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**State of Wisconsin  
Wisconsin Employment Relations Commission**

March 16, 2011

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Re: Door County  
Case 175 No. 70084 MA-14858  
(Lemens Grievance)

Gentlemen:

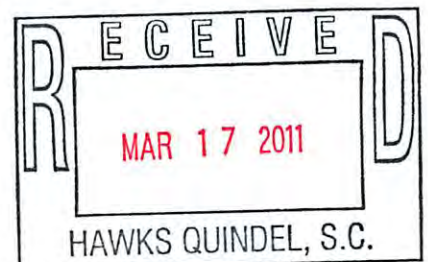
Please find enclosed a copy of the Arbitration Award issued by the undersigned in the above-entitled matter.

Sincerely,

A handwritten signature in black ink that reads "William C. Houlihan".

William C. Houlihan  
Arbitrator

WCH/gjc  
G0022G.18  
Enclosure



BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**DOOR COUNTY HIGHWAY EMPLOYEES,  
LOCAL 1658, AFSCME, AFL-CIO**

and

**DOOR COUNTY**

Case 175  
No. 70084  
MA-14858

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**Appearances:**

**Aaron Halstead**, Hawks Quindel, S.C. 222 West Washington Avenue, Suite 450, Madison, Wisconsin 53701-2155, appeared on behalf of the Union.

**Grant P. Thomas**, Door County Corporation Counsel, 421 Nebraska Street, Sturgeon Bay, Wisconsin 54235, appeared on behalf of the County.

**ARBITRATION AWARD**

On August 11, 2010 Door County and the Door County Highway Employees, Local 1658, AFSCME, AFL-CIO filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Following appointment, a hearing was conducted on November 9, 2010 in Sturgeon Bay, Wisconsin. A record of the proceedings was taken and distributed on November 24, 2010. Post-hearing briefs were submitted and exchanged, and the record was closed on January 20, 2011.

This Award addresses the termination of employee J.L.

**BACKGROUND AND FACTS**

J.L., the grievant, has been employed by the County since July, 2005. He was hired as a Crusher Operator and subsequently became a Roller Operator. In November 2007 he posted into a job as a Seasonal Truck Driver, and in November, 2008 he became a Truck Driver.

The event giving rise to this proceeding occurred on May 10, 2010. The grievant was driving a semi tractor and trailer, hauling hot mix from the County quarry and pit. He lost

control of his vehicle when he failed to negotiate a curve, which caused the vehicle to leave the road and turn over. The vehicle came to rest upside down just off the gravel shoulder of the road. The grievant was injured and burned by the hot mix. The grievant had no memory of the events leading to the accident. The tractor and trailer sustained substantial damage.

The County conducted a thorough investigation of the incident and terminated the grievant. The termination letter is set forth below. Key to the County's decision to terminate was the grievant's driving record.

On June 1, 2009 the grievant was given a written reprimand for his conduct as described in the disciplinary report form.

On Monday, June 1, 2009 J.L. was assigned the job of hauling gravel in his truck for shouldering. He left the shop without his tailgate on, which is required when hauling aggregate for shouldering operations. When he loaded his truck at the mine, he noticed that he did not have the tailgate, but still proceeded to load the truck and haul the aggregate to the job site. He then attempted to unload the material into the shouldering machine very slowly, however, in the process of unloading and watching the load and not watching the overhead obstructions, he broke an overhead telephone wire, and then the load released and a large portion of the aggregate ended up on the roadway.

The events could have been avoided if J. L. had properly inspected his equipment. Even after realizing that the equipment did not have the tailgate on, he should have returned to the shop and installed.

On December 26, 2010 the grievant was plowing snow on a county highway. There was heavy snow, high winds, drifting and limited visibility. His front tire hit a shoulder of the roadway and then his vehicle slid into the ditch. He was not injured. There was no discipline issued because of the weather conditions.

On March 4, 2010 the grievant was given a 5 workday suspension for the following conduct:

On Thursday, February 25, 2010 J.L. was assigned the job of performing snow and ice control on his assigned county and town roads. Upon completion of this task his assignment was to undress his equipment and haul sand from Andres Mine to Johnson Mine. He completed his assignment on the County roads and did not perform any snow and ice control on the town roads. As he was preparing his equipment to haul sand, he forgot to remove the sander from the truck and was proceeding to lift the dump box for installation of the tailgate. As a result, he damaged hydraulic and electrical connections and proceeded to spend about 4 hours on repair. He then removed the sander for the day, parked the truck since there was not sufficient time to haul material and did

some cleanup around the shop. He was scheduled to be off the following day and therefore his truck was not in ready condition for Friday or the upcoming weekend for snow and ice control.

Neither the reprimand, nor the 5 day suspension, was grieved.

In the course of the investigation, the County discovered that the grievant had been issued 2 speeding citations while driving his personal vehicle on non work time. Those events had occurred on March 25, 2006 and January 23, 2007. The grievant holds a Commercial Driver's License (CDL). Federal Law requires that CDL holders report such citations to their employer. The grievant had not reported either to his employer because he was unaware that he was required to report non work related citations.

Following the investigation and the release of the grievant from the hospital, the County provided the grievant with a summary of its conclusions related to the accident, which was dated July 6, 2010. On July 12, 2010 the County terminated the grievant by the following letter:

July 12, 2010

J.L.

Re: Disciplinary Action – Discharge From Employment

Dear Mr. L:

Door County's investigation is complete. The results of this investigation are summarized in my July 6, 2010 letter (which is incorporated herein by reference) and substantiated by the documentary evidence supplied to you on July 6, 2010 (which is also incorporated herein by reference).

You were made aware of the foregoing and given the opportunity to address the same. No evidence or authority was offered or put forward by you or the bargaining unit, at or after the July 6, 2010, meeting, that calls into question the County's investigation or findings and conclusions.

Just cause exists for the disciplinary action. Specifically:

1. The findings and conclusions set forth in my July 6, 2010, letter, which are an integral part of Door County's just cause determination.

2. The May 10, 2010, motor vehicle accident and outcome of the accident. Both the accident and outcome were eminently avoidable and a direct consequence of your careless and reckless operation of a motor vehicle.
3. The lack of extenuating circumstances or mitigating factors related to the May 10, 2010, motor vehicle accident.
4. Door County, Case Number 2010-TR-1435 (Note: This is a reference to the traffic citation issued the grievant for the May 10 incident).
5. Your failure to comply with commercial driver's license requirements (i.e., you did not notify Door County of your conviction in Door County Case Number 2006-TR-1550 and Winnebago County Case Number 2007-TR-784) and potential consequences of this failure.
6. Critical failures, by you, to meet the duties and responsibilities set forth in the position description (e.g., failure to observe proper safety rules and traffic laws to avoid employee injuries and traffic accidents; inability to operate county owned motor vehicle(s) in a safe and effective manner; and falling short of meeting commercial driver's license requirements).
7. Door County's management rights and legitimate interests in addressing safety and liability risks created by your acts or omissions.
8. Violation of the collective bargaining agreement as follows:
  - a. Violation of lines 7-10, page 1 in which the employee did not operate equipment for the safety and welfare of himself and others.
  - b. Article 1.B. The employee has received previous disciplinary action in accordance with this procedure. He has received previous disciplinary measures and was made aware the next disciplinary action would be dismissal.
9. Breach of the Highway Commission Employee Handbook as follows:
  - a. Employee Responsibilities, pages 2-3, Items 12 and 17.

- b. Valid Commercial Drivers Licenses, Page 16, Employee is required to be thoroughly familiar with state and local regulations governing motor vehicle operations.

The appropriate level of discipline, in view of all the relevant facts and circumstances, is your discharge from employment with Door County. These relevant facts and circumstances include:

- a. Those set out above;
- b. Your prior record;
- c. The safety-sensitive nature of the job;
- d. The tremendous (potential and actual) liability faced by Door County due to injuries or damages caused by your conduct and the fact that the County should not have to wait for another disaster to take action and mitigate its risk and liability;
- e. Public protection and safety concerns.

Your discharge from employment with Door County is effective immediately.

Please contact me if you have any questions or require additional information.

Respectfully,

John P. Kolodziej /s/  
John P. Kolodziej  
Door County Highway Commissioner

#### ISSUE

The parties could not agree upon the issue to be decided.

It is the view of the Union that the issue is:

Whether the County violated Article 21 of the collective bargaining agreement when it discharged the grievant, J.L.; and, if so, what is the remedy?

It is the view of the County that the issues presented are:

Did Door County have just cause to terminate J.L.?

If not, what should be the remedy?

The dispute in framing the issue goes to what provision of the contract controls this proceeding. That issue will be addressed in this Award. I regard the issue as:

Did the County violate the collective bargaining agreement when it terminated the grievant?

If so, what is the remedy?

**RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT**  
**AGREEMENT**

THIS AGREEMENT, made and entered into this 1<sup>st</sup> day of January, 2008 by and between the Highway Committee of Door County Board of Supervisors, hereinafter referred to as the "Employer" and the Door County Highway Department Employees through their Union, the Door County Employees Union, Local 1658, affiliated with the Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, hereinafter referred to as the "Union", for the purpose of maintaining harmonious labor relations between the Employer and employees, and for purposes of promoting the mutual interest of the employees of the Door County Highway Department and the Board of Supervisors so as to provide for the operation of the equipment and physical properties of the Door County Highway Department under methods which will further to the fullest extent the safety and welfare of the above mentioned members, economy of operations, elimination of wastes, and the quantity and the quality of the results of the scope of operations carried on by the Door County Highway Department. It is recognized by this Agreement to be the duty of the Union and its members and the Board of Supervisors through its Highway Committee to cooperate fully for the advancement of these conditions. This Agreement shall be binding on both parties.

**ARTICLE 1 - MANAGEMENT RIGHTS RESERVED**

...

- B. Disciplinary Procedures: Suspension is defined as the temporary removal without pay of an employee from his or her designated position.
1. Suspension For Just Cause:  
The Employer may for disciplinary reasons suspend an employee. An employee who is suspended, except probationary and temporary employees, shall be given written notice of the reasons

for the action and copy of such notice shall be made a part of the employee's personal history record, and a copy of such notice shall be sent to the Union. No suspension for cause shall exceed thirty (30) calendar days. An employee who has been suspended may use the grievance procedure by giving written notice to his steward and his department head within five (5) working days after suspension. Such appeal will go directly to the third step of the grievance procedure.

2. Suspension During An Investigation:

During an investigation, hearing or trial of an employee on any civil or criminal charge, when suspension would be in the interest of the County, an employee may be suspended with pay by the Employer for the duration of the proceedings. The suspension shall terminate within ten (10) days after completion of the cause for which he was suspended, by reinstatement or by other appropriate action, by resignation or dismissal of the employee.

3. Dismissal:

No employee shall be discharged except for just cause. An employee who is dismissed, except probationary and temporary employees, shall be given a written notice of the reasons for the action, and a copy of the notice shall be made a part of the employee's personal history record, and a copy sent to the Union. An employee who has been discharged may use the grievance procedure by giving written notice to his steward and his department head within five (5) working days after dismissal. Such appeal will go directly to the fourth step of the grievance procedure.

4. Usual Disciplinary Measures Shall Be:

- a.) Oral Reprimand
- b.) Written Reprimand
- c.) Suspension
- d.) Dismissal

C. Written Notice: The Union shall be furnished a copy of any notice of reprimand, suspension or dismissal. A written warning sustained in the grievance procedure or not contested, shall be considered a valid warning. No form of disciplinary action shall be used as the basis of suspension or dismissal after twelve (12) months. In the case of serious infractions, prior warnings are not a prerequisite for disciplinary action, which includes suspension or discharge.



- D. Reasonable Rules: In keeping with the above, the Employer may adopt reasonable rules and regulations and amend the same from time to time, and the Employer and Union will cooperate in the enforcement thereof.

...

## ARTICLE 21 - SPECIAL PROVISIONS

...

The Employer and the Union mutually agree that in order to further the efficient operations of the Door County Highway Department and to promote the welfare and safety of the employees, negligent abuse of equipment shall not be tolerated. It is further agreed that penalties for negligent abuse of equipment committed by an employee shall be as follows:

1. First offense: One (1) week suspension without pay;
2. Second offense: Two (2) weeks suspension without pay;
3. Third offense: Termination from employment

Grievance procedures previously set forth in this Agreement are available to the employees on any questions involving negligent abuse of equipment. The Employer and the Union mutually agree that in order to further the efficient operations of the Door County Highway Department and to promote the welfare and safety of the employees, negligent abuse of equipment shall not be tolerated. It is further agreed that the penalties provided above for failure to use safety devices shall apply along with the same grievance procedures available to the employees.

The above provisions are intended to cover the various situations and conditions that normally occur or exist, however, special conditions may arise which are not covered, in which event the Highway Commissioner and the Union Bargaining Committee shall meet to discuss such conditions and reach such agreements as may be necessary to cover such conditions.

## RELEVANT PROVISIONS OF THE EMPLOYEE HANDBOOK

### **EMPLOYEE RESPONSIBILITIES**

Responsible for performing their job with every possible regard for their own safety and for the rights and safety of others, and for compliance with all federal, state, and county safety standards that apply to the performance of their job. This includes:

- ...
12. Obey all traffic laws. Any traffic ticket received due to violation of the law will be the responsibility of the employee.

- ...
17. Always consider the safety of the traveling public when working on or adjacent to any highway.
- ...

## **VEHICLE OPERATION AND REPAIR**

### **4.01 VALID COMMERCIAL DRIVERS LICENSES**

All employees operating county motor vehicles must have a Commercial Drivers License (CDL) and they must be thoroughly familiar with state and local regulations governing motor vehicle operations.

### **POSITIONS OF THE PARTIES**

It is the position of the County that the May 10 accident was the result of driver error. There were no extenuating circumstances contributing to the crash. The crash caused considerable damage, injury to the employee, and presented a serious public safety risk to the public. It is the view of the County that the grievant's actions violate the "essential duties and responsibilities" set forth in his job description, the safety and welfare statement contained in the collective bargaining agreement, and the employee responsibilities found in the employee handbook.

The County made a thorough investigation of the matter, before acting.

The County notes that the grievant is required to maintain a CDL as a condition of employment. As a condition of holding a CDL the grievant is subject to the federal requirement that he advise his employer of traffic violations. The grievant received two such violations, and failed to report them, as required. In the view of the County this failure to report is further demonstration of his lack of attention to detail. The County reviewed the grievant's past disciplinary history and work record, including the December, 2009 incident and concludes that the grievant has been provided with progressive discipline. It is the view of the County that the grievant cannot perform the duties of the job, and is a safety and liability issue.

The County addressed a previous arbitration award between these parties, the Merkle award, and believes it to be distinguishable. Merkle was a long term employee, with a good

driving record. Merkle had a single accident. There was no CDL like issue involved with Merkle. In the view of the County Merkle demonstrated a satisfactory and unblemished work record, while the grievant has not.

It is the view of the Union that the County violated the contract by not applying Article 21 to this discipline. It is the view of the Union that Article 21 applies directly to the facts of this case. The Article sets forth a sequence of discipline which permits no exception, other than the "special circumstances" which would cause the Highway Commissioner and the Union Bargaining Committee to meet and discuss the matter.

The Union cites the Merkle award, whose facts are alleged to parallel the facts in this dispute. The Union points out that the Merkle arbitrator applied Article 21 to sustain the discipline, while rejecting the Union's contention that the just cause standard should be applied.

Under Article 21 the County could impose, at most, a 2 week suspension. The only alternative was to approach the Union with an assertion that the case involved "special conditions". No such agreement was discussed or achieved.

In its decision to terminate the grievant, the County referenced the citation issued for the accident. It is the view of the Union that such reliance is in error in that the grievant had contested the citation, had not even attended a pre-trial conference on the matter, and enjoyed a presumption of innocence.

It is the view of the Union that the County could not discipline the grievant for a failure to notify the County of moving violations because the County never put the grievant on notice that he was required to provide such notice or that a failure in this regard subjected the grievant to discipline. It is the view of the Union that the grievant did not breach any provision of the handbook.

### DISCUSSION

The parties disagree as to which provision of the collective bargaining agreement controls this dispute. Critical to the analysis of that dispute is the question as to the relationship between Article 1 and Article 21. It is also critical to the analysis whether the grievant's actions on May 10 constituted "negligent abuse of equipment".

On its face, it appears that Article 1 is a disciplinary process, generally applicable to disciplinary matters. Article 21 appears, by its own terms, to be a special provision that addresses how discipline will be handled where there is alleged to be "negligent abuse of equipment".

These parties have confronted this question before. In the Merkle case, (DOOR COUNTY HIGHWAY EMPLOYEES LOCAL #1658, AFSCME, AFL-CIO AND DOOR COUNTY WERC Case 150, No. 64492, MA-12916, 2/3/06, Millot) the Arbitrator summarized the operative facts as follows:

The Grievant, Allen Merkle, has been employed by the County Highway Department for eleven years in the position of truck driver. He currently drives truck 034 which is a 3000 Sterling tri-axle with an automatic load box for sanding and salting. The Grievant has driven this 65,000 pound vehicle since 2003. Prior to the accident of August 23, 2004, the Grievant had a clean driving record with the County.

On August 23, at approximately 10 a.m., the Grievant was involved in a single vehicle motor vehicle incident with truck 034. He was driving Southbound with a load of gravel on County Highway U enroute to Johnson's Pit where he was scheduled to drop off the gravel. The Grievant had begun his workday at 6 that morning and this was the third time on August 23 that the Grievant had hauled a load of gravel to that location. The Grievant's truck left the paved roadway and ultimately turned on its side in the ditch leaving the Grievant suspended from the ceiling of the cab of the truck by his seat belt. The Grievant released the seatbelt and fell to the seat/floor of the cab area and sustained injuries as a result of this fall. Truck 034 sustained greater than sixty five thousand dollars in damage excluding loss of the vehicles' use costs due to the accident. The Grievant was off work for ten days due to his injuries and received workers' compensation benefits.

Following an investigation the grievant was given a five day disciplinary suspension which was confirmed by the following letter:

The County's investigation is complete. It has been determined that you engaged in negligent abuse of County equipment arising from the August 23, 2004 motor vehicle incident. Specifically: you were operating a County owned vehicle in the scope of your employment, you veered off the traveled portion of the road and rolled the vehicle over, which resulted in a substantial amount of damage to the vehicle. Your careless operation of the vehicle is the sole explanation for this motor vehicle incident. This conduct is not acceptable and will not be further tolerated.

There was no citation issued in the Merkle case. The grievant, Merkle, was a long term employee with a strong driving record. Merkle was given discipline because the County concluded that he had lost control of his vehicle due to driver negligence.

In analyzing the dispute between the parties, Arbitrator Millot discussed the relationship between Article 1 and Article 21. Her discussion included the following:

The Union argues that the County lacked just cause and deviated from the progressive discipline model when it issued the Grievant a five-day suspension. The Grievant was disciplined pursuant to Article 21 and there is no language in Article 21 that indicates the just cause standard is applicable when issuing discipline. This language is contrasted with the Article 1, Disciplinary Procedures, which recognizes suspensions for “cause” and discharges for “just cause”. Article 1 is the general section that addresses disciplinary sanctions and the disciplinary procedure, while Article 21 is the specific section that addresses unique circumstances in which the parties agreed that discipline was warranted. Since the parties bargained language that imposes a penalty for *negligent abuse of equipment* that places the welfare and safety of employees at risk, they have agreed that just cause exists should an employee engage in such behavior. Therefore, the question is whether the Grievant was guilty of *negligent abuse of equipment*?

I believe that Arbitrator Millot’s treatment of the relationship between Article 1 and Article 21 reflects the plain meaning of the two provisions. It gives meaning to both and offers a pragmatic analysis as to how the two provisions interact with one another. The award disposes of the question raised in this proceeding as to how the provisions are to be analyzed. The parties dispute which provision is to be applied. I read the Merkle award to require application of Article 21 when discipline of employees for negligent abuse of equipment is under review.

This leaves the question, was the grievant’s actions of May 11, 2010 negligent abuse of equipment? Once again, the Merkle award is instructive. In Merkle the parties argued over the meaning of “negligent abuse”, including the question of whether human error in the absence of intent to harm could constitute “negligent abuse”. Arbitrator Millot came to the following conclusion as to “negligent abuse”:

The Grievant was an experienced driver. He was driving a vehicle that he had consistently driven for greater than two years on a road that he regularly traveled including two times earlier that day. It is unknown what caused the Grievant to drive his truck off of the paved roadway. The road was dry, the day was clear, and no evidence was offered indicating an intervening event. The Grievant did not exercise a reasonable and proper care while driving, to which resulted in him losing control of the vehicle, the vehicle leaving the paved roadway and overturning resulting in substantial damage to the vehicle and injury to the Grievant. The County has established that the Grievant failed to exercise proper judgment when he drove truck 034 off the paved roadway onto the shoulder, was unable to return the vehicle to Highway U and it overturned. This constitutes negligent abuse of equipment.

Having found that the Grievant negligently abused County equipment in violation of Article 21, the disciplinary sanction of a one-week suspension

without pay is not subject to review. My role is limited by the negotiated language of the labor agreement. The parties bargained and agreed that negligent abuse of equipment carries with it severe penalties, therefore it is immaterial whether I believe this penalty reasonably relates to the severity of the offense.

I believe her application of the term “negligent abuse” to the circumstance presented in her hearing is dispositive as to the meaning of the contract.

For purposes of this proceeding, I find the facts surrounding the accident in this case *meaningfully indistinguishable* from the facts of Merkle. In both cases drivers were involved in single vehicle accidents, brought about by driver error. There were no mitigating circumstances. Both drivers overturned their vehicles on curves they had previously traveled. Both accidents resulted in significant injury to the driver and considerable property damage. The disciplinary letter issued in Merkle, set out on page 11 of their award, describe the event in this proceeding. The same is true of arbitrator Millot’s analysis of negligent abuse set forth on page 12 of this award.

This analysis leads to the application of Article 21 in this matter. As noted by Arbitrator Millot, Article 21 limits the role of the Arbitrator. The parties have agreed that the progression of discipline set forth in Article 21 “shall apply”. The grievant has a 1 week suspension for negligent abuse of equipment in his disciplinary history. The County argues that the grievant is a less senior employee than was Merkle, has a much worse driving record, and, unlike Merkle, was cited at the scene of the accident. While all this may be true, it does not serve to re-write the explicit provisions of Article 21.

Article 21 provides; “It is agreed that penalties for negligent abuse of equipment committed by an employee shall be as follows: ... Second offense: Two (2) weeks suspension without pay...” The County argues that there are factors, such as the grievant’s driving record, that should influence the outcome of this decision. However, I read Article 21 as directing me to apply its provisions as written. This is consistent with the Merkle award, where the arbitrator concluded that Article 21 removed arbitral discretion to consider mitigating or exacerbating factors. The parties have contemplated the inevitability that no two incidents are identical, and have stipulated that the prescribed schedule of discipline is to be applied notwithstanding those differences.

The County set forth 9 numbered reasons for the termination. I believe that all but No.’s 5 and 9 derive from the circumstances of the accident and the grievant’s driving record, which I believe to be covered by Article 21. Reasons number 5 and 9 go to the failure of the grievant to advise his employer that he had received traffic citations for off the job driving. He testified that he was not aware that he was under an obligation to so inform his employer. I do not believe the employee handbook makes clear that such an obligation exists. The handbook does make clear the fact that traffic tickets are the responsibility of the employee, and also cautions the employee to be familiar with state and local rules.

I agree that the grievant was responsible for reporting the tickets. I do not agree that this omission pushes the discipline to the termination level. The failure to report is not *negligent* abuse of equipment. It therefore falls under Article 1. Under Article 1 the usual disciplinary step would be a reprimand. If the grievant was unaware of the reporting requirement such a warning should be sufficient to bring it to his attention so that it does not recur.

Article 21 has a paragraph which applies if special conditions arise. It permits the Highway Commissioner and the Union to meet under such conditions and seek an agreement. It would appear that the paragraph is designed to apply where one or both parties agree that the disciplinary sequence set forth in Article 21 is not appropriate to the circumstances. It does not appear that this paragraph was invoked.

### AWARD

The grievance is sustained.

### REMEDY

The discharge is reduced to a two week suspension without pay pursuant to Article 21. The grievant is to be made whole for lost wages and benefits other than the lost wages and benefits, if any, that arise from the two week suspension. The County is entitled to offset the back pay with interim earnings and Unemployment Compensation, if any. The County is authorized to issue a warning for the grievant's failure to report that he had been issued traffic citations under non-work related circumstances.

### JURISDICTION

I will retain jurisdiction over this matter for a period of 60 days to resolve disputes over the remedy directed.

Dated at Madison, Wisconsin, this 16th day of March, 2011.

William C. Houlihan /s/

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William C. Houlihan, Arbitrator

WCH/gjc  
7706