BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
SUPERIOR CITY EMPLOYEES UNION LOCAL 244, AFSCME, AFL-CIO	:	Case 113 No. 49309 MA-7890
and	:	
CITY OF SUPERIOR	:	

Appearances:

Mr. James Mattson, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Thomas N. Hayden, City Attorney, appearing on behalf of the Employer.

ARBITRATION AWARD

The Employer and Union above are parties to a 1991-93 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the discipline grievance of Steve Liebaert.

The undersigned was appointed and held a hearing on December 8, 1993 in Superior, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on February 14, 1993.

ISSUES:

The Union proposes the following

1. Did the Employer give the grievant a three-week suspension for just cause?

The Employer proposes the following

1. Is the grievance timely?

2. Is there just cause for the suspension of the grievant?

3. What remedy is appropriate, if the answers to questions 1 and 2 are in the affirmative?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 10 - DISMISSALS

> 10.01 The City of Superior agrees that it will act in good faith in the discipline or discharge of any employee. No employee will be disciplined or discharged except for just cause.
>
> 10.02 In the event a disciplinary action is taken against any Union employee, a notification of such action shall be given in writing to the employee and the Union stating the reasons said action shall be taken and when it will commence.
>
> 10.03 All disciplinary action and discharges shall be subject to the grievance and arbitration procedure of this Agreement.

ARTICLE 11 - GRIEVANCE PROCEDURE

> Crucial to the cooperative spirit with which this Agreement is made between the Union and the City of Superior is the sense of fairness and justice brought by the parties to the adjudication of employee grievances. Should any employee feel that his/her rights and privileges under this Agreement have been violated, hew/she shall consult with his/her Union Grievance Committee. The aggrieved employee and the Grievance Committee shall, within ten days of the date the grievance occurred, present the facts to the employee's immediate supervisor or department head. . . .

DISCUSSION:

Grievant Steve Liebaert had worked at the Wastewater Treatment Plant for approximately nineteen years, and had been an Operator since 1976, when in February, 1993, a .22 caliber rifle was found in a paint locker he used. There is no dispute that the grievant had brought the rifle to the plant approximately four years earlier in response to a suggestion by the City's poundmaster as to how to deal with a pest problem at the plant. Liebaert testified without contradiction that in about 1989 the plant was inconvenienced by a group of groundhogs which were established around the plant and were causing some maintenance problems. He called the City's poundmaster, then Bill Benjamin, and asked him to take care of the problem; he testified that Benjamin informed him that he did not have time and that shooting

the groundhogs was the way to deal with it. The grievant brought his father's .22 rifle to the plant shortly thereafter, with five shells. But because the groundhogs moved to another location, the rifle was never used. The grievant placed it behind some cans of paint, in a locker to which he had the only key, and forgot about it over the course of time.

On February 9, 1993, Liebaert left the paint locker unlocked because another plant worker needed to retrieve something from it. That morning, Assistant Superintendent Dan Romans was searching for a scraper to do some painting, went to the paint locker, and found the rifle there. Both Romans and the other members of management whom he told about finding the rifle were concerned about it, called the police, and after a police officer had examined it, called Liebaert to ask if it belonged to him. Liebaert forthrightly admitted that he had brought it to the plant.

The City subsequently called a meeting for February 17, in Public Works Director Jeffrey Vito's office. Vito, Liebaert, Union representative Mattson, City Attorney Hayden, and Local 244 President Chuck Miller were present. The City took the position that at the least the presence of the rifle in the plant was a serious safety violation, while the Union took the position that the rifle had never been used and had been brought to the plant for innocuous purposes. At the meeting, however, it is undisputed by all sides that the parties negotiated a discipline level governing this incident, and agreed that the grievant would be suspended for three weeks. Subsequently, on February 18, Hayden wrote to Liebaert to confirm the suspension, in the following terms:

> This will confirm the agreement between the City of Superior, yourself and Union Representatives on Wednesday, February 17th. That agreement was as follows:
>
> 1. You will be suspended for 3 weeks without pay commencing February 17, 1992.
>
> 2. You will report to work on Wednesday, March 9th at 11:00 PM for the midnight shift for March 10th.
>
> 3. Any further violations of the Union Contract or City work rules not in conflict with the Contract will result in your terminations.
>
> 4. This letter shall be placed in your personnel file and shall remain there.

> The above represents the total agreement between the parties.

At the time this letter was sent, the grievant was already serving the suspension involved. On February 23, however, Hayden sent a second letter, as follows:

> This is to advise that an error was made in this office relative to the number of days you are suspended. The total number of days is 21 (3 weeks) and **not** 15 as previously stated. Sorry for any inconvenience caused.

1. You will be suspended for 3 weeks without pay commencing February 17, 1992.

2. You will report to work on Tuesday, March 9th at 11:00 PM for the midnight shift for March 10th.

3. Any further violations of the Union Contract or City work rules, not in conflict with the Contract, will result in your termination.

4. This letter shall be placed in your personnel file and shall remain there.

It is undisputed that despite the language of the second letter, the actual length of suspension was 17 days, because of the plant's scheduling requirements. The Union objected to the additional two days, and Local President Miller testified that after he received Hayden's two letters he set up a meeting with management for March 8 to discuss the two-day discrepancy. Miller testified that this meeting was cancelled, but was later held, and that he continued to feel that the matter was still open and that this was an on-going discussion. Following the actual holding of the meeting in question, on April 7, Vito wrote to Miller on April 8 in the following terms:

> This is in regards to our meeting in the Mayor's office on Wednesday, April 7, 1993, concerning Steve Liebaert. We discussed how to handle the two (2) days of suspension that Mr. Liebaert served that the Mayor agreed were beyond the original 15-day suspension that the Union agreed to.
>
> Due to the fact that Mr. Liebaert did not receive pay for those days, the only alternative we feel we can offer is to allow Mr. Liebaert to take two (2) days of vacation for the days in question. This would allow him to be paid for those days. We cannot pay Mr. Liebaert for these days if, in fact, he is not working nor is on vacation.

On April 21, Miller wrote to Vito as follows:

> This is in response to your letter dated April 8, 1993 concerning the above topic. Because we feel it was an error on management's part that Mr. Liebaert served two (2) days of suspension beyond the original 15-day suspension that was agreed to, we cannot agree

> with the alternative that Mr. Liebaert use two (2) days of his vacation time to make up for the error.
>
> Because we cannot reach an agreement, we suggest that the matter of suspension and the amount of time off for such suspension be brought to an arbitrator for a decision. We also question why there was never a written agreement drawn up outlining the suspension of Mr. Liebaert. I remind you that it has always been the practice in the past for both parties to sign an agreement following a suspension.
>
> If you would, please contact me as soon as possible so we can file for arbitration and hopefully resolve this problem.

And on May 11, the correspondence was concluded with a letter from Vito to Miller as follows:

> I am writing in response to your letter dated April 21, 1993, concerning the two days in question on Mr. Liebaert's suspension. If the Union feels that arbitration is the direction they want to proceed in resolving this matter, you should proceed in implementing the process that is necessary.

The grievance in this matter was filed on May 20th, 1993. On cross-examination, Miller stated that he could not answer why a grievance was not filed within ten days of Hayden's first letter. In his own testimony, grievant Liebaert (who has been Union Steward since 1976, and was Union President from 1981 to 1986) testified that he did not agree to a three-week suspension on February 17, but did agree to a 15-day suspension. Liebaert stated that he was now grieving the suspension entirely because he thinks it was unfair and because management improperly considered a ten-year-old incident in setting the penalty. It is undisputed that management considered a 1982 incident in its investigation of how to respond to the presence of the rifle, but the three-week suspension letter introduced into the record demonstrates that the conduct at issue then involved unauthorized use of City equipment, not something related to the incident which gave rise to the present case. It is also undisputed that normally the parties reduce settlement agreements to writing, but that this was never done in this matter.

The City contends initially that the grievance was not timely filed, because the grievant did not file the grievance until after the three weeks' suspension was up and not within the ten days mandated by the contract. The City further argues that with

respect to the merits, this grievance in effect requests the Arbitrator to review penalties imposed by management, when the Union and management had agreed, even though in an unwritten fashion, that a three-week suspension was appropriate. The City argues that the only dispute which kept the issue alive was whether "three weeks" meant seventeen days, twenty-one days or fifteen days. The City requests that the penalty originally set forth in its February 22 letter be upheld and the grievance denied.

The Union contends that the grievance is not untimely because the local was still in the process of negotiating a settlement to the matter with the City, following a series of meetings and letters. The Union contends that after the course of several months, with no prospect of reaching agreement with the City, the Local was left with no choice but to file a grievance. With respect to the merits, the Union contends that the Employer grossly overreacted by giving the grievant a three-week suspension for this incident, because it was clear to all concerned that the firearm was brought to the plant for innocuous reasons and was simply forgotten. The Union further contends that the use of a ten-year-old incident by the City in setting the penalty here is out of line with traditional arbitral concepts of fairness, particularly because the 1982 incident was unrelated. The Union contends that the City never asked the grievant why the firearm was in his locker initially, and would have found no reason to proceed further if they had made such a minimal investigation. The Union requests that the Arbitrator sustain the grievance and make the grievant whole for any and all lost benefits and wages due to the Employer's action, and remove any reference to this matter from the grievant's record.

I note that all of the evidence in the record supports the grievant's contention that he brought the firearm to the plant initially for innocuous reasons, and that the fact that it was maintained for four years at the plant is of less significance than it might be under circumstances where it was not kept in a locker to which (normally) other people did not have access. I do not, however, find that I have jurisdiction to modify the penalty established by management in this matter, because the grievance is clearly untimely.

There is no evidence at all in this record to demonstrate that the parties explicitly agreed to waive the ten-day period for filing grievances. Clearly, the grievant was on notice that he was suspended as of February 17, when the initial meeting was held. Because the plant does not follow a five-day working week, it is possible that the parties could in good faith misunderstand each other as to what "three weeks" would mean in practice. Thus once the City corrected its letter of suspension on February 22 or

23 1/ a new opportunity to file a grievance therefore arose. But the grievance arguably created by this difference of opinion could extend no further than to challenge the two-day discrepancy between the Union's interpretation and the City's. Any further challenge, to the concept of a suspension as a whole or to its length up to fifteen days, was disposed of clearly by the parties' agreement on February 17, whether or not that agreement was ever reduced to writing. Thus even if the most charitable interpretation is given to the subsequent series of communications between Miller and Vito, that discussion was entirely about the two day discrepancy. Indeed, Miller's April 21 letter cited above, which raised the possibility that the Union might challenge the suspension in its entirety, drew a response from Vito clearly demonstrating that the City had not agreed to discuss anything beyond the two days. Vito's May 11 letter could be read as an agreement by the City to arbitrate the two-day discrepancy. But there is nothing in the entire sequence of events to suggest that the City ever agreed to waive the time limit with respect to the suspension issue as a whole. And when the Union requested arbitration and formulated its proposed issue for this

1/ Two copies of the same letter were entered into evidence, one showing a date of February 22 and one a date of February 23. It is not clear from the testimony which of these two was actually sent, or if both were sent; but it makes no difference in practice.

Arbitrator, the statement of the issue did not challenge the two-day discrepancy, but instead challenged the entire basis for the suspension. The aspect of this issue which I therefore might have found to be timely is not the subject of the Union's grievance; and the subject of the Union's grievance is clearly out of time. It must therefore be denied without any further consideration of the underlying merits.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

The grievance is denied as untimely.

Dated at Madison, Wisconsin this 2nd day of June, 1994.

By Christopher Honeyman /s/

Christopher Honeyman, Arbitrator