BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
LOCAL 67, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO	:	Case 414 No. 49875 MA-8083
and	:	
CITY OF RACINE	:	

Appearances:

Mr. John P. Maglio, Staff Representative, appearing on behalf of the Union.

Mr. Guadalupe G. Villarreal, Assistant City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-94 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 and sick pay grievance of Roy Chacon.

The undersigned was appointed and held a hearing on May 31, 1994 in Racine, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on September 6, 1994.

Issues:

The Union proposes the following:

1. Did the City have just cause to suspend the grievant for one day and in addition withhold an additional eight hours of pay from the grievant?

2. If so, what is the appropriate remedy?

The Employer proposes the following:

1. Did the Employer violate the collective bargaining agreement when it issued a one-day suspension on June 30, 1993?

2. If so, what is the appropriate remedy?

Relevant Contractual Provisions

ARTICLE II

Management and Union Recognition

. . .

E. Management Rights. The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

1. To direct all operations of City government.

2. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge and take other disciplinary action against employees for just cause.

. . .

In addition to the Management Rights listed above, the powers of authority which the City has not officially abridged, delegated or modified by this Agreement are retained by the City. The Union recognizes the exclusive right of the City to establish reasonable work rules.

Relevant Work Rule

This work rule, dated June 10, 1993, was introduced as Employer's Exhibit 5:

> The Department of Public Works (Street Maintenance, Solid Waste and Bridge Divisions) has a policy that any employee who fails to notify supervision within one hour after the start of their work shift that he/she will be late or work, will not be permitted to work for the rest of the day. This is an established policy since approximately 1983 and has been enforced on a number of occasions.

> If employees work on a shift other than the normal 7:00 a.m. to 3:00 p.m., Monday to Friday schedule (example: Bridge tenders, sweeper operators) it is their responsibility to notify the designated supervisor in their area. Those employees who fail to follow these instructions and who report to work one hour after the start of their work shift without notifying supervision will be subject to an automatic one day suspension without pay. This suspension will be enforced on the employees' next work shift following the violation.

Discussion:

Grievant Roy Chacon was working as a street sweeper in June of 1993 when a recurring problem with his jaw required a bout of surgery, similar to surgery he had had in the past. The grievant was scheduled to work Monday through Friday from 2:00 a.m. to 10:00 a.m., and the surgery was scheduled well in advance for the afternoon of Friday, July 25.

On or about June 21st, the grievant called Public Works Superintendent Joe Golden to tell him that he would be having the oral surgery. The parties dispute the nature and extent of the grievant's advance notice of absence for one of the days involved. There is no dispute, however, that on Monday, June 28, the grievant did not appear for work, and called in only an hour and six minutes after the start of his shift. The City suspended the grievant for a day for failing to call in, and denied his request for sick leave pay for that day. The present proceeding results from the grievant's grievance protesting these acts.

DPW Superintendent Golden testified that the grievant called him on June 21st to say he would be off on the 25th of June, and that he did not know whether this would be extended to the following week. Golden testified that because Monday the 28th was the Monday preceding the 4th of July holiday, there was a concern that his position needed to be filled on that Monday, or else the area the grievant was responsible for would not be swept for two weeks. Golden testified that he and the grievant discussed "the fact that I would get someone to take his place on Monday, and assuming that he wouldn't be in to work. And if he were to be coming into work he was to contact me. If he was going to be coming in to work he would contact me on Sunday and let me know what the situation was going to be." 1/ Golden further testified that the grievant knew his phone number because he was on the on call list, and that he did not hear from the grievant. But Golden also testified that "the assumption that I had if I didn't hear from him he was going to be in to work. He was going to contact me on Sunday and let me know, but he kind of thought he would probably come in. And he was going to get back to be on Sunday if he wasn't. I kind of felt uncomfortable about the situation because it was so important that somebody would be in there, that's why I made arrangements for another employe to come in. But I went into Monday morning assuming he was going to be there because I hadn't heard from him." 2/

1/ Transcript, page 23.

2/ Transcript, page 25.

Golden further testified that after the grievant did not appear for work on Monday the 28th, he heard from the office clerk that the grievant "had called in on Friday and told her that he would be in to work, and she hadn't told me." 3/

On the night of June 27 - 28, the supervisor on call was DPW general supervisor Jeff Fidler. Fidler testified, without contradiction, that he received a telephone call from the grievant at about 3:06 a.m. on Monday, June 25 at his home. In this call, the grievant "told me that he had overslept because of medication he was taking, and I guess he felt that he was calling in sick. But at no time did he indicate to me that he was calling in sick." 4/

Grievant Roy Chacon testified that on June 21st he had called Golden to warn him of the surgery, and that "I think I told him that I wouldn't be in (on the 28th of June). So he told me if I do come in to give him a call on Sunday, if I was going to come into work Monday." 5/ The grievant was given Valium to calm him for the impending surgery at about 1:00 on Friday, June 25. The surgery began about 2 or 2:30 p.m., and after it the grievant was given a prescription lasting three or four days for Lortab, which he testified was a narcotic which would prevent him from driving under the terms of his commercial driver's license. The grievant testified that about the time he took the Valium, he called in to the DPW Office to let them know that he doubted he would be in to work the following Monday. The grievant was unable to reach a supervisor at the office and left the message with Connie Torcia, the office clerk.

The grievant testified that he was under the influence of the Lortab narcotic throughout the weekend, and did not make a phone call to management partly for that reason. He testified that he set an alarm clock for 1:30 a.m. Monday morning in order to ensure that management had the message that he was calling in sick, but slept through it. He woke about an hour and a half later, and immediately called Fidler to let him know that he was not coming to work.

On Monday, after the grievant failed to appear for work, Golden concluded that the grievant had improperly failed to call in sick. On Wednesday of that week, Golden called in the grievant and questioned him, and then gave him a one-day disciplinary layoff for this act. The City also refused to pay the grievant's sick leave claim for Monday, June 28.

The City introduced testimony and exhibits concerning several prior written and oral reprimands which the grievant had received over the preceding several years, related to failure to call in, absence and tardiness issues. The Union objected to introduction of these documents, based on the parties' agreement that "minor" infractions would be removed from the record after one

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3/ Transcript, page 25.

4/ Transcript, page 13.

5/ Transcript, page 50.

year. The City contended that the infractions in question were not minor and that the grievant had not kept a clean record for the necessary one year within the City's usual method of computation. I reserved ruling at the time on the question of whether the prior disciplines should be considered as part of the record. For reasons explained below, I find that whether or not the City correctly computed these as being countable against the grievant, they are irrelevant to the present case. They will therefore not be described further.

The City contends that the grievant has had problems with timeliness at the early morning start of his shift on several occasions, and has been reprimanded for it several times before. The City contends that progressive discipline was and is the Employer's means of addressing such a problem, and that the grievant had arrived at the point where the appropriate discipline for the infraction found on the present occasion was a one-day disciplinary suspension. The Employer contends that when the grievant called in at 3:06 a.m. on Monday, June 28, he told Fidler that he was coming in late because he overslept due to the medication. The City contends that the grievant was not in fact calling in sick, nor did he indicate such a request until he was denied work on that Monday. The City contends that the grievant was attempting to cover up his tardiness by saying that he was merely confirming his intention not to come in to work with that call. The City argues that the grievant could have called in at any time on Saturday or Sunday, and notes that he testified that he was "not in the mood" to talk to anybody then. The City questions the validity of the sick leave excuse the grievant subsequently submitted because it states on it the date of June 28, while the grievant claims he received it on Friday, June 25. The City points to the undisputed policy, known to the grievant, that a call must be made within one hour of the start of a shift in order to claim sick leave, and contends that the grievant has attempted to evade this rule, while having given the Department the impression that he would be in at work on the 28th. Consequently, the City argues that it had just cause to impose a one-day suspension in accordance with generally established progressive discipline policies. Further, the City contends that it had reason to deny the sick leave pay because the grievant failed to call his supervisor within the one hour period after the start of his shift. The Employer requests that the grievance be denied.

The Union contends that the grievant properly notified his supervisor a week earlier that he was going to be absent on the 28th, and that his subsequent calls were attempts to confirm this. The Union contends that if the grievant had in fact reported to work on the 28th under the influence of a narcotic, he and the City would both be in jeopardy because of violation of the terms of a commercial driver's license. The Union argues from this that it was obvious that the grievant could not work on that day, and that the City has mistaken the grievant's intent in each of his attempts to contact the Employer. The Union also contends that the Employer is attempting to introduce stale discipline into the record and that there is no nexus between the grievant's past tardiness and the facts at issue in this matter. The Union requests an award sustaining the discipline grievance and making the grievant whole for wages lost during his one-day suspension on June 29th, as well as the additional sick leave pay lost for June 28, 1993.

Upon review of the record, I conclude that the City has failed to carry its burden of convincing me that the grievant acted improperly in respect of giving notice of sick leave for June 28, primarily because of the confused testimony of DPW Superintendent Golden as well as the logic of the sequence involved.

The City attacks the grievant's basis for expecting to need the time off, declining to stipulate that the grievant was in fact on a prescription for a narcotic and also disputing the date on which the grievant received the doctor's excuse involved. But the logic of the situation does not support the Employer's skepticism. It is undisputed that the grievant called Golden to warn him of his impending surgery a week before June 28, and that they had a conversation about the work to be performed on June 28th at that time. The grievant's surgery for the 25th was scheduled for four hours after his shift was over. There was no reason for him to contact Golden to discuss needing to be absent on the 25th, and he was not scheduled to work on the weekend (the 26th and 27th). The only reasonable explanation for the call is that he was, in fact, advising Golden that he probably would not be at work on the 28th. Golden, as noted above, testified both that the grievant indicated he would not be at work on the 28th, and that he indicated that he probably would be at work on the 28th. This confusion inherently undercuts the Employer's argument, but in addition I find that it is more probable that the grievant would have indicated at that time that he would not be at work on the 28th. This is because it is undisputed that the grievant has had similar surgery before; that he knows the effects of the medication he is given thereafter; that that effect includes those generally associated with the word "narcotic"; and that the grievant expected he would not be able to perform adequately or safely within the period for which the prescription ran. While Golden testified that clerk Torcia told him that on the 25th the grievant had indicated that he would be at work on the 28th, I find it improbable that the grievant would have said this, in view of the fact that the grievant had not yet had the surgery and had just been administered Valium to calm him down for it. I note that the City did not call Torcia to testify. Also, there is nothing in the record to support the Employer's skepticism as to the date the grievant received the doctor's slip for June 28.

Finally, I note that the conversation between the grievant and Fidler took place between an individual who was admittedly under the influence of a narcotic, and an individual who had just been awoken from sleep at 3:06 in the morning. Since Fidler also expressed some doubt as to whether the grievant intended to imply he was calling in sick or was saying he was coming to work, I see no reason to believe that anything about that conversation was so clear in the mind of either party that it should be assumed that the grievant was calling in to announce that he did intend to appear at work late (a phrase which appears in the Employer's brief but nowhere in the transcript), when the logic of the situation, once again, suggests that the grievant was merely trying to be sure he called in. While the prior disciplines given the grievant become irrelevant upon my concluding that the grievant gave a week's notice of his impending absence on the 28th, thus certainly obeying the rule, they are relevant in another respect. I believe that those prior disciplines are fundamentally the explanation for the grievant's curious course of action. In a way, they lend credence to the Union's argument that the grievant was merely trying to cover himself by making the additional calls.

I conclude that the balance of the evidence is that the grievant did in fact give notice on June 21 that he expected to be absent on June 28; that the absence was for a medically permitted reason; that there is insufficient evidence to conclude that the grievant's subsequent calls constituted a reversal of that notice; and that on the morning of June 28th the grievant was therefore properly on sick leave. He was accordingly disciplined without just

cause for that absence, and the award below requires payment to him of the disputed sick leave pay as well as the clearing of his record and backpay for the one-day suspension.

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

AWARD

1. That the City violated the collective bargaining agreement by suspending the grievant on June 29, 1993, and by failing to pay him sick leave pay for June 28, 1993.

2. That as remedy, the Employer shall pay to the grievant one day's pay from his sick leave bank, shall make him whole for any monies lost by reason of his one-day suspension on June 29, 1993, and shall correct its records accordingly.

Dated at Madison, Wisconsin this 25th day of November, 1994.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator