

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**BUFFALO COUNTY HIGHWAY EMPLOYEES, LOCAL 1652, AFSCME, AFL-CIO**

and

**BUFFALO COUNTY**

Case 86  
No. 71052  
MA-15091

(Linse Termination Grievance)

---

**Appearances:**

**Ms. Katy Lounsbury**, Attorney, Ehlke, Bero-Lehmann & Lounsbury, S.C., 6502 Grand Teton Plaza 202, Madison, Wisconsin appearing on behalf of Buffalo County Highway Employees, Local 1652, AFSCME, AFL-CIO.

**Ms. Mindy K. Dale**, Attorney, Weld, Riley, Prenz & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of Buffalo County.

**ARBITRATION AWARD**

Buffalo County Highway Employees, Local 1652, AFSCME, AFL-CIO, hereinafter "Union", and Buffalo County, hereinafter "County or Employer," requested that the Wisconsin Employment Relations Commission assign a sole arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot of the Commission's staff was assigned. The hearing was held before the undersigned on March 26, 2012, in Ladysmith, Wisconsin. The hearing was not transcribed. The parties submitted briefs and reply briefs, the last of which was received May 30, 2012 whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

## ISSUES

The parties stipulated that there were no procedural issues in dispute and framed the substantive issues as:

Did the County violate Article IV-Management Rights, Section 3, of the collective bargaining agreement when it discharged the Grievant for failure to maintain his commercial driver license? If so, what is the appropriate remedy?

## RELEVANT CONTRACT LANGUAGE

...

### ARTICLE IV – MANAGEMENT RIGHTS

- Section 1      The Union recognizes the rights and responsibilities belonging solely to the County, prominent among, but by no means wholly inclusive are the rights to hire, promote, discharge, or discipline for just cause. The right to decide the work to be done and the location of the work. (sic) The Union also recognizes that the County retains all rights, powers, or authority that it had prior to this Agreement except as modified by this Agreement.
- Section 2      The rights, powers, and/or authority herein claimed by the County are not to be exercised in a manner that will cease to grant privileges and benefits the employees (sic) enjoyed prior to adoption of this Agreement and that are not incorporated herein, or in a manner that will undermine the Union or as an attempt to evade the provision of this Agreement or to violate the spirit, intent, or purpose of this contract.
- Section 3      It is agreed that the exercise of proper and reasonable disciplinary measures belong to management.
- A. The employer may for just cause discipline or discharge employees without prior warning for the following offenses:
1. Being under the influence of intoxicants or drugs during hours of work which have not been prescribed by a physician and which resulting condition may materially affect production and present a safety hazard.

2. Theft or illegal acquisition of anything of value from the employer at any time or fellow employees during hours of work.
  3. Willful damage of employer's property.
  4. Willful violation of a posted major safety rule.
  5. Transportation of unauthorized persons with a County vehicle or unauthorized use of County vehicle.
  6. Failure to carry out proper work assignments for which an employee is qualified and capable of performing provided it does not expose the employee to an adjustable safety hazard.
  7. Assault by/on any person during the hours of work.
  8. Falsification of material information of (sic) records, reports or applications of employment.
- B. The employer may for just cause discipline employees by progressively implementing the following steps:

Step 1 – Written Reprimand

Step 2 – Suspension Without Pay, Not to Exceed Ten (10) Work Days

Step 3 – Discharge

The violation of any three infractions or the third infraction of the same rule or any combination of three infractions within a period of one (1) year of the offenses below enumerated may be grounds for discharge:

1. Unexcused tardiness or absence.
2. Scurrilous misconduct during hours of work which adversely reflect on the image of the County and fellow employees.
3. Negligence and inefficiency in the performance of duties assigned and the directions for completing the same.
4. Violation of posted safety and other reasonable rules.

Within seventy-two (72) hours of the time of discipline or discharge, as indicated in this section, the employer shall personally or by certified mail deliver a report to the affected employee(s) with a copy to the secretary of the Union explaining the action taken and reasons for the same.

...

ARTICLE XII – LEAVE OF ABSENCE

- Section 1 Applications for leave of absence for personal reasons shall be made in writing and presented to the Commissioner. The Commissioner will give copies to the Union when a decision is made. The granting of such leaves and the length of time for such leave shall be contingent upon the requests. The Highway Commissioner may grant leaves of absence of fourteen (14) calendar days or less without further authorization of the Highway Committee. Leaves of absence of more than fourteen (14) calendar days shall be discussed with the Commissioner. The Commissioner shall present such requests to the Highway Committee with a recommendation. The Union shall be notified by the Commissioner of the date of the presentation of the recommendation to the Highway Committee. The Union shall also be advised of any decision of the Commissioner or the Committee to grant or deny a request for leave. All leaves of absence under this article, with the exception of jury duty, shall be without pay.
- Section 2 A period of not more than two (2) years shall be granted as leave of absence due to personal illness, or for disability due to accident, provided physician's certificate is furnished from time to time to substantiate the need for continuing the leave. Additional time may be extended in such cases by mutual consent of the Union and the County.
- Section 3 Seniority shall continue to accrue during leaves of absence for personal illness and/or disability due to accident.

...

**BACKGROUND AND FACTS**

The Grievant, Fred Linse, was hired by the County in 1995 to a Patrolman position. The Grievant's employment record was free of discipline and the County characterized him as a good employee. The Grievant's immediate supervisor was Mike Thompson.

At all times relevant herein, the Buffalo County Highway Commissioner was David Brevick. Brevick has held the Commissioner position for 26 years. The County Highway Department is staffed by 26 full time bargaining unit employees; three mechanics and 23 patrolmen. The Patrolman job description reads as follows:

**Name:** TA RH **Department:** Highway  
SA RH  
BA **Fred Linse** **Position Title:** County  
Section Patrolman  
CB GL Operator-Full time, Seasonal  
JD JW State Section (Nov-Apr)  
JF WZ ...  
TG

**Date:** January 2007

**Reports To:** Highway  
Commissioner

---

**Approximate Number of Employees in classification with same title:** None (0) (sic)

**Purpose of Position:**

This is a skilled equipment operator position under the general supervision of one or more Highway Department supervisors for the purpose of highway construction and maintenance. The position requires effective operation as a county section patrolman.

**Essential Duties and Responsibilities**

The following duties are normal for this position. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

- Performs general highway maintenance and related activities including snow and ice removal, patching holes, repairing signs, clearing brush, hauling materials, flagging traffic, sweeping intersections, sealing road cracks, clearing culverts, removing dead animals, trash, and buildings and facilities maintenance and repairs.
- Operates any assigned heavy construction equipment, machinery and tools for highway construction and maintenance.
- Performs necessary maintenance and preventative maintenance to assigned machinery and equipment as directed.
- Responds to emergency situations including high water, blocked roads, washouts, snow and ice events and others as directed.

- Measures and places grade and alignment stakes using tapes, measuring devices and construction grade levels.
- Operates patrol trucks and other assigned light and heavy construction equipment, machinery and tools for heavy construction and maintenance.
- Performs necessary hand tool operations as directed including shoveling, raking, sawing, tamping, hammering, etc.

***Minimum Training and Experience Required to Perform Essential Job Functions (Italic in original)***

- A high school diploma with one-year highway equipment operation experience or any combination of education and experience that provides equivalent knowledge, skills, and abilities.

**Physical and Mental Abilities Required to Perform Essential Job Functions**

**Essential Knowledge, Skills and Abilities**

- Knowledge of road and bridge construction and maintenance, construction materials, materials handling, sand and gravel mining, grading, excavation, drainage systems, foundations soils, soils and construction materials compaction and construction staking.
- Knowledge of operation and maintenance of assigned equipment and machinery including hydraulic systems, trailers, towing, fastening and covering loads, lifting capacities and proper loading to meet safe and efficient weight distributions.
- Ability to operate assigned machinery and equipment skillfully and safely in close proximity to vehicular traffic, grade and alignment stakes, slopes, trucks, other construction equipment, laborers and utilities.
- Ability to communicate with truck drivers and other operators to coordinate materials handling and delivery.
- Ability to oil, grease, fuel and perform preventative maintenance on assigned equipment and machinery.
- Knowledge of the Digger's Hotline, utility markings and clearances and rules for safe equipment operation in close proximity to underground and overhead utility facilities.

- Knowledge of legal load limits for assigned equipment and trucks.
- Ability to read and understand grade and alignment stakes set by others.
- Ability to read and use tapes and measuring devices, construction grade levels, hand tools and power tools.
- Ability to be self-motivated and self-directed for the effective operation of managing the maintenance activities on a patrol section.

### **Language Ability and Interpersonal Communication**

- Ability to understand and follow oral and written instructions.
- Ability to measure, compare, count (sic), differentiate, measure and/or sort. Ability to reach and comprehend equipment maintenance and repair manuals, non-complex blueprints and drawings, maps, operating manuals, safety procedures, truck and equipment weights and written instructions. (sic)
- Ability to utilize descriptive data and information such as time cards, operating and repair manuals, vehicle and equipment weights and capacities and safety manuals.

### **Mathematical Ability**

- Ability to add and subtract, multiply, divide, calculate percentages, fraction decimals.

### **Physical Requirements**

- Ability to coordinate eyes, hands, feet and limbs performing semi-skilled movements such as drawing and data entry.
- Ability to operate motor vehicle, heavy equipment, two-way radios, telephone, measuring tape, level, calculator/adding machine, transit, metal locator, computer terminal, hammer, pickax, level (sic), tape measure, measuring wheel, hand tools, power tools, and other machinery/instruments.
- Ability to operate equipment and machinery requiring monitoring multiple conditions and making multiple, complex and rapid adjustments, such as earth moving equipment, trucks, cranes/backhoe, high pressure washer, end loader, mechanical saws, mechanic's hand tools, tampers, electric drills, jack hammers, shovels, rakes, etc. Ability to repair complex equipment and machinery.

- Ability to exert moderate to heavy physical effort, typically involving repeated and prolonged periods of driving trucks, operating equipment, climbing, balancing, stooping, twisting, turning, kneeling, lifting, carrying, pushing, crawling, crouching and pulling.
- Ability to recognize and identify degrees of similarities or differences between characteristics of colors, forms and sounds associated with job-related objects and materials.

### **Special Skills**

- This position requires a Commercial Drivers License.
- This position requires the operation of equipment and machinery in all types of weather conditions including snow removal in the winter.

### **Environmental Adaptability**

Ability to work under safe and comfortable conditions where variations or extremes in temperatures, odors, toxic agents, violence, noise, vibrations, wetness, disease and dust are minimal and pose little to no risk of injury.

Buffalo County is an Equal Opportunity Employer. In compliance with the Americans with Disabilities Act, the County will provide reasonable accommodations to qualified individuals with disabilities and encourages both prospective and current employees to discuss potential accommodations with the employer.

The county (sic) retains and reserves any and all rights to change, modify, amend, add to or delete from any section of this document as it deems, in its judgment, to be proper.

...

On January 22, 2011 the Grievant was arrested and criminally charged with Operating While Intoxicated (OWI). The Grievant informed his supervisor, Mike Thompson, of the arrest on his next scheduled work date. Thompson informed Highway Commissioner David Brevick. The Grievant continued to work for the County while his case was pending. The Grievant met with Brevick once during February and once during March to discuss what the impact of his driver license being revoked would have on his continued employment with the County.



The Federal Motor Carrier Safety Improvement Act (Act) was adopted by Wisconsin and became effective on September 30, 2005. The Act provides that a person's CDL is disqualified because of convictions for certain offenses committed by the person while driving. Disqualification is the withdrawal of a person's privilege to operate a commercial motor vehicle. No occupational license can be obtained for commercial motor vehicle operation during any period of disqualification. OWI is a disqualifying offense. The CDL of any driver who is found guilty of a first offense, OWI related charge, after September 30, 2005 is automatically disqualified for one year.

In preparation for the loss of his driver license and CDL, the Grievant signed for and was awarded the Loader Operator position on June 1, 2011. A CDL is not legally required to operate the loader.

The Grievant met with Brevick a third time in May. He informed Brevick that he was going to plead guilty and asked Brevick about three different options: 1) taking a leave of absence; 2) working through the summer and then taking a leave of absence; and 3) working through the year. Brevick did not provide the Grievant advice on what he should do, but told the Grievant he (Brevick) would "do the best he could." Brevick met with the County Highway Committee and discussed the revocation and the Grievant's continued employment. These conversations occurred in closed session.

The Grievant reached a plea agreement during May wherein he agreed to plead guilty to operating at a prohibited alcohol concentration, first offense, his driver license was revoked for six months and he was responsible to pay a fine. The Court accepted the Stipulation and Order on June 1, 2011 and soon thereafter, the Department of Motor Vehicles notified the County of the Grievant's license revocation.

The County terminated the Grievant on June 16, 2011. The Grievant's termination letter read as follows:

Dear Mr. Linse,

Please be advised that the Highway Department has been notified of your loss of the required Commercial Driver License. This loss has resulted in your termination of employment. Your last day will be today, June 16, 2011.

Sincerely,

/s/

David Brevick, Commissioner  
Buffalo County Highway Department

The Union filed a grievance on June 22, 2011 describing, "Employee Fred Linse was terminated from employment without just cause, Article IV, Section 3 on June 16, 2011." The remedy the Union sought was reinstatement and pay for time lost.

County Highway Commissioner Brevick responded to the first step grievance in letter:

RE: Grievance

Dear Mr. Auseth,

This letter is in response to the Fred Linse grievance dated June 22, 2011.

The Union grievance states the violation as "employee Fred Linse was terminated from employment without just cause, Article IV, Section 3, on June 16<sup>th</sup>, 2011."

Please be advised that this termination was due to the loss of the required commercial driver's license and not due to disciplinary measures. Therefore, no Union contract violation has occurred and the grievance is hereby denied.

Sincerely,

/s/

David Brevick, Commissioner  
Buffalo County Highway Department

The grievance was processed through all steps of the grievance procedure and the Union filed for arbitration.

Additional facts, as relevant, are contained in the DISCUSSION section below.

### **ARGUMENTS OF THE PARTIES**

#### County

The County maintains that the termination was justified and consistent with management rights.

The Grievant was well aware of the consequences for losing his commercial driver license. The Federal Motor Carrier Safety Improvement Act was incorporated by Wisconsin in

2005 resulting in driving privilege disqualification for certain acts committed. State law no longer grants occupational licenses for the operation of commercial motor vehicles. The Grievant's conviction for operating with a prohibited alcohol concentration, first offense, resulted in a one year automatic license disqualification. The Grievant was not surprised that his license was revoked; the laws governing CDL disqualification were common knowledge.

The Union unsuccessfully attempted in 2008 to obtain additional security for employees who lost their CDL privileges. The Union would not have proposed the new CDL language unless it viewed the collective bargaining agreement as providing little or no guarantee for job security for employees required to hold a CDL who temporarily lose their license. In addressing the Union's proposed CDL language, Arbitrator Krinsky acknowledged that significant issues concerning job security were raised when the law went into effect in 2005. He continued noting:

...the comparables have taken steps to address the issue of employees who lose a CDL. That said, however, there is no established pattern with respect to the nature of those provisions. They vary considerably with respect to what is covered and for how long, what the status of the employee is during the period, and whether the contract language is temporary or permanent.

The arbitrator's view reflects the end product of bargaining – the need to address and balance employee rights and responsibilities with the County's rights and responsibilities. The Union cannot secure through arbitration what it was unable to achieve at the bargaining table.

The just cause provision of the Article IV, Section 3 does not apply to non-disciplinary discharges. Section 3 addresses workplace violations. There is a nexus between the conduct and the workplace in all of the itemized offenses in Section 3. The Grievant's conduct occurred outside of the workplace and the source document for his termination is the job description which requires Loader Operators to hold a CDL. The Grievant's discharge resulted from his failure to meet the CDL requirement of his job.

As Arbitrator Gallagher stated in CITY OF OSHKOSH, Case 337, No. 61791, MA-12064 (Gallagher, 3/03) when the employee was unable to perform the essential functions of his job:

In any event, R.D. had not engaged in any on-the-job misconduct and he could not have been disciplined with any hope of improving his behavior as he could no longer perform the essential functions of his job after he lost his "p" endorsement.

Similarly, in ONEIDA COUNTY, Case 196, No. 70295, MA-14935 (Emery, 10/11) Arbitrator Emery concluded that a termination for a CDL disqualification was not subject to analysis under the just cause standard for discharge. In the instant grievance, there is no CDL language in the bargaining agreement and the Union has turned, erroneously to the “just cause” standard to provide a foundation for the grievance.

### Union

The parties have negotiated eight enumerated bases for discharge and the temporary absence of a valid commercial driver license is not on that list. The County posits that the Grievant’s discharge was “not due to disciplinary measures.” The labor agreement does not provide the County the right to discharge for non-disciplinary reasons.

For the sake of argument, if the County had the right to discharge the Grievant for reasons other than the eight enumerated offenses, it was still required to have just cause. At the time the County terminated the Grievant, just cause did not exist. The Grievant’s termination date was June 16, 2011. At that time, the Grievant had recently posted into an operator position and his job responsibilities did not include operating commercial driver license equipment. There was testimony that work assignments during the summer “can be fairly flexible” and they could go for “weeks on end” with non-CDL work.

It appears that the County’s decision to terminate was premised on the theory that, at some time in the future, the Grievant would need to operate CDL equipment. Yet, the County failed to present any evidence to show that the Grievant would have been expected to perform a function that he was unable to perform.

The County has a history of accommodating temporary losses of driving privileges. The County allowed RB to continue working when he lost his driver license due to a driving under the influence conviction. The County hired SJ to a CDL required position even though he didn’t have a CDL and he was given a year to obtain the CDL. SJ later sustained an injury which prevented him from performing all the core functions of his mechanic position, yet the County made accommodation.

The County’s assertion that the 2008 interest arbitration forecloses the Union’s right to challenge the discharge for loss of a CDL is misplaced. The award did not modify the language nor did it provide the County with carte blanche rights to terminate any employee who loses a CDL. The arbitrator specifically stated in the award that it was not meant to grant the employer the free reign, but rather to adopt the status quo and encourage the parties to reach “mutually acceptable language.”

The Union asks that the Grievant be reinstated to his position with full back pay and benefits retroactive to his termination. If the Arbitrator determines the Grievant was unable to perform his functions and that reasonable accommodation could not have been made, then the Union asks that the Grievant be granted an unpaid leave of absence until the date of reinstatement of his CDL endorsement.

#### County in Reply

The Union's request for reinstatement exceeds the accommodation request proposed by the Union in bargaining. When the parties were negotiating the 2007-2008 agreement, the Union requested a provision that would allow "temporary assignments....at the sole discretion of the department head." The Union is now asking for a mandatory year-long job assignment accommodation. This remedy was not realistic in 2007 and is less realistic today given the decreased staffing levels.

The Grievant never requested a leave of absence nor does the grievance request a leave of absence as the remedy. The granting of leaves of absence is discretionary. There is no evidence that the parties have a past practice of accommodating employees who lose their CDL with a one year leave of absence.

The County acknowledges that the Grievant was a good employee. The County explored alternate courses of action, but ultimately was forced to choose between what was in the best interest of the County and what was in the best interest of the Grievant. The County exercised its authority in a careful and reasonable manner. The County asks that the grievance be denied.

#### Union in Reply

The Union first points out that just because it proposed to amend the contract and add language that employees would be entitled to remain employed in the event of the loss of their CDL does not mean that the just cause provisions of the labor agreement have been reduced. The Union was not successful when it proposed language in interest arbitration and the contract remained the same. The Employer's suggestion that just cause rights were reduced by the rejection of new language should be dismissed.

The cases cited by the County are distinguishable. In CITY OF OSHKOSH, supra, there was contract language that required CDL licensure and specifically stated that an employee's failure to maintain proper licensure was grounds for immediate termination. In ONEIDA COUNTY, supra, there was similar CDL language. There is no such language in this labor agreement. The County's decision to terminate the Grievant is subject to the just cause provision and the County must show it was unable to allow the Grievant to work when he did not have a valid CDL.

The County's argument about the 2005 change in the CDL law is not determinative in this case. The stipulated issue is whether the County violated the just cause provision when it terminated the Grievant. Substantial evidence was presented which establishes that other bargaining unit members lost or failed to obtain CDL licensure and their employment was not terminated.

The County violated the labor agreement and the grievance should be sustained.

### **DISCUSSION**

The parties stipulated that the issue was whether the labor agreement was violated when the County terminated the Grievant. The Union argues that the case is subject to a just cause analysis pursuant to Section 3 while the County maintains that the just cause provision is inapplicable since this termination was not for disciplinary reasons, but that the termination was justified.

The parties framed the issue focusing on Article IV, Section 3, which begins with the statement, "[i]t is agreed that the exercise of proper and reasonable disciplinary measures belong to management." This is a general statement that recognizes the County's right to discipline. This sentence is followed by two sub-sections, A and B. Sub-sections A and B each address and delineate certain misconduct offenses to which the parties negotiated the consequence. Sub-section A sets forth eight terminable offenses which the parties believed to be so egregious that they concluded it unnecessary to provide the employee notice prior to termination. Those offenses include:

1. Being under the influence of intoxicants or drugs during hours of work which have not been prescribed by a physician and which resulting condition may materially affect production and present a safety hazard.
2. Theft or illegal acquisition of anything of value from the employer at any time or fellow employees during hours of work.
3. Willful damage of employer's property.
4. Willful violation of a posted major safety rule.
5. Transportation of unauthorized persons with a County vehicle or unauthorized use of County vehicle.
6. Failure to carry out proper work assignments for which an employee is qualified and capable of performing provided it does not expose the employee to an adjustable safety hazard.
7. Assault by/on any person during the hours of work.
8. Falsification of material information of (sic) records, reports or applications of employment.

The Grievant's discharge was not for one of these offenses. Rather, it was for no longer possessing a CDL, therefore I move on to sub-section B.

Sub-section B identifies four additional offenses for which the parties negotiated a three step progressive discipline model. If an employee violates any of the four offenses, the first step is a written warning, the second step is a suspension and the third step is discharge. The four offenses include:

1. Unexcused tardiness or absence.
2. Scurrilous misconduct during hours of work which adversely reflect on the image of the County and fellow employees.
3. Negligence and inefficiency in the performance of duties assigned and the directions for completing the same.
4. Violation of posted safety and other reasonable rules.

Again, loss of a CDL license is not specifically included in this list and although it is possible that it may fall into item four, "...other reasonable rules," since the County did not rely on this language, I will forego further analysis of this part of the sub-section as the basis for the Grievant's termination.

The Union argues that since the loss of a CDL is not included in either sub-sections A or B, then the County did not have the contractual right to terminate the Grievant. While it is true that the parties specifically addressed and agreed on twelve offenses to which discipline is warranted, there is nothing in the language of sub-sections A or B to suggest that these lists are all-inclusive or that the County is forbidden from imposing discipline for offenses not identified in either sub-section A or B.

Having concluded that the Grievant's discharge is not grounded in either sub-section A or B, I return to the first sentence of Section 3 which provides that the County may discipline provided it is "proper and reasonable." This "proper and reasonable" language is different than that contained in the first sentences of sub-sections A and B, both of which require that just cause be met and different than that contained in Article IV, Section 1 which grants the County the right to "...discharge or discipline for just cause." The parties have asked that I analyze this case based on Section 3 of the labor agreement. Section 3 must be read in concert with the entire agreement. I conclude that the just cause standard must be met in order for the Grievant's termination to stand.

The County characterizes the Grievant's discharge as a non-disciplinary termination and concludes that the just cause standard is not applicable. The perception that just cause is germane only to misconduct charges is misguided. Just cause is a broad enough concept to include disqualification. As Arbitrator Dan Nielsen explained in CITY OF HORICON, Case 38, No. 68590, MA-14280 (Nielsen, 3/09):

While the term “just cause” normally conjures up notions of misconduct and punishment, it can also apply to accurate, good faith determinations that an individual, without fault, is not capable and will not again become capable of performing the job for which he or she was hired. The resulting termination is not disciplinary, but it is nonetheless imposed for just cause.

The right of management to discharge an employee for conduct away from the job depends on the effect, if any, of the employee’s off duty conduct on the employer. Elkouri & Elkouri, How Arbitration Works, 6<sup>th</sup> Ed. (2006) p. 938. This standard was further explained by Arbitrator Kesselman in W.E. CALDWELL CO., 28 LA 434, 436-37 (Kesselman, 1957):

The Arbitrator finds no basis in the contract or in American industrial practice to justify a discharge for misconduct away from the place of work unless:

- 1) Behavior harms Company reputation or product...;
- 2) Behavior renders employee unable to perform his duties or appear at work, in which case the discharge would be based on inefficiency or excessive absenteeism...
- 3) Behavior leads to refusal, reluctance or inability of other employees to work with him...

The Grievant was arrested and ultimately convicted for the lesser offense of operating with a prohibited blood alcohol content. This arrest happened off-the-job and resulted in the revocation of his regular driver license on or about June 1, 2011 which resulted in the disqualification of his CDL for one year from that date.<sup>1</sup> The disqualification of the Grievant’s CDL, pursuant to the terms of the Act, as a result of his off-duty OWI conviction, served as the basis for his termination. The question, therefore, is whether the Grievant’s termination met the just cause standard - was he unable to perform his Patrolman position due to the disqualification? The Union acknowledges that the Grievant lost his CDL for one year, but maintains that the County did not need to terminate him because there was sufficient non-CDL work for him to perform until he regained his CDL.

Union President Bruce Auseth testified that patrolmen do not have specific assigned functions and that they have different jobs during the spring and summer months. Auseth testified that from May through October the Grievant, in his seasonal Loader Operator position, would have been operating the loader between 75 and 80 percent of the time and that during the remaining amount of time he would have been operating other equipment, some of which would not have required a CDL license. During the winter months, the Grievant would have been

---

<sup>1</sup> The parties stipulated that the anticipated date for the Grievant’s CDL to be reinstated is May 23, 2012.



responsible for a state patrolman plow/snow route which required a CDL to operate. Auseth identified non-CDL patrolman responsibilities including loading material into trucks with the loader, operating the grader, road sealing with a rubber tire roller, shouldering road with a sweeper, mowing, cutting and removing brush, picking up litter, painting and brine mixing that are performed throughout the year. The Union maintains that there is enough non-CDL patrolman responsibilities to fill the Grievant's days.

County Highway Commissioner Brevick did not agree with the Union that it was possible for the County to find work or make assignments to accommodate the Grievant's loss of his CDL. Brevick testified that due to the reduced staffing levels, 10 less than in 2006, the County has limited flexibility in making work assignments. He explained that the County has 23 designated drivers for 20 regular winter plow routes leaving just one spare "man" that would have other responsibilities, but would also respond to big events. Brevick continued pointing out that the weather also plays a major factor in work assignments since it regularly interrupts summer construction projects and prioritizes employee tasks during the winter when responding to snow and storms.

This record establishes that there is non-CDL work available and performed year-round by highway department patrolmen, although there is significantly more non-CDL work available during the summer months than during winter months. But much of this non-CDL work is neither time sensitive in terms of when it must be completed nor is it priority work of the department. The evidence further establishes that department staffing is tight and assigning all non-CDL work to the Grievant would negatively impact the County's flexibility in scheduling staff, especially during the winter months. The County Highway Department is in the business of operating motor vehicles to construct and maintain the roadways in Buffalo County. All highway department employees hold CDL licenses and Auseth confirmed that it is a requirement in order to perform "at least a portion of the job." Based on this record, I cannot conclude that the Grievant was capable of performing his Patrolman duties lacking a valid CDL license.

There are certainly some situations when an employer has an affirmative legal obligation to accommodate an employee through job assignment modifications so that an employee may continue to perform the essential functions of his/her position or a different position but this is not one of those cases. While I accept that the Grievant is a long-standing employee with a good work record, to expect the County to reconfigure patrolmen job duties and piece-meal together job tasks so that the Grievant can maintain full-time employment status is inefficient and not required by the collective bargaining agreement. Moreover, if the Grievant is assigned to perform non-CDL functions, who performs his state patrolman plow route during the winter?

The Union challenges Brevick's testimony asserting that the County has a past practice of accommodating temporary losses of driving privileges and identified three employees who

maintained their employment relationship when they did not have CDL licenses.<sup>2</sup> Employee RB was charged with OWI in 1989 and his ordinary driver license was revoked. After a 20 day waiting period, RB was able to obtain a chauffeur's driver license and was legally able to perform all functions, including CDL driving responsibilities, of his highway position. I do not find RB's situation similar to the Grievant. After RB's waiting period, the County was not obligated to make any work assignment modifications or accommodations to maintain RB's employment. The Grievant cannot obtain an occupational CDL which would allow him to perform his patrolman job duties and therefore the circumstances of RB's continued employment are distinguishable.

A second employee lost his CDL and obtained an occupational license prior to the 2005 Act. He regularly operated a pickup truck and operated the grader during snow emergencies. As a result of the occupational license, he was able to perform his foreman and CDL job duties and the County was not impacted by the loss of his CDL.

The third employee, SJ, was hired in 2005 to the mechanic position and, while holding a CDL was listed on the job description as a required "Special Skill," he did not have one. The County learned two months after SJ's hire that he did not have the CDL when SJ declined to operate a piece of equipment after he was asked to do so by his supervisor. Both Brevick and SJ's testimony were consistent: the County failed to verify that SJ had a CDL license when he was hired. This was a mistake and one that Brevick rectified by requiring SJ to obtain the CDL prior to the completion of his probationary period.

Of greater relevance is the County's handling of SJ's off the job injury to his left arm which significantly limited his ability to perform the diagnostic, repair and maintenance of County equipment. JS testified that the County allowed him to drive a "dump truck" which was work normally done by a patrolman. The record is silent as to whether another patrolman or patrolmen completed SJ's responsibilities during the two month time period when he was unable to perform his mechanic duties. While the Union points to this as evidence that the County is willing to work with and find work for an employee, it also establishes that there is CDL required work to be performed, possibly more CDL work than the number of employees available to complete the work.

The bargaining history establishes that the Union sought to obtain protections for highway department employees that lost their CDL license in the interest arbitration litigation in 2008. They did not succeed before that Arbitrator and I am unwilling to create such a benefit through grievance arbitration.

---

<sup>2</sup> Subsequent to the Grievant's termination, another County highway department employee, TR, also lost his commercial driver license and was terminated by the County effective July 8, 2011.

The final issue to address is the Union's argument as it relates to the Grievant wanting to take a leave of absence. The parties' collective bargaining agreement provides that employees have the option to request a leave of absence for personal reasons. The agreement defines the process to follow when requesting the leave and also sets forth a two year maximum when the reason for the leave is personal illness or disability due to illness. While the Grievant discussed with Brevick the possibility of requesting a leave, he never submitted a leave request. There is no question that Brevick could have advised the Grievant to submit his request, especially when he knew that the County was contemplating the Grievant's termination, but even if he had informed the Grievant, there is no guarantee that the leave would have been granted.<sup>3</sup> It is beyond the scope of my authority to review and rule on a leave request that was never submitted, approved, or denied and exceeds the four corners of the pending grievance.

On this record, I conclude that the Grievant was disqualified from performing the essential functions of his Patrolman position and the County had a just cause to terminate his employment.

### **AWARD**

1. The County did not violate Article IV-Management Rights, Section 3, of the collective bargaining agreement when it discharged the Grievant for failure to maintain his commercial driver license.
2. The grievance is dismissed.

Dated this 28th day of August, 2012 in Rhinelander, Wisconsin.

Lauri Millot /s/

---

Lauri Millot, Arbitrator

---

<sup>3</sup> Randy Brommer testified that he located 75 Leave of Absence requests submitted and approved by the County since 1980. Brommer testified that he did not locate any denied requests. Lacking data addressing the reason for the requested leaves, the length of time the leaves were requested, the timing of the leaves and other relevant facts regarding the leave requests, I cannot reach the conclusion that had the Grievant submitted a leave request, it would have been granted.