

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MARINETTE COUNTY (HIGHWAY
DEPARTMENT)

and

MARINETTE COUNTY HIGHWAY EMPLOYEES
LOCAL 300, INTERNATIONAL UNION OF
OPERATING ENGINEERS

Case 144
No. 51412
MA-8598

Appearances:

Mr. Robert L. Calkins, International Representative, International Union of Operating Engineers, P.O. Box 102, Oak Creek, WI 53154-0102, on behalf of Local 300.

Mr. Chester Stauffacher, Corporation Counsel, Marinette County, 1926 Hall Avenue, P.O. Box 320, Marinette, WI 54143-0320, on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1994 collective bargaining agreement 1/ between Marinette County (County) and Marinette County Highway Employees, Local 300, International Union of Operating Engineers (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as impartial arbitrator to resolve a dispute between them regarding whether the County had just cause to issue Roger Runnoe a written warning on January 10, 1994. The Commission designated Sharon A. Gallagher arbitrator. A hearing was scheduled and held on December 5, 1994 at Marinette, Wisconsin. By agreement, the parties submitted their post-hearing briefs by January 16, 1995 and they waived the right to file reply briefs herein. The record was then closed.

Issues:

The parties stipulated that the following issues should be determined in this case:

Did the County violate Article 1.02 and Article 10.03 of the collective bargaining agreement when it gave Roger Runnoe a written warning for reporting late for work on January 10, 1994? If not, what is the proper remedy?

1/ The parties have had a collective bargaining relationship for many years. The most recent collective bargaining agreement between the parties is effective for the calendar year 1994 and that agreement contains the same language as quoted herein in the Relevant Contract Provisions section of this Award.

Relevant Contract Provisions:

ARTICLE 1

Recognition and Management Rights

. . .

1.02 Management Rights. The Employer possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this agreement and the employees' right of adjusting grievances or differences as hereinafter stated, and applicable law. These rights include, but are not limited to the following:

- A) To direct all operations of the County; to maintain the efficiency of County operations; to determine the table of organization; to establish and enforce reasonable uniform work rules, conduct, safety and schedules of work;

. . .

- C) To uniformly enforce reasonable minimum standards of performance; to establish procedures and controls for the performance of work; to hire, promote, transfer, assign or retain Employees (subject to existing practices and terms of this agreement related thereto); to suspend, discharge, or take other appropriate disciplinary action against the Employees for just cause; to lay-off Employees in the event of lack of work or funds;
- D) To introduce new or improved methods or facilities; or to change existing methods or facilities; to terminate or modify existing positions, operations or work practices, giving due regard to the obligations imposed by this agreement, and to consolidate existing positions, departments or operations;
- E) To determine the kinds and amounts of services to be performed as pertains to County operations, and the number and kinds of classifications to perform such services.

. . .

Article 10

Grievance Procedure and Disciplinary Procedure

...

10.03 Discipline. The purpose of discipline is to correct job behavior and performance problems of Employees. Disciplinary rules and regulations shall be applied in equitable and consistent manner, commensurate with the Employee action. No Employee shall be disciplined, suspended, or discharged except for just cause.

Whenever an Employee commits an offense warranting disciplinary action, the Highway Commissioner, the supervisor or designee may take such action as deemed appropriate to the seriousness of the offense committed, though in general, the concept of progressive discipline shall be followed by management.

...

B) Disciplinary Progression. The progression of disciplinary action will be:

- 1) Written reprimand.
- 2) Suspension, not to exceed five (5) working days.
- 3) Dismissal.

An Employee shall not be subject to disciplinary suspension, unless he had been given a written reprimand on a prior occasion, and no Employee shall be subject to discharge from employment unless for cause. The employee shall have the right to have any matter under this paragraph arbitrated as set forth in Section A. Any disciplinary action taken by the Employer against an individual Employee shall be reduced to writing, stating therein the reason for the disciplinary action. The individual Employee and the Union shall be given copies of the said writing and a copy shall be placed in the Employee's personnel file. All disciplinary action taken under this paragraph shall be removed from the individual Employee's personnel file after passage of two (2) years.

Background:

Roger Runnoe has been an employe of the Highway Department for twenty-one and one-half years. Runnoe is currently a Heavy Equipment Operator for the County. It is undisputed that Runnoe was late arriving at work on August 20, 1992, April 6 and April 7, 1993. On these three occasions, the Highway Commissioner Delorit issued warning letters to Runnoe which he did not grieve. The substantive portions of these letters (sent on the dates listed), read as follows:

August 20, 1992

. . .

This letter is to inform you of failing to report to work on August 20, 1992 at the designated hour of 6:00 a.m.

Notification was received by our Shop Superintendent Dan Dolata from you at 6:15 a.m. by phone that you would report to work. Please heed this warning or disciplinary action will be taken.

. . .

April 6, 1993

. . .

I was informed at 7:45 a.m. on April 6, 1993 by Shop Superintendent Mr. Dan Dolata, that you failed to report to work at the designated hour of 6:00 a.m. Please be advised that your last occurrence was on August 20, 1992.

This letter is to inform you of failing to report to work on the date and time stated in paragraph one.

Please heed that this is your second warning given during an eight month period.

. . .

April 14, 1993

. . .

On April 7, 1993 at 6:30 a.m., I was informed by Patrol Superintendent, Mr. Jerry Swanson that you failed to report to work at the designated hour of 6:00 a.m.

I instructed both Mr. Jerry Swanson and Shop Superintendent, Mr. Dan Dolata that if a phone call was received by either of them or if late arrival would occur to request that you take the full day, April 7, 1993 without normal pay.

A phone call was received at 6:50 a.m. by Mr. Dan Dolata from you. Mr. Dolata stated that he referred to the instructions he had received from me and requested that you take the full day, April 7, 1993 without pay.

Please be advised that the last occurrence's (sic) were on August 20, 1992 and April 6, 1993. Please heed that this is your third warning given during an eight month period.

Holiday pay for Good Friday will not be granted under Article 4 - Holidays. 2/

...

According to Patrol Superintendent Swanson who has occupied this position since 1983, it is his policy to allow each employe one incident of tardiness without disciplining the employe in writing. Swanson stated that on the first occasion of tardiness, he verbally counsels the employe and he has never put anything in writing regarding these verbal warnings until September 9, 1994, when Highway Commissioner Delorit directed him to put one of his verbal warnings for tardiness in writing to employe James Nesberg. Swanson stated that the County expects Highway Department employes to be at work on time. However, Swanson stated that once in a while, if an

2/ The Union objected to the County's submission of prior disciplinary actions taken against Runnoe for tardiness. I find them relevant and material to this case regarding Runnoe's knowledge of the County's tardiness policy and his recent work record. In addition, I note that Article 10.03(B) of the labor agreement allows retention of such disciplinary action documents in the employe's personnel file for a period of two years after their occurrence.

employe oversleeps he (Swanson) simply gives the employe a verbal counseling.

Steve Berman has been Union President for nine years and has been a County Highway Equipment Operator at the Peshtigo shop for the past seventeen years. Berman receives all disciplinary notices issued by the Employer to unit employes in his position as Union President. Berman stated that in his opinion, the Department has not consistently applied its policies regarding issuing written warnings for tardiness. Berman also pointed out that the Department has not committed its policies to writing except for a policy which states that written reprimands are to be held in employe files for a two-year period.

Berman stated that there were four examples which occurred in August, October and November, 1993, which demonstrated the inconsistency of the County's tardiness policy. On August 17, 1993 employe Sandburn did not show up for work as scheduled. Berman stated that he picked Sandburn up at his home on the way to the job site in a Department truck. Sandburn admitted to Berman and to his supervisor, Patrol Superintendent Swanson, that he had been reading the newspaper that morning, had lost track of time and had failed to go to work at the appointed time. On October 6, 1993, employe Prestine failed to report for work on time and employes of the Highway Department picked him up at his home. Prestine was not issued any written warning. On October 15, 1993, Highway Department employe Polomis failed to call in and to arrive at work on time. On November 29, 1993, Polomis did not show up for work and his supervisor, Steve Porfilio stated that Polomis called him one hour and forty-five minutes after the start of his shift to indicate that Polomis would not be coming to work on November 29th. Porfilio indicated that Polomis agreed to take the day without pay. The Union did not receive any letter notifying it that Polomis' pay had been docked.

Berman stated that during the 1970's and 1980's employes had reported to him that they believed the tardiness rules were not being consistently enforced. Also, Berman stated that in the Winter during this period, employes were often picked up by other County employes in County vehicles if they did not report to work on time. Highway Department employes King and Franzen corroborated Berman's testimony regarding the County's inconsistent enforcement of a tardiness policy and they denied that the County consistently gave employes a pass the first time they were tardy.

Facts:

On January 10, 1994, Roger Runnoe was unable to start his truck due to gas line freeze. At approximately 6:45 a.m. he called Patrol Superintendent Swanson to notify him that he would not be able to report to work at the scheduled time of 7:00 a.m. that day. It is undisputed that Runnoe told Swanson that his truck would not start due to gas line freeze and that he would come to work as soon as possible. It is also undisputed that Swanson did not verbally warn Runnoe at this time that his tardiness would subject him to discipline.

Highway Commissioner Delorit issued Runnoe the following letter dated January 10, 1994:

. . .

On January 10, 1994 Superintendent, Mr. Jerry Swanson stated that he received a phone call from you at 6:45 a.m. stating that you would report to work as soon as possible.

Reporting to work at 7:42 a.m., you explained to Superintendent Swanson that you had problems with your truck.

Please be advised that the continuing of this practice, regardless of truck problems or whatever other excuse is used, you will be instructed to take that full day off, without pay.

For your information, you already have written reprimands dated August 20, 1992 and April 6, 1993 and a verbal reprimand on April 7, 1993.

. . .

Positions of the Parties:

County:

The County urged that the Union's assertion that discipline for tardiness has been inconsistently meted out was not supported by any real specifics and ". . . no study of the alleged non-uniformity . . . no statistical chart or record . . ." was provided by the Union. The County argued that the Union should not complain in this case because Runnoe and other employes have been disciplined for their tardiness at a lower level than should have reasonably been done by the County. Thus, the County asserted that the Union's arguments and positions taken in this case are "logically absurd."

The County observed that like a traffic cop, it cannot catch every speeding citizen (every tardy employe), but that it should be allowed to discipline those tardy employes it does catch, just as a municipality can punish those speeding citizens it catches. To overturn the discipline in this case, in the County's view, would result in the County's being foreclosed from issuing any disciplinary actions for tardiness unless the County could prove that it had been completely consistent in issuing all such disciplinary actions. This, the County urged, would mean that lax or inconsistent enforcement of a tardiness policy would necessarily have to be perpetuated. Therefore, the County urged the undersigned to deny and dismiss the grievance in its entirety.

Union:

The Union argued that the County has been inconsistent in disciplining employees for tardiness and failure to call in. The Union noted that according to its witnesses, the County has failed to discipline employees who have called in saying they will be late to work; that the County has failed to discipline employees who did not even call in an absence or tardiness; and that County employees, at times, have picked up late employees at their homes and these employees have not been disciplined.

In the instant case, grievant Runnoe called in on January 10, 1994, to explain that he would be late due to car problems. In the Union's view, the County's issuance of a written reprimand in the context of its failure to issue disciplinary action to other similarly situated employees was therefore arbitrary and constituted disparate treatment of Runnoe, not for just

cause. The Union observed that the broad non-discrimination clause in the contract should also protect employees like Runnoe from discrimination by the County. The Union urged that the grievance should be sustained and the discipline should be expunged from Runnoe's personnel file.

Discussion:

The evidence in this case supports a conclusion that the County has been somewhat lax in its initial enforcement of its tardiness policy. In this regard, I note that Patrol Superintendent Swanson admitted that he allows each employee one tardiness incident before he begins documenting tardinesses, and that from time to time he has also given employees a verbal warning if they oversleep. Union President Berman's testimony 3/ regarding the treatment of employees Sandburn (August 17, 1993 incident), Polomis (October 15, 1993 incident) and Prestine (October 6, 1993 incident) also supports a conclusion that the County has been somewhat lax in disciplining employees for tardiness. 4/

However, the fact that the County may have been lax in initially enforcing its tardiness policy is not relevant to this case. Here, the evidence shows that in 1992-93, Runnoe himself

3/ The County argued that the Union had the burden of showing that no actual discipline had been meted out against employees Sandburn, Polomis and Prestine. The County is incorrect. Rather, in disciplinary cases, it is the employer (the keeper of the records) who must prove it had just cause to discipline a grievant and that its actions were fair and consistent.

4/ I find distinguishable the November 29, 1993 incident regarding Polomis. On November 29, 1993 Prestine failed to show up for work at 6:00 a.m. and called in to declare that he would not be at work on that day at 7:45 a.m. It was at this time that the Employer decided to issue him a one-day unpaid leave for November 29th. Prestine did not object to this decision and he failed to file a grievance regarding the incident.

received two written warnings and a one-day unpaid leave (which also resulted in his loss of holiday pay for Good Friday, 1993), all for separate tardiness incidents occurring on August 20, 1992, April 6, 1993, and April 7, 1993. It is significant that Runnoe chose not to grieve these prior disciplinary actions. Thus, the record in this case demonstrates that Runnoe was fully aware of the County's tardiness policy as it had been applied to him in the past and that the County had progressively disciplined Runnoe prior to his receipt of the January 10, 1994 written warning. In these circumstances, at least in Runnoe's case, the County had not been lax in enforcing its tardiness policies and based on his experience, Runnoe had every reason to believe that the County would discipline him for tardiness for his conduct on January 10, 1994. 5/

In all of the circumstances of this case, and in light of Runnoe's prior disciplinary record regarding tardiness as well as his admission that he was in fact tardy on January 10, 1994, I issue the following

AWARD

The County did not violate Article 1.02 and Article 10.03 of the collective bargaining agreement when it gave Roger Runnoe a written warning for reporting late for work on January 10, 1994. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 23rd day of February, 1995.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

5/ Although the Union offered evidence to show that other employees have been treated differently from Runnoe, it failed to prove that there was any intent by the County to discriminate against Runnoe by stricter enforcement of its tardiness policies against Runnoe.

