enforcement attention.

Later that day, the Police Officer involved, Mark Kurtzhals, filed an e-mail report summarizing the incident. He did so after having reviewed the Grievant's driving record and having concluded that the Grievant had a poor driving history. Officer Kurtzhals' report stated:

On 11-03-10 at approx. 0720 I was assisting with an investigation in the 300 block of north 2<sup>nd</sup> Avenue. I was standing near my squad car on 2<sup>nd</sup> Avenue when I heard a vehicle engine rev up drastically.

I looked to the south and observed a yellow colored pickup truck turn w/b onto Spruce Street from 1<sup>st</sup> Avenue. This truck accelerated rapidly to a speed I believed to be well in excess of the 25 mph speed limit in the residential area. The truck turned north bound onto 2<sup>nd</sup> Avenue and again briefly accelerated before abruptly applying its brakes as it approached our squad cars.

I walked to the driver side of the vehicle and asked the operator of the DPW truck if he was in a hurry for some reason. His response was something to the effect of, "yeah, I'm in a hurry". I said I did not know what emergency a DPW truck driver would be involved in. He said he was in a hurry to get to a school to clean it out after an election.

I advised him the way he was driving was not acceptable. I asked for his driver's license and he gave it to me, identifying himself as [J.B. DOB: \_\_\_\_]. I told [B.] that I had never met him before, that I did not intend to issue him a citation at that time, but he did need to slow down. [B.] seemed rather upset about something and was short in his responses with me.

After he left the area, I checked [B.'s] driving record. Although he was within his times for his occupational license, the content of the record, along with his demeanor and driving led me to contact my supervisor, Lt. Pankow.

Officer Kurtzhals testified that after he had filed his initial report, he met with the Police Chief to review the matter. During that meeting, the Chief invited Officer Kurtzhals to add detail to his report (which he did), and to issue a citation, if he believed that to be in order. Officer Kurtzhals declined to issue a citation, feeling that he had exercised discretion under the circumstances, and that it would be inappropriate to second guess that decision. However, Officer Kurtzhals had stopped the truck because he did believe the Grievant had been speeding, and that his driving had been reckless and unsafe.

On November 8, 2010, the Grievant filed a more detailed narrative:

On 11-03-10 at approx. 0720 I was assisting with an investigation in the 300 block of north 2<sup>nd</sup> Avenue. I was standing near my squad car on 2<sup>nd</sup> Avenue when I heard a vehicle engine rev up drastically.

I looked to the south and observed a yellow colored pickup truck turn w/b onto Spruce Street from 1<sup>st</sup> Avenue. This truck accelerated rapidly to a speed I believed to be well in excess of the 25 mph speed limit in the residential area. The sound created by the engine was very loud and far in excess of what would be necessary acceleration.

The truck turned north bound onto 2<sup>nd</sup> Avenue and again briefly accelerated. I approached its location on 2<sup>nd</sup> Avenue while on foot and began waving both of my hands in an effort to gain the operator's attention. The operator then abruptly applied the brakes as he approached our squad cars.

I walked to the driver side of the vehicle and asked the operator of the DPW truck if he was in a hurry for some reason. His response was something to the effect of, "Yeah, I'm in a hurry". This response was quite short and sarcastic. It appeared to me that he was upset about something. Whether that was me stopping him or some other issue I do not know. I said I did not know what emergency a DPW truck driver would be involved in. He said he was in a hurry to get to a school to clean it out after an election.

I advised him the way he was driving was not acceptable. I asked for his driver's license and he gave it to me, identifying himself as [J.B. DOB: \_\_\_\_ ]. I told [B.] that I had never met him before and did not know whether writing a citation or contacting his supervisor was the right thing to do, but he did need to slow down. [B.] remained upset, appeared to be in a hurry to leave and was short in his responses with me. I had a male detained at the time for a domestic disturbance and did not believe deviating from that to write a citation was appropriate.

After he left the area, I checked [B.'s] driving record. I found that his commercial driver's license was disqualified, that his class D and M operator's licenses were revoked and he was under an occupational permit with 3 OMVWI's on his record. Although he was within his times for his occupational license, the content of the record, along with his demeanor and driving led me to contact my supervisor, Lt. Pankow. This incident occurred on a weekday at 7:20 a.m. when children were likely en route to school. I had been standing on the street with the person I had arrested as well.

I have been a patrol officer with the Wausau Police Department for nearly 15 years. In that time I have observed DPW trucks being operated hundreds if not thousands of times. I have never to this point seen a DPW truck driven in this reckless manner in all of that time. I was and still am concerned for the safety of both the citizens of Wausau and myself, if B.'s driving habits are not addressed. That is the reason for the report to my supervisor.

Following an investigation and interviews, the City terminated the Grievant by letter, dated November 9, 2010:

Effective immediately, I hereby terminate your employment with the Department of Public Works. I conclude after further investigation, that your conduct warrants discharge. Your pattern of behaviors, especially disregard to property and safety of others and the cumulative discipline you have received, have left no choice other than to terminate your employment.

The Grievant has a significant disciplinary history, including a number of accidents. His disciplinary history falls into two general categories: tardiness and careless operation of equipment/damage to property.

The Grievant's formal tardiness/absenteeism record includes the following:

1. 9/3/86 Oral reprimand
2. 6/10/92 Oral reprimand
3. 7/22/92 Written reprimand
4. 4/19/93 Written reprimand
5. 4/27/93 3-day suspension, absenteeism and tardiness
6. 12/9/93 Memo-tardiness
7. 8/13/96 Written reprimand
8. 10/19/98 Written reprimand
9. 8/29/00 Written reprimand
10. 12/19/00 Written reprimand
11. 3/21/01 Written reprimand
12. 7/31/01 Written reprimand

The Grievant's formal disciplinary record for careless operation of a vehicle/equipment includes:

1. 6/5/91: Grievant was given a suspension for the loss of his CDL for Operating While Intoxicated.
2. 1/2/92: Written reprimand: Grievant ran a red light while plowing and damaged another vehicle; was issued a citation
3. 4/16/92: Oral reprimand: Grievant damaged a City vehicle by driving with the brake engaged
4. 1/13/97: Memo: Grievant hit a parked car while plowing
5. 7/6/98: Written reprimand: 2 incidents of damage to property
6. 2/8/99: Written reprimand: Damage to property while plowing

7. 6/10/02: Written reprimand for a series of incidents:
  - a. 1/3/02: Hit a tree
  - b. 2/27/02: Hit a planter
  - c. 4/25/02: Backed his dozer into a tandem
  - d. 5/21/02: Started a compressor with a valve open
  - e. 5/24/02: Trailer came off a mismatched hitch
8. 10/25/04: 1-day suspension: left the tarp on his box and had a load of asphalt dropped on the tarp
9. 2/1/07: Written reprimand:
  - a. 12/11/06: Damaged a sander
  - b. 12/13/06: Hit a ballard
  - c. 1/5/07: Damaged his vehicle when he backed into something
10. 3/5/09: 1-day suspension: Lost control of a Holder Tractor and hit a private vehicle. Supervisor felt he was driving too fast for conditions
11. 2/8/10: 2-day suspension: Failed to set the brakes on a tractor which moved and did damage to an overhead door
12. 6/30/10: 5-day suspension: Cut off the end of an air hose attached to a blow gun in need of repair. Disciplined for willful destruction of equipment.

### ISSUE

The parties were unable to stipulate to the precise wording of the issues. The City suggests that the issues be stated as follows:

- 1) Was there just cause for the discharge of the Grievant?
- 2) If not, what is the appropriate remedy?

The Union proposes the following statement of the issues:

- 1) Did the City violate the Collective Bargaining Agreement when it discharged J.B. from employment on November 9, 2010?
- 2) If so, what is the appropriate remedy?

I believe that there is no substantive difference of consequence between the parties' proposed statements.

**RELEVANT PROVISIONS OF THE  
COLLECTIVE BARGAINING AGREEMENT**

**ARTICLE 5 – MANAGEMENT RIGHTS**

The City possesses the sole right to operate City government and all management rights repose in it but such rights must be exercised consistently with the other provisions of this contract. Those rights include but are not limited to the following:

- A. To direct all operations of City government.
- B. To hire, promote, transfer, assign and retain employees in positions with the City;
- C. To suspend, demote, discharge and take other disciplinary action against employees for just cause;
- D. To relieve employees from their duties because of lack of work or other legitimate reasons;

. . .

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this agreement (see Exhibit 'A' for a complete list of these employees) may be processed through the grievance and arbitration procedures contained therein, however, the pendency of any grievance or arbitration shall not interfere with the right of the City to continue to exercise these management rights.

. . .

**ARTICLE 14 – GRIEVANCE PROCEDURE**

- 5. Decision of Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance. The arbitrator shall not modify, add to or delete from the express terms of this agreement. If a discharged employee is found to have been unjustly discharged, the employee shall be reinstated to the employee's former position and receive pay for all lost time or some other appropriate action as the arbitrator may decide.

. . .

