

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 569, AFL-CIO

and

JUNEAU COUNTY

Case #: 158

No. 70686

MA-15025

Appearances:

Neil Rainford, Staff Representative, Wisconsin Council 40, AFSCME Local 569, AFL-CIO, 8033 Excelsior Dr., appearing on behalf of the Juneau County Highway and Public Works Union.

David Lasker, Juneau County Corporation Counsel, Courthouse Annex – Suite 16, 220 East La Crosse St., Mauston, Wisconsin 53948, appearing on behalf of Juneau County.

ARBITRATION AWARD

Pursuant to the terms of a collective bargaining agreement (CBA) between the Juneau County Public Works Committee (the County) and Local 569, Public Works Employees, Council 40, AFSCME, AFL-CIO (the Union), the parties selected the undersigned from a panel of arbitrators provided by the Wisconsin Employment Relations Commission to hear and resolve a dispute between them. The dispute involves whether the County had just cause within the meaning of the CBA to terminate the Grievant's employment for taking various items from the landfill, his neglect to charge a disposal fee for the items, his subsequent sale of the items to a landfill patron for his own profit, and his attempts to conceal the transaction, including dishonesty about it while under investigation. A hearing in the matter was held on August 3, 2011, in the County Board Room of the Mauston Courthouse, 220 East State Street, Mauston, Wisconsin. A duly-appointed court reporter recorded the proceedings and provided copies of the transcript to the parties and the undersigned. The parties filed written briefs, the last of which was received on November 29, 2011. Although Article 6 of the CBA provides in part that "[t]he Arbitrator shall render his/her decision within thirty (30) days of the hearing or submission of final argument", the parties agreed on record to waive this requirement.

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STIPULATED ISSUES

The parties stipulated in writing to two issues: “Was there just cause for the termination of the employment of [the Grievant] or, if not, what is the appropriate remedy?”

RELEVANT CONTRACT LANGUAGE

The relevant contract language includes the following:

ARTICLE 5 – EMPLOYER’S RIGHTS

Subject to the provisions of this contract and applicable law, the Employer possesses the right to operate the county government and all management rights repose in it. These rights include . . . and . . . are not necessarily limited to the following:

. . .

- D. To suspend, demote, discharge and take other disciplinary action against employees for just cause . . .

. . .

FACTS

Overview of Grievant’s Employment with the County

The Grievant was an employee of the Juneau County Public Works Division from approximately January of 2006 to December of 2010. In approximately May of 2007, that Division’s Landfill and Highway Departments merged. The Grievant began his employment as a landfill scale operator and subsequently transitioned to a landfill operator. For the last four to five months of his County employment, he worked as a highway patrolman. As a landfill scale operator, the Grievant’s primary duty was to weigh incoming vehicles filled with items to be deposited at the landfill, weigh the vehicles after they had disposed of those items, and take payment for the disposal based on the calculated weight of items disposed. The Grievant’s duties as a landfill operator expanded to include *inter alia* bookkeeping and secretarial tasks associated with the landfill office and the operation and maintenance of heavy equipment. In late summer or fall of 2010, the Grievant signed for a vacant position as a highway patrolman and was awarded that position based on his seniority over the only other applicant, a highway laborer named Damian Weiland. On several occasions, the latter had told his supervisor, Rick Potter, he wanted to be a highway patrolman and the section to which he (Weiland) would be assigned would not matter. The highway patrol position paid more than Weiland’s highway laborer position.

The Grievant had no previous experience as a highway patrolman or highway laborer. He was to undergo a probationary/training period of 240 hours for the highway patrol position, at the end of which he was to take a final exam. At times during his probationary period, the Grievant worked with Weiland; however, the latter was uncooperative when the Grievant asked him work-related questions. The Grievant was not allowed to complete the probationary period or to take the final exam, because his employment was terminated less than one week prior to his completion of the required working hours.

Events Leading to, and Including, Termination of Grievant's Employment

In late summer, 2009, Alan Gehri brought approximately fifteen to thirty lights to the landfill that had been used in a school. The Grievant and/or Todd Kolpien assisted Mr. Gehri, who explained that the lights had been replaced with more efficient ones but were still functional. Contrary to proper landfill protocol, neither the Grievant nor Mr. Kolpien required Mr. Gehri to drive across the scale or to pay the appropriate, weight-based disposal fee. The lights were loaded into boxes, placed near some newspapers, and later moved inside a shed by Mr. Kolpien at the suggestion of the Grievant, who had heard a forecast for inclement weather. Shortly after Mr. Gehri dropped off the lights, some of them were given away.¹

Subsequently, Brent Lenorud, the owner of a disposal business that had contracts with Juneau County, arrived at the landfill. Lenorud expressed an interest in the lights that Gehri had dropped off for use in a pole shed that he planned to build. The Grievant and Lenorud then reached an agreement by which Lenorud would purchase ten lights for \$100. Lenorud gave the Grievant a cash payment of \$100, and the latter kept the money without recording the transaction or issuing a receipt.

Following this transaction, sometime in early 2010, landfill employee Todd Kolpien was investigated for taking material from the landfill for his personal use.² The investigation did not include the Lenorud transaction, of which management was not yet aware. The investigation prompted Kolpien to resign. During the investigation of Kolpien or shortly after his resignation, the Grievant telephoned Mr. Lenorud and asked him not to reveal that the Grievant had sold him the lights at the landfill.

At some point after the Grievant's phone call to Lenorud, Damian Weiland learned from Lenorud or from one of Lenorud's employees that the Grievant had sold the lights to Lenorud for \$100. Weiland did not immediately act on this information; rather, in November of 2010, as the Grievant was nearing completion of the probationary period

¹ The giving away of some lights, even if given away by the Grievant, was not a basis for terminating the Grievant's employment.

² The record is inadequate to support conclusions regarding what items Kolpien took and what he did with them.

for the highway patrol position that he had secured based on his seniority over Weiland, the latter informed his supervisor, Rick Potter, of the Grievant's sale of lights to Lenorud. Potter testified that at first, he did not think much of the information and did not disclose it to Commissioner Weiss until a day or two later. Upon receipt of this information from Potter on November 12, 2010, Weiss called a meeting with Potter and Weiland the same day, during which Weiland reiterated what he had told Potter – that the Grievant had sold Brent Lenorud lights for \$100. Weiss thus called a meeting with the Grievant and a Union representative on November 17, 2010. Also present were Attorney Lasker and Supervisor Potter. During the meeting, the Grievant was confronted with the allegations and shown one of the lights that Gehri had brought in. The Grievant admitted having knowledge of the lights and Mr. Lenorud's interest in them but emphatically denied having sold or even given any lights to Lenorud. In addition, the Grievant acknowledged that taking the lights would be theft, an offense that could result in the termination of his employment. Following the meeting, the Grievant was suspended with pay pending further investigation.

On or about November 18, 2010, Mr. Weiss contacted the Juneau County Sheriff's Office regarding the matter. Assigned to investigate it, Undersheriff Craig Stuchlik proceeded to interview Weiss on November 22nd, the Grievant on November 24th, Brent Lenorud on November 30th, Allan Gehri on December 1st, and Damian Weiland on December 6, 2010. When questioned by Stuchlik, the Grievant continued to maintain that he did not sell the lights to Lenorud. At the conclusion of the interview, the Grievant asked Stuchlik his opinion regarding whether the lights technically belonged to the landfill if they never had crossed the scale.

Stuchlik concluded in part from his investigation that the Grievant had sold the lights to Lenorud for \$100 and had kept the money. In so doing, the Grievant, in Stuchlik's opinion, had stolen county property and had violated the Juneau County's Personnel Policy and Code of Ethics. Nevertheless, the Grievant was never charged with theft or any other crime.

Following the investigation by the Sheriff's office, the Juneau County Highway and Public Works Committee met on December 17, 2010, to consider Commissioner Weiss's recommendation to terminate the Grievant's employment. In a letter to the Grievant dated December 17, 2010, the Committee informed him that effective immediately, his employment was terminated. The letter also detailed the grounds for the discharge. It stated in relevant part:

Dear [Grievant's name]:

You have been on a suspension with pay since November 17, 2010, pending further investigation into the allegation that you sold County property and kept the money for yourself sometime in the summer

of 2009. Investigation by the Juneau County Sheriff's Department now leads us to the conclusion that the allegation is true and that, therefore, you engaged in theft of County property and misconduct in public office as well as numerous violations of the Juneau County Personnel Policy and the Juneau County Code of Ethics. Further, we believe that you lied to the Director of the Public Works Department, Dennis Weiss, in an effort to cover up your wrongdoing.

Accordingly, your employment is hereby terminated, effective immediately.

During the investigation by the Sheriff's Department on November 24, 2010, you confirmed to Undersheriff Craig Stuchlik that one cannot buy anything from the landfill. You told him that anyone wishing to buy anything from the landfill would have to go through Dennis Weiss. You further confirmed that you received the lights that are the subject of this allegation, when they were brought in, and that you knew they had not been noted in the landfill records or weighed in on the landfill scale, as would have been proper.

During the investigation, Undersheriff Stuchlik interviewed a citizen named Brent Lenorud. He stated to the Undersheriff that he only spoke to you about the lights. Lenorud confirmed unequivocally that he gave you a \$100 bill in payment for the ten lights he received. Your behavior was such that Lenorud believed you were authorized to sell him the lights at the time of the transaction. Lenorud further stated that, while this investigation was going on, you called him and asked him not to tell anyone about the lights and the exchange of money for the lights.

Undersheriff Stuchlik also interviewed Allan Gehri, who was the person that brought the lights into the landfill in the first place. He confirmed that when he arrived at the landfill with the lights he did not get weighed in as other people do when they bring items to the landfill. He further stated that when the lights were received he saw that they were placed in the shed just behind the scale office, which was contrary to normal practice and was consistent with the intent to sell them illegally.

Mr. Lenorud and Mr. Gehri are both credible citizen witnesses, who have no reason not to tell the truth in this case. You have flatly and persistently denied any knowledge or any involvement whatsoever regarding the lights when confronted by either Mr. Weiss or Mr. Stuchlik. You even went so far as to try to convince the Undersheriff that the lights were not County property because they had not been weighed in. Your credibility in this case is totally lacking.

Your wrongful actions constitute clear violations of section 2.4 of our Personnel Policy, which forbids the use of your county position for personal financial gain. You have made unauthorized use of County property, stolen County property, and used your position for personal profit, all of which are grounds for harsh disciplinary action under section 10.1 of the Personnel Policy. Under section 10.2, “the degree of disciplinary action shall be tailored to the offense. Progressive discipline is not required for a serious instance of misconduct, which would more properly be handled by immediate termination. In this case, your actions likely are in violation of two applicable criminal statutes, Wis. Stats. § 943.20 (misdemeanor theft) and Wis. Stats. § 946.12 (felony misconduct in public office). Several provisions of the County’s Code of Ethics also have been violated. Immediate termination of your employment is really the only disciplinary action properly tailored to this offense.

...

Investigation of Damian Weiland

On November 17, 2010, the same day that the Grievant was suspended, another Highway Department employee notified him that Damian Weiland’s truck was parked at the highway shop and was filled with a load of scrap to be taken to Manthey’s, a local recycler. The Grievant then went to the shop, took photos of Weiland’s loaded truck (one of which shows a hupcap), and proceeded to Manthey’s. There, the Grievant alerted Ann Manthey to the truck’s imminent arrival and described Weiland. A couple of days later, the Grievant called Ms. Manthey and confirmed that Weiland had indeed dropped off a load of scrap and received money for it.

After he was informed of these events, Commissioner Weiss telephoned Weiland to inquire about the matter. Weiss believed Weiland’s explanation that the material in his truck was from his father’s house and had not been collected on company time. Weiss accepted Weiland’s explanation without discussing the matter with Potter, with any of the Highway Department employees, or with anyone from the Sheriff’s Department. After the Grievant’s employment was terminated, Damian Weiland was assigned to the Grievant’s former position as a Highway Patrolman.

Overview of Employer Policies and Employee Practices Re: Found and Disposed Goods

Prior to the termination of the Grievant’s employment, the County had no written policies regarding employees’ authorization to appropriate items found on the highway or brought to the landfill during the course of employment; however, for decades, the highway employees understood that they could, and actually did, take possession of highway finds for their own use and/or profit from future sales. Such highway finds included tires, abandoned trailers, scrap metal, broken sign posts, and wood from fallen or removed trees to be converted to firewood. Highway employees receiving wood most often used, but sometimes sold, it. Those who found tires sold them for up to \$100.

Moreover, some highway employees – including Scott Fritz and Damian Weiland – gathered scrap metal found along the highway during the course of their employment and later sold it. Manthey’s was one business that bought tires and scrap metal from highway employees. Such appropriation of highway finds for personal use and/or profit was widespread and not concealed. Rick Potter, the Superintendent of State Highways for the County and Weiland’s supervisor, admitted as much in testimony and conceded that prior to becoming part of management, he, too, kept highway finds for his own use. The sole, loosely understood restriction on employees under this unwritten policy was that a highway find of value had to be held for three to four weeks before the finder could take ownership of it.

The unwritten policy prior to the discharge of the Grievant regarding landfill employees’ authorization to take items brought in for disposal was similar to that of the highway division with one notable difference. While landfill employees could take disposed items for their own use, they could not sell such items for personal profit – at least not without management’s prior permission. Notwithstanding this policy, prior to the termination of the Grievant’s employment, not only landfill but also highway employees, including Scott Fritz and Damian Weiland, took items from the landfill, some of which they later sold to Manthey’s.³ These items varied and included without limitation golf clubs, fishing poles, and scrap iron. Weiland and Fritz brought items found along the highway to the landfill for disposal during their work shifts and then filled their emptied trucks with other landfill items, including scrap metal to be sold at Manthey’s for personal profit.

New Policy Following Termination of Grievant’s Employment

Shortly after the termination of the Grievant’s employment, either in December of 2010 or January of 2011, the County issued a new policy *via memorandum* sent to all highway and landfill employees. Under the new policy, items found along the highway or brought to the landfill are not to be taken by County employees for personal use or future sale.

³ Highway Commissioner Weiss testified that the landfill policy prior to the termination of the Grievant’s employment required employees wishing to take (but not sell) items from the landfill to obtain prior permission and to pay scrap price for the items. However, Mr. Weiss has only been the Highway Commissioner since March of 2007 and does not work at the landfill. Moreover, although he testified that he believed employees taking items that had been brought to the landfill telephoned him first for permission, he conceded that he did not receive many such calls and did not give any specific example of such a call. By contrast, George Treml, a landfill employee from 1984 until he became a highway employee approximately two years prior to the hearing in this matter, testified that landfill employees thought they could, and often did, take landfill items for their personal use without making any payment. I am skeptical whether Commissioner Weiss’s largely unfulfilled expectations of employees obtaining prior permission and making scrap-price-payments for landfill items for personal use rises to the level of a “policy”. In any event, even assuming such a “policy” existed, the greater weight of the evidence suggests that both highway and landfill employees took things from the landfill for their own use without making any payments to the County.

Professional and Personal Relationships

Brent Lenorud has known and been friends with Mr. Weiss for most of Lenorud's adult life, even before Lenorud began contracting with the County. Prior to Lenorud's contracts with Juneau County, Lenorud and Weiss knew each other from fire department meetings. In addition, Lenorud and Damian Weiland graduated high school together and were good friends. Although their friendship is no longer as close, they still talk about once a month. Damian Weiland's supervisor, Rick Potter, has known Weiland since he was a child. Potter's son and Damian were friends as boys and played basketball together. Mr. Potter is friends with Damian Weiland's father and goes fishing with him. As Damian's supervisor, Rick Potter sees Weiland daily.

Grievant's Prior Discipline

Prior to the termination of his employment, the Grievant had received the following discipline:

<u>Date</u>	<u>Act or Omission</u>	<u>Discipline Imposed</u>
August 17, 2010	Failure to lock safe	Verbal Warning
August 26, 2010	Failure to timely complete bank deposits	Written Warning
June 1, 2010	Unauthorized personal use of County computer (game playing)	Written Warning

...

Other facts are set forth below where appropriate.

ANALYSIS

Article 5, Section D of the CBA empowers the Employer to discharge employees for "just cause". Because the CBA does not define "just cause", I shall identify and apply an appropriate construction of the standard.

I. APPROPRIATE CONSTRUCTION OF "JUST CAUSE"

The stipulated issues noted above accord with the construction of "just cause" set forth in Frank Elkouri & Edna Asper Elkouri, How Arbitration Works 948 (Alan Miles Ruben ed., 6th ed. 2003):

There are two “proof” issues in the arbitration of discipline and discharge cases. The first involves proof of wrongdoing; the second, assuming that guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, concerns the question of whether the punishment assessed by management should be upheld or modified. . . .

II. APPLICATION OF JUST-CAUSE STANDARD

Applying this construction, I consider 1) whether the Grievant engaged in the conduct on which the termination of his employment was based, and 2) whether the termination should be upheld or modified.

A. The Grievant Engaged in the Conduct at Issue

As factual grounds for the termination of the Grievant’s employment, the County alleges that he 1) did not charge Alan Gehri the required disposal fee for the lights; 2) sold ten of the lights to Brent Lenorud for \$100 without prior permission and pocketed the money; 3) asked Lenorud not to disclose that the Grievant had sold him the lights; and 4) falsely denied the occurrence of the transaction to management and Undersheriff Stuchlik. I find that these allegations are true.⁴

1. Alan Gehri Was Not Charged a Disposal Fee.

It is undisputed that Alan Gehri’s vehicle was not weighed and that he was not charged a disposal fee for the lights. The Grievant admitted as much in testimony:

. . . You didn’t see something like this come into the landfill every day, and I guess I just thought I was doing a guy a favor by getting rid of these lights, and I probably was wrong for not charging him coming across the scale, but at the time that he asked if we could just give them away, I didn’t even think about it. The lights were left there and he [Gehri] left.

Whether management would have approved a request for a disposal fee waiver for receiving something of value that might be reused was not addressed, but there is no evidence that the Grievant or anyone else even made such a request.

⁴ After hearing in this matter, the County filed a motion to supplement the record with a written acknowledgment by the Grievant of his receipt of the Personnel Policy in 2008 and his receipt and agreement to follow the Juneau County Code of Ethics. The County offers these documents to impeach the Grievant’s testimony that he had never received copies of the Personnel Policy or Ethics Code. I deny that motion on two grounds. First, the Grievant’s written acknowledgments were in the County’s possession prior to the hearing and could have been, but were not, offered as exhibits during the hearing. Second, the documents are, in my view, moot, given my rulings in favor of the County on credibility issues of import and my conclusion that under the circumstances of this case, the Grievant was subject to the Personnel Policy and the Ethics Code.

2. The Grievant Sold Ten Lights to Brent Lenorud for \$100 and Kept the Money.

I find that the greater weight of the credible evidence supports Brent Lenorud's testimony that the Grievant sold him ten lights for \$100, rather than the Grievant's emphatic denial of the allegation. One or the other is either inaccurate in his memory or deliberate in his deceit. I consider both possibilities for both individuals. Lenorud's recollection of some details of the transaction is indeed foggy. Through his disposal business contracts with the County, Lenorud frequented the landfill and was familiar with both Kolpien and the Grievant. Both were working at the landfill on the day Lenorud acquired the lights and could have had some interaction with Lenorud. The latter testified that while he believed he and the Grievant were alone while discussing the lights, Kolpien may also have been present. Lenorud also was uncertain whether the Grievant or Kolpien loaded the lights onto his truck. Moreover, Lenorud's testimony that the lights were loaded onto a trailer that he had with him at the time conflicts with his statement to Undersheriff Stuchlik that Lenorud's brother returned to the landfill to load the lights. Lenorud's uncertainty and inconsistency about these relatively insignificant details are, in my view, most likely attributable to the passage of time; however, I do not believe that Lenorud would fail to remember who sold him the lights for \$100 – a comparatively more memorable detail. Nor do I believe that Lenorud would confuse the Grievant with Kolpien regarding who ultimately sold him the lights.

Similarly unlikely would be the Grievant's failure to recall such an atypical transaction. He has never claimed or said anything to suggest any difficulty remembering whether he sold the lights to Lenorud. To the contrary, his consistent and emphatic denial of any sale does not intimate the equivocality that might otherwise attend a foggy memory.

It is more likely – unfortunately – that either Lenorud or the Grievant is lying. Yet neither's demeanor alone during testimony clearly evinced untruthfulness.⁵ I must therefore weigh the evidence to determine credibility. Both the Grievant and Mr. Lenorud have conceivable motives to lie. The Grievant's possible motive is obvious: he wishes to avoid being fired. Mr. Lenorud's possible motive to falsely accuse the Grievant of selling the lights springs from his friendship with Damian Weiland and the latter's thwarted aspirations. They have been friends since high school, although they no longer spend as much time together. Weiland, a highway laborer, desired and had applied for the highway patrol position that the Grievant was awarded based on seniority. On several occasions, Weiland had expressed interest to Potter in being a highway patrolman – a higher paying

⁵ While this is generally true, I do find that the following equivocal response by the Grievant on direct examination undermines the Grievant's credibility:

Q If you had sold those lights to Lenorud, would you have told them so at the investigation?
A Probably.

(Tr. 234).

position – and Weiland informed Potter that he would not be particular about the section to which he'd be assigned. Weiland's express interest in the higher paying position and his uncooperative treatment of the Grievant while working with him during the Grievant's probationary period suggest not only Weiland's disappointment in not getting the patrol position but also his resentment of the Grievant for having taken it from him. It was Weiland who disclosed the sale of the lights to Potter – only days before the Grievant was to complete his probationary period – and who thereby usurped the position from which the Grievant was terminated. Thus, misguided loyalty conceivably could have impelled Lenorud to conspire with his disgruntled buddy, Weiland, to dethrone the Grievant with the sword of fabrication and enthrone Weiland with the scepter of deceit.

Although I believe that self-interest motivated Weiland's disclosure of the Lenorud transaction to Potter, other evidence dissuades me from concluding that Lenorud fabricated the transaction as a coconspirator. Such fabrication would have required Lenorud to lie to Highway Commissioner Weiss. I find it unlikely that Lenorud would do so, because he considered Weiss a longtime friend. In addition, Lenorud had business contracts with the County; I do not believe that he would jeopardize them by lying to Weiss, a member of Juneau County's management. In addition, Lenorud continued to maintain that the Grievant had sold him the lights for \$100 when interviewed by Undersheriff Stuchlik. I do not find that Lenorud would lie to law enforcement authorities merely to advance the career of a friend to whom he had not been as close in recent years. Lastly, highway patrolman Gary Schwedersky, a witness called by the Union, testified on direct about remarks Weiland had made to him. Weiland, according to Schwedersky, told Schwedersky that if Weiland did not get the highway patrol position to which the Grievant had posted, he had one more "card up his sleeve": disclosing that the Grievant had sold the lights to Lenorud. However, on cross-examination, Schwedersky clarified that he did not interpret Weiland's reference to the "card up his sleeve" to imply that Lenorud was fabricating the allegation of the sales transaction; rather, Schwedersky interpreted the remark to mean that Weiland would use the truth of the allegation against the Grievant if necessary. (Tr. 177-178). In light of these considerations and the evidence as a whole, I find that the Grievant sold Mr. Lenorud ten lights for \$100.

3. The Grievant asked Mr. Lenorud Not to Disclose the Transaction

For related reasons, I also find that the Grievant telephoned Mr. Lenorud to ask him not to disclose the sale of the lights. The Grievant allegedly made this call some time during the investigation of Todd Kolpien in early 2010 or shortly after Kolpien's employment was terminated. It is logical that the Kolpien matter would unnerve the Grievant and prompt him to make such a call, because Kolpien was being investigated for, and ultimately resigned because of, similar allegations of misappropriation of County property. For the reasons noted above, I doubt that Mr. Lenorud would lie about the call to Weiss and Undersheriff Stuchlik. I think it is more likely that the Grievant would falsely deny the allegation than Lenorud would fabricate it.

4. The Grievant Falsely Denied the Transaction to Management and Undersheriff Stuchlik

I find that the Grievant falsely denied to management and Undersheriff Stuchlik that he had sold the lights to Lenorud. I believe that whether management would have spared the Grievant's job had he admitted to the sale, the Grievant feared the loss of his job, were the transaction disclosed. The specter of termination loomed large in the wake of the Kolpien resignation. The Grievant had more to lose (his job) than Lenorud had to gain (helping his friend). Given the potential risks and gains that each man faced by lying, I believe it more likely that the Grievant succumbed to this temptation.

B. The Discipline of Termination Must Be Modified.

Considered in a vacuum, my findings detailed above indeed could constitute just cause for terminating the Grievant's employment. I conclude that the Grievant violated various provisions of the Juneau County Personnel Policy and Juneau County Code of Ethics. More specifically, by selling the lights and pocketing the money, he "use[d] his ... position for personal financial gain ..." in violation of Section 2.4 of the Personnel Policy and used his "official position or authority for personal ... profit or advantage" in violation of Section 10.1 of that policy. I also find that he "knowingly use[d] ... county services or county-owned ... equipment ... for unauthorized non-governmental purposes ..."

Nevertheless, when I consider my findings and conclusions in the context of 1) various considerations related to relevant policies and practices, and 2) the *de minimis* investigation of, and absence of discipline imposed on, Damian Weiland, I conclude that that the County did not have just cause to terminate the Grievant's employment. I further conclude that the discipline should be reduced to reinstatement without backpay.

1. Considerations Related to Relevant Policies and Practices

Examining the highway and landfill policies and practices reveals the following: a) the policies distinguish at least somewhat arbitrarily between appropriating items to be used rather than sold; b) the highway policies were inconsistent with the landfill policies, resulting in disparate treatment; and c) the landfill policy was not applied uniformly.

a. Dubious Distinction Between Using vs. Selling Items

The County proposes that appropriating items for personal use is acceptable, while taking items for future sale is not. For years, the County allowed highway employees to sell scrap found along the highway and to keep or even sell lost items of value, provided that such items were held but not claimed for a three to four week waiting period. Landfill employees were allowed to take things to use (apparently in exchange for a scrap price that was rarely if ever paid); however, they were not allowed to sell such items, at least not without permission.

I question the logic of this distinction (using vs. selling found items), one that goes not to the value of the employee's gain but to the manner in which he realizes it. In this regard, Terry Cilley's testimony is illustrative: ". . . it doesn't make any difference to me if I would get a cord of firewood and I would burn it in my fireplace and provide heat for my home, or if I would get a cord of firewood and sell it to the neighbor and take the \$30 and buy LP for my home, the end result is the same." (Tr. 202). Similar reasoning could be applied to the use vs. sale of other landfill items such as golf clubs or fishing poles. That is not to say that employees enjoy an unfettered freedom to violate policies or practices that rest on questionable logic or tenuous distinctions. Here, however, I believe that the questionable logic (and fairness) of distinguishing between the qualitative and quantitative nature of the gain to the employee (use vs. sale) at least mitigates the culpability of conduct that disregards that distinction.

b. Highway Policies Inconsistent With Landfill Policies

The highway policies and practices materially differed from those of the landfill. Highway finds could be, and were, both used and sold, subject to a three to four week waiting period for things of value. By contrast, landfill finds could be used but not sold, at least not without prior permission.⁶ Rather than dispute this variation in policy/practice between the highway and the landfill, the County offers a justification for it.

The County justifies its sanctioning of employees collecting and selling highway but not landfill items (and keeping the money) based on a proposed distinction of ownership. Highway finds, according to the County, are subject to the "finders-keepers" rule, because the County has no ownership of such items and usually no hope of finding their owners. By contrast, the County maintains that items brought to the landfill become County property, once the landfill receives them. For example, Commissioner Weiss testified as follows regarding whether and when items dropped off at the landfill become County property:

Q So could you specify a little bit by what you think is county property and when?

A Once it's dropped off inside the county property, it's county property.

(Tr. 92).⁷

⁶ The record does not reveal specific examples of landfill employees seeking permission to take and sell items from the landfill, let alone being granted such permission.

⁷ The following exchange at hearing during the County's cross-examination of witness Terry Cilley also highlights the County's distinction between the County's ownership of items dropped off at the landfill and its lack of ownership of items found along the highway:

Q: Let's talk about that, because apparently there is a widespread belief that there's no difference between what [the Grievant] did [selling the lights and keeping the money] and what's done apparently as practice in the highway department. Everything that you're talking about in the highway department is above board, right? I mean, people do it because they know that it can be done, and if somebody sees it happening –

Assuming *arguendo* that items brought to the landfill become County property once acquired, I nonetheless reject 1) the County's unqualified, unsupported conclusion that it has no ownership over employees' highway finds as a legal basis for its policy, as well as the legality of its policy in other respects, and 2) the logic and fairness of its policy distinctions, irrespective of legal concerns.

i. County Ownership of Highway Finds and Legal Deficiencies of Highway Policy

I disagree in part with the County's unqualified conclusion that it has no ownership over its employees' highway finds and with the legality of its highway policy in other respects. The Legislature has addressed the custody and ownership of chattels found by public officials, employees or agents as follows:

170.105. Chattels found by public officials, employees or agents

(1) Notwithstanding ss. 170.07 and 170.08, if an official, employee or agent of the state or of a county, city, village or town finds \$25 or more or any goods having a value of at least \$25 while acting within the scope of his or her official duties, employment or agency, he or she shall transfer custody of the found money or goods to the agency in the city, village or town where the money or goods were found that is designated by the city, village or town governing body to receive found money or goods. That agency shall post a notice of the found money or goods in 2 public places in the city, village or town.

(2) If the owner of lost money or goods appears within 90 days after the notice is posted under sub. (1) and makes out his or her right to the found money or goods, he or she shall have restitution of the money or goods or the value of the money or goods upon paying all of the costs and charges on the money or goods. If no owner of lost money or goods appears within 90 days after the notice is posted under sub. (1), the found money or goods become the property of the state or county, city, village or town whose official, employee or agent found the lost money or goods.

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- A: It was accepted practice.
Q: Yes. And they are taking something that the county did not have ownership in, it was alongside the highway. As you point out, the owners usually – you can't even identify who the owners are, correct?
A: Yeah.
Q: Isn't it true to your knowledge even from your year out there, that when somebody brings something into the landfill and puts it there, it becomes the property of Juneau County, that's the truth, isn't it?
A: Yes . . .

(Tr. 200).

Wis. Stat. § 170.105.⁸

The County's highway policies and practices do not satisfy its obligations under Wis. Stat. § 170.105 regarding the care and custody of goods found by County employees with a value equal to, or greater than, \$25 (*e.g.* tires found by highway patrolmen). Subsection (1) clarifies where custody of such goods must be transferred and specifies notice requirements. Subsection (2) requires *inter alia* that the goods be held for 90 days and provides that ownership of the goods transfer to the government if not claimed by the owner within the 90-day period. The County's policy of employee "finders keepers" following a three to four week waiting period disregards its statutory, 90-day custodial and notice obligations for found chattels valued at or in excess of \$25. Moreover the County's non-ownership position and finders-keepers policy do not accord with the County's statutory ownership of any such goods that are unclaimed within 90 days. Wis. Stat. § 170.105. "Agreements and practices that conflict with a statute, however, must give way; the statute controls." *Antisdell v. City of Oak Creek Police and Fire Com'n*, 229 Wis. 2d 433, 438, 600 N.W.2d 1, 3 (Ct. App. 1999) (citing cases). That the County's policy permitting employees to sell highway finds of value for their own gain – conduct very similar to that for which the Grievant was fired – contravened a state statute dilutes the persuasiveness of the County's reliance on the unlawfulness of the Grievant's conduct as grounds for discharge.⁹ Moreover, the legally flawed rationale on which the County allowed employees to sell highway finds of value but forbade them from selling landfill goods effectively resulted in the disparate treatment of landfill employees – especially the Grievant.

ii. Arbitrariness and Unfairness of County's Policy Distinctions

Even disregarding the legal infirmities of the County's policy sanctioning employees' appropriation and sale of highway finds, I nonetheless conclude that permitting the sale of items taken from the highway but not the landfill constitutes arbitrariness, unfairness, and disparate treatment. In both scenarios, County employees find and appropriate items on County time (and in some cases using County equipment) and sell those items for their own gain. Only the manner by which the items are acquired and the location in which they are found (involuntary loss on the highway vs. voluntary disposal at the landfill) differ. I find these distinctions to be insignificant; in fact, insofar as the County's three-to-four-week holding period to allow owners to reclaim items lost

⁸ According to the "Historical and Statutory Notes" accompanying Wis. Stat. § 170.105, Act 263, § 6(1) provides: "This act first applies to money or goods found on the effective date [May 7, 1996] of this subsection." (Brackets in original.)

⁹ The December 17 discharge letter asserts in part that the Grievant's "actions *likely* are in violation of two applicable criminal statutes, Wis. Stats. § 943.20 (misdemeanor theft) and Wis. Stats. § 946.12 (felony misconduct in public office)". (Emphasis added.) The Grievant, however, was never charged for either offense, and the County made no effort in its discharge letter or its briefing to identify the elements of these crimes, let alone argue that the Grievant's conduct met those elements. Accordingly, my analysis is based solely on the Grievant's conduct, not on any legal conclusions regarding whether the Grievant committed any crime(s).

on the highway was inadequate, the selling of such lost items was arguably worse than the selling of items voluntarily relinquished at the landfill. In any event, in both cases, County employees appropriate items during the course of their employment, sometimes using County equipment, sell those items, and keep the money. To allow such conduct to occur on the highway but not at the landfill, or to be undertaken by highway but not landfill employees, is arbitrary and unfair.¹⁰ And to allow such conduct on the highway but to fire an employee for similar conduct at the landfill constitutes disparate treatment that cannot survive a reasoned application of just cause. Illustrative of this conclusion is the testimony of Terry Cilley, a highway department employee who had been a patrolman for over two decades before becoming a machine operator:

Q And what's your understanding about management's knowledge and understanding of how people treated the stuff found on the highway department over there? They know about this, they didn't know about it?

A They knew about it.

Q Some of the managers would come right out of the ranks themselves?

A Exactly, and they were as guilty as the rest of us. Like I said, if you're going to fire one guy, you better start at the top with him and go all the way to the bottom and fire us all, because at one time or another we've all had some benefit through the county in that manner, myself included, and it's just the way it's been accepted.

(Tr. 207).

c. The Landfill Policy Was Not Applied Uniformly

The record suggests that the landfill policy prohibiting the sale of landfill items was not consistently enforced. Damian Weiland and Scott Fritz brought items found along the highway to the landfill for disposal during their work shifts and then filled their emptied trucks with other landfill items, including scrap metal to be sold at Manthey's for personal profit. Commissioner Weiss claims that he was unaware of this. Moreover, while Supervisor Potter admitted knowledge of employees collecting scrap iron and tires from the highway to be sold for their own benefit, it is not clear whether he knew about employees collecting and selling items from the landfill. Nonetheless, Potter supervised Weiland and saw him daily. Moreover, Potter was aware of the investigation into, and resignation of, landfill employee Todd Kolpien for similar conduct. In addition, highway department employees sometimes had duties at the landfill, such as snowplowing, hauling water with the tanker, filling in for the bulldozer operator, or helping to haul cover. They thus had occasion to take things from the landfill, and they did so openly, sometimes talking about their good finds. In light of these factors, if Highway Supervisor Potter was unaware that Highway Department employees took and sold items from the

¹⁰ Further supporting my conclusions that being a highway vs. landfill employee, or acquiring an item on the highway vs. at the landfill, are ultimately distinctions without meaning, is the merger of the Highway and Landfill Departments in approximately May of 2007.

landfill, he arguably should have been aware of the practice. In any event, the Grievant assumed that management knew about it. Elkouri observes,

Arbitrators have not hesitated to disturb penalties where the employer over a period of time has condoned the violation of the rule in the past. Lax enforcement of rules may lead employees reasonably to believe that the conduct in question is tolerated by management. Even where the employee has engaged in conduct that is obviously improper, such as threatening a supervisor, the fact that management had failed to impose discipline in the past can be a signal that unacceptable behavior will not be penalized.

Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 994 (Alan Miles Ruben ed., 6th ed. 2003). Although the Grievant admitted while under investigation that selling the lights and pocketing the money would constitute theft and *could* be grounds for discharge, I question whether he was sincere in making these remarks or whether he made them as a calculated attempt to dispel any inference of a sale that answering otherwise might occasion. In any event, in light of employees' past practice of taking and selling items from both the highway and the landfill and management's actual and/or apparent tolerance of that practice, I question whether the Grievant believed he would be fired for his conduct. Regardless, he was actually fired for conduct similar to conduct in which both landfill and highway employees had engaged with impunity.¹¹

In sum, the highway and landfill policies and practices distinguished at least somewhat arbitrarily between appropriating items to be used rather than sold. Moreover, the highway policies were inconsistent with the landfill policies, and the landfill policy was not applied uniformly, resulting in disparate treatment. That shortly after the termination of the Grievant's employment, the County issued a new policy via *memorandum* sent to all highway and landfill employees, highlights the inadequacies of the old policies. Under the new policy, items found along the highway or brought to the landfill are not to be taken by County employees for personal use or future sale.

2. *De Minimis* Investigation of, and Absence of Discipline Imposed on, Damian Weiland

As detailed above, Damian Weiland took items from both the highway and the landfill on multiple occasions, some of which he sold at Manthey's for his own gain. On one such occasion, November 17, 2010, the same day that the Grievant was suspended, another Highway Department employee notified the Grievant that Damian Weiland's truck was parked at the highway shop and was filled with a load of scrap to be taken to Mantheys. The Grievant then went to the shop, took photos of Weiland's loaded truck (one of which shows a hupcap), and proceeded to Mantheys. There, the Grievant alerted

¹¹ Section 10.2 of the Juneau County Personnel Policy provides in pertinent part, "[i]t is expected that supervisory personnel shall uniformly enforce rules and regulations and document and date supporting evidence of misconduct."

Ann Manthey to the truck's imminent arrival and described Weiland. A couple of days later, the Grievant called Ms. Manthey and confirmed that Weiland had indeed dropped off a load of scrap and received money for it.

After he was informed of these events, Commissioner Weiss telephoned Weiland to inquire about the matter. Weiss believed Weiland's explanation that the material in his truck was from his father's house and had not been collected on company time. Weiss believed Weiland's explanation without discussing the matter with Potter, with any of the Highway Department employees, or with anyone from the Sheriff's Department. After the Grievant's employment was terminated, Damian Weiland was assigned to the Grievant's former position as a Highway Patrolman.

I find that the County's investigation of Weiland – whose conduct was similar to that for which the Grievant was terminated – was *de minimis*, especially compared to that of the Grievant. Investigation of the latter included multiple meetings, contacts with the Sheriff's office, multiple interviews by the Undersheriff, and review and consideration of the Undersheriff's report. The comparatively anemic investigation of the very individual who was to take over the Grievant's position, notwithstanding the similarity of Weiland's alleged conduct, also contributes to the absence of just cause. Moreover, I do not accept Weiland's explanation that the photographed truckload of items, including a hubcap, came from his father's house.

In concluding that the discipline herein must be modified, I have considered the Grievant's past discipline (a verbal warning and two written warnings). I note that while the prior discipline did not involve allegations of selling county property without authorization or pocketing money belonging to the County, it does contribute to the degree of discipline I believe should be imposed. I also give some credence to the County's point that it can no longer trust the Grievant; however, a similar apprehension invariably attends all incidents of employee misconduct, and, though relevant, is not ultimately dispositive of whether the employer had just cause to impose the discipline it did. Presumably, moreover, the Grievant's position on the spectrum of progressive discipline following his reinstatement will shift in a direction and degree commensurate with past discipline and the severity of the discipline imposed in the instant matter. He will have a strong incentive not to commit misconduct in the future.

Here, in light of the evidence presented and my findings and conclusions detailed above, I find that the County did not have just cause to terminate the Grievant's employment. However, I find that his misconduct – including not charging a required disposal fee, appropriating and selling property brought to the landfill without permission, attempting to persuade another to lie on his behalf, and lying to his employer and the Sheriff – are sufficiently serious to warrant discipline just short of termination.

AWARD

For all of the foregoing reasons, the County must reinstate the Grievant to the Highway Patrol position from which his employment was terminated immediately upon the County's receipt of this Award, without back pay but without loss of seniority.

Dated at Madison, Wisconsin, this 1st day of March, 2012.

John C. Carlson, Jr. /s/

John C. Carlson, Jr., Arbitrator