

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**VILLAGE OF POYNETTE**

and

**WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES,  
DISTRICT COUNCIL 40, AFSCME, AFL-CIO**

Case 12  
No. 71719  
MA-15196

---

**Appearances:**

**Drew Cochrane**, Stafford Rosenbaum, LLP, Attorneys at Law, 222 West Washington Avenue, Suite 900, Madison, Wisconsin, appeared on behalf of the Employer

**Neil Rainford**, Staff Representative, 8083 Excelsior Drive, Madison, Wisconsin, appeared on behalf of the Union.

**ARBITRATION AWARD**

The Village of Poynette, hereinafter “Employer,” and District Council 40, AFSCME, AFL-CIO, hereinafter “Union,” jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Poynette, Wisconsin, on January 30, 2013. Each party filed a post-hearing brief, the last of which was received February 25, 2013, and the record was closed as of that date.

**ISSUES**

The parties stipulated to the following statement of the issues:

1. Did the Employer have just cause to terminate Andy Tomlinson?
2. If so, what is the appropriate remedy?

## FACTS

The Employer is a small Wisconsin municipality that operates a Department of Public Works. Mike Paulcheck is the Director of Public Works. The Union represents the four non-supervisory employees of the Department of Public Works. Grievant, Andy Tomlinson was one of those non-supervisory employees employed by the Employer in the Department of Public Works. He was employed for about fifteen years until he was discharged. The discharge is the subject of this dispute. All of the Department of Public Works employees report directly to Mr. Paulcheck. He reports to the Village Manager who, in turn, reports to the Village Board of Trustees.

All of the personnel of the Department work Monday through Friday from 7:00 a.m. to 3:00 p.m. with a scheduled half-hour paid break during that period. All of the Department employees and Mr. Paulcheck work out of the Village garage. Mr. Paulcheck reports a little later than 7:00 a.m. All Department employees are required to have and maintain a Commercial Driver's License (herein "CDL").

On July 9, 2012, the Employer terminated Mr. Tomlinson for the following reasons:

Mr. Tomlinson was discharged for having the four subsequent disciplinary incidents and additional issues concerning advance notice of time off requests:

1. On June 26, 2012, the Employer discovered that Mr. Tomlinson had failed to report to the Employer as required by the collective bargaining agreement that had he had had an off duty traffic accident in his private vehicle, citations for inattentive driving and causing damage to a parked vehicle, and consequently having his CDL license suspended, all in connection with that accident.
2. On June 21 and 22, 2012, again using the Employer's vehicle in the manner described above.
3. On June 23, being on-call, but refusing to report to work when called.
4. On June 28, refusing Mr. Paulcheck's direction to pick up lumber from a dumpster.

The factual details of these incidents are explained in the section entitled "Discussion" below and will not be restated here.

The background leading to the decision to discharge is instructive and is set out here. At the time of this dispute, Mr. Tomlinson was experiencing problems in his personal life due

to a pending divorce. On February 21, 2012, the then Village Manager, Daniel Guild<sup>1</sup>, sent Mr. Tomlinson a letter voicing the concern that Mr. Tomlinson was reporting to work under the influence of alcohol or seriously hung over. It questioned whether he was safely performing his work and expressed a concern that his attitude and behavior were inappropriate for work. It warned him in relevant part as follows:

- . . . . If you cannot make your shift, you are expected to call your supervisor, Mike Paulcheck, by 6:50 a.m. [10 minutes before the start of his shift]
- You must report to the jobsite completely alcohol free. This includes, but is not limited to, not being hung over from the effect of alcoholic consumption. . . .
- Your behavior and demeanor in the workplace must be pleasant, cooperative, and conducive to a happy, safe, and productive jobsite. We expect you to take direction from your supervisor

Should fail to satisfy these expectations; (sic) the Village's next step will be to pursue further action against you which could lead to discipline, up to and including termination.

On March 2, 2012, the Employer again sent Mr. Tomlinson a warning letter for having failed to call in prior to the start of his shift and having first requested leave about two hours after the start of his shift. It also expressed the concern that Mr. Tomlinson did not, even then, talk to his supervisor about the tardiness and its reason. It reiterated the directions specified above from the February 21<sup>st</sup> letter.

On March 14, 2012, Mr. Tomlinson was again warned<sup>2</sup> for improperly using the Employer's property to drive to the local BP gas station. The facts underlying the warning are not disputed. Mr. Tomlinson had developed a routine of taking his personal vehicle to the DPW garage a few minutes before his 7:00 a.m. start time. He then would take a DPW vehicle the few blocks to the BP station to get coffee and a newspaper and return to the DPW a few minutes after 7:00 a.m. The letter directed him:

. . . . It is our expectation that you do not use a Village owned vehicle outside of your normal working hours and only for activities related to your employment with the Village's Public Works Department. . . .

---

<sup>1</sup> Mr. Guild left employment with the Employer prior to the hearing. He was unavailable as a witness. The prior discipline involved herein was issued at the direction of Village Trustees and not Mr. Paulcheck.

<sup>2</sup> The original warning was a written warning, but it was effectively reduced to an oral warning pursuant to the settlement of a grievance protesting the warning.

The Union filed the instant grievance. The same was properly processed the same to arbitration.

**RELEVANT AGREEMENT PROVISIONS**

. . .

**ARTICLE 2 – MANAGEMENT RIGHTS**

2.01 Except as expressly provided by other provisions of this Agreement, the Village retains the sole right to operate the Village and all management rights repose in it. Without limiting the generality of the foregoing, these rights include the following:

1. To direct all operations of the Village;
2. To establish and require observance of reasonable work rules and schedules of work;

. . .

4. To suspend, demote, discharge and take other disciplinary action against employees;

. . .

**ARTICLE 6 – DISCIPLINE/DISCHARGE/DRUG TESTING/CDL**

6.01 Just Cause: The Village shall not suspend, discharge or otherwise discipline any non-probationary employee without just cause. Probationary employees may be disciplined/discharged at the sole discretion of the Village.

. . .

6.05 Loss of Commercial Driver’s License: The parties agree that it is in the best interest of the Employer, the Union and employees to preserve and protect the employment status of the employees whose Commercial Driver’s License (CDL) is suspended, revoked, or disqualified due to circumstances arising outside of work, provided the employee is expected to regain his/her CDL at the end of the penalty period. Should an employee lose his/her CDL, as noted herein, the Village shall make every reasonable effort to assign available, non-safety sensitive, bargaining-unit work to said employee, for which s/he is qualified. The Village shall determine the work to be performed which shall not be subject to the job posting procedure or seniority considerations. For a period

of up to twelve (12) months from the date of the loss of the CDL, the employee shall be paid at the rate for the position(s) assigned. When an employee has the CDL restored, s/he shall be returned to position s/he held prior to the loss of the CDL. The employee shall be granted up to sixty (60) days following any CDL suspension to arrange for the reinstatement of his/her license.

If non-safety sensitive work is not available the employee shall be placed on an unpaid leave of absence. However, the employee may substitute vacation and holiday time, if available. While on an unpaid leave of absence, the employee will not accrue benefits. Insurance benefits will be made available; however, an employee on an unpaid leave of absence must pay the applicable premium(s). An employee on an unpaid leave of absence will not be required to return to work for intermittent work assignments, unless the employee makes him or herself available for such work.

The Village is not required to provide non-safety sensitive work assignments under this provision to more than one (1) employee at a time and in the event the first slot is filled, the most senior employee shall receive the benefits of this provision. Up to one (1) additional junior employee shall be placed on unpaid leaves of absence as specified in this provision.

If the CDL is not restored to the employee at the end of twelve (12) months, the employee shall be placed on layoff, subject to recall to available positions for which s/he is qualified. The employee shall maintain all rights under the contract available to laid-off employees.

Any employees whose CDL is suspended as a result of a drug or alcohol violation agrees to undergo a drug/alcohol assessment and to abide by any recommendations made regarding treatment for dependency. This provision shall not preclude the discipline of an employee where there is just cause under Article 6 of this agreement for misconduct.

. . .

## **ARTICLE 12 – WORK DAY AND WORK WEEK**

12.01 Work Day and Work Week: The normal workday for all regular full-time Public Works employees shall be eight (8) hours, commencing at 7:00 a.m. and concluding at 3:00 p.m. The normal workday for all regular full-time Office personnel shall be eight hours commencing at 7:30 a.m. and concluding at 4:00 p.m. The normal workweek for all regular full-time employees shall be forty (40) hours, Monday through Friday. Employees are expected to be ready to work at the beginning of their assigned work hours.

...

12.06 Weekend Duty: Public Works employees perform weekend duties in the water and wastewater utilities on a rotating basis, and shall be compensated with five (5) hours at time and one-half (1-1/2) compensation on Saturday and three (3) hours at time and one-half (1-1/2) compensation on Sunday.

12.07 On-Call: Only bargaining unit personnel shall be placed on the on-call rotation. Responsibility starts on Friday evening. The next employee on the rotation is assigned for the next week beginning Friday afternoon. The on-call employee is normally expected to report to duty within one-half (1/2) hour of a call.

### **ARTICLE 13 – OVERTIME/COMPENSATORY TIME**

13.01 Distribution: Overtime shall be authorized by the Employer. Offers of overtime shall be made among the employees who normally perform the work. In the event no one voluntarily accepts the assignment the Employer shall assign the overtime by inverse seniority.

...

### **ARTICLE 16 – VACATION**

16.01 Earned Vacation: Regular Full-Time Employees are eligible for vacation pay. Employees may not use vacation time before it is earned without approval of the Village Administrator.

...

D. Scheduling: Requests for vacations of one (1) week or more shall be made in writing to the employee's department head no less than two (2) weeks prior to the date of said vacation. Vacations of less than one (1) week require at least twenty-four (24) hours' notice and supervisor approval. Deviations from the above notice requirement may be made by mutual agreement between the employee and the Department Head.

### **ARTICLE 17 – AUTHORIZED LEAVES**

17.01 Sick Leave

B. Notice: Utilization of sick leave shall be allowed only if the employee notifies the Director of Public Works or his/her designee of the need for said sick leave within one-half (1/2) hour following the start of regular work hours

or, in the case of serious bodily injury or grave illness, as soon as reasonably possible under the circumstances.

C. Abuse: The provision of sick leave does not vest in an employee the right to a certain number of days each year and substantiated abuse of sick leave privileges may result in discipline or discharge.

D. Use: An employee shall be permitted to use sick leave in the event of illness or injury of the employee or serious illness or injury of a member of his/her immediate family which requires the employee's personal time and attention. Such use includes visiting doctors, dentists, or other recognized practitioners. "Immediate family" is defined to include the employee's spouse, child, or parent, and will also include any person living in the employee's home. The Employer may require a doctor's certificate for illnesses involving more than three (3) day's absence from work or in the event the Village has evidence of sick leave abuse.

...

### **RELEVANT EMPLOYEE MANUAL PROVISIONS**

...

#### **Driver's License and Driving Record**

Employees whose work requires operation of a motor vehicle must present and maintain a valid driver's license and an acceptable driving record. Any changes in an employee's driving record must be reported to his or her supervisor immediately. Failure to do so may result in disciplinary action, up to and including possible termination.

Employees whose positions require specific driving certifications, such as the Commercial Driver's License, are responsible for ensuring that they obtain those. Village of Poynette will reimburse current employees for any reasonable expenses related to obtaining or maintaining such certifications.

...

#### **Work Rules**

##### **Business Hours**

Regular Village Hall operating hours are from 7:30 AM – 12 noon and 12:30 PM – 4:00 PM Monday through Friday. The Public Works Crew is

regularly scheduled from 7:00 AM – 3:00 PM with a morning break at 9:30 AM

An employee's particular hours of work and the scheduling of breaks is determined and assigned by the supervisor or by representative union agreement.

One Public Works employee each week shall be assigned responsibility for responding to after-hours (evening and weekend) emergency calls.

### **Attendance**

Employees are expected to be ready to work at the beginning of their assigned work hours. They should inform supervisors if they will be away from their assigned work stations for an extended period of time.

...

## **DISCIPLINE**

### **Standards of Conduct**

...

Unacceptable Behavior, which will result in discipline, includes:

...

Insubordination or refusing to obey instructions properly issued by your manager pertaining to your work; refusal to help out on a special assignment.

...

## **WORKPLACE POLICIES**

...

### **Personal Use of Agency Property**

In some instances employees may be allowed to borrow certain Village of Poynette tools or equipment for their own personal use while on our premises, or for business use off premises. In no instance may this be done without prior management approval. The Village of Poynette is not liable for personal injury incurred during the use of agency property for personal projects. Village of



Poynette employees accept full responsibility for any and all liabilities or injuries or losses which occur, or for the malfunction of equipment in those circumstances, and are responsible for retuning the equipment or tools in good condition.

### POSITIONS OF THE PARTIES

#### Employer

The Employer has shown just cause to terminate Mr. Tomlinson. He has had prior warnings and even a suspension concerning what would ordinarily be minor transgressions. Within a very short period he committed a number of other violations, many of which standing alone could warrant termination. Taken together, they clearly demonstrate the termination is appropriate.

As to the incident of again using the Employer's vehicle to go to the BP station, Mr. Tomlinson's testimony is incredible. He knew the conduct was prohibited. While the written warning with respect to his prior discipline for doing essentially the same thing was withdrawn, the parties agreed that the direction to not repeat the behavior remained in effect. Mr. Tomlinson's testimony at hearing herein that he did not know his behavior was prohibited is both incredible and in flat contradiction of his testimony at his unemployment compensation hearing at which he acknowledged that he knew this behavior was prohibited. This violation is a deliberate disregard of the Employer's legitimate directive to him.

Mr. Tomlinson's failure to respond to a request to report to work while he was on-call to do so warranted discipline. The Union is not disputing that he refused a fellow employee's request to report to work on June 23, 2012. Mr. Gorman's testimony that Mr. Tomlinson said he was busy and asked if Mr. Gorman could do the work should be credited over Mr. Tomlinson's testimony that Mr. Gorman volunteered to do the work. In either case, however, Mr. Tomlinson's action still violated the Employer's handbook and Section 12.07 of the collective bargaining agreement. While some swapping of job assignments is allowed, those arrangements must be made in advance. Mr. Tomlinson's conduct relates back to his first written warning about his failure to work in a timely manner.

Mr. Tomlinson's refusal to follow his supervisor's direct order to retrieve some lumber from a construction site dumpster merited discipline. Mr. Paulcheck testified that Mr. Tomlinson refused to pick up the lumber. Mr. Tomlinson testified that he offered what is a number of excuses to Mr. Paulcheck. He was told to do it anyway and did not do so. The Employer acknowledges that Mr. Paulcheck appeared more critical of Mr. Tomlinson at the arbitration hearing than he was at the unemployment compensation hearing. However, the Union has not disputed that Mr. Tomlinson has a history of pushing back against his supervisor's legitimate directions. The prior warnings were intended to address this conduct. There can be no doubt that the Employer was addressing this concern.

Mr. Tomlinson violated Section 6.05 of the Collective Bargaining Agreement and the relevant portion of the Employer's handbook when he failed to inform the Employer that his CDL license was suspended and when he failed to inform the Employer that he had received serious traffic citations for a traffic accident. Mr. Tomlinson's testimony as to this issue is incredible. It is not believable that he did not open the letter from the Department of Transportation notifying him his CDL license was suspended. In any event, he failed to notify the Employer of the other very serious traffic violations.

The Employer told Mr. Tomlinson that he was required to give advance notice of his absences and advance notice of vacation and other leave. However, Mr. Tomlinson's behavior did not change in this regard. This conduct warranted discipline.

Discharge is the only appropriate remedy for Mr. Tomlinson's conduct. The fact that Mr. Tomlinson had a large number of violations in short order after having been disciplined demonstrates that rehabilitation is not practical. Mr. Tomlinson may argue that his personal problems are a mitigating factor. The Employer did offer him the opportunity to work with it, but he chose not to avail himself of the opportunity. The Union's argument that Mr. Tomlinson was not given an opportunity to refute the charges is not factually correct. He was offered the opportunity to require a full evidentiary hearing before the Board pursuant to Sec. 19.85(1)(b), Stats, but chose not to appear before the Board. Finally, Mr. Tomlinson has been a fifteen year employee. While that might otherwise be a mitigating factor, the past evaluations in evidence show he was never a very good employee and Mr. Paulcheck testified that Mr. Tomlinson had been a difficult employee for years. The conduct in this case establishes Mr. Tomlinson violated the Employer's trust, created a liability risk to the Employer, and failed to be cooperative even after he was warned about his attitude. The Employer urges that the grievance be denied.

### Union

The Employer has failed to demonstrate just cause for the discharge of Mr. Tomlinson. He is a fifteen year employee with a good work record. He responded positively to minor discipline earlier in the year. As to the incidents in dispute, Mr. Tomlinson was never given a chance to provide his explanation as to these events before the Employer made the decision to discharge him. His explanations presented at hearing demonstrate that the Employer did not have just cause to discipline him for these incidents.

As to the CDL incident, Mr. Tomlinson did not report the Department of Transportation's suspension of his CDL license because he did not know it had been suspended. In any event, the violation is not worthy of discharge because there was no harm to the Employer. Mr. Tomlinson did not operate a vehicle requiring a CDL license during the period between the suspension and the time the Employer discovered it had been suspended.

As to the incidents of using a Village vehicle to go to the BP station to get coffee and a newspaper (personal business), Mr. Tomlinson did not commit the violation which was

alleged. He admits that he did stop at the BP Station on the two occasions, but did so only while enroute to a work site. This was different than the incident which had prompted the prior warning. This was consistent with prior practice of other employees.

The allegation that Mr. Tomlinson refused to report to work while he was “on-call” is without merit. As fellow employee Scott Gorman testified, Mr. Tomlinson did not refuse to report to work, but merely asked if Mr. Gorman could perform the minor repair involved.

The Employer’s allegation that Mr. Tomlinson engaged in insubordination by failing to perform his supervisor’s direction to retrieve wood from a dumpster does not rise to the level of the insubordination. Mr. Tomlinson fully explained the reasons why he questioned Mr. Paulcheck’s direction to retrieve the wood. There is nothing out of the ordinary in him having done so. Mr. Paulcheck told Mr. Tomlinson he would go to the dumpster himself and get back to Mr. Tomlinson. Mr. Paulcheck never told Mr. Tomlinson that he was concerned about Mr. Tomlinson’s failure to retrieve the wood. Mr. Paulcheck’s testimony at hearing was significantly more critical of Mr. Tomlinson at the hearing herein than at the unemployment compensation hearing. Accordingly, his testimony should be accorded little weight. The Union asks that the grievance be sustained and that Mr. Tomlinson be reinstated and made whole for all lost wages and benefits.

### DISCUSSION

The role of the arbitrator in this case is to determine whether the employee engaged in the misconduct alleged and, if so, whether the discharge penalty imposed by the Employer is correct.<sup>3</sup> I conclude that Mr. Tomlinson committed the work-rule and/or failure to follow directions offenses as specified in the warning letters as specified above. I am satisfied that discharge is the only appropriate remedy because these incidents occurred over a short period of time and evince a habitual disregard for the authority and interests of the Employer. In this context, Mr. Tomlinson’s untruthful testimony demonstrates that he is so unlikely to maintain an appropriate relationship with his employer that discharge is the only appropriate remedy.

I note that all of the discipline involved in this matter was issued by Mr. Paulcheck’s supervisors, the Village Trustees and/or then Village Manager, necessarily based on information provided by Mr. Paulcheck. The reason for this was not adequately explained at the hearing.

I address the June 21<sup>st</sup> and 22<sup>nd</sup> incident. Village Trustee Ross testified as follows: After the prior warning for the same conduct, he decided to spot check to see if Mr. Tomlinson was complying with his direction to not use the Employer’s truck to go to the BP station. He positioned himself a little more than a block away shortly before 7:00 a.m. and observed Mr. Tomlinson on both days arrive with the Employer’s truck from the direction

---

<sup>3</sup> This is the essence of Ch. 6, NAA, *The Common Law of the Workplace: The Views of the Arbitrators*, (BNA, 2d Ed.).

of the DPW shop, park the truck, go into the station, leave with coffee, and return in the same direction toward the shop.

Mr. Tomlinson testified as follows to the June incidents at the local BP station: He acknowledged that he had on both occasions stopped at the BP station, but alleged that on one occasion he went there to fuel the vehicle and merely stepped inside to get coffee and on the second occasion that he was merely driving by the station and stopped to get coffee. He believed that stopping at the BP station under these circumstances was not a violation of the prior warning.

Mr. Tomlinson's testimony is a fabrication. He deliberately ignored the prior warning and continued his old habit believing he would not be caught. Specifically, this conduct occurred shortly after the warning. It occurred on two consecutive days. The facts that it happened to occur when a Village Trustee decided to spot check Mr. Tomlinson's compliance and that it happened on two consecutive days strongly suggest that the conduct was part of a pattern or habit. Mr. Tomlinson testified that on one of the two occasions he was fueling the truck and merely went inside the BP station and on the other he merely stopped while in route to a work site. However, Trustee Ross testified that he did not fuel the vehicle on either day. He also testified that on both days Mr. Tomlinson approached the BP station from the direction of the DPW garage and returned heading in that direction. Therefore, it is not believable that Mr. Tomlinson was on the way somewhere else on either day because he went back in the same direction. Further, the timing of both events was consistent with his pattern and inconsistent with it being work related. He arrived at the BP station before the normally scheduled daily meeting at the start of each shift. Mr. Tomlinson's testimony that "he thought" this was not covered by the warning isn't believable. He knew it was prohibited. The view might be different if he had discussed what the prior warning meant with his supervisor. He made no such effort.

I turn to the allegations about Mr. Tomlinson's alleged failure to follow Mr. Paulcheck's direction to him to retrieve the wood from the dumpster at the construction site. Mr. Paulcheck testified that the Police Chief asked him to retrieve wood which the contractor put in the dumpster at a site the contractor was constructing a building for the Employer. Mr. Paulcheck told Mr. Tomlinson at the beginning of the morning to pick up the lumber and that Mr. Tomlinson refused to do so. Mr. Tomlinson argued that the wood belonged to the contractor. Mr. Paulcheck told him that it was the Village's wood and to do it anyway. Mr. Paulcheck expected at the end of the conversation that Mr. Tomlinson would do it and was surprised when he did not do it. Mr. Paulcheck testified that it was not unusual for employees to "refuse" to do things or argue about their individual assignments, but that the employees ultimately did as they were told. Mr. Paulcheck stated that Mr. Tomlinson was far more argumentative than most.

Mr. Paulcheck's testimony was less critical of Mr. Tomlinson at the unemployment compensation hearing. At that hearing, he testified as above, but stated that Mr. Tomlinson was no different in his resistance to directions than other employees.

While Mr. Paulcheck's testimony at the two proceedings varied somewhat, the testimony is sufficient to establish that Mr. Paulcheck told Mr. Tomlinson to do it anyway and that he expected him to do it.

Mr. Tomlinson testified as follows about that incident: He acknowledged that Mr. Paulcheck asked him to retrieve the wood from the dumpster at the construction site. He never went to the construction site or saw the wood in dispute. He told Mr. Paulcheck that the wood belonged to the construction company in control of the site and that it was unsafe to get the wood because he would have to go into the dumpster and risk injury from nails in the wood or other debris. Later in his testimony, he stated that he was busy with another project and had intended to get the wood when he was done.

Again, Mr. Tomlinson's testimony is intentionally untruthful. For example, Mr. Tomlinson testified at one point that Mr. Paulcheck ended the conversation by saying that Mr. Paulcheck would go out to the dumpster and let him know if he had to do it. However, he later testified that he intended to do it, but got so busy that he did not have time to do it. I conclude that Mr. Tomlinson never intended to follow Mr. Paulcheck's direction to obtain the wood.

Turning to the issue of the failure to report traffic violations and loss of the CDL, Mr. Tomlinson testified about his failure to report the loss of his CDL to the Employer as follows: He acknowledged that he had an accident with his personal vehicle at about 4:00 a.m. one morning and that he improperly left the scene of the accident. It is undisputed that he was not scheduled to report to work that morning. He was cited for inattentive driving (4 point violation) and leaving the scene of an accident (6 point violation). When he next was scheduled to work he arrived in a rented vehicle. He told his fellow employees that he was in an accident and believed it was common knowledge that he had the accident. He was unsure if he ever discussed the accident with Mr. Paulcheck. He never told Mr. Paulcheck that he had hit a parked car and driven away from the scene. He never told him about the citations. He received the two letters from the Wisconsin Department of Transportation. The first informed him of the traffic convictions against his personal drivers' license. He read this letter when it arrived. The second letter arrived shortly thereafter. This letter informed him of the one year suspension of his CDL. He merely thought this was another copy of the first letter and did not read it. He, therefore, did not know his CDL was suspended. He did not believe that his CDL could be suspended for anything other than a DUI conviction. He was familiar with Article 6.05 of the collective bargaining agreement. He denied current knowledge of the Employer's work rule stated in the "Employee Manual" which requires that:

Employees whose work requires operation of a motor vehicle must present and maintain a valid driver's license and an acceptable driving record. Any changes in the employee's driving record must be reported to his or her supervisor immediately. Failure to do so may result in disciplinary action up to and including possible termination.

Mr. Tomlinson was provided with the employer's work rules. Mr. Tomlinson was responsible to be familiar with the above rule. The rule is a common sense statement of the Employer's interest when it trusts employees to drive. It is believable that Mr. Tomlinson chose not to look at the second letter. Nonetheless, the nature of the accident, the timing of the accident and the severity of the traffic citations were all factors which the Employer had a right to know and investigate. The choice to not report these and the choice to ignore a letter from the DOT are violations of this rule. As whole, Mr. Tomlinson chose ignored his Employer's interest in knowing about these matters.

I turn now to the allegation of refusal to report to work while on-call. A fellow employee, Mr. Gorman, who was then off duty was at an event at a village park on a Saturday. The employee noted that the restroom toilet backed up and needed attention. He called Mr. Tomlinson who was on-call at that time. Employees who are on-call are paid to be available to perform work if needed. If they are called to perform work, they are paid a minimum of two hours' pay. The work in question would have only required a few minutes to complete. Mr. Gorman testified that Mr. Tomlinson responded to the call by saying that he was busy and stated that Mr. Gorman should do the work. Mr. Gorman called others on the over-time list, but could not find anyone to come in. He did do the work, but it was not work he wanted to do at the time.

Mr. Tomlinson testified that he told Mr. Gorman that he was busy at the time and only asked if he could do the work. If Mr. Gorman had said "no" he would have come in right away. Mr. Tomlinson also testified that it was common for employees to trade assignments.

Again, Mr. Tomlinson's testimony is not believable. It is not believable that Mr. Gorman wanted to perform this work. While employees do trade work assignments with 24 hours advance notice that policy does not apply to this situation. Mr. Gorman did not volunteer to trade this assignment.

The Employer had just cause to discipline Mr. Tomlinson for the foregoing incidents. The penalty imposed by the Employer is the only appropriate remedy. In order to be appropriate, a penalty imposed by the Employer must be proportionate to the misconduct which occurred and consistent with progressive discipline principles.<sup>4</sup> Mr. Tomlinson's failure to report his traffic accident, citations, or to keep track of the status of his driver's license is a very serious disregard of the Employer's interest. Similarly, his choice to ignore a high level direction to not take the Employer's vehicle to the BP station for his own convenience is a flagrant disregard of his Employer's authority. The deliberate refusal of his supervisor's direction to obtain the wood taken in this context is not an isolated incident, but part of a pattern of resisting his immediate supervisor's authority to give him ordinary directions. The fact that all of this has occurred in a very short period after a direct warning also demonstrates that Mr. Tomlinson's attitude toward the Employer's authority to give him directions is very poor. Finally, Mr. Tomlinson's testimony about these incidents indicates that it is unlikely that

---

<sup>4</sup> NAA, *The Common Law of the Workplace: The Views of the Arbitrators*, (BNA, 2d Ed.), Sec. 6.7

any further progressive discipline will produce any change in that attitude. I conclude that the Employer has met its burden to show that the discipline imposed is proportionate and that further progressive discipline is not reasonably likely to succeed. Accordingly, the Employer had just cause to discharge Mr. Tomlinson.

**AWARD**

The Employer had just cause to discharge Mr. Tomlinson. The grievance is denied.

Dated at Madison, Wisconsin, this 9th day of April, 2013.

Stanley H. Michelstetter II /s/

---

Stanley H. Michelstetter II, Arbitrator