**ARTICLE 35 – RULES OF PERSONAL CONDUCT FOR EMPLOYEES**

Rules of City employees established by the City are hereby agreed to be by the individual employees and the Union. Any other work rules which the City shall establish shall be subject to the grievance procedure based upon their reasonableness. The work rules set forth in this agreement are as follows:

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F. It is required that proper care be exercised in the use of City tools and equipment or other property. Where such tools are lost or damaged, and an employee is found to be negligent therein, the resulting money damages will be charged to said employee.

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N. Discipline or Discharge: The City agrees that no employee in the bargaining unit represented by the Union will be disciplined except for just cause. An employee may appeal any discipline or discharge cases through the grievance procedure.

**RELEVANT PROVISIONS OF THE WAUSAU MUNICIPAL CODE**

**10.01.001 Disorderly conduct with a motor vehicle.** No person shall, within the city, on public or private property, by or through the use of a motor vehicle, motorcycle, snowmobile or mini-bike, under circumstances which tend to cause or provoke a disturbance or annoy one or more persons, engage in violent, abusive, unreasonably loud or otherwise disorderly conduct, including but not limited to unnecessary or deliberate or intentional: spinning of wheels; squealing of tires; revving of the engine; blowing the horn(s); causing the engine to backfire; or causing the vehicle, while commencing to move or in motion, to raise one or more of its wheels off the ground. Such conduct is declared to be both unlawful and a nuisance, and whoever is adjudged guilty of such conduct shall forfeit not less than twenty-five dollars, nor more than two hundred dollars, and the person or persons may also be enjoined from engaging in such conduct in the future. (Ord. 61-4283 §1, 1975).

**POSITIONS OF THE PARTIES**

The City maintains that over his tenure with the City, the Grievant was involved in at least 12 motor vehicle accidents using DPW equipment and additionally engaged in reckless or intentional actions that caused damage to City property. The incident of November 3 represents yet another incident of reckless use of his motor vehicle.



The City also argues that the appropriate standard of review in this matter requires consideration of 1) whether the Grievant committed the wrongdoing alleged; and 2) whether the termination assessed by the City should be upheld. The City contends that the record supports its decision on both matters. The Grievant was terminated in part for the uncontested fact that he unnecessarily revved his engine and floored the accelerator of his City-issued vehicle while working. The City holds that such behavior is inherently dangerous and also harmful to the city's equipment. In the City's view, the Grievant was operating in violation of the Municipal Code.

According to the City, the Grievant's driving was unacceptable, unjustifiable and dangerous, and Officer Kurtzhals had probable cause to issue a citation. The City's safety concerns were magnified by the "...fact that there were undisputedly children in the approximate area of where Mr. B. was operating his vehicle in this manner."

The City reviewed the Grievant's disciplinary history and concluded that it demonstrates a consistent pattern of careless and reckless behavior on the part of the Grievant in the operation of City equipment and vehicles. Progressive discipline has not altered his conduct and treatment of City equipment. The City is concerned that it bears significant potential liability if it continues to employ the Grievant. It asks the question, should it have opted, instead, for a less significant discipline, such as a suspension, which has shown no signs of being effective? Had it done so and had the next incident caused an injury, the city would face significant criticism for retaining an employee with this pattern of behavior.

The Union concedes that the Grievant revved his engine; however, it argues that revving the engine of a City vehicle does not equate to speeding, reckless driving or equipment damage. In essence, according to the Union, the City has exaggerated the events to support its decision to discharge the Grievant. The record establishes that the Grievant did not squeal his tires, nor did he exceed the posted speed limit. In addition, the Union points out that there is no evidence that the vehicle suffered any damage. No one inspected the vehicle after the incident.

The Union also contends that the absence of a traffic citation further demonstrates the lack of just cause for discharge. The police officer's role was to determine whether probable cause for a citation existed. The officer decided not to issue a citation. It is not for this Arbitrator to now review the events of the day, make an independent determination as to a municipal ordinance violation, and then bootstrap that decision to a finding of just cause for discharge.

The Union points to the record testimony of the Grievant that there were no children present on the morning of November 3. Officer Kurtzhals could not recall whether there were any pedestrians on the street at the time. The Union maintains that officer Kurtzhals was focused on the arrest he was making; therefore, his observation that the Grievant was speeding was simply wrong. The City truck was equipped with a GPS. That device never recorded a speed higher than 27 miles per hour.

In its reply brief, the City contends that the GPS is irrelevant to this dispute. The GPS mounted on the Grievant's vehicle takes a snapshot of the vehicle's progress every minute. It is not a continuous monitoring. According to the City, the device is too limited to provide an accurate measurement of speed at most particular moments.

### DISCUSSION

Don Scare, the Street Superintendent, and Brad Marquardt, Director of Public Works, each testified that they regarded the events of November 3 to be sufficient, standing alone, to warrant discharge. I disagree. What occurred was that the Grievant handled his truck in an immature and reckless manner. He neither injured anyone nor damaged any property. His driving was the kind of stunt that would normally prompt a warning that it is not acceptable to mishandle his vehicle. While I do not excuse his behavior, standing alone, it is not of the sort that warrants a discharge.

However, this behavior does not stand alone. As the Grievant proceeded on his way, he attracted the attention of Officer Kurtzhals, who was in the midst of an arrest. The officer heard, and subsequently observed, the Grievant. I do not think the officer would have been inclined to leave his prisoner handcuffed on the sidewalk and proceed into the street to flag down a City truck, had that vehicle been proceeding in a routine fashion. I do believe the truck must have been operated in a way to attract attention. I credit Officer's Kurtzhals' report regarding how the vehicle was being operated, because he had no reason to exaggerate and the report explains his actions.

Kurtzhals stopped the vehicle and decided to warn the Grievant but not issue a citation. That decision fell within his discretion. It appears to reflect common sense, given the circumstances. He effectively reconsidered his commitment not to pass the information along, after he had reviewed the Grievant's driving record. I believe that Kurtzhals was alarmed by his observation as to how the Grievant was driving, and intervened to slow him down. A later review of the Grievant's driving record gave Kurtzhals a perspective on the Grievant as a driver. That said, when he met with the Chief, Officer Kurtzhals was invited to issue a citation, and declined to do so.

There was a good deal of back and forth regarding whether the Grievant was speeding. It is impossible to tell from this record. The police officer, trained to monitor speed without the aid of a radar device, testified that he was speeding. The GPS indicated that he was not, but its measurements were less than precise. What is not in dispute is that the Grievant put the pedal to the floor as he drove, and did so in a manner that attracted the attention of a Police Officer located approximately a block and a half away. I think it is fair to conclude from the record that the Grievant was handling his vehicle in a rough manner. Such operation is not good for the vehicle and serves to lessen the operator's control.

The real question presented in this proceeding is whether the November 3 event is the straw that broke the camel's back. The Grievant has a substantial disciplinary history. The tardiness discipline ended in 2001 and does not factor into my decision. A review of the Grievant's discipline history related to his careless operation of a vehicle and equipment, however, paints a very different portrait. The disciplinary record goes back 19 years. Some of the entries reflect damage done while plowing snow. I recognize that it can be difficult to plow under winter snow conditions and that some accidents and property damage are to be expected. All parties understand that reality and factor it into their decisional process, including the reasonableness of discipline for damage to property.

However, some of the discipline was issued under circumstances where the Grievant acted carelessly or negligently, without weather being an apparent factor. There are incidents of driving with the brake engaged, hitting stationary objects, starting a compressor with a valve open, using a mismatched hitch – incidents that appear to reflect an inattention to the job or thoughtlessness.

Moreover, some of the discipline reflects willful behavior. Cutting off the end of a hose cannot be described as an accident. In addition, the various citations for Operating While Under the Influence reflect a decision to drink and then drive – illegal conduct that threatens lives.

This is the context in which the Grievant's actions must be measured. He has been warned on numerous occasions to be more careful operating his work vehicle. These warnings have been issued over a period of approximately 19 years. They have been both informal and formal. In the approximately 20-month period preceding the termination, the Grievant was suspended 3 times. Each of these suspensions involved damage to property brought about by either negligence or willful harm to property. I think the message was sent. The City has directed the Grievant to take better care of its property and to be more attentive to how he operates equipment. I do not think, however, that the message has been received. Flooring the gas pedal and revving the engine in a residential neighborhood is both a nuisance and a willing reduction of the driver's control of the vehicle. There was no reason to do so; the act was willful and gratuitous. It is also telling that the Grievant was surprised that he was pulled over. He did not understand why the Police Officer would single him out. The Grievant has repeatedly been disciplined for accidents arising from his carelessness or loss of control of his vehicle. The poor driving behaviors that contributed to his driving history have not been corrected.

The City asks what it should have done. The Grievant does not recognize that his driving habits are a problem. Corrective discipline has not been effective. The discipline spans approximately 19 years. There has been plenty of property damage. I do not think that the City is required to endlessly warn the Grievant or to wait for an accident causing injury. While the immediate event is relatively minor, it is yet one more instance in a continuing saga of vehicle/equipment mishandling. I believe that the City is entitled to be done with it.

**AWARD**

For all of the foregoing reasons, the grievance is denied.

Dated at Madison, Wisconsin, this 22<sup>nd</sup> day of December, 2011.

John C. Carlson, Jr. /s/

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John C. Carlson, Jr., Arbitrator