STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL TEAMSTERS UNION LOCAL 662, Complainant, vs. SCHOOL DISTRICT OF WINTER, Respondent.	Case 31 No. 41929 MP-2208 Decision No. 25993-A

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 788 North Jefferson Street, P.O. Box 92099, Milwaukee, Wisconsin 53202, by Mr. William S. Kowalski, appearing on behalf of Complainant Union.
Coe, Dalrymple, Heathman & Coe, S.C., 24 West Marshall Street, P.O. Box 192, Rice Lake, Wisconsin 54868, by Mr. Edward J. Coe, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

General Teamsters Union, Local 662, filed a complaint on March 16, 1989 with the Wisconsin Employment Relations Commission, alleging that the School District of Winter had violated Sec. 111.70(3)(a)5, Wis. Stats. by discharging custodian Ronald Koach. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5). A hearing was held in Radisson, Wisconsin on June 20, 1989, at which time all parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs and reply briefs, and the record was closed on September 20, 1989. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. General Teamsters Union, Local 662 is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., and has its principal office at 119 West Madison Street, Eau Claire, Wisconsin 54702.

2. School District of Winter is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., and has its principal office at Winter, Wisconsin 54896.

3. At all times material to this proceeding, Complainant Union has been the exclusive bargaining representative of all regular full-time and regular part-time maintenance and custodial employes, cooks, and bus drivers, but excluding managerial employes, supervisors and confidential employes.

4. Complainant and Respondent District have been parties to a series of collective bargaining agreements, of which the most recent is in effect to July 1, 1988 to June 30, 1991. This agreement provides the following provisions relevant to this matter:

ARTICLE X

DISCHARGE

A. No employee covered by this Agreement shall be suspended or discharged except for just cause.

B. The Employer shall give the employee involved and the appropriate Union representative at least seven days' notice prior to the effective date of any suspension or discharge. Such notice shall contain a full explanation of the reason for the action, and shall be in writing with a copy to the Union steward and to the Union office at Eau Claire, Wisconsin.

C. Nothing in the foregoing shall prevent the Employer from immediately removing the employee, for just cause, from the premises or job assignment pending final disposition of the case.

D. The question of whether "just cause" exists for the

suspension or discharge shall be subject to the grievance procedures provided herein.

5. Ronald Koach has been employed by the District as a part-time custodian, and also as a bus driver. Koach began working as a custodian on or about December 15, 1987 at the District's Winter School building, and worked four hours per day or 20 hours per week during the school year. Subsequently, Koach was employed to work as a school bus driver with a regular route. On or about January 24, 1989, Koach was discharged by the District from his custodian position; his bus driving duties were not affected and he continued in that employ. Complainant Union filed a grievance on Koach's behalf and processed that grievance through the contractual steps of the parties' grievance procedure; the grievance was not settled, the parties' procedure does not provide for binding arbitration, and on March 16, 1989 Complainant Union filed the instant complaint.

6. The record shows that Ronald Koach was discharged following a January 20, 1989 incident in which Koach failed either to report to work or to call in to indicate that he would not be available. The record demonstrates that on three prior occasions Koach had either been more than an hour late for work or had failed to report to work, and that in each instance he had failed to call in to advise his supervisor of his impending absence. The record demonstrates that Koach was told when he was initially hired that he was expected to be at work when scheduled and that if he was not able to be present, he was expected to notify his supervisor in advance. The record demonstrates that Koach was told immediately or shortly after each incidence of absenteeism that this was not acceptable conduct. But the record further demonstrates that in none of these instances was Koach given a written reprimand or a suspension, nor was he specifically warned that his job was in jeopardy. The record demonstrates that Koach maintained a consistent attitude that it did not matter when he performed his work because it was performed at night, and that he paid little attention to such warnings as he was given.

7. The record demonstrates that Koach repeatedly ignored requests that he present himself for work when scheduled to do so or call-in in advance; but it also demonstrates that at no time did the District explicitly warn Koach that he was in danger of losing his employment because of his repeated failure to follow this instruction. The record therefore shows that the Respondent District did not have just cause to discharge Koach.

Upon the basis of the foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

The School District of Winter violated Article X of the parties' 1988-1991 collective bargaining agreement by discharging Ronald Koach without just cause, and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)(5) of the Municipal Employment Relations Act.

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

ORDER 1/

IT IS ORDERED that Respondent School District of Winter, its officers and agents shall immediately:

Cease and desist from violating the parties' 1988-1991 collective bargaining agreement.

Take the following affirmative action, which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

(a)Offer immediate reinstatement to Ronald Koach as to his custodian position, without backpay but with full seniority rights.

(b)Notify the Wisconsin Employment Relations Commission in writing within 20 days from the date of this Order as to what steps it has taken to comply therewith.

Dated at Madison, Wisconsin this 18th day of October, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, 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 complaint alleges that Respondent District violated the collective bargaining agreements "just cause" provision by discharging Ronald Koach from his custodial position and that that in turn violated the Sec. 111.70(3)(a)(5) of MERA. Some of the essential facts are stated in the Findings and will not be repeated here.

BACKGROUND

Ronald Koach was initially hired as a custodian, and admitted in testimony that when he was hired, he was told that he was expected to adhere to his work schedule and to call head custodian Donald Hopkins if he would be unable to do so. On March 3, 1988 Koach was two hours late for work, did not call Hopkins in advance, and when Hopkins came in himself at 6:00 the following morning he found Koach (who had punched out at the end of his four-hour shift but remained at the school waiting for his bus driving shift to begin) talking to a lady friend whom Koach described as having arrived at the school at 3:00 a.m. There is no dispute that Koach was told he was supposed to be on time and that he was not permitted to have other people in the building. On November 22, 1988 Koach did not report to work or call in, and the following morning, when he was scheduled to begin work at 7:00 a.m., he arrived at 8:30. He was informed on this occasion, according to Hopkins, that it was not acceptable for him to fail to show up for work. With respect to this incident, Koach stated that he was lost in the woods hunting deer and could not find a telephone; but Hopkins testified without subsequent rebuttal that Koach had told him about the time of this incident that he was out of the woods by 10:30 or 11:00 p.m., and that this would have permitted Koach to call Hopkins that night and/or to appear for work on time the following morning.

On December 16, 1988, the custodians' Christmas party was held, and Koach called Hopkins and asked if he could be late to work as a result. According to Koach, he said that he might be "two or three hours late" for his 7:00 p.m. starting time; according to Hopkins, Koach requested if he could be as much as two hours late. There is no dispute that Koach subsequently began work at 10:41 p.m. On December 29 Koach met with Hopkins, and according to Hopkins, Koach was told that his failure to show up for work within the time extension he had been given was unacceptable. According to Koach, Hopkins said on this occasion that Koach was not entitled to take a lunch break during his four-hour shift, and said nothing about working during his scheduled hours.

On January 20, 1989 Koach was scheduled to work from 7:00 p.m. to 3:00 a.m., and neither appeared for work nor called in. The following morning, Hopkins went to the school and discovered that Koach had not been there. Hopkins proceeded to do the bulk of Koach's cleaning duties himself. Because he was absent, Koach had not stoked the wood-fire boilers in the elementary and high schools, but there is no dispute that in this instance no actual damage resulted, as one boiler was set to automatically switch to oil firing in the absence of heat from the wood boiler and the other was manually switched to oil by the last custodian departing on January 20 in Koach's absence. On January 22, the Sunday of that weekend, Koach was not scheduled to work, but went in to work at 10:35 a.m. and proceeded to work for three hours. In his testimony he stated that not all of his work had been done in his absence, and that although he did not punch out on that day he actually left at about 1:30 p.m. On Tuesday, January 24 Koach was called into a meeting by Hopkins and was informed that he was terminated for repeated failure to show up for work or call in.

Koach admitted in his testimony knowing that it was important to show up for work when expected to do so. He testified that with respect to January 20, 1989 in particular, he had taken two different types of medication and had eaten nothing that day, and passed out. Koach testified that he slept on and off for about 24 hours, but admitted that he "probably should have tried" to call Hopkins. Koach also testified that he had been told by District Administrator Barry Bay that his hours were flexible; but on cross-examination, Koach admitted that what he was told was that if his bus driving resulted in his being late for work as a custodian, his hours could be moved backward to accommodate that.

Custodian Bob Buckwheat testified that in the fall of 1988 Hopkins had told him that he would find a way to get rid of Koach. But on cross-examination, while denying that this remark was made in response to a complaint of his about Koach, Buckwheat admitted that he had complained about Koach to Hopkins on at least two occasions, once about Koach refusing to follow instructions and again about Koach appearing at work smelling of alcohol. Hopkins, in his testimony, denied ever telling Buckwheat he would get rid of Koach.

It is undisputed that at no time did the warnings and instructions given to Koach concerning his tardiness and absenteeism contain an explicit statement

to the effect that he continued in this pattern greater discipline or discharge would be imposed.

THE PARTIES' POSITIONS

Complainant concedes that Koach did not act properly in his various failures to appear on time or at all, without calling in. Complainant argues, however, that an elementary principle in labor relations is that if the employer is to have just cause to discharge an employe, the employer must first have put the employe on notice that continued conduct of the same kind may subject the employe to discharge. Here, the Union notes, no such explicit warning was given. Accordingly, Complainant argues, the District has failed the test of just cause required under the collective bargaining agreement, citing Mead Company 2/ and Empire Tractor and Equipment Company. 3/ Complainant argues that discharge is the capital punishment of the industrial society and cannot be imposed where the employe has not been fairly warned that he is liable to it. Accordingly, Complainant contends that the discharge was without just cause and that it should be reduced to a warning letter, with the Grievant being reinstated to his position with full backpay.

Respondent contends that there is nothing more basic in employment relationships than the requirement that the employe report for work when scheduled to do so, and that Koach admitted knowledge that this was a universal requirement in all work places. Respondent contends that Koach was repeatedly warned that this was a transgression and that the importance of the rules was repeatedly emphasized to him. Respondent argues that Koach's conduct evidences willful disregard of the rule and that the repeated nature of the offense justified the eventual discharge of Koach from his custodial duties.

DISCUSSION

I note initially that this matter presents a clear case both of employe misconduct and of employer failure to give adequate warning. Where Koach's account of his discussions with Hopkins differs from Hopkins', I credit Hopkins; Koach's version is not only self-serving, but with respect to the December 16 incident in particular, it strains belief that Hopkins would make no reference to the requirement for an employe to be present during his scheduled hours and would instead digress into the subject of when and if an employe was entitled to a lunch break once at work. Accordingly, I find that Koach ignored repeated instructions to present himself at work on time, and that his tardinesses and absences were more than the ten-or twenty-minute latenesses which commonly result in an employer's irritation, but less commonly justify discharge.

At the same time, Complainant is correct in its assertion that an employe is entitled to fair warning of the consequences of his conduct as well as its unacceptability, in order for an employer to be justified in so severe an act as discharge, particularly where the conduct involved is not of an immediately hazardous or directly insubordinate nature. And again the record is quite clear that no plain warning of impending discharge was given. Even though there is no specific scheme in this contract for progressive discipline, therefore, I find that by its conduct the District failed an elementary principle of fair

2/ 80 LA 713 (Arbitrator Milentz, 1983).

3/ 85 LA 345 (Arbitrator Koven, 1985).

treatment, which requires that an employe have reason to understand what repetition of his offense will bring.

This combination of circumstances requires that I find that the Respondent acted without just cause in discharging Koach, but that some lesser penalty would be appropriate. The Union argues here for the minimum possible penalty of a written warning. That, however, would be appropriate only if the balance of equities here strongly favored Koach; and I cannot find that to be the case. While the District has erred by failing to give the clearest possible warning to Koach, I cannot ignore the fact of Koach's repeated failure to follow a basic instruction, nor is it fair to overlook the attitude demonstrated by Koach at the hearing as well as in his prior relationships with the District. Simply put, Koach's entire conduct has indicated a refusal to give any weight to the Employer's proper demands, and even at the hearing Koach essentially maintained in his testimony that the District should not need to have him appear for work when told to, because he works at night and in his opinion his work can be done any time before school begins again. This demonstrates the willful disregard which the District accuses him of, and justifies finding that had the District taken the one additional step of giving Complainant explicit warning that discharge could result from further infraction of this kind, it would now have just cause for this discharge. Accordingly, I conclude that while reinstatement without backpay is a remedy to be imposed under limited circumstances, such as where the procedural failure of the employer is the sole factor militating in favor of a finding of "no just cause", there is both precedent for such a finding in prohibited practice cases of this nature and appropriateness in reaching that remedy here. 4/

Dated at Madison, Wisconsin this 18th day of October, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

4/ For example, Frank L. Wells Company, Dec. No. 16381-B, C (WERC, 11/78) and Webster Electric Company, Inc., Dec. No. 14909-B,C (WERC, 1/78) both involve similar combinations of employe misconduct and employer inappropriateness in setting and maintaining standards, and both resulted in reinstatement without backpay.