

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 VILLAGE OF HOWARD : Case 25
 : No. 50563
 and : MA-8299
 :
 TEAMSTERS LOCAL UNION 75, IBT :
 :

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys
 at Law, by Mr. John J. Brennan, and Mr. Mike Williquette, Business
 Representative, appearing for the Union.
 Duffy, Holman, Peterson, Wieting & Calewarts, Attorneys at Law, by
Mr. Dennis M. Duffy, and Mr. Kevin Anderson, Village Administrator,
 appearing for the Village.

ARBITRATION AWARD

Teamsters Local Union 75, IBT, herein the Union, requested the Wisconsin
 Employment Relations Commission to designate a member of its staff as an
 arbitrator to hear and to decide a dispute between the parties. The Village of
 Howard, herein the Village, concurred with said request and the undersigned was
 designated as the arbitrator. Hearing was held in Howard, Wisconsin, on
 April 25, 1994. There was no transcript made of the hearing. The parties made
 verbal closing arguments, rather than filing post-hearing briefs.

ISSUES:

The parties stipulated to the following issues:

Did the Village have just cause to discharge the
 grievant on December 27, 1993? If not, what is the
 appropriate remedy?

BACKGROUND:

At the time of his discharge on December 27, 1993, 1/ the grievant,
 David Bringe, had been employed as a laborer in the Village's Streets
 Department for approximately sixteen years.

On March 24, Bringe was given a written notice advising him that he could
 receive further disciplinary action if he continued to take time off from work
 without calling to report his absence, as he had done on that date.

The Village sent the following letter to Bringe on April 7:

During the calendar year 1992 you were absent from work
 351.75 hours. In 1993 you have been absent from work
 206 hours during the first 7 pay periods. During 1992

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

there were only 4 pay periods in which you were present at work each day of the pay period. During 1993 there has yet to be a pay period in which you were present at work each day of the pay period.

The Village has been sympathetic to your health problems and has allowed this extensive time off with the hope that you will be able to return to work. However, the Village can no longer condone continued absenteeism of such length. Your position of Street Laborer is important to the community. It is important for the position to be filled with full time personnel so that services expected by the community are performed.

Therefore, if you are absent from work over six days by the end of 1993 your employment with the Village will be terminated. An appropriately scheduled vacation may be the only exception. All vacation time must be scheduled at least one week in advance. If you have any questions regarding this matter do not hesitate to stop in and talk with me.

Also, please sign below indicating that you have received a copy of this letter and return the original to me.

On May 20, Bringe received a written notice advising him that his absences on May 17 and 18 had reduced to four the total days on which he could be absent from work during the calendar year of 1993 per the letter dated April 7. On June 2, Bringe received a written notice advising him that his absence on June 1 had reduced his allowable absences in 1993 to three. On June 21, Bringe received a written notice advising him that the allowable absences had been reduced to two by his absence on June 14. On July 7, Bringe received a written notice advising him that his absence on July 6 had reduced the number of allowable absences to one. On July 8, Bringe received a written notice advising him that his absence on July 7 had reduced the number of allowable absences to zero (0).

On September 22, Bringe met with Kevin Anderson, the Village Administrator, Ken Pamperin, Bringe's Foreman, and Mike Williquette, the Union's Business Agent, at which meeting Bringe was informed that he was being suspended without pay for two weeks because his absence on September 20 exceeded the six day limit which had been established on April 7. Anderson also told Bringe that if he missed one day during the months of October, November and December, then he would be fired. Bringe stated that he understood he had to come to work every day so he would not be fired.

In the evening of December 13 Bringe went to the emergency room at St. Vincent Hospital in Green Bay because he was tired, he was having difficulty in breathing and his legs were swollen. Bringe was hospitalized that evening. The following day, Anderson telephoned Bringe after learning that Bringe was absent from work and was in the hospital. Anderson also telephoned Bringe at the hospital on December 17. Bringe was absent from work on December 14, 15, 16, 17, 20, 21, 22 and 27. December 23 and 24 were scheduled holidays.

On December 27 the Village sent the following letter to Bringe:

This is to inform you that your employment with the Village of Howard is terminated effective immediately for cause. That cause is your violation of the agreement reached on September 22, 1993 which provided that if you failed to show up for work during the remainder of the calendar year you would be fired. We regret that we have been forced to take this action but your repeated and continuous absenteeism has worked a hardship on the Village operations.

On January 3, 1994, Bringe filed a grievance over his discharge. Attached to the grievance was a letter dated December 31, which letter read:

David Bringe is a patient at the Webster Clinic in Green Bay. He is currently being followed for a significant pulmonary problem which is resulting in total disability. There is potential for improvement in the future but for a minimum of 90 days he will be unable to return to employment. If further information is needed, please contact me.

Said letter was signed by a physician, Kenneth Hujet.

On or about February 28, 1994, the Village received a letter from the Union which included a copy of a letter written by John Stevenson, a physician who is an Accredited Clinical Polysomnographer and is the Medical Director of the Sleep Disorders Center at St. Vincent Hospital. Said letter was dated February 7, 1994, and read, in relevant part, as follows:

Mr. David Bringe has well-documented severe obstructive sleep apnea. This has come on gradually over several years. The severe obstructive sleep apnea is a sufficient cause for him to be sleepy despite adequate time in bed and to have problems with work performance and work attendance. These are the expected consequences of severe obstructive sleep apnea, untreated, and he has had no control over these symptoms.

Mr. Bringe is presently being treated for obstructive sleep apnea and is making excellent progress with weight loss and better daytime function.

Dr. Stevenson first saw Bringe on December 16 at the request of Dr. Hujet. On December 20 and 21, Dr. Stevenson conducted a sleep study of Bringe and concluded that Bringe qualified for immediate treatment. Initially, Bringe was on oxygen 24 hours a day. As of the hearing, Bringe was receiving oxygen only at night when he was sleeping. Dr. Stevenson also saw Bringe on January 4 and February 1, 1994, and had not released Bringe to return to work as of the date of the hearing. Dr. Stevenson testified that he believed many of Bringe's absences from work in 1993 were caused by his sleep disorder.

At no time prior to Bringe's discharge on December 27 had the Village been informed that Bringe had a sleep disorder. On January 3, 1994, the Village did receive a copy of Dr. Hujet's letter stating that Bringe had a pulmonary problem which resulted in his total disability.

POSITIONS OF THE PARTIES:

The Union agrees that an employe should not come to work in an unsafe condition. However, it was unreasonable to terminate an employe with 16 years of service when the employe did not know that he had an illness during the time he was having attendance problems. Bringe did not know about his sleep disorder until two days after his termination. Now that the Village is aware of Bringe's condition, the Village should return Bringe to work when he is released for such a return by his doctors, and Bringe should be made whole for all lost wages and benefits resulting from his termination.

The Village believes that it did have just cause to discharge Bringe. Bringe had a history of absenteeism. The Village used progressive discipline in an effort to correct Bringe's conduct. He was clearly warned on September 22 that any absence during the remainder of 1993 would result in his discharge. The information about a sleep disorder was not discovered until after he had been discharged. The record fails to establish that the sleep disorder was the cause of all of Bringe's absences.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 11. DISCIPLINE

11.01. The Employer shall not discharge or suspend any Employee without just cause and shall give at least one (1) warning notice against such Employee to the Employee in writing and a copy of same to the Union affected, except that no warning notice need be given to the Employee before he/she is discharged due to dishonesty, being under the influence of intoxicating beverages or illegal drugs while on duty, drug addiction, or other flagrant violations. The warning notice provided herein shall not remain in effect for a period of more than twelve (12) months from date of said warning. Discharge or suspension shall be in writing with a copy to the Union and to the Employee affected.

DISCUSSION:

There is nothing in the record which would indicate that Dr. Stevenson's diagnosis of sleep apnea is incorrect. Rather, Dr. Stevenson's testimony was presented in a straightforward and understandable form and was convincing in its content. However, a conclusion that Bringe was suffering from sleep apnea at the time of his discharge does not resolve this matter. It would be inappropriate to focus only on the Village's act of discharging Bringe when he was absent on December 14 because he had been hospitalized as a result of his poor physical condition. In isolation, such an act could be viewed as unreasonable, since there is little doubt that Bringe was quite ill on December 14. But, that act was not based on an isolated incident. Instead, there is a considerable amount of background information which is relevant to the Village's decision to discharge Bringe for his absence on December 14.

The Village did not act in a precipitous manner in dealing with Bringe. A review of Bringe's attendance records reveals that he was absent on numerous occasions during the first three months of 1993. As a result of those absences, the Village advised Bringe in writing on April 7 that, if he was absent from work on more than six additional days before the end of 1993, then his employment would be terminated. Bringe was given a copy of that document. The Village also advised him in writing on May 20, June 2, June 21, July 7 and July 8, after he was absent, as to the number of absences he had left pursuant to the document issued on April 7. Then Bringe was suspended without pay for two weeks after being absent on September 20. Although the Village had considered discharging Bringe at that time, after meeting with the Union, the Village agreed to suspend, rather than to discharge, Bringe. The record leaves no doubt that Bringe understood the seriousness of the situation as of September 22 when he was suspended. Unfortunately, he was unable to reach the end of 1993 without another absence. It would be unfair to the Village to overturn the discharge on the basis that Bringe's absence on December 14 should not be held against him because he was in the hospital. If Bringe's attendance record had not been so poor, then he would not have been in the situation in which he found himself on December 14. The Village had utilized written warnings and the suspension in attempts to make Bringe aware of its concern that his absences were becoming excessive in number and that his continued employment was in jeopardy if the absences continued. If Bringe had decreased the number and frequency of his absences in response to those earlier written warnings, it is quite possible he would not have put himself in the position of being discharged when he was hospitalized in December.

Based on Dr. Stevenson's testimony, the Union urges the arbitrator to

accept the premise that most, if not all, of Bringe's absences in 1992 and 1993 were caused by his sleep disorders. In concluding that Bringe's absences resulted from his sleep disorders, Dr. Stevenson relied on a cross reference of Bringe's recollections about his physical condition on the dates when he was absent in 1993 and the usual symptoms associated with Bringe's sleep disorders.

The undersigned is not persuaded that such an approach is sufficiently reliable so as to conclude that Bringe was incapable of working on all of the dates on which he was absent in 1993 solely because of his sleep disorders. Even if he was tired on those dates, it is possible that he should, and could, have made a greater effort to report to work and to stay awake while he was at work on at least some of those dates. Certainly, he made such an effort both in August after his final written warning and in the period following his suspension in September until his hospitalization in December.

An employer has the right to expect its employees to report to work on a regular basis and in a physical condition which allows them to perform their duties in a safe manner. Bringe failed to comply with that expectation. Furthermore, the undersigned is not persuaded that his failure to do so on all of the dates on which he was absent was entirely related to his sleep disorders.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the Village did have just cause to discharge the grievant, David Bringe, on December 27, 1993; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 20th day of July, 1994.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator