

#17

FEDERAL MEDIATION AND CONCILIATION SERVICE

Ohio Civil Service Employees Association	:	Case No.: 12-02917
	:	
Union,	:	Grievance: Disciplinary Suspension
	:	
and	:	Grievant: Timothy L. Davis
	:	
Trumbull County Engineer	:	Arbitrator's File No.: 12038
	:	
Employer	:	October 26, 2012
	:	

APPEARANCES

For the Union:

George L. Yerkes, OCSEA Staff Representative
Timothy L. Davis, Grievant
Anthony Johnson, Chief Steward

For the Employer:

John D. Emanuel, Consultant
Herb W. Laukhart Jr., Director of Finance and Personnel

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I. BACKGROUND

The grievance giving rise to this arbitration was submitted to the Employer in writing on March 23, 2012 and processed in accordance with Article 8 of the Agreement between the Office of the Trumbull County Engineer (Employer or County Engineer) and the Ohio Civil Service Employees Association AFSCME Local 11/AFL-CIO (Union or OCSEA), from April 20, 2010 thru April 19, 2013. After unsuccessful attempts to resolve the grievance, it was submitted to arbitration pursuant to Article 25, Section 7 of the Agreement. Using the services of the Federal Mediation and Conciliation Service, this Arbitrator was selected.

The arbitration hearing took place on September 25, 2012 at the offices of the Trumbull County Engineer, 650 North River Road NW, Warren, Ohio. During the hearing, the parties had full opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue their positions. Witnesses were sworn and separated. The parties stipulated that the matter was properly before the Arbitrator and ready for final and binding arbitration. The parties timely submitted briefs to the Arbitrator no later than October 12, 2012 and the matter was submitted.

II. ISSUE

The parties were unable to stipulate to the issue. They did stipulate that the Arbitrator would determine the issue after a review of the record as a whole. After such review, the Arbitrator concludes the issue is:

Whether there was just cause under the collective bargaining agreement to suspend the Grievant for five (5) days? If not, what shall be the remedy?

III. **RELEVANT PROVISIONS OF THE AGREEMENT AND COUNTY ENGINEER POLICY**

**ARTICLE 3
EMPLOYER RIGHTS**

SECTION 1. Nothing contained in this Agreement shall be interpreted to restrict any constitutional, statutory, or inherent rights of the County Engineer with respect to matters of Managerial Policy. The County Engineer has the right and the authority to administer the business of the Office and, in addition to other functions and responsibilities; the County Engineer has and will retain the full right and responsibility to direct the operations of the Departments of the Employer, to make rules and regulations and to otherwise exercise the rights of Management.

This includes, but is not limited to, the right to:

...

Direct, supervise, evaluate or hire employees.

...

Suspend, discipline, demote, or discharge for just cause or layoff, transfer, assign, schedule, promote or retain employees.

...

The exercise of these powers, rights, authority, duties and responsibilities by the Employer and the adoption of such policies, regulations and rules as it may deem necessary shall be limited only by the specific and express terms of this Agreement.

...

**ARTICLE 6
CORRECTIVE ACTION AND PERSONNEL FILE**

SECTION 1. Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden to establish just cause for any disciplinary action.

SECTION 2. Disciplinary action shall generally be applied in a progressive manner commencing with a verbal reprimand, written reprimand, suspension(s) without pay and discharge from employment. However, the severity of discipline may be increased or decreased on a case by case basis depending upon the nature and seriousness of the offense and the employee's past record of discipline and performance. It is also recognized and understood that certain offenses are serious enough to warrant discharge without regard to previous reprimands or discipline.

...

**TRUMBULL COUNTY ENGINEER'S
EMPLOYEE WORK RULES, POLICIES & PROCEDURES MANUAL**

WHAT THE COUNTY ENGINEER EXPECTS FROM YOU

Your first responsibility is to know your own duties and how to do them promptly, correctly, and safely. You are expected to cooperate with management and your fellow employees. Whatever your position, you have an important assignment: perform every task to the very best of your ability. The result will be better performance for the County overall, and personal satisfaction for you.

We strongly believe you have the right to make your own choices in matters that concern and control your life. We believe in direct access to management. We are dedicated to making the County Engineer's department a workplace where you can approach your supervisor, or any member of management, to discuss any problem or question. We accept your suggestions to improve the quality of the County Engineer's Department.

Remember, you help create the healthful, pleasant and safe working conditions that are intended for you. Your dignity and that of fellow employees, as well as that of our taxpayers, is important.

We need your help in making each working day rewarding.

JOB DESCRIPTION

A job description, based upon the essential functions, duties and responsibilities of positions shall be maintained by the Personnel Office. The plan shall include job specifications consisting of a classification title, nature of work, essential functions, minimum qualifications, and other related characteristics. Records are to be maintained and updated. Job descriptions shall not be inclusive and other duties may be assigned.

The County Engineer shall, as needed, review the duties and responsibilities of positions and make necessary adjustments or revisions to the job descriptions.

POLICY ON DISCIPLINE

The major areas of discipline are:

1. Neglect of duty
2. Inefficiency/Incompetency
3. Dishonesty
4. Drunkenness
5. Immoral conduct
6. Insubordination
7. Discourteous treatment of the public
8. Any other failure of good behavior, and
9. Any other act of misfeasance, malfeasance and nonfeasance.

Events which trigger disciplinary action(s) have been placed in categories within each major area. The penalties for each category are as follows:

	First Offense	Second Offense	Third Offense	Fourth Offense
Category #1	Oral to Written Reprimand	One Day to Three Day Suspension	Three Day to Ten Day Suspension	Ten Day Suspension to Removal
Category #2	Written Reprimand to Three Day Suspension	Three Day to Ten Day Suspension	Ten Day Suspension to Removal	N/A
Category #3	Three Day to Ten Day Suspension	Ten Day Suspension to Removal	N/A	N/A
Category #4	Thirty Day Suspension to Removal	N/A	N/A	N/A

In accordance with Article 6, Section 2 of the Bargaining Unit Agreement, the penalty may deviate from the standard penalties described by the policy. The reasons for the deviation shall be noted at the time this discipline is applied.

IV. FACTS

The Employer is the Engineer for Trumbull County. It is an elected position. The County Engineer's duties include maintaining the various roadways of the county. The Union represents all the bargaining unit employees of the County Engineer. The parties have had a collective bargaining relationship for a number of years. The Grievant has been employed by the County Engineer approximately nineteen (19) years. At all times relevant to this matter, he held the position of Hoseman. The duties of the Hoseman position include supervising a road crew when no foreman is present. (Jt. Ex.8).

On February 23, 2012, the Grievant and his crew were assigned to cold patch several county roads. The work schedule that date listed County Highways (CH) 99,

72, 1171, and 848 were to be done. (Jt. Ex. 6). Cold patching is temporarily filling potholes in the road with asphalt so they do not cause accidents or damage to automobiles. The crew consisted of five (5) employees. The Grievant and Lindsay Smith, a part time temporary worker, were in one truck and had road signs indicating road work was being done. The cold patch truck carried the asphalt and the other three (3) crew members.

In the afternoon, Thomas Klejka, Highway Supervisor, drove out to CH 72 where the Grievant and his crew were working. The crew was finishing up their work on CH 72. Klejka instructed the Grievant to patch CH 86 next. CH 86 runs east-west and is approximately two (2) miles in length. It is approximately one (1) mile from CH 72. (Jt. Ex. 9). The Grievant and Smith drove to CH 86 and Klejka arrived there shortly after. When he arrived, the cold patch truck was not on the road. Klejka asked the Grievant where the cold patch truck was and the Grievant responded he did not know. Klejka radioed the cold patch truck driver, John Evans, and asked him where he was. Evans replied that he was on CH 92. Klejka told Evans that he should be on CH 86 and Evans stated he would head to that road. Evans drove the cold patch truck to CH 86 and the Grievant and the crew worked until about 2:30 p.m.

Klejka has been with the County Engineer's office almost nineteen (19) years. His duties as Highway Supervisor include dealing with property holders and responding to resident complaints. He is also assigned an area of the County and is responsible for road maintenance in and the crews assigned to the area. Klejka testified that it was approximately 1:15 p.m. when he approached the Grievant and Smith on CH72. The crew had completed patching the road and the Grievant and Smith were picking up the

road work signs. Klejka testified that he instructed the Grievant that the crew was to go to CH 86 next. Since the road was only about two (2) miles in length, he told the Grievant to not worry about the two (2) mile limit for sign placement and put the signs at each end of the road. Klejka also told the Grievant that the road was not that bad and they would not be there long. The Grievant and Smith picked up the rest of the signs and drove to CH 86.

Klejka arrived on CH 86 about 1:50 p.m. The Grievant and Smith were there, had the road work signs posted, and were ready to work. Klejka testified that he stopped and asked the Grievant where the cold patch truck was and the Grievant replied he did not know. He then called Evans, asked him where he was, and Evans responded he was on CH 92. Klejka testified that he told Evans he was supposed to be on CH 86 and Evans said "I'm no my way." Klejka then asked the Grievant why the cold patch truck was on CH 92 when he should be on 86. According to Klejka, the Grievant said "Oh well, that's John Evans. What can I say?" They had a discussion about the Grievant being responsible for the crew, knowing where it was, and getting the work done promptly. Klejka testified that the Grievant stated he should be able to work at his own pace and, if they did not complete the work that day, they would complete it the next day. He told the Grievant that it was important to get as much work done as possible to keep the roads safe. According to Klejka, the Grievant then said "I have to pick up my signs." He believes the Grievant was ready to stop so he told him to work until 2:30 p.m. Klejka testified it would take twenty (20) to thirty (30) minutes to patch the big holes. He further testified that the crew lost at least fifteen (15) to twenty (20)

minutes, that they did most of the work on CH 86, but did not finish and had to complete it the next day. Klejka wrote a statement as to what happened that day. (Jt. Ex. 7).

Klejka testified that the Grievant is a Hoseman and his duties include overseeing a crew when a supervisor was not present. When he arrived on CH 86, Klejka thought the cold patch truck would be there. According to Klejka, the Grievant should have known where the truck was. Had the patch truck been there right away, the work on CH 86 would have been finished. The Grievant did not tell him that he had sent Evans to CH 92 and he (Klejka) did not ask Evans why he was on 92. Klejka testified that, after the incident, he called his supervisor, Greg Alberini, to discuss it. Klejka further testified that other employees have been disciplined for inefficiency.

The following morning, Klejka was present during a phone call with Highway Superintendent Greg Alberini and Herbert Laukhart, the Director of Finance and Personnel. Alberini called Evans on speakerphone to ask about the incident. Alberini asked Evans why he had gone to CH 92 instead of 86 and Evans said that the Grievant instructed him to go to 92. Klejka testified that CH 92 had been recently patched, did not need to be patched again, and was not on the list to be patched.¹ He also testified that CH 86 was not on the schedule for February 23 or 24. According to Klejka, he could have called Evans to tell him to proceed to CH 86 and did call him to ask where he was. He did not ask or instruct the Grievant to call Evans and the Grievant did not call Evans. After speaking with the Grievant on CH 86, he did not stay. He observed CH 86 on February 24 to see that the work was completed. Klejka further testified that trucks have driven to the wrong location and that road crews start at 7 a.m. and finish

¹ The parties stipulated that County Road 92 had been patched the week prior to the February 23 incident and that it was possible it was worked on again the week of the incident.

work about 3 p.m. Depending on which road is being patched, it could take a crew anywhere from a few minutes to forty (40) minutes to arrive. Finally, Klejka testified that road crews put up three (3) signs in each direction on a road. The first is Road Work Ahead, the second Flagger Ahead, and the third One Lane Ahead. Typically, the first sign is placed about two (2) miles ahead of where the road work is being done.

Gregg Alberini is the Highway Superintendent. His duties include road repair, snow and ice removal, and road and equipment maintenance. Prior to this position, he was with the Ohio Department of Transportation for twenty-three (23) years as a Transportation Manager. Alberini testified that Klejka informed him of the incident on February 23 and later gave him a statement. (Jt. Ex. 7). He discussed the situation with Klejka and Laukhart. The next day, he called Evans on the speakerphone while Klejka and Laukhart were in his office. He asked Evans why he was on CH 92 and Evans responded that the Grievant sent him there. (Mgt. Ex. 1). Alberini testified that he requested a pre-disciplinary hearing, that Klejka's statement and the phone call to Evans were enough of an investigation in his mind, and that there was no question the Grievant was responsible for the crew. Alberini also testified that he was present for the pre-disciplinary hearing, that the Grievant had an opportunity to explain what had happened, that the Grievant was represented by the Union, and that Klejka was also present.

According to Alberini, not patching a road that is supposed to be patched is serious and could lead to damage to a resident's vehicle, that, as the foreman on site, the Grievant should have known where the cold patch truck was, and the Grievant should have called the truck. Alberini further testified that he is aware of several

incidents where road crews were not ready to work, but is not aware of any incident where the cold patch truck was not where it was supposed to be. According to Alberini, he only called Evans and not the Grievant or anyone else on the crew. He testified that the cold patch truck should be at the work site first and, if it is not, it is a red flag. While Alberini tries to get out onto the roads several times a week, he is not certain whether he saw CH 86 after February 23 to see if the work had been done. He testified that, if a road is not finished on a particular day, it is typically put on the list for the next day, unless something occurs that needs immediate attention.

Herbert Laukhart Jr. was hired as the Director of Finance and Personnel for the County Engineer in August 2011. He was with the County for seventeen (17) years, then the private sector for six (6) years before returning to the County. He is responsible for overseeing payroll and personnel. Laukhart testified that Alberini informed him of the February 23 incident and gave him Klejka's statement. He believed Klejka's statement was a sufficient investigation because Klejka is thorough, knowledgeable, and reliable and his statement was credible. Laukhart also testified that Alberini called Evans with him and Klejka in the room. According to Laukhart, other employees have been disciplined for inefficiency within the past year. He recalls an incident in which three (3) employees were sitting in a church parking lot and were reprimanded. They were reprimanded for negligence and an irresponsible attitude toward the job, i.e., misfeasance. There was also a foreman assigned to supervise a road crew on a rainy day. The supervisor pulled up and the crew was sitting in its truck not working. The foreman was reprimanded. Laukhart believes that the foreman grieved the reprimand, but the others did not. (Mgt. Ex. 2).

Laukhart served as the hearing officer in the Grievant's pre-disciplinary hearing. (Jt. Ex. 4). The Grievant did not say that he called Evans before Klejka called him. Laukhart concluded there was no reason the Grievant did not know where the cold patch truck was. Laukhart testified that the Grievant's five (5) day suspension was consistent with the Agreement, considering the Grievant's disciplinary history. The Grievant had a prior three (3) day suspension for a Category 2 offense and the next offense calls for a suspension of three (3) to ten (10) days. The Grievant also had a verbal reprimand for neglect of duty and a three (3) day suspension for insubordination. (Jt. Ex. 5). Laukhart recommended a five (5) day suspension for the February 23 incident.

Randy Smith is the County Engineer, a position elected by the voters of the County. He is a licensed engineer and surveyor. Smith testified that he issued the Grievant's discipline based on Laukhart's recommendation as the hearing officer, speaking to Alberini, and the Grievant's discipline history. Smith also testified that he is aware of no other similar incident where the person responsible for the crew did not have a truck needed to do a job, was not ready to work, and had made no attempt to find out where the truck was. He further testified that, at the time, the Grievant had a disciplinary suspension on his record.

Lindsay Smith is retired from the County Engineer and currently serves as a part time temporary worker. On February 23, 2012, he was a Laborer on the Grievant's crew. Smith testified that Klejka came out to CH 72 and wanted them to go to 86 next. He and the Grievant went to CH 86 and set up the road work signs. Klejka then came out to CH 86. Smith testified that the Grievant was driving and he was the passenger.

He also testified that Klejka asked where the cold patch truck was and the Grievant replied he was not sure. Klejka called Evans and the cold patch truck arrived about fifteen (15) minutes later. Evans arrived with the cold patch truck at approximately 2:10 p.m., they patched the biggest holes, and finished for the day. According to Smith, Klejka did not check on their work on CH 86 that day. Smith does not recall the Grievant telling Klejka that Klejka was keeping the Grievant from working. Smith further testified that the Grievant did not say anything about wanting to quit early, that no one asked him about the incident, and that he believes the cold patch truck was still on CH 72 when Klejka came to that road. Smith testified that he and the Grievant had just finished putting up the road work signs on CH 86 when Klejka arrived and the cold patch truck was not there. According to Smith, the Grievant did not call the cold patch truck and he does not recall the Grievant speaking with Evans.

John Evans is an Equipment Operator for the County Engineer. On February 23, 2012, he drove the cold patch truck in the Grievant's crew. Evans testified that the Supervisor gives work to the foreman and the on site foreman instructs the crew. Evans also testified that the crew was to work on CHs 99, then 72, and then 92. After patching the holes on CH72, he drove to 92. According to Evans, no one told him he was to go to CH 86 next. Evans testified that he was on CH 92 for about fifteen (15) minutes when Klejka radioed and asked him where he was. He told Klejka he was on CH 92 at the Newton garage and Klejka replied he should be on 86. According to Evans, he told Klejka he did not know he was supposed to go to CH 86 and was told to go to 92. It took about ten (10) minutes to drive to CH 86 and he did not see Klejka when he arrived.

Evans testified that the schedule for the 23rd indicated the roads to be worked were CHs 99, 72, 1171, and 848. (Jt. Ex. 6). CHs 99 and 72 are separate roads that meet. (Jt. Ex. 9). He further testified that, after working on CH 99, the Grievant told him to go to 92. He drove there and parked at the Newton Township garage because it is off the road with sufficient place to park the truck. It took no more than ten (10) minutes to drive to CH 92 and he was parked at the Newton garage fifteen (15) to twenty (20) minutes at the most. During this time, he thought that the Grievant and Smith were putting up the road work signs on CH 92. He did not contact the Grievant during this time. Evans testified that the Grievant did not call him, that he has worked with the Grievant a number of times, and that they only called each other when necessary. The crew completed the work on CH 86. Evans also testified that he does not recall anyone calling him the next day about the incident. He cannot say whether Alberini did or did not call him, he simply does not remember. Nor does he recall whether the crew worked on CH 72, but does recall working on 99.

The Grievant has been with the County Engineer about 19 (19) years and is currently a Hoseman. His duties include supervising a crew when there is no Foreman. (Jt. Ex. 8). He has an oral reprimand for refusing to give a document back to management and a three (3) day suspension for refusing to give back the oral reprimand document. The typical work day begins at 7 a.m. and ends at 3 p.m. The Grievant testified that, on February 23, 2012, his crew was to patch CHs 99, 72, and then 92. Klejka told him verbally what roads to do that day. According to the Grievant, it takes about fifteen (15) to twenty (20) minutes to set up the road work signs and the Supervisor is normally not on the job. The crew normally breaks down the job about 2

p.m. so the crew can get back to the garage about 2:30 p.m. He does not call the Supervisor to tell him the crew is returning. The Grievant testified that, if the crew does not finish its work, it will finish it the next day.

The Grievant has worked with Evans many times. He usually tells Evans where to go next and Evans is not usually late. The Grievant testified that, on the day of the incident, the Grievant and the crew worked on CH 99, which was left over from the day before. They then went to CH 72 and completed the work there. Evans left and Klejka arrived and told him to go to CH 86 and patch the bigger potholes. The Grievant did not call Evans to tell him to go to CH 86. He testified that he thought Klejka also had told Evans to go to CH 86 and that Evans was on his way. He and Smith went to CH 86 and posted the road work signs. They were putting up the last sign when Klejka drove up about 2 p.m. He had not called Evans to ask where he was. According to the Grievant, Klejka was on CH 86 about ten (10) minutes and called Evans. Evans said he was on CH 92 and Klejka told him to come to 86. The Grievant testified that he then called Evans. Klejka then left sometime around 2:05 to 2:10 p.m.

The Grievant testified that Klejka did not say anything about discipline for the incident and no one from management asked him about it. He was not asked to provide a statement. The Grievant also testified that the crew completed the work on CH 86, that he and Smith returned to the garage about 2:55 p.m., and the rest of the crew returned about 3:05 p.m. According to the Grievant, he was not concerned when he did not see Evans on CH 86 because the road is about a mile long and Evans could have parked where he could not see him. The Grievant further testified that he did not tell Klejka "I have to pick up my signs," and that he told Evans to meet him at the

intersection of CH 86 and Route 534, i.e., the west end of 86, and Evans was there when he drove there from the east end of 86.

The Grievant was charged with two (2) offenses, Inefficiency, a Category #3 offense, and Misfeasance, Malfeasance or Nonfeasance, a Category #2 offense. (Jt. Exs. 2 and 4). A pre-disciplinary hearing was held on March 13, 2012. At the hearing, Klejka stated that the Grievant and Smith were finishing up on CH 72 when he approached. He did not recall seeing Evans and the cold patch truck. He instructed the Grievant to patch 86 next. CH 92 was not on the list. The Grievant and Smith finished picking up the signs and headed to CH 86. Klejka followed them. According to Klejka, they drove slowly because they had put the signs into the truck upright instead of folding them. They first put up the signs at the west end of CH 86 and then drove to the east end of CH 86. When he approached them, the Grievant and Smith were set up and sitting in their truck. They were ready to work at approximately 1:50 p.m., but the cold patch truck was not there. Klejka asked the Grievant where Evans was and the Grievant responded he did not know. He then called Evans, who said he was on CH 92, and told him to come to CH 86. When Klejka asked why Evans was on CH 92, the Grievant replied "That's John Evans, what can I say" or words to that effect. He told the Grievant that it was his responsibility to know where his crew was. Klejka also stated that the Grievant told him he (Klejka) was holding him up and he (the Grievant) needed to pick up his signs. Klejka asked why when it was only 2 p.m. and the Grievant responded that he wanted to get into the shop. Klejka then told the Grievant to work until 2:30 p.m. According to Klejka, during the conversation, the Grievant also said "This road isn't even this bad. What's the big deal? If I don't get it today, I'll get it

tomorrow.” Klejka stated that there was not that many holes in the road and only a handful actually needed patching. It would have taken only 20-25 minutes to patch the holes that were bad. However, the work was not completed and had to be finished the next day. It took approximately 20-25 minutes to drive to 86 from the shop, so that time was consumed the next day. (Jt. Ex. 4).

The Grievant's version differed from Klejka's. According to the Grievant, CH 92 was not on the first list for the day, but he received a second list that had it to be patched. He did not have it with him at the hearing, however. After completing CH 72, Evans asked him what was next and he told Evans they were going to CH 92. When Klejka approached, Evans was still on the road or just leaving, so Klejka should have seen him. The Grievant and Smith went to CH 86 and were setting up the signs when Klejka again approached. When Klejka asked where Evans was, he responded “I don't know. He should be at the other end of the road,” or words to that effect. According to the Grievant, after speaking with Evans, Klejka told him to call Evans and he did. Evans told him he was on CH 92 and the Grievant told him to meet him on CH 86 at Route 534. The Grievant also stated he did not say he wanted to stop at 2 p.m. Rather, he told Klejka “You need to let me go so I can finish doing my job,” or something along those lines. (Jt. Ex. 4).

This grievance followed. (Jt. Ex. 3).

V. POSITION OF THE EMPLOYER

The grievance ought to be denied. The Employer met its burden of proving that the Grievant was disciplined for just cause and the discipline imposed was appropriate.

It was not disputed that the Grievant was in charge of the crew, that he was at the work site, that the cold patch truck was not, and that he did nothing to locate the truck. Klejka's testimony proved that, when he arrived at CH 86, the Grievant and Smith were there, but Evans and the cold patch truck was not. Smith corroborated this testimony. Klejka and Smith testified that the Grievant did not know where Evans was, that Klejka called Evans, and the Grievant did not call Evans. Alberini investigated further by contacting Evans, who stated that the Grievant had sent him to CH 92. Evans corroborated that the Grievant told him CH 92, not 86, was the next road to work on. Based on this evidence, the Grievant was charged with inefficiency and misfeasance.

At the pre-disciplinary hearing, Klejka's and the Grievant's versions were different in several respects. However, there was no dispute that the cold patch truck should have been on CH 86 and was not. The Union argued that the amount of time lost was minimal and the charges were too severe. Based on the Grievant's discipline history and the discipline of others charged with inefficiency, neglect of duty, or misfeasance, Laukhart recommended a five (5) day suspension. Smith accepted the recommendation.

The Grievant's was not a credible witness. He denied sitting in the truck when Klejka arrived, even though Smith testified they were. He denied losing any time even though they had to wait until Evans arrived with the cold patch truck. The Grievant testified that CH 92 was on the list to be patched that day, even though the schedules showed otherwise and the parties stipulated that it had been patched the prior week. The County Engineer's rules provide that employees should know their duties and

perform them promptly. Had not Klejka arrived at CH 86, the Grievant's actions in not knowing where Evans was and not contacting him would have resulted in significant lost time.

The Employer adequately investigated. Klejka had spoken to the Grievant, Smith, and Evans, and Alberini called Evans to find out why he was not where he should have been. The Employer concluded that the Grievant was responsible. There was no dispute he was in charge, that Evans was in the wrong location, and that the work could not be done without the cold patch truck. The Grievant received a five (5) day suspension only because of his prior disciplinary record. It was within the guidelines set forth in the County Engineer's rules.

VI. POSITION OF THE UNION

The grievance must be sustained. The Employer did not have just cause for the five (5) day suspension. The suspension should be removed from the Grievant's file, the Grievant should be paid for the five (5) day suspension and otherwise made whole, including correcting all leave balances and crediting any lost seniority. The Arbitrator should retain jurisdiction for remedy purposes.

There is no dispute which roads were to be patched on February 23. Nor is there any dispute that the schedule was subject to change. That is exactly what happened when Klejka told the Grievant to go to CH 86. When Klejka approached the Grievant and Smith, they were placing road work signs, but the cold patch truck was not there. Klejka asked where Evans was and the Grievant told Klejka that he thought Evans was on his way. As it turned out, Evans was on CH 92, not 86. It is not unreasonable that trucks go to the wrong location on occasion. Klejka stated at the pre-disciplinary

hearing that the safety meeting for the month was on good communications, so miscommunication must have been a problem. The Grievant, Smith, and Evans testified that they completed the work on CH 86 that day.

The only person who caused inefficiency on February 23 was Klejka. He kept the Grievant and Smith from working while he questioned them. There also could be no inefficiency on the Grievant's part since the work on CH 86 was completed that day. Simply because the work is not done as quickly as the supervisor would like does not mean there is inefficiency. Impatience on the supervisor's part is not grounds for discipline. Nor does the delay mean there was inefficiency. Trucks could be delayed for many reasons. Additionally, the Grievant and Smith were still putting up the road work signs. No work could be started until this was done. The Grievant and Evans had worked together before and Evans was typically on time, so there was no reason for the Grievant to assume that Evans was not somewhere on CH 86. The evidence established that the work was done and there is no evidence that the County Engineer checked that it was done. When a road is not completed on one day, it is put on the schedule for the next. That the schedule does not list CH 86 on February 24 corroborates that the work was completed. This negates the charge of inefficiency.

The misfeasance charge is based on the Grievant's alleged statement that he wanted to quit work early. The Grievant was consistent that he did not want to quit early. He said so during the pre-disciplinary hearing and testified the same at the arbitration. Smith corroborated that the Grievant said nothing about quitting early. The only evidence of this comes from Klejka. That the crew completed work that day belies any intention to quit early. The misfeasance charge cannot stand.

There is no evidence of a similar violation. The Employer could not produce any discipline where a cold patch truck was not at the work site. In short, the Grievant was not on notice that he could be disciplined for this. Further, the rule that any irresponsible act could lead to discipline is vague and provides no guidance to employees. The rule is unreasonable. Finally, the investigation was incomplete. An investigation should discover all the facts, yet neither the Grievant nor Smith were contacted and Evans did not remember being called.

VII. OPINION

The Employer bears the burden of proving that just cause exists for the Grievant's suspension. Just cause generally requires persuasive proof that the rules or policies cited for the discipline were violated and the discipline was proportionate to the offense. That is, the discipline imposed must be reasonable and the facts and circumstances of each particular case dictate the appropriate disciplinary level. Generally, arbitrators will not second guess management so long as the penalty imposed is reasonable. On this record, the Arbitrator concludes that the Employer did not have just cause to suspend the Grievant.

The key to this matter is the conversation between Klejka and the Grievant on February 23 on CH 86. However, there is not much agreement on what was said. As noted above, Klejka's version and the Grievant's version differ dramatically on several key points. Were they sitting in the truck when Klejka approached? Who called Evans, Klejka only or the Grievant as well? Did the Grievant say he was going to stop working early? (Jt. Ex. 4). Additionally, both Klejka's version and the Grievant's version appear to have some inconsistencies. At the pre-disciplinary conference, Klejka stated that he

told the crew about going to CH 86 when they ate lunch and a second time when he drove out to CH 72. (Jt. Ex. 4). At the arbitration hearing, he testified only that he told the Grievant and Smith when he met them on CH 72. Klejka testified that he followed the Grievant and Smith to CH 86, but they had already put out the road work signs when he approached them. Klejka also testified that the work was not completed and had to be finished the next day. Yet the schedule for February 24 does not include CH 86, suggesting the work was completed, and Smith, Evans, and the Grievant testified that the work was done. (Jt. Ex. 6). Finally, Klejka testified that the Grievant said something about wanting to quit early, but the Grievant denied it and was corroborated by Smith's testimony. At the pre-disciplinary hearing, the Grievant first stated that he had called Evans and then that he called Evans after Klejka radioed him. The Grievant testified that he told Evans to go to CH 92, but did not mention this to Klejka on CH 86 or at the pre-disciplinary hearing. Additionally, he testified that CH 92 was on another list of roads that he was given, but he did not produce it at the pre-disciplinary hearing or the arbitration. The evidence showed that CH 92 was not on the schedules for February 23 or 24, suggesting it was not to be patched. In short, it is difficult to determine exactly what occurred on February 23.

What is undisputed is that the Grievant and Smith were on CH 86 and the cold patch truck driven by Evans was not. Klejka told the Grievant that CH 86 was the next road to be patched and the Grievant failed to communicate with Evans. This caused some time to be lost. The Grievant testified that he thought Klejka also told Evans to go to CH 86. While it is not unreasonable to believe that Klejka might have also told

Evans, the Grievant was in charge of the crew and should have called Evans to make certain he knew about the change in plan.

The question is whether this amounts to inefficiency sufficient for discipline under the rules. It is true the Grievant should have contacted Evans. However, there was not a great deal of time lost and the work appears to have been completed. As noted above, Klejka testified the work had to be completed the next day. He also testified that the work would only take about twenty (20) to thirty (30) minutes, that he left shortly after 2 p.m., and that he told the Grievant to work until 2:30 p.m. Evans testified it took approximately ten (10) minutes to drive from CH 92 to 86. This would give the crew enough time to patch 86. Evans, Smith, and the Grievant testified that they completed the work and this appears to be corroborated by CH 86 not being on the work list for the next day. All in all, the evidence supports the conclusion that about thirty (30) minutes was lost, but the work was completed that day. The Arbitrator concludes that this is insufficient to support a charge of inefficiency.

Additionally, the Employer argues that it adequately investigated before deciding upon the suspension, yet there is no dispute that Smith was never interviewed. He was the only neutral witness to the conversation between Klejka and the Grievant. The Grievant was charged with misfeasance, malfeasance, or nonfeasance apparently on the basis, according to Klejka, of the Grievant's statements that Klejka was interfering with work and the Grievant wanted to stop working early. Smith testified that he does not recall the Grievant telling Klejka that Klejka was keeping them from working and that the Grievant did not say anything about wanting to quit early. Smith also contradicted the Grievant about having put up the signs, sitting in the truck, and calling Evans. His

testimony is credible. Based on this evidence, the charge of misfeasance, malfeasance, or nonfeasance is not supported.

The record, then, is this. Approximately thirty (30) minutes of work was lost. The Employer did not interview Smith in its investigation, which may have led to the conclusion that the charge of misfeasance, malfeasance, or nonfeasance was not supported. The notice of discipline specifically states that the suspension was based on the finding that both charges were sustained. (Jt. Ex. 4). The Employer has the burden of proving that just cause existed for the discipline. On this record, the Employer did not meet that burden. The Arbitrator concludes that the Employer did not have just cause to suspend the Grievant.

VIII. AWARD

The grievance is sustained. All records of the suspension are to be removed from the Grievant's file and the Grievant should be paid for the five (5) day suspension. The Grievant shall be otherwise made whole, including correcting all leave balances and crediting any lost seniority. The Arbitrator retains jurisdiction for sixty (60) days for the sole purpose of deciding any disputes as to the remedy.

Dated: October 26, 2012



Daniel G. Zeiser
Arbitrator