

BEFORE THE ARBITRATOR

IN THE MATTER OF THE ARBITRATION OF A DISPUTE BETWEEN

CITY OF MANITOWOC

and

CITY OF MANITOWOC EMPLOYEES LOCAL 731, AFSCME, AFL-CIO

Case 133 No. 55110 MA-9902
(Michael Zimmer)

APPEARANCES

Mr. Patrick L. Willis, City Attorney, City of Manitowoc, City Hall, 817 Franklin Street, PO Box 1597, Manitowoc, Wisconsin, 54221-1597.

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, PO Box 370, Manitowoc, Wisconsin, 54220-0370.

ISSUE

The parties stipulated to the following issue:

Did the employer violate the collective bargaining agreement by denying grievant, Michael Zimmer, sick leave on January 27, 1997? If so, what is the appropriate remedy?

RELATIVE CONTRACT PROVISIONS

Article X - Vacations, Sick Leave, Holiday, and Leave of Absence

Section 2. Sick Leave

(a) Accumulation of Sick Leave. Following the completion of ninety (90) calendar days of employment employees shall accumulate sick leave as follows:

(2) Beginning with the second year of work and thereafter, all employees shall be granted one (1) day of sick leave following each month of employment making a total of twelve (12) days each year. All sick leave days shall be granted with full pay.

Verification. All absences shall be subject to verification by the Employer.

(f) Use of Sick Leave. An employee may use sick leave with pay for absence necessitated by personal illness or injury incurred off of the job or if the employee's presence is required at home in the event of illness or injury of members of his family living in the employee's residence.

BACKGROUND

This grievance arises from a claim by Michael Zimmer (grievant) that he was denied the use of four hours sick leave on Monday, January 27, 1997. The grievant is an Engineering Aide in the City of Manitowoc Engineering Department. His supervisor is William Handlos. January 27, 1997, was the day after the Super Bowl. The grievant attended a Super Bowl party on January 26, 1997, during which time he ate different kinds of food and estimated that he had between four and five alcoholic beverages. The grievant was unsure of the exact hour that he returned home; he estimated that it was approximately twelve midnight. The grievant starts work at 7:30 a.m. On January 27, 1997, grievant called the Engineering Department at approximately 8:00 a.m. and talked to Engineering secretary, Carol Adler. Grievant testified that he was not coming in to work and was going to take sick leave. Ms. Adler kidded the grievant whether he had celebrated the Green Bay Packers' victory too much; the grievant responded that he would not be coming in, that he was going to be off and take sick leave. Ms. Adler did not question the grievant as to why he was taking sick leave, and it was not the practice of the Department to question employees regarding the reason they needed to take sick leave.

Approximately an hour after the grievant called in, Mr. Handlos was informed by Adler that the grievant was not coming in, and was taking sick leave. Handlos was upset because he was already short-staffed because of the Super Bowl weekend and called grievant at home. The parties disagree as to what was said between grievant and Handlos. The grievant testified that he told Handlos he was tired and was sick to his stomach; Handlos recalls that grievant only stated that he was tired because of the effects of the party he attended on January 26. Handlos made the assumption that grievant was hungover; Handlos admitted on the record that this assumption was his and not anything to which grievant agreed. Handlos told the grievant, during the phone call on January 27 that he could not take sick leave, but he would allow him to use vacation to which the grievant at that time agreed. The grievant came in to work the afternoon of January 27 and worked half of his normal shift.

Grievant decided later that day (27th) that he wanted to take four hours of sick leave instead of vacation and filed a request for use of sick leave (Joint Exhibit 4). This request was denied by his supervisor, Mr. Handlos, on January 29, 1997. Handlos took the

position that grievant was hungover and that this was an improper use of sick leave. Handlos and grievant met on January 29, 1997, and January 30, 1997, to discuss grievant's request for sick leave. Both grievant and Handlos testified about the discussions that occurred on January 29 and January 30 in Handlos' office. Handlos testified that grievant never said he was sick, only that he had been tired; grievant testified that he explained to Handlos that he not been just tired and drowsy, but had been sick to his stomach as well. Handlos testified that the first time the grievant made a claim of being sick to his stomach was before the City's Personnel Committee where grievant's grievance was considered. The City never asked the employee for verification of his illness. The City took the position that it did not have to verify the grievant's claim that his absence on January 27 was because he was tired. The grievant filed a grievance for being denied the use of four hours of sick leave on January 27, 1997, (Joint Exhibit 2). The Union contends that the denial of the grievant's request to use four hours of sick leave on January 27, 1997, is a violation of the collective bargaining agreement.

The grievance, dated January 30, 1997, was processed through the parties' collective bargaining agreement grievance procedure. The parties were unable to resolve the grievance, and the Union petitioned the Wisconsin Employment Relations Commission on April 8, 1997, to appoint an arbitrator from the Commission. An arbitration hearing on this matter was held by the arbitrator on June 26, 1997, in the City of Manitowoc. The parties were given the opportunity and filed briefs which were received on July 17, 1997 (City), and July 24, 1997 (Union). The hearing was not transcribed. The hearing was closed at approximately 4:00 p.m. on June 26, 1997.

POSITION OF THE PARTIES

The Union:

It is the position of the Union that when grievant called the Engineering Department on January 27, 1997, and told the Department secretary that he was not coming to work because he did not feel well and was going to take sick leave, the grievant was following the normal practice of the Department when employees determined they were sick and not coming to work. The Engineering secretary did not, pursuant to that practice, question the grievant as to his symptoms or why he was sick. It is the Union's position that when grievant's supervisor, William Handlos, talked to the grievant later that morning, the grievant told his supervisor that he was tired and sick to his stomach, and that this was all an employee had to do to be granted the use of sick leave.

The Union argues that under the collective bargaining agreement the City had the right to request verification from the grievant as to his illness, but never did so. Handlos, despite having talking with the grievant on January 27, and meeting with him on January 29 and January 30, never inquired or investigated as to why the grievant was sick or as to his symptoms. The Union argues that it was the employer's obligation to ask for verification if it was going to question and/or deny the grievant the use of sick leave. The Union takes

the position that the grievant told Handlos he was sick to his stomach not only in phone conversation of January 27, but during their meetings on January 29 and January 30. The Union further alleges that grievant's supervisor, Handlos, tried to intimidate him from filing a grievance for Handlos' denial of grievant's use of four hours of sick leave on January 27, 1997. The Union points out that Handlos admitted that the use of the word hangover was Handlos' term not the grievant's, and that "*hangover*" was what Handlos presumed based on what grievant had told him.

The Union requests that the arbitrator sustain the grievance and that the grievant be allowed to credit the four hours vacation he used to his vacation account, and that four hours of sick leave be debited, and that any and all references to this matter be removed from the grievant's employment files.

The City:

It is the position of the City that the only reason that the grievant ever gave for requesting sick leave was that he was fatigued or tired from having attended a Super Bowl party on January 26, 1997, and that this is not a valid reason for the use of sick leave. It is the position of the City that it was not until the Personnel Committee meeting to consider grievant's January 30, 1997, grievance that grievant stated to anyone in management that he did not come in for four hours on January 27, 1997, because he was sick to his stomach as well as fatigued. It is the position of the City that had the grievant claimed that he was sick to his stomach, even if from partying on January 26, 1997, the day before his regular shift on January 27, that his sick leave would have been allowed; it was only because the grievant told Handlos on January 27, 1997, that he was not feeling well because of fatigue that the sick leave and, ultimately, the grievance were disallowed.

The City argues that grievant's testimony shows that the severity of the grievant's situation on January 27, 1997, increased as the grievance progressed through the grievance procedure, and even continued to do so at the arbitration hearing where for the first time grievant stated on the record that not only was he tired and sick to his stomach, but also suffered diarrhea on January 27, 1997. The City argues that the grievant had ample opportunity in phone conversations on January 27 with Adler and Handlos to indicate to them that he was sick because of a stomach ailment. Grievant further had the opportunity to describe his symptoms on January 29 and January 30 when he met with Handlos. The City points out that the grievant never told his Union Steward, Neuser, when he spoke to Neuser about filing a grievance, that he felt he should be allowed to use sick leave because he had a stomach ache. The City argues that although the grievant testified in detail from his diary of conversations with Handlos about his sick leave claim, he did not testify from his diary that he claimed to have a stomach ache on January 27, 1997.

Employer argues that the hearing testimony establishes that grievant only claimed that he was sick because he was tired and that the Employer was not obligated to proceed under Article X, Section 2(c), to verify fatigue as such verification would have established

nothing further than what the grievant had already told Supervisor Handlos. Lastly, it is the Employer's position that fatigue is not a sufficient justification for the use of sick and does not qualify as a personal illness under the collective bargaining agreement. The City argues that the grievance should be denied.

DISCUSSION

This case presents the arbitrator with credibility issues similar to the companion case heard on the same date. 1/ Both the grievant and his supervisor, Handlos, testified from their "*past recollection*" notes or summaries which are also inconsistent. The collective bargaining agreement does not define illness or injury. 2/ The City did not have a procedure in place at the time of this incident as to what an employee was to do if the employee called in sick. The arbitrator finds, based on the testimony, and particularly the testimony of Carol Adler, that the practice was that all employees had to do was call the Department and say that they were not coming in because they were sick and no questions were asked. 3/ The City's right to ask for verification of personal illness was apparently never used. Therefore, it would be reasonable for an employee, the grievant in this case, to assume that once he called in and said that he was sick, to not expect that he would be questioned further.

Even if the City in this case did not waive its right to request verification of grievant's claim of sickness, the City did not try and verify the illness further. The City argues that this was not necessary because the grievant only said that he was tired or fatigued, and there was no point in trying to verify "*fatigue*" any further. As noted above, the grievant testified that he did tell Handlos that he was sick to his stomach as well as fatigued and that Handlos never questioned him further either on the phone on January 27 or on January 29 or 30 when they met in Handlos' office.

The City represented at the hearing that if the grievant had originally said in his phone call to Ms. Adler that he was sick to his stomach that it would not have been questioned, and he would have received the use of sick leave for January 27. This acceptance of personal illness even from partying was confirmed by the Union Steward who creditably testified that employees have been allowed to use sick leave even if the illness (being sick) was caused by too much drinking. The arbitrator agrees with the City that the grievant's symptoms seemed to worsen even during the course of the arbitration hearing, but the arbitrator finds that it is Supervisor Handlos' characterization of grievant's personal illness that is critical.

Handlos characterized the fatigue or sickness as a "hangover" and that was the basis on which he denied the use of four hours of sick leave on January 27. 4/ A hangover has been defined as having symptoms of headache, nausea (stomach ache) tired and a general feeling of not being well. 5/ If Handlos thought that the grievant was suffering from a hangover, then it was incumbent on him to request further verification from the grievant that he was truly sick. Given the fact that the City accepted a "*stomach ache*" from too much drinking as a legitimate personal illness, Handlos probably could not have achieved

much more by such a request. Handlos' choice of hangover to describe the illness of the grievant may be unfortunate given the City's position in this case, however, at the time of this incident, the symptoms of a hangover met the City's definition of acceptable personal illness under the collective bargaining agreement to justify the use of sick leave.

Where a question of illness arises when an employee is actively employed, the burden is normally on the employer to prove that the illness is not legitimate. 6/ In this case, it is the decision of the arbitrator that the City did not meet that burden. Lastly, the City had an obligation to place the grievant and other members of the bargaining unit on notice that the practice was going to change whereby they would now have to be prepared to verify their illness. It is the decision of the arbitrator that based on the record, including a review of the briefs, the grievance is sustained.

AWARD

The grievance of Mike Zimmer is sustained.

REMEDY

The grievant will be allowed to use four hours of sick leave on January 27, 1997, and to credit four hours to his vacation account and debit his sick leave account by four hours. Any record of this incident shall be removed from his personnel record other than the normal documentation of the use of sick leave.

Dated at Madison, Wisconsin, this 26th day of August 1997.

Paul A. Hahn /s/_____

Paul A. Hahn
Arbitrator

ENDNOTES

1/ SAFEWAY STORES INC. AND UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 7, 96 LA 304 (COYLE, 1990).

2/ Article X, Sick Leave Section 2 (f).

3/ The parties testified that subsequent to the incident giving rise to the instant grievance a new call in procedure for illness is in effect; this has no bearing on this matter or decision.

4/ Union Exhibit 7, the letter from William Handlos to the grievant dated January 30, 1997, denying grievant's use of sick leave on January 27, 1997.

5/ "*Hangover*" Webster's Third New International Dictionary (1993) Merriam - Webster Inc., Publishers.

6/ Elkouri and Elkouri. How Arbitration Works 5th Edition (1997) Voltz and Groggin, Co-Editors, pg. 413.