

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 KENOSHA COUNTY HIGHWAY DEPARTMENT : Case 111
 EMPLOYEES LOCAL 70, AFSCME, AFL-CIO : No. 45249
 : MA-6537
 and :
 :
 KENOSHA COUNTY :
 :

Appearances:

Ms. Judith A. Weseman, Assistant Corporation Counsel, 912 - 56th Street,
Mr. Frank Volpintesta, Corporation Counsel, Kenosha County, filed a post-
Mr. Jack Bernfeld, and Mr. John P. Maglio, Staff Representatives, AFSCME,
 Local 70, P.O. Box 624, Racine, Wisconsin, appeared on behalf of
 the Union.

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Mr. Laurence Rodenstein, Staff Representative, Wisconsin Council 40,
ARBITRATION AWARD

AFSCME

On February 4, 1991, Local 70, American Federation of State, County and Municipal Employees filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint a member of its staff to hear and decide a grievance pending with Kenosha County. Following jurisdictional concurrence from the County, the Commission on February 27, 1991 appointed William C. Houlihan, a member of its staff, to hear and decide the matter. The hearing was conducted on August 13, 1991 and on September 6, 1991, in Kenosha, Wisconsin. The proceedings were transcribed and the transcript was distributed by September 26, 1991. Post-hearing briefs were submitted and exchanged by February 24, 1992. The parties waived submission of reply briefs by letter dated March 6, 1992.

This arbitration addresses the suspension of employe Raymond Becker.

BACKGROUND AND FACTS

Raymond Becker, the grievant, has been employed by the Kenosha County Highway Department as a truck driver for 13 years. On October 25 1990, Becker was hauling gravel. In the early afternoon, Becker, hauling the last load of the day, approached an intersection, put his left turn signal on, and turned left. The turn signals are manual and do not switch off automatically. Becker failed to turn his turn signal off. He proceeded on and approached a four-way intersection. Becker proceeded to the second intersection, located in downtown Wilmot, stopped, and without turning his left turn signal off, or putting his right turn signal on, proceeded to turn right. An automobile driven by a man named Diaz was behind Becker and seeing Becker with his left turn signal on, pulled up along Becker's right side and also proceeded to turn right. According to Becker, he (Becker) looked into his rear view mirror before turning, turned and felt that he hit Diaz's car. Becker believes that Diaz must have been in his blind spot at the moment. The front quarter of Diaz's automobile was damaged. Diaz's vehicle was hit by the middle axle of Becker's truck.

William Schenning, the Highway Department Patrol Superintendent, was called to the scene of the accident. It was his understanding that Becker had his left turn signal on from his prior turn, forgot to turn the manual signal off as he approached the subsequent intersection and turned right with a left turn signal on. Schenning talked with the investigating Sheriff's Department Deputy, reviewed the report written, talked with Becker, and concluded that the accident was Becker's fault. According to Schenning, the attending Deputy

indicated the accident was Becker's fault.

Dave Heiring was the investigating officer. Heiring was not called upon to testify at the arbitration hearing. According to Becker, Heiring indicated that both drivers were at fault. No tickets were issued at the site of the accident. The report prepared by Heiring indicates that both drivers contributed to the accident. According to Becker, Heiring told Becker that if he (Becker) didn't hear by Monday (10/29) there would be no ticket issued. According to Becker, Heiring indicated that he would issue a ticket only if his supervisor directed that he do so. Becker subsequently received a ticket on Wednesday, October 31, 1990. Diaz was not ticketed.

Gene Scharfenorth, then-Kenosha County Highway Commissioner, took all accident-related material into his possession. In reviewing the matter, Scharfenorth determined that discipline was warranted. His conclusion in this regard was based upon the fact that Becker had been involved in two prior accidents. According to Scharfenorth, he did not consider the fact that discipline had been imposed previously. Rather, the two prior accidents were "severe" and "life-threatening". Because of the grievance dispositions of the two prior accidents, Scharfenorth considered this Becker's first discipline. Scharfenorth testified that he did not consider the fact that a ticket was issued. It appears that Scharfenorth did consider the fact that the County's insurance company was monitoring Becker, that the Company had paid out monies from prior accidents involving Becker and had further advised the County that Becker was adversely influencing the insurance rates of the County.

Mr. Becker was involved in two accidents prior to the October 25 incident. Both of those accidents led to discipline, and to a disposition of the discipline in the form of settlement agreements between the County and the Union. The first of those accidents was resolved by a settlement agreement dated September 2, 1988, which provided the following:

On September 2, 1988 at 7:30 a.m. the pre-disciplinary meeting was held to determine if certain conditions of settlement could be obtained to reduce the amount of discipline to Mr. Becker.

The following items were agreed to on the part of Mr. Becker, Local #70 Executive Board, and Kenosha County in settlement of the amount of discipline administered.

1. Suspension of three (3) working days.
2. Mr. Becker agrees to attend a Gateway Technical College course on traffic safety to be completed by the end of December, 1988 or as otherwise agreed to by Mr. Becker and myself. (Reference is to Gene Scharfenorth, Highway Commissioner).
3. If Mr. Becker submits a certificate of completion from the traffic safety course to the Highway Commissioner, the three working day suspension discipline record will be removed from his personnel file at the end of April, 1990. Further, the Highway Department will

reimburse Mr. Becker for the registration fee for the course.

4. It is also agreed that the results of this agreement and accident do not constitute setting any kind of precedent in evaluating circumstances of this nature.

This document is in the form of a memo from Gene Scharfenorth, to Raymond Becker and George Serpe, President of Local 70.

The second accident was similarly resolved by a memorandum of agreement dated June 5, 1989, signed by the representatives of the County, representatives of the Union, and Mr. Becker. That grievance settlement agreement reads as follows:

Kenosha County, Local 70, AFSCME and Ray Becker agree as follows regarding Grievant Becker's grievance dated 1-10-89 and the disciplinary action to which it relates.

1. The grievance noted above is withdrawn. By withdrawing the grievance the Union and Grievant are not conceding that their grievance and contentions in support of it lacked merit.
2. A discipline is to be modified so that Grievant's record shows a 10-day suspension.
3. Grievant shall be paid 9 days backpay.
4. Grievant shall attend National Safety Council defensive driving course (two successive Saturday mornings on Grievant's own time and travel expense but course fee to be paid by County.)
5. The 10-day suspension shall be of no effect after June 2, 1990.
6. The results of this Agreement and accident do not constitute setting any kind of precedent in evaluating circumstances of this nature.

Following the accident, it appears that County Personnel Director Brook Koons asked Chief Deputy Roger Schoenfeld to investigate the matter. According to Chief Deputy Schoenfeld, he passed the matter down the chain of command for review. Based upon his review of the incident report, Schoenfeld indicated to Koons that it appeared both drivers had violated the law.

On October 30, 1990, Gene Scharfenorth, by memo advised Ray Becker of the scheduling of a pre-disciplinary hearing. The memorandum outlines the County Highway Department rules alleged to have been violated, and advises Becker that the Employer is considering a 30-day suspension. The pre-disciplinary hearing

was conducted on November 15. At that hearing, it appears that Becker was told he would serve a 30-day suspension. Following the pre-disciplinary hearing, Becker took his vacation, and went deer hunting. Upon his return, he was served a memorandum, dated November 27, 1990, which contained the finding and decision of the Highway Commissioner arising out of the November 15 meeting. The County, by memorandum, imposed a 10-day suspension. Becker served the 10-day suspension between November 28 and December 12. On December 2, the Union grieved the suspension. On December 12, Becker returned to his previous job and worked on that job until some point in January.

On January 16, the Union met with the County Personnel Committee, for the third step hearing portion of the grievance procedure, relating to Becker's grievance. On January 17, Becker was called off the job and provided the Personnel Committee's disposition of the grievance, summarized by the following memorandum:

This memo is in regard to the above-captioned matter which was heard by the Administration Committee last night. The Committee made the following decision:

Grievant Raymond Becker is hereby demoted to the position of Janitor at the east end garage effective immediately. As a janitor, he will not be allowed to operate any Kenosha County highway vehicles on a public road. He will be red-circled at his current rate of pay until such time that the janitor's wage is greater than his current rate. He will not be permitted to post for any job in Kenosha County which would require him to operate a Kenosha County motor vehicle. Furthermore, the 10-working day suspension is upheld. This determination resolves the grievance and any other legal matters.

In the event that Mr. Becker does not accept the Committee's decision, his employment with Kenosha County will be immediately terminated.

By way of this memo, I am directing you to take the remainder of today, January 17, 1991, off with pay and to report your acceptance or refusal of the Committee's determination to the acting Highway Commissioner at the beginning of your shift tomorrow, January 18, 1991.

Becker returned with his Union representative the next day, January 18. They indicated that they did not concur with the discipline, would take the janitor job under protest, and would grieve the whole matter. The initial reaction of the County was that this was unacceptable and that Becker was fired. Becker left, believing that he had been fired. That night, a Friday, Mr. Rose, Chairman of the Personnel Committee, called Becker and told him to come back to work on Monday as a janitor.

Upon his return to work on Monday, January 21, Mr. Becker was provided the following memorandum:

This memo is in regard to the above-captioned matter which was heard by the Administration Committee

on Wednesday, January 16, 1991. The Committee made the following decision:

Grievant Raymond Becker is hereby demoted to the position of Janitor at the east end garage effective immediately. As a janitor, he will not be allowed to operate any Kenosha County highway vehicles on a public road. He will be red-circled at his current rate of pay until such time that the janitor's wage is greater than his current rate. He will not be permitted to post for any job in Kenosha County which would require him to operate a Kenosha County motor vehicle until his personal driver's license and his chauffeur/commercial driver's license is clear of demerit points. Furthermore, the 10-working day suspension is upheld.

All language previously issued on accepting or rejecting the Committee's decision is hereby rescinded. It was never the intent of the Committee to inhibit the employe's right to appeal to arbitration.

Becker took the janitor's job under protest, and filed a second grievance.

On January 23, the County posted the truck driving job previously occupied by Becker. On January 25, Becker's ticket was resolved on a no-point basis. He thereafter signed the posting, and was awarded his old job. Becker worked for two and one-half weeks as a janitor. During that period of time, his pay was red-circled, however he may have lost overtime opportunities.

A number of other traffic incidents were made a part of this record. On May 31, 1985, employe Violet Robinson drove away from a fuel pump with a door open, hitting either the pump itself or another car. The record is unclear as to whether or not Robinson had prior discipline. She was issued a verbal warning. Employe Kevin Gerber wandered across the lane on Interstate 94 and made contact with another vehicle. This was Gerber's first accident and he was issued a verbal warning. Employe Daniel Bizek was transporting road signs on a County vehicle. Those signs came loose and hit another County-owned vehicle being driven by William Niederer. Bizek was cited for improperly hooking up the signs. No discipline was imposed. Employe Perry White struck another truck while backing his own truck. This was Perry's first accident and he was given a verbal warning. On December 13, 1989 Doria Lichter backed her truck into a parked car. This was Lichter's first accident and she was issued a verbal warning.

On January 9, 1990, employe Smith Cunningham III hooked the snowplow attached to his truck while backing out of a garage, damaging the overhead door. This accident involved only his vehicle. He was issued a verbal warning. Cunningham subsequently had another accident, with no reference to this warning, which had evaporated from his file. On February 17, 1986, seven-year employe Jeff Koessl backed his snowplow into another vehicle. He was cited for unsafe backing, but given no discipline. On March 2, 1989, Koessl backed his vehicle into a car while snowplowing. No discipline was issued. On November 14, 1989, Koessl, while making a right turn, struck another vehicle. Both vehicle drivers were cited. No discipline was issued.

ISSUES

The parties agreed to have me frame the issue(s). I believe the following summarizes this dispute:

1. Did the County have just cause to impose a 10-day suspension on Raymond Becker? If not, what is the appropriate relief?
2. Did the County impose discipline in a fair and impartial manner? If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article 1 - RECOGNITION

. . .

Section 1.2 Management Rights. Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; . . . the County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner.

. . .

Article 3 - GRIEVANCE PROCEDURE

. . .

Section 3.5 Work Rules and Discipline. Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. When any employe is being disciplined or discharged, there shall be a Union representative present and a copy of the reprimand sent to the Union. . .

POSITIONS OF THE PARTIES

It is the Union's view that Becker's due process rights were violated by the investigation. The Personnel Department solicited a citation. That solicitation was improper, argues the Union, and inconsistent with the Employer's obligation to weigh evidence fairly. The ticket was issued six days after the incident. It was issued after the County Personnel office initiated a review which led to the ticket, thus manufacturing evidence against Mr. Becker.

The imposition of multiple disciplines demonstrates the County's prejudice toward Mr. Becker. He was initially advised he would be given a 30-day suspension. That suspension was reduced to 10 days. Thereafter he was demoted, and banned from applying for other County driving positions. He was thereafter told that he must accept this discipline or be discharged. The

demotion was rescinded when his ticket resulted in no points. The Union believes that retaliation occurred. He was told to accept the discipline or be discharged immediately after filing a grievance in the matter.

The County's assessment of Becker's work record is flawed. There were three accidents between 1988 and 1991. The discipline arising from the first accident was resolved and removed by April, 1990 by operation of a grievance settlement between the parties. Similarly, a second grievance settlement removed reference to the second discipline, causing it to have no effect after June 2, 1990. As of October, 1990, the month of the accident, Becker's prior work record was no longer relevant for consideration of discipline. The County's interpretation that it may consider prior accidents, but not the discipline imposed as a result of those accidents, is characterized as absurd.

The Union contends that prior disciplines occurred too far in the past to be relevant. The parties' settlements agreed that the applicability of those accidents and their attending discipline would be limited to a period of time, long since expired.

The Union points to the driving records of the employes cited above, and claims Becker was subject to disparate treatment. What those various employes have in common is that they received verbal reprimands for accidents occurring in County vehicles. Many of them had been subject to prior discipline. A number of employes were cited for their driving conduct with no attendant discipline. Koessler was involved in an accident in 1986 and two in 1989, all in County vehicles. He was cited on two occasions for unsafe backing and on one occasion for inattentive driving. Koessler was not subjected to discipline. Becker's discipline is viewed as particularly egregious measured against the standard applied to his co-workers.

In the view of the County, Becker caused the accident through the improper use of his turn signals. The Employer cites Arbitrator Daugherty and his seven standards in analyzing this case. In the Employer's view, Becker was on notice of the work rules he violated. He had received and signed those work rules. There is no dispute in this proceeding that those work rules are reasonable. The Employer conducted a substantial investigation. That investigation established the fact that Becker was at fault. The County denies that it ordered a citation, or caused one to be issued. There is no dispute the work rule was violated. The County argues that it has applied its rules in an even-handed fashion. The other employes mentioned were not in similar circumstances. They were either employes who had received no other discipline or had had no other accidents. The Employer contends that the discipline was reasonably related to the seriousness of the offense.

Becker was at fault in this accident. The Employer is not prepared to concede that the conduct involved herein warrants a minimal discipline regardless of Becker's prior accident and discipline record. Becker has had prior accidents and the Employer should be permitted to consider his driving record even if not his disciplinary record. The County has made substantial efforts to assist Becker and send him to driving school, in order to improve his driving record. It would be manifestly unfair to ask the County to act in a vacuum with respect to the reality of Mr. Becker's driving record.

DISCUSSION

There is little dispute that this accident occurred, and that Becker is substantially, if not exclusively, at fault. His improper use of turn signals was a significant factor in the accident. The County investigated the matter thoroughly. It did establish that Becker was significantly at fault. The Personnel Department did cause the Sheriff's Department to look into the matter in greater depth than would otherwise have occurred. That was done. It

appears that one result of that greater review was that Becker was issued a ticket. It is unclear from this record why only Becker was ticketed. Chief Deputy Schoenfeld was unable to explain why Becker, but not Diaz, was ticketed. No other witness from the Department was called.

The Union claims that the County has broken mightily from precedent. The Union contends that Becker's situation is analogous to a first offense. Seen in this light, the County has imposed a ten-day suspension where normally no discipline, or a verbal or written warning would have been issued. The County contends that it has not deviated from its prior record. In the County's view, it was entitled to examine Becker's total driving record, including all of his accidents. Viewed in this light, Becker is not akin to the various individuals whose first accidents were cited. The County's construction distinguishes Becker from most of the other employees cited in this proceeding. However, it does not begin to explain the treatment of employee Koessler. Koessler had three accidents. He was cited in all of them. He was not disciplined. It is difficult to understand the internal consistency of a system that permits Koessler three accidents with no discipline but mandates that Becker be demoted and given 10 days without pay for this offense, even given his driving record.

I believe that the County improperly imposed multiple discipline upon Mr. Becker. It initially considered a 30-day suspension, ultimately issuing a 10-day suspension without pay. I find no procedural impropriety in this action, standing alone. It was the testimony of County witnesses that having considered all factors in this matter, the County decided upon 10 days. There is nothing inherently flawed about that process. However, having done this, the matter should have been final in the eyes of the County. Becker was then demoted. This is, in effect, a second level of discipline. It is particularly inappropriate given the consideration testified to by County witnesses which gave rise to the initial 10-day suspension. Becker was then told to accept his suspension, and his demotion, or be fired. This is a rather blatant violation of his contractual and statutory right to grieve. It is clearly improper, and its timing supports the Union's claim that it was retaliatory.

It is the view of the County that it is free to consider Mr. Becker's prior driving accidents, but not prior disciplines, in future matters. In the view of the Union, the County can consider neither. The County adheres to a system of progressive discipline with respect to its employees. Such a system anticipates that inappropriate behavior be subject to discipline. Should that behavior not be corrected by relatively minor disciplinary measures, the sanctions imposed are increased progressively to attempt to influence employee behavior. That is the essence of a progressive discipline system. The parties settled two prior grievances both involving Mr. Becker's driving. In both instances, the grievant was disciplined for his conduct. He was directed to satisfy certain conditions contained within those agreements. He did so. Upon serving his discipline and satisfying those conditions, those agreements evaporated disciplinary reference from Becker's record. The discipline existed solely because of the accidents. I do not understand the distinction being drawn by the County between the accidents themselves and the resulting discipline.

The County points to the insurance consequences of Becker's driving. However, a part of the consideration entering into the discipline in the first two matters had to be the adverse insurance consequences.

I consider a 10-day suspension without pay, and accompanying job demotion, to be harsh measures of discipline. All parties agree that this Employer operates on a system of progressive discipline, and further agree that

prior discipline was not considered in this instance. The County explains the relatively harsh discipline by referring back to past accidents. However, Becker has already been disciplined for those matters. This incident is, in and of itself, relatively minor. It does not warrant a 10-day suspension. This severe discipline makes sense only as a step in a progressive series of disciplines. This is accented by the modest discipline otherwise imposed. All parties agree that the underpinnings, the preliminary progressive, remedial steps, are not to be considered in this proceeding. In the limited context of this proceeding, the County's distinction between the accidents and the accompanying discipline is artificial. They cannot be separated.

The County argues that this result requires it to act in a vacuum. The County argues that it is required to refrain from considering Becker's driving record. It may be that the County is right. It is my view that the Settlement Agreements, to which the County is a signatory, wiped Becker's record clean.

AWARD

The grievance is sustained. In light of the Settlement Agreements, I do not believe there existed just cause for the imposition of a 10-day suspension. The escalation of penalties and threats of reprisal were not fair nor impartial.

RELIEF

The County has legitimate concerns over Mr. Becker's driving record. However, this disciplinary process has been so tainted as to be totally invalid. I direct the County to restore the full 10 days pay Mr. Becker lost as a result of his suspension. I further direct the County to expunge Mr. Becker's personnel records, and any other record which may exist, of all reference to this discipline.

Dated at Madison, Wisconsin this 14th day of April, 1992.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator