BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 67, AFSCME, AFL-CIO	Case 410 No. 49590 MA-7997
and	
CITY OF RACINE	

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin 53401-0624, for the Union.

Mr. Guadalupe Villarreal, Assistant City Attorney, 730 Washington Avenue, Racine, Wisconsin 53403, for the City.

ARBITRATION AWARD

Local 67, AFSCME, AFL-CIO (the Union) and City of Racine (the City), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on October 29, 1993, appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Racine, Wisconsin on December 9, 1993. The parties made oral argument and declined opportunity to file briefs. A transcript was taken and received on January 14, 1994.

ISSUE

The parties stipulated to the following statement of the issue:

> Did the employer violate the collective bargaining agreement by terminating D.M. on June 23, 1993? If so, what is the appropriate remedy?

BACKGROUND

When this dispute arose, Grievant D.M. was a seasonal employe for the City. (Seasonal employes work during the period of March to November for approximately 32 weeks a year.) After beginning his seasonal work in May, 1993, he received a notice to come to the Racine County Child Support Office to have his child support obligation adjusted to reflect his new income. Grievant was not

alleged to be behind in his child support payments. The original notice was for June 10 at 10 a.m., 1/ but Grievant rescheduled his appointment for June 17 at 4 p.m. so as to not miss work. When Grievant appeared as scheduled, he was put under a body attachment until the court had ascertained that he was up to date on his child support payments. Persons subjected to body attachments are not allowed to make bail, and Grievant was then detained in jail overnight. On Friday, June 18, he called Solid Waste Supervisor Erv Keller to say that he was in jail on a matter related to his child support payments and would not be able to come to work that day, but that he was going to be released later that day. Keller responded that Grievant should bring the paperwork with him on Monday. The information was relayed to Superintendent of the Department of Public Works Joseph Golden.

Grievant appeared in court that day, Friday, June 18, and the matter of his child support was cleared and the body attachment was released, but Grievant was not released from jail because of a requirement that his parole officer approve his release and the parole officer was unavailable to see him that day. Consequently, Grievant was detained over the weekend. The parole officer, for reasons not in the record, did not release grievant until June 23.

There is a dispute whether Grievant's sister called the City on Monday, June 21. On Tuesday, June 22, no inmates were allowed to make calls out of the jail. On Wednesday, June 23, Grievant telephoned Superintendent Golden to tell him that the parole officer was releasing the body attachment on him and he could be at work the next day. Golden informed Grievant he was being terminated.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE V

Seniority

...

G. Loss of Seniority. An employee shall lose seniority rights for the following reasons only:

....

3. If without giving a reasonable excuse to his foremen, he remains away from work for three (3) or

1/ Unless otherwise noted, all dates herein refer to 1993.

more consecutive working days.

POSITIONS OF THE PARTIES

The Union

The Union argues that Grievant gave reasonable excuse for his absence. It notes that neither the Grievant nor his sister who phoned on his behalf were told that his job was in jeopardy, and, in fact, Supervisor Erv Keller told him that his absence would be acceptable if proper documentation was provided upon his return. The Union asserts that Grievant's sister notified the City on June 21, that Grievant was unable to phone the City on June 22 because of jail constraints, and that when he phoned on June 23, he was told he was terminated. After hearing that he had no employment, Grievant decided to remain incarcerated in fulfillment of a $400 fine and was therefore unavailable for work.

The Union insists Grievant was not afforded due process prior to termination. Grievant was never sent any written correspondence regarding his termination and the Union was never notified in any way. There was no fair investigation. According to the Union, since the City did not meet its due process obligations, it did not have just cause to terminate grievant.

The Union asks for reinstatement of Grievant as a seasonal employe and a make whole remedy including interest on back pay.

The City

The City disputes the Union's contention that Grievant's sister called the Department of Public Works on Monday, June 21. It asserts Keller's direction to Grievant to bring the documentation to work the following Monday was not an indication that the absence was excused. To the contrary, the City insists that being in jail is not a reasonable excuse for being absent from work. It asserts the City followed due process in making its decision to terminate Grievant and that it was not compelled to tell an employe that a reasonable excuse can be made.

ADDITIONAL FACTS AND DISCUSSION

The parties agree that the validity of Grievant's termination must be reviewed under the standard of Article V Paragraph G, Section 3, quoted above. Thus, the question is whether Grievant was away for three or more consecutive working days, and if so, whether he gave a reasonable excuse to his foreman.

The City argues that being in jail is not a reasonable excuse for being absent from work. While that may be true as a general

proposition, there are instances when detention might be a reasonable excuse. In this case, the jail detention was not for the usual reason, being accused or found guilty of some crime or misdemeanor. In Grievant's case he was subjected to an administrative procedure that did not result from any wrongdoing on his part, but resulted from a necessity to have his child support obligation recalculated based on his changed income.

Indeed, he would not have been detained except for the procedure which put a body attachment on him until the court was satisfied his child support was paid up and he had seen his parole officer. His detention on Friday, June 18, then was not the immediate result of any wrong doing on his part. (It could be argued that Grievant was supervised by a parole officer, and thus detained, because of some earlier wrongdoing that is not in the record. Whatever the cause of his being assigned to a parole officer, that fact is not in the record, and more important, that act predates the events for which Grievant was terminated, and was not the basis of the termination.)

The undersigned concludes that Grievant's absence on June 18 through June 23, being for a reason beyond his control and not being for any wrong doing should be treated as an excused absence. As an excused absence, it would not cause loss of seniority under Article V, Paragraph G, Section 3, and did not entitle the City to terminate the Grievant.

The City argues that Grievant was not available for work until he was released on July 3, 1993. Although that argument is factually correct, it does not change the result reached herein. Grievant was told he was terminated on June 23, 1993 and the City must be able to support its decision with the information it had at that time. (One reason for the legal rule that employer actions must be supported by facts at the time of the action is illustrated by the facts of this case: when Grievant was told he had to either pay an outstanding $400 fine or serve jail time in lieu of the fine, 2/ Grievant decided that since he had just been fired, it made more sense for him to serve that time in jail. It is a reasonable hypothesis that if he had not been told on June 23 that he was terminated, he would have paid the fine and been available for work.)

In summary, having found that the reasons for Grievant's absence on June 18 through 23 should constitute a reasonable excuse, the undersigned finds that the City terminated Grievant in violation of Article V, Paragraph G, Section 3.

2/ The reason for the fine is not in the record and is, presumably, irrelevant to this proceeding.

The undersigned rejects the Union's request for interest on the backpay, for the Union does not cite, and the undersigned does not find, any contractual provision for such interest.

In light of the record and the above discussion, the Arbitrator issues the following

AWARD

1. The Employer violated the collective bargaining agreement by terminating D.M. on June 23, 1993.

2. The City shall reinstate Grievant D.M. to a position as a seasonal employe and make him whole for all compensation lost as a result of its violation.

Dated at Madison, Wisconsin this 31st day of March, 1994.

By Jane B. Buffett /s/

Jane B. Buffett, Arbitrator