

BEFORE THE IMPARTIAL HEARING OFFICER

In the Matter of the Grievance of

ERIC ANDERSON

Under the Grievance Procedure of the

COUNTY OF MARINETTE

Case ID: 253.0001

Case Type: IHO

DECISION NO. 36180

Appearances:

Mr. Mark DeLorme, Staff Representative, AFSCME Wisconsin Council 32, 701 North 8th Street, Manitowoc, Wisconsin, appeared on behalf of Eric Anderson.

Attorney Gale Mattison, Marinette County Corporation Counsel, 1926 Hall Avenue, Marinette, Wisconsin, appeared on behalf of the County of Marinette.

DECISION OF THE IMPARTIAL HEARING OFFICER

The County of Marinette (“County”) discharged Eric Anderson from his employment as an equipment operator effective on September 16, 2015. Section 1.25(h) of the County’s Personnel Policies and Procedures Manual (“Manual”) provides that an employee may request a hearing before an impartial hearing officer (“IHO”) if his grievance regarding a County personnel decision is not resolved in two prior, requisite steps. AFSCME Council 32 made such a request on behalf of Anderson. The County waived the second step of the grievance procedure. Pursuant to its policy for an impartial hearing, the County selected Karl R. Hanson, from the Wisconsin Employment Relations Commission, to serve as the IHO in this matter.

The hearing in this matter was held on February 3, 2016, in Marinette, Wisconsin. The parties made oral arguments at the conclusion of the evidentiary hearing, which was audio recorded. No transcript of the hearing was produced and no written arguments were submitted by the parties. Based upon the evidence and arguments of the parties, the IHO makes and issues the following decision:

BACKGROUND AND FACTS

Eric Anderson has held a commercial driver's license ("CDL"), or its equivalent, for about thirty years. He knew that when his CDL is renewable, he must renew it on or before his birthdate. Anderson's CDL required renewal on July 19, 2015, his birthday. He did not renew his CDL until July 22, 2015. In addition to the standard renewal fee, Anderson paid a \$5 late fee when he renewed his CDL. As part of the qualifications for his County equipment operator position, Anderson was required to "[p]ossess and maintain an insurance acceptable Class A Commercial Driver's License (CDL) with Tanker endorsement."

On July 20 and 21, 2015, Anderson reported for work as a County equipment operator. On those days he worked as a bridge tender at a bridge site in the County. This type of assignment is customary for an equipment operator between May and October. While working the bridge tender assignment, Anderson does not drive any vehicle requiring a CDL to operate. Anderson knew, however, that at any time the County may call upon him to drive a vehicle requiring a CDL to operate. Such an occurrence happened only once within the last three years, after a tornado which caused significant damage. Anderson had not driven equipment requiring a CDL in roughly the last three years while working as a bridge tender.

In September 2015, the County learned that Anderson's CDL had expired in July.¹ Anderson was not alone in his deficiency. Two other employees were similarly discharged from their employment for possessing expired CDLs and after the County learned of the deficiencies.² About a year ago, the County discharged one employee who was required to maintain a CDL, after an operating while intoxicated offense.³

The County considers Section 1.15(e) of its Manual to be a bright line rule; it provides: "[e]mployees acquiring a Commercial Drivers License as part of a job requirement shall be terminated if the Commercial Drivers License is suspended for any reason." Anderson was aware of this rule. When Anderson was discharged, he was informed that his discharge was based upon Section 1.15(e) of the Manual. The Employee Consultation Report recording Anderson's discharge states that the action taken against Anderson was "[t]ermination pursuant to 1.15 – License, Certifications and Background Checks; (e) of Marinette County Personnel Policies & Procedures."

Additional facts, as relevant, are presented in the Discussion section below.

DISCUSSION

¹ A technology problem created disruption in the County's receipt of drivers' information from the Wisconsin Department of Transportation for about six weeks in the summer of 2015 until September.

² The record is silent regarding whether they grieved their terminations.

³ The record does not establish if this employ was discharged after being charged with an OWI offense, convicted of an OWI offense, or after his CDL was suspended due to the OWI offense.

I. Is Anderson Entitled to Seek Relief under the County's Grievance Procedure?

Before reaching the merits of Anderson's discharge, it is first necessary to address the County's threshold argument that Anderson is not entitled to seek relief under the County's grievance procedure. The Manual states, "[t]ermination does not include a separation from employment because of [an employee's] ... failure to meet required qualifications." Manual § 1.25(b)(5). By implication, Section 1.25(b)(3) of the Manual provides that an employee who was separated from employment for the failure to meet required qualifications is not terminated and not entitled to bring a grievance under Section 1.25. The County argues that Anderson was not terminated, and he was instead separated from employment for failing to meet a required qualification. It argues that he is not eligible to bring a grievance under Section 1.25 of the Manual. Without waiving this argument, the County permitted Anderson to file and bring his grievance before the IHO. Anderson argues that he is entitled to file a grievance and to an impartial hearing under the County's grievance procedure.

The Wisconsin Court of Appeals held in 2014 that an employee separated from municipal employment for her failure to maintain necessary qualifications is entitled to grieve her termination through a county's grievance procedure. *Dodge County Professional Employees Local 1323-A, AFSCME, AFL-CIO and Burden v. Dodge County*, 2014 WI App 8 ¶15, 352 Wis.2d 400, 842 N.W.2d 500. In the *Dodge County* case, the county-employer ended Heidi Burden's employment because she no longer met the requirements of the county's driver qualification criteria. *Id.* at ¶3. Dodge County argued that Burden could not grieve the loss of her employment because dismissal, as defined in county's personnel policies and procedures, excluded termination of employment due to lack of qualifications. *Id.* at ¶4 (internal citations removed). The Court of Appeals held that "application of [Dodge] County's grievance procedure so as to exclude Burden's dismissal from being grieved violates [Statute] s. 66.0509(1m)'s mandate that grievance procedures address terminations." *Id.* at ¶10.

The County is required to provide a grievance procedure under which its employees may contest termination decisions. Stat. § 66.0509(1m)(c)1. Based upon the Court of Appeals' holding in *Dodge County*, Anderson is entitled as a matter of law to grieve, as a termination, the County's decision to separate him from employment due to lack of requisite qualifications. Anderson is entitled to use the County's grievance procedure despite the Manual's language to the contrary. Anderson's grievance is properly before the IHO as a step in the County's grievance procedure.

II. Did the County Have Just Cause for Anderson's Termination?

A. Just Cause Standard.

Under the County's grievance procedure, the County must demonstrate by a preponderance of the evidence that it had just cause to discharge Anderson. Manual § 1.25(g)(8). The IHO is nonetheless required by the grievance procedure to deny and dismiss the grievance if the County's action was reasonable and supported by the evidence, even if the evidence presented at hearing reveals other reasonable conclusions. *Id.* The County defines "just cause" as:

A legally sufficient reason for a suspension or termination. A reason is legally sufficient if it is supported by a preponderance of the evidence. The elements of just cause are

[sic] Whether the employee could reasonably be expected to know the probable consequences of his/her conduct.

- a. Whether the rule or order that the employee allegedly violated is reasonable.
- b. Whether the employer made a reasonable effort to investigate whether the employee violated the rule or order.
- c. Whether the employer's investigation was fair and objective.
- d. Whether the employer's investigation produced substantial evidence that the employee violated the rule or order.
- e. Whether the employer applied the rule or order fairly and without discrimination.
- f. Whether the discipline reasonably relates to the seriousness of the offense and to the employee's overall record.

Manual § 1.25(b)(2).

B. Did Anderson Commit the Conduct Alleged?

Although not stated explicitly in the County's policy, it is implied that as part of its just cause standard the employer must prove that Anderson committed the conduct alleged. This is implied by three elements of the County's just cause standard: "a. [w]hether the rule or order that the employee allegedly violated is reasonable; b. [w]hether the employer made a reasonable effort to investigate whether the employee violated the rule or order; [and] f. [w]hether the discipline reasonably relates to the seriousness of the offense and to the employee's overall record."

The County told Anderson in its Employee Consultation Report and through its agents that he was separated from employment under the provisions of Section 1.15(e) of the Manual. That section provides a bright line rule such that any employee required to possess a CDL shall be terminated if his CDL is suspended for any reason. By virtue of invoking this provision as

justification for Anderson's discharge, the County alleged that Anderson's CDL was suspended. In effect then, the first question before the IHO becomes, "Was Anderson's CDL suspended?" Only after answering this question affirmatively is it necessary to address the explicit elements of just cause defined by the County. The County argues that where Section 1.15(e) of the Manual states an employee shall be terminated if his CDL "is suspended for any reason," the phrase should be broadly interpreted to include "expired for any reason."

County ordinances are interpreted using the same rules of construction that the courts apply to statutes. *Board of Regents of U. of Wisconsin v. Dane Cty. Bd. of Adj.*, 2000 WI App 211 ¶14, 238 Wis.2d 810, 618 N.W.2d 537 (internal citations removed). If the language of an ordinance is plain, its language is applied to the facts at hand and there is no reason to look beyond that language to ascertain its meaning. *Schroeder v. Dane Cty. Bd. of Adj.*, 228 Wis.2d 324, 596 N.W.2d 472, 478 (Ct. App. 1999) (internal citations removed). The Supreme Court has further held that "[t]he plain meaning of a statute [or an ordinance] takes precedence over all extrinsic sources and rules of construction, including agency interpretations." *Wisconsin Citizens Concerned for Cranes and Doves v. Wis. Dept. of Nat. Resources*, 2004 WI 40 ¶8, 270 Wis.2d 318, 677 N.W.2d 612 (citing *UFE Inc. v. LIRC*, 201 Wis.2d 274, 282, 548 N.W.2d 57 (1996)). "Words and phrases are generally accorded their common everyday meaning, while technical terms or legal terms of art are given their accepted legal or technical definitions." *Wisconsin Citizens Concerned for Cranes and Doves*, 2004 WI 40 ¶6 (citing Stat. § 990.01(1)). Notwithstanding the foregoing, "[w]ords that are defined in the statute [or ordinance] are given the definition that the legislature [or county board] has provided." *Id.* (citing *Beard v. Lee Enters.*, 225 Wis.2d 1, 23, 591 N.W.2d 156 (1999)).

In its Manual, the County has not defined what the word "suspended" means related to an employee's CDL. Elsewhere in the Manual, the County has defined "suspension" to mean an action taken when an employee "is involuntarily suspended from employment for a period of time without compensation for unsatisfactory performance or misconduct." Manual § 1.25(b)(4). This definition plainly does not apply to the question of whether Anderson's CDL was suspended. The Manual definition is narrowly tailored to address a form of discipline imposed by the County against employees. The context of how the term is used in relation to a CDL is sufficiently different to render the defined term inapplicable to the facts of this case. Since the term "suspended" – or a conjugation of the word – related to a CDL's status is not defined by the County's Manual, the word must be accorded its common meaning.⁴

A dictionary definition of "suspend" provides: "1. to debar temporarily especially from a privilege, office, or function; 2. to cause to stop temporarily." Merriam-Webster Dictionary, available online at www.merriam-webster.com/dictionary/suspend (last accessed 2/4/16). The parties agree that Anderson's CDL was expired for a period of three days. As the County alleges that the term "expired" ought to be incorporated into its use of the word "suspended" in Section 1.15(e) of the Manual, its meaning must be ascertained as well. The Manual does not define the word "expired" – or any conjugation. A dictionary definition of "expire" provides: "2.

⁴ The record does not establish that a legal or technical meaning for the words "expired" or "suspended" exist beyond the common definition meanings.

to come to an end.” Merriam-Webster Dictionary, available online at www.merriam-webster.com/dictionary/expire (last accessed 2/4/16). Merriam-Webster’s dictionary further provides a “simple definition” that “expire” means “to end: to no longer be valid after a period of time.” *Id.*

Possession of a CDL is a privilege granted by the state through the Department of Transportation (“DOT”). Statutes related to a CDL provide that a CDL is operative if not “revoked, suspended, canceled or expired.” Stat. § 343.05(2). Although those four terms are not defined, each has a distinct, common meaning.

The common definition of the word “suspend,” contemplates an action by a party to temporarily stop a privilege. Based upon this definition, a CDL is suspended when the DOT temporarily stops the holder’s commercial driving privilege. Here, the DOT took no such action. Instead, Anderson’s CDL expired – it became no longer valid after a period of time and not by an action of the DOT. Anderson’s CDL was not suspended.

Contrary to the County’s offered interpretation, the plain reading of Section 1.15(e) of the Manual does not provide that an employee will be terminated if his CDL becomes expired. It provides that an employee will be terminated if his CDL is temporarily stopped by action of the DOT. Because the plain reading of Section 1.15(e) of the Manual provides an unambiguous meaning, it is not necessary to resort to extrinsic evidence, such as the County’s interpretation of the rule, to determine the meaning of the rule.

The County also argues that the literal reading of its rule leads to an absurd result. Under a plain reading of Section 1.15(e) of the Manual, an employee who’s CDL is revoked is not subject to termination pursuant to that section, which only provides for termination of those who possess a suspended CDL. An ordinance may have an absurd result when the interpretation of its plain language leads to an unreasonable or unthinkable result and open disbelief of what the ordinance requires. *C. of Kaukauna v. Vil. of Harrison*, 2015 WI App 73 ¶9, 365 Wis.2d 181, 870 N.W.2d 680 (internal citation removed). This analysis must be tempered with the presumption that a legislative body knows the law and knows the legal effect of its actions. *In re Commitment of West*, 2011 WI 83 ¶61, 336 Wis.2d 578, 800 N.W.2d 929. Additionally, it is a well-established principle of statutory construction (*expressio unius est exclusio alterius*) that where a legislative body mentions only one thing of a class, it is to the exclusion of the alternatives. *FAS, LLC v. T. of Bass Lake*, 2007 WI 73 ¶27, 301 Wis.2d 321, 733 N.W.2d 287 (internal citation removed).

Here, the County’s mention of suspension only in Section 1.15(e) of the Manual is to the exclusion of revocation, expiration, and cancellation, all of which are among a class of reasons why a CDL is not valid. *See* Stat. § 343.05(2). It is presumed that, in mentioning only suspension in Section 1.15(e) of the Manual, the County Board was aware of the consequence that the provision would not then apply to revocation, expiration, or cancellation of CDLs. It is possible that the plain reading of the provision produces an unthinkable result relative to a revoked CDL.

Revocation of a CDL is more serious than a suspension. A suspension is temporary, whereas revocation is permanent.⁵

While this may indeed be an absurd result related to revocation, the County's argument is too broad to also incorporate the concept of expiration.⁶ Anderson was able to reinstate his expired CDL by paying a \$5 late fee. Expiration of a CDL is less serious than suspension of a CDL (which is less serious than revocation of a CDL). The plain reading of Section 1.15(e) of the Manual cannot be said to produce an unthinkable result creating disbelief relative to an expired CDL. Given this conclusion, combined with the presumption that the County Board chose its words purposefully and with the intention of excluding any word other than "suspend" from Section 1.15(e), the County's argument must be rejected. Based upon the concepts of statutory construction and interpretation discussed above, the plain reading of Section 1.15(e) prevails over the attempt to incorporate the word "expired" into the definition of the word "suspended."

Anderson did not violate the rule established by Section 1.15(e) of the Manual when he allowed his CDL to expire. Because he did not commit the conduct alleged by the County -- possession of a suspended CDL -- it is not necessary to further address the elements of just cause provided by the Manual. Because it has not proven that Anderson committed the conduct alleged, the County did not have just cause to terminate Anderson's employment based upon Section 1.15(e) of the Manual.

C. Was the County's Action Reasonable?

The last sentence of the standard to be applied in this case reads: "[t]he hearing officer shall deny and dismiss the grievance so long as the County's action was reasonable and supported by the evidence even if evidence presented at the hearing reveals other reasonable conclusions." Manual § 1.25(g)(8). Based upon the analysis above, the County's action was not reasonable because Anderson's CDL was not suspended as contemplated by Section 1.15(e) of the Manual.

Although the County informed Anderson that he was discharged based upon Section 1.15(e) of the Manual, it argued at hearing that Anderson was also discharged for failing to maintain a CDL as required by the qualifications of his equipment operator position. Traditionally, if an employee is not notified of a reason for the action taken against him, the employer is barred from subsequently amending its rationale to incorporate additional reasons. Anderson's testimony was uncontroverted that the County terminated his employment only because of the alleged Section 1.15(e) of the Manual offense. The County's Employee Consultation Report lists only one reason for Anderson's termination, Section 1.15(e) of the Manual. The County presented testimony and argument suggesting that Anderson's failure to

⁵ Revocation of a CDL would still violate the County's job description requirement that an equipment operator maintain a CDL. The outcome of a just cause analysis applied to a CDL revocation case may be very different than the analysis presented below regarding Anderson's CDL which was expired for three days.

⁶ There is no allegation that Anderson's CDL was revoked and it is therefore beyond the scope of this matter to resolve whether revocation should be read into Section 1.15(e) of the Manual.

maintain a CDL, as a necessary qualification for his position, was incorporated into its decision. The County presented no evidence that Anderson was notified accordingly.

The County is appropriately barred from raising this rationale now because it failed to give Anderson notice of that reason.⁷ Nonetheless, the reasonableness of the County's action based upon Anderson's failure to maintain his CDL is addressed below. It is addressed because (1) the County's policy may be read to suggest (despite application of due process rights by the County's incorporation of the "just cause" concept) that, if the County's action was reasonable in any view, that action must be affirmed; and (2) because of the potential for this matter to be reviewed by the County Board in the future.

- (1) Could Anderson reasonably be expected to know the probable consequences of his conduct?

Anderson testified that he did not anticipate that the failure to renew his CDL before it expired would result in discharge. Until Anderson and his peers were discharged in 2015, no employee was discharged for allowing a CDL to become expired. The County offered no reason that Anderson should believe discharge would likely occur if his CDL was allowed to expire other than Section 1.15(e) of the Manual. As discussed above, Section 1.15(e) of the Manual does not apply to expired-CDL holders; it only applies to suspended-CDL holders. Anderson could not reasonably be expected to know that he would be discharged if his CDL became expired.

- (2) Was the rule or order that Anderson allegedly violated reasonable?

The requirement of Anderson's position description was reasonable. He was an equipment operator. Among many other job duties, he could be called upon at any time to operate vehicles for which he must possess a CDL in order to drive. It is eminently reasonable for the County to require Anderson to maintain a CDL given these duties.

- (3) Did the County make a reasonable effort to investigate whether Anderson violated the rule or order?

The County had documentation from the DOT that for a three-day period Anderson did not possess a CDL. Anderson confirmed it. Any further investigation was unnecessary. The County's investigatory efforts were reasonable.

- (4) Was the County's investigation fair and objective?

⁷ Since the 2011 implementation of what is known commonly as "Act 10" in Wisconsin, an ample body of case law has developed regarding which municipal employees are afforded Constitutional due process rights when their public employment is terminated. The just cause language of Section 1.25(g)(8) of the Manual is sufficient to move Anderson's employment out of the category of "at-will" employment, beyond the basic right to a grievance hearing provided by statute, and into the category of employment-property interest protected by due process rights. See, *Nesvold v. Roland*, 37 F.Supp.3d 1027, 1041-42 (W.D. Wis. 2014); *Kvapil v. Chippewa Cnty., Wis.*, 752 F.3d 708, 713 (7th Cir. 2014).

The County met with Anderson and presented him with an allegation that he did not possess a CDL for a period of time. He was provided the opportunity to respond. Anderson's response did not refute the County's claims but supported them. Although the investigation was brief, it was fair and objective.

- (5) Did the County's investigation produce substantial evidence that Anderson failed to maintain a CDL?

Based upon Anderson's admissions and the DOT-supplied information, the County did obtain substantial evidence that Anderson failed to maintain his CDL for a period of three days.

- (6) Did the County apply the rule or order fairly and without discrimination?

The County did not discriminate against Anderson. Two other employees who failed to maintain their CDLs were discharged just as Anderson was. The hearing produced no evidence that any employee with an expired CDL was not discharged. That said, the hearing produced no evidence that, either before or after Anderson and his two peers were discharged, any other employee had an expired CDL. The record established that other County employees who were required to maintain a basic driver's license as a job qualification have been discharged when their licenses were no longer valid. The circumstances of those cases were not submitted into evidence, making a more detailed comparison difficult (such as whether their licenses were expired, suspended, revoked or cancelled). The subjective determination of "fairness" is more nuanced. The seventh element of the County's just cause standard, discussed below, sufficiently incorporates the concept of "fairness" related to this matter.

- (7) Was termination a reasonable action to take against Anderson for his failure to maintain a CDL for three days and given his overall record?

The record provides no indication that prior to allowing his CDL to expire Anderson was either an exemplary or deficient employee. There was also no evidence that he had suffered prior discipline from the County. It is therefore reasonable to assume that he was a satisfactory employee. Although he was required to maintain a CDL, Anderson had not operated equipment for which a CDL was required in about three years while serving as a bridge tender from the beginning of May to the end of October. Despite that assignment, he still may be called upon at any time to operate equipment for which he needed a CDL. In the past three years this occurred once in response to a tornado. During two of the three days that his CDL was expired, Anderson worked as a bridge tender and was not called upon to drive any equipment requiring a CDL to operate.⁸

Anderson's failure to maintain a CDL put the County at risk for either having an unlicensed driver on the roads or an employee who could not carry out any assignment given to him. The possibility that such circumstances would arise during two days in July 2015 were

⁸ July 19, 2015 was a Sunday and Anderson did not work on that day.

remote. The County typically applies progressive discipline to employee rule violations. Inappropriate or dishonest conduct has led to the County skipping progressive discipline in favor of termination. No written rules – akin to the Section 1.15(e) bright line rule – exist requiring such action. There is no allegation that Anderson’s possession of an expired CDL amounted to inappropriate or dishonest conduct. Discipline was warranted, but discharge was excessive and not reasonable given the full scope of the circumstances.

Anderson’s case may be distinguished from two arbitration cases cited by the County in its arguments. In the first, an Oneida County case, an employee was discharged when his CDL was suspended for a period of one year after conviction for an OWI offense. *Oneida County Highway Employees Union, Local 79, AFSCME, AFL-CIO and Oneida County (Bradley Paddoc Grievance)*, Dec. No. 70295, p.6-7 (WERC, 10/11). In that matter, the parties’ agreement provided for the discharge of an employee if he “loses his CDL ... for a period of time in excess of seven months.” *Id.* at 2. The bright line rule in *Oneida County* was predicated upon an employee losing his CDL and the consequence was contractually provided. Here, the bright line rule is triggered not when an employee generally loses his CDL, but only when an employee’s CDL is suspended. The County does not provide a defined consequence or bright line rule applicable when an employee fails to maintain a CDL for three days.

In the second case cited by the County, an employee was terminated after he lost his CDL for a period of one year (again related to an OWI offense). *Buffalo County Highway Employees, Local 1652, AFSCME, AFL-CIO and Buffalo County (Linse Termination Grievance)*, Dec. No. 71052, p.16 (WERC, 8/12). In that matter, the union sought but failed to obtain a contractual grace period for its employees who lose their CDL, such as those in Oneida County enjoyed. *Id.* at 17. The arbitrator concluded that Buffalo County had just cause to terminate the employee, without a bright line rule, when he could not perform the majority of his job duties without a valid CDL. *Id.* at 19. In this matter, Anderson was able to perform all of his summer bridge tender job duties without a CDL, notwithstanding the remote potential that his duties could be adjusted in response to rare emergencies.

* * *

Based upon the reasons provided to him at the time of his discharge, the County is foreclosed from now asserting that Anderson was discharged for failing to maintain a CDL. The record supports the fact that Anderson was discharged only for allegedly having a suspended CDL. Even if the County could offer the “failure to maintain a CDL” rationale at this juncture, the County has only established that some progressive discipline may have been warranted; termination was excessive discipline.

DECISION

Eric Anderson’s grievance is sustained. Anderson shall be reinstated to his position as an equipment operator and made whole accordingly.

Dated at the City of Madison, Wisconsin, this 8th day of March 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karl R. Hanson, Impartial Hearing Officer