



no stenographic transcription of the proceedings was taken, and the parties waived closing arguments and instead elected to file post hearing briefs/ arguments which they did subsequently file on or before August 17, 2009.

The following appearances were entered:

FOR THE EMPLOYER:

Peter D. Bergstrom	Attorney at Law South Haven, MN
Don Kuhlman	County Auditor

FOR THE UNION:

Keith Ferrington	Staff Representative St. Peter, MN
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**THE ISSUE**

DID THE EMPLOYER HAVE JUST CAUSE TO DISCHARGE GRIEVANT RANDY ILLG AND, IF NOT, WHAT SHALL THE REMEDY BE?

**PERTINENT CONTRACT PROVISIONS AND POLICIES**

**ARTICLE V. EMPLOYER SECURITY**

- 5.1 Except as herein clearly and explicitly limited in the express terms of this Contract, the right of the Employer in all respects to manage its business, operations, and affairs including but not limited to establishing wages and schedule hours; to hire, demote, promote, suspend, discipline, discharge employees due to lack of work or other legitimate reason; to make and enforce reasonable rules and regulations; and to change or eliminate existing methods, equipment or facilities. The Employer's failure to exercise any right hereby reserved to it, or to exercise any right in a particular way, shall not be deemed a waiver of

any such right or preclude the employer from exercising the same in some other way not in conflict with the express terms of this Agreement.

## **ARTICLE XII. DISCIPLINE AND DISCHARGE**

### **12.1 Discipline**

- A. Disciplinary action may be imposed upon an employee only for just cause.
- B. Disciplinary action shall include the following:
  - 1. Oral Reprimand
  - 2. Written Reprimand
  - 3. Suspension
  - 4. Demotion
  - 5. Discharge
- C. If the Employer has reason to reprimand an employee, it shall be done in a manner that shall not embarrass the employee before other employees or the public.
- D. When any disciplinary action more severe than an oral reprimand is intended, the Employer shall notify the employee, in writing, of the specific reasons for such action.

### **12.2 Discharge**

A. The Employer shall not discharge a regular employee without just cause. If the Employer feels there is just cause for discharge, the employee and the Union shall be notified in writing that the employee is to be discharged and shall be furnished the reason therefore and the effective date of the discharge. The employee may request an opportunity to hear any explanation of the evidence against him/her; to present his/her side of the story and is entitled to Union representation at such meeting upon request. The right to such meeting shall expire at the end of the next scheduled workday of the employee after the notice of discharge is delivered to the employee unless the employee and the Employer agree otherwise. The discharge shall not become effective during the period when the

notice of discharge is delivered to the employee unless the employee and the Employer agree otherwise. The discharge shall not become effective during the period when the meeting may occur. The employee shall remain in pay status during the time between the notice of discharge and the expiration of the meeting.

B. At any time during the probationary period, a newly hired or rehired employee may be terminated at the sole discretion of the employer.

**JOB DESCRIPTION**  
**HEAVY EQUIPMENT OPERATOR B-23-2**

**DESIRABLE QUALIFICATIONS**

**Training and Experience**

Requires a valid Minnesota Class A Commercial Driver's License. Requires a combination substantially equivalent to considerable experience in highway/street maintenance or construction work.

**JOB DESCRIPTION**  
**LIGHT EQUIPMENT OPERATOR B22 (2)**

**DESIRABLE QUALIFICATIONS**

**Training and Experience**

A combination substantially equivalent to experience in maintenance and construction work of roads and bridges is preferred. Requires a valid Class A CDL. If assigned to weed spraying and/or hazardous waste handling, must be able to pass certification testing within 6 months of hire.

**BACKGROUND**

Watonwan County, hereinafter referred to as the "EMPLOYER," is a political subdivision of

the State of Minnesota and a public employer within the meaning of Section 179, Minnesota statutes. Employees of the County Public Works Department, excluding certain maintenance employees and all supervisory and confidential personnel, are represented by the American Federation of State, County and Municipal Employees, Council #65, and its Local Union, 1204D, hereinafter referred to as the “UNION.”

There is no dispute over the relevant facts of this grievance. Randy Illg, the Grievant, initially applied for, and was hired as, a “Highway Worker” with the Employer in April of 1998. The stated minimum qualification for this position required that the applicant have a valid Class B Minnesota Driver’s License by “date of hire” and that the applicant acquire a “Class A Commercial Driver’s License within 6 months.” Grievant indicated on his application that he was already in possession of a Class A license. The title of his position was later changed to “Light Equipment Operator” (LEO). Grievant was thereafter employed as an LEO until March 9, 2008 when he was arrested off-duty and charged with driving his personal vehicle while intoxicated (DWI). He was later convicted of Driving While Intoxicated and his driving privileges were revoked for one year on April 4, 2008. It is undisputed that Grievant’s work performance as an LEO was at all times satisfactory prior to the above incident.

Grievant’s arrest resulted in the suspension of both his personal and commercial driver’s licenses. Accordingly, he contacted his immediate supervisor on March 10, 2008 to advise the Employer of his arrest and license suspension. On May 21, 2008 Grievant was advised in a letter from County Auditor Donald Kuhlman that the County was “contemplating” his dismissal from his LEO position as a result of the license suspension. Specifically, Kuhlman indicated that the reason for this proposed action was that:

Your position as Light Equipment Operator for Watonwan county Public Works requires a Class A Commercial Driver's License. You signed a statement of your understanding of this requirement when you applied for the position on April 15, 1998.

Effective April 4, 2008 your driving privileges were revoked by the Minnesota Department of Public Safety for being caught driving with an alcohol concentration of .08 or more. Since you do not possess a Minnesota Driver's License, you do not meet the minimum qualifications of your position with Watonwan County.

The Employer initiated its own investigation of the above incident and convened a *Loudermill* hearing on May 22, 2008 allowing Grievant to present his version of events. On June 9 the County Board of Commissioners met and suspended Grievant's employment. The Board's decision was communicated in a letter from Kuhlman which states, in relevant part:

At today's special meeting of the Watonwan County Board of Commissioners, the Board reviewed information related to the revocation of your driving privileges and loss of your CDL. As previously noted in my correspondence dated May 21, 2008, your position as Light Equipment Operator requires a Class A Commercial Driver's License. Because your driving privileges were revoked on April 4, and you do not possess a CDL, you do not meet the minimum qualifications of your position.

The Board acted to suspend your employment with Watonwan County effective June 10 without pay or benefits for 90 calendar days or such time as your CDL is reinstated, whichever is sooner. If at the end of 90 days, on September 7, 2008, you do not possess a valid CDL, you will be dismissed from employment with Watonwan County for failure to meet the minimum requirements of your position.

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The Union responded to the above letter through the filing of an "Official Grievance Form" on June 16, 2008. The grievance alleges that:

The Employer violated the CBA [collective bargaining agreement]

including but not limited to Article 12 when on 6/9/08 it suspended the Grievant for 90 days with the caveat of termination without just cause.

In remedy, this grievance requests that Grievant be reinstated retroactive to June 10, 2008 and be made whole. The grievance was denied by the Employer without comment on the same day.

The dispute was subsequently advanced to arbitration in accordance with the provisions of Article VI of the parties' collective agreement. There being no allegation of procedural or substantive arbitrability, the Arbitrator finds that the matter is properly before him for final and binding determination.

### **CONTENTIONS OF THE PARTIES**

The Union does not dispute that Grievant's drinking and driving was a serious offense but takes the position that Grievant's excellent work record during his ten years of employment with the Employer warrants mitigation of the discharge penalty. The Union further takes the position that the Employer could have, and should have, accommodated Grievant's loss of driving privileges by assigning him alternative (non-driving) employment. In this connection the Union argues that when Grievant received another DWI citation in May of 1998, he was provided with alternative employment while his license was suspended and no disciplinary action was taken against him. The apparent implication is that the Employer tolerated the earlier violation and thereby allowed Grievant to believe that off-duty drinking and driving would be ignored. The Union also maintains that the Employer delayed formal discipline for the April 2008 DWI for three months, thereby encouraging Grievant to believe that accommodations would be made and discipline withheld. The Union contends that Grievant's discipline may have been influenced by a DWI citation received

by another County employee during the same time period. The Union therefore requests that, at the very least, Grievant be returned to work effective with the reinstatement of his Commercial Driver's License on April 30, 2009.

The Employer takes the position that Grievant was discharged solely for his failure to meet the minimum requirements of his Light Equipment Operator's position. The requirement that an operator hold a Class A Commercial Driver's License is clear and unambiguous and it is undisputed that Grievant was aware of this requirement. The Employer further takes the position that it had no obligation to accommodate Grievant by assigning him to non-driving work during his one year license revocation period or to allow him to perform snow plowing duties in situations where a commercial driver's license was not required. Indeed, the Employer argues that to accommodate Grievant would be to show him preferential treatment. Finally, the Employer contends that its departmental personnel and the statute regarding driving while intoxicated have changed since the Employer accommodated Grievant's 1998 DWI. The Employer also notes that it subsequently treated another employee, in circumstances similar to Grievant's, in an identical manner. Accordingly, the Employer urges that the grievance be denied.

### **DISCUSSION, OPINION AND AWARD**

It is readily apparent from the record that Grievant was a competent and satisfactory employee of the County for approximately ten years, but that this work record was blemished by two DWI convictions, neither of which was directly job related. However, there is a clear nexus between this undeniably criminal behavior and Grievant's employment because of the unambiguous

requirement that he hold a Class A Commercial Driver's License. The loss of this license as a result of actions solely attributable to Grievant can only be construed as misconduct within the meaning of County Personnel Policies and the collective bargaining agreement. While it is true that the Employer accommodated Grievant and provided him with alternative employment during a DWI related license revocation in 1998, it cannot be faulted for taking a more progressive response to the 2008 DWI. Whether the instant disciplinary action was the result of the Employer eliminating past lax enforcement; of changed circumstances; or simply of an unwillingness to accommodate Grievant after a second offense is irrelevant. It is clear from the record that the Employer could have disciplined and/or refused to accommodate Grievant in 1998. That it elected not to take disciplinary action in 1998 cannot be deemed an impediment to imposition of disciplinary action for the repeated offense in 2008.

The delay in imposing discipline noted by the Union is troubling but not unreasonable under the circumstances. In this connection it is noted that the delay was approximately six weeks from April 4, 2008 when Grievant was actually convicted, until May 21 when Grievant was given notice of pending disciplinary action, and not the three months asserted by the Union. The Employer certainly cannot be faulted for waiting until Grievant's CDL was actually revoked before beginning its investigation, and a six week investigation of a long term employee with an otherwise satisfactory work history, particularly an employee who was apparently well liked and relied upon by his immediate supervisors, cannot be considered excessive. Further, the Arbitrator finds that there is no evidence within the record to support the Union contention that this delay was related to the status of another employee or Board politics. Grievant was put on notice on May 21, 2008 that his continued employment was in jeopardy, and he was provided with a timely *Loudermill* hearing during which

he was permitted to provide any evidence or circumstances in his favor. While it is certainly possible that Grievant believed he would again be accommodated or that the Employer did not intend to discipline him, there is nothing within the record to support such a belief or even to suggest that the Employer intended to again turn a blind eye to Grievant's failure to maintain a commercial driver's license.

Whether or not the Employer elects to accommodate Grievant or any other employee under similar circumstances is wholly within the discretion of the Employer. Based on the record, the Arbitrator must find that there is no obligation, either implied or created by prior practice, to provide such accommodation, and the Arbitrator has no authority to substitute his judgment for that of the Employer. This is also true with regard to the Union's request that Grievant be reinstated effective with his re-acquisition of a valid commercial driver's license. While the Employer may certainly re-employ Grievant at its discretion, the Arbitrator has no authority to compel such an action.

The Arbitrator has made a detailed review and analysis of the entire record in this matter, and has given careful consideration to the cogent post hearing briefs and arguments submitted by the respective parties. Further, he has determined that certain matters that arose in these proceedings must be deemed immaterial, irrelevant, or side issues at the very most, and therefore has not afforded them any significant treatment, if at all, for example: whether or not Grievant was denied unemployment compensation; whether or not Grievant's CDL was ultimately reinstated; the fact that another employee disciplined in the same manner as Grievant was reinstated following his acquittal of a DWI charge; whether or not this DWI charge against another employee motivated the Board of County Commissioners to take action against both Grievant and the other employee; whether or not the Shop Foreman and Road Foreman were willing and able to accommodate Grievant; and so forth.

Having considered the above review and analysis, together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of the parties' collective bargaining agreement, the Employer has demonstrated, by clear and convincing evidence, that it had just cause to discharge Grievant. Accordingly, an award will issue, as follows:

**AWARD**

THE EMPLOYER HAD JUST CAUSE TO DISCHARGE  
GRIEVANT RANDY ILLG. THE GRIEVANCE IS HEREBY  
DENIED AND DISMISSED AS BEING WITHOUT SUBSTANCE  
OR MERIT.

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John Remington,  
Arbitrator

September 28, 2009  
St. Paul, MN