BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF GREEN BAY (PARKS DEPARTMENT)

and

GREEN BAY MUNICIPAL EMPLOYEES UNION PARKS DEPARTMENT, LOCAL 1672, AFSCME, AFL-CIO

Case 250
No. 51327
MA-8572

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of Local 1672.

Ms. Judith Schmidt-Lehman, Assistant City Attorney, and Mr. Paul Jadin, Personnel Director, appearing on behalf of the City of Green Bay.

ARBITRATION AWARD

Green Bay Municipal Employees Union Parks Department, Local 1672, AFSCME, AFL-CIO (hereafter Union) and City of Green Bay (Parks Department) (hereafter City) are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as impartial arbitrator to hear and decide a grievance over the termination of seasonal employe George VanderVeren. The undersigned was so designated. Hearing was held at Green Bay, Wisconsin on October 26, 1994. A stenographic transcript of the proceedings was prepared and submitted to the undersigned by November 14, 1994. The parties submitted their post hearing briefs which were exchanged through the Arbitrator on December 19, 1994.

Issues:

The parties stipulated that the following issues should be determined in this case.

Did George VanderVeren violate City Work Rules in 1994?

If not, what is the appropriate remedy?

Relevant Contract Provisions

ARTICLE 6

SICK LEAVE

(A) All employees shall be granted sick or emergency leave with pay of one (1) full working day for each month of service. Sick or emergency leave shall accumulate, but not exceed one hundred and thirty-five (135) days. An employee may use sick leave or emergency leave for absences necessitated by injury or illness of himself or a member of his/her immediate family.

In order to be granted sick leave or emergency leave an employee must:

(1) Report prior to the start of the work day to the department head or supervisor the reason for the absence.

(2) Keep the department head informed of his/her condition and the anticipated date of return to work.

(3) Be legitimately ill or attending a member of the immediate family who is ill and unable to care for themselves or make other arrangements for care.

. . .

ARTICLE 14

DISCIPLINARY PROCEDURE

The Employer shall not discharge any employee without just cause, and shall give at least one (1) warning notice of the complaint against such employee to the employee in writing, and a copy of the same to the Union affected, except that no warning notice need be given to an employee before discharge if the cause of such discharge is dishonesty, being under the influence of intoxicating beverages while on duty, recklessness, endangering others while on duty, the carrying of unauthorized passengers, or other flagrant violations. Discharge must be by proper written notice to the employee and the Union affected. Any employee may request an investigation as to

> the discharge. Should such investigation prove that an injustice has been done an employee, the employee shall be reinstated and compensated at the usual rate of pay while having been out of work. Appeal from discharge must be taken within five (5) days by written notice, and a decision must be reached within ten (10) days from the date of discharge. In the event a settlement cannot be reached within ten (10) days of the first date of appeal, then such dispute shall be submitted to arbitration as outlined in Article 15 of this Agreement.

Facts

The City of Green Bay operates a Parks Department which is responsible for the maintenance of all city park areas. To accomplish its goals, the Parks Department employs 30 full-time employes, 19 seasonal employes and 15 temporary employes under the direction of Parks Superintendent Keith Wilhelm and his assistant, Tom Fritsch. The Grievant, George VanderVeren was employed by the City as a seasonal Parks Department employe from June 1990 until his termination on June 16, 1994. As a seasonal employe, VanderVeren worked an eight month season (March to November) and was entitled to vacation time, comp time and sick leave under the provisions of the collective bargaining agreement.

The City's Work Rules (Article 6) require that employes must call in before the start of their work day if they are requesting sick leave for that day. It is normal procedure for Parks Department employes to call in during the one-half hour before their scheduled work time begins. It is not normal for Parks Department supervisors or any supervisor to call employes when they have failed to report to work on time.

During the Spring of 1993, VanderVeren missed work on approximately eight days. By letter dated May 17, 1993, Parks Superintendent Wilhelm advised VanderVeren as follows:

. . .

> I am writing in regard to your recent absences. Since the start of this season you have missed approximately eight days of work. Several of these days you were forced to take as leave without pay since you have exhausted all of your sick leave. Although a few days you attribute to an off-duty back injury, you were absent again on Friday although your doctor provided a return to work note on Thursday. Along with this absence on Friday, you failed to call in to notify me that you would be absent and the reason until 8:30 a.m. Contract work rules specify you are to call in before the start of the work day. For this violation you received a verbal warning. This

> letter is also intended to provide written notice of that warning. Be advised that future absences could lead to more serious discipline.
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> . . .
>
> If there is a problem with which I can be of assistance, I am always available to you. If there is a personal problem which may be affecting your attendance, your Employee Assistance Program is available to help. This program is free and confidential. Only you and the counselor will know you're using the program. No information comes back to the City. . . .

By letter dated May 24, 1993 Parks Superintendent Wilhelm advised VanderVeren as follows:

> . . .
>
> I am writing to advise you that, due to your continued abuse of City work time, you are hereby being suspended without pay from May 25, 1993 through May 31, 1993.
>
> Furthermore, you will be required to seek counseling through the City's Employee Assistance Program and, by signing an appropriate medical release, must keep the City apprised of the progress of your treatment program. Failure to comply with the treatment program outlined by your counselor will subject you to immediate dismissal. Should that program include inpatient treatment we will arrange for the appropriate unpaid leave.
>
> Finally, be advised that any further violation of City work rules during the 1993 or 1994 work seasons will subject you to immediate dismissal.
>
> . . .

The above-quoted May 24, 1993 letter is known to the parties as a "last chance agreement." It was signed and dated by George VanderVeren at the end of the letter below the following quote:

> I understand the above and recognize that, if I am dismissed for violation of City work rules during the 1993 or 1994 work season, I may grieve but the arbitrator will only have the authority to determine whether the violation occurred.

It is undisputed that VanderVeren sought and completed counseling through the City's Employee Assistance Program after receiving and signing the May 24th "last chance agreement." VanderVeren chose for his treatment to regularly attend support group meetings and to meet with a counselor once a month for three months. It is undisputed that the Employee Assistance Program contacted the City only once during VanderVeren's counseling program to indicate that VanderVeren had properly completed the counseling of his choice. VanderVeren never sought to re-enter the Employee Assistance Program or to get further counseling after he completed this counseling program in 1993.

On June 7, 1994 VanderVeren did not show up for work at 7:00 a.m. as scheduled. Superintendent Wilhelm called VanderVeren at his home at approximately 7:30 that morning to ask why VanderVeren had not come to work. It is undisputed that VanderVeren told Wilhelm that he had been landscaping around his house over the prior weekend, had hurt his back and that his cat had knocked down his alarm causing him to miss getting up on time to prepare to go to work. VanderVeren asked Wilhelm if he could have sick leave for the day of June 7th. Wilhelm granted VanderVeren sick leave for the day.

On Sunday, June 12, 1994, VanderVeren was scheduled to work starting at 6:00 a.m. He failed to call any of the department managers to state that he would not be at work on time that day. VanderVeren reported to work at 8:00 a.m. on June 12th.

On June 14, 1994, VanderVeren did not show up at work as scheduled at 7:00 a.m. Assistant Superintendent Fritsch called VanderVeren at approximately 7:15 a.m. to ask why he had not come to work on time. Fritsch and VanderVeren's accounts of the conversation are in dispute. Fritsch stated that VanderVeren admitted that he had been drinking the night before and that he was in no condition to come to work. Fritsch stated that VanderVeren then asked him if his not appearing for work that day would affect his job. Fritsch stated that he told VanderVeren that he was not in a position to answer that question. Fritsch stated that he told VanderVeren that he was supposed to be at work that day. Fritsch stated that he granted VanderVeren the use of comp time for June 14th. However, Fritsch stated, he urged VanderVeren to come into work on June 15th at 7:00 a.m. to talk to Superintendent Wilhelm about his absences.

VanderVeren stated that he responded to Fritsch's question why he had not come to work on time on June 14th by stating that he was really burned out. VanderVeren stated that he then asked Fritsch if he could take a day of comp time. VanderVeren stated that Fritsch told him that he could take a day of comp time because he had the time coming. VanderVeren said that Fritsch made no other comments to him during that conversation and that he (VanderVeren) stated that he would see Fritsch the next day. VanderVeren denied that he ever told Fritsch that he had been drinking on June 13th.

On June 15, 1994 VanderVeren did not come to work at 7:00 a.m. as scheduled. Fritsch called him at approximately 7:15 a.m. and left a message on VanderVeren's answering machine.

Fritsch called again at approximately 7:45 a.m. and VanderVeren answered. Fritsch asked why VanderVeren had not shown up at work. VanderVeren said, according to Fritsch, that he was really out of it and that he could not report to work right away. Fritsch stated that he told VanderVeren that he wanted him to come to work by 10:00 that morning. VanderVeren

answered that he would try to make it. Approximately 20 minutes later, VanderVeren called the Parks Department and spoke again to Fritsch. VanderVeren stated that he could not come to work by 10:00 a.m. because he had been drinking. Fritsch requested that VanderVeren come to work by noon. VanderVeren agreed that he would make it to work by noon that day.

VanderVeren's account of his conversation with Fritsch on June 15th varies slightly from Fritsch's account. VanderVeren stated that Fritsch called him twice on June 15th and that Fritsch requested that VanderVeren bring his keys to the shop when he came to work that day. VanderVeren stated that he asked Fritsch whether the Employer was going to fire him and that Fritsch said that he did not know. VanderVeren stated at the instant hearing that he knew something was going on and that it was something serious but at this time, he did not want to cope with it. VanderVeren reported to work at noon on June 15th, and thereafter had meetings with management and worked the rest of the day. On June 16, 1994 VanderVeren reported to work at 6:30 a.m. At approximately 8:00 a.m. VanderVeren was called into the office. Thereafter, VanderVeren received the following letter, signed by Park Superintendent Wilhelm, dated June 16, 1994:

. . .

> I am writing in regard to our meetings yesterday, June 15, 1994, and today where your recent incidents of abuse of City work time and work rules were addressed. After investigating these recent incidents and examining your past work record, I regret to inform you that your employment with the City of Green Bay Park and Recreation Department will be terminated immediately.

Although VanderVeren stated that he did not understand the 1993 "last chance agreement," he admitted at the instant hearing that he knew that if he did not sign the last chance agreement he would be fired. VanderVeren was not represented by a Union representative at the May 24, 1993 "last chance agreement" meeting. VanderVeren stated he assumed that a Union representative would show up for the meeting. However, when a representative did not appear, VanderVeren never requested Union representation during the May 24, 1993 meeting. Nor did he request that the meeting stop while he waited for a Union representative to represent him. There is no dispute that VanderVeren was represented by the Union at the investigation meetings on June 15, 1994 and at the termination meeting on June 16, 1994. At the instant hearing, VanderVeren admitted that he had started drinking again on June 13, 1994, and that this was why he had failed to timely

call in and report to work on June 14 and 15, 1994, as scheduled.

Positions of the Parties

City

The City objected in its initial brief to the Arbitrator's consideration in this case of the Unemployment Compensation decision relating to Grievant VanderVeren's discharge, and it moved, based upon Sec. 108.101, Wis. Stats., that the unemployment compensation decision must be disregarded as statutorily inadmissible. 1/

Regarding the merits of the case, the City noted that on five separate occasions within a nine day period in June, 1994, VanderVeren violated the Article 6 Work Rule requiring employes to call in prior to the start of each work day in order to request sick/emergency leave for the day. Because the parties stipulated that the sole issue before the Arbitrator is whether VanderVeren violated City Work Rules in 1994 and because the undisputed evidence demonstrates that VanderVeren's acts in June, 1994, violated City Work Rules, he must remain discharged and the grievance must be denied and dismissed. The City noted that VanderVeren was fully aware of the rule requiring that he call in to work prior to the start of his shift to request an absence: VanderVeren had failed to follow this same rule on several occasions in 1993, which led to VanderVeren's being expressly notified of the rule on May 17, 1993 and later led to his having to enter into the May 24, 1993 "last chance agreement" in order to avoid termination. Contrary to the Union's claims, the City argued that it was not required to dock VanderVeren's pay each time he failed to call in during June, 1994, in order to successfully assert that VanderVeren had thereby violated City Work Rules and later to discharge him on that basis. On this point, the City observed that Article 6 (C) states:

> . . . Misuse of City sick leave may subject the employee to

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1/ Sec. 108.101, Wis. Stats., reads in relevant part as follows:

> . . .
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> Effect of finding, determination, decision or judgement.
> (1) No finding of fact or law, determination, decision or judgement made with respect to rights or liabilities under this chapter is admissible or binding in any action or administrative or judicial proceeding in law or in equity not arising under this Chapter, unless the department is a party or has an interest in the action or proceeding because of the discharge of its duties under this Chapter. . . .

disciplinary action per the labor agreement. . . .

Thus, the City contended, granting VanderVeren's request for the use of sick leave and/or comp time for his absences in June, 1994, did not amount to condonation of his repeated failure to call in pursuant to City Work Rules.

The City noted that despite the Union's arguments to the contrary, VanderVeren demonstrated by his actions in 1993 and 1994 and by his testimony herein, that he fully understood the terms of the "last chance agreement" and how they could affect his continued employment with the City. The City contended, that even if one believes that VanderVeren's problem with alcohol in June, 1994, amounted to his being "legitimately ill" (Article 6(A)(3)), VanderVeren's failure to call in before the start of his work day on five occasions in June, 1994, require a conclusion that VanderVeren is not privileged to claim he suffered from Article 6 illnesses or to receive sick leave with impunity for his absences. The City also observed that in any event, VanderVeren would have received any accumulated comp time and vacation time upon his termination. The City therefore sought denial and dismissal of the grievance and an award stating that VanderVeren had violated City Work Rules in 1994.

Union

The Union asserted that the record facts fail to show that the Grievant actually violated City Work Rules in 1994. The Union urged that the City's allowing VanderVeren to use his accumulated sick leave and comp time in June, 1994, for the days that he failed to call in to report his absences, amounted to City approval of his time off. The Union contended that VanderVeren was "legitimately ill" in June, 1994, due to alcoholism and that in May, 1993, VanderVeren could neither understand nor appreciate the terms of the 1993 "last chance agreement," again due to alcoholism. Therefore the Union sought an award reinstating VanderVeren and making him whole.

Discussion:

The City argued that the Unemployment Compensation decision regarding VanderVeren must be disregarded in this case. The City is correct. Such decisions are based upon an entirely different statutory framework, are subject to entirely different legal theories and arguments, and are not binding in grievance arbitration cases. Therefore, I cannot and have not considered the VanderVeren Unemployment Compensation decision.

The Union has asserted that VanderVeren did not understand the import of the 1993 "last change agreement" (LCA), before he entered into it, and that this is grounds to overturn the City's decision to discharge VanderVeren pursuant to the LCA. I disagree. The record facts clearly demonstrate that by its letter of May 17, 1993, the City put VanderVeren on notice that the City's Work Rules required him to call in before the start of his scheduled shift on each day he wished to

be absent and that VanderVeren's failure to comply with this rule "could lead to more serious discipline." VanderVeren was thereafter suspended for seven days pursuant to the LCA dated May 24, 1993, for "continued abuse of City work time."

At the very least, VanderVeren should have sought clarification of the LCA document before he signed and dated it, assuming he did not truly understand its ramifications. Indeed, VanderVeren admitted at the instant hearing that he knew he would be fired if he failed to sign the LCA on May 24, 1993. In addition, when VanderVeren's Union representative did not arrive at the LCA meeting, VanderVeren should have at least questioned the value of his assumption that a Union representative would appear to represent him, questioned management regarding the content of the LCA or asked that the meeting stop while a Union representative was sent for to explain the LCA to him. VanderVeren took none of these paths. In the circumstances proven here and given the fact that VanderVeren knew at least by May 17, 1993, that he must call in before the start of his shift to request an absence, I find that VanderVeren knew that he had a responsibility to call in and that if he failed to do so he would be fired. 2/

The next question that must be determined in this case is whether VanderVeren's actions in June, 1994, violated City Work Rules. I find that VanderVeren's actions violated City Work Rules. On this point, the Union urged that the City's granting VanderVeren paid time off for his absences in June, 1994, amounted to condonation of his acts. Such an assertion is not supported by the evidence in this case. Mr. Jadin's testimony stands undisputed on this record, that the City has had a practice of granting paid time off to employes who have such accumulated time, pending investigation of misconduct and even though the employe is later discharged for confirmed misconduct. Obviously, this practice is less time-consuming and confusing for Payroll Department employes and it is fair to employes pending investigation of their alleged misconduct.

In addition, Mr. Jadin stated that even discharged City employes are entitled to receive their accrued benefits upon discharge, so that payment for accrued benefits in advance of the ultimate decision to discharge would be nonetheless appropriate. I note that the City followed this practice on and before May 17, 1993, in granting VanderVeren paid leave for his absences in May, 1993, until such leave was exhausted (May 17, 1993 letter to VanderVeren). I note that VanderVeren was clearly aware of the City's accrued benefit payment practices. Therefore,

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2/ This conclusion is buttressed by the fact that according to VanderVeren's account, on June 15, he asked Frisch whether the City was going to fire him. VanderVeren also admitted that he knew something serious was going on at this time. This evidence shows that VanderVeren was aware of the consequences of his being absent in June, 1994.

VanderVeren cannot now fairly claim that he reasonably relied upon Wilhelm and Fritsch's granting him paid time off for his absences in June, 1994, as being the equivalent of total forgiveness of his misconduct. Even if we do not count VanderVeren's failure to call in and his absence on June 7, 1994, due to an at-home back injury, VanderVeren's failure to call in on June 12, 14 and 15, 1994 violated City Work Rules contained in Article 6 of the labor agreement. The LCA clearly states that any further violation of the Rules by VanderVeren during the 1993 or 1994 work seasons would result in VanderVeren's immediate discharge. VanderVeren's failure to call in prior to the start of his shift on June 12, 14 and 15, 1994 formed a sufficient basis upon which to discharge him for cause. 3/ I therefore issue the following

AWARD

George VanderVeren violated City Work Rules in 1994. The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this ___ day of February, 1995.

By _____
Sharon A. Gallagher, Arbitrator

3/ The Union argued that VanderVeren was suffering from a "legitimate illness" on and after June 13, 1994. Yet, VanderVeren did not request sick leave for his absences of June 12, 14 or 15, 1994.