BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MARSHFIELD CITY EMPLOYEES UNION LOCAL 929, WCCME, AFSCME, AFL-CIO	Case 85
and	No. 43132
	MA-5904
CITY OF MARSHFIELD	

Appearances:
Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1973 Strongs Avenue, Stevens Point, Wisconsin 54481, on behalf of the Union.
Mulcahy & Wherry, S.C., Attorneys at Law, 401 Fifth Street, P.O. Box 1004, Wausau, Wisconsin 54401-1004, by Dean R. Dietrich and Jeffrey T. Jones, on behalf of the City.

ARBITRATION AWARD

Marshfield City Employees Union Local 929, WCCME, AFSCME, AFL-CIO, hereafter the Union, and City of Marshfield, hereafter the City, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the City concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance relating to discipline. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Marshfield, Wisconsin, on February 10, 1990; it was not stenographically transcribed. The City and Union submitted briefs on March 23 and March 27, and reply briefs on April 9 and April 26, respectively, at which time the record was closed.

On July 11, 1990, Mr. Levitan took a leave of absence from his duties at the Commission. Pursuant to a letter from the City dated July 20, 1990, and a letter from the Union dated July 27, 1990, the Commission on July 31, 1990, assigned Dennis P. McGilligan of its staff to issue an award in the disputed matter.

After considering the entire record and consulting with Mr. Levitan regarding the matter, I issue the following decision and Award.

ISSUES:

The Union frames the issues as follows:

> Did the Employer have just cause to discharge the grievant? If not, what is the remedy?

At hearing, the City framed the issues in the following manner:

> Whether the City violated Article 20 of the labor agreement when it terminated the grievant for tardiness on July 18, 1989. If so, what is the appropriate remedy?

In its brief, the City frames the issues as follows:

> Whether the City violated Article 20 and/or Article 21 of the labor agreement when it terminated the grievant for repeated tardiness on July 18, 1989? If so, what is the appropriate remedy?

The undersigned frames the issues as follows:

> Did the City violate Article 20 or Article 21 of the collective bargaining agreement when it discharged the grievant on July 18, 1989? If so, what is the appropriate remedy?

BACKGROUND:

William Gratzek, herein the grievant, began work for the City of Marshfield as a General Laborer on June 2, 1980. He was discharged on July 18, 1989, at which time he was an Equipment Operator III. This is a Street Department position on the outside crew.

Beginning in the early Spring of 1987, the grievant began having some problems reporting to work on time. Subsequently, these incidents of tardiness led to the following acts of discipline:

> On March 19, 1987, the grievant received an oral reprimand for punching in at 4:23 a.m. for a 4:00 a.m. starting time.

On September 18, 1987, the grievant received a written reprimand "for calling in to work at 7:09 a.m. . . . to report that you were sick and would be absent," in violation of the contractual provision that requires employees to call in and request a sick day between 6:45 a.m. and 7:00 a.m. The written reprimand from Street Superintendent Duane Schueller continued as follows:

> This is not the first problem with tardiness you have experienced. On 3/19/87 you reported for work 23 minutes late and, as a result, you received an oral warning.
>
> The City of Marshfield has established an Employee Assistance Program to help employees who feel that a personal or family problem may be causing a problem at work. I believe that you are already aware of this service through the hand-outs and information periodically included in the newsletter. If you feel that this type of program may benefit you, please feel free to call 387-5444 and set up an appointment.
>
> Any further problems involving tardiness or related areas may result in more serious disciplinary action, including suspension or termination. I am counting on you to correct the problem before we get to that point.

On June 24, 1988, the grievant received a one-day suspension for punching in at 7:28 a.m. for a 7:00 a.m. starting time.

On December 13, 1988, the grievant was called in for emergency snowplowing, with a mandatory starting time of 3:00 a.m., but failed to report until 3:18 a.m. On December 19, 1988, Schueller suspended the grievant for three days, stating as follows:

> This letter is a written reprimand for reporting to work at 3:18 a.m. on 12-13-88 for a mandatory starting time of 3:00 a.m.
>
> As you have previously been suspended for one day, given a written reprimand, and an oral reprimand for similar offenses, this requires a disciplinary action of three day suspension. The days to be taken will be December 20-21, 1988 and January 6, 1989. Any further problems involving tardiness or related areas may result in termination.
>
> The City of Marshfield has established an Employee Assistance Program to help employees. If you feel that this type of program may benefit you, please feel free to call 387-5444 and set up an appointment.

On January 26, 1989, the grievant was again called in for emergency snowplowing, with a mandatory starting time of 3:00 a.m., but failed to report until 3:13 a.m. On February 1, 1989, Schueller suspended the grievant for five days, stating as follows:

> On January 25, 1989, you were ordered to report to work on January 26 at 3:00 a.m. for snow-removal duties. You failed to report to work as directed at 3:00 a.m., and you were then contacted by another employee and reported to work at 3:13 a.m.
>
> This represents the third time in the past seven months that you reported to work tardy. You were suspended on June 24, 1988, for one day due to tardiness and on December 13, 1988 you were suspended for three days for tardiness. Your conduct exhibits a repeated failure to report to work in a timely fashion and cannot be tolerated by the City.

> Due to the circumstances surrounding this request to report to work, I have chosen to suspend you for five (5) work days in lieu of termination at this time. The days to be taken are February 6-10, 1989. However, if you are again tardy at any time during the next 12 months, you will be discharged from employment with the City. This should be considered your last chance to prove your willingness to work for the City without being tardy.

The grievant never challenged any of the above disciplinary actions.

On Friday, July 14, 1989, the grievant was scheduled to report to work at 7:00 a.m. but actually punched in to work at 7:38 a.m. Shortly after he punched in, the grievant was instructed by one supervisor, Brian Panzer, to take the #46 tractor to one of the day's work sites. The grievant responded that he did not want to do so, as he would be fired anyway, and that he'd rather just go home. After some discussion the grievant began to comply with his orders, but was interrupted by Street Superintendent Schueller who instructed him to go into the office.

At or about this time, the grievant advised Schueller that if he wished him (the grievant) to contact the Employee Assistance Program (EAP), he would immediately do so. Schueller responded that it was the grievant's decision whether he wished to contact that agency.

Shortly after the above occurred, Schueller contacted two Union officials, Mark Strohman and Darrell Michalski, and asked them to report to his office to discuss the grievant's most recent tardiness offense. At this meeting, Schueller informed the grievant and the Union representatives that he would be referring the matter to the City's Personnel Office and would advise them if the grievant was to report for work on the next work day (i.e., Monday, July 17, 1989).

Subsequently, by memorandum dated July 14, 1989, Schueller advised the grievant and Union officials of the following:

> The purpose of this memorandum is to inform you of an immediate suspension with pay pending an administrative investigation into your recent attendance work record.
>
> You are directed to not return to work until and unless directed by me. You are directed, however, to report to my office at 1:30 p.m., Monday, July 17, 1989, at which time we will review your past employment record with you. The City Administrator will be present, and you are encouraged to bring the appropriate union representation with you to the meeting.

Following the July 17 meeting, City Administrator Randy Allen wrote the following memorandum, addressed to "File," with a copy to Schueller:

> On July 14, 1989, Mr. Gratzek reported to work at the City garage at 7:30 a.m. His scheduled time to report was 7:00 a.m. Since this practice had occurred in the past, Mr. Gratzek was suspended with pay indefinitely pending an investigation.
>
> This afternoon at 1:30 p.m., I met with Mr. Gratzek in Mr. Schueller's office. Also present were Messrs. Duane Schueller, Michael Albee, Darrell Michalski, and Bill LaPointe. I explained to Mr. Gratzek that the matter was being reviewed and that the purpose of the meeting was to listen to his reasons for the tardiness. For example, if there were extenuating circumstances or some other legitimate reasons why he could not have called in promptly, now was the time to let us know.
>
> Mr. Gratzek indicated that he was going through a divorce and had experienced marital problems in the past. He indicated that he was drinking more than he should and was in the "blues." He indicated his reason for being tardy was that he had slept through alarm clocks. I explained the seriousness of the problem and indicated that he would receive a phone call from Mr. Schueller in the next day or so. Meanwhile, his suspension with pay was to continue.

On July 18, 1989, Schueller presented to the grievant a notice of his discharge, with an accompanying memorandum which read as follows:

> On Friday morning, July 14, 1989, William Gratzek punched the time clock reporting to work at 7:38 a.m., 38 minutes past the scheduled reporting time. This tardiness followed several previous instances of the same infraction as listed below:
>
> | Date | Infraction | Disciplinary Action |
> |---|---|---|
> | March 19, 1987 | Tardiness | Oral Reprimand |
> | Sept. 18, 1987 | Tardiness | Written Reprimand |
> | June 24, 1988 | Tardiness | One-day Suspension |
> | Dec. 13, 1988 | Tardiness | Three-day Suspension |
> | Jan. 26, 1989 | Tardiness | Five-day Suspension |
>
> On July 17, 1989, the supervisor and City Administrator conducted a hearing with Mr. Gratzek to determine whether there were valid, legitimate reasons or extenuating circumstances that would have prevented Mr. Gratzek from reporting to work or notifying the supervisor of illness on July 14, 1989. It is concluded that there were no valid reasons. All progressive disciplinary measures designed to improve job performance have been utilized in the past and yet the infraction has again recurred. Therefore, the employee is discharged from his employment with the City of Marshfield as of the end of the work day of July 18, 1989.

RELEVANT CONTRACTUAL LANGUAGE:

Article 6 - Sick Leave

. . .

Section 3. Employees shall call the supervisor at the street division office when they are unable to report for work because of illness and injury. . . . Employees of the street division shall call the supervisor on duty between 6:45 and 7:00 a.m., or earlier if available, to advise they will not be available on said day, unless unable to do so due to circumstances beyond the

employee's control. . . . Failure of such notice shall be grounds for disciplinary action. . . .

Article 13 - Hours - Work Day - Work Week

. . .

Section 2. . . . The hours of work for the outside crews may be changed as agreed to between the employees and the department head, i.e. eight consecutive hours a day, with a fifteen minute lunch break on the job at noon with no loss in pay and the starting time for the outside crews shall be 7:00 a.m.

. . .

Article 15 - Grievance Procedure

. . .

Section 5. The arbitrator shall have no authority or power to add to, modify, or delete from the express terms of this agreement.

Article 19 - General Provisions

Section 1. All employees shall be at their place of employment at the designated time. Deductions for tardiness and payment for overtime for hourly employees will begin eight (8) minutes after the commencement or completion of the designated work hours, respectively, and shall be based upon 1/4 hour periods.

. . .

Article 20 - Suspension, Discharge, and Disciplinary Action

Section 1. An employee may be demoted by a department head for just cause in the interest of good discipline, or for the good of the service. In making a demotion, length of service shall be given due consideration.

Demotions may be accomplished by reducing the employee's pay within the pay range on the job the employee holds or by assigning the employee to a position in a lower class. An employee who is demoted shall be given a written notice by the department head of the reasons for the action at the time of demotion and a copy shall be forwarded to the union representative.

Section 2. No employee who has completed his/her probationary period shall be discharged or suspended without one (1) warning notice of the complaint in writing to the employee with a copy to the Union and steward, except no warning notice is required for discharge due to dishonesty, being under the influence of intoxicating beverages while on duty, recklessness resulting in a chargeable accident while on duty, or other flagrant violations.

1.For the first offense, an oral reprimand;

2.For the second offense of the same or similar nature, a written reprimand with a copy placed in the employee's file;

3.For the third offense of the same or similar nature, one day's suspension without pay;

4.For the fourth offense of the same or similar nature, suspension or discharge.

An employee's record of each offense will be cleared in the event the employee has not committed the same offense within a period of one (1) year from the date of notification of that offense.

Section 3. An employee desiring an investigation of his/her discharge, suspension, reprimand, or warning notice must file his/her protest in writing with the Employer and the Union within five (5) days, exclusive of Saturday, Sunday, and holidays, of the date the employee received such disciplinary notice.

Section 4. The discharge, reprimand, suspension, or warning notice shall then be discussed by the Employer or its representative and the Union as to the merits of the case. Should it be

found that the employee has been unjustly discharged or suspended, he/she shall be reinstated and compensated for all time lost at his/her regular rate of pay, plus such overtime as he/she may have worked.

Section 5. The employee may be reinstated under other conditions agreed upon by the Employer and the Union or pursuant to the terms of an arbitration award. Failure to agree shall be cause for the issue to be submitted to arbitration as provided for in Article 15 of this agreement.

Section 6. Disciplinary grievances shall commence at Step 2 of the grievance procedure as set forth in this agreement.

Article 21 - Management Rights

Contracting and Subcontracting

A) The Union recognizes that the management of the City of Marshfield and the direction of its working forces is vested exclusively in the City, including but not limited to the right to hire, suspend, or demote; discipline or discharge for just cause; adoption of reasonable work rules; to transfer or layoff because of lack of work or other legitimate reasons; to determine the type, kind and quality of service to be rendered to the City; to determine the location of the physical structures of any division or department thereof; to plan and schedule service and work programs; to determine the methods, procedures, and means of providing such services; to determine wage substitutes, good and efficient City service; subject to the terms of this Agreement. Any unreasonable exercise of the management's rights by the City as set out in this paragraph may be appealed by the Union through the grievance procedure.

. . .

POSITIONS OF THE PARTIES:

In support of its position that the grievance should be sustained, the Union argues in its brief that:

The grievant was indeed guilty of the offense as charged; namely, that he was 38 minutes late for work on July 14, 1989. But the penalty imposed -- discharge -- simply does not fit the crime.

While rules relating to tardiness do have a reasonable purpose, tardiness is decidedly at the "less serious" end of the spectrum of employee misconduct. Moreover, tardiness in this particular instance did not provide just cause for termination.

There were mitigating circumstances which the City, based on its prior statements, should have considered. The City was aware that the grievant was undergoing personal marital difficulties (including an impending divorce), was drinking too much, and had a bad case of the blues. Yet, although the City itself had held out "extenuating circumstances" as an important aspect in determining just cause, and had scheduled an investigatory interview ostensibly to give the grievant the opportunity to explain such circumstances, the City improperly concluded that the grievant's established personal difficulties had no bearing on his ability to report for work on time. Given the City's publicity for the EAP as "a safety net" for City employees; given that the grievant voluntarily offered to seek the services of the EAP to deal with his personal problems; and given the City's offer to consider extenuating circumstances, the City acted unreasonably in discharging the grievant.

Further, close review of the other instances when the grievant was disciplined reveal that the City did not properly follow the contractual provisions for progressive discipline and the procedures for clearing an employee's record found in Article 20.

Article 20 provides for progressive discipline for offenses of "the same or similar nature," and also that an employee's record "will be cleared in the event" he or she "has not committed the same offense" within a year's time. On December 13, 1988 and January 26, 1989, the grievant was disciplined for untimely reporting for unscheduled snowplowing. Because these were not regularly scheduled shifts, and because the messages were left with his spouse, these incidents are not "of the same or similar nature" as the tardiness for regular shifts. Thus, because they are different they should not be considered as part of the chain of progressive discipline in the instant case.

However, even if they are considered as "same or similar," they clearly are not "the same" for purposes of clearing an employee's record. It is fundamental that arbitrators must honor all words in an agreement; the fact that the same contractual section uses both phrases -- "same or similar" and "the same" means that the two phrases must have separate, different meanings. Even if reporting late for unscheduled work in the middle of the night was an offense "of a similar nature," it was not "the same offense." Therefore, more than a year had passed since the grievant committed "the same offense" -- being tardy for a regularly scheduled shift. Under the contract this should have caused the
clearing of his record of offenses prior to and including the June 24, 1988 incident. Thus, the July 14, 1989 tardiness was the first such offense; pursuant to Article 20, this should have subjected the grievant to an oral reprimand, or, at worst, a one-day suspension.

By requiring that all discipline be for just cause, Article 20 requires the City to demonstrate that the grievant committed the offense with which he was charged, and that the discipline imposed fits the offense. The City has failed to carry this burden.

In sum, for nine years, the grievant was considered a good Equipment Operator. Then, due to some personal problems (which he has since corrected), he was late for work six times in a 20-month period. He was fired. This discharge was inappropriate. The City improperly applied the "progressive discipline" system to the grievant by holding against him two offenses that were not the same as the one for which he was fired. (emphasis supplied)

The grievance should be sustained, and the grievant made whole.

In support of its position that the grievance should be denied, the City asserts in its brief as follows:

The collective bargaining agreement provides for management's right to discharge employees (Article 21), and provides a progressive disciplinary procedure culminating in discharge for repeated offenses. As there is no doubt that the grievant was tardy on all occasions noted, the sole issue is the reasonableness of the decision to discharge.

Arbitral case law establishes that "just cause" means that an employer, acting in good faith, has fair reason for discharging an employee. Misconduct which represents a willful disregard of the employer's interest and which is inconsistent with an employee's obligations -- such as repeated tardiness -- constitutes just cause.

It is well settled that an employer has just cause to discharge an employee who is continually tardy, especially when progressive discipline has failed to correct such misconduct. See, Kimberly-Clark Corp., 82 LA 1091 (Keenan, 1984); GAF Corp., 77 LA 947 (Weinberg 1981); S & S Corp., 62 LA 883 (Williams, 1973), and Cameron Iron Works, Inc., 84 LA 937 (Milentz, 1985).

Here, unrebutted evidence establishes that the grievant was habitually tardy, and that the City's repeated reliance on progressive discipline was unsuccessful in correcting this misconduct. Moreover, the City even gave the grievant two extra chances to correct his misconduct before his discharge. The grievant was explicitly warned early in the process that any further offenses involving tardiness or related areas could subject him to discharge. Indeed, in the suspension notice after the fifth offense, the grievant was given clear and unambiguous notice that further tardiness would result in termination.

As the grievant never challenged any of these prior disciplines, they must be deemed valid for determining progressive discipline.

It is also well established that arbitrators must defer to the City's determination as to the proper penalty to be imposed for the grievant's misconduct, and should not substitute their discretion for that vested with the employer. Only where the employer has acted in an unreasonable, arbitrary or capricious manner can the employer's judgment be superseded. Here, the City gave the grievant two extra chances for redemption; conducted a full and fair investigation, and gave the grievant adequate warning of the effects of further offenses. Such actions are hardly those of an unreasonable, arbitrary or capricious employer. The City's reasonableness is further established by the forewarning it gave the grievant, notifying him in the January, 1989 suspension notice that he had reached his "last chance" to prove his "willingness to work for the City without being tardy."

The provisions of Article 20(2) set forth a progressive disciplinary procedure, with which the City has complied, and which must be given effect. Discipline imposed under such procedures must stand. See, Kimberly-Clark Corp., supra, at 1094. A conclusion that the discharge was unreasonable would constitute a rewriting or modification of the contract, an arbitral act expressly forbidden by the contract.

Moreover, the Union's arguments are totally without merit. The Union appeals for compassion and sympathy; the

contract, however, is devoid of any such elements. Discretion in the imposition of discipline rests with the City exclusively. The Union's argument as to so-called "lengthy time periods" between offenses is also unpersuasive, inasmuch as the contract provides only that offenses are expunged if not repeated within a year. Finally, the grievant's own actions show that he was well aware of the Employee Assistance Program, and that the City neither had the responsibility of ordering him into the program, nor the reliable expectation that his participation therein would resolve his tardiness.

In City of Marshfield, Dec. No. 33729 (3/85), Arbitrator Crowley upheld the City's discharge of an employee for repeated tardiness under similar circumstances.

In its reply brief, the Union rebuts the City's arguments as follows:

The City's arguments -- that arbitral authority and the record evidence support discharge, and that the arbitrator must defer to the City's determination of the penalty -- are all flawed.

The City cited four tardiness-related cases in which just cause for discharge was found. Review of those cases, however, does not support the City's action herein, but actually supports the Union's position.

The grievant was discharged for six instances of tardiness over a 30-month period. In none of the cases cited by the City was an employee discharged for as few as six instances of tardiness over such a period of time. The grievants in the cases which the City cites, were discharged for tardiness/absenteeism on 40% of the scheduled workdays; tardiness over 30 times in 18 months, plus falsification of documents; tardiness/absenteeism 106 days out of 383 scheduled work days in 19 months; and tardiness while on disciplinary probation, coupled with an unrepentant attitude. Thus, there is no legitimate comparison of the cases cited by the City to the grievance under review.

Further, the City failed to conduct a fair investigation, in that it did not take into consideration the personal problems of the grievant, and took no steps to determine whether the grievant's claims about marital problems and excessive alcohol use were valid. No matter what the grievant's explanation, the only explanation that would have saved him from discharge would have been that he was physically prevented from reporting to work or calling in sick. Since this was a sham investigation, the discharge is invalid.

Moreover, the City's reliance on a previous arbitration award involving the same parties is not on point. In that award, it was not just the grievant's six instances of tardiness, but his act of dishonesty (tampering with the time clock) that lead the arbitrator to find just cause for the discharge.

Finally, the City errs in its assertion that the arbitrator has no authority to modify the discharge. As is well-established, a critical aspect of just cause is that the penalty is reasonably related to the proven offense as well as the employee's record of service to the employer. Here, as the discharge is not reasonable based on the foregoing factors, it lacks just cause and is thereby prohibited by the contract. A finding that the arbitrator lacks authority to modify the penalty would totally dismantle the explicit just cause standard of the contact.

The discharge of the grievant, a valuable Equipment Operator whose extremely difficult (but now resolved) personal troubles caused him to be late six times in 30 months, lacked just cause. The grievant should be reinstated to his former position and made whole.

In its reply brief, the City concludes its argument as follows:

The Union's claim that the City did not have just cause to discharge the grievant is totally without merit. Since

the City used its discretion to grant the grievant two full chances to redeem himself after the point at which he could have been discharged, the City clearly had just cause to discharge him on the occasion of his sixth instance of misconduct. Moreover, the City properly followed the steps of the progressive discipline procedure in discharging the grievant for his six instances of tardiness.

The Union also errs in its analysis of the progressive discipline procedures. Contending that the tardiness offenses of December, 1988 and January, 1989 were not of a "same or similar nature" as the other offenses -- because they involved "unscheduled" starting times -- is wrong. Contrary to the Union's allegations, these offenses, and their attendant discipline, must indeed be counted in the progressive discipline.

First, it is clear that the discipline for these offenses was subject to the grievance process, and that the grievant accepted the discipline at the time. Thus, the discipline must be deemed valid and counted for purposes of progressive discipline. Given the contractual time limits on filing grievances, the Union is hereby challenging the validity of the prior discipline when it can no longer do so.

The Union further errs in its description of the nature of the offense for which the grievant was previously disciplined. Contrary to the Union's claim that he was disciplined for failure to report for "unscheduled snowplowing," the grievant had indeed been advised that he was to report for work at 3:00 a.m. on the two occasions in question. Indeed, the grievant acknowledged that he had received a note to this effect from his wife relating to the December 13, 1988 incident, but that he failed to report for work because he overslept. Thus, even if the January, 1989 incident is not considered, the grievant was still subject to discharge based on his five other offenses.

Moreover, the Union's allegations regarding the grievant's so-called extenuating circumstances are without merit, as are its contentions that the discharge should be overturned because the City refused to accept the grievant's offer to participate in the Employee Assistance Program. This offer came only when the grievant knew he was about to be discharged; it would be absurd to force the City to retain all employees who, when faced with imminent discharge, suddenly seek to enroll in the EAP. The grievant's awkward attempt to save his job came only after he was repeatedly made aware of the EAP, but had continuously declined to avail himself of its services.

The Union's contentions as to "extenuating circumstances" are also specious. In its investigatory interview on July 14, 1989, the City was looking for the grievant to offer a legitimate reason, as determined by the City, to explain why he had neither reported on time nor phoned in his report of illness -- e.g., an incapacitating illness, a car accident, a sudden death in the immediate family. The grievant's explanations -- personal problems and alcohol abuse -- are simply not of this nature. It is also noteworthy that such purported problems were never mentioned to the City until after the discharge, indicating that the grievant dreamed up his supposed problems in an effort to retain his employment.

Finally, the Union assertion that the grievant has now resolved his personal problems, even if true, is irrelevant.

Because the Union contentions are unsupported by the record and totally without merit, this grievance should be dismissed in its entirety.

DISCUSSION:

The record establishes and the grievant admits that he came in 30 minutes (or more) late on July 14, 1989. The record further demonstrates that the grievant had a long history of tardiness for which he had been progressively disciplined. The only issues in dispute are whether the City followed the progressive discipline procedure in discharging the grievant and the appropriateness of the grievant's discharge.

An argument has been advanced by the Union that the City failed to follow progressive discipline when it discharged the grievant. In this regard the Union maintains that Article 20 provides for progressive discipline for offenses of "the same or similar nature," and also that an employee's record "will be cleared in the event" he or she "has not committed the same offense" within a year's time. The Union claims that two of the five instances of tardiness relied upon by the City to discharge the grievant -- December 13, 1988 and January 26, 1989 -- were not of "the same or similar nature" because they were not regularly scheduled shifts (both instances involved unscheduled snowplowing); and because the message to come in was not given to the employee but to his spouse (with whom he was having marital difficulties). The Union concludes that the aforesaid two incidents are different and, therefore, should be excluded from the list of offenses considered by the City in the chain of progressive discipline. If this is done, according to the Union, fully a year has passed from the date the grievant had last been notified that he reported late to work for a scheduled shift (June 27, 1988) and the time he reported late for work giving rise to his discharge (July 14, 1989). Accordingly, pursuant to the provisions of Article 20, Section 2, the grievant's record should have been cleared of offenses prior to and including June 24, 1988. Therefore, the provisions of Article 20 place the grievant at best at the oral reprimand stage of the progressive discipline procedure and at worst at the one-day suspension stage according to the Union.

The record, however, does not support a finding regarding same. In both of the two aforesaid incidents, the grievant had been advised that he was to report to work at 3:00 a.m. Moreover, in regard to the December 13, 1988 incident, the record indicates the grievant's wife had, in fact, left him a note advising him that he was to report to work at 3:00 a.m. but that he did not do so because he had overslept. The labor agreement makes no distinction between the grievant's obligation to report on time to a regularly scheduled shift, and his obligation to report promptly to a scheduled snowplowing shift. In view of the foregoing, and the record as a whole, the Arbitrator finds it reasonable to conclude that the offense the grievant was guilty of on the two dates noted above is tardiness. Consequently, there is no basis for removing these two incidents from the chain of progressive discipline as argued by the Union. Based on all of the above, it is clear that the City acted properly in following the progressive disciplinary procedures set forth in Article 20 and based on the grievant's six instances of tardiness had "just cause" to discharge him.

The Union argues, however, that discharge of the grievant was inappropriate. The Union lists several mitigating factors in favor of a lessor form of discipline. For the reasons listed below, the Arbitrator rejects this argument of the Union.

The Union first argues that the City failed to consider the grievant's personal difficulties, and his offer to voluntarily engage the services of the Employee Assistance Program. The record, however, does not support a finding regarding same. The City gave the grievant not one, but two "extra" chances to redeem himself after he had reached step 4 of the disciplinary procedure. (emphasis supplied) That is, although the grievant was subject to discharge on two prior occasions, the City opted for suspension rather than discharge. In addition, the City repeatedly encouraged the grievant to seek assistance for his personal problems through its Employee Assistance Program. As early as the second step of the progressive discipline procedure, the City, on September 18, 1987, informed the grievant as follows:

> The City of Marshfield has established an Employee Assistance Program to help employees who feel that a personal or family problem may be causing a problem at work. I believe that you are already aware of this service through the hand-outs and information periodically included in the newsletter. If you feel that this type of program may benefit you, please feel free to call 387-5444 and set up an appointment.

Finally, the City made repeated warnings to the grievant that any further problems involving tardiness could result in his termination. Nevertheless, the grievant did not correct his behavior until, when threatened with termination on July 14, 1989, he belatedly offered to seek Employee Assistance. In the Arbitrator's opinion, the grievant's 11th hour offer was too little too late, and even if sincere, the City was not contractually obligated to accept it in lieu of discharge.

The Union further maintains that the grievant's discharge should be overturned because he was a valuable, nine-year employee and has now straightened out his life. Assuming arguendo that the Arbitrator can take this factor into consideration, the Union's case still must fail. There is no persuasive evidence in the record that the grievant has straightened out his life, and taken care of his personal problems so that he would not be tardy again in the future. In addition, there is no contractual authority requiring the City to make such an accommodation herein nor did the Union cite any persuasive authority for this proposition.

Finally, the Union argues that tardiness is at the "less serious" end of the spectrum of employee misconduct and does not provide just cause for termination in the instant case. While it is true that tardiness is a less serious offense than other kinds of employee misconduct, it is also true that the grievant was tardy on six different occasions totalling over two hours over a 2 1/4-year period of time. As noted above, the City properly followed the progressive disciplinary procedure in discharging the grievant for his tardiness. The City put the grievant on notice that his tardiness could lead to termination. It gave him several chances to change his behavior but the grievant never did so. The City also encouraged the grievant to use the Employee Assistance Program very early in the process (it could not force him to do so) to help him solve his personal problems but to no avail. Based on the foregoing, the Arbitrator rejects this argument of the Union as well.

Based on all of the above and foregoing, the record as a whole and the arguments of the parties, the Arbitrator finds that the answer to the issue as framed by the undersigned is NO, the City did not violate Article 20 or 21 of the collective bargaining agreement when it discharged the grievant on July 18, 1989. In light of all of the foregoing, it is my

AWARD

That the grievance of William Gratzek is hereby denied and the matter is

dismissed.

Dated at Madison, Wisconsin this 30th day of August, 1990.

By _____
Dennis P. McGilligan, Arbitrator