BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SUPERIOR CITY EMPLOYEES' UNION LOCAL #244, AFSCME, AFL-CIO

and

CITY OF SUPERIOR

Case 162
No. 56348
MA-10247

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1701 East Seventh Street, Superior, Wisconsin 54880, appearing on behalf of the Union.

Ms. Mary Lou Andresen, Human Resources Director, City of Superior, 1407 Hammond Avenue, Room 100, Superior, Wisconsin 54880, appearing on behalf of the City.

ARBITRATION AWARD

Superior City Employees' Union Local #244, AFSCME, AFL-CIO, hereafter Union, and City of Superior, hereafter City or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the Employer concurred, in the appointment of a Wisconsin Employment Relations Commission staff arbitrator to hear and decide the instant dispute. The undersigned was so appointed. The hearing was conducted at Superior, Wisconsin, on July 23 and August 20, 1998. The hearing was not transcribed and the record was closed on November 10, 1998, upon receipt of post-hearing written arguments.

ISSUE

The Employer frames the issue as follows:

> Did the City have just cause to discharge Steve Erickson on December 5, 1997?
>
> If not, what is the appropriate remedy?

The Union frames the issue as follows:

Did the Employer discharge the grievant, Steve Erickson, for just cause?

If not, the appropriate remedy is to make the grievant whole for any and all lost wages and benefits due to this action.

The undersigned adopts the following statement of the issues:

Did the Employer have just cause to discharge the grievant, Steve Erickson?

If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 10
DISMISSALS

10.01 The City of Superior agrees that it will act in good faith in the discipline or discharge of any employee. No employee will be disciplined or discharged except for just cause.

10.02 In the event a disciplinary action is taken against any Union employee, a notification of such action shall be given in writing to the employee and the Union stating the reasons said action shall be taken and when it will commence.

10.03 All disciplinary action and discharges shall be subject to the grievance and arbitration procedure of this Agreement.

BACKGROUND

Steve Erickson, hereafter grievant, began employment with the City of Superior on January 27, 1990. On August 26, 1993, the City issued the following:

CEA POLICY LETTER

RE: Daily Maintenance Job Tickets

The following procedures will be considered CEA policy in regards to the filling out of the daily maintenance job tickets by all CEA employees.

All pertinent data shall be recorded in the spaces provided for: equipment numbers, miles/or hours, job description and the time. Time in and time out entries will be punched on the time clock. On occasion if the need for the time entry to be written arises, a CEA foreman or supervisor will be required to initial same.

Your cooperation in following these procedures will be appreciated.

At the time that this policy letter was issued, the grievant was a CEA employee.

On April 26, 1995, the City's Director of Public Works, Jeff Vito, issued the following:

TO: All Local 244 Employees

FROM: Jeff Vito, Director

RE: Operations Policies

Several areas of our operational policy need to be clarified and complied with. The first area of concern is the need for employees to be at work and ready to perform their assigned duty at their specified starting time. Any employee who comes to work late will be docked pay for the amount of time they are late as well as being subject to the enforcement schedule as outlined at the end of this correspondence.

The second area of clarification is how employees are allowed to take coffee breaks and the time allowed for those breaks. All employees will be allowed a fifteen (15) minute work break in the first half of their shift and a fifteen (15) minute break during the second half of their shift. Immediate supervisors will establish the time frames for breaks. The break shall be taken on the job site. There will be no breaks allowed in the coffee shops. There will be no traveling allowed to or from the Municipal Service Center or other City facilities for breaks without authorization of the direct supervisor.

Lunch hours will be one-half (1/2) hour for those employees who are authorized a lunch hour under the working agreement. Employees shall not leave their job site until the lunch time begins and shall be back at their job site at the end of the one-half (1/2) hour time frame.

There has been some confusion regarding the use of flex time. For those employees who currently have a written agreement in place for the use of a flex time schedule to work through their lunch period to end the work day early, there is no allowance for a break during the normal lunch period. Those employees should arrange to eat their lunch during the two (2) fifteen minute rest breaks that are allowed. Employees who are working a flex time schedule and have not signed a flex time agreement should contact their supervisor immediately to complete the required paperwork.

The final area of concern is the time that employees return to their respective facilities to end their work day. No employee shall return to their facility any earlier than fifteen (15) minutes prior to the end of their shift.

In order for all of us to improve our public image we must convince the public that they are getting their monies worth in regard to municipal services. I feel that this directive treats everyone in a fair and equal manner. These policies will be enforced by the supervisors on a consistent basis. Violators will be subject to the following disciplinary action:

First occasion:	Employee will receive a verbal warning by supervisor.
Second occasion:	Employee will receive a written warning from supervisor.
Third occasion:	Employee will receive a one-day suspension, without pay.
Further violations:	Employee will receive additional time off, without pay, and possible termination.

This policy will be effective as of Monday, May 1, 1995.

On February 8, 1996, the grievant and the City of Superior entered into the following:

LAST CHANCE AGREEMENT

It is agreed by and between Steve Erickson (Erickson), the City of Superior (City) and AFSCME Local #244 (Local 244) as follows:

1. In consideration of the promises of Erickson and Local #244 as set forth in this Agreement, the City agrees not to terminate Erickson for actions known to the City as of the date of this Agreement involving tardiness and falsification of time cards. In consideration for the promises of the City as set forth in the Agreement, Local #244 and Erickson agree that the terms of this Agreement supersede any collective bargaining agreement or other City Ordinance or policy.

2. Erickson will be suspended for 30 working days without pay for falsification of time cards beginning on January 11, 1996 at 12:00 p.m. and continuing through February 22, 1996 at 3:30 p.m. During the period of Erickson's suspension, Erickson will stay off the City premises.

3. As a condition of continued employment, Erickson will be placed on a six month probationary period ending August 23, 1996, and will be required to comply with City ordinances, policies and procedures; to follow all standards, all operating rules and procedures; to comply with any duty imposed by the collective bargaining agreement and to perform satisfactorily the duties of his position.

4. As a condition of continued employment, for the 24-month period beginning on February 23, 1996 and ending on February 22, 1998 Erickson may not:

a. have any unexcused instances of absence or tardiness; and

b. engage in any activity that serves to undermine the management of City programs. In itself, acting in the capacity of a union steward or union officer does not constitute an activity that serves to undermine the management of the City.

5. As a condition of continued employment, Erickson, through a mandatory supervisory referral, will schedule an appointment with the City's Employee Assistance Program (EAP) regarding communication and interpersonal issues with supervisors, and will follow through on the recommendation of the EAP for any treatment plan. Any required meetings will not be scheduled on work time.

6. As a condition of continued employment, Erickson may never falsify any City record, including time reports or job costing records.

7. If Erickson breaches any of the provisions of this Agreement, the City may discharge Erickson. No such discharge shall be subject to review by

grievances or arbitration, or breach of contract action, either under this Agreement or any collective bargaining agreement, except that if a collective bargaining agreement is in effect and timely grievance is filed, an arbitrator may review the question of whether the union has proved by clear and convincing evidence that Erickson did not breach this Agreement. No arbitrator has jurisdiction to hear any other issue, nor to decide the severity of the breach by Erickson, nor to consider anything in mitigation of the breach, nor to change the remedy of discharge.

8. This Agreement shall not constitute a precedent in any other case.

9. By his signature Erickson acknowledges that he has read this Agreement, and has had the opportunity to consult with Local #244 and that he enters into it voluntarily and with full knowledge of its significance.

. . .

A representative of Local 244 signed this last chance agreement on February 1, 1996. The grievant signed this last chance agreement on February 8, 1996. Representatives of the City signed the last chance agreement on February 1 and 13, 1996.

In February of 1996, a second employe signed a last chance agreement to avoid termination for tardiness and falsification of time cards and a third employe signed a last chance agreement to avoid termination for tardiness, falsification of time cards and prohibited harassment. A representative of Local 244 and representatives of the City also signed each of these last chance agreements.

On September 24, 1996, Public Works Director Jeff Vito issued the following:

TO: Steve Erickson, Certified Mechanic

FROM: Jeff Vito, Public Works Director

RE: Completion of Probationary Period

The Last Change Agreement which you signed in February 1996 stated that you would serve a six month probationary period to end August 23, 1996. Consider this memo as notification that you have successfully completed your six month probationary period on August 23, 1996, as per the settlement provisions of your Last Chance Agreement. All other provisions of your Last Chance Agreement are still in effect until their specified date.

The areas of concern raised by your supervisors on your performance resulting from this probationary review include the following:

1. Being ready to work in your work area at the start of the shift and using time efficiently during the work day and working in the assigned area rather than wandering throughout the shop holding conversations with other staff that interrupt their work;

2. Completing jobs in a timely manner as assigned by supervisors

3. Work time use of the telephone for personal reasons;

4. Productive use of the work day where you are not ready to work at the start of the day; before and after lunch breaks or immediately before the end of your work day.

5. Entering the unattended supervisors area and spending time in this area with no apparent reason.

I would hope that you, Art Swede and Len Moen can work together to improve your performance in your assignment as a Certified Mechanic for the City and that you can focus on improvement in these specific areas.

. . .

On September 25, 1996, the grievant's supervisor, Art Swede, issued the following:

TO: Steve Erickson

FROM: Art Swede, Fleet Manager

Dear Steve:

This letter addresses some of the events that occurred on September 12, 1996 to include required corrective actions. On that day I took and forwarded a personal phone call to you which you kept ongoing for the better part of 10 minutes. This has been a reoccurring situation which you and I have spoke of before. To clarify this issue the following policy should be observed. With the exception of emergency calls, all personal use of the phones should be done during your break periods or lunch time.

At the close of the same day approximately 3:00 PM, Len Moen assigned you the task of unloading some materials from a vendor's trailer with the forklift. When the 3:30 PM shift change took place I observed you wandering around the Shop and talking with oncoming shift personnel. Len Moen later observed you standing in the time clock area. Neither Len or myself were able to understand why you were still on the grounds after shift change. You than applied for ¼ hour overtime for that time. We both agree you had ample time to accomplish your assignment before shift change. Considering the actions that took place, your request for overtime was denied on your timecard.

In summary, so that there is no misunderstanding as to what is expected of you during the normal workday, the following should clarify what is acceptable at the end of your shift. Clean-up time at the end of the shift is the amount of time that it takes to clean yourself, your work area and put tools away. Time spent loitering anywhere on the premises or by the time clock should not be considered part of the clean-up time. You likewise need to understand these guidelines should be utilized for your coffee and lunch breaks as well.

One additional subject needs to be addressed in this correspondence. Your August 26 request to flex through your 11:00 AM lunch break is denied. At this time, I believe you need to concentrate on having a good compliance program with your present normal shift before you enter into any alternate programs.

When the grievant was presented with this document, he declined to sign that portion of the document that states "I have received a copy of this letter of counseling."

On September 25, 1996, Swede issued the following:

TO: Steve Erickson, Certified Mechanic

FROM: Art Swede, Fleet Manager

RE: Notice of Suspension

This will serve as your notice that on September 26, 1996 you will be suspended from work for one 8-hour shift without pay. The basis of this suspension is your violation of written policy on timecard reporting.

On September 12, 1996, both Len Moen and I were unable to locate you at the 7:00 am start time. Len did see you entering the locker area in your street clothes minutes after 7:00 am. Your timecard turned in at the end of your shift

revealed that you had hand written your starting time as 7:00 am, yet you were not in the Shop at that time. This is not an acceptable practice and is specifically against written Shop policy. All written entries require supervisor authorization (see attached CEA policy dated August 26, 1993). This written entry was not authorized.

Further as part of a Last Chance Agreement you agreed that there would be no unexcused tardiness or absences or falsification of any City record including time reports. As a part of reaching this Last Change (sic) Agreement you were counseled on the timecard reporting requirements. Your signed agreement indicates that you will comply with these conditions. In entering the hand written starting time without obtaining a supervisors (sic) authorization, it is questionable as to whether you have an unexcussed (sic) tardy and if you falsified the starting time. We have determined that you did violated (sic) the time reporting policy and that as a result, a 1-day suspension is the appropriate discipline. You are expected to be ready for work in your work area and punched in by the time clock by 7:00 am each morning. You can not (sic) enter hand written entries on your time card without having a supervisor's authorization.

In the event you in the future you (sic) violate this policy you will be subject to further discipline up to and including termination. You may provide a written response to this notice of suspension that will be retained in your personnel file.

When the grievant was presented with this document, he declined to sign that portion of the document that states "I have received a copy of this letter of counseling."

On October 16, 1996, Vito issued the following:

TO: Steve Erickson, Certified Mechanic

FROM: Jeff Vito, Public Works Director Jeff Vito /s/

RE: Response to Grievance Dated 10/9/96 – Eight Hour Suspension

On September 26, 1996 you were suspended from work for one 8-hour shift without pay. The basis of this suspension was your violation of written policy on timecard reporting. All written entries require supervisor authorization (CEA policy dated August 26, 1993). As a part of a Last Chance Agreement you agreed that there would be no falsification of any City record including time reports. As a part of reaching this Last Change (sic) Agreement you were

counseled on the timecard reporting requirements. Your signed agreement indicates that you will comply with these conditions. In entering the hand written starting time without obtaining a supervisor's authorization you violated the time reporting policy. Based upon the previous action taken by the City, counseling and a written agreement, a one-day suspension is appropriate discipline. You have been informed that further violations of this policy will result in termination.

On December 3, 1997, the City's Public Works Director, Jeff Vito, issued the following:

TO: Steve Erickson, Certified Mechanic

FROM: Jeff Vito, Public Works Director

RE: Notice of Release from Employment

This will serve you with notice that you are released from employment effective December 5, 1997 at 3:30 p.m. The basis for this release from employment is a violation of your last chance agreement and department policy. On April 26, 1995, I issued a memo which included direction that employees are to be at work and ready to perform their assigned duty at their specified starting time. Your starting time is 7:00 a.m. which means that you were expected to be ready to perform mechanic duties at 7:00 a.m.

As a result of you prepunching time cards, rather than be terminated, you entered into a last chance agreement which included a 30 working day suspension; a six-month probationary period; and an agreement that you would not have any unexcused instances of absence or tardiness for the period of February 23, 1996 through February 22, 1998; in addition to some other requirements. You signed this agreement on 2/8/96. On August 23, 1996, you completed your probationary period and then on September 12, 1996 you were not ready to work at 7:00 a.m. On September 24, 1996, you received a memo that indicated you need to be ready to work at the start of the day. On September 26, 1996, you were suspended for one 8-hour shift without pay as a result of not having your supervisor sign your time card when you clocked in after your starting time on September 12th.

Since that time, you have been not ready to work at 7:00 a.m. or your scheduled starting time on the following days:

December 16, 1996, December 18, 1996, December 19, 1996, January 5, 1997, January 8, 1997, March 14, 1997, March 17, 1997, June 17, 1997, June 27, 1997, July 17, 1997, and October 6, 1997.

On these days you clocked in after the starting time and therefore could not have been ready to work at your starting time. These tardies were unexcused and a violation of the last chance agreement.

As a result of this record of continuous flagrant violation of department policy and your last chance agreement, you are released from employment with the City effective December 5, 1997 at 3:30 p.m. You will need to remove your tools and personal belongings from the City Garage by that time in coordination with your supervisors, Art Swede or Len Moen. Turn in keys, gas cards, City Identification and any other City property to Art Swede.

. . .

On or about December 15, 1997, a grievance was filed alleging that "Mr. Erickson was discharged from his position as mechanic without "just cause." On March 15, 1998, the grievant provided the City's Human Resource Committee with the following:

To Whom It May Concern,

I have enclosed copies of the letters the City of Superior gave to me at the time of my termination. I have also enclosed copies of the time cards city officials cited in my termination letter. There are a few points of defense I would like known in my behalf.

First of all, because of the petty nature of my dismissal, I believe I lost my job due to personality conflicts with my supervisors. Art Swede admitted to several people, including Mary Lou Andresen, that I am one of the best mechanics the City of Superior has had in recent years. Therefore, it is clear that I was not terminated due to my job performance, skills and efficiency.

Secondly, the members of the mechanic's garage have access to two time clocks. These time clocks are not synchronized to each other nor are they synchronized to the clocks on the wall. Someone could punch in late on one time clock and walk to the other time clock and be on time or even early. On some of the time cards listed, I punched in at 7:02, which is not 2 minutes after 7am but 2/100 of an hour late. (1/100 of an hour = approximately 35 seconds.) It should be noted that on the days that I punched in late, I worked past the 3:50pm shift end.

> As part of my last chance agreement, I could not have any unexcused times of tardiness. Therefore, when I did punch in late, I requested that one of my supervisors initial my time card. Sometimes my supervisors complied, sometimes they refused without reason. It was my understanding that their initials on my timecard made the tardiness excused. No one ever corrected or denied this claim. When my supervisors did refuse to initial my timecard, I immediately notified Mary Lou Andresen by phone and was told by her to not worry about it. She said she would take care of it. I realize now I should have got something in writing.
>
> The City of Superior did not act in good faith when they terminated me. Had I been blatantly late, I would agree that termination was in order. However, I was late less than five minutes and made up the time at the end of the day. Weather, trains, traffic, and bringing my two small children to daycare and their doctor appointments caused me to be late in all of the occasions. I am the first to admit that I am not perfect but I do not think that this is any reason to terminate me or anyone else from their job. Further examination of many other C.E.A. employees' time cards over the same time frame will show a similar amount of late punches (most likely without supervisor's initials).
>
> Thank you for taking the time to review my case. If you have any questions, please call me at the above number.

The grievance was denied at all steps of the grievance procedure and submitted to arbitration.

POSITIONS OF THE PARTIES

Union

The letter terminating the grievant's employment provided two reasons for the termination. First, the alleged violation of the grievant's last chance agreement and, secondly, the alleged violation of Department policy.

The City argues that the grievant punched in late and, thus, could not have been ready to work at the required starting time. The Union responds that the act of termination is not reasonable.

At most, the grievant was a few minutes late and, frequently, the grievant was only seconds late in punching the time clock. The grievant provided mitigating reasons for late punches, which were unjustifiably ignored by the Employer. By initialing the late punches, without discussion, the grievant's supervisors approved the late punches.

Employes have the option of punching one of two time clocks, each of which keep different time, often differing by several minutes. Thus, the accuracy of the time card punch must be called into question. Contrary to the argument of the City, the evidence demonstrates that the City did rely on the time card punches, and not visual observation, when determining that the grievant was tardy.

Standards and expectations of the supervisor were unclear as demonstrated by Supervisor Swede's inability to communicate performance expectations to employes. Not until the supervisors began refusing to initial the grievant's time card did the grievant become aware that there was a problem. When the grievant attempted to discuss the matter with Supervisors Moen and Swede, each refused to talk to him about their concerns.

On July 17, 1997, the grievant went to the City's Human Resources Director, Mary Lou Andresen, and informed