

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 BELOIT CITY EMPLOYEES, LOCAL :
 UNION NO. 643, AFSCME, AFL-CIO :
 :
 and : Case 78
 : No. 41892
 : MA-5494
 CITY OF BELOIT (DEPARTMENT :
 OF PUBLIC WORKS) :
 :

Appearances:

Mr. Thomas Larson, Staff Representative, AFSCME, Council 40, appearing on behalf of the Union.

Mr. Daniel T. Kelley, City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and City respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on May 4, 1989 at Beloit, Wisconsin. The hearing was not transcribed and the parties filed briefs which were received May 23, 1989. Based on the entire record, the undersigned issues the following award.

ISSUE

At hearing, both parties requested that the arbitrator issue a bench decision on a procedural issue, namely the timeliness of the grievance, before they proceeded with the merits. In accordance with this request, the undersigned issued such a bench ruling. Therein, I held that the grievance was procedurally arbitrable. 1/

The parties were unable to agree upon the substantive issue and requested the arbitrator to frame it in his award. 2/ The arbitrator frames the issue as follows:

Did the City violate the collective bargaining agreement when it disciplined the grievant with a three (3) day suspension for sick leave abuse? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

The parties' 1987-88 collective bargaining agreement contained the following pertinent provision:

1/ In their brief, the Employer takes exception to that ruling and urges the arbitrator to reverse it. After reviewing same, the undersigned declines to do so. That being the case, the bench ruling that the instant grievance is procedurally arbitrable is hereby reaffirmed.

2/ The Union states the issue as:

Did the Employer have just cause to suspend the grievant, Charles Hemerley? If not, what is the appropriate remedy?

While the City states the issue as:

Did the Employer unjustly discipline the grievant?

ARTICLE VIII

Sick Leave Insurance

. . .

8.07 Any abuse of sick leave will subject an employee to a three (3) day suspension without pay. Any continued abuse of sick leave will subject an employee to discharge.

FACTS

Grievant Charles Hemerley has been employed by the City for nine (9) years as a refuse collector and bus driver. Prior to the three (3) day suspension which is the subject of the instant grievance, Hemerley had never been disciplined before.

Vacation request in Hemerley's department (the Department of Public Works, hereinafter DPW) are made by April 30 for the remainder of the year. A popular time for vacation requests is during the gun deer hunting season. In 1988, 3/ gun deer hunting season occurred around November 18-23 and Hemerley, a deer hunter, requested vacation for those dates. His vacation request for November 21-23 (Monday-Wednesday) was granted, but his vacation request for Friday, November 18 was denied based on his seniority ranking. On November 14, Hemerley again requested vacation for November 18 and his request was again denied because that date was being taken by other employes with more seniority. Hemerley was irritated that his vacation request for Friday, November 18 was not granted.

Hemerley called in sick on Thursday, November 17. This call was answered at 6:00 a.m. by the on-duty person at the waste water treatment plant. Hemerley testified he had a sore throat that day and that he went to the drug store to get some cold medicine for it.

Hemerley was absent the next day, Friday, November 18. That day, Hemerley's wife called the waste water treatment plant and told the on-duty person that her husband would not be at work that day due to illness. Hemerley testified that he still had a sore throat that day and just generally did not feel good. He further testified that he stayed at home that day and slept a lot.

Don Dorcey, Hemerley's supervisor, testified he received a sealed envelope for Hemerley from the Beloit Transit System on November 17. Dorcey, knowing that Hemerley had signed up for a training program with Beloit Transit and knowing Hemerley was on vacation from November 21-23, felt he should reach Hemerley with the envelope on November 18.

Dorcey drove to Hemerley's house in Beloit on November 18 at 1:25 p.m. to deliver the envelope. He knocked on the front door of the one-story three-bedroom house and rang the door bell (which was in working order), but no one answered the door. Dorcey testified that Hemerley's white truck was in the driveway at the time.

Finding no one home, Dorcey returned to the DPW shop and called Hemerley's house at 2:10 p.m. Dorcey testified he let the phone ring 30 times, his standard operating procedure when calling an employe. No one answered the phone.

Dorcey then returned to Hemerley's house at 3:20 p.m. He knocked on the front door and rang the door bell, but no one answered. Dorcey, believing no one was home, put the envelope from Beloit Transit in the mail box. Dorcey testified Hemerley's truck was still in the driveway.

3/ All dates hereinafter refer to 1988.

Hemerley's explanation for not responding to Dorcey's knocking on the door or phone call was that he did not hear either. Hemerley characterized himself as hard-of-hearing.

It was common knowledge within the department that Hemerley planned to go deer hunting in the Black River Falls area with family members on his vacation, as is his custom. In past years, Hemerley has left on Friday afternoon to drive to Black River Falls. Hemerley testified that this year though, he did not leave Friday afternoon; instead, he left home on Friday, November 18 at 5:00 p.m. after his two sons got home from work and the three of them drove to Black River Falls together.

The following week Hemerley was on scheduled vacation from November 21 - 23. On Wednesday, November 23, Hemerley came to the DPW shop to pick up his pay check. While there, he told Dorcey about his hunting trip and specifically about the deer he had shot. Afterwards, Dorcey asked Hemerley where he was on Friday, November 18 and Hemerley replied that he was sick. Dorcey further testified that Hemerley said: "If I called in sick I must have been home." Dorcey then told Hemerley he (Dorcey) had gone to his (Hemerley's) house to drop off the envelope from Beloit Transit, but no one had been home. Dorcey testified that upon hearing this, Hemerley became angry and said: "Is that procedure now to check on people when they call in sick?" As Hemerley walked away, Dorcey told him they would talk about it on Monday (i.e. November 28). Dorcey testified that Hemerley appeared to be in fine health when he was at the DPW shop that day.

On Monday, November 28, a meeting was held with labor and management representatives in attendance wherein Hemerley was informed of management's belief that he was not at home ill on November 18, but instead had taken off early on his hunting trip so he could be ready for the opening day of deer season on Saturday, November 19. During this meeting, Hemerley was asked where he was when Dorcey came to his house, and several management representatives said Hemerley's response was that he was in the basement. Hemerley testified that he did not remember making such a statement. Hemerley was then asked where he was when Dorcey called him on the phone, and Hemerley made no response except to say he was filing a grievance. At the conclusion of this meeting Hemerley was suspended without pay for three (3) days for abuse of sick leave. Hemerley grieved the suspension and the matter was appealed to arbitration.

POSITIONS OF THE PARTIES

The Union acknowledges that the City has the right to monitor sick leave usage for abuse and to act accordingly whenever it occurs. Here, though, the Union contends the Employer failed to establish by clear and convincing evidence that the grievant abused sick leave. According to the Union, the facts relied upon by the Employer to support its contention (namely that the grievant had requested November 18 as a vacation day and been denied it and that Supervisor Dorcey was unable to contact the grievant that day when he visited and called) fail to establish that the grievant was, in fact, abusing sick leave. In the Union's view, the grievant provided a rationale explanation as to why he did not hear Dorcey knocking at his door or the phone ringing. Thus, it is the Union's position that while it is not preposterous for the City to have concluded that the grievant took off November 18 to go deer hunting, neither is it unreasonable to accept the grievant's explanation. As a remedy for the alleged contract violation herein, the Union requests that the arbitrator find in favor of the grievant, make him whole and remove the disciplinary action from his file.

The Employer submits that a claim of sickness which is not true constitutes an abuse of sick leave. In the Employer's view, that is what happened here when the grievant took sick leave on November 18. According to the Employer, the grievant was not at home when Dorcey visited and called him that day because he had already departed for his deer hunting trip. While the Employer acknowledges that it was not in the position to personally observe Hemerley on that date, it contends that circumstantial evidence establishes the true course of events. It is the Employer's position that the grievant was not able to give a satisfactory explanation of his whereabouts when Dorcey visited and called his home that date, so this cast sufficient doubt on his story that it should not be believed. The Employer therefore argues the grievant's suspension for sick leave abuse was justified and his suspension should be upheld.

DISCUSSION

The Employer has a legitimate concern with protecting itself against fraudulent sick leave claims. That being so, it follows that the Employer has the right and the duty to monitor claims of sick leave in situations where it has reasonable grounds for suspecting fraudulent use of same.

Here, the Employer believed Hemerley's sick leave usage on Friday, November 18 was open to suspicion since it was common knowledge within the department that he was going deer hunting that weekend and also that he had twice been denied vacation for that day. The undersigned agrees with the Employer that the timing of the absence to coincide with the denied vacation date does make the absence appear suspicious. Likewise, the fact that Hemerley was known to be going deer hunting that weekend gives rise to a motive.

Having said that, it must next be noted that suspicious circumstances and inferences are insufficient to prove abuse of sick leave. Instead, if an employer challenges the validity of a sick leave claim, it must present evidence to rebut the presumption that the employe was actually sick. Such proof is needed here because the grievant testified he was sick at home all day on Friday, November 18 (until he left at 5:00 p.m. to drive to Black River Falls for his hunting trip). Thus, in the context of this case, just cause for discipline requires evidence establishing that the grievant was guilty of the misconduct charged (i.e. sick leave abuse).

As is often the situation in such cases, the Employer herein did not present any direct evidence of sick leave abuse. For example, no one from management personally observed Hemerley on the day in question, so he was not caught in the act (so to speak) of abusing sick leave. Instead, the Employer relied upon circumstantial evidence to establish that Hemerley was not at home as he claimed he was on Friday, November 18. Specifically, the Employer's circumstantial evidence is that Supervisor Dorcey found no one home when he visited Hemerley's house twice that day and also that no one answered the phone at Hemerley's house when Dorcey called.

Hemerley's response to this circumstantial evidence was that he was home that day but did not hear either the phone ring or anyone knock at the front door. Hemerley, who characterized himself as hard-of-hearing, infers this is the reason he did not respond to either Dorcey's knocking at the door or Dorcey's phone call.

Assuming for the sake of argument that Hemerley is hard-of-hearing as he claims, this assertion, in and of itself, does not automatically lead to the conclusion that he can not hear a knock at the door or a phone ring. Instead, if such is the case, it was incumbent upon the grievant to prove same because he, not the Employer, raised the matter of his hearing. He failed to do so. Specifically, he did not show he is incapable of hearing a knock at the door or a phone ring. Surely if such was the case, the grievant would know it and would have taken steps to deal with same. 4/

Given the foregoing, it is the opinion of the undersigned that although it may have been plausible that Hemerley did not hear Dorcey's knocking at the front door and ringing the doorbell, this cannot be said of a phone call which rings 30 times (as happened here). Even if Hemerley was asleep at the time of the call, the undersigned considers it highly improbable that he could have slept through 30 phone rings.

While Hemerley's failure to respond to Dorcey's knocking at the door and phone call would be understandable if, for example, Hemerley was outside the house or had gone to the drug store to get medicine, such was not case here. Instead, by his own account, Hemerley was at the house all day (until he left at 5:00 p.m. to drive to Black River Falls). It is logical to assume then that had Hemerley been home on the afternoon of November 18, he would have answered the knocking at the door or answered the ringing phone. Since he did not, I reach the same conclusion as did the City, namely that the grievant was not home that afternoon as he claims. Having so found, it follows that the grievant failed to provide an adequate explanation as to his whereabouts on Friday afternoon November 18 while he was on sick leave. That being so, Hemerley is found to have abused sick leave on that date.

In light of this conclusion that cause existed for disciplining the grievant for sick leave abuse, the question remains whether the discipline imposed by the Employer herein was proper. The parties herein have contractually agreed in Article 8.07 that "any abuse of sick leave will subject an employe to a three (3) day suspension without pay." Inasmuch as that is exactly what happened here, the undersigned is constrained by this explicit language from reducing the penalty imposed upon the grievant even though he had not received previous discipline.

Based on the foregoing and the record as a whole, the undersigned enters

4/ It is noted in this regard that Hemerley did not wear a hearing aid at the hearing nor did he appear to have any trouble understanding the questions put to him.

the following

AWARD

That the City did not violate the collective bargaining agreement when it disciplined the grievant with a three (3) day suspension for sick leave abuse. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 15th day of August, 1989.

By _____
Raleigh Jones, Arbitrator