

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MENOMINEE COUNTY HIGHWAY
EMPLOYEES, LABOR ASSOCIATION OF
WISCONSIN, INC.

and

MENOMINEE COUNTY (HIGHWAY
DEPARTMENT)

Case 49
No. 52087
MA-8835

Case 50
No. 52088
MA-8836

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc.,
206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of the
Association.

Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 1000,
Milwaukee, Wisconsin 53202, by Mr. James S. Clay, appearing on behalf of the
County.

ARBITRATION AWARD

Menominee County Highway Employees, Labor Association of Wisconsin, Inc., hereafter
the Association, and Menominee County (Highway Department), hereafter the County or
Employer, are parties to a collective bargaining agreement which provides for the final and
binding arbitration of grievances. The Association, with the concurrence of the County, requested
the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial
arbitrator to resolve the instant grievance. Hearing was held on April 12, 1995, in Keshena,
Wisconsin. The hearing was not transcribed and the record was closed on June 26, 1995, upon
receipt of post-hearing briefs.

ISSUE:

The parties stipulated to the following statement of the issue:

Whether the County violated the collective bargaining agreement
when it suspended Grievants, Warrington and Roberts, for ten (10)
days? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

**III
RELEVANT AGREEMENT PROVISIONS**

ARTICLE I - INTENT AND PURPOSE

1.1 The mutual interest of the Employer, the Association and the employees is recognized by this Agreement for the operation of the Highway Department under methods that will promote safety to the employee; economy of operations; cleanliness and proper care of equipment; the protection of property; to secure and sustain maximum work effort of each employee covered by this Agreement; to maintain a harmonious relationship between the employees in the bargaining unit and the Employer; to establish wages, hours and working conditions; and, further, to set forth the entire agreement between the Employer, the Association and the employees covered by this Agreement concerning rates of pay, wages and other conditions of employment to be observed by the parties hereto.

ARTICLE III - MANAGEMENT RIGHTS

3.1 **Exclusive Rights.** The Association recognizes the right of the Employer to operate and manage its affairs and the exclusive right of the Highway Commissioner to operate his department consistent with the terms of this Agreement and applicable County, State and Federal laws:

* * *

- (e) To suspend, demote, discharge, and take any other disciplinary action against employees for just cause;

* * *

ARTICLE VI - GRIEVANCE PROCEDURE

6.4 **Authority of Arbitrator.** Only one grievance

may be decided by the arbitrator at any hearing, however, the parties may mutually agree to waive this requirement. The arbitrator shall have no right to add to, subtract from, nullify, ignore, or modify any of the terms of this Agreement or expand the issue before him. He shall consider and decide only the particular issue presented to him in writing by the Employer and the Association, and his decision and award shall be based solely upon his interpretation of the terms or provisions of this Agreement. If the matter sought to be arbitrated does not involve an interpretation of the terms or provisions of this Agreement, the arbitrator shall so rule in his award. The arbitrator shall render no award under this Contract which shall impose any liability not explicitly expressed therein. The award of the arbitrator shall be final and binding on the Employer, the Association and the employee or employees involved.

* * *

ARTICLE XVIII - DISCIPLINARY PROCEDURE

18.1 **Policy.** Disciplinary procedures are a legitimate Management function to inform employees of poor work habits, absenteeism, etc., which are not consistent with the obligation of the Employer's public function and to correct these deficiencies.

18.2. **Penalties.** Any employee may be disciplined, suspended or discharged for just cause. The sequence of disciplinary action, except for major violations when immediate discharge may be appropriate, shall be oral reprimand, written reprimand, suspension, and discharge. A reprimand shall remain in the employee's personnel record for no longer than a twelve (12) month period, except for suspensions, which shall remain in an employee's personnel record for two (2) years.

Any suspended or discharged employee may appeal such action through the Grievance Procedure and shall initiate grievance action by immediate recourse to Step 2 within ten (10) working days of notice of suspension or discharge.

Suspensions shall not be for less than two (2) days, but for serious offenses or repeated violations, suspensions may be given up to ten (10) working days.

18.3 **Notice of Discipline.** Notice of discharge or suspension shall be in writing and a copy shall be provided the employee and the Association.

BACKGROUND:

On October 27, 1994, Patrick Roberts and Benjamin Warrington, Jr., reported to work at the Menominee County Highway Department. At approximately 8:20 a.m., Roberts and Warrington, who are firemen with the Town of Menominee Fire Department, were dispatched to a disaster drill at the Menominee Tribal Clinic. Upon returning to the Highway Department, Warrington and Roberts each received written notice that he was immediately suspended for ten days without pay. The basis for the suspension was "Leaving work premises without authorized permission".

A grievance was filed alleging that the Employer did not have just cause to suspend the Grievants. The grievance was denied at all steps of the grievance procedure and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES:

County

On the morning of October 27, 1994, the Grievants were advised to go to work while the Highway Commissioner verified the authenticity of the drill. The Grievants' conduct in leaving the worksite before the Highway Commissioner could verify the authenticity of the drill, constituted insubordination, job abandonment and/or a voluntary quit, each of which is a serious offense.

Article XVIII of the collective bargaining agreement provides for suspensions of up to ten days for serious offenses. Other arbitrators have recognized the seriousness of the Grievants' conduct and have upheld the suspension of employees who have "walked off the job" (cites omitted).

The Highway Department has a general policy of requiring prior approval for absence from work. Having reported to work on October 27, 1994, the Grievants had an obligation to remain at work.

Had the County been able to confirm that the disaster drill was legitimate, the County may have approved the Grievants' participation in the drill. The Grievants, however, left work before the County was able to confirm the legitimacy of the drill.

Roberts, who received the drill outline at 8:00 p.m. on October 25, 1994 made, at best, minimal attempts to contact Commissioner Grignon to inform her of the drill and to obtain her approval to leave work on October 27, 1994. The conduct of Roberts deprived Commissioner Grignon of the time necessary to verify the authenticity of the disaster drill.

The State statutes relied upon by the Association neither compel, nor control, the Grievants attendance at the disaster drill. In arguing that participation in the disaster drill provided a service to the community, the Association overlooks the fact that the Grievants' "absence without leave" involved activities other than participation in the disaster drill. In the County's view, these other activities were merely an excuse for avoiding work.

The record does not establish why the Grievants, and not other members of the fire department, were required to attend the drill. Nor does the record provide a satisfactory explanation as to why those sponsoring the drill did not provide the Highway Commissioner with advance warning of the drill to ensure undue disruption to the work of the Highway Department. The organizers of the drill, and not the County, are responsible for the confusion surrounding the drill of October 27, 1994.

The Grievants were not disciplined in retaliation for the employes' participation in protected activity. Nor were the Grievants discriminated against in the severity of the penalty.

Association Steward Gruentzel's testimony concerning a conversation with Highway Commissioner Grignon is self-serving and uncorroborated. Assuming, *arguendo*, that Gruentzel's accusations were correct, this case would be a case of mixed motive. Under Wright Line, the test is that the employe would not have been disciplined "but for" the employer's improper motive. In this case, the discipline was justifiable, notwithstanding the retaliation allegation.

All of the justification for the Grievants' conduct advanced by the Association is without basis in fact or lacks merits. The County has just cause to discipline the Grievants by imposing a suspension of ten working days without pay. The County respectfully requests that the grievances be denied.

Association

The Grievants gave sufficient and appropriate notice to the Employer that there was going to be a disaster drill on October 27, 1994. Neither Grievant was specifically told that he could not respond to the drill. Nor was there a work rule which prohibited the Grievants from responding to the disaster drill without specific permission.

Commissioner Grignon maintains that it was necessary for the Grievants to fill out written "leave requests" before responding to the disaster drill, as an employe would do if requesting compensatory time off for vacation. The Grievants, however, were responding to a dispatch in which time was of the essence and did not have time to fill out a leave request form.

Given the circumstances of this case, it was reasonable for the Grievants to respond to the disaster drill in the same manner as any other dispatch, i.e., when the page is received, respond as quickly as possible. Moreover, as testified by Steve Dodge, Keshena Fire Commissioner, the Grievants had a statutory obligation to respond to the disaster drill as if it were a real emergency. The record does not support the County's contention that the Grievants left work without permission.

The Grievants did not unreasonably extend their time away from the worksite. The Grievants returned to the Fire Department as soon as the drill ended. Consistent with their normal duties, they checked equipment and replaced equipment, as necessary, to ensure that the Department would be in a position to respond to the next emergency.

Neither employe attempted to conceal any information from the County. Had the Highway Commissioner contacted the Menominee Tribal Clinic, the organizers of the drill, she could have resolved her concerns. The Highway Commissioner did not conduct a fair and objective investigation of the incident on October 27, 1994.

Prior to October 27, 1994, two employes engaged in a violent fight at the work place. Neither employe was disciplined and the aggressor employe was referred to counseling. Comparing the two incidents, the suspensions imposed upon the Grievants are discriminatory, arbitrary and capricious.

The Highway Commissioner's decision to suspend the Grievants for ten working days without pay was motivated, in part, by a desire to retaliate against the Grievants for participating in a meeting with County Coordinator DePerry in which employes criticized the management of the Highway Department.

The County does not have just cause to suspend the Grievants for ten days without pay. The grievance should be sustained and the Grievants made whole. In the event that the arbitrator finds just cause to discipline, the arbitrator should conclude that the suspension is too severe.

DISCUSSION:

On October 27, 1994, the Menominee Tribal Clinic conducted an on site disaster drill. Grievants Benjamin Warrington, Jr. and Pat Roberts, volunteer firefighters and employes of the Highway Department, left work to respond to a dispatch call to the disaster drill. Upon return to work, each Grievant was suspended for ten working days without pay for "Leaving work premises without authorized permission". The Association, contrary to the Employer, argues that the suspensions were without just cause.

On October 27, 1994, at least four members of the Highway Department were volunteer firefighters. The Grievants were the only employe firefighters to respond to the dispatch to the disaster drill. 1/

The Association relies upon the testimony of Steve Dodge, Fire Commissioner, who relies upon Chapter 166 of the Wisconsin Statutes, to argue that the County has a statutory duty to release the Grievants to attend the disaster drill. The Chapter relied upon by the Association, entitled "Emergency Government", addresses the powers of the State of Wisconsin and its subdivisions.

The disaster drill was authorized and conducted by the Menominee Indian Tribe of Wisconsin. The Tribe is not the State of Wisconsin, nor is it any subdivision of the State of Wisconsin. Thus, instructions from the Tribe are not instructions from "emergency government" as that term is defined in the statutes.

Neither the language of the statute, nor any other evidence, persuades the undersigned that the disaster drill was an act of "emergency government". Thus, the provisions of Chapter 166 are not relevant to the determination of this grievance.

Contrary to the argument of the Association, it is not evident that the County had a statutory duty to release the Grievants from work to attend the disaster drill. Nor is it evident that the County had any compact, or agreement, with the Tribe, or any other entity, to release employe firefighters from work to attend disaster drills.

At the time of the disaster drill, the Highway Department had not issued any work rule with respect to the release of employe firefighters to perform firefighter duties during Highway Department work time. However, it is undisputed that, at the time of the disaster drill, an employe firefighter who was paged by the dispatcher was permitted to respond to the page by immediately leaving work. The employe firefighter was not required to notify any supervisor, or receive permission from any supervisor, prior to leaving the work site.

Pamela Grignon, the Highway Commissioner, has been an employe of the Highway Department for nearly twenty years. The Highway Commissioner recalls that, on one occasion prior to October 27, 1994, the Fire Department held a propane drill during working hours. On

1/ While the County considers this to be suspicious, it is not evident that the Fire Department considers the Grievants' response to be inappropriate. Absent such evidence, one cannot reasonably conclude that the Grievants' response to the disaster drill was other than a legitimate firefighter function. It is the Grievants' conduct, and not the conduct of other firefighters, which is at issue.

that occasion, Doug Duquain, an employe firefighter, submitted a leave of absence slip in advance of the drill; requested compensatory time off or vacation time to attend the drill; and received the time off to attend the drill. 2/ The Highway Commissioner maintains that Duquain's conduct is consistent with the Highway Department's leave of absence policy, i.e., when an employe has advance notice of a need to be absent from work, the employe fills out a leave of absence slip and a supervisor approves, or disapproves, the leave request prior to the employe leaving work. 3/

It is not evident that, at the time of the disaster drill, the Grievants had any knowledge of the Duquain incident. Thus, it is not reasonable to conclude that this incident provided the Grievants with any guidance with respect to the manner in which the Grievants were to respond to the dispatch to the disaster drill.

The October 27, 1994 disaster drill was the first disaster drill. Prior to that time, employe firefighters had not been dispatched for any reason other than an emergency.

It is true that the disaster drill was not a "real" emergency. It was, however, very similar to a "real" emergency, i.e., the Grievants did not know the exact time at which they were to respond, the Grievants were dispatched in the same manner as if there had been a "real" emergency, and the Grievants were expected to provide services to the community as if it were a "real" emergency. 4/

The undersigned, unlike the Highway Commissioner, is not persuaded that common sense would lead the Grievants to conclude that they were required to follow the general leave of absence policy, i.e., fill out a leave of absence slip and obtain supervisory approval, prior to leaving work to respond to the disaster drill. Given the uniqueness of the disaster drill, as well as its similarities to a "real" emergency, the undersigned is persuaded that the Grievants could reasonably conclude that they were authorized to respond to the dispatch to the disaster drill in the same manner as any other firefighter dispatch, i.e., immediately leave the worksite, without notifying any supervisor of the employe's absence and without obtaining specific supervisory permission to leave the work site, unless instructed to the contrary by a County supervisor.

2/ According to the Highway Commissioner, other employe firefighters chose not to attend the drills because they did not want to use vacation or compensatory time.

3/ It is not evident, however, that failure to follow this procedure has resulted in a denial of a request to leave work. Indeed, the record indicates that employes may request leave on the day of the leave and that the only reason for denying a request to leave work is that the employe is required to perform work which is too important to be postponed.

4/ Under the disaster protocol, a copy of which was provided to the County prior to the time in which the Grievants responded to the dispatch, firefighters were expected to respond and provide assistance as if there had been a real emergency.

The Grievants, however, did not respond to the dispatch to the disaster drill in the same manner as any other dispatch. Rather, prior to responding to the dispatch to the disaster drill, each Grievant notified County supervisory personnel of his intent to respond to the dispatch to the disaster drill. Having provided such notice, it would be reasonable for each Grievant to conclude that, absent a supervisory instruction to the contrary, he could respond to the dispatch to the disaster drill in the same manner as any other dispatch.

In summary, the Grievants were not required to request, or obtain, specific permission to leave work prior to responding to the dispatch to the disaster drill. Under the circumstances of this case, it was reasonable for each Grievant to assume that he had County permission to respond to the dispatch to the disaster drill in the same manner as any other firefighter dispatch, unless instructed to the contrary by a County supervisor.

Grievant Warrington

Testimony

Benjamin Warrington, Jr., an eight year employe of the Highway Department, has been a volunteer member of the Town of Menominee Fire Department for at least fifteen years. Warrington recalls the following: when he arrived at work at 7:00 a.m. on October 27, 1994, he was given his work assignment; he advised his supervisor, acting Foreman Joe Caldwell, that there would be an emergency drill at the Tribal clinic at approximately 8:30 a.m. or 9:00 a.m.; at the time of this conversation, Highway Commissioner Pamela Grignon, was standing next to Caldwell; neither the Highway Commissioner, nor Caldwell, told Warrington not to go to the drill; Caldwell told Warrington to go to his work site and indicated that, when Warrington's pager went off, Caldwell would use the Foreman's truck to return Warrington to the Highway Department so that Warrington could retrieve his personal vehicle. Warrington further recalls that, at approximately 7:15 a.m., the Highway Commissioner approached Warrington at the gas pumps and asked where the drill was and what was happening and Warrington responded that the drill was at the Tribal Clinic, between 8:00 a.m. and 9:00 a.m., he did not know exactly what was happening, and that Roberts had a paper which Roberts would give the Highway Commissioner if she asked for it. According to Warrington, the Highway Commissioner responded by turning around and walking into the building.

At the time of hearing, Joseph Caldwell, Sr., had been a Truck Driver with the Highway Department for more than six years. On October 27, 1994, Caldwell, acting as Foreman, was the immediate supervisor of Warrington. Caldwell recalls the following: at approximately 7:00 a.m., he assigned work to employes, including Warrington; Warrington was assigned to sweep the Forestry parking lot and intersections; at that time, Warrington told Caldwell that he would like a different assignment because he was going to a fire drill; Caldwell asked where and when; Warrington responded that he did not know; Caldwell told Warrington that he would pick-up

Warrington by truck and take him to the drill; the Highway Commissioner was in the vicinity and told Warrington to do what he was told and that she would check into the matter; the Highway Commissioner did not tell Warrington that he could not go to the drill; at around 7:50 a.m., Caldwell followed Warrington to the Highway Department and asked what was wrong; Warrington explained that the sweeper was not working; Caldwell told Warrington to work with Al the rest of the day; Warrington indicated that he was not happy about the fact that Caldwell was ordering him around; Caldwell responded that Warrington should relax and go with Al and that Caldwell left with Al. Caldwell does not claim, and the record does not demonstrate, that Caldwell had any other conversation with Warrington on October 27, 1994.

The Highway Commissioner recalls that, on the morning of October 27, 1994, she overheard Warrington tell Caldwell that Warrington would be going to a drill when his beeper went off and the Highway Commissioner responded by telling Warrington to go to work, or to do his job, and that she would check out the drill. The Highway Commissioner recalls that, thereafter, she met Warrington at the gas pump and engaged him in a conversation.

The Highway Commissioner gave several accounts of the conversation at the gas pump. Initially, the Highway Commissioner recalled that she told Warrington that she would check into it and let him know later; then she recalled that she told Warrington that she would get hold of Edith Waukau, find out who authorized the drill, and would get back to him; then she recalled that she told Warrington that she was checking it out and that she would get back to him; and in the final account, she recalled that she told Warrington she would check it out and would see who was authorized to go.

The Highway Commissioner does not claim, and the record does not demonstrate, that she had any other conversation with Warrington on October 27, 1994. The Highway Commissioner maintains that Warrington never expressly asked for permission to attend the drill and she never told Warrington that he had permission to go to the drill.

Conclusions

As discussed above, Warrington could assume that he had County permission to respond to the dispatch to the disaster drill in the same manner as any other firefighter dispatch, unless instructed to the contrary by County supervisors. Caldwell, Warrington's supervisor, not only did not object to Warrington's stated intent to respond to the disaster drill, but rather, offered to assist Warrington to respond to the disaster drill. 5/

5/ The County argues that it is doubtful that Caldwell's offer of transportation was related to the disaster drill. Caldwell, however, acknowledges that he said that he would take Warrington to the drill. Contrary to the argument of the County, the record demonstrates that it was possible for Warrington to contact Caldwell if Warrington needed assistance in obtaining transportation to the disaster drill. Warrington did not need such assistance

The Highway Commissioner recalls that she told Warrington to go to work, or to do his job. Caldwell recalls that the Highway Commissioner told Warrington to do what he was told. Regardless of which statement was made by the Highway Commissioner, it is evident that the statement was made in response to the conversation between Caldwell and Warrington in which Warrington was protesting his job assignment. 6/ Given the context of this conversation, the undersigned does not construe the Highway Commissioner's statement to mean anything other than "do the work which is assigned by your supervisor."

While there is variation in the Highway Commissioner's testimony concerning the conversation at the gas pumps, there are two consistent themes, *i.e.*, that she told Warrington that she would check into the drill and that she told Warrington that she would get back to him. Warrington stated that he did not recall that the Highway Commissioner told him that she would check the drill out and get back to him.

Warrington's testimony indicates that the Highway Commissioner asked for information on the drill; that Warrington could not provide the requested information; and that Warrington indicated that Roberts had more information on the drill. Given this testimony, it is likely that the Highway Commissioner would state that she would check out the drill and get back to him. Moreover, Caldwell also recalls that the Highway Commissioner told Warrington that she would check into the matter.

There is less consistency to the claim that the Highway Commissioner told Warrington the reason why she intended to check into the disaster drill, *i.e.*, either she wanted to find out who authorized the drill or that she wanted to find out who was authorized to go. In a letter dated November 10, 1994, which was directed to Association Representative Bauer, the Highway Commissioner states, in relevant part, as follows:

I first learned that Mr. Warrington and Mr. Roberts were going to be unavailable for work when I overheard Mr. Warrington tell acting foreman Joseph E. Caldwell, Sr. that he couldn't do the work assigned because he had to attend some sort of emergency drill for the Fire Department. I told Mr. Warrington to go to work and that

because he was able to ride with Roberts.

6/ Union Steward Gruentzel, who was present when Caldwell assigned jobs, confirms that Warrington was protesting his job assignment. According to Gruentzel, Warrington said that the assignment did not make sense because sometime after 8:00 a.m. there would be a drill.

the drill authorization would be checked out with Mrs. Edith Waukau of the Police and Fire Committee. . . . (emphasis supplied)

Statements made in this letter, as well as other testimony of the Highway Commissioner suggest that, at the time of the Highway Commissioner's conversation with Warrington, she was concerned with finding out who had authorized the drill, rather than in finding out who was authorized to go to the drill. 7/

To be sure, the statements recalled by the Highway Commissioner would be sufficient to put Warrington on notice that the Highway Commissioner intended to investigate the drill and get back to Warrington. However, at the time that Warrington would have received such notice, Warrington had no reasonable basis to conclude that there was any issue with respect to Warrington's right to respond to the drill. 8/ Thus, within the context of the morning's events, a general statement of intent to investigate the drill and get back to Warrington, or the more specific statement of intent to find out who authorized the drill, or who was authorized to go to the drill, would not be sufficient to place Warrington on notice that Warrington's right to respond to the disaster drill was being questioned or was related, in any way, to the Highway Commissioner's investigation.

Assuming arguendo, that the Highway Commissioner made each statement that she recalls, she did not instruct Warrington that he could not leave work to respond to the dispatch to the disaster drill and she did not instruct Warrington to remain at work until she gave him permission to respond to the drill. The Highway Commissioner's comments do not contain any work instruction other than "go to work" or "do your job". As discussed above, within the context of the conversation, it would not be reasonable to conclude that this work instruction meant anything other than "do the work which is assigned by your supervisor".

Neither the comments recalled by the Highway Commissioner, nor any other evidence, demonstrates that a County supervisor instructed Warrington that he could not respond to the dispatch to the disaster drill in the same manner as any other dispatch. Thus, it was reasonable for Warrington to assume that he had County permission to leave work to respond to the dispatch to

7/ The record suggests that the Highway Commissioner did not focus on the issue of who was authorized to go to the drill until after she reviewed Roberts' "paper", which paper apparently raised more questions than it answered. This may explain why Warrington was not given the same instruction as Roberts.

8/ Warrington had just advised Caldwell, his immediate supervisor, of his intent to respond to the disaster drill and Caldwell had just indicated that Caldwell would assist Warrington to respond to the drill. The Highway Commissioner, who overheard this conversation, had not indicated any disagreement with Caldwell's offer of assistance.

the disaster drill without first notifying any supervisor of his absence and without first obtaining specific supervisory permission to leave work.

Warrington was disciplined for "Leaving work premises without authorized permission".
9/ Warrington did not engage in such misconduct and the County does not have just cause to discipline Warrington for "Leaving work premises without authorized permission".

Grievant Roberts

The Highway Commissioner and Roberts agree that, on October 27, 1994, Roberts gave the Highway Commissioner a copy of Joint Ex. #9, the disaster drill protocol. According to Roberts, he gave a copy of Joint Ex. #9 to the Highway Commissioner while he was in the shop; the Highway Commissioner made a copy of Joint Ex. #9; and the Highway Commissioner did not say anything to Roberts other than she wanted a copy of Joint Ex. #9. Roberts asserts that the Highway Commissioner did not say that he was not to report to the drill.

The Highway Commissioner recalls that, at approximately 7:20 a.m., Roberts overheard South and the Highway Commissioner discussing the drill; that Roberts brought in a copy of Joint Ex. #9; and that South made a copy of the document. The Highway Commissioner maintains that she then reviewed the document, but could not determine the time of the drill, who was to respond to the drill, or who authorized the drill. According to the Highway Commissioner, she then told Roberts she would check the drill out and get back to Roberts to let him know if he could leave or not.

Conclusions

The Highway Commissioner's testimony concerning the conversation with Roberts is internally consistent and is not inherently incredible. Moreover, the Highway Commissioner's testimony concerning statements made to Roberts' is consistent with statements made in her letter of November 10, 1994, *i.e.*, "Mr. Roberts was told to continue work until the drill could be checked out". (emphasis supplied)

9/ The County argues that the Grievants were away from work longer than was necessary. Not only is this argument not supported by the record evidence, it is immaterial to the resolution of the grievance. The Highway Commissioner chose to issue the ten day suspensions within one hour of learning that the Grievants had responded to the disaster drill. The basis for the discipline was "Leaving work premises without authorized permission". At the time that the suspensions were issued, the Highway Commissioner had no knowledge that the Grievants were any place other than at the disaster drill. The Grievants conduct in taking time to refill air tanks for the SCBA units was not an issue in the decision to suspend and, thus, is not relevant to the determination of whether or not the suspension was for just cause.

South neither confirms, nor denies, that the Highway Commissioner told Roberts that the Highway Commissioner would check the drill out and get back to Roberts to let him know if he could leave or not. South recalls, however, that, at 8:20 a.m., Roberts asked if "we had found out anything" and he was told no.

This testimony of South is corroborated by the testimony of the Highway Commissioner and the Highway Commissioner's statements in the letter of November 10, 1994, i.e., "Mr. Roberts was told to continue work until the drill could be checked out. Later, Mr. Roberts questioned whether authorization had been cleared. It hadn't." (emphasis supplied)

South's testimony is internally consistent and is not inherently incredible. To be sure, South has been an assistant to the Highway Commissioner for two years. This fact, however, is not sufficient to warrant the conclusion that South would fabricate testimony to promote the interests of the Highway Commissioner. Nor does the record suggest that South has any other motive to fabricate such testimony.

Having no reasonable basis to discredit the testimony of South, the undersigned is persuaded that, at 8:20 a.m., Roberts stopped at the Highway Department office and asked if they "had found out anything" and that Roberts was told no. If, as Roberts' maintains, the Highway Commissioner did not say anything other than she wanted a copy of Joint Ex. #9, it is unlikely that Roberts would have stopped by the office at 8:20 a.m., the approximate time that he was paged by the dispatcher, to ask if they "had found out anything". Thus, the undersigned considers the testimony of South to support the Highway Commissioner's testimony that the Highway Commissioner told Roberts that the Highway Commissioner would check the drill out and get back to Roberts to let him know if he could leave or not.

Roberts' reliability as a witness is also called into question by the testimony of Craig Grignon. Grignon, the son of the Highway Commissioner, is a Lead Mechanic in the Highway Department and is Roberts' immediate supervisor. Grignon recalls that before noon on October 26, 1994, Roberts, who was on sick leave, came into the shop to fill out a time card for the previous day and a sick leave slip ; Roberts showed Grignon a copy of Joint EX. 9, the disaster drill protocol, and asked Grignon, a fellow firefighter, if he intended to go to the drill; and Grignon responded "No", he had not been informed about the drill and he had other things to do. According to Grignon, he did not order, but rather, suggested that Roberts fill out a leave of absence slip because it was a mock drill and Roberts responded that whenever the pager goes off, he goes.

Roberts does not deny that he came to the shop on October 26, 1994. Rather, Roberts states that he does not remember having done so. Roberts does deny that Grignon ever told him to

fill out a leave of absence slip. 10/

While Roberts does claim that he normally completes a sick leave slip on the day he returns from sick leave, he offered no testimony on the likelihood that he would have come in to the office to fill out a time card. Since an employe's pay check may be dependent upon the submission of the appropriate time cards, it is not incredible, per se, that an employe on sick leave would come in to work to fill out a time card. Robert's testimony does not establish that the conversation of October 26, 1994, recalled by Grignon, could not have occurred.

Grignon is the son of the Highway Commissioner. In addition, Grignon has been the subject of complaints by employes, including Roberts. One may reasonably conclude, therefore, that Grignon is not a disinterested party.

Grignon, however, did not exhibit any chagrin at being the subject of employe complaints. Moreover, Grignon was quite candid in admitting that he did not order Roberts to fill out a leave of absence slip on the disaster drill and that he did not notify the Highway Commissioner of the disaster drill because he did not consider it to be important. Grignon's candidness, as well as his general demeanor at hearing, militates against a finding that Grignon's interest in this proceeding caused Grignon to fabricate testimony.

Grignon's testimony is internally consistent and is not inherently incredible. The record does not provide any reasonable basis to conclude that the meeting between Grignon and Roberts did not occur on October 26, 1994, as described by Grignon. Roberts' failure to recall this meeting provides a reasonable basis to question the reliability of Roberts' memory.

The inconsistencies in the testimony between the Highway Commissioner and Roberts, with respect to their conversation of October 27, 1994, have been resolved in favor of the Highway Commissioner. Crediting the testimony of the Highway Commissioner, the undersigned is persuaded that, on October 27, 1994, prior to the time that Roberts received the dispatch to the disaster drill, the Highway Commissioner told Roberts that she would check out the drill and get back to Roberts to let him know if he could leave or not. By telling Roberts that she would let him know if he could leave or not, the Highway Commissioner was instructing Roberts not to leave work to respond to the disaster drill until he received approval from the Highway Commissioner.

For the reasons discussed above, it was not unreasonable for Roberts to conclude that, absent supervisory instructions to the contrary, he was authorized to respond to the dispatch to the disaster drill in the same manner as any other dispatch call. The undersigned is satisfied that a

10/ After the fact, Grignon reported this conversation to the Highway Commissioner. It is not clear that Roberts' failure to follow Grignon's "suggestion" to fill out a leave of absence slip was a factor in the decision to suspend Roberts for ten days without pay.

supervisor, the Highway Commissioner, did give Roberts "instructions to the contrary" when she told Roberts that she would check out the drill and get back to Roberts to let him know if he could leave or not.

As the Association argues, the Highway Commissioner did not forewarn Roberts of the disciplinary consequences of his responding to the disaster drill without specific permission. However, an employee need not be forewarned of consequences which should be obvious to the employee. Given the Highway Commissioner's statement that she would let Roberts know if he could leave or not, it should have been obvious to Roberts that he could not leave work without the specific permission of the Highway Commissioner. Moreover, it should have been obvious to Roberts that, if he did leave work without the specific permission of the Highway Commissioner, then he would be guilty of misconduct and subject to discipline.

The undersigned agrees that the Highway Commissioner's investigation into the authenticity of the drill would have been served by immediately contacting the Tribal Clinic, rather than simply waiting for Edith Waukau to respond to a telephone call. However, the fact that the Highway Commissioner did not explore all avenues of investigation is not critical to the investigation of Roberts' misconduct. The reason being that Roberts was not disciplined because he responded to a drill which was not authentic. Rather, he was disciplined for leaving work without "authorized permission."

It was the Highway Commissioner who told Roberts that she would get back to him to let him know if he could leave or not. The Highway Commissioner did not need to conduct an investigation to determine whether or not she had done so. Upon learning that Roberts had left work to respond to the disaster drill, the Highway Commissioner had sufficient information to determine that Roberts had left work premises without "authorized permission." Contrary to the argument of the Association, the record does not warrant a finding that the Highway Commissioner failed to make a reasonable inquiry or investigation prior to imposing the ten day suspension.

The undersigned agrees that Roberts' immediate supervisor, Craig Grignon, did not state that Roberts could not go to the disaster drill. The undersigned further agrees that, by remaining silent as Roberts left work to respond to the disaster drill, Grignon implied that he did not object to Roberts' leaving work to respond to the disaster drill.

The Highway Commissioner is Grignon's supervisor, as well as the Grievants' supervisor. The Grievant knew, or should have known, that it was the Highway Commissioners' instructions, and not Grignon's silence, which were controlling. Contrary to the argument of the Association, the fact that Grignon did not object to Roberts' response to the disaster drill did not relieve Roberts of his duty to remain at work until such time as the Highway Commissioner gave Roberts permission to leave.

Article XVIII, Disciplinary Procedure, provides a just cause standard for discipline. In this Article, the parties have agreed upon a sequence of disciplinary action, i.e., oral reprimand, written reprimand, suspension and discharge. The parties have agreed, however, that this sequence need not be followed in cases involving a "major violation".

Article XVIII, does not define a "major violation". Nor does it identify misconduct which falls within the "major violation" category.

Roberts was disciplined for "Leaving work premises without authorized permission". Roberts did leave "work premises without authorized permission." Moreover, in "leaving work premises without authorized permission", Roberts ignored the work instruction of his supervisor, the Highway Commissioner, and, thus, was insubordinate.

Roberts' misconduct in "Leaving work premises without authorized permission" is a "major violation". Moreover, Roberts' misconduct is of sufficient magnitude to warrant an immediate suspension.

The Association argues that the ten day suspension is without just cause because the County applied its rules, orders and penalties in a discriminatory, arbitrary and capricious manner. This argument is based upon one incident in which two employees fought at work and were not suspended or discharged.

The fight was precipitated by employe "A" telling employe "B" that employe "A" was having an affair with the girlfriend or wife of employe "B". According to the Highway Commissioner, the two employes were "best friends" and stress was a factor in the altercation. Each employe was referred to counseling under the County's employe assistance program.

Roberts did not engage in the same type of misconduct as the employes who fought in the work place. Moreover, it is not evident that Roberts' misconduct was due to stress, or any other mitigating factor which would warrant a referral to an employe assistance program. Contrary to the argument of the Association, the incident relied upon by the Association does not demonstrate that the County's application of its rules, orders and penalties is discriminatory, arbitrary and capricious.

During the week prior to the disaster drill, the two Grievants were among a group of employes who met with County Coordinator DePerry to voice concerns about the management of the Highway Department, including concerns that the Highway Commissioner favored employes Craig Grignon and Joe Caldwell. The Association maintains that the Highway Commissioner's decision to discipline the Grievants was in retaliation for having complained to DePerry and, thus, does not meet the standards of just cause.

The Association relies upon the testimony of Union Steward Mark Gruentzel. At the time

of hearing Gruentzel had been an employe of the Highway Department for approximately three and one-half years. Gruentzel recalls that sometime between 10:30 a.m. and 10:45 a.m., the Highway Commissioner drove to Gruentzel's work site and handed Gruentzel two envelopes which contained copies of the Grievants' suspension notices. According to Gruentzel, Gruentzel responded that the suspension was harsh because, to his knowledge, no one else had received a ten day suspension; the Highway Commissioner responded that she was not happy about getting called by DePerry, you were not a man if you can't talk to her about complaints, and she was deeply hurt over the Deperry situation; Gruentzel responded that he knew she was hurt and had already drafted the suspension letters, but she should do some investigating and cool off; and the Highway Commissioner responded that you guys really hurt me with what you had done. According to Gruentzel, the Highway Commissioner appeared upset when she talked about the incident with DePerry. Gruentzel denies that he was the first one to mention the meeting with DePerry.

The Highway Commissioner agrees that she delivered copies of the two suspension letters to Gruentzel. According to the Highway Commissioner, Gruentzel asked why she had given ten days; the Highway Commissioner responded because the employes had left work without permission; Gruentzel suggested that the Highway Commissioner think about the matter and investigate the matter further; Gruentzel brought up the meeting between the employes and DePerry; and the Highway Commissioner discussed the employe complaints with Gruentzel and told Gruentzel that it was not courteous for employes to go behind her back. The Highway Commissioner maintains that she was upset when she met with Gruentzel because the employes had left their jobs and the employes were not respecting her authority. The Highway Commissioner also acknowledges that she was upset when DePerry provided her with a copy of the employe complaints and, that on October 27, 1994, she was feeling bad about the incident with DePerry.

Regardless of whether Gruentzel, or the Highway Commissioner, brought up the subject of the employe meeting with DePerry, it is evident that the DePerry incident was on the Highway Commissioner's mind on October 27, 1994. The Highway Commissioner's testimony demonstrates that she was not particularly upset by the nature of the employe complaints to DePerry, 11/ but rather, was upset because the employes had not come to her with the complaints and had gone behind her back. In essence, her reaction to the DePerry incident was the same as her reaction to Roberts' misconduct, i.e., employes were not respecting her authority.

The proximity of the DePerry incident to the date of Roberts' misconduct; the Highway Commissioner's admission that, on October 27, 1994, she was still upset by the DePerry incident; the evidence that the reason for this "upset" was essentially the same reason that she was upset by Roberts' misconduct, i.e., that employes were not respecting her authority; and the evidence that

11/ According to the Highway Commissioner, she had dealt with the matters underlying the employe complaints in her own manner.

the DePerry incident was a topic of discussion at the time that the Highway Commissioner provided Gruentzel with copies of the suspension letters, persuades the undersigned that the DePerry incident was a factor in the Highway Commissioner's decision to suspend Roberts for ten days.

The undersigned is satisfied that the Highway Commissioner considers it to be a major violation, under Article XVIII, for an employe to leave work without permission. Thus, the undersigned is not persuaded that, but for the DePerry incident, the Highway Commissioner would not have disciplined Roberts for his misconduct.

The undersigned is persuaded, however, that the DePerry incident influenced the Highway Commissioner's decision to impose the maximum suspension permitted under the contract, i.e., ten days. Since the decision to impose a ten day suspension was influenced, in part, by factors which have nothing to do with the Grievants' misconduct, the ten day suspension is excessive and, therefore, without just cause.

The grievance was the subject of a hearing before the County Highway Committee. It is not evident that this Committee was influenced in any way by the DePerry incident. The Highway Committee determined that the penalty imposed by the Highway Commissioner was too severe and recommended that the suspension be reduced to four days. 12/

The determination of the Highway Committee is reasonable. Moreover, it provides the best evidence of the penalty that County management would have imposed without the influence of the DePerry incident. The undersigned is satisfied that the County has just cause to suspend Roberts for four days without pay for "Leaving work premises without authorized permission".

Based upon the above, and the record as a whole, the undersigned issues the following award:

AWARD

1. The County violated the collective bargaining agreement when it suspended Grievant Warrington for ten days without pay because the County did not have just cause to discipline Grievant Warrington. The appropriate remedy is for the County to immediately (1) make Grievant Warrington whole for the loss of pay and benefits due to the ten day suspension and (2) expunge all references to the ten day suspension from Grievant Warrington's personnel file.

2. The County has just cause to discipline Grievant Roberts, but the imposition of a

12/ See Joint Ex. #7.

ten day suspension violated the collective bargaining agreement because it was excessive and, thus, without just cause. The appropriate remedy is for the County to immediately (1) modify the original suspension to four days without pay; (2) make Grievant Roberts' whole for six days loss of pay and benefits; and (3) modify Grievant Roberts personnel file to expunge all references to the ten day suspension and to reflect the modification of the suspension to four days without pay.

Dated at Madison, Wisconsin, this 2nd day of October, 1995.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator