

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:
of a Dispute Between	:
	:
LOCAL 3306, AFSCME, AFL-CIO	: Case 81
	: No. 50778
	: MA-8378
and	:
	:
CITY OF SHEBOYGAN (WATER UTILITY)	:
	:

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME,
Mr. Robert C. Culver, Superintendent of City of Sheboygan Water Utility,

AFL-CIO
on beh

ARBITRATION AWARD

Local 3306, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Sheboygan Water Utility, hereinafter the Employer, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ The Employer subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on June 24, 1994, in Sheboygan, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted oral argument at the hearing. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there were no procedural issues and that the following are the substantive issues to be decided:

Did the Employer violate the contract when it denied Ben Goltry sick leave? If so, what is the appropriate remedy?

1/ The parties agreed to waive the time limit in the Agreement for the issuance of an award.

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE IX

FRINGE BENEFITS

SECTION 9.1 SICK LEAVE: Each full-time employee of the Employer shall earn sick leave of one work day with pay for each completed month of service.

Unused sick leave shall be accumulated up to a maximum of 90 work days. Unused sick leave in excess of 90 days shall lapse, but shall nevertheless be recorded in the records of the Employer. Upon the recommendation of the Superintendent and with the approval of the Board of Water Commissioners, lapsed sick leave recorded to an employee's credit may be restored and used in case of extended illness, in whole or in part, after such employee's unlapsed sick leave is exhausted.

Accrual of sick leave benefits shall not be affected by absence from work on a holiday, vacations, or while on authorized leave of absence with pay.

An employee eligible for sick leave with pay may use such sick leave for absences due to illness, injury, exposure to contagious disease requiring quarantine, or, upon the approval of the Superintendent, serious illness to a member of the employee's immediate family who resides in the employee's household and who requires the employee's attendance.

An employee on sick leave shall inform his immediate supervisor or the Superintendent of the fact and the reason therefor prior to the day of absence or as soon as possible, but no later than 12 o'clock noon of the first day of absence, and keep his department head informed of the conditions if the absence is of more than three (3) working days, or in the case of rotating shift employees before the start of the first shift from which he or she will be absent. Failure to give such notice in a reasonable time may be cause for denial of sick leave pay for the period of absence.

Absences for a fraction or part of a day that are chargeable to sick leave in accordance with these provisions shall be charged proportionately in an amount not smaller than one-half day, except that an employee may request less than one-half day's absence for doctor or dentist appointments. At the request of the employee, absences may be charged against accumulated overtime.

Employees will be allowed to use accumulated sick leave for doctor and dentist appointments that cannot be obtained after working hours, if proof of visit is provided. Advance request for accumulated sick leave use for doctor and dentist appointments shall be answered by the Employer where administratively possible in five (5) working days prior to date of

appointment.

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BACKGROUND

The Grievant, Ben Goltry, is employed by the Employer on its Construction/Maintenance Crew doing maintenance and repairs on the City's water delivery system. His foreman on the crew is Terry Ruge 2/ and the Grievant's immediate supervisor is Tom Johnson.

On February 9, 1994, the Grievant worked his regular eight hours and then was called in late that evening due to a break in a water main. The crew, consisting of the Grievant, Ruge and two other employes, worked through the night to repair the break and returned to the shop at approximately 7:30 a.m. the morning of February 10th. 3/ Tom Johnson came out of the office and the Grievant told him he was "exhausted" and was going home. There is some dispute between Johnson and the Grievant as to exactly what the Grievant told Johnson.

Johnson testified that all the Grievant told him was that he was tired or exhausted and was going home. The Grievant testified he told Johnson he did not feel well and that he was taking a sick day or, "I'm exhausted and I'm going to take a sick day." He also testified that he told his foreman, Ruge, that he was going home sick. Ruge indicated that the Grievant was using sick leave on the latter's time sheet. The Grievant then left with the rest of the crew to eat breakfast at a restaurant and went home directly from the restaurant. Other employes on the crew also went home. Johnson subsequently asked the Plant Superintendent, Darrell Staege, whether the employes should be treated using leave or as using accumulated overtime hours, i.e., "plus time". Staege, who was in charge in the Utility Superintendent's absence, told Johnson it should be plus time.

There had been a meeting at the shop the previous Friday at which the Utility Superintendent, Robert Culver, discussed with the employes the use of plus time when they are tired after putting in long days, as opposed to using sick leave. It appears the Grievant was not present at that meeting. The other employes on the crew who went home on February 10th used "plus time".

On February 21, 1994, the Grievant's request to use sick leave for February 10th was denied and the absence was charged to his bank of overtime hours. The Grievant subsequently grieved the denial of sick leave for his absence, however, he mistakenly referred to February 16-17, rather than February 9-10. That discrepancy, along with the parties' respective positions on the dispute, was discussed through the steps in the grievance procedure. The parties were unable to resolve their dispute and proceeded to arbitration on the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union notes that Section 9.1 of the Agreement states that sick leave may be used for absence due to illness, and asserts that the Grievant's condition on February 10th falls within that provision. The Grievant was sick and exhausted that day, and could not work, therefore, he was "ill", as that

2/ The foreman position is in the bargaining unit.

3/ There was some dispute as to whether the day in question was February 10th or February 17th, but the Union subsequently agreed at hearing that it was February 10.

term is defined in Roberts' Dictionary of Industrial Relations and Black's Law Dictionary. The Grievant is particularly sensitive to a lack of sleep and previously had to give up a position in the Employer's filtration plant because of it.

The Union notes that in the discussions on the grievance at the third step Johnson had said that if the Grievant had told him he was sick, he (Johnson) would not have denied it. The Grievant told his foreman, Ruge, that he was sick. He did not fill out a form, but he never has in the past when he has gone home sick. The Union notes that on the forms the Employer submitted as evidence that employes must fill out a form requesting to use sick leave (Employer Exhibit 2), one of the employes simply stated, "sick" and did not explain it further. The Grievant told his supervisor that he was "exhausted" and that should be sufficient.

Employer

The Employer asserts it based its decision to deny the sick leave upon the facts. The Grievant did not make a request to his supervisor to use sick leave; rather, he just told Johnson he was "tired" or "exhausted" and was going home. His request to use sick leave was made later, after the fact. It is something the whole crew had discussed doing and it was later, as an afterthought, that he decided to do it. He did not claim any "illness", beyond being tired until the Board level meeting on his grievance.

The Employer contends it is a small operation and that it will have a problem if employes are able to use sick leave when they are tired. It asserts that is what the "plus hours" are to be used for.

DISCUSSION

Section 9.1 of the Agreement states that employes are to inform their immediate supervisor prior to the absence, or no later than 12:00 p.m. on the first day of absence, that they are taking sick leave and the reason for it. Failure to give reasonably timely notice is a basis for rejecting sick leave. In this case, the Grievant apparently told his foreman, Ruge, that he was going home sick, since Ruge indicated on the Grievant's time sheet he was taking sick leave. He told his supervisor, Johnson, at a minimum that he was exhausted and was going home. The Employer has argued that the employe must fill out a "Employee Request for Time Off" form at the time the employe is leaving work; however, neither Ruge nor Johnson asked the Grievant to fill out such a form. Johnson testified it would be his job or the foreman's to have the employe fill out the form.

Further, Johnson indicated that had the Grievant told him on February 10th that he was going home sick, he would not have denied him the use of sick leave for that day. There is a dispute as to what the Grievant told Johnson beyond that he was exhausted and was going home. The Employer argues that employes should be using "plus time" when they are tired from working long hours and that the Grievant only came up with the idea of requesting sick leave later, after the fact. The latter assertion appears contrary to what the facts indicate. The Grievant's foreman checked sick leave on the Grievant's time sheet for that day and Johnson conceded he must have told his foreman that morning that he was using sick leave. The Grievant also testified that was the case.

As to the assertion that employes are to be using "plus time" in these situations instead of sick leave, the undersigned notes that there is little or nothing in the record upon which he could base a conclusion in that regard. It appears from the evidence that "plus time" is something new as far as its use

in that regard, and that there is no practice established as of yet. Beyond the Employer's argument that the parties intended that employes use plus time when they are tired from working overtime, there is nothing in the record regarding bargaining history from which to determine the parties' intent. While it appears the other employes on the crew did use "plus time" to cover their absence that day, there is nothing in the record with which to compare their condition with that of the Grievant. The Grievant's un rebutted testimony was that he was "exhausted" and that although he felt ill, he did not describe his symptoms beyond that at the time.

Without sufficient evidence to determine how the parties intended to utilize "plus time" in these situations, the Arbitrator cannot conclude that it was intended to pre-empt the use of sick leave. That being the case, and given the evidence that the Grievant was "exhausted" and did request to use sick leave that day, it is concluded that he was entitled to use sick leave for his absence on February 10, 1994. Therefore, the Employer violated Section 9.1 of the Agreement when it denied the Grievant's sick leave for that date.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The Employer is directed to grant the Grievant's request to use sick leave for his absence on February 10, 1994, and to reinstate the hours to his "plus time" bank or to the appropriate bank from which they were deducted.

Dated at Madison, Wisconsin this 23rd day of September, 1994.

By David E. Shaw /s/
David E. Shaw, Arbitrator