

## LABOR &amp; EMPLOYMENT

## Arbitration Decisions



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## Labor Arbitration Decision, Ionia Cnty. Rd. Comm'n, 139 BNA LA 771

Pagination  
\* BNA LA

Decision of Arbitrator

In re IONIA COUNTY [Mich.] ROAD COMMISSION and GENERAL TEAMSTERS UNION,  
LOCAL 406

April 2, 2019

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**BNA Headnotes**
**LABOR ARBITRATION****DISCIPLINE**

**[1] Due process - Investigation - Insubordination - Suspensions ▶ 118.306**

▶ **118.6521** [\[Show Topic Path\]](#)

County did not have just cause to issue two-day suspension to scraper for disobeying his supervisor's directive to work overtime due to emergency conditions. The county violated grievant's due process rights by failing to interview other employees-who were at the meeting where the supervisor claimed to have issued an overtime directive-before it suspended grievant, since grievant did not admit at the pre-disciplinary meeting that he received a directive to work overtime, another employee stated he did not hear such a directive, and two union stewards did not support supervisor's version of his instructions.

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For the employer-Thomas H. Derderian (Michale R. Kluck & Associates), attorney.

for the union-Michael J. Fayette and Crystal J. Bultje (Pinsky, Smith, Fayette & Kennedy LLP), attorneys.

LEE HORNBERGER, Arbitrator.

**LABOR ARBITRATION  
PROCEEDING**

**DECISION AND AWARD**

**2. INTRODUCTION**

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between [\*772] the Ionia County Road Commission (Employer) and the General Teamsters Union, Local No. 406 (Union). The Union contends that the Employer violated the CBA when it gave the Grievant a two day suspension. The Employer maintains that it did not violate the CBA when it gave the Grievant a two day suspension.

I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on January 4, 2019, in Ionia, Michigan. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for the introduction of relevant exhibits. The hearing was transcribed. The transcript was received by me on January 16, 2019. The dispute was deemed submitted on March 19, 2019, the date the last post-hearing submission was received.

The parties stipulated that the grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

Both advocates did an excellent job in representing their clients.

### 3. ISSUES

The parties framed the issue as follows.

The Employer framed the issues as "Did the Employer have cause to issue the Grievant a two day disciplinary suspension for his refusal to obey a directive to work overtime on February 27, 2018?"

The Union framed the issues as "Did the Employer violate the CBA when it suspended the Grievant in violation of the CBA and without establishing just cause?"

I frame the issues as "Did the Employer have just cause to discipline the Grievant? If not, what shall the remedy be?"

### 4. RELEVANT CONTRACTUAL LANGUAGE

#### *Section 7.4 of the Contract states:*

The unusual nature of the operation of the Commission dictates that ALL EMPLOYEES other than those on authorized leave, will be expected to work during the winter months during emergencies when called. When employees accept an assigned scraper route with state trunkline responsibility, they understand they must be available for overtime as necessary during emergency conditions. Management understands that this may be impossible for these employees at some times. In order to adequately staff for emergency work on nights, weekends and holidays, management will assume a routed employee is available unless notified otherwise. Notification should be made to the foreman at least 24 hours in advance and the employee must check with the foreman to see if alternate coverage is available. A routed driver who is consistently unavailable for overtime may be removed from their assignment through the discipline process.

#### *Section 14 of the Contract states, in part:*

##### **Section 14.1**

Suspension or discharge must be by written notice to the employee. An employee may request an investigation as to their suspension or discharge by filing a written grievance within ten (10) working days thereafter, with their supervisor. Such matters shall be handled promptly and if the discharge is found to be unwarranted, the employee shall be reinstated and compensated for the period of lost work in such amount as the parties agree or as ordered by an arbitrator. Nothing in this paragraph will preclude reinstatement without back pay.

##### **Section 14.2**

Consuming alcoholic beverages during working hours, misuse of equipment of the Commission, flagrant violation of motor vehicle laws, jail sentence, unsafe operation of equipment, leaving equipment while fueling, failure to charge out materials, removal of Yield or Stop signs without replacing, excessive absenteeism, are just causes for dismissal.

##### **Section 14.3**

The foregoing enumeration of causes for discharge is by way of illustration and shall not be deemed to exclude management's right to suspend or discharge employees for any other just cause.

#### **Employer's Rules**

### Section 2.

For a violation of any of the following offenses a suspension without pay will be issued to affected employee. Repeat violations for the same [\*773] or similar offense, progressive discipline will be instituted up to and including discharge:

A. Insubordination

...

### Section 3.

For violations of any of the following offenses, a written warning shall be issued to the affected employee. Repeat violations of similar nature or violations within the same violation section shall be dealt with progressive disciplinary action:

...

B. Leaving work prior to the employee's designated quitting time without the permission of the employer/supervisor.

## 5. FACTUAL OUTLINE

### Introduction

The Employer is a public employer responsible for building and maintaining public roads and bridges under its jurisdiction throughout Ionia County, Michigan. It has 37 employees. Twenty-nine of these employees are in the bargaining unit. These employees occupy the positions of Transportation Maintenance Workers and Mechanics.

Director Dorothy Pohl has worked for the Employer for 27 years and has been the Director for 23 years.

Superintendent Bud White has worked for the Employer for 22 years and four years as Superintendent. The Superintendent reports to the Director.

Grievant A\_\_ was hired on October 16, 2000. He is a maintenance worker and a scraper driver. The Grievant reports to the Superintendent. The Grievant was suspended for two days for allegedly disobeying an order from the Superintendent to work end-of-shift overtime.

B\_\_ was a maintenance worker. He reported to the Superintendent. Mr. B\_\_ was suspended for two days for allegedly disobeying an order from the Superintendent to work end-of-shift overtime. Shortly thereafter Mr. B\_\_ voluntarily resigned.

The normal shift is 7:00 a.m. to 3:00 p.m. Employees work until 2:45 p.m. Then they park their trucks. They normally do not have to report to the Superintendent at the end of the work day.

### Monday, February 26, 2018

According to the Superintendent, during the week of February 26, 2018, there were extreme weather conditions. These weather conditions started the prior week. There were five inches of rain. There were freezes and thaws. Roads were washed out. There were "cross road tube" issues because of too much water. The Monday, February 26, 2018, morning instructions to the crew from the Superintendent were: "If you guys want to work late tonight, that is fine." He said employees would work late "some time that week." The Superintendent does not have to check with the Director concerning using overtime.

The Superintendent testified that:

Q. Did you mention anything Monday about potential overtime later in the week?

A. Yes.

Q. And what did you say?

A. I just simply said with the temp - because we had really warm temperatures coming up throughout that whole week, and that's - that's my job, is to keep track of the temperature coming up and when we can do this and do that, and I did mention that we would work late sometime that week. Tr. 41-42.

According to the Grievant, he was assigned an area he had to take care of. He had a route. In the winter, he plows certain roads. A helper might help him. He had worked the prior week. On Monday, February 26, 2018, he worked on a scraper. The Superintendent gave orders on the morning of Monday, February 26, 2018. All of the approximately 24 employees were in the break room. The Superintendent said he would be getting approval for overtime that week. The Grievant worked until 3:00 p.m. on Monday, February 26, 2018.

The Grievant has a small salvage yard. A customer called the Grievant on Monday, February 26, 2018, to set up a meeting for 4:00 p.m., Tuesday, February 27, 2018. The customer was coming from out-of-state.

The Grievant testified that:

Q. Tell me what [the Superintendent] said to the crew [on Monday morning].

A. ... He talked, the first thing early in the morning, that he would be possibly getting with [the Director] for approval of overtime later on in the week, "later on in the week." There was no mandatory overtime for that day. Tr. 116. [\*774]

#### Tuesday morning, February 27, 2018

According to the Superintendent, he gave orders at the 7:00 a.m., February 27, 2018, crew meeting. He kept a close eye on the weather. If there were high temperature, the employees could scrape roads. On Tuesday, the Superintendent's list was made up for who was to scrape and that the "scraping" will work 4:30 p.m. to 5:00 p.m. that day. The Grievant never told the Superintendent on February 26 or 27, 2018, that the Grievant was not available on the afternoon of February 27, 2018. The Superintendent is 100% positive that he told all the scrapers that they would work until 4:30 p.m. or 5:00 p.m. He told all the scraper drivers Tuesday morning they would scrape until 5:00 p.m. that day. There are a lot of road miles. The drivers could fix a lot of bad spots. It gets dark at approximately 5:30 p.m. or 6:00 p.m.

The Superintendent testified:

A. 7 o'clock [Tuesday], I come out, had my list made up for who was scraping. I went through that and said everybody that's scraping will work till 4:30, 5 o'clock.

Q. Were you clear about that?

A. Yes.

Q. Anybody question that at all?

A. No.

Q. Did [the Grievant] or anybody else indicate to you at any time that they were not available to work until 4:30 or 5 o'clock that day?

A. No. Tr. 35.

Q. Are you a hundred percent positive and sure on the morning of the 27th that you told all the scraper drivers they would be working till 4:30 or 5 o'clock?

A. Yes.

Q. Did all the scraper drivers, with the exception of [the Grievant] and Mr. B\_\_, work late that day?

A. Yes. Tr. 36,

According to the Grievant, there was a 7:00 a.m., Tuesday, February 27, 2018, crew meeting. The Superintendent passed out assignments. "We could go scrape and work until 4:30 p.m. or 5:00 p.m. But there was nothing said about mandatory." According to the Grievant, there is no doubt that Tuesday overtime was voluntary. The Grievant testified that he is "positive" that he was not told that Tuesday overtime was mandatory.

The Grievant testified that:

Q. ... do you recall [the Superintendent] saying anything about overtime that day [Tuesday] for the scraper drivers?

A. We could go scrape and work till 4:30 or 5 o'clock, but there was nothing mandatory.

Q. [I]s there any doubt in your mind that the working until 4:30 or 5:00 was voluntary and not mandatory?

A. No doubt. Tr. 119.

Q. [I]t's your testimony ... that [the Superintendent], on Tuesday, February 27th, in the morning, did not notify you that you would be working until 4:30 or 5 o'clock and it was mandatory?

A. That's correct.

Q. You're positive about that?

A. Positive. Tr. 128.

... Isn't it true that he did give you a directive on Tuesday morning to work the overtime?

A. No.

Q. And you're positive about that?

A. One hundred percent positive. Tr. 136.

#### Tuesday afternoon, February 27, 2018

According to the Superintendent, during the afternoon of February 27, 2018, he was sitting in his office. The Superintendent saw the Grievant return at 3:00 p.m. and go over to the board. As the roads are fixed, they are crossed of the board. The drivers check the board before they go out in the morning. They take care of complaints on the board. The Superintendent asked the Grievant why he was not working. The Grievant responded, "Places to go and things to do." The Superintendent did not order the Grievant to go back to work. By the time the Grievant got his truck, he would have been driving in the dark. There were 12 employees scraping on February 27, 2018. The Superintendent tried to recreate a crew assignment sheet for February 27, 2018.

According to the Superintendent, it is not unusual to see the Grievant at the board. He saw the Grievant standing by the board. He asked him, "can't work late this evening?" The Grievant responded, "Places to go and things to do." The Superintendent did not respond. The Superintendent was busy at that [\*775] time. The Grievant was looking for an argument. The Superintendent had to process all of that. He decided to follow-up a day or two later.

According to Grievant, he returned to the garage at approximately 2:40 p.m. He parked the truck inside the garage. He entered the time of the day on the kiosk. This is computer entry activity. "8 hours surface maintenance ... [location]." He went over to the board and erased completed tasks. He remained on the premises until the end of the shift. The Superintendent asked him: "Can you stay late?" The Grievant responded, "No, I got places to go and things to do." Co-employee B\_\_ was also in the break room waiting to leave. Mr. B\_\_'s presence did not surprise the Grievant. According to the Grievant, if he had been told staying over was mandatory, he would have stayed. He had the 4:00 p.m., Tuesday, February 27, 2018, appointment. He does not remember who he met with that Tuesday. The Tuesday meeting involved the selling of parts.

#### March 1, 2018

On March 1, 2018, the Superintendent interviewed the Grievant, who was represented by his Union Steward. This interview was audio recorded. The Superintendent communicated the findings of this interview to the Director.

In the interview, the Superintendent stated that he told the employees on Monday morning that they would have to stay late Tuesday, and he asked the Grievant how he thought it was "fair" for him to leave at 3:00 instead. The Superintendent asked other witnesses in the room, Joe Kruger and Union Steward Scott Clark, if they heard the Superintendent say on Monday that overtime Tuesday would be mandatory. There was no affirmative response. One did say, "I think you said Monday we'd be staying late later in the week." The Superintendent stated that, if the Grievant had come to him on "Monday or Tuesday and said, hey I can't stay because this appointment or that appointment," that the Superintendent would have accommodated the Grievant.

The Grievant responded by saying, "Well first of all, everybody wasn't staying late ... you had scraper drivers doing other jobs that weren't even in their townships and, now if there was snow in the forecast, snow storm, of course I would stay late. But I had appointments to make and things to do. So I couldn't stay late." The Grievant explained, "I listened to your orders very thoroughly in the morning and I don't remember you saying anything Monday about staying late Tuesday." He apologized, but he continued to state that the reason he did not ask the Superintendent to skip the mandatory overtime was because he believed the Superintendent had made the overtime optional on both Monday and Tuesday. During the interview, the Grievant said: "I don't remember you saying anything Monday about stayin' late Tuesday"; "you said stay late if you could"; "you didn't say that you have to stay late"; and "yeah, I didn't realize. ..."

According to the Director, the Director made the discipline decision. The Superintendent told her of the situation. The Employer was in the middle of the weather emergency at the time. There had been no prior problems with any employee working mandatory overtime.

The Director reviewed the Grievant's prior disciplines. The prior disciplines were a three day suspension in April 2005 for failure to properly maintain equipment, a warning in December 2013 for insubordination, and a five day suspension in December 2013 for insubordination. The Director looked at everything in the file. The Employee Handbook rules apply to drivers. She talked with some of the other employees. She does not have notes of those questions and answers. She does not have a list of people with whom she talked. Mr. B\_\_ said overtime was not ordered. She did not make it a point to interview the other scraper drivers. The Superintendent has his "daily assignment sheets." They go in the book and become part of the permanent record. There is no written record kept of mandatory overtime.

The Superintendent had no recollection of the Grievant failing to previously work overtime. This is the Superintendent's first discipline of the Grievant. The Grievant does not work voluntary overtime. If it snows, the Grievant comes to work. If it is snowing, they stay out until it is done. Except for this situation, the Grievant has not turned down mandatory overtime. It is the drivers' responsibility to notify the Employer if they are going to [\*776] be absent. Scraper drivers have a helper. In the winter, they have a trunk line.

#### March 6, 2018, discipline

The March 6, 2018, discipline states:

Date of Violation: 02/27/2018 Location: Ionia garage

Statement of violation: An announcement was made on 07/26/18 and again on 02/27/18 that all scraper drivers would work until 5:00 pm on 02/27/18 to scrape gravel roads. On 02/27/18, A\_\_ punched out at 3:00 p.m. without approval. We consider this violation insubordination. ...

Suspension, 2 Working days. ...

The Employer met with the Grievant on March 6, 2018, to inform him of the suspension. During this meeting, the Grievant stated that the Superintendent did not indicate overtime was mandatory on Tuesday, February 27, 2018. The Grievant stated, "So if it's mandatory then how come he didn't say it's mandatory? ... [Y]ou got a whole room full of guys out there that will tell you, [the Superintendent] didn't say it was mandatory."

The Employer also met with Mr. B\_\_ on March 6, 2018, to inform him that he was receiving a two day suspension for not working mandatory overtime the afternoon of February 27, 2018. Mr. B\_\_ stated that the Superintendent had not made overtime mandatory that day. "... I wasn't told that I had to work late on Tuesday." He stated, "... this is outrageous." He voluntarily resigned shortly thereafter after.

#### March 12, 2018, Grievance.

A Grievance was filed on March 12, 2018. The Grievance stated as follows.

I disagree with the disciplinary action that was taken against me on March 6, 2018. I would like this matter to be investigated under section 7.4 as all the employees received the same morning work details on February 27, 2018, as I did, once the investigation is completed and shows there was no insubordination I would like this matter settled as a whole in every way.

#### June 6, 2018, Grievance Denial

In a memo dated June 6, 2018, the Director denied the grievance, stating:

You were told by your supervisor on February 26, 2018, and again on February 27, 2018, that we would work overtime until 4:30-5:pm on 2-27-18 due to emergency conditions throughout the county. Neither of you discussed leaving early with your supervisor. ... You ignored a direct order from your supervisor and violated the requirements of 7.4 of the Collective Bargaining Agreement.

The Superintendent testified that "We go by the contract. Not by the Handbook." He does not know a whole lot about the Handbook. He does not know if there were meetings with the employees concerning the Handbook.

The Grievant testified that the Superintendent had never denied him release from mandatory overtime.

## 6. CONTENTIONS OF THE PARTIES

### a. For the Employer

According to the Employer, the Grievant deliberately refused to comply with a directive given by his supervisor to work overtime on February 27, 2018. The Grievant is not contesting the Employer's right to assign the mandatory overtime. He is disputing that the order was given in the first place. Resolving this factual dispute is the key issue facing the Arbitrator. The evidence clearly reveals that the Grievant was given an order to work mandatory overtime on February 27, 2018, and that he is being dishonest in his assertion to the contrary.

The Superintendent testified that he gave the order. The Grievant testified that the order was not given. One of these witnesses is either very much mistaken or is not telling the truth. The Employer asserts there are three good reasons why I should believe the Superintendent and not the Grievant. The first reason is that the Superintendent has no motive to lie and the Grievant has a clear motive to be less than truthful in his testimony. The second reason I should find that the Superintendent is telling the truth is the simple fact that no Union member other than the Grievant took the stand to contest the Supervisor's testimony. The third and most important reason why I should believe the Superintendent and not the Grievant is that the Grievant admitted to the Employer during the internal investigation that he had received the directive to work mandatory overtime. [\*777]

According to the Employer, the Grievant does not respect authority and will only follow the orders of his supervisor if he decides they are proper and worth following.

In determining whether a disciplinary penalty as imposed is reasonable, most arbitrators ascribe to the view that the determination of the extent of the penalty is a management prerogative and the arbitrator should not substitute his or her judgment for that of management unless the action was arbitrary, capricious, or unreasonable. There is no evidence that the Employer has abused its discretion. The Employer conducted a fair investigation.

The Employer is a 24 hour a day, 365 day a year, emergency response organization. The safety of the public depends directly on employees showing up and doing their jobs. On February 27, 2018, the Employer was operating under a state - imposed public emergency. The Grievant had a duty to work overtime as directed. He had a duty to advise his supervisor in advance if he was for any reason unavailable to work overtime. The Grievant did neither. He ignored the directive of his supervisor so he could make a few dollars selling parts to a customer of his private business. This is more than insubordination, this is gross neglect of duty. The Grievant is lucky he still has a job. According to the Employer, I should deny the grievance.

### b. For the Union

According to the Union, the Employer failed to establish just cause. The Employer based its decision to suspend the Grievant on a factually incorrect Disciplinary Action Report. The Employer did not establish that the Superintendent gave a clear directive for mandatory overtime, let alone that a reasonable person would have understood it as the Superintendent contends he intended. The Employer did not justify its decision to categorize the Grievant's conduct as "insubordination" since the Grievant could not have intended to disobey a directive he did not know existed, especially since the Employer's Work Rules specifically provide that an employee who leaves prior to his designated quitting time should only receive a written warning.

The Employer violated the CBA when it suspended the Grievant without just cause through an inappropriate application of its rule regarding "insubordination." The Employer cannot reasonably support the conclusion that the Superintendent gave a clear directive-that a reasonable person would have understood-for the employees to work mandatory overtime. Even if the Superintendent clearly ordered the mandatory overtime, the Employer's decision to categorize the Grievant's behavior as "insubordinate" and suspend him, in contravention of its own rules, is unreasonable.

The Employer failed to sufficiently investigate the situation, as it only asked and documented three people's responses about this: the Superintendent, the Grievant, and B\_\_\_. Out of those three, the only person who confirmed the Superintendent's (current) version was the Superintendent. The Employer failed to ask any other employees what they heard or understood. When the Superintendent asked the Union stewards, Scott Clark and Joe Kruger, for support for his version of the instructions at the March 1, 2018, interview, they did not support him. One said nothing and the other said, "I think you said Monday we'd be stayin' late later in the week."

The Union requests that I rule that the Employer violated the CBA when it suspended the Grievant without just cause, that the I order the discipline be removed from the Grievant's file and that the Grievant receive full back-pay for the two-day suspension, and that he be otherwise made whole in all regards. The Employer also requests that I retain jurisdiction to assist the parties in the event they cannot agree on the implementation of the Award.

## 7. DISCUSSION AND DECISION

### Introduction

The CBA provides that an employee cannot be disciplined without just cause. Sec. 14. It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that such action be for just cause, the employer has the burden of proving that the discipline was for just cause. "Just cause" is a term of art in CBAs. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient [\*778] proof that the employee engaged in the conduct for which he was disciplined. Other elements include a requirement that an employee know or could reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline; the existence of a reasonable relationship between an employee's misconduct and the punishment imposed; and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude that Grievant was not disciplined for just cause.

The March 16, 2018, discipline notice says:

Statement of violation: *An announcement was made on 07/26/18 and again on 02/27/18 that all scraper drivers would work until 5:00 pm on 02/27/18 to scrape gravel roads. On 02/27/18, A\_\_ punched out at 3:00 p.m. without approval. We consider this violation insubordination. Emphasis added.*

The Employer contends that notice of mandatory overtime was given Tuesday morning. The Union contends that notice of mandatory overtime was not given Tuesday morning.

### Witness Credibility

The Employer contends that the Superintendent's recollection is accurate. The Union contends that the Grievant's recollection is accurate. Arguably both recollections cannot both be accurate.

One of my duties is to decide how credible each witness was. It is up to me to decide if a witness's testimony was believable, and how much weight I think it deserves.

I start my credibility analysis with the viewpoint that all witnesses are equal and deserving of equal deference concerning their recollections. At the onset, neither Employer nor Union witnesses should be given higher deference. Supervisors should not necessarily be given greater credibility. It has been suggested that neither the disciplined employee, the steward, nor the supervisor who made the discipline decision is inherently more credible. Elkouri & Elkouri, *How Arbitration Works* (8<sup>th</sup> ed.), pp. 8-96 to 8-98.

Here are some things I consider in evaluating witness testimony. (A) Was the witness able to clearly see or hear the events in question? Sometimes even an honest witness may not have been able to see or hear what was happening, and may have an incorrect recollection. (B) How good the witness's memory seemed to be? Did the witness seem able to accurately remember what happened? (C) Was there anything else that may have interfered with the witness's ability to perceive or remember the events? (D) How did the witness act while testifying? Did the witness appear honest? Or did the witness appear to be mistaken? (E) Did the witness have any relationship with any party, or anything to gain or lose from the case that might influence the witness's testimony? Did the witness have any bias, prejudice, or reason for testifying that might cause the witness to testify incorrectly or to slant the testimony in favor of one side or the other? (F) Did the witness testify inconsistently while on the witness stand, or did the witness say or do something or fail to say or do something at any other time that is inconsistent with what the witness said while testifying? If I believe the witness was inconsistent, I ask myself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. I consider whether the inconsistency was about something important, or about some unimportant detail. I ask myself if it seemed like an innocent mistake or if it seemed deliberate. (G) How believable was the witness's testimony in light of the other evidence? Was the witness's testimony supported or contradicted by other evidence that I found believable? If I believe a witness's testimony was contradicted by other evidence, I realize people sometimes forget things, and even two honest people who witness the same event may not describe it exactly the same way.

These are some of the things I consider in deciding how believable each witness was. I consider other things that I think shed light on the witness's believability. I use my common sense and my everyday experience in dealing with other people. Then I decide what testimony I believe and how much weight I think it deserves. Abrams, *Inside Arbitration* (2013), pp. 189-192; See generally WD Mi Civ JI 2.07. [\*779]

I consider all the circumstances of all the witnesses when assessing which testimony is the most credible.



I consider the totality of the circumstances.

The failure to call as a witness a person who is available and should be able to provide important testimony may permit an arbitrator to form an inference that the testimony would have been adverse to the party that did not call such person as a witness. *Id.* at 8-51 to 8-52.

It has been indicated that:

If the missing witness appears to the arbitrator to have played a critical role in the events raised in the grievance, the neutral will draw a negative inference that the missing witness would not have testified in support of the claim. *Abrams*, p. 147.

Furthermore:

The arbitrator's decision in discharge and discipline cases must reflect the parties' values and interests, not the arbitrator's personal conception of how the workplace should be run." *Id.* at 202.

The Employer argues that the fact that the Union failed to call the other employees who were at the February 27, 2018, morning meeting to testify supports the Employer's position concerning the creditability of witnesses. This argument does not control for a number of reasons. These employees were equally available to both sides as witnesses. They were not peculiarly within the Union's control. Given the fact that these bargaining unit employees were equally assessable to the Employer, I do not make an adverse inference against the Union for not calling them.

### Appropriate Investigation

The Union contends that there was not an appropriate investigation. The Employer contends that there was an appropriate investigation.

The Director testified:

... And you didn't interview any other employees who were in that crew of 24 or so to find out what they heard?

A. Yes, I did talk with some of the employees.

Q. Did you take notes of those conversations?

A. No, I didn't.

Q. Do you have notes of the questions you asked?

A. No.

Q. Do you have a list of the people you interviewed?

A. No. Tr. 107-108.

... Did you make it a point to interview any of the other scraper drivers as to whether there was an order for mandatory overtime?

A. I did not make it a point to interview them personally, no.

Q. Did you direct anyone else to interview them?

A. No. Tr. 108.

"Industrial due process ... requires management to conduct a reasonable inquiry or investigation before assessing punishment." *Elkouri & Elkouri*, at p. 15-49.

It is a fundamental principle of employment law that the issue of due process and following correct procedures can impact on the issue of just cause and the amount of discipline, if any, that should be approved or imposed. *Id.* at 15-47 to 15-50. *Federated Dep't Stores v. Food & Commercial Workers Local 1442*, 901 F.2d 1494 (9th Cir. 1990) (arbitrator appropriately determined due process to be component of good cause for discharge); *Teamsters Local 878 v. Coca-Cola Bottling Co.*, 613 F.2d 716, 718 (8th Cir.), cert. denied, 446 U.S. 988 (1980) (appropriate for arbitrator to interpret just cause as including requirement of procedural fairness); *Skelly v. State Personnel Bd*, 15 Cal.3d 194, 539 P.2d 774 (1975) (remedy for violation of employee's due process rights was back pay from date of discipline until date of decision after a fair hearing); *State of Florida*, 134 LA 1181 (*Abrams*, 2015) (under the just cause standard the employer must conduct a thorough investigation before it disciplines or discharges an employee for alleged misconduct); *State of Illinois*, 136 LA 122, 129-130 (*Goldstein*, 2015); and *Standard Parking Plus Corp.*, 137 LA 1785, 1791 (*Saunders*, 2017) ("All witnesses are to be interviewed and some record made of their statements.").

*Abrams*, at p. 211, states:

... [T]he concept of "due process" is inherent in the just cause provision.

... [a]rbitrators prefer seeing evidence that management ... offered the accused employee the opportunity to contribute before the investigation hardened into a decision. A discharge followed by an investigation obviously puts the cart before the horse. An employer need not keep an employee at work, but there is no obvious reason why it cannot suspend the employee pending investigation. [\*780]

Arbitrators "often overturn otherwise valid discharges where the employer has denied the employee those [due process] protections." Nolan, *Labor and Employment Arbitration* (1999), pp. 205 to 206.

[1] The Employer alleged at the March 1, 2019, meeting with the Grievant that the announcement of mandatory overtime was made at the morning meetings of both October 26 and 27, 2018. The discipline notice alleges that "[a]n announcement was made on 07/26/18 and again on 02/27/18 that all scraper drivers would work until 5:00 pm on 02/27/18 to scrape gravel roads." The Director's June 6, 2018, Memo to the Grievant, Mr. B\_\_, and the Union says "You were told by your supervisor on February 26, 2018, and again on February 27, 2018, that we would work overtime until 4:30 pm on 2-27-18. ..." At the arbitration hearing, the Employer only alleged that such an announcement was made on February 27, 2018.

At the March 1, 2018, meeting, no one present, other than the Superintendent, supported the allegation that there was a direct order given the morning of February 27 to work February 27, 2018, afternoon mandatory overtime. The Grievant did not admit during the March 1, 2018, meeting that he had received the directive to work mandatory overtime. At the March 1, 2018, meeting, no one other than the Superintendent, contested the Grievant's recollection.

Mr. B\_\_ articulated that he did not hear the Tuesday morning announcement for mandatory overtime.

None of this necessarily means that the Superintendent's recollection of what he said Tuesday morning is incorrect. It does mean that there should have been further investigation. An appropriate investigation would have included interviewing those present at the Tuesday morning meeting, including the scraper drivers.

### Conclusion

The crucial points in this case include:

1. The situation was not adequately investigated;
3. The discipline notice alleges the order was given both Monday and Tuesday morning;
4. The Employer alleged at the March 1, 2018, meeting that the order was given both Monday and Tuesday morning;
5. The Employer alleged at the arbitration hearing that the order was only given Tuesday morning;
6. Mr. B\_\_ articulates that the order was not given Tuesday morning;
- 7 The Employer has the burden of proof;
8. The CBA; and
9. The totality of the circumstances.

This decision neither addresses nor decides issues not raised by the parties.

The Employer did not have just cause to discipline the Grievant.

### 8. AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I grant the grievance.

I order that the discipline be removed from the Grievant's file and that the Grievant receive full back-pay for the two-day suspension, and that he be otherwise made whole.

I retain jurisdiction over this matter for sixty days from the date of this Award for the sole purpose of resolving any issue(s) pertaining to the order of rights and privileges contained in this Award.

Dated: April 2, 2019, Traverse City, Michigan.

