

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 CITY OF БЕЛОIT :
 :
 and : Case 81
 : No. 42238
 : MA-5621
 LOCAL 643, AMERICAN FEDERATION OF :
 STATE, COUNTY AND MUNICIPAL :
 EMPLOYEES, AFL-CIO :
 :

Appearances:

Mr. Daniel T. Kelley, City Attorney, City of Beloit, City Hall, 416 College Avenue, P.O. Box 328, Beloit, Wisconsin 53511, appeared on behalf of the City.
Mr. Thomas J. Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1722 St. Lawrence Avenue, Beloit, Wisconsin 53511, appeared on behalf of the Union.

ARBITRATION AWARD

On May 19, 1989, Local 643, American Federation of State, County and Municipal Employees, AFL-CIO filed a request with the Wisconsin Employment Relations Commission to provide an Arbitrator to issue a final and binding award on a grievance pending with the City of Beloit. Following jurisdictional concurrence from the Employer, the Commission, on June 27, 1989 appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on August 14 and 22, 1989, in Beloit, Wisconsin. Post-hearing briefs were submitted and exchanged by October 12, 1989.

This award addresses a disciplinary warning issued to employe Major Cain for absenteeism.

BACKGROUND AND FACTS

Major Cain, the Grievant, has been employed by the City of Beloit since March 1980. Mr. Cain is a mechanic with the Transit System and is responsible for the maintenance and repair of the buses operated by the System. Additionally, Mr. Cain has a full-time job elsewhere. He works from 11:00 p.m. - 7:00 a.m. on that job and then reports to his Transit job at 7:15 a.m. to begin an eight hour shift. On, or about, April 6, 1989 Mr. Cain was given a written warning with respect to what the Employer characterized as excessive absenteeism. That warning, and a prior oral warning were grieved and processed through the grievance procedure culminating in this arbitration.

At least since 1984, Major Cain has utilized a good deal of sick leave. The record indicates that in 1984 Mr. Cain used 264 hours, or about 6.6 weeks, of sick leave time. It was Mr. Cain's testimony that he had a cyst surgically removed from his wrist that year and missed about six weeks of work. In 1985 Mr. Cain had hemorrhoidal surgery, was in the hospital, and missed a period of work thereafter. The sick leave record maintained by the City shows use of 144 hours, or 3.6 weeks of sick leave. Most, if not all of that leave would be accounted for by the surgery related absence. In 1986 Mr. Cain is recorded as having used 465 hours, or 11.6 weeks, of sick leave. It was his testimony that he had a second cyst operation and was off work for six to eight weeks as a consequence of the surgery. In 1987 the City's records show that Mr. Cain used 580 hours, or 14.5 weeks, of sick leave. It appears that 40 hours of that time was due to a work related accident. The balance, according to Mr. Cain was surgery related. In 1988 Mr. Cain used 381 hours of sick leave. The bulk of that leave occurred following surgery for acute appendicitis.

On March 6, 1989 Mr. Cain was given an oral warning relative to absenteeism. That warning was codified as follows:

Nature of Offense and Expected Behavior

Nature: Excessive absentism. (sic) Major Cain has missed 42 3/4 hours or five days since Jan. 1, 1989. This is his fourth occurrence (sic) this year.

Expected Behavior: Employee is expected to be on the job. BTS is a small organization that requires everyone to be present and to perform their duties and carry their share of the work load, When someone is absent it places a burden on the system.

Future absences will result in more severe disciplinary action up to and including discharge.

Cain missed work March 27 - 31, 1989 because of bronchitis. He returned to work with a medical slip. It should be noted that Mr. Cain regularly brought medical slips with him upon his return to work, following sick leave, whether those slips were required or not. On April 6 he was given the following written warning, which cites the March 27 - 31 absence:

Nature of Offense and Expected Behavior

Nature: Excessive absentism (sic) this year. Major Cain has missed a total of 82.75 hours of work since Jan. 1, 1989. This is fifth occurrence (sic) this year.

Expected Behavior: Major Cain is expected to be on the job. Absenteeism at Beloit Transit System causes a burden to the other employees that must pick up the work load of the absent employee.

Future absences will result in more severe disciplinary action up to and including discharge.

Both the oral and the written warnings were issued by Robert Spenle, Transit Manager. In issuing this discipline Spenle followed the written City policy on attendance. That policy was promulgated by Richard Freese, Director of Public Works, by the following memo:

DEPARTMENTAL CORRESPONDENCE

December 14,

1987

SUBJECT: City of Beloit Absenteeism Policy

To: Public Works Department Employees

From: Richard Freese, Director of Public Works

Employees of the City of Beloit are required to maintain an acceptable level of attendance (sic) on the job.

Employees are entitled to certain days off with pay. These days include vacations, holidays, death in the immediate family or non-immediate family, attendance at the funeral of a deceased retired city employee, pallbearer duty, jury duty, subpoenaed by the City. Employees will be entitled to two, two-hour absence per year for doctors or dentist appointments.

Any other absence, for any period of time during the day, by an employee will be considered as an absenteeism occurrence. (sic) There will be no more paid or unpaid personnel business days.

Each individual absence will be considered an absenteeism occurrence. (sic) After an employee has experienced three (3) absenteeism occurrences (sic) in one calendar (sic) year a consultation session will be held between the employee, the employee's supervisor and the Personnel Department. After an employee has experienced four (4) absenteeism occurrences, (sic) progressive disciplinary procedures (sic) will be initiated by the employee's supervisor. Continued occurrences (sic) will initiate the next step of progressive discipline.

Mr. Freese developed this memo to implement the new language of the labor agreement (Sec. 8,03, set forth below) relative to absenteeism. Once the language was developed it was presented and discussed at a labor-management meeting with, according to Union witnesses, the discussions being general in nature.

Mr. Freese indicated that the memo was sent to division supervisors to be posted, but was personally unaware of whether or not the memo was posted. A number of Union called witnesses testified that they had never seen the memorandum.

The City introduced a number of warning notices relating to sick leave (Employer Exhibit #17). Of the 15 notices presented, one is from September 1987, seven are dated January 11 or 12, 1988 and address conduct occurring from October - December 1987; one is from November 1988 (a suspension), and six are dated July 26, 1989 and address conduct occurring in April, May, June and July 1989. The January 1988 warnings carry the following message:

Nature of Offense and Expected Behavior

Your attendance record does not meet the acceptable levels for authorized absence from your work unit. You have received previous counseling and yet continue to be absent without any mitigating circumstances.

You are reminded that you are to attend work on all scheduled occasions. Failure to attend scheduled work or other violations of work rules will result in further disciplinary action.

The July 1989 warnings simply indicate that the employee is being given a counseling for a fourth or fifth occurrence, as the case may be. It was the testimony of Pam West that a number of people had experienced far more than three - five occurrences of sick leave use and had not been subject to disciplinary warning.

Section 8.03, set forth below, was new to the 1987-88 collective bargaining agreement. Prior to the 1987-88 agreement, employes had generous sick leave allowance. According to Pam West:

The sick leave was granted as long as you called in one half hour prior to your starting time. There was basically unlimited sick time. All that was required was a doctor's slip, and we had sixty days full pay per illness or occurrence. (Tr. p. 90-91).

The City raised sick leave as an issue in the 1987-88 negotiations and Section 8.03 resulted. According to West the parties never discussed a system of discipline following automatically upon a fixed number of sick leave occurrences.

ISSUE

The parties stipulate the issue to be:

Did the Employer have just cause to discipline the Grievant for excessive absenteeism? If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE II
MANAGEMENT RIGHTS

- 2.01 The Union recognizes the Employer as having the right to:
1. Plan, direct and control the operation of the work force
 2. Hire, lay-off, discipline or discharge for just cause
 3. Establish and enforce reasonable rules of conduct
 4. Introduce new or improved methods of operation
 5. To subcontract work. The City agrees to provide written notice to the union sixty (60) days prior to the effective date of subcontracting the work if there is to be a reduction in personnel. The parties will meet to discuss the impact, however, impasse in such discussion shall not prevent the City from implementation of the decision.
 6. Determine and uniformly enforce minimum standards of performance 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 any employee or the Union.

. . .
ARTICLE VIII
SICK LEAVE INSURANCE

- 8.01 For any non-work related illnesses or accident and under the care of a physician, a regular full-time employee who has been employed sixty (60) calendar days or more shall receive full pay for all work days absent from the first day missed through a maximum of sixty (60) consecutive calendar days of illness or injury. If the illness and absence continues, the employee will receive two-thirds (2/3) normal pay of all workdays (sic) missed from the sixty-first (61st) day up to a maximum of three hundred thirty-four (334) consecutive calendar days. Employees who are eligible for and receive an annuity from the Wisconsin Retirement Fund or eligible for and receive Social Security benefits for disability or regular retirement will not continue to receive sick leave insurance benefits.
- 8.02 An attendance incentive to increase perfect attendance among employees the following cumulative schedule applies for any calendar year
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|----------------------------------|--------------|
| one quarter perfect attendance | |
| two quarter perfect attendance | 1/4 days pay |
| three quarter perfect attendance | 1/2 days pay |
| four quarter perfect attendance | 3/4 days pay |
| | 1 days pay |
- provided that the employee must have three quarters perfect attendance to qualify. Incentive payment will be made on the first pay period of the following year.
- 8.03 Each individual absence will be considered a sick leave occurrence. After an employee has experienced five (5) sick leave occurrences in one calendar year then the sick leave of absence shall be without pay for the first three days unless the sick leave of absence exceeds five (5) days.
- 8.04 Sick leave pay shall be computed on the regular eight (8) hour day or forty (40) hour week.
- 8.05 A condition in granting sick leave is that the employee call the Department of Public Works office at least one-half (1/2) hour before his/her regularly scheduled starting time for work. This requirement shall remain in force until such time as the Director of Public Works excuses the employee from reporting in as required.
- 8.06 In any case where an employee shall be absent for three (3) or more working days in succession and upon returning to work, he/she shall be required to provide a doctor's certificate of illness or fitness showing the nature of such illness or injury. For any extended absence from work due to illness or injury, the employee will be responsible for advising the supervisor of the estimated absence period from work.
- 8.07 Any abuse of sick leave will subject an employee to three (3) or more working day suspension without pay. Any continued abuse of sick leave will subject an employee to discharge.
- 8.08 Probationary employees shall be entitled to sick leave without pay for the first ninety (90) calendar days.
- 8.09 An employee shall continue to accumulate

seniority during a period of illness.

- 8.10 If the employee is unable to return to work at the end of the sick leave period, he/she may be subject to dismissal. In no event shall the sick leave be in excess of thirteen (13) months in the case of non-industrial injury or illness

POSITIONS OF THE PARTIES

The Union contends that the City did not properly promulgate its absenteeism policy. Employees who testified indicated that they had never seen the policy. Mr. Freese was unaware of whether or not the policy had ever actually been posted. The Union contends that the City should not be allowed to rely upon the policy. It is the view of the Union that prior warnings were too vague.

According to the Union, the policy is invalid on its face. Under the rule, employees are subject to discipline for the legitimate use of a contractually provided benefit. The parties negotiated a change in the sick leave policy during the last round of negotiations. The City is attempting to add something to what was bargained.

Mr. Cain was absent for legitimate health reasons. There is thus no rational basis for discipline. The discipline was automatic and invoked without meaningful investigation or analysis of Cain's situation. The Union argues that the discipline was applied inconsistently. It speculates that the July 25 - 26 disciplinary warnings were issued in preparation for the pending August arbitration hearings.

It is the view of the City that Cain was disciplined pursuant to the City's promulgated policy. It is the City's view that attendance at work is required and that excessive absenteeism will not be permitted. An employee has an obligation to be reasonably reliable in attendance and even bona fide illness induced absenteeism can become excessive if it impairs the essence of the employment relationship. Bona fide medical slips cannot form a complete defense to a failure to come to work. It is the City's view that repeated absences, over a long period of time call into question the eligibility of an employee to perform his job. Mr. Cain has, in effect, become a part-time employee.

The City cites Elkouri and Elkouri, How Arbitration Works, Third Ed. (BNA, 1973) and In re General Foods Corp. (Entermann's Inc.) and Bakery, Confectionery and Tobacco Workers' International Union, AFL-CIO, Local 1, 91 LA 1254. Elkouri was cited for the proposition that an Employer can terminate an employee whose absence, even for legitimate reasons, becomes excessive. General Foods was cited for the proposition that management retains the right to promulgate reasonable work rules for the purpose of controlling absenteeism so long as those rules do not conflict with the terms and conditions of the labor agreement.

DISCUSSION

Under the circumstances presented in this case I believe the warnings issued to Major Cain violate the collective bargaining agreement. My conclusion in this regard is predicated upon my view that the absenteeism policy was defectively applied and violates the collective bargaining agreement.

Article 8.01 of the collective bargaining agreement establishes paid sick leave for employees who are absent from work because of injury or illness. The benefit described in 8.01 is one to which an employee is entitled. The benefit is subject to certain restrictions. For example, Sections 8.03 and 8.08 limit sick leave pay, under certain circumstances. Sections 8.05 and 8.06 assign certain responsibilities to employees who use sick leave. Section 8.07 prohibits abuse of sick leave and subjects employees who abuse sick leave to discipline.

It is my reading of the work rule that warnings and progressive forms of discipline follow automatically upon a set number of absences/occurrences. There is no distinction drawn between absences due to bona fide illness or injury and those resulting from an employee's desire to regularly extend his/her weekend. The work rule equates sick leave use with sick leave abuse. The contract, and specifically Article 8.01 and 8.07 distinguish use and abuse. Sick leave use is acceptable under 8.01. Sick leave abuse is not acceptable under 8.07. It is, in the first instance, the task of management to draw meaningful distinctions between bona fide sick leave use and abuse of the benefit. Only the latter is subject to discipline.

In summary, I believe the work rule violates the contract. Mr. Cain's discipline was issued pursuant to the work rule and is therefore defective.

The Union has alleged that the policy was never properly posted. It is the Union's and the Grievant's claim that he never had actual notice of the work rule. In light of the above decision I do not believe it is necessary to address this claim. It appears to me that the Union is correct in its claim that the July 1989 warnings were an effort to clean up the record for the hearing. Some of the conduct addressed in those memos is months old.

The messages contained in the warning letters are relatively innocuous reminders to employees that they are expected to attend work. This award does not purport to preclude the City from advising employees whose use of sick leave may be inappropriate of that fact. It does bar the automatic imposition of discipline for the use of sick leave without consideration of the legitimacy of the use of the benefit.

The City's substantive complaint in this proceeding is that Mr. Cain doesn't come to work often enough. The City is right. The Grievant has missed a tremendous amount of work since 1984. His rate of attendance is such that he has, in effect, become a part-time employee. A problem exists. The City has a legitimate concern. I found the following exchange, which occurred on cross examination, in reference to an April 1989 conversation, disturbing:

- Q Do you remember what Mr. Spence said to you?
- A No, not all of it I don't think.
- Q Did he explain to you that this was a warning that your absenteeism had to be improved or it could result in disciplinary action or discharge?
- A Yes.
- Q You aware of any other employees in the Transit System that have the record of absenteeism that you do?
- A No.
- Q In reality, you've really missed a lot of work, haven't you?
- A No, I don't think so.

It may well be that Mr. Cain's absences have been brought about by bona fide injury and/or illness. It also appears that Mr. Cain does quality work. However, his absenteeism rate is extraordinarily high. An attitude to the contrary contributes nothing to the potential resolution of what I regard to be a problem.

The City speculates that Mr. Cain is wearing his body down by working two full-time jobs. That may or may not contribute to his relatively poor health. Mr. Cain, a bus mechanic, is allergic to diesel fumes. At least one protracted absence was sinus/allergy induced. It is at least conceivable that measures can be taken to minimize the harmful impact of the fumes. Both the Grievant and the City have an obligation to contribute what they can to a resolution of this problem.

The City has tolerated a great deal of absenteeism for a number of years. Notwithstanding the legitimacy of the sick leave use, this tolerance need not continue forever.

AWARD

The grievance is sustained.

RELIEF

The warnings are to be expunged. The comment in this decision should serve to put the Grievant on notice that his attendance has not been satisfactory, and that something must be done to bring about improvement.

Dated at Madison, Wisconsin this 19th day of March, 1990.

By _____
William C. Houlihan, Arbitrator