

BEFORE THE INDEPENDENT HEARING OFFICER

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In the Matter of the Grievance of

ANTHONY HERRICKS

Under the Grievance Procedure of the

VILLAGE OF CASHTON

Case ID: 449.0000

Case Type: IHO

DECISION NO. 36165

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**Appearances:**

Jack D. Buswell, Arndt, Buswell, & Thorn, 101 West Oak Street, P.O. Box 349, Sparta, Wisconsin, appearing on behalf of the Village of Cashton.

Kyle R. Davis, Matousek & Laxton Law Office, 123 N. Water Street, Sparta, Wisconsin, appearing on behalf of Anthony Herricks.

**DECISION OF THE IMPARTIAL HEARING OFFICER**

On December 29, 2014, the Village of Cashton (“Village”) sent a letter to Anthony Herricks informing him of his termination and setting forth seven incidents that led to the determination.

The Village has chosen to implement its employee policy and procedure through the Employee Handbook of which Chapter 5: Discipline, Rules, and Employee Communication Procedures applies. Pursuant to the Discipline and Grievance Procedure, an “Impartial Hearing Officer will determine whether the Village acted in an arbitrary and capricious manner.” Herricks has the burden of proof in this regard.

Herricks asserts that the Village acted in an arbitrary and capricious manner. In support of this, Herricks claims that:

1. There is a lack of direct evidence of the behavior and actions alleged;
2. The Village failed to follow its own mandatory procedure;

3. The bulk of the allegations occurred outside of work hours and off Village property; and
4. Herricks suffered from differential treatment and expectations.

## DISCUSSION

### **I. The Alleged Incidents and Discussion.**

#### **A. October 2011.**

The Village claims Herricks arrived at work with the smell of alcohol on his breath. While having a discussion with his supervisor, David Bekkum, Herricks suddenly ran to the toilet and vomited. The Village asserts that a verbal reprimand was given to Herricks by Bekkum in this instance, however, there is no documentation of this occurrence in his personnel file. Herricks claims that the instance was caused by his work conditions, specifically getting a “blast” of foul smelling odor from his manipulation of the facilities at the wastewater treatment facility.

The evidence presented in this instance is favorable to Herrick’s account of events. There was no documentation of the incident. Furthermore, the Village failed to test Herricks for the presence of alcohol in his system. Additionally, if there had been a concern over the intoxication levels of Herricks at the time of this instance, one would hope that the liability concerns and dangers presented to the Village would have been incentive for Bekkum to send Herricks home. Instead, Herricks continued to work throughout the day. This undermines the Village’s assertion of intoxication and lacks not only evidence in fact but actions in conformity of the concern alleged.

#### **B. February 5, 2012.**

On a Sunday morning, Bekkum was contacted regarding a water main break. Bekkum called employees to assist in the repair. Herricks did not pick up his telephone and a message was left for him to which he did not reply. Approximately ten minutes later Herricks arrived at the light plant apparently intoxicated. Bekkum sent Herricks home stating he was unfit for duty. Herricks maintains that he was not intoxicated, that the Village lacks any evidence of his intoxication, and that the Village did not confirm or investigate the matter in a manner that clarifies what his state was.

Whether Herricks was intoxicated or not is not the pivotal issue in this regard. Testimony was received from Bekkum regarding the expected work hours for the position, primarily in reference to the snow removal relevant to the job description. This incident occurred on a Sunday outside of normal working hours. Additionally, unlike a snow removal, a water main breaking is

an unforeseen event which cannot be forecasted by the Village or its staff. While there may exist some conditions where the right of the employer to regulate or discipline an employee for being intoxicated during non-working hours is appropriate if the employee knows they may be called in, it is unreasonable to expect the same in this instance.

While there is no question that alcohol consumption during work hours, or in a manner that affects the productivity of an employee during work hours, is an offense which can justify discipline, prohibition of alcohol consumption during non-working hours is problematic for several reasons. It would in effect create a total abstinence standard for all DPW/village employees abridging their privacy rights. This could create additional complications and liabilities for the Village in regards to federal and state statutes.

C. December 10, 2013.

Herricks contacted Bekkum at 6:35 a.m. requesting the day off, which was granted. Bekkum later realized that he was understaffed and called Herricks back to order him to report for work. Herricks stated that he had been drinking and should not come in. All parties agree to the facts of this incident.

In this instance, Herricks was not in violation of the employee handbook. Bekkum gave permission to Herricks to use leave. At that point, Herricks was alleviated from any responsibility to the employer and had a right to use the time as he deemed fit. The fact that Bekkum erred in understanding what coverage he had was the fault of Bekkum, not Herricks. At the moment that leave was granted, Bekkum and the Village lost their authority to regulate the actions of Herricks.

D. Summer of 2014.

Bekkum was traveling to Milwaukee for a Brewers game when he received a complaint that a citizen, Scott Fredrick, had struck a water pipe with his mower and caused a leak. Herricks was instructed to show up to turn the water off. Fredrick complained that Herricks was intoxicated. This complaint suffers from the Village's lack of documentation or remedial efforts for the alleged behavior.

According to the testimony of Fredrick, Herricks arrived in a condition which suggested the potential for intoxication. Herricks denies that he was intoxicated at this time. Fredrick has taken a course on identifying alcohol consumption as part of his private employment, which offers no small amount of credibility to his statement. However, Fredrick also stated that there was not much that needed being done. The only issue involved was locating the valve, which Herricks did. Fredrick provided the labor, and there was no other request of Herricks.

Herricks file has no mention of this incident, as demonstrated by the lack of a specific date being attributed to the occurrence. Herricks was not confronted or disciplined for the action. His level of intoxication, if it existed, is impossible to gauge. Herricks was required to arrive and locate a valve, which he did. His work performance was not impaired further complicating the

Village's allegation. Had Herricks been confronted on this matter in a timely manner, he may have been able to explain his condition, or the Village may have been better able to ascertain the existence of alcohol in his system. There has been no argument offered by the Village to explain a persuasive justification for the delay in confrontation or discipline offered in this instance, shifting the burden of proof on the charge alleged back to the Village, which ultimately fails in establishing this point.

E. March 2014.

The Village was conducting interviews for the position of WWTP operator, for which Herricks applied. The interviews were conducted at night to accommodate the schedule of Village board members. Herricks appeared for the interview intoxicated and admits as much.

There is no question that the judgment exhibited by Herricks in this regard was beyond poor. To appear for an interview intoxicated creates a great unlikeliness that one would be hired or promoted for the position sought. However, as poor as the judgment of Herricks was in this instance, it is outside the scope of his employment. The interview was for a promotion. Herricks was not being paid for his time at the interview, nor was there an expectation that he attend the interview as part of his job duties. As poor a choice as it was, it was outside the scope of employment and the Village did not have the authority to regulate the actions of Herricks in this regard or to punish him for his actions. The power of the Village in this regard was limited to whether they wanted to hire / promote a candidate for the position who came to the interview intoxicated, a power that they exercised in not offering the promotion to Herricks.

F. November 24, 2014.

Bekkum left a message for Herricks ordering him to come to work to plow. Herricks was enjoying prior-requested leave and did not respond. There appears to be no disagreement over the facts of this incident.

The record does not clearly establish whether a day of leave relinquishes the duty of Herricks or like-classified employees from being required to be available during off-hours in the case of snow removal needs. Industry standards would suggest that approved leave relinquishes one's duty to be available for work. The manner in which leave is utilized, once granted, is beyond the purview of the employer. Both Herricks and the Village failed to adequately address this issue for purposes of reaching a conclusion as to its merit or lack thereof. As demonstrated in the order, further exploration of this incident by the Board is required to make a determination as to their institutional view and past practice as to how this matter was addressed in previous like-circumstances. The Board should act in conformity therein.

G. December 7, 2014.

Herricks was contacted at 10:00 p.m. on a Sunday and ordered to report for work in order to salt icy streets. At 10:02 p.m. Herricks called back stating that he had just woken up and was

unable to come to work. The Village states that the response was nonsensical and alleged that Herricks was intoxicated.

Herricks maintains that he anticipated snowfall to be coming and purposely went to bed early in preparation for the expected call. Herricks indicated that he thought the call would more likely come at 4:00 a.m. and explains his telephone conversation as being the result of being woken up from slumber and disorientated.

Again, the Village has an unsubstantiated claim of intoxication against Herricks. While the occurrence is outside of working hours, as argued by Herricks, the Village does in this situation have an expectation that Herricks would be available for snow removal. By Herricks own testimony, he was aware of the incoming snow and necessity to work non-traditional hours. While Herricks incorrectly predicted the time that he would be needed, he nonetheless was aware that he would be needed at some point. This requires a different analysis than an unexpected off-work call-in, such as the “Summer of 2014” water main incident, which was unforeseen.

Since the Village’s allegation of intoxication is again unsubstantiated, this act should be viewed on its merits as an instance of insubordination. Herricks was instructed to report for work. His job duties and expectations include snow removal during times where the weather mandates such work outside of normal working hours. He was aware that the conditions would require him to come in. Ultimately, when contacted by Bekkum to come in, he refused. Herricks was insubordinate and failed in the execution of his duties.

## **II. Summary.**

Herricks has met his burden of proof in part to establish the Village acted in an arbitrary and capricious manner.

The Village has failed to establish the intoxication of Herricks during work hours or that his intoxication off-hours had an effect on his job performance. The magnitude of allegations made by the Village ultimately weaken their claims, as with every instance listed where intoxication was suspect, the Village had more and more opportunity to confirm the presence of alcohol in Herricks’ system and never did. There was no formal personnel record reflecting these claims or substantiation of the allegations through additional investigation despite numerous opportunities to accomplish either. The claims regarding Herricks intoxication are primarily speculative and without substance or proof and in all cases lacked documentation or the ability for Herricks to contemporaneously defend the allegations.

In the instance where intoxication was proven and admitted to, Herricks was outside of his normal working hours and present for a promotion interview. Herricks displayed poor judgment, but his actions were outside of the employer’s purview and should not be used as an event subject to discipline for his current employment.

The November 24, 2014 incident is unclear as to the Village's policy regarding leave for essential Village staff who were granted leave and then were required to report for work. The Village must subsequently address this issue.

In the case of Herricks not reporting for work on December 7, 2014, Herricks was insubordinate. He was required to appear for work, had advance knowledge that he would likely be called to work, and refused a directive from a superior to report for work. While again the record does not establish the presence of intoxication, such proof is irrelevant. In this instance Herricks was at fault.

In this matter, the record does not indicate whether any singular incident was sufficient to justify the termination of Herricks. Given the Village's choice to include over three years of incidents in their termination of Herricks, it is fair to assume that the Village Board, when making the decision on discipline of Herricks, took into account the entirety of the alleged incidents in sum. Given that of the seven enumerated incidents given to the Village Board in their decision making capacity five were arbitrary and capricious in nature, one was potentially arbitrary and capricious (the November 24, 2014 incident), and one did have merit but was characterized inappropriately, it is impossible in my role as an independent hearing officer to make a judgment based on what I think the Village Board would have done given the proper instructions on how to proceed on this matter.

### **DECISION**

I hereby remand this matter back to the Village of Cashton Board for an initial determination of the affirmation of the recommendation for discharge of Anthony Herricks under the following guidelines:

1. The Board shall not take into consideration the allegations of October 2011;
2. The Board shall not take into consideration the allegations of February 5, 2012;
3. The Board shall not take into consideration the allegations of December 10, 2013;
4. The Board shall not take into consideration the allegations occurring in or around the Summer of 2014;
5. The Board shall not take into consideration the allegations occurring in or around March of 2014;
6. The Board shall make a determination as to whether Herricks' non-response on November 24, 2014 is permissible given that a day of leave was requested and granted. If the Board determines Herricks' actions were impermissible, the Board shall use such determination in conjunction with its decision in regards to the appropriate discipline for Herricks' activities on December 7, 2014.

7. The Board shall make a determination as to whether Herricks' insubordination displayed on December 7, 2014 is sufficient to justify the termination on its own merits, assuming that Herricks' behavior on November 24, 2014 was permissible. In making this determination under either scenario, the Board shall:

a. Determine if the seriousness of the action warrants the discharge of Herricks or if a lesser form of progressive discipline is appropriate;

b. Take into account whether similarly situated employees have been disciplined equally to the ultimate discipline that the Board enacts in this instance.

c. As this is remanded for review to the Board for their determination, Herricks shall enjoy his rights for further appeal under the guidelines established by the Village for any revised or affirmed decision of the Board.

Dated at the City of Madison, Wisconsin, this 11th day of February 2016.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Independent Hearing Officer