

BEFORE THE IMPARTIAL HEARING OFFICER

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In the Matter of the Grievance of

JOHN PEARCE

Under the Grievance Procedure of the

CITY OF WASHBURN

Case ID: 489.0000

Case Type: IHO

DECISION NO. 36314

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**Appearances:**

John Pearce, 28445 State Hwy 137, Ashland, Wisconsin, appearing on his own behalf.

Benjamin R. Jones, Weld Riley, S.C., 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin, appearing on behalf of the City of Washburn.

**DECISION OF THE IMPARTIAL HEARING OFFICER**

Grievant John Pearce and the City of Washburn requested that the Wisconsin Employment Relations Commission appoint a member of the Commission's staff as an Impartial Hearing Officer to hear and decide the instant dispute in accordance with the City of Washburn's policies and procedures. Lauri A. Millot was appointed. The hearing was held before the undersigned on February 4, 2016, in Washburn, Wisconsin. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following decision and order.

**ISSUE**

The issue to be decided is whether Grievant John Pearce was terminated for just cause.

## RELEVANT COUNTY POLICY

### SEC. 5.14 GRIEVANCE PROCEDURES

**Discipline.** For purposes of this procedure, “discipline” means an employment action that results in disciplinary suspension without pay or disciplinary demotion/reduction in rank. “Discipline” does not include any written or verbal notices, warnings, or reminders; verbal discipline will be documented, but not subject to the grievance procedure. The purpose of written and verbal notices, warnings, or reminders is to alert the employee that failure to correct the behavior *may result* in disciplinary suspension, termination, or disciplinary demotion/reduction in rank.

**Grievance Procedure.** This policy is intended to comply with Section 66.0509, Wis. Stats., and provides a grievance procedure addressing issues concerning workplace safety, discipline, and termination. This policy applies to all employees covered under Section 66.0509, Wis. Stats. other than police and fire employees subject to Section 62.13(5), Wis. Stats. An employee may appeal any level of discipline under this grievance procedure. For purposes of this policy, the following definitions apply:

1. “Employee discipline” includes all levels of progressive discipline, but shall not include the following items:

- Placing an employee on paid administrative leave pending an internal investigation;
- Counselings, meetings, or other pre-disciplinary action;
- Actions taken to address work performance, including use of a performance improvement plan or job targets;
- Demotion, transfer or change in job assignment; or
- Other personnel actions taken by the employer that are not a form of progressive discipline.

2. “Employee termination” shall include action taken by the employer to terminate an individual’s employment for misconduct or performance reasons, but shall not include the following personnel actions:

- Voluntary quit;

- Layoff or failure to be recalled from layoff at the expiration of the recall period;
- Retirement;
- Job Abandonment, “no-call, no-show”, or other failure to report to work; or
- Termination of employment due to medical condition, lack of qualification or license, or other inability to perform job duties.

### **Steps of the Grievance Procedure**

Employees should first discuss complaints or questions with their immediate supervisor. Every reasonable effort should be made by supervisors and employees to resolve any questions, problems, or misunderstandings that have arisen before filing a grievance.

1. Step 1 – Written Grievance Filed with the Department Head. The employee must prepare and file a written grievance with the Department Head within five (5) business days of when the employee knows, or should have known, of the events giving rise to the grievance. The Department Head or his/her designee will investigate the facts giving rise to the grievance and inform the employee of his/her decision, if possible within ten (10) business days of receipt of the grievance.
2. Step 2 – Review by City Administrator. If the grievance is not settled at Step 1, the employee may appeal the grievance to the City Administrator within five (5) business days of the receipt of the decision of the Department Head at Step 1. The City Administrator or his/her designee will review the matter and inform the employee of his/her decision, if possible within ten (10) business days of receipt of the grievance.
3. Step 3 – Impartial Hearing Officer. If the grievance is not settled at Step 2, the employee may request in writing, within ten (10) business days following receipt of the City Administrator's decision, a request for written review by an impartial hearing officer. Fees for the review of an impartial hearing officer shall be split between the employee and the employer. The City shall select the impartial hearing officer. The hearing officer shall not be a City employee. In all cases, the grievant shall have the burden of proof to support the grievance. The impartial

hearing officer will determine whether the City acted in an arbitrary and capricious manner. This process does not involve a hearing before a court of law; thus, the rules of evidence will not be followed. Depending on the issue involved, the impartial hearing officer will determine whether a hearing is necessary, or whether the case may be decided based on a submission of written documents. The impartial hearing officer shall prepare a written decision.

### **FINDINGS OF FACT**

1. Grievant John Pearce (hereinafter “Pearce”) was hired by the City of Washburn (hereinafter “City”) in December 2013 as an Equipment Operator/Laborer in the Public Works Department. Pearce’s supervisor was Public Works Director Gayla Salami.

2. While operating the sand truck on January 3, 2014, on a road without a shoulder, Pearce slid into the ditch. Pearce was not disciplined, but rather received a non-disciplinary warning.

3. Pearce was evaluated by Salami on December 19, 2014. Pearce was rated as meeting requirements for most factors, although a notation in the “*Drive and Commitment*” category included, “... needs to slow down ....” Specific work performance goals included “[w]ork on slowing down to process situation/procedures” and “[w]ork toward coaching other employees on projects.” The evaluation recommended that Pearce obtain training “on Heavy equipment operations.”

4. In January 2015, Pearce drove a dump truck into the ditch which damaged the dump truck fender. Pearce was not disciplined, but rather received a non-disciplinary verbal warning on or about February 4, 2015 for driving too fast.

5. On July 29, 2015, Pearce failed to stop at a stop sign for which he received a verbal warning/reprimand on August 7, 2015. The cited basis for the discipline was improper use of City equipment, in violation of City safety and rules of conduct.

6. On November 8, 2015, Pearce drove the street sweeper too close to a dump truck causing damage to the street sweeper mirror. Pearce was not disciplined, but rather received a warning.

7. On December 9, 2015, Pearce accelerated too quickly which lobbed a back hoe bucket from the bed of the truck he was driving onto the parking lot. He received a written warning/reprimand on December 9, 2015. The basis for the discipline was improper and dangerous driving.

8. Pearce failed to stop at a stop sign on December 14, 2015, when driving a City pickup truck and received a one-day suspension for this misconduct on December 17, 2015.

9. On December 26, 2015, Pearce was backing the City pickup truck out of the City public works garage and failed to navigate around the back hoe causing damage to the pickup truck. Based on this misconduct and his disciplinary history, the City terminated Pearce on January 4, 2016 for an unacceptable number of incidents of misconduct.

10. Pearce was trained to properly operate the City dump truck and the City pickup truck.

11. Pearce was disciplined consistent with the City disciplinary procedure.

### **FINAL DECISION**

Consistent with the mandate contained in § 66.00509, Stats., the City adopted a discipline and grievance procedure which addresses discipline, including termination. That procedure affords employees the right to appeal grievances to an Impartial Hearing Officer. In order to prevail, the grievant bears the burden of proof to show that the City acted in an arbitrary or capricious manner. In the context of employment law, it is generally understood that arbitrary or capricious action occurs when the action is unreasonable or does not have a rational basis.

The City disciplinary procedure provides that all instances of discipline shall be “fair, just, and in proportion to the seriousness of the violation” and further that progressive discipline shall be followed. The steps in the progressive discipline procedure include: Step One – Verbal Warning; Step Two – Written Warning/Reprimand; Step Three – Suspension; and Step Four – Dismissal.

Pearce was formally made aware three times for driving at an excessive speed prior to the City issuing discipline. The first warning was issued in January 2014 when Pearce was “driving too fast” in poor conditions resulting in his vehicle entering the ditch. The second time was during Pearce’s performance evaluation on December 19, 2014. The third warning was issued on February 4, 2015, for excessive speed when a dump truck went in the ditch.

Pearce received his first disciplinary sanction, a verbal warning/reprimand, in August 2015 for failing to stop at a stop sign on July 29, 2015. This was reported to the City by a citizen and confirmed by a coworker who was in Pearce’s vehicle. Pearce asserts the citizen’s motive was retaliatory. Even accepting that the citizen had an ulterior motive when reporting Pearce, the City investigated and determined that Pearce was guilty of violating City safety and operation policy.

Thereafter, Pearce received two disciplinary written warnings/reprimands, first in November 2015 and then on December 9, 2015. Both instances were the result of inattentive driving and unsafe operation of City vehicles.

Pearce was issued a one-day suspension on December 17, 2015, for failing to stop at a stop sign while driving the City pickup truck. Ed Westlund, a coworker, testified that based on Pearce's failure to stop, he was forced to break to avoid a collision even though Westlund had the right of way. Pearce denies having run the stop sign and, further, challenge's Westlund's credibility. Pearce did not grieve his one-day suspension. While this does not constitute an admission, the discipline remains undisturbed.

The final incident giving rise to Pearce's termination was the collision between the pickup truck Pearce was backing out of the City garage and a back hoe. The evidence establishes that Pearce and Westlund were the only individuals present. Pearce argued that he was relying on Westlund for verbal direction to avoid the back hoe and that Westlund failed to provide this guidance. Westlund testified that Pearce did not ask him for assistance. Assuming Pearce asked for assistance, it follows that he would not start backing up the pickup truck until Westlund was situated in a location where Westlund could visually assist and where Pearce could hear Westlund. Thus, either Westlund agreed to assist Pearce and intentionally allowed Pearce to damage City equipment or Westlund credibility testified that he was not asked. The record fails to include any incentive for Westlund to sabotage Pearce and Pearce's statement of December 26, 2015 does not accuse Westlund of being deceitful. I find Westlund credible. It is possible that Pearce asked Westlund for assistance, that Westlund did not hear Pearce ask for assistance, and that Westlund inadvertently moved into position to be of assistance. Even if all of this is true and I attribute some guilt to Westlund, it does not negate that this was the fifth infraction in less than five months for Pearce of which two resulted in damage to City equipment and two violated traffic laws.

There is no question that Pearce wanted to be a conscientious employee. Unfortunately, his actions indicate that he was not careful enough. Because of: 1) the number of incidents that occurred within a short amount of time; 2) the increasing corrective measures taken by the City thus affording Pearce both notice and an opportunity to change his behavior consistent with the disciplinary procedures; and 3) the safety and liability concerns associated with negligent actions, I conclude that the City's decision to terminate Pearce was a reasonable and rationale response.

**ORDER**

The grievance is denied.

Signed at the City of Rhinelander, Wisconsin, this 18th day of March 2016.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Lauri A. Millot, Impartial Hearing Officer