

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

No. 24263-A

(d) ~~To establish and enforce reasonable work rules;~~

(e) ~~To establish and apply uniformly reasonable standards of job performance; and~~

(f) To suspend, discharge or otherwise discipline employees for just cause.

(g) All of which shall be in compliance with and subject to provisions of this agreement and provided that nothing contained herein shall be used by management to discriminate against the union or any employee.

Article XVII of said contract, entitled "Leaves of Absence", stated:

Granting Of. Employees may be allowed a leave of absence without pay for a period not to exceed one (1) year. Such leave is subject to the approval of the department head.

. . .

Furthermore, there was no provision in the contract providing for light duty status for those employees medically unable to do their regular job duties.

4. Norman Tveit was employed by the City since 1965 as a laborer. In January 1977, Tveit incurred an on-the-job injury which necessitated that he undergo major spinal fusion surgery and he was off work for several months. Upon his return, and under a medical restriction which provided that he could not lift anything over 40 pounds (subsequently raised to 50 pounds in 1985) Tveit worked as a parks laborer, doing so only after the duties of said job were significantly altered to accommodate his medical condition. Over time, Tveit was unable to perform more and more of his regular job duties so that at the end of his employment he was unable to perform duties relating to snow shoveling; planting trees; digging holes; removing trees; receiving and moving heavy park equipment; picking up garbage; and changing equipment.

5. Tveit was on sick leave for several weeks in 1979; for about two (2) months in 1980; and for about three (3) months in 1984. Because of such absences, Robert M. Holling, the City's Director of Parks and Recreation, by letter dated February 13, 1985, warned Tveit that his poor attendance record "will be closely monitored during the next six month period" and that if it did not improve, "I will recommend to the City Administrator that you be sent for a complete physical examination." Thereafter, Tveit's attendance improved, but he subsequently missed work again during the week of October 8-13, 1985. The City then had Tveit examined by its own doctor, Dr. Paul Schmidt, who by letter dated December 10, 1985, informed the City:

On November 21, 1985, I examined Norman Tveit at your (sic) request. This gentleman stated he has lost two to three days of work because of his back pain approximately two to three times over the last year. He states that a job such as shoveling and heavy lifting aggravate his back pain. Of special note is that the patient has had a laminectomy for a slipped disc in the past.

* * *

My assessment is that Mr. Tveit has chronic back pain due to a previous slipped disc and subsequent surgery with evidence of ligamentous weakness of the lower back. I feel he should be limited in prolonged repetitive back movements, such as shoveling snow or dirt greater than one-half hour in duration. I also feel he should have a 50# weight lifting restriction. Should he continue to have back pain and work loss in spite of these restrictions, I would recommend referral for orthopedic evaluation.

. . .

6. Following receipt of said report and in an effort to comply with Dr. Schmidt's recommendation that Tveit be assigned to light duty, Holling and Parks Supervisor Larry Hernan by letter dated January 6, 1986, advised City Administrator Richard M. Finn that Tveit be placed on light duty status for six (6) months.

On the next day, Finn met with Holling, Hernan, Tveit and a Union representative to discuss Tveit's continued employment. Finn stated that he would put Tveit on light duty for six (6) months, but warned that if Tveit could not perform his regular duties by the end of that time that he would consider permanently reclassifying him to another job; placing him on an unpaid leave of absence; or terminating him.

7. On February 5, 1986, Tveit had an orthopedic exam performed by Dr. Ernest Pellegrino, his personal doctor, who by letter dated February 5, 1986, advised the City:

The patient comes in for evaluation of his back. He has had spine surgery (sic) done by me in 1977 for a spondylolisthesis. He underwent a decompressive laminectomy with bilateral-lateral fusion from L-5 to S-1. He has been working through the years as a laborer for the Parks Department for the City of Sun Prairie. The past couple of years he has been having some increasing discomfort related to some specific activities, primarily shoveling, heavy lifting. He has seen both Dr. Justl and Dr. Paul Schmidt for this. He has been put on light duty and his employer would like a definitive diagnosis and prognosis.

* * *

Recommendations:

It is my feeling that the patient's back symptoms are consistent with the fact that the L-4, 5 level is the area that is stressed most about his fusion and likely to degenerate as time goes on. Basically I feel that continuing to be employed gainfully, but should have a permanent light duty status so as to avoid lifting beyond 50 pounds. The light duty status is described, which is to include avoiding snow shovel (sic), planting trees, digging holes, etc. is appropriate for this individual, and I believe should be on a permanent basis.

8. On July 15, 1986 another orthopedist chosen by the City, Dr. George Vogt, examined Tveit and by letter dated July 15, 1986 in essence advised the City that he agreed with Dr. Pellegrino's diagnosis that the restrictions on Tveit would have to be permanent.

9. On July 28, 1986, the City met with Tveit and his Union representative, at which time the various physicians' reports were reviewed and Tveit was asked if he disagreed with any of their recommendations, to which he said no. The City reiterated that the light duty position it had created for Tveit had always been a temporary accommodation pending further medical evaluation to determine if Tveit's condition was temporary or permanent. The Union stated on Tveit's behalf that the light duty status should be continued for an additional six months or longer, but the City refused to do so because there was no evidence that Tveit's condition would improve during that period. The Union next suggested that Tveit's wage rate be nominally reduced to reflect the fact he could not do the normal job functions, but the City again refused, saying that that would not help in getting the work done which was the primary problem with Tveit's continuing disability.

At that time Tveit was placed on an involuntary paid medical leave of absence and given one (1) week to consider the three earlier options offered by the City. After Tveit on August 4, 1986 advised the City that he was refusing those options, the City on August 5, 1986 placed him on an involuntary unpaid medical leave of absence which continued up until the time of the instant hearing. In said capacity, Tveit is eligible to apply for any City positions for which he is qualified and he is entitled to reinstatement to his former position if his medical restrictions are lifted.

10. Throughout the years that the City assigned lighter duties to Tveit in order to accommodate his medical disability, it experienced greater and greater difficulties in having his regular duties performed by anyone else since Tveit's ability to perform physically demanding tasks dropped from about seventy (70)

percent of his job duties in 1977 to thirty (30) percent in 1986, with Parks Department supervisor Hernan in 1986 performing about forty (40) percent of Tveit's regular duties.

11. Tveit on August 13, 1986 filed a grievance under the contractual grievance procedure protesting his leave of absence and the City subsequently denied it. Tveit on August 15, 1986 also filed a complaint with the Wisconsin Department of Industry Labor and Human Relations, alleging that the City had discriminated against him because of his medical disability. Said complaint was subsequently dismissed upon a finding that "There are no facts that indicate that Respondent used (Tveit's) handicap as a factor against him in its actions."

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

The City did not violate Section 111.70(3)(a)5, Stats., or any other section of MERA, by relieving Norman Tveit of his duties.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

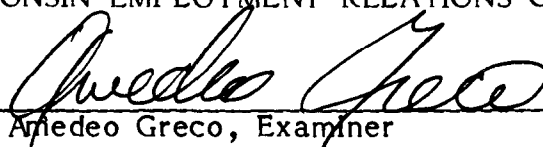
ORDER 1/

IT IS ORDERED that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 26th day of August, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Amideo Greco, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The Union argues that the City treated Tveit unfairly by letting him go after 21 years of service because of a proven medical injury and that it in fact should have continued to assign him light duties, just as it had in the past. It also asserts that the City violated the contractual provision relating to medical leaves of absence because, in its words, "The clear provisions of Section 17.01 do not allow the employer to place an employee on a leave of absence without some type of concurrence with the employee." This latter point is well taken since Section 17.01 is totally silent as to whether the City itself can place employees on an involuntary leave of absence, thereby indicating that only employees can trigger such leaves, which certainly was not the case here.

However, this technical argument overlooks the fact the City nevertheless retained its managerial right under Article II of the contract to totally terminate Tveit because of his continuing inability to perform his regular job duties as a laborer, an inability which Tveit himself admitted precluded him from doing about forty (40) percent of the physical tasks involved in his job. Thus, Tveit was unable to perform such basic laborer tasks as shoveling snow; planting trees; digging; removing trees; receiving and moving heavy park equipment; picking up garbage; and changing equipment. Since the City's Parks Department consisted of only three employees and inasmuch as proper operation of the City's 21 parks require the performance of such tasks, the record establishes that the City by 1986 no longer could afford the luxury of juggling Tveit's work assignments to accommodate his medical condition, one which by that time had become permanent and with no sign of ever improving.

That being so, and in the absence of any contractual language requiring the City to place employees on light duty status, the City was free to terminate Tveit under Article II which gave it the right to "establish and apply uniformly, reasonable standards of job performance"; to layoff employees whenever it "believes continuation of such work would be inefficient or unproductive;" and to "plan, direct, and control the operation of the work force." It therefore is immaterial that the City placed Tveit on an involuntary leave of absence, rather than formally terminating him, since: (1) Tveit was not in any way prejudiced by the City's action; (2) the City did so only as a favor to Tveit so that he could retain his seniority and bid on jobs during his leave; and (3) said leave in any event constituted an effective termination given that Tveit would never be able to medically recover and perform all his former job duties. As a result, it must be concluded that the City's actions were not violative of the contract and that the complaint must be dismissed in its entirety. 2/

Dated at Madison, Wisconsin this 26th day of August, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Amedeo Greco, Examiner

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- 2/ The City requests that the Union be ordered to pay attorneys fees in this case, claiming that the "Complaint is frivolous and has been pursued in bad faith." Since there is some factual basis for finding that the City improperly placed Tveit on an involuntary leave of absence, and because the Commission in any event seldom grants this remedy, it is denied.