BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
GENERAL DRIVERS and DAIRY EMPLOYEES UNION LOCAL NO. 563	:	
and	:	Case 287 No. 42422 MA-5682
CITY OF APPLETON (VALLEY TRANSIT)	:	

Appearances:
Previant, Goldberg, Uelman, Gratz, Miller and Brueggeman, S.C., by Mr. John Brennan, P.O. Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of the Union.
Mr. Greg J. Carman, Appleton City Attorney, 200 North Appleton Street, Applet

ARBITRATION AWARD

Teamsters Local No. 563, hereinafter referred to as the Union, and the City of Appleton (Valley Transit), hereinafter referred to as the City, are parties to a collective bargaining agreement, effective January 1, 1988 through December 31, 1989, which provides for final and binding arbitration of grievances over the interpretation or application of the agreement. Pursuant to a request for arbitration, the undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the suspension of an employe. Hearing on the matter was held in Appleton, Wisconsin on August 23, 1989. Post-hearing arguments were received by the undersigned by October 6, 1989. Full consideration has been given to the testimony, evidence and arguments presented by the parties in rendering this Award.

ISSUE

During the course of the hearing the parties agreed upon the following issue:

> Was the one (1) day suspension of the grievant, David DeBraal, violative of the collective bargaining agreement and/or Valley Transit's revised (10-9-86) attendance policy?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

. . .

ARTICLE 7

DISCIPLINE

7.1 Warning Notices

A. The Employer shall not suspend or discharge an employee without just cause and shall give at least one warning notice of the complaint against such employee to the employee in writing, and a copy of same to the Union, except that no warning notice need be given in the following cases. (Emphasis Added)

1. Dishonesty.

2. Drunkenness, drinking, being under the influence or in possession of alcoholic beverages while on duty and/or on Valley Transit property or when in uniform in a public place provided, however, that the purchase of sealed package goods while in uniform or having such beverages in a locked personal vehicle shall not be considered "possession" for purposes of this Paragraph.

3. Use of, being under the influence or in possession of any controlled substance while on duty and/or on Valley Transit property or when in uniform in a public place, unless such substance has been legally

prescribed.

4.Recklessness or endangering others while on duty.

5.Miss-outs, as defined in Article 33.5.

6.Failure to report an accident, if the driver is aware of the accident.

7.Attempted rape or sexual assault.

B.The warning notice as herein provided shall not remain in effect for more than one hundred and eighty (180) days from date of issuance, except that warning notices relating to accidents or attendance issues shall remain in effect for one (1) year and records of suspension shall remain in effect for eighteen (18) months. (Emphasis Added)

7.2 Suspension or Discharge

Discharge or suspension of an employee must be by proper written notice, Certified Mail, return receipt requested, sent to the last known address of the employee, or by personal service on the employe, (sic) with a copy to the Union. Appeal from discharge must be taken within five (5) working days by written notice to the Director of Personnel and a meeting held between the Employer and the Union within fifteen (15) working days after the appeal is filed. A decision must be reached within five (5) working days from the date of this meeting.

. . .

PERTINENT WORK RULE

No. 86-18B Date 10-9-86 Issued by: Don Peterson
General Manager
To: All Employees Subject: Revised Attendance Policy

REVISED ATTENDANCE POLICY

Based upon our past several year's (sic) experience with the attendance policy, we have made several changes that will improve the administration of the policy without changing its basic objectives. The updated comprehensive policy, including the revisions, is elaborated below.

ATTENDANCE GOALS

All Valley Transit employees will be required to maintain a certain attendance level. Absences will be considered either short term, if the duration of the absence is seven (7) consecutive calendar days or less, or long term, if the duration is longer than seven (7) consecutive calendar days. The attached charts of "Annual Attendance Guidelines" identify five rating levels ranging from EXCELLENT to POOR. Separate charts have been developed for both full-time and part-time employees. (Emphasis Added)

The guidelines will apply to the chargeable types of short term absences listed below; non-chargeable absences will not be included. Long term absences will be evaluated on the specific circumstances of each individual case. Unless there is some very legitimate reason(s) for one's attendance to be otherwise, each employee is expected to consistently maintain at least an ADEQUATE attendance rating.

CHARGEABLE ABSENCES	NON-CHARGEABLE ABSENCES
- Sick Leave	- Worker's Compensation
- Loss of Time	- Funeral Leave
- Miss-Outs	- Military Leave
- Other Chargeable Absences	- Jury/Witness Duty
	- Approved Leave of

Absence
- Approved Schedule Change
- Disciplinary Suspensions
- Lates
- Other Non-Chargeable Absences

BACKGROUND

The City, amongst its various governmental functions, operates a transit system (Valley Transit). During negotiations in 1986 the Union and the City reached agreement on the absenteeism rules identified above. However, the parties could not agree on how long-term absences would be handled and did not include long-term absences in the rule. The Union was aware that the City could discipline employes for long-term absences and that such instances would be dealt with on a case-by-case basis. The instant matter is the first time an employe has been disciplined for long-term absences.

The City reviews employes' absentee records at the end of each calendar year. After the review is completed each employe is informed as to whether their absentee rate was acceptable. On January 6, 1986 employee David DeBraal, hereinafter referred to as the grievant, received an "Adequate" rating. However, on July 9, 1986 the grievant received the following letter from Coach Operations Supervisor John Mitchell:

> July 9, 1986
>
> David DeBraal
> 1001 North Mason Street
> Appleton, WI 54914
>
> David:
>
> A summary of your attendance for the first six months of 1986 and the three previous years is provided on the attached sheet. While your attendance has been adequate the past several years, your performance thus far in 1986 has deteriorated seriously. In fact, your record of 10 days of absence in 8 occurrences just through June is already bad enough to merit a "POOR" rating for the entire year.
>
> Your failure to work with reasonable regularity and to meet normal attendance standards as represented by your recent record, cannot be tolerated. You are hereby warned, therefore, that if your attendance record does not show immediate substantial, and continuing improvement in the future, you may be subject to further disciplinary action.
>
> John Mitchell
> Coach Operations Supervisor

On January 3, 1987, the grievant received a "Fair" rating for 1986 from General Manager Don Peterson. Peterson's letter to the grievant stated the following:

> January 3, 1987
>
> TO: Dave DeBraal
>
> FROM: Don Peterson
> General Manager
>
> SUBJECT: 1986 Attendance Summary
>
> A summary of your attendance for 1986 and the three preceding years (if applicable) follows on the next sheet. Also attached are detailed listings of all your chargeable and non-chargeable absences for the past year. Based upon Valley Transit's attendance policy (see Bulletin #86-18B), your attendance rating for 1986 was FAIR.
>
> Your attendance deteriorated to an unsatisfactory level in 1986. All of your absences occurred in the first seven months of the year and most seem to be related to family problems. I am pleased to see that, after you were counseled in July about your failure to work with reasonable regularity and the need to meet normal attendance standards, you did not have a single absence the rest of the year. I hope this improvement will continue in 1987.

Based upon your total 1986 attendance, however, you are hereby warned that you will be expected to maintain at least an "ADEQUATE" rating for the coming year or you may be subject to disciplinary action.

On January 8, 1988, the grievant received the following letter from Peterson:

January 8, 1988

TO: David DeBraal

FROM: Don Peterson
General Manager

SUBJECT: 1987 Attendance

A summary of your attendance for 1987 and the three preceding years (if applicable) follows on the next sheet. Also attached are detailed listings of all your chargeable and non-chargeable absences for the past year. Based upon Valley Transit's attendance policy (see Bulletin #86-18B), your attendance rating for 1987 was FAIR.

Your short term attendance continued at an unacceptable level in 1987 and, in addition, you had your second long term absence in the past three years. You have been counseled and warned in the past about your failure to work with reasonable regularity and to meet normal attendance standards, yet you failed to show the necessary improvement. You are warned, therefore, that if you do not maintain at least an "ADEQUATE" rating for the coming year, or if you have any more long term absences, you will be subject to further disciplinary action.

On January 3, 1989 the grievant received the following letter from Peterson:

January 3, 1989

TO: Dave DeBraal

FROM: Don Peterson
General Manager

SUBJECT: 1988 Attendance Summary

A summary of your attendance for 1988 and the three preceding years follows on the next sheet. Also attached are detailed listings of all your chargeable and non-chargeable absences for the past year. Based upon Valley Transit's attendance policy (see Bulletin #86-18B), your attendance rating for 1988 was ADEQUATE.

Your short term attendance improved marginally for the less than full year you worked in 1988, but you had your third long term absence in the past four years. You have been counseled and warned in the past about your failure to work with reasonable regularity and to meet normal attendance standards, yet you showed no improvement in your long term absences. You are suspended without pay for one day and warned that if you do not maintain at least an "ADEQUATE" rating for the coming year, or if you have any more long term absences, you will be subject to further disciplinary action or discharge.

Thereafter, the matter was grieved and processed to grievance arbitration in accordance with the parties' grievance procedure.

City's Position

The City contends the collective bargaining agreement clearly allows the City to discipline employes for excessive absenteeism. In support of its position the City points at Article 19.4(B). Therein the agreement specifically points out employes may be disciplined for excessive absenteeism. The City argues the attendance policy allows it to evaluate long-term absences and that after such an evaluation the City may discipline an employe. The City concludes it is manifestly clear that the City may discipline an employe, on a case-by-case basis, for excessive long-term absences.

In the instant matter the City asserts the grievant had been previously warned that excessive use of long-term sick leave could subject him to discipline. In support of this position the City points to the January 8, 1988 letter sent to the grievant. The City asserts it provided sufficient written warning to the grievant upon which to premise a suspension. The City also points out that the agreement does not require the City to use any specific

"form" in notifying the grievant. The City argues the grievant was given sufficient notice of his past attendance deficiencies.

The City concludes that the agreement and attendance policy clearly give the City the authority to discipline employes for excessive long-term absences. The City would have the undersigned deny the grievance.

Union's Position

The Union raises several arguments in contending the City did not have cause to suspend the grievant. The first, that the City may not make use of any past offenses which are stale. The Union argues Section 7.1(B) is not super-ceded by the attendance policy agreed to by the parties. Clearly, the City may not rely on disciplinary action which are more than one (1) year old. The Union acknowledges that the parties agreed to define long-term absences as those which are longer than seven (7) consecutive calendar days. However, the Union argues, an individual could have more than one long-term absence in a year's period of time. Even if such events are rare, the City cannot ignore the clear intent of Section 7.1(B). The Union asserts the collective bargaining agreement contains no language nor is there any evidence of intent to support the City's actions.

The Union argues that if the parties had wanted to extend the one (1) year period they would have included such language in the agreement. The Union points out that the City clearly went back four (4) years in determining the grievant's suspension and that as this was the third occurrence of a long-term absence in a four (4) year period that the City concluded the grievant had failed to work with reasonable regularity. The Union also points out the first disciplinary entry goes back to 1985, a full year and one-half prior to the issuance of the attendance policy in October, 1986. The Union argues Section 7.1(B) limits the City's review to one year.

The Union also contends the written notice the grievant received in 1988 cannot circumvent the protection of the collective bargaining agreement. The fact that the 1988 notice referenced a previous disciplinary action cannot be used to circumvent the protection afforded by Section 7.1(B). The Union also asserts that the Union was not copied the attendance review letter sent to the grievant and, therefore, the letter cannot be construed as a disciplinary action. The Union points out Section 7.1(A), and 7.(2) provide that the Union be notified of any disciplinary action. The Union argues that such notification allows the Union to assist employes in filing grievances. Absent such notification, an employe must review any letter to determine whether it should be viewed as discipline. The Union asserts such a situation is unacceptable and that the Union must be notified of any disciplinary action taken against its members.

The Union also contends the discipline in the instant matter was excessive. The Union argues the long-term absences were beyond the grievant's control and asserts the grievant should not be penalized a full day's pay for it.

The Union would have the undersigned sustain the grievance, rescind the suspension, clear the grievant's personnel record, and make the grievant whole for any losses he suffered.

DISCUSSION

Article 7.1(B) clearly limits the use of warning notices relating to attendance issues to one (1) year. Article 19.4(B) clearly allows the City to discipline employes for excessive absenteeism. The parties have also agreed upon an attendance policy which defines long-term absences as any absence which is longer than seven (7) consecutive calendar days and are to be evaluated on the specific circumstances of each individual case.

The record demonstrates the grievant achieved an "Adequate" attendance rating for 1985 on January 3, 1986. On July 9, 1986 the grievant received a notice that his absences during the first six (6) months of 1986 were already bad enough to warrant a "Poor" rating. On January 3, 1987 the grievant received a "Fair" rating. He was also notified to maintain an "adequate" rating for the coming year or he may be subject to discipline. On January 8, 1988 the grievant again received a "Fair" rating. It was pointed out that he had his second long-term absence in three years. The grievant was warned to improve to an "Adequate" rating or that if he had any further long-term absences he would be subject to further discipline. On January 3, 1989 the grievant received an "Adequate" rating for 1988. However, because the grievant had another long-term absence during 1988, he received a one (1) day suspension.

The City herein suspended the grievant because he had three (3) long-term absences over a four (4) year period. The undersigned finds that the City's reliance on the long-term absence in 1985 is clearly prohibited by Article 7.1(B). Even though the City referenced the 1985 long-term absence in the January 8, 1988 letter to the grievant and assuming this warning was a valid warning, warnings may only remain in effect for one (1) year from the date of issuance. To allow the City to consider events which are older in duration than the one (1) year limitation imposed by Article 7.1(B) would render this provision meaningless. The undersigned finds that the grievant's suspension therefore violated the parties' collective bargaining agreement because the City's decision to suspend the grievant was based in part on an incident that was over one (1) year old, the 1985 long-term absence.

The undersigned has reached this conclusion because the collective bargaining agreement and attendance policy are silent concerning the City's ability to look beyond a one (1) year period when evaluating long-term absences. Absent such an agreement between the parties the City is limited by Article 7.1(B) to only reviewing effective written warnings. However, the undersigned notes here that the grievant's 1987 long-term absence occurred in August-September. The grievant's 1988 long-term absence occurred in March-April. These two events are within a one (1) year period. At the hearing, the City presented no evidence as to why it waited until the end of the 1987 and 1988 calendar years to discipline the grievant. The just-cause standard of the parties' agreement requires some promptness in notifying employes of actions they have committed which may result in discipline. Herein, the parties have agreed that warning notices relating to attendance issues remain in effect for one (1) year and that records of suspension remain in effect for eighteen (18) months. However, the City offered no rationale as to why it was necessary to wait almost four (4) months to discipline the grievant for the 1987 long-term absence and why the City waited almost eight (8) months to discipline the grievant for the 1988 long-term absence. Absent some justification for the City's delay in evaluating the grievant's long-term absences, the undersigned concludes the City violated the intent of Article 7.1(B) when it did not promptly evaluate the specifics of the grievant's long-term absences.

The undersigned also notes that the City did not dispute the Union's claim that it did not receive a copy of the grievant's letters concerning disciplinary actions and warnings. The agreement does not require disciplinary actions to be on a specific form. Thus, the letters to the grievant clearly serve as notice of disciplinary action. However, the City's failure to notify the Union of these actions clearly violates the requirement of Article 7.1(A). The instant matter is the first time the question of long-term absences has been raised in the parties' grievance procedure. However, had the Union been aware of the January 8, 1988 letter to the grievant wherein the grievant was warned that if he had another long-term absence, he would be subject to further discipline the Union may have grieved the warning at that time. Thus, the City's reliance on the 1988 letter is flawed because it never informed the Union as required by Article 7.1(A) that it had disciplined the grievant.

Based upon the above and foregoing and the testimony, evidence and arguments presented by the parties the undersigned concludes the City violated Article 7.1(B) when it suspended the grievant. The City is directed to cleanse the grievant's personnel file of the suspension action and to make the grievant whole for any loses he suffered. The grievance is sustained.

AWARD

The one (1) day suspension of the grievant violated Article 7.1(B). The City is directed to cleanse the grievant's personnel file of the one (1) day suspension and to make the grievant whole for any lost wages or benefits.

Dated at Madison, Wisconsin this 13th day of December, 1989.

By _____
Edmond J. Bielarczyk, Jr., Arbitrator