BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between LOCAL 2239, AFSCME, AFL-CIO and CITY OF RACINE	Case 469 No. 53041 MA-9211

Appearances:

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. William R. Halsey, Attorney at Law, Long & Halsey Associates, Inc., appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned arbitrator to hear the grievance of Sylvia Rodriguez. A hearing was held on November 15, 1995, in Racine, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by January 4, 1996.

ISSUE:

The parties ask:

> Did the City have just cause to terminate the Grievant? If not, what is the appropriate remedy?

BACKGROUND:

The parties have stipulated that the termination of the Grievant, Sylvia Rodriguez, was for an incident that occurred on July 21, 1995.

The Grievant held the position of court clerk with the City before her discharge. She started in July of 1984. Her record of prior discipline includes two oral reprimands, one written reprimand, five suspensions of increasing length, one termination, then an agreement for another chance, then this termination.

The first oral reprimand was given on January 13, 1987, following 15 dates in 1986 when the Grievant was late. On most of those dates, she was late by only one or two minutes, and on two occasions, she was late from 42 minutes to an hour. She used personal time to account for some of her lateness. On October 28, 1988, the Grievant was given another oral reprimand for excessive absenteeism. On November 9, 1989, she was given a written reprimand for excessive absenteeism after calling in sick on twelve days during that year.

The first suspension, for one day, was given on January 24, 1991, based on the Grievant's absence of 13 days and 2.5 hours during 1990 when she called in sick. On July 10, 1991, she was given a three-day suspension for being off sick or on personal time off for another 15-plus days between January 1, 1991 and the date of the suspension. The supervisor also noted that she had been late ten times since May 2, 1991. The next suspension, for five days, came on May 15, 1992, following 50 hours of absence due to illness from January 1, 1992. A second five-day suspension came later that year, on November 17, 1992, following another 48 hours of sick leave time. The 30-day suspension was given on May 25, 1994, where the Employer cited nine instances of tardiness during 1993 and January of 1994.

On several occasions, the City warned the Grievant that her attendance record was unacceptable and that continued absenteeism would result in termination of her employment. That happened on February 14, 1995. The Union filed a grievance, and two days or so before the arbitration hearing, the City and Union met and worked out a memorandum of agreement, referred to by the parties as a "last chance" agreement. The agreement states the following:

> It is hereby agreed and understood by the undersigned parties, the City of Racine (Employer), Local 2239, AFSCME, AFL-CIO (Union), and Sylvia Rodriguez (Grievant), that the following terms and conditions shall resolve Grievance No. 7-95.
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> 1. The Union and Grievant shall withdraw Grievance No. 7-95.
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> 2. The Employer shall reinstate the Grievant to her previous position of Court Clerk (SU-5) on June 6, 1995.
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> 3. The reinstatement shall be with pro-rated benefits and without back pay.
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> 4. The Grievant shall be entitled to seniority and full vacation benefits for 1995.
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> 5. The Union and Grievant agree that, should the Grievant violate the Employer's policy on tardiness,

> the appropriate disciplinary measure shall be termination.
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> 6. The Employer and the Union shall meet on or about June 6, 1996 to review the terms and conditions of paragraph 5 of this Memorandum of Agreement.
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> 7. The Union and Grievant shall have a right to grieve whether a violation occurred, however, they cannot challenge the level of discipline.
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> 8. The resolution of this Grievance shall not serve as precedent for any other dispute that may arise between the parties.

The document was signed on June 5, 1995. The Grievant was cautioned by all present at that meeting to be on time, even early, to her job.

The Grievant was scheduled to start work at 7:00 a.m. On July 21, 1995, she was three minutes late. When Personnel Director James Kozina received notice from Sergeant J. Dobbs of the Police Department that the Grievant had been late on July 21st, he believed that her conduct violated the last chance agreement. On July 25, 1995, Kozina notified her that her employment with the City was terminated by the end of that day.

The Grievant had been having trouble with her water heater during the summer of 1995, with hot water spilling into her basement and blowing fuses in the main fuse box for the house. She called Goebel Electric and talked with Tom Goebel, who was quite busy since the summer of 1995 was exceptionally hot and demands on electricity were great. Goebel suggested some things that she might do to repair it herself. Upon his suggestion, she bought a valve on June 26, 1995, and changed the valve on the water heater. However, the water heater started throwing hot water on the floor a few days later and the fuses blew again. She went back to the hardware store on July 10 and 12, 1995, and bought a thermostat. She changed the thermostat, and that seemed to correct the problem for awhile. However, the fuses blew again during the night or morning hours of July 21, 1995.

When the Grievant woke up that morning, she saw her digital electric clock blinking and checked a wrist watch. 1/ It was already 6:45 a.m., and the Grievant had only 15 minutes to get

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1/ This is one confusing fact that was no explained. If the alarm clock were blinking, which indicates that the power had gone off but come back on, how had the power come back on without anyone having changed the fuses? If the power were still out, the clock would have been dark.

to work on time. She lives about one mile from the police station where she works. She checked her basement and found it full of water, but her primary concern was to get to work. She did not call anyone at work because she thought she would make it on time, and she managed to get there only three minutes late. While she was at work, she called her son at home and told him to change the fuses, and later in the day, she called the electrician. Goebel told her that there were two thermostats on the water heater. She had changed the one on top, and he suggested that the bottom thermostat might be the problem. She has had no problems since she changed the thermostat on the bottom of the water heater.

The Grievant had no problems with power on the evening of July 20, 1995. She never considered the possibility that the power would go out and she would be late for work, and consequently, she never considered getting a battery operated clock.

THE PARTIES' POSITIONS:

The City asserts that regular attendance and reporting for work on time is expected of each employee, and that unsatisfactory attendance may be cause for discipline up to discharge where absenteeism or tardiness is excessive. There is no dispute that the Grievant reported late for work on July 21, 1995. Before that date, she had been disciplined on nine separate occasions for violating the work rule in question, and received five unpaid suspensions prior to her first termination. After agreeing to a last chance following that termination, the Grievant was aware that she faced possible termination of her employment if she reported to work late again, which in fact happened only six weeks after signing the agreement.

The City finds no merit to the Union's argument that the tardiness on July 21, 1995, does not violate City policy. The work rule does not allow for a certain number of incidents of reporting late for work, and the policy states that discipline will be initiated for excessive tardiness. That process was initiated long before the July 21st incident. It makes no sense to suggest that the Grievant is entitled to several dates of being late after signing the last chance agreement. If the July 21st incident does not trigger discipline, what should? Should she be entitled to three, five, seven or ten tardiness incidents before being disciplined? If one is not sufficient, the last chance agreement is meaningless.

The City contends that the Grievant was given ample opportunity to correct her attendance and tardiness problems, but she failed to do so. The City asks that the grievance be denied.

The Union argues that the Grievant was late for work by three minutes for a situation totally beyond her control, because fuses blew in her home, causing her alarm to fail. The last chance agreement gives the Grievant the right to offer acceptable reasons for future tardiness, and the power outage at her house was beyond her control The evidence showed that the Grievant was attempting to remedy the problem with the home water heater blowing fuses -- she sought the advice of a professional and purchased replacement parts for the water heater. She was not trying

to test the City's tolerance but was put in a position of which she had no control. Would the Grievant have faced termination if she had been involved in a car accident on the way to work, or faced a medical emergency with her children? The situation in which she found herself on July 21, 1995, merits the same type of consideration.

The Union points out that each time employees have been disciplined for attendance or tardiness, myriad instances of a violation have resulted in a singular disciplinary action. In fact, 15 tardiness violations occurred before her oral reprimand, 12 absences before her written reprimand, 13 days of absences before the one-day suspension, 10 occasions of tardiness for the next suspension, 50 hours of absenteeism/tardiness for the next one, 48 hours the next, then nine occurrences of tardiness. The Union asks -- what is the City's policy? It is not consistent, but never before has any employee been disciplined for one tardiness infraction which amounted to three minutes.

The Union asks that the Grievant be reinstated and made whole for all lost wages and benefits.

DISCUSSION:

The parties' collective bargaining agreement says that the Employer may discharge or discipline employees for just cause.

The City used progressive discipline in all its usual forms -- oral reprimand, written reprimand, suspensions of various lengths and increasing lengths, and finally, termination. Then the City even agreed to a last chance agreement, which put the Grievant back to work conditionally. This is the second termination.

The whole point of progressive discipline is to allow an employee a chance to correct behavior which is unacceptable to an employer. When discipline becomes increasingly severe, and the behavior does not change, it is clear that progressive discipline will not work with the particular employee. The employer's choice is to either tolerate that behavior from that employee, as well as others then, or to discharge that employee.

Through all this discipline, the Grievant has not shown that her pattern of tardiness or absenteeism will change. A single incident of tardiness would never merit discharge, but the pattern continued after all the chances that the Grievant was given to correct her behavior. If the incident of July 21st stood alone, it would not be cause for discharge. It does not stand on its own, but is part of a series of incidents going back some time. Clearly, progressive discipline has failed to change behavior in this case, and the City has just cause for discharge.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin this ___ day of January, 1996.

By _____
Karen J. Mawhinney, Arbitrator