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State of Wisconsin
Wisconsin Employment Relations Commission

January 6, 2012

Mr. Aaron N. Halstead
222 West Washington Avenue, Suite 705
P.O. Box 2155
Madison, WI 53701-2155

Mr. Joseph Ruf III
P.O. Box 63
Portage, WI 53901-0063

Re: Columbia County

Case 313 No. 70490 MA-14977
(Joe Arndt Suspension)
Case 314 No. 70491 MA-14978
(Tom Jones Discharge)
Case 315 No. 70492 MA-14979
(Tom Killoran Discharge)

Gentlemen:

Please find enclosed a copy of the Arbitration Award issued by the undersigned in the above-entitled matters.

Sincerely,

Stanley H. Michelstetter II

Stanley H. Michelstetter II
Arbitrator

SHM/gjc
G0022G.LT
Enclosure

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

COLUMBIA COUNTY

and

COLUMBIA COUNTY EMPLOYEES' UNION, LOCAL 995, AFSCME, AFL-CIO

Case 313
No. 70490
MA-14977

Case 314
No. 70491
MA-14978

Case 315
No. 70492
MA-14979

Appearances:

Aaron Halstead, Hawks, Quindel, S.C., Attorneys at Law, 222 West Washington Avenue, Suite 450, Madison, Wisconsin, appeared on behalf of the Union.

Joseph Ruf, III, Columbia County Corporation Counsel/Human Resources Director, 120 West Conant Street, P.O. Box 63, Portage, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Columbia County, hereinafter "Employer," and Columbia County Employees Union, Local 995, AFSCME, AFL-CIO, hereinafter "Union," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator

held a hearing in Portage, Wisconsin, on June 30, 2011. Each party filed a post-hearing brief, the last of which was received October 18, 2011, and the record was closed as of that date.

ISSUES

The parties agreed to the following statement of the issues:

1. Did the Employer discharge Mr. Killoran and/or Mr. Jones for just cause?

2. Did the Employer suspend Mr. Arndt for just cause?

3. As to any grievant for which the answer to the above questions is "no," what is the appropriate remedy? [1]

RELEVANT AGREEMENT PROVISONS

"...

ARTICLE 3 – MANAGEMENT RIGHTS

3.01 The management of the Highway Department and direction of the working forces is vested exclusively in the Employer, including, but not limited to, the right to hire, suspend, or demote, discipline or discharge for just case, . . . to create, promulgate and enforce reasonable work rules, to determine what constitutes good and sufficient County service and all other functions of management and direction not expressly limited by the terms of this Agreement. The Union expressly recognizes the prerogative of the Employer to operate and manage its affairs in all respect with its responsibilities.

...."

[1] The parties stipulated that I might retain jurisdiction over the specification of remedy if either party requests in writing, copy to opposing party, that I exercise jurisdiction within sixty (60) calendar days of the date of the award.

RELEVANT WORK RULES

COLUMBIA COUNTY PERSONNEL POLICIES & PROCEDURE MANUAL

". . .

Sec. 7.18 Misconduct – Unacceptable Performance

. . .

(b) Violation of County Rules of Conduct. The continued employment of County employees shall be contingent upon acceptable conduct, satisfactory job performance and compliance with the rules and regulations set forth in this Personnel Manual. County employees are also expected to observe a set of reasonable non-statutory rules covering their behavior on the job. Failure to display acceptable job performance or the violation of these rules and regulations shall be cause for disciplinary action including reprimands, suspension without pay, or dismissal. The exact form of discipline shall depend on the seriousness of the offense committed. An employee shall be considered to have engaged in misconduct if he/she violates any of the following listed reasons, such list not to be considered all inclusive:

. . .

(5) The employee has taken for personal use, a fee, gift, or other valuable things in the course of work or in connection with employment with the County.

(6) The employee has used County-owned equipment, supplies, uniforms or a vehicle for personal use without receiving proper authorization.

. . .

(20) The employee has misappropriated County funds, appropriated County property for personal use, or illegally disposed of County property.

. . .

(30) Willful misconduct or insubordination.

. . .

(d) **Unlawful Acts Prohibited**

(1) No person shall make any false statement, certificate, make, rating or report, or in any manner commit, or attempt to commit, any fraud preventing the impartial execution of this Chapter and policies.

. . . ."

FACTS

The Employer is a Wisconsin County. It operates a highway department. The Union represents non-supervisory, non-managerial employees of the Highway Department. The bargaining unit includes the three grievants herein, Joseph Arndt, Thomas Jones and Thomas Killoran.

The Highway Department provides for the care and maintenance of county-owned parks, highways and other facilities. It also performs similar services under contract with the State of Wisconsin's Department of Transportation for similar work on state-owned roads. The Highway Department is headed by the Highway Commissioner, Kurt W. Dey, who is responsible for overseeing all of the operations of the Highway Department. Commissioner Dey has been Highway Commissioner since December, 1987. There are assistant commissioners who directly supervise different crews. Assistant Commissioner T.O. Boge supervises Mr. Killoran and Mr. Jones directly.[2] The State of Wisconsin assigns a supervisor who has authority to direct crews in the performance of work for the State.

The grievants involved are all in the bargaining unit represented by the Union. Mr. Killoran was hired in 1994 and has been employed by the Employer continuously for at

[2] He was not on duty on September 16, 2010.

least seventeen years. For the last ten years of his tenure he has been assigned to the Parks and Wayside crew. Mr. Jones was hired in 1995 and has been assigned to the Parks and Wayside crew since 1996. The two comprise the Parks and Wayside Crew. Mr. Arndt was hired approximately five years before the facts in dispute. He was hired as a general laborer and was assigned to the paint crew continuously since he was hired.

The Parks and Wayside crew works without direct supervision. The position involves substantial trust by the Employer that the employees are properly performing their duties during the work day. Both employees work four ten-hour work days from 6:00 a.m. to 4:00 p.m. They are routinely responsible to clean and maintain the county's parks and waysides. In this regard they spend about half their time working separately. The other half of their time involves working together in jobs which require more than one person. The position requires a close working relationship and the two maintain a friendship. They open and close those facilities as required for various seasons. About twice per year, they remove dead trees or those which cause obstructions, clean up fallen branches and remove excessive underbrush. This crew also assists road crews in similar assignments as may be needed along roadsides maintained by the Employer or the State. Road crews have similar responsibilities along the roads they maintain

This dispute involves the disposition of wood after one of the tree cutting operations on September 16, 2010. As discussed more below, wood cut or gathered by the Employer has no value to the Employer and is considered waste material. In some instances, the wood cut or gathered has some value to the public if it is in a form which the public might readily use. It was not uncommon for employees to take cut wood home for personal use in past years. Supervisors even participated and accepted wood gathered in this way for their personal use. The Employer contends that it changed this policy some years prior to the facts in dispute. The policy has some undisputed aspects. It is undisputed that the policy was that brush or other wood which could be chipped would be chipped by the chipping crew or brought into the main departmental shops and chipped.[3] The chips were made available free to the public at the main shops. Trees which were greater than seven inches in diameter were too large to be left for the public. The Employer maintains an area for storage and destruction of this wood known as the Spear Pit. The Spear Pit is adjacent to Wyona Park, where the incidents in

[3] The Parks and Wayside crew did not use the chipper. They ordinarily picked up wood which would be chipped and took it to the Spear Pit or took it into one of the main shops to be chipped.

dispute occurred. These large logs are hauled to the Spear Pit and left there. The Employer burns the large logs at the Spear Pit once or twice per year. It takes one or two employees two days to burn the logs. The Employer does not sell or distribute logs which are deposited in Spear Pit with one exception when it had some hard wood logs milled into board for use in departmental pick-up trucks. Although the public is theoretically not allowed to take the wood at the Spear Pit, logs in that pit do tend to disappear over the year between burning sessions. The "theft" of this wood is greatly appreciated by the Employer because it saves labor in burning it. The Employer makes no effort to investigate those "thefts." The employee version of the exceptions to this policy is discussed below.

The facts of what occurred where not significantly in dispute as of the close of the hearing. Mr. Killoran and Mr. Jones arrived at work at 6:00 a.m. and determined that they would cut wood at Wyona Park. Ordinarily each drives a pick-up truck and a trailer for these operations; however, they decided this job required a front-end loader and dump truck. The also took chain saws and other related equipment. They cut down approximately eight large trees and proceeded to cut them into logs which would fit in the dump truck. Mr. Killoran operated the dump truck and Mr. Jones operated the front-end loader to load the logs. The trees were properly selected for removal in accordance with the Employer's policies. Mr. Killoran took two loads of logs to his home and deposited them in his driveway. It took him between twenty and thirty minutes round trip to deliver the first load of wood to his home. It would have taken at least four minutes to take the wood to the Spear Pit. Mr. Jones continued to perform the normal clean-up which occurs when they cut down trees. When they loaded the last of the large logs, Mr. Killoran drove the partially loaded dump truck to the Spear Pit. Mr. Jones took the front-end loader to the Spear Pit. It took Mr. Jones four minutes to drive to the Spear Pit. Mr. Jones and used the front end loader to add logs from the Spear Pit to fill up the dump truck with logs which had been stored at the Spear Pit. Mr. Killoran took the last load of logs to his home and then returned to the Wyocena shop with the dump truck. Mr. Jones returned the front end loader to the Wyocena shop. Both of them had returned by about 10:00 a.m.

While Mr. Killoran was at the shop he told Mr. Arndt that he and Mr. Jones were going to have fire wood at the Wyona Park and that Mr. Arndt should get some. Mr. Arndt said he had vacation time scheduled at the end of his day and might come over and get some.[4] Mr. Killoran and Mr. Jones returned to Wyona Park.

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[4] It is also possible that he said he would come over. See, tr. p. 162-3.

Commissioner Dey received a call from a citizen who reported seeing Mr. Killoran dumping the load of logs in Mr. Killoran's driveway. Commissioner Dey went through Wyona Park and observed that the crew apparently had cut down trees and that the project had been completed. He also contacted the Sheriff's Department and others who went to Mr. Killoran's home and saw the logs in dispute dumped in his driveway.

Mr. Arndt had previously scheduled vacation time to start at about 2:00 p.m. that day. He went home at 2:00 p.m. and got his own truck and his own trailer. Wyona Park is near his home. He arrived at about 2:20 p.m. He drove over to the fire wood. Mr. Killoran and Mr. Jones both helped Mr. Arndt load wood into his trailer by hand which Mr. Arndt then took home for personal use. The investigating detective observed this and talked to Mr. Killoran while they were loading the wood.

Commissioner Dey conducted an investigation the following Monday. He interviewed all three grievants separately. Mr. Killoran admitted taking the logs home but alleged that he ran the front end loader. Mr. Arndt admitted the facts relating to him. Mr. Jones admitted running the front end loader and said he did not observe anything. Commissioner Dey alleges that he denied loading logs at the Spear Pit. Commissioner Dey discharged Mr. Killoran and Mr. Jones. He suspended Mr. Arndt for three days without pay. The Union filed a grievance concerning all three and the grievances were properly processed to arbitration.

POSITIONS OF THE PARTIES

Employer

The Employer had just cause to discharge Mr. Jones and Mr. Killoran and to impose a three day suspension on Mr. Arndt. The Employer had a reasonable expectation that its employees are not permitted to take, or to assist another employee in taking, Employer-owned property, including wood for personal use.

The investigation shows that that Mr. Arndt, Mr. Killoran and Mr. Jones removed wood from the Employer's premises for their own use. Specifically, it showed:

1. Mr. Arndt removed wood for his personal use from a county park with his own vehicle and trailer.

2. Mr. Killoran used Employer equipment including a saw, loader and truck to remove wood from a county park and a county burn pit.

3. Mr. Jones loaded wood into Arndt's personal vehicle, claimed to have run the loader all day, but denied knowing that Mr. Killoran took the wood home for his personal use.

Even a cursory review of Sec. 26.05, Stats, the timber theft statute, demonstrates that the conduct of the three falls within the purview of the statute.

Mr. Arndt admitted his misconduct and believes the punishment was appropriate. Mr. Arndt had no prior disciplinary history and he knew that taking the wood was a violation of the Employer's policy prohibiting taking Employer property for personal use. He also brought the wood back to the Employer at its request.

Mr. Killoran admitted that he took Employer-owned wood for personal gain, after some reluctance to do so. Discharge is the only appropriate remedy. He has a history of discipline for similar behavior. He was disciplined in 2004 for having another employee pick up personal items while he was on an errand for the Employer. He was again disciplined in 2009 for using Employer-owned equipment to patch an entrance to a private driveway. The Employer had a reasonable expectation that he would know that he could not take Employer-owned property. Mr. Killoran admitted that he knew that he could not use Employer-owned equipment to take the wood and deliver it to his home. The evidence supports Mr. Dey's conclusion that Mr. Killoran repeatedly violated the Employer's trust.

Mr. Jones was not truthful in his statements about the incident in dispute. Mr. Jones alternately denied knowledge of the incidents in question or presented questionable statements. He was properly terminated for not being honest about what occurred and independently properly terminated because he assisted both Mr. Killoran and Mr. Arndt in taking wood. Mr. Jones breach of trust is even greater than that of Mr. Killoran. Law Officer Belay found Mr. Jones to be untruthful and uncooperative. For example, Mr. Jones and Mr. Killoran gave contradictory statements about who loaded the wood that day. He incredibly stated that he had "no idea" where Killoran took the wood. He either knew what Killoran was doing with the wood or should have asked. Most importantly, during the investigation, Jones persisted in the position that he "knew nothing."

From the beginning of its case, the Employer established that the historical view of personal gain by public employees differed greatly from what the rules are today. However,

the Employer established that since 2004, a strict rule prohibiting unit employees of obtaining personal gain through their employment had been in effect. The Employer requests that the discipline imposed herein be sustained.

Union

The Employer has the burden to show that it has just cause for the discipline it imposed on each of the three grievants. It has failed to show just cause for any discipline to have been imposed on Mr. Arndt and Mr. Jones and has shown only justification for a three-day suspension on Mr. Killoran. In each instance of discipline, Commissioner Dey based his decision to discipline on facts which were supported in the record.

Mr. Arndt did not commit any violation of Employer policy. He took approved vacation time and used his own pick-up truck and trailer. The wood was cut by the others and would have been chipped or left where it lay. Members of the public would have been able to take it for free. Mr. Arndt had no authority to direct Mr. Jones and Mr. Killoran. He cannot be held responsible for the actions of the others when they loaded his truck with wood. He was suspended for three days for misappropriation of county property and employees for personal gain. However, the evidence indicates that Mr. Jones and Mr. Killoran did not do anything more for Mr. Arndt than they would have done for any other private citizen and what they did do was work which the Employer regularly approved. There is no evidence that he even requested that they load his personal truck with wood. Similarly, there is evidence that the Employer retained any right of ownership over the wood once it was cut. From the Employer's perspective, the wood was scrap or refuse. Mr. Arndt testified without contradiction that he intended to use the wood for campfires which is a proper use for any wood left for the public by the Employer.

The Employer lacked just cause to terminate Mr. Killoran. The Employer asserted three reasons:

1. He used Employer-owned equipment without authorization to load and haul wood from Wyona Park to his home for personal use.

2. He had "shown willful misconduct and insubordination by those actions.

3. He "hindered the efficiency" of the Employer's operations.

Mr. Killoran engaged in some of these acts, but not all. The acts which were proved do not amount to just cause for termination. Third, the Employer failed to prove that but for Killoran's taking of wood "for personal use" it nonetheless would have fired him.

As to the first allegation the Union concedes that he did use the Employer's truck to haul two loads of wood to his home. While the Union concedes that he did take the wood for "personal use," it continues to argue that that "personal use" of scrap wood was not prohibited by any policy of the Employer. There is no dispute that the logs he took would have otherwise been burned at the Spear Pit at Employer expense. The second allegation of being "willful" is not defined and adds no reasons for discipline to the Employer's case. There is no evidence to support a conclusion that Mr. Killoran was "insubordinate." The third allegation is true only to the extent that Mr. Killoran was away from his work for less than an hour and used the Employer's equipment.

The allegations the Employer did prove do not constitute just cause for termination. Mr. Killoran has been employed by the Employer for seventeen years and has had no significant discipline in his past. The Union concedes that Mr. Killoran should not have used the Employer's vehicle to transport the wood to his home or to use the time to do so. The Employer failed to show that it would have terminated Mr. Killoran but for its erroneous belief that his taking the wood constituted a work rule violation. The Employer's action is predicted on its premise that the taking of the wood was a violation, but the evidence did not support that conclusion.

The Employer also lacked just cause to discharge Mr. Jones. As to the first alleged violation, the Employer failed to show that Mr. Jones committed any work rule violation in assisting Mr. Killoran. Mr. Killoran's obtaining the wood did not constitute a work rule violation. Therefore, to the limited extent that Mr. Jones even assisted him, he could not have committed a work rule violation. As to the second violation, the Employer failed to show that he committed any form of willful misconduct or that he committed any kind of "insubordination." Finally, the Employer alleged that Mr. Jones lied when the Employer investigated the disputed incidents. However, Commissioner Dey testified that Mr. Jones basically said he didn't know anything, denied knowing where the logs that were loaded went, that he did not know Mr. Killoran was missing, and denied loading logs wood from Wyona Park as well. Mr. Jones testified that he loaded all of the wood which Mr. Killoran took

home, but stated that he never denied having done so. Accordingly, Mr. Jones did not lie during the investigation. Alternatively, if he did obfuscate during the interview, the Employer has not shown just cause to terminate him for doing so. The Union requests that the discipline imposed be overturned or modified as it has stated above.

Employer Reply

None of the important facts appear to be in dispute. None of this changes the fact that all three employees took Employer property without authorization for personal use. The Union makes three arguments. First, it argues that the Employer did not have a valid work rule prohibiting the stealing of the wood in question. Second, the Union asserts that even if there was such a rule, the grievants did not know such a rule exists. Finally, the Union argues that the grievants should not be disciplined because the rules were not enforced.

The Union's "no rules" argument is not supported by the record. The Employer's work rules are detailed in the exhibits on file. The Employer does not have a specific rule which tells employees not to take wood from Employer property. Employees do not have a detailed list of the things they cannot steal. Employees should know that theft is misconduct.

The Union's argument that the grievants did not understand the rules does not find support in the record. Even Arndt acknowledged that he violated a work rule. Mr. Killoran had two prior disciplines under the "personal gain" policy and the Union makes it clear that discipline should be imposed. Lastly, Mr. Jones, who had prior discipline for a personal gain policy violation, was terminated not for taking any wood for himself, but for assisting Mr. Killoran and Mr. Arndt in taking wood while using Employer equipment and then lying about it.

The Union's argument about what has happened to wood in the past is irrelevant. Highway Commissioner Dey indicated that he changed the past lenient policies and replaced it with his policy prohibiting employees from having any personal gain from their employment.

While it is true that the Employer did not place a value on the wood, wood is regularly bought and sold in the market. Mr. Arndt and Mr. Killoran saw value in the wood they took. The fact that they took wood which did not have a value to the Employer, does not excuse them from taking wood for personal use without authorization. Union witnesses established that the wood that Mr. Killoran and Mr. Jones cut at Wyona Park should have been taken to

the Spear Pit and the wood at the Spear Pit should have stayed there. Once the wood is deposited at the Spear Pit, management determines whether; the wood is destroyed by burning, chipped for landscaping use, or processed for making decking on the Employer's trailers. Mr. Arndt and Mr. Killoran admitted committing misconduct. Mr. Jones misconduct in assisting Mr. Killoran and Mr. Arndt to take firewood and his untruthful statements justify his discharge.

Union Reply

The Union agrees that the standards of just cause enunciated in by the arbitrator in PORTAGE COUNTY, WERC Case No. 67296 (Michelstetter, 2008) are the correct standards by which this matter should be determined. The Union concludes, however, that the standards require reversal of the discipline imposed on each of the three employees. The Employer makes some factual misstatements in its brief. Mr. Jones did not remove wood himself. The Employer's assertion that Mr. Arndt knew that taking wood was a violation of the Employer's policies is not supported by the record. Mr. Arndt stated in his testimony that he did not know for sure whether doing so violated any Employer policy. The Employer asserts that the 2010 discipline of Mr. Killoran was the "third time" he had been disciplined for inappropriate personal gain. This is incorrect in two ways. First, the undisputed record indicates that Mr. Killoran received no personal gain from the incident in 2009. He used $245 of Employer-owned asphalt at another person's residence. He received no gain from that incident. Second, the Employer is wrong in asserting that the 2010 incident involved personal "gain." Its own record of discharge indicates that he obtained the wood for personal "use." The Employer's argument that there has been a change in its "historical" policy concerning the removal of wood is not supported by the record. This so-called change is not explained in the hearing record. What was the "historical view?" When did it change? How was this change announced to the employees? The Employer has failed to prove that it ever notified employees that taking scrap wood from Employer-owned land was a violation of its policy Sec. 7.18, or any other policy. There is nothing in the 2004 memo cited by the Employer which applies to the taking of wood. This is particularly true in the light of the numerous witnesses who testified that employees and supervisors alike had taken or accepted delivery of wood for personal use. Mr. Arndt's statements about his discipline are entirely irrelevant because he did nothing wrong and it is the Union, not the individual, who administers the collective bargaining agreement. The Employer improperly relied on Mr. Jones' statements to police officers in assessing discipline. The police officer was acting in police capacity. Had he been acting to investigate for personnel purposes, Mr. Jones would have been entitled to

Union representation in the investigation. He also would have been required to provide him with a warning under the doctrine of GARRITY V. NEW JERSEY, 385 U.S. 493 (1967). Finally, the Employer's brief incorrectly assumes that Mr. Jones had some obligation to keep track of where Mr. Killoran was going. The Employer's discipline is based upon a non-existent duty to do so.

DISCUSSION

1. Standards

The parties agreed that the standards of just cause explained by the arbitrator in PORTAGE COUNTY, WERC MA-13823 (Michelstetter, 6/08) properly apply to this case. In that case, the employer therein lacked just cause to discharge an employee for an alleged conflict of interest. The long term employee ran a small business sawmill operation on the side. The employer therein was aware of the business and authorized him to have the operation. The employee's supervisor was somewhat involved in that business. The dispute involved two small dollar amount contracts in which the supervisor contracted on behalf of the county with employee to remove wood on two occasions. The employee did this on his own time with his own equipment at a competitive, if not cheaper, price than otherwise available in the market. The Employer discharged him under its conflict of interest rules. I concluded that he had never been told about the rules, had previously contracted with the County in a similar fashion, acted at arms' length, and had not conspired with the supervisor. The conclusion of the case was that in the absence of a conflict of interest or direction from the employer otherwise, the employee had the same right as other citizens to contract with the employer. The basic principle of just cause stated therein is:

> The basic principle of just cause which is implicated in this case is that an employee has the right to know what is expected of him or her and an opportunity to comply. It goes without saying that an employer is not free to change the meaning of its rules between the date of the alleged offense and the date of the decision to impose discipline. This basic concept of the right of an employer to discipline an employee for misconduct was eloquently stated by the National Academy of Arbitrators as follows:
>
> > It is unfair to punish an employee for conduct the employee has no reason to know would be unacceptable. Normally that elemental requirement of justice will mean that the employer must

> announce the rules it expects the employees to follow and must give some indication of the penalties that will follow a breach. Some rules and expectations are so obvious, however, that employees are presumed to know them. . . .[5]

Further, there is no dispute in this matter that the Employer is entitled to basic honesty from its employees and needs no rules in situations when the employee knows, or so clearly should know, that his or her conduct is dishonest.

2. Key Common Factual Issues

This dispute involves alleged incidental benefits of employment relating to wood which is the by-product of cutting up fallen trees, cutting down dead trees, and clearing brush as a part of the Employer's operations. All employment carries with it some forms of incidental benefits for employees. These are benefits which are provided for the convenience of the employer such as the right to use its equipment to drive to lunch during work day. Other examples are essentially additional compensation such as the right to use the employer's equipment in off hours for personal projects. All employment carries with it some of these incidental benefits. An employer has every right to regulate these benefits by express rules. Most often these incidents are created by word of mouth and the practices of the parties. For example, Retired Foreman Lueck was allowed to take the Employer's pick-up truck home from work regularly because he was frequently called in to work. This saved commuting expenses for him and made it easier for him to respond to call-ins directly from his home.[6] The regulation of the incidents of the employment in dispute was primarily by word of mouth among employees.

The parties disputed what the Employer's policy is with respect to the disposition of wood which is the by-product of its clearing and cleaning operations. The Employer must dispose of the wood from fallen trees, dead trees cut down, brush and debris. Commissioner Dey testified as to his understanding of how his policies concerning the wood left from these

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[5] The quoted reference is from the National Academy of Arbitrators' *The Common Law of the Workplace*, Sec. 6.5, comment, p. 178 (BNA, 2d. Ed.)

[6] Tr. p. 331

operations were handled. He acknowledged that in prior years, employees, including supervisors, freely took left-over wood home. However, in recent years, he developed a new policy that employees were not entitled to any "personal gain' from their work for the Employer. This policy was not directly communicated to employees as a general rule, but it was mentioned in the process of disciplining employees. In January 9, 2004, he sent a notice all employees concerning the "personal usage of county equipment" in which he stated in relevant part: "The use of county owned equipment and time for any personal gain is not permitted." That policy was not otherwise communicated to employees in any other way.

Commissioner Dey also testified without contradiction that as of the date in question, left-over wood with some irrelevant exceptions was divided into that wood which could be handled by hand and that which required handling by equipment. The wood which was handled by hand was generally chipped on site by crews using chipping equipment or, was brought into the Portage or Wyocena Shops for chipping. In any case, the chipped wood was made available to the public from the shops as a public service. [7] It appears that because the Parks and Wayside Crew did not use the wood chipper that they either brought the wood in to be chipped or simply took it to the Spear Pit. The policy as to the larger pieces was that they were taken to the Spear Pit where they were not available to the public. Instead, that which was not pilfered by the public was burned. This required the labor of about two employees for two days twice per year.

The area of dispute is that employees and former supervisors testified that it was less expensive to the Employer to leave fire wood for the public. The Wisconsin Department of Transportation supervisor directed employees working on state roads to leave fire wood for the public rather than chip it. This was within his authority. However, wood destined for Spear Pit or in Spear Pit was not given to the public, but destroyed. This was within his authority. I conclude that this practice was continuing and not prohibited.[8]

The next factual issue common to the discipline of all three grievants is whether with respect to the Employer, the wood in question is scrap, unwanted by-product of its operations which it views as not having value. Commissioner Dey testified that on one occasion in twenty years, the Employer took some hardwood and had it sawed at a saw mill into boards for

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[7] Tr. pp 25-6, 54-57-8, 63-66, 79-80, 82-83, Employer exhibit 5
[8] See the testimony of Mr. Klaila and Mr. Lueck.

pick-up truck beds. This is the only instance in which the Employer has used the wood cut in its operations for something of value. However, the fact is that there is no evidence any employee was ever told this happened. The clear evidence is that all wood is treated as scrap and employees have never been told to segregate any wood which might be useful in any regard. I conclude that the wood in dispute was scrap with respect to the interests of the Employer.

3. Killoran Discharge

The Employer discharged Mr. Killoran for using "County owned equipment without authorization" for taking the wood in question to his home with the Employer's dump truck, for doing so during work time, and for taking the logs in question without authorization. There is no dispute that Mr. Killoran did the foregoing as alleged.

Addressing the use of equipment first, the use violates county work rule 7.18(b) 6 above. Mr. Killoran's defense is based upon two theories. First, that he was not aware of the rule. Mr. Killoran has been trained in the work rules and policies of the Employer on more than one occasion. He was in a meeting in which the above rule and others were read to him. Further, on January 9, 2004, he received a memorandum which stated in relevant part:

> The use of county owned equipment and time for any personal gain is not permitted.

As noted above, the Employer's policies about the incidental use of equipment have changed over the years. While the practice of taking fire wood home continued, the better view of the evidence is that for rank and file employees, if they wanted to take wood home, they came back with their own personal vehicle or, if their home was on the way back from the work site, dropped it off as they drove back to the shop at the end of the day.[9] Even when Employer equipment was used more freely, wood was hauled to a rank and file employee's home only during the work day and only when it saved work time. Mr. Killoran went out of his way to take the wood in question home when it could have been delivered in a matter of minutes to the

[9] There is some disagreement among the Union's witnesses on this point. I give Mr. Lueck's testimony at tr. Page 317-8 heavy weight. By contrast, for example, Mr. Mael at pages 261, 264 is far more ambiguous.

Spear Pit. Mr. Killoran used Employer-owned equipment solely for his personal benefit in violation of the Employer's rules

The next aspect is the use of work time. A fair view of all of the employee witnesses is that they generally did help the public pick up wood and may have used Employer equipment as a courtesy to the public. This work is clearly in the Employer's public relations interest. The better view of the employee witnesses is that they generally avoided using work time to load their vehicles with wood unless it was in the Employer's interest in clearing the area, on minor breaks, or convenient in the flow of moving vehicles between locations. In this regard, Mr. Killoran's two trips to his home during the work day had to consume at least a half hour of work time for each trip. Further, Mr. Jones was left to do much of the clean-up work on his own. This is far more time than is customary in these situations. There is no dispute that work time is for just that. I conclude that Mr. Killoran made a conscious decision to take work time well beyond that which might have been customary, for his own personal benefit.

The final reason for Commissioner Dey's decision to discharge Mr. Killoran was for the "theft" of logs. Mr. Killoran took home two dump truck loads of logs. The better view of the fellow employees' testimony is that when employees had taken wood home it was usually a pick up load or less of what has been termed in this dispute "fire wood." Logs are not distributed to the public even though they are scrap. While it is not fair to characterize this as "theft," it is fair to characterize this as a deliberate violation of the Employer's policy on handling wood. Even if it is scrap, the Employer has a number of potential interests in controlling its distribution, including, for example, liability and controlling potential tree borne diseases.

The Union's chief argument is that the penalty of discharge is too severe. The Employer did not consider a lesser penalty because it viewed this situation as a breach of trust. Mr. Killoran has a long work history and no serious discipline. Nonetheless, he was disciplined in September, 2009, for using county materials for work for people he personally knew which was not sanctioned by the Employer. He had also been warned about asking a fellow employee (Mr. Jones) to run an errand for him when he was using the Employer's truck to pick up items for the Employer in Madison. He was forewarned about personal use situations in the past. Contrary to the implications of the Union's case, this was not a situation which occurred as a result of a difference of perception over the Employer's policies; instead, this was a situation in which Mr. Killoran chose to take advantage of the Employers' trust. Commissioner Dey testified that these jobs require that the Employer be able to trust that

employees will use time and equipment properly and in the interest of the Employer. I conclude that a lesser penalty will not sufficiently deter others from doing the same. Accordingly, the discharge of Mr. Killoran is sustained.

4. Jones Discharge

The situation with respect to Mr. Jones is significantly different. He was discharged for assisting Mr. Killoran and Mr. Arndt in obtaining fire wood for personal use and for "not being honest" in the investigation concerning the matters in dispute. There is no allegation that he took any of the fire wood for himself.

Mr. Killoran's choice to take the logs put Mr. Jones in a Hobson's choice situation because Mr. Jones' job requires that he maintain a good working relationship with Mr. Killoran. The two have been part of the same crew for at least 9 years. Mr. Killoran is the senior employee which is likely to make him the lead worker. They spend about half of their time working as a team when circumstances require two workers to be present either because the work requires two people or for safety reasons.[10]

The Employer's decision to discharge Mr. Jones is partly based upon an implied theory that he was complicit in Mr. Killoran's conduct.[11] There is no evidence that Mr. Jones knew in advance of arriving at Wyona Park on the day in dispute that Mr. Killoran was going to take logs home or that Mr. Arndt would be taking any fire wood home. The Employer drew the conclusion that he must have known because of the close working relationship between the two, the time it took Mr. Killoran to return from taking the first load home, the unusual nature of removing trees previously cut from Spear Pit, and his lack of credibility in the investigation. Mr. Jones denied any knowledge during the investigation that he knew during the disputed events that Mr. Killoran was taking wood to his home.[12] I conclude that his testimony is mostly credible.

Mr. Jones performed the loading and clean-up operations at Wyona Park that day. This is the same work he would have done had Mr. Killoran taken all of the cut logs to the Spear Pit as he was supposed to do. While Mr. Killoran was gone significantly longer when he took the first load of wood to his home than he would have been had he driven to the Spear Pit, the

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[10] Tr. p. 296
[11] There is no allegation that the crew took down any trees which were not proper to take down.
[12] Tr. p. 301

delay involved was not so significant that it could not have been explained by Mr. Killoran having taken a break from work.

It is not clear that Mr. Jones knew if or why he was asked to go to Spear Pit. In this regard, it is clear that he should have become suspicious about what was going on when he was asked to load logs from the Spear Pit into the dump truck because Mr. Jones believed that once logs were put in the Spear Pit they were not removed. Whatever may be the case, the act of driving the front-end loader to the Spear Pit was something which would have been done in the normal course of his work. The logs at the Spear Pit are re-arranged for safety as necessary. This work requires the front-end loader. This crew uses the front end loader rarely. Therefore, it is likely he would have driven to the Spear Pit which is adjacent to Wyona Park on his way back to the shop to see if there was anything to do.[13]

The Employer concluded that using the loader for the one minute to load logs onto the dump truck at the Spear Pit was an act for Mr. Killoran's benefit. It is true that this did benefit Mr. Killoran. The Employer had cause to discipline Mr. Jones for this action, however, the penalty imposed for this act alone is so disproportionate to the offense that it does not itself support anything more than a warning. This is true for a number of reasons. First, the work would have been in the Employer's interest had Mr. Killoran been authorized to take the logs to another place. Mr. Killoran was the leader. It is questionable what he told Mr. Jones. Second, this is a very minor use of equipment and time which is of a nature which employees were normally doing even if they technically were not supposed to. Third, it was not in the Employer's interest for Mr. Jones to bicker over this work. It would have taken more time to bicker over the work than it would have taken to do it. It would have created an unsafe situation to force Mr. Killoran to do the loading without the presence of another employee.[14]

The Employer also concluded that Mr. Jones was complicit in Mr. Arndt's conflict of interest when he loaded fire wood in Mr. Arndt's vehicle. For the reasons discussed elsewhere herein, I conclude that loading fire wood under these circumstance is a service normally provide to members of the public and was work properly within the scope of his employment. Accordingly, Mr. Jones did not engage in any misconduct in this regard.

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[13] Tr. p 308

[14] Commissioner Dey testified that one of his concerns was potential liability in this situation, Tr. 77-8.

The other major reason that the Employer discharged Mr. Jones was because the Employer believed he falsely denied knowing that Mr. Killoran had taken the logs home and falsely denied having used the front-end loader to load logs at the Spear Pit. Commissioner Dey testified that Mr. Jones stated that he was the sole person to run the front-end loader that day, but that he denied loading any logs that day on the dump truck either at the Spear Pit. Mr. Jones denied that he had ever denied using the front-end loader at the Spear Pit during the investigation. There is little doubt that Mr. Jones was being evasive and less than cooperative in the Employer's investigatory interview. As noted above, his work partner and friend, Mr. Killoran had put him in him in an awkward position. Similarly, he appears to have concluded that the Employer was compounding the issue by trying to involve him even though he was not privy to any direct knowledge. He demonstrated that he had taken the position that he would do his own work and avoid being involved as much as possible. The Employer is entitled to honesty from its employees. In order to be a lie, a false statement must be material to the investigation, and made with the intent that it deceive. Under the circumstances, I conclude that he did not definitively deny loading the logs in dispute. While he was evasive, he did not intend to deceive.[15] Instead, he believed that he was properly maintaining the required relationship with Mr. Killoran.

Under the circumstances, the Employer did not have just cause to discharge Mr. Jones. The appropriate remedy is to reinstate Mr. Jones and an order to make him whole for all lost wages and benefits. The Employer may enter a written warning in accordance with the discussion above.

5. Arndt Suspension

Commissioner Dey testified that Mr. Arndt was suspended for receiving wood from Wyona Park.[16] It may also be on the basis that he conspired with fellow employees to use their work time to load the wood and/or that he received advance notice that wood would be available. I address all of the concerns.

The main reason for Commissioner Dey's position is that Mr. Arndt received wood. Commissioner Dey's testimony was based upon his testimony as a whole to the effect that he

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[15] I note that the Employer is generally entitled to forthright cooperation from its employees. However, Mr. Jones was entitled to at least a warning that he was being viewed as being non-cooperative and an opportunity to comply.
[16] Tr. p. 45

had changed the policy such that wood was no longer left for the public rather than returning it to be chipped or taken to the Spear Pit.[17] However, as discussed above, I have concluded that as of the date in dispute, wood which could be useful to the public as fire wood was ordinarily left where it was cut by work crews and that if a member of the public came by and asked for it, employees would routinely help that person load it. This was a public service the Department was routinely providing. This was known to Mr. Killoran and Mr. Jones. It does not appear that Mr. Arndt was aware of it because he did not do related work. Mr. Arndt received the wood on his own time, using his own vehicle and with the help which is customarily provided the public as a service of the Employer. Mr. Arndt did not violate any work rule.

Commissioner Dey alluded to the fact that Mr. Killoran gave advance notice to Mr. Arndt of the fact that wood would be available at Wyona Park. The Employer has a right to control conflict-of-interest situations between employees and the public in the interest of insuring that its intention to benefit the public is not subverted. The better view of the evidence is that Mr. Killoran told Mr. Arndt about the availability of the wood. I conclude that Mr. Killoran cut the wood before 10:00 a.m. He did not prevent the public from taking the wood. Neither he nor Mr. Arndt made any agreement that the wood would be held from the public. I conclude that the wood was not withheld from the public, if anyone had asked for it, until Mr. Arndt came for it. I conclude that the advance notice was not a significant factor in this case. Accordingly, the Employer had no basis to discipline Mr. Arndt. It is ordered herein to rescind the discipline imposed and make him whole for all lost wages and benefits.

AWARD

The Employer had just cause to discharge Mr. Killoran. It did not have just cause to discharge Mr. Jones. It did not have just cause to suspend Mr. Arndt. The Employer shall reinstate Mr. Jones to his former or substantially equivalent position and make him whole for

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[17] See, for example, tr. p. 82

all lost wages and benefits. It may enter a written warning as described above. The Employer shall make Mr. Arndt whole for all lost wages and benefits and expunge his record of the suspension in dispute. I reserve jurisdiction over issues arising from the specification of remedy if either party requests in writing, copy to opposing party, that I do so within sixty (60) calendar days of the date of this award.

Dated at Madison, Wisconsin, this 6th day of January, 2012.

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Arbitrator

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