BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between MILWAUKEE DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 366 and MILWAUKEE METROPOLITAN SEWERAGE DISTRICT	Case 288 No. 54223 MA-9588

Appearances:

Mr. Alvin R. Ugent, Podell, Ugent, Haney & Deleary, Attorneys at Law, Suite 200, 611 North Broadway, Milwaukee, WI 53202-5004, on behalf of the Union.

Mr. Don Schriefer, Senior Staff Attorney, Milwaukee Metropolitan Sewerage District, P.O. Box 3049, Milwaukee, WI 53201-3049, on behalf of the Employer.

ARBITRATION AWARD

According to the terms of the 1995-98 collective bargaining agreement between the Milwaukee Metropolitan Sewerage District (District) and Local 336, AFSCME, AFL-CIO, District Council 48 (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding whether the one-day suspension of Grievant George Washington was for just cause. The Commission designated Sharon A. Gallagher to hear and resolve the dispute, the hearing was held at Milwaukee, Wisconsin on October 22, 1996. A stenographic transcript of the proceedings was made and received by November 12, 1996. The parties agreed to submit their initial briefs by December 23, 1996 and that the undersigned would exchange those for the parties. The parties reserved the right to file reply briefs within ten working days after their receipt of the initial briefs. All documents in this case were received by January 7, 1997, whereupon the record was closed.

Issues:

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

Whether the suspension of the Grievant was for just?

If not, what is the appropriate remedy?

Relevant Contract Provision:

Part II

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C. Management Rights

1. Except as otherwise specifically provided herein, the management of the plant and direction of the work force, including but not limited to the right of hire, the right to discipline or discharge for proper cause, the right to decide employee qualifications, the right to lay off for lack of work or other reasons, the right to discontinue jobs, the right to make reasonable work rules and regulations governing conduct and safety, the right to determine the methods, processes and means of operation are vested exclusively in the employer. The employer in exercising these functions will not discriminate against any employe because of his or her membership in the union.

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Background:

The parties have had a collective bargaining relationship for many years. For the past six and one-half years the Grievant, George Washington, has been employed at the District's 25th and Canal Street facility. The Grievant stated that he is familiar with the following Departmental Work Rules, particularly Rule 5 below:

1. Starting Time

Normal starting time is 7:00 a.m. All employees should be punched in and ready to start work at this time. At 7:00 a.m., each employee must be in the Tool Room or Garage areas as appropriate, to receive their work assignments. . . .

. . .

5. Call-In Procedure

Field Operations employees who are unable to report for work at their designated starting time must notify their immediate supervisor before 6:45 a.m. daily by calling 344-3930. If absent from work because of illness for more than three (3) days, an MMSD doctor's certificate must be submitted in order to return to work.

. . .

7. Vacation Scheduling

Vacation scheduling will be done in accordance with the applicable collective bargaining agreement. Requests for vacation time must be in writing to and receive the prior approval of the supervisor.

The Grievant also stated that the above-quoted Work Rules have been in effect for the entire term of his employment with the District.

The District also has a set of District Work Rules for represented employees which read in relevant part as follows:

. . .

In order for any group of people to work together safely and efficiently, it is necessary to have a reasonable code of employee conduct. The District over the years has established various rules governing conduct for the benefit of the District, its employees and

the communities served. This document contains updated rules of conduct which are to be observed.

Each employee must read and follow the work rules. Additional rules are found in the respective labor agreements and are made by individual departments. The attached rules do not cover all possible situations. However, employees are expected to conduct themselves in a manner which conforms to the other laws and standards of conduct of our society.

Constructive (progressive) disciplinary action will be taken in event of a violation of a general or major work rule and for inappropriate conduct for non-probationary employees. Each violation of these rules will be considered on its own merits depending on the nature of the offense, previous disciplinary actions and notices to the employee, and any aggravating or mitigating circumstances. Except when an offense is "intolerable" as defined by those rules, the purpose of discipline is to prevent future violations. Repeated violations of the same rule or of different rules by an employee will result in more severe discipline. Typical disciplinary stages include: oral warning, written warning, disciplinary suspension without pay, and discharge. Violations of general rules are normally considered minor infractions. An example of progressive discipline involving a general rule is oral warning, written warning, one-day suspension, five-day suspension, ten-day suspension, discharge.

Regular and probationary employees are expected to follow all the rules and their supervisors' instructions.

. . .

The commission of certain offenses, defined as Major or Intolerable can typically result in discipline as follows subject to mitigating or aggravating circumstances:

MAJOR OFFENSES

1. First offense - written warning

2. Second offense - five working day suspension

3. Third offense - discharge

INTOLERABLE OFFENSES

1. First offense - discharge

. . .

GENERAL RULES

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13. Attendance

a. Employees shall be prompt and regular in attendance. Employees are to be at their assigned work locations at the beginning of each scheduled work period (example: at the beginning of work, after lunch or break) and remain there during scheduled work hours. Employees must remain in their designated work areas during the scheduled work hours unless prior permission to leave is granted by the supervisor.

The Grievant stated that the Work Rules for his Department and for the District have been posted at the 25th and Canal Street facility during his employment, although he was unsure whether these documents were continuously posted at that facility.

The Grievant also admitted herein that he has called in late in the past and received some discipline therefor. The documentary evidence in this case indicated that on October 7, 1992, the District issued the Grievant a written warning for failure to show up for work and failure to call in before 6:45 a.m. on September 24, 1992. On December 15, 1993, the District issued the Grievant a one-day suspension for failure to call in before 6:45 a.m. on December 6, 1993. On March 1, 1995 the District issued the Grievant a written warning for calling in late on February 28, 1995 to request a day of vacation. The Grievant stated that he did not file any grievances over these three disciplinary actions taken by the District. The facts also showed that the Grievant asked for either sick leave or vacation on the three occasions that he was disciplined for calling in late from 1992 through 1995.

District Supervisor Roddy (the Grievant's immediate supervisor) stated that it has been the District's past practice that when employes call in late to request either sick leave or vacation, although supervisors generally grant the employes' requests for sick leave or vacation time those employes are nonetheless subject to possible discipline for calling in late. Roddy stated that whether an employe who calls in late will receive discipline depends upon the circumstances of the

case, whether there is a reasonable explanation for the employe's tardiness, the number of times the employe has called in late and their general tardiness and attendance history as well as their history of discipline with the District. Roddy stated that for example, if an employe calls in late for the first time that employe would not be given any discipline and that if an employe, who has had a problem calling in late or with other attendance or tardiness issues has shown an improvement over time, calls in late he/she may receive no discipline or light discipline. Roddy admitted that there is no language in Departmental Rule 5 which states that discipline will be meted out depending upon the circumstances.

Facts:

Approximately one and one-half weeks prior to June 5, 1995, the Grievant suffered an industrial accident and he was off work for that period of time. Approximately one week before June 5, 1995 while the Grievant was on industrial accident leave, he was prescribed two medications, one for pain relief and a muscle relaxant medication. The Grievant stated that while he was on these prescription drugs he felt tired, exhausted and drowsy most of the time and that his doctor told him that he should take the medication until the prescriptions ran out. The Grievant received an unrestricted return-to-work slip for June 5, 1995.

On June 5, 1995 the Grievant stated that he felt exhausted and drowsy and was incapable of getting up to prepare to go to work in his normal fashion. Just after 7:00 a.m. that morning, the Grievant stated he received a call from his Union steward, Steve Holt. The Grievant stated that after he spoke to Holt, he called the Employer at approximately 7:05 a.m. to talk to his supervisor and request a vacation day. At that time, the Grievant spoke to temporary zone supervisor Jim Demitros and Demitros granted him one day of vacation. At that time, the Grievant stated, Demitros did not inform him that he (Demitros) was still intending to discipline the Grievant for calling in late. 1/

The Grievant reported to work on June 6, 1995. On August 8, 1995, the District issued the Grievant a one-day suspension for failure to call in prior to 6:45 a.m. on June 5, 1995. That suspension notice read in relevant part as follows:

> District Work Rule #13a states: "Employees shall be prompt and regular in attendance. Employees are to be at their assigned work locations at the beginning of each scheduled work period."
>
> Department Work Rule #5 regarding call-in procedure states: "Field Operations employees who are unable to report for work at

1/ The Grievant had not requested vacation for June 5th prior to June 5, 1995.

> their designated starting time must notify their immediate supervisor before 6:45 a.m. daily by calling 344-3930.
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> On Monday, June 5th, 1995, you were not at your designated work area at the 7:00 a.m. starting time. Union Steward Steve Holt phoned you at home apparently waking you up. You then spoke to Jim Demitros (Temporary Zone Supervisor) and requested a day of vacation which was granted. You have received numerous disciplinary actions in the past for tardiness and late call-ins, the most recent, a written warning on Feb. 28th, 1995.
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> In the future, you are expected to be at your assigned work location on time and to follow all District work rules. Failure to do so will result in further disciplinary action.
>
> Since the violation occurred on June 5th and it is now August 8th, this disciplinary action may seem untimely to you or others involved in the process. Due to your extended absence on Industrial Injury leave, it was not possible to deal with this matter at an earlier date.
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> . . .

Positions of the Parties:

Union:

The Union argued that the District's call-in rule is unreasonable because it causes employes to call in fifteen minutes before they are paid and on the clock. The Union noted that the time clock in question was intentionally set by management (and without the Union's approval) so that employes who actually arrived and punched in on time would appear to be late for work. 2/ In addition, the Union contended that the rule has not been enforced in a reasonable or consistent manner because some employes are disciplined and some are not. The Union urged that the District had given no notice regarding the proper interpretation of the call-in rule, nor did employes have clear knowledge of the actual terms of the rule or the basis for its enforcement at the time that the Grievant was disciplined for violating that rule. The Union argued that because the Grievant had a reasonable explanation for failing to call in prior to 6:45 a.m. on June 5, 1996

2/ It is undisputed that this clock had been set five minutes fast to allow employes to leave early to "beat" the traffic on their routes home.

(drowsiness due to prescription medication) and because the Grievant requested vacation time off on June 5, the Employer could not reasonably discipline him for violating the call-in rule. In this regard, the Union noted that as a technical matter, the Grievant could not be considered to have called in late on a day when he had taken vacation.

Therefore, the Union sought an award rescinding the discipline and making the Grievant whole for all lost wages and/or benefits.

District:

The Employer argued that the one-day suspension imposed upon the Grievant was appropriate in the circumstances. The Employer noted that the call-in rule is required so that management can plan and maintain full shifts and efficiently accomplish the work tasks required

each day. The District noted that the Grievant knew of the Work Rule and admittedly did not comply with it. When the Grievant failed to call in before 6:45 a.m. on June 5, 1996, the District urged, this constituted the rule violation and made a one-day suspension reasonable. The fact that the Grievant's supervisor granted him a vacation day for June 5th, did not, in the District's view require that the grievance be sustained. Only if the Grievant had requested vacation at least 48 hours in advance would the Grievant have been exempted from the requirements of the call-in rule.

The District noted that on at least three previous occasions, the Grievant had violated the District's call-in rule and that on each of these occasions the Grievant had requested and received either sick leave or vacation time off. These incidents occurred in 1992, 1993 and 1995 and in each one, the District noted, the Grievant received discipline for failing to call in in a timely fashion. The Employer observed that a grievance arbitration award submitted by the Union herein related to a work rule different from the one at issue in this case and that in any event, the facts of the instant case are distinguishable from those in the Hawks Award, cited by the Union. Finally, the Employer made several arguments regarding why it had concluded that the Grievant's testimony that he was drowsy on June 5th and unable to call in on time was "unconvincing and probably fabricated. . . ." In all of the circumstances of this case, the District sought an award denying and dismissing the grievance in its entirety.

Reply Briefs:

The parties agreed that reply briefs should be postmarked ten working days after the receipt of the initial briefs in this case. The Union chose not to file a reply brief. The Employer filed its reply brief on January 7, 1997.

Employer:

The District argued that the quid pro quo for employes calling in in advance of their shifts should be that the employes' absences can then be fully excused. Therefore, in the Employer's view the Union's argument that the call-in rule was unreasonable because employes were not being paid to call in was specious. The District also noted that there was no evidence that any past practice existed which allows employes to call in after 7:00 without receiving discipline.

The District observed that employes have been subjected to discipline depending on the circumstances and the number of prior occurrences; that the District's Work Rules state that each violation must be considered on its own merits and weighed in light of the surrounding circumstances and prior incidents. Therefore, the Employer urged, it has not been inconsistent in its treatment of employes who have called in late and its treatment of employes has been supported by the work rules. In addition, the District noted that there was no evidence that other employes have been treated differently from Mr. Washington in similar circumstances.

Finally, the District contended that there are no cases to support the Union's assertion that because the Grievant was granted a vacation day, that this somehow absolved him from having called in late. In all the circumstances, therefore the District urged that the grievance should be denied and dismissed in its entirety.

Discussion:

Work Rule 5 clearly requires employes to call in before 6:45 a.m. to request sick leave. 3/ The rule does not state any exceptions to this call-in requirement, such as for drowsiness due to prescription medication. Grievant Washington admitted that he failed to comply with this rule when he called in at 7:05 a.m. on June 5, 1996 to request a vacation day.

In reaching a decision whether discipline was warranted in a case, where the labor agreement specifies that management can make "reasonable rules and regulations" regarding conduct, Arbitrators must consider such issues as whether the rule is reasonably related to a legitimate employer objective, whether the employe disciplined had clear notice of the rule and the consequences for violating it and whether the employer has consistently enforced the rule in the past. In this case, the evidence undisputedly showed that Work Rule 5 has been in place since at least 1992 and that the Union has not challenged the reasonableness of this rule prior to this case. In addition, the Employer presented evidence (not challenged by the Union herein) that Rule 5 was created to ensure that the Employer could plan ahead to perform the tasks necessary to run the District as efficiently as possible.

Although the Union did not attack the reasonableness of Rule 5 in general, the Union has contended that Rule 5 must be found unreasonable because it requires employes to call in to request sick leave by 6:45 a.m. on the day of their absence without receiving any remuneration for the time they spend calling in. In my view, Rule 5 constitutes an ordinary call-in rule which appears regularly in public and private sector contracts and the fact that the employes are not "on the clock" when they must call in is insufficient basis to find that Rule 5 is an unreasonable work rule.

In regard to the question of notice, it is clear that the Grievant was personally aware of the Employer's rules, including Rule 5, because the Grievant admitted he had seen the Employer's Work Rules posted at his work site relatively consistently over the years. In addition, the Grievant had himself been disciplined for violating Rule 5 three times prior to the incident which led to the instant case. Furthermore, I note that the Grievant accepted the discipline imposed upon him in 1992, 1993 and 1995, choosing not to file any grievances thereon. Therefore, I believe the record evidence clearly shows that the Grievant was fully notified and aware of Rule 5 as well as its

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3/ This rule is different from the one in effect when the Hawks Award issued. Therefore, I agree with the Employer, the Hawks Award is not relevant or applicable to this case.

consequences prior to June 5, 1996.

Questions have arisen in this case regarding whether the enforcement of Rule 5 has been consistent. 4/ Although it is generally true that employes should be treated essentially the same when they violate the same work rule, if reasonable basis exists for applying different penalties to different employes, such "disparate" treatment does not require a conclusion that specific discipline of a particular employe was therefore unreasonable and should not stand. In the instant case, the Employer's supervisors admitted that they take mitigating circumstances into account in considering whether to discipline an employe (and if so, how severely) for violating Rule 5. I note that this is in line with the general directives contained in the District's Work Rules. In addition, the evidence showed that even when a vacation or sick day was granted at the last moment by the Employer, if an employe had called in late on a day when they requested either sick leave or vacation, the Employer then considered any mitigating circumstances in deciding whether to discipline the employe for a violation of Rule 5. 5/ I note that the above principles were apparently applied to the Grievant in the past -- that he was issued a written warning in October, 1992, then a one-day suspension in December, 1993 and a written warning in March, 1995 for separate violations of Rule 5. For his violation of Rule 5 on June 5, 1996, the Grievant was (again) issued a one-day suspension. 6/

4/ Because the Grievant did not call in until 7:05 a.m., more than five minutes after 6:45 a.m., the fact that the time clock had been set five minutes fast by the Employer is not relevant to this case.

5/ Contrary to the arguments of the Union in this case, I can find no evidence that other employes were treated differently from the Grievant in similar circumstances.

6/ The Union argued that because the Employer granted Washington a vacation day on June 5th, it therefore had no grounds upon which to discipline him for calling in late because Washington technically could not call in late on a vacation day. I find this

Complete consistency in handling rule violations is not possible. However, the fact that different penalties are assessed for violations of the same rule does not necessarily mean that the rule has been unfairly enforced. In the instant case, the Employer has considered mitigating circumstances in past cases, including those involving the Grievant. In addition, I note that the Employer has followed progressive discipline after having given consideration to the surrounding circumstances in prior cases. It is significant that the evidence herein failed to demonstrate that the Employer has been inconsistent in enforcing Rule 5 so as to make its decision to suspend Washington for one day for his admitted failure to call in on time improper or discriminatory. Based upon the above analysis as well as the relevant evidence and argument herein, I issue the following

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argument unpersuasive. Rule 5 clearly requires that call-in by the employe must be completed "before 6:45 a.m." Thus, a violation of Rule 5 occurred in this case when Washington failed to call in on June 5th before 6:45 a.m. on a day he had not arranged in advance to take vacation time off.

AWARD

The suspension of Grievant George Washington was for just cause. The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this ___ day of February, 1997.

By _____
Sharon A. Gallagher, Arbitrator