BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 2807

and

CITY OF RACINE (WASTEWATER UTILITY)

Case 538
No. 56157
MA-10191

(Wayne Brown Discipline)

Appearances:

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin 53401-0624, appearing on behalf of the Union.

Mr. Guadalupe G. Villarreal, Deputy City Attorney, City of Racine, 730 Washington Avenue, Racine, Wisconsin 53403, appearing on behalf of the Utility.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, AFSCME Local 2807 (hereinafter referred to as the Union) and the Racine Wastewater Utility (hereinafter referred to as the Employer or the Utility) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen as arbitrator of a dispute over discipline imposed on Wayne Brown. A mediation session was held on April 29, 1998, but the matter was not settled. A hearing was held on June 24th Racine, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. A stenographic record was made and a transcript was received on July 8, 1998. The parties submitted post-hearing briefs, the last of which was received by the undersigned on September 29, 1998, whereupon the record was closed.

ISSUE

The parties agreed that the following issue should be determined herein:

Did the Employer have just cause to impose disciplinary action against the Grievant? If not, what is the appropriate remedy?

In conjunction with the stipulation on the issue, the parties also stipulated that the grievant lost pay from January 7 through January 23, 1998, as a result of the discipline. They further stipulated that the matter was properly before the arbitrator.

FACTUAL BACKGROUND

The Employer is a utility affiliated with the City of Racine, but governed by an independent commission, which provides water and wastewater services to the citizens of Racine. The Union is the exclusive bargaining representative for the Utility's blue-collar employes. The grievant is a Utility Worker who joined the Utility in October of 1994.

Prior to joining the Utility, the grievant was a seasonal employe with the City of Racine's Department of Public Works. In May of 1994, while still with the DPW, he stepped on a board with nails through it and punctured his foot. The puncture caused continuing problems with his foot, and the resulting change in his gait also caused back problems for him. As a result of these problems, he missed a substantial amount of time over the next three years, including some time off for surgery, and became embroiled in a workers' compensation dispute with the City of Racine. In the fall of 1997, while he was off work, one of his doctors prescribed a specially made pair of boots which he believed would alleviate the grievant's problems.

On November 19th, he went to National Pedorthic Services (NPS), a provider of boots and shoes with specialty orthotics. He had a foam impression made of his feet by Certified Pedorthist Kathy Kannenberg in anticipation of ordering boots, but did not place an order. NPS provided a printout of the total cost for him. The total for a pair of #3121 P.W. Minor Boots, with specialty inserts, an extended steel shank and rocker bottom soles was $727.00. $84.00 of this total was the cost of the foam impressions, which the grievant paid on his November 19th visit.

On November 25th, the grievant's attorney, Scott French, sent a copy of the receipt for the $84.00 to the Department of Workforce Development's Worker's Compensation Division, and copied the City. On November 26th, the City also received a copy of the printout from NPS.

A hearing was scheduled on December 4th on some of the grievant's claims. The City was represented by Stacey Salvo, a legal assistant in the City Attorney's office who is responsible for workers' compensation litigation. Terry Parker, the Senior Personnel Assistant responsible for safety and workers' compensation was also present. The grievant attended along with his attorney. Settlement discussions took place, and a partial compromise agreement was reached, under which, among other things, the City agreed to pay the cost of the specialty boots. As part of the agreement, the grievant agreed to return to work as soon as the boots were ready.

The grievant went to NPS on December 9th for a fitting of the boots. The boots used for the fitting were 8 inches high, but Kannenberg told him that the boots also came in a 6-inch height. He told her that he preferred the 6-inch height. She advised him that the boots would have to be modified to add the steel shank and rocker soles, which takes seven to ten work days. Before he left, she told him they would have to order the six-inch boot.

On December 11th, Brown called his supervisor, Maintenance Supervisor James Jordan, at 8:55 a.m. and told him the boots had been ordered but would take a couple of weeks to receive because of the holidays. This was consistent with Jordan's understanding of the situation, and Jordan had not expected him to return by the 11th. It was not unusual for employes off on workers' compensation leave to have undefined dates for returning to work, and Jordan was not concerned that the grievant's exact return date was unknown.

Terry Parker had been handling the grievant's worker compensation claims. Following the hearing on the 4th, Parker's belief was that the grievant had an appointment to get his boots the next day, on Friday, December 5. However, he did not hear from the grievant on Friday. Instead he got a call from the grievant on Monday the 8th, saying he would go for the boots the next day. On Wednesday the 10th, Parker called NPS and spoke with the receptionist. She told him that she had not dealt with the grievant on his fitting, but it was her understanding that the grievant had rejected the boots that were available because he didn't like the style, and that other boots were being ordered. The receptionist said that he could have taken the boots that were on hand.

Parker called the Utility and told Tom White that the grievant could have returned to work on the 9th but he rejected the boots that were available and had a different style special ordered. White decided that the grievant was not really interested in doing any work for the Utility, so he told City Personnel Director James Kozina that he wanted to discharge him. Kozina counseled White that discharge would be premature, and advised him to impose a three-day suspension instead. White had James Jordan send him a letter of suspension:

December 12, 1997

. . .

> According to Terry Parker of the Personnel Department, you were able to return to work on Tuesday, December 9, 1997 but you did not. Therefore, you will not be paid for Tuesday, December 9th, Wednesday, December 10th, and Thursday, December 11th. Furthermore, you will be suspended without pay for three days for being absent from work without authorization. The 3 day suspension will occur on December 12th, December 15th and December 16th. You should report for work on Wednesday, December 17th or face further discipline.

This notice was mailed to the grievant, and was also hand delivered and read to him over the telephone. When Jordan read the grievant the suspension letter, he asked him what his correct address was, and he said it was 5330 Athens Avenue. The Utility records had his address as 2700 Maryland Avenue, and that was where the discipline notice had been sent. Jordan did not advise the Personnel Department of the grievant's change of address.

On December 16th, Parker called Kannenberg at NPS, and asked her to provide a letter saying that the grievant could have had boots on the 9th, but rejected them because of style. Parker understood her answer to be that he could have gotten the boots on the 9th. However, Kannenberg did not send a letter to that effect.

When the grievant did not report for work in the 17th as ordered in the suspension letter, nor on the 18th or 19th, White told Kozina he wanted to proceed with a discharge. He did not check with Jordan before doing this, as he assumed the Personnel Department would do so. No one did check with Jordan, who had in fact spoken with the grievant on the 11th and been told that he would return when the boots were ready and that that would not be until Christmas at the earliest. A letter was sent by certified mail on Monday, December 22nd advising him that his failure to report on three consecutive days -- the 17th, 18th and 19th -- was grounds for termination. The letter also advised him to contact the Personnel Department no later than December 29th to submit a written account of any mitigating circumstances, and that a final decision would be made after a review of such documentation. Because the City's records had the old address for the grievant, he did not receive the letter, and did not respond. Kozina sent a certified letter of termination on December 30th. This was also sent to the old address.

Unaware that his termination was pending, the grievant spoke with James Jordan on December 22nd and 26th, both times telling him that the boots were not yet ready. Jordan did not mention the termination to him. On the 29th, he spoke with another supervisor, Bob

Bradley, and told him that the boots would be ready on January 6th, and he would return to work on the 7th. Bradley passed this information on to Terry Parker, but did not tell the grievant that discipline was pending against him. On January 2nd, Bradley and the grievant spoke again, and the grievant repeated that he would be in on the 7th. Bradley told him he should call Kozina. He telephoned Kozina, and was told he had been terminated and that he should contact his Union.

On January 6th, Kannenberg sent a letter to the Utility, summarizing her dealings with the grievant:

> 11-19-97 - Initial visit. Evaluation, measure for shoes. Impressions of feet taken to fabricate custom orthotics.
>
> 11-09-97 - Second visit. Fit orthotics with sample boots for size. Client tried on boots, size 10.5, 8" height. Placed order in same size for 6" height according to client's request.
>
> 12-23-97 - Called client and Terry Parker and advised them both that we had received the special order boots. The boots were given to our technician to apply the prescription modifications of steel shanks and rocker soles. Both parties were advised that the boots would be ready for Mr. Brown to pick up on 1/06/98 along with the custom orthotics.
>
> Note: Custom items, orthotics and shoe modifications, require 10 to 14 days for our technician to complete.
>
> Special order shoes/boots have a time frame of two weeks for receiving from the manufacturer.

A copy of this letter was given to Parker, who tried to reach Kannenberg. He went to her office on January 13th. He questioned her reference to the shoes as "samples" and she made a note on the bottom of the letter changing this to "salable." She told him that even if the boots on hand were used, it would still have required 7 to 10 working days for modifications, plus some time to account for the holidays.

A meeting was held with the grievant, representatives of the Utility and the Union. The Utility rescinded the discharge and directed the grievant to report to work on January 23rd. The Utility refused to pay him for the time lost between January 7th and the 23rd, and advised the grievant and the Union that this time would be treated as a suspension. The instant grievance was filed, protesting all of the discipline. It was not resolved in the grievance procedure, and was referred to arbitration.

A hearing was held on June 24, 1998. In addition to the facts recited above, Kathy Kannenberg testified that she had no recollection of speaking with Terry Parker before December 23rd, when she told both him and the grievant the boots would be ready on January 6th. She also testified that NPS is only open on Tuesday, Wednesday and Thursday, and is closed on Monday and Friday. The grievant testified that he had never told Parker he would get his boots on December 5th, since that was a Friday and NPS was closed. According to the grievant, he needed a shorter boot because of circulatory problems, and was never told that ordering a six-inch boot would take a substantial amount of time. He also claimed that, in addition to the phone conversations with Jordan and Bradley, he had spoken several times with some temporary secretary the Utility was using in December of 1997.

Additional facts, as necessary, will be set forth below.

THE POSITIONS OF THE PARTIES

The Position of the Utility

The Utility takes the position that it had multiple legitimate grounds for imposing discipline, and that the grievance should be denied. The grievant clearly failed to keep the Utility advised of his current address, despite rules requiring him to do so, and also failed to inform his supervisors that he would not report for work on numerous days in December. He violated an employe's fundamental duty to either report for duty or justify his absence in advance. Further, he extended his absence by rejecting the prescription boots that were available for his use on December 9th, and special ordering another pair that were more to his taste. In so doing, he manipulated the system to avoid returning to duty. Given his pattern of abuse of the system of sick leave and workers' compensation benefits, it is entirely appropriate for the Employer to have suspended him for thirteen days, matching the amount of work time missed by his improper extension of his medical leave. The arbitrator should defer to the Employer's reasonable judgment that just cause existed and that this suspension was an appropriate penalty. The grievance should be denied.

The Position of the Union

The Union takes the position that there was no misconduct in this case, simply a series of errors and mishaps, most of them the Utility's own doing. Every participant in the December 4th hearing knew that special boots would have to be ordered and would take an indeterminate time for delivery. Despite this, the Utility imposed a three-day suspension on him for failing to report on December 5th, the day after the hearing. City witnesses admitted at the hearing that this suspension was improper. The Utility then rescinded the suspension and

terminated him for failing to report on December 17th, a date that appears to have been arbitrarily selected. After the Union protested this entire sequence of events, the Utility switched gears, rescinding the discharge and suspending the grievant from January 7th through the 23rd. The basis for this new suspension was that he could have returned to work earlier if he had not requested six-inch high boots instead of eight-inch high boots. However, the clear evidence is that no one told the grievant that asking for a different height would delay delivery of the boots. He cannot have improperly extended his leave by taking an action that he could not know would extend his leave. The Utility also suggests that the grievant did not keep in touch with his supervisors, but the supervisors conceded that he had spoken with them, and kept them advised of his status. Finally, the Utility claims that he kept them in the dark about his correct address. However, the Utility sent someone to pick him up for a surgical appointment in 1996, and that person went to the correct address without the grievant giving him directions. Clearly the Utility knew where he lived.

Taken as a whole, the Utility's evidence does not prove just cause for any level of discipline, much less a lengthy suspension. The grievance should be granted and the grievant should be made whole for his losses.

DISCUSSION

The grievant was disciplined for various and apparently cumulative reasons. The three items primarily discussed in the Utility's brief are (1) failure to keep the Utility advised of his correct address; (2) failure to call in and advise his supervisors of his whereabouts in December; and (3) improperly extending his medical leave by ordering a different style of boots. Each is addressed in turn.

Failure to Advise the Utility of His Address

The Utility asks that the grievant "be held accountable" for failing to report his change of address. It is not at all clear what the Utility seeks, or what harm -- other than further confusing the events in this case -- befell the Utility from the failure to update the address. The grievant did not receive the termination notices after they were sent in late December, but he was not going to return to work until January 6th in any event, and he knew of it before then through telephone conversations with Personnel Director Kozina. In any event, before it ever became an issue, the grievant did inform the Utility of his new address. Kozina testified that the proper procedure for an address change is for the employe to notify his supervisor. The grievant's supervisor, James Jordan, knew of the change of address on December 12th because he asked the grievant for his current address when he read him the suspension notice and noted that it was different than the one in the files. It did not occur to Jordan to pass this information along, which suggests that the City's procedure is not well known to all employes.

Even assuming, solely for the sake of argument, that discipline can be used to force employes to update their addresses, on this record and using a just cause standard, I must conclude that the grievant did not violate this procedure.

Failure to Call In During December

As a general rule, employes must call before the start of their shifts if they are not going be able to report. The grievant did not call in to say he would not be in until he spoke with James Jordan at about 9:00 a.m. on December 11th, and told Jordan he would return to work as soon as his boots were ready. Thus on December 5th, 8th, 9th, 10th and 11th, he failed to call before the start of his shift. However, the City participated in a hearing on December 4th during which it was agreed that the grievant would not return until he had his boots. While Parker thought he had promised to get them on the 5th, that is not the grievant's recollection, and there is no reason to think he would have said this, since it would have been impossible. NPS is not open on Fridays or Mondays, and the grievant could not have been fitted until Tuesday the 8th. Thus I conclude that Parker is wrong in his recollection, and the City had reason to know that the grievant could not possibly return to work until December 9th at the earliest. That was apparently the conclusion of the Utility as well, since the original attempt to suspend him listed a failure to report on the 9th, 10th and 11th as the incidents of unexcused absences.

Utility Superintendent Tom White conceded in his testimony that the grievant could not have returned to work on December 9th, 10th and 11th, and conceded that the suspension was not warranted. Further, he conceded that the grievant could not have returned on December 17th, 18th and 19th, which were the dates cited as triggering the discharge. In fact, even if the grievant had taken the 8-inch boots, he would not have been able to return to work until December 26th at the earliest. Two weeks were needed for the modifications on the boots and, having been fitted on the 9th, he would have gotten them on the 23rd. The next two days are holidays for Utility employes. (See Article 17, Section A of the collective bargaining agreement).

Thus prior to the 26th at the earliest, the only basis for disciplining the grievant would have been his failure to call in. Yet he did call in on the 11th, and told Jordan that he would return when the boots were ready, which would be at least two weeks. Jordan did not tell him to call every day, and conceded in his testimony that it was common to have people with workers' compensation injuries off for undetermined periods, and that he did not consider the grievant to be in violation of any policy during this period. On the 22nd, the grievant called Jordan and told him that his boots were not yet ready. Jordan told him to call every day. On Friday the 26th he called Jordan. On Monday the 29th, he called and spoke to Bradley, advising him that the boots would be ready on January 6th, and he would return on January 7th. On Friday, January 2nd, he spoke to Bradley again, and Bradley told him to call Kozina. He did, and found he had been discharged.

The City and its representatives knew perfectly well that the grievant would not be returning to work until the special boots were ready. It is evident from the testimony of White, Jordan and Parker that the complaint about calling in was not the reason for discipline in this case. Instead, it was based upon Parker's report that the grievant had cavalierly rejected a pair of boots that would have allowed his return on the 9th, because he did not like their style.

Ordering the Lower Cut Boots

Parker spoke with the receptionist at NPS on December 10th, and came away with the impression that the grievant could have taken the boots that were in stock on the 9th and have returned to work, but rejected them because he did not like the style. This continued to be his impression after he spoke with Kannenberg a week later. This was the basis for both the three-day suspension and the discharge. It is not possible to state with any certainty what the receptionist told Parker on the 10th, but if she said what he claims, she was clearly wrong. The boots that the grievant tried on were not ready to wear, and could not have been made ready for at least two weeks. Given this, it is impossible to accept that Parker's recollection of his conversation with Kannenberg is accurate. If one assumes that the receptionist knows nothing about the business, she might have been confused about the difference between the boots being in stock and the boots being ready for use. However, Kannenberg is a professional in the field, and could not possibly have told Parker that the grievant could have had the boots on the 9th. She denies having told anyone that, her written chronology is inconsistent with any such claim, and it simply makes no sense at all that she would have said the boots could be used on the 9th when she knew it would take at least two weeks to get them ready. I find it far more likely that Parker was confused about the difference between the boots themselves and the boots properly fitted with the required modifications, and asked his questions and interpreted the answers guided by this misunderstanding.

The only volitional act by the grievant that can be pointed to as misconduct is the decision to ask for 6-inch boots rather than 8-inch boots. The Utility believes that this was done either to delay the grievant's return to work, or with casual disregard of the resulting delay. Put another way, the grievant did not care that the City was incurring workers' compensation costs for every day that he was off work. In order to make out this case, the Utility must persuade the arbitrator that the grievant knew that asking for 6-inch boots would materially delay the delivery of the finished product. According to Kannenberg, she told the grievant that the boots were available in either an 8-inch style or a 6-inch style, and he said he preferred the 6-inch boots. She did not tell him at the time that 6-inch boots would have to be ordered, but she did tell him this before he left the store. However, there is nothing in the record to suggest that she told him that ordering the boot would take an extra two weeks, and that long a delay is not something that one could be held to naturally assume. In connection with this, it bears noting that the grievant spoke with Jordan on the 11th and told him the store

said it would be about two weeks before the boots were ready. This suggests either that he did not anticipate some substantial delay by reason of asking for 6-inch boots, or that he was misleading his supervisor for no particular reason.

It is not difficult to understand the Utility's frustration with the grievant's prolonged recovery from his foot injury, nor -- given the receptionist's apparently misleading information to Parker -- the Utility's anger at the idea of the grievant putting off his return to work just because he wanted a different style of work boot. What is striking in this record is the failure of anyone to actually ask the grievant about this, which might well have avoided a great deal of confusion. Once Kozina became involved at the discharge step, the Utility did at least ask the grievant to advise them of mitigating circumstances, but unfortunately that effort was thwarted by the problem with the grievant's address. In the end, however, no matter how understandable the Employer's concerns, the issue before the arbitrator is whether the grievant did anything that would establish just cause for a 16-calendar day suspension. On this record, he did not. He complied, even if accidentally, with the procedures for making a change of address. He advised his supervisors of his status and of the time frame for his likely return to work. That return was unquestionably delayed by his decision to have 6-inch boots instead of 8-inch boots, but the record does not show that he would have known the choice of a shorter boot would trigger a meaningful delay, and his conversation with Jordan on December 11th suggests that he did not know this.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The Utility did not have just cause to discipline the grievant. The appropriate remedy is to remove the suspension from his record, and make him whole for his losses

Dated at Racine, Wisconsin, this 30th day of December, 1998.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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