BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between GREEN BAY BOARD OF EDUCATION EMPLOYEES UNION LOCAL 3055, AFSCME, AFL-CIO and GREEN BAY SCHOOL DISTRICT	Case 196 No. 54834 MA-9806

Appearances:

Podell, Ugent, Haney & Delery, S.C., Attorneys at Law, 611 North Broadway, Milwaukee, Wisconsin 53202, by Mr. Alvin R. Ugent, appearing on behalf of the Grievant.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Martin Luther King, Jr. Boulevard, P. O. Box 1664, Madison, Wisconsin 53701-1664, by Mr. Jack D. Walker, appearing on behalf of the District.

ARBITRATION AWARD

The Green Bay Board of Education Employees Union Local 3055, AFSCME, AFL-CIO, and the Green Bay School District are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association and the District requested the appointment of the undersigned as arbitrator to hear and decide the instant dispute. 1/ The hearing was conducted in Green Bay, Wisconsin, on April 2, 1997. The hearing was transcribed and the record was closed on July 18, 1997, upon receipt of post-hearing written argument.

ISSUES

The Grievant frames the issue as follows:

> Was the discharge for just cause and if not, what is the appropriate remedy?

1/ With the agreement of the Union, Mr. Ugent presented the case on behalf of the Grievant.

The District frames the issues as follows:

Is the grievance arbitrable?

Was the grievant available for work on October 31, 1996 and November 1, 1996?

Was the grievant absent from work without permission on and after October 31, 1996?

Did the grievant lie to the employer when he requested personal leave on October 30, 1996?

If the answer to the above is "yes," "yes" and "no," "no," what is the appropriate remedy?

The undersigned frames the issues as follows:

Is the grievance arbitrable?

Did the District have just cause to discharge the Grievant?

If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE VIII

SUSPENSION - DISCHARGE

Suspension: Suspension is defined as the temporary removal without pay of an employee from h/er designated position.

a. Suspension for cause: The Employer may for just cause suspend an employee. Any employee who is suspended, except probationary and temporary employees, shall be given a written notice of the reasons for the action and a copy of such notice shall

be made a part of the employee's personal history record and a copy shall be sent to the Union. Such reprimands shall be removed from the employee's file after two (2) years. No suspension for cause shall exceed thirty (30) calendar days.

No employee who has completed probation shall be discharged or suspended except for just cause. An employee may be discharged immediately for dishonesty, drunkenness, reckless conduct endangering others, drinking alcoholic beverages while on duty, use of controlled substances or unauthorized absence. An employee who is discharged or suspended, except probationary and temporary employees, shall be given a written notice of the reasons for the action and a copy of the notice shall be made a part of the employee's personal history record and a copy sent to the Union. An employee who has been suspended or discharged may use the grievance procedure by giving written notice to h/er steward and h/er immediate supervisor within five (5) workdays after such discharge or suspension. Such appeal will go directly to the appropriate step of the grievance procedure.

Usual disciplinary procedure: The progression of disciplinary action shall be oral reprimand, written reprimand, suspension, and discharge. The Union shall also be furnished a copy of any written notice of reprimand, suspension or discharge. Such reprimands shall be removed from the employee's file after two (2) years.

. . .

ARTICLE XIII

UNAUTHORIZED ABSENCE

No employee may absent h/erself from duty during regular working hours without the permission of the Employer.

BACKGROUND

Randy Chmielewski, hereafter the Grievant, began employment with the District as a custodial employe in August of 1985. In July or August of 1996, the Grievant received a sixty-

five day jail sentence on a misdemeanor conviction. At the time of his sentencing, the Grievant was granted Huber privileges, i.e., the right to be released from jail to fulfill his work obligations.

The Grievant began his sentence on September 24, 1996, and fulfilled his work obligations until October 2, 1996, at which time the Grievant's Huber privileges were suspended by Jail authorities for five days because the Grievant had violated jail rules. 2/ As a result of this suspension of the Grievant's Huber privileges, the Grievant missed two and one-half days of work.

On October 16, 1996, Assistant to the Superintendent for Human Resources John J. Wilson issued a letter which states as follows:

> Dear Randy:
>
> As a result of your Huber Law privilege being revoked on October 2, 1996, you were absent without excuse for two and one-half (2-1/2) days during which you were confined to the Brown County Jail.
>
> On October 9, 1996, a meeting was held between you, your labor representative and District officials in which the above facts were determined.
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> On October 11, 1996, you were notified that you would be suspended for five (5) workdays as a result of your unexcused absence. Additionally, your previous reprimand which, by agreement, would have been removed from you (sic) file on October 23, 1996, if no future discipline was necessary, will now remain in your file.
>
> Please be advised that unacceptable job performance (e.g attendance, etc.) could lead to further discipline up to and including discharge.

A copy of this letter was sent to Union President Pat Doherty.

2/ Jail authorities have the right to place a Huber inmate in lock-up for up to five days per violation. While the inmate is in lock-up, the inmate does not have a right to exercise his/her Huber privileges.

The "previous reprimand" referenced in Wilson's letter of October 16, 1996, was a February 23, 1996 oral reprimand for poor job performance. This reprimand had been grieved. The grievance was resolved when the parties agreed that the reprimand would be removed from the Grievant's personnel file on October 23, 1996, "providing no further discipline is necessary."

The five-day suspension from work, which was not grieved, was served from Monday, October 7 through Friday, October 11, 1996. While serving the suspension from work, the Grievant was placed in lock-up.

The Grievant returned to work on Monday, October 14, 1996, and performed his normal work duties through Wednesday, October 30, 1996. When the Grievant returned to the jail on October 30, 1996, the Grievant was required to provide a urine sample, which sample was tested for drugs.

At approximately 7:15 p.m. on October 30, 1996, the Grievant was removed from the Huber section of the jail and placed in lock-up. At that time, the Grievant knew that he was in lock-up because his urine sample had tested positive for drugs.

At approximately 9:45 p.m. on October 30, 1996, the Grievant telephoned his work supervisor, Facility Manager Jim Jossie, and stated that he was suffering from depression and needed to take the following two days off as personal leave. Jossie asked if the Grievant had the two personal days available. The Grievant responded yes. Jossie then asked (1) if the Grievant was available for work; (2) was the Grievant in "lock-down" and (3) had the Grievant done anything wrong which would cause jail officials to revoke his Huber privileges. The Grievant responded no, that he had not done anything wrong and that he was available for work. Jossie then advised the Grievant that, based upon the Grievant's responses to Jossie's questions, Jossie would grant the two personal days. Jossie also advised the Grievant that he would contact jail authorities the next morning to report their conversation.

When Jossie contacted the jail authorities at approximately 6:30 a.m. on October 31, 1996, he was advised that the Grievant had been placed in lock-up after he had returned from work the previous day because he had failed a urine test for drugs. As a result of this conversation, Jossie understood that, because this was the Grievant's second infraction of jail rules, it was possible that the Grievant's Huber privileges would be revoked.

The Grievant did not have any further contact with District representatives until Monday, November 4, 1996. At that time, the Grievant telephoned Jossie's secretary and reported that he was sick and could not come to work.

On November 6, 1996, various District and Union representatives met with the Grievant in the jail. At that time, the Grievant was interviewed by John Wilson, the District's Assistant to the Superintendent for Human Resources and Christine Perrigoue, the District's Senior Personnel Analyst.

On November 11, 1996, Wilson issued the following letter to the Grievant:

> On February 25, 1996, you were given a verbal warning for poor work performance. On October 11, 1996, you were suspended for five (5) days because you were jailed and unable to report to work.
>
> On Wednesday, October 30, 1996, at 9:45 p.m. you called Jim Jossie at home and requested two (2) personal days. When Jim asked if you were available for work you indicated "yes", you were available for work. On Thursday, October 31, 1996, the District was informed by the Brown County Sheriff's Department that your Huber privileges had been suspended. On Monday, November 4, 1996, you called in and reported that you were ill. A contact with the Brown County Jail revealed that your Huber privileges were still suspended, you were unable to report for work, and that you had not reported yourself ill to Jail personnel and continued to do the duties of Trustee.
>
> On Wednesday, November 6, 1996, we met in Brown County Jail. Your statement that you did not know if you were available for work along with your other responses were implausible at best.
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> Therefore, you are being terminated effective November 13, 1996, for unauthorized absence (unavailability for work) due to the suspension of your Huber privileges and for dishonesty, telling Jim Jossie you were available for work when asking for two personal days, when in fact your attempt to get 2 personal days was borne of the fact that you knew your Huber privileges were suspended.

On November 15, 1996, the Grievant filed a grievance alleging an "unjust discharge." The District denied the grievance at all steps. Additionally, the District advised the Grievant that "as with other grievances filed during the contract hiatus, the District does not intend to arbitrate this grievance."

POSITIONS OF THE PARTIES

District

At the time that the District denied the grievance, the District placed the Grievant on notice

that it would not arbitrate the grievance. As the WERC has consistently held, an employer does not have a duty to arbitrate a grievance which arises during a contract hiatus.

Assuming *arguendo* that there is a contract which is retroactive, the WERC and courts have held that only economic issues are typically retroactive. Since the arbitration provision is not an economic item, it should not be retroactively applied.

During the October 30, 1996 conversation with District Facility Manager Jossie, the Grievant falsely denied that he was in lock-up; falsely denied that he had done anything wrong; and falsely stated that he was available for work.

The Grievant's claim that he was ill is unsubstantiated. Having lost his Huber privileges, the Grievant was not available for work because he was in jail. Since the contract does not provide for jail leaves, the Grievant was absent without leave.

Under the expired collective bargaining agreement, the District has the right to immediately discharge for dishonesty or unauthorized leave. Thus, if the Arbitrator finds that the Grievant acted dishonestly or was absent without authorization, the District would have just cause to discharge the Grievant without warning.

The Grievant's claim that he had a very good record is contrary to the record evidence. As the record demonstrates, the Grievant has received prior progressive discipline.

Grievant

Generally speaking, the Grievant, an eleven year employe, has had a good work record. The letters of praise and support received from fellow employes are a testimony to his good work effort.

On November 6, 1996, Employer representatives visited en masse, at a time in which the Grievant was severely stressed and depressed. Surely, the Employer's representatives could have obtained relevant information by telephone call, or with less of an entourage.

On November 6, 1996, the Grievant had not been informed that his Huber privileges had been revoked. Thus, the Grievant was not untruthful when he told Employer representatives that he was not sure about his future availability for work. Thus, the charge of dishonesty is without merit.

At the time of the incident, the Grievant was being treated for severe depression. While the Grievant's absence from work for a few days may be justification for a suspension, it does not provide just cause for termination.

DISCUSSION

Arbitrability

As the District argues, the WERC has found that a municipal employer's status quo obligations do not include honoring contractual grievance arbitration procedures. 3/ However, the status quo doctrine relied upon by the District is not applicable to the present case.

3/ Village of Saukville, Dec. No. 28032-A (Crowley, 10/94); aff'd, Dec. No. 28032-B (WERC, 3/96).

While the grievance was initially filed during a contract hiatus period, the parties subsequently reached a tentative agreement on a successor agreement. This tentative agreement was ratified by each party. 4/ Under Wisconsin law, the successor collective bargaining agreement is binding upon each party. 5/

Relying on Sauk County v. WERC, 165 Wis.2d 406 (1991), the District argues that an arbitration provision is not an economic item and, thus, should not be retroactively applied. While Sauk County does contain dicta which provides support to the District's position, the undersigned is persuaded that the controlling law is found in another case. As Arbitrator McLaughlin stated in a prior arbitration award involving the parties: 6/

> The Wisconsin Supreme Court, in Jt. School District No. 10, City of Jefferson et. al., 78 Wis.2d 94 (1977), set forth the framework governing the determination of substantive arbitrability. The Jefferson court noted the policies underlying the determination turn on the consensual nature of arbitration. The aim of fostering the peaceful resolution of labor disputes is enhanced by deferring disputes, to the broadest extent possible, to the consensually created arbitration process. 2/ The limit of that deferral is, however, the consensual nature of the process itself: "a party cannot be required to submit to arbitration any dispute which the party has not so agreed to submit." 3/
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> The Jefferson court balanced these considerations thus:
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> > An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. 4/
>
> More specifically, the Jefferson court stated the analysis appropriate to this determination thus:

4/ At the time of hearing, the parties had not executed the collective bargaining agreement because they had a dispute concerning the language that had been ratified.

5/ Brown County, Dec. No. 28289-A (Crowley, 8/95); affirmed by operation of law, Dec. No. 28289-B (WERC, 9/95).

6/ Green Bay School District, 4/96.

> The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 5/

2/ 78 Wis.2d at 112.

3/ Ibid., at 101, citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

4/ Ibid., at 112, citing United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 583 (1960).

5/ Ibid., at 111.

The successor collective bargaining agreement is retroactive to July 1, 1996. It is not evident that the parties have any agreement that the contractual grievance arbitration provision is not retroactive to July 1, 1996. On its face, the grievance arbitration provision covers the time period in which the grievance arose.

The Grievant, an eleven year employe, alleges that he was discharged without just cause in violation of the contract. Article VIII of the contract states that "An employee who has been suspended or discharged may use the grievance procedure by giving written notice to h/er steward and h/er immediate supervisor within five (5) workdays after such discharge or suspension." The discharge was effective November 13, 1996. The grievance is dated November 15, 1996.

In summary, the undersigned is persuaded that there is an agreement to arbitrate which covers the grievance on its face and that there is no provision of the contract that specifically excludes the grievance from arbitration. Since it may not be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, the undersigned concludes that the grievance is arbitrable.

Merits

Article VIII states that "No employee who has completed probation shall be discharged or

suspended, except for just cause." 7/ Article VIII recognizes a "usual disciplinary procedure" of "oral reprimand, written reprimand, suspension and discharge."

Standing alone, the above quoted language provides a general duty to impose progressive discipline. This language, however, does not stand alone.

The parties have agreed that an "employee may be discharged immediately for dishonesty, drunkenness, reckless conduct endangering others, drinking alcoholic beverages while on duty, use of controlled substances or unauthorized absence." By adopting this language, the parties have recognized that "just cause" does not always require the imposition of progressive discipline.

The Grievant was discharged for "unauthorized absence (unavailability for work) due to the suspension of your Huber privileges and for dishonesty, telling Jim Jossie you were available for work when asking for two personal days, when in fact your attempt to get 2 personal days was borne of the fact you knew your Huber privileges were suspended." Each of these charges involve misconduct which, if proven, may serve as a basis for immediate discharge under the terms of the collective bargaining agreement.

7/ For the purposes of this discussion, the undersigned is citing the provisions of the parties' 1994-96 collective bargaining agreement. The record demonstrates that the successor agreement does not contain any language change which is relevant to this grievance.

The undersigned turns first to the charge of dishonesty. The conversation with Jossie which serves as the basis for the charge of dishonesty occurred on October 30, 1996. During this conversation, Jossie asked (1) if the Grievant was available for work; (2) was the Grievant in "lock-down";8/ and (3) had the Grievant done anything wrong which would cause jail officials to revoke the Grievant's Huber privileges. The Grievant responded no, that he had not done anything wrong and that he was available for work.

At the time of the conversation, the Grievant knew that he was in lock-up. The Grievant also knew that he did not have the right to exercise his Huber privileges while he was in lock-up. The Grievant does not claim, and the record does not demonstrate, that the Grievant had been advised of when he would be released from lock-up.

According to the Grievant, he thought that he would be available for work because the drug test would be found to be in error. 9/ Jossie, however, was asking about the Grievant's Huber status and availability for work at the time of the conversation. By telling Jossie that he was available for work, and by failing to admit that he was in "lock-up" or had done something wrong that would affect his Huber status, the Grievant was being dishonest.

8/ Throughout this proceeding, the District has used the term "lock-down." The correct term is "lock-up."

9/ According to the Grievant, he had asked his jailers for independent verification of the test, but this request was met with silence. Neither this conduct of the jailers, nor any other record evidence, persuades the undersigned that the Grievant had a reasonable basis to believe that he would be retested or that the existing test would be invalidated.

Jossie had the right to ask for and to receive accurate information about the Grievant's Huber status and availability for work. The Grievant provided information which he knew to be inaccurate. The Grievant has engaged in dishonesty within the meaning of the collective bargaining agreement.

On October 31, 1996, the Grievant was in lock-up as a result of a Jailer's order. On November 1, 1996, a Brown County Circuit Court Judge issued an order which permanently revoked the Grievant's Huber privileges. The Grievant remained in jail, without Huber privileges, until he completed serving his sentence on November 27, 1996.

The Grievant claims that he was too ill to work after October 30, 1996. The Grievant, however, did not offer any medical documentation to support this claim.

From October 31, 1996 until November 27, 1996, the Grievant was unable to report to work for the District because he was incarcerated in the County Jail. The record does not establish that the Grievant is contractually entitled to be absent from work during the period of this incarceration.

After October 30, 1996, the Grievant was absent from duty during regular working hours without the permission of the Employer. Thus, the Grievant was absent without authorization as defined by Article XIII.

In summary, the Grievant has been absent from work without authorization and has been dishonest. Under the provisions of the parties' collective bargaining agreement, the District has just cause to immediately discharge the Grievant.

Based upon the above, and the record as a whole, the undersigned issues the following

AWARD

1. The grievance is arbitrable.

2. The District has just cause to discharge the Grievant.

3. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 18th day of September, 1997.

CAB/mb
5554.WP1

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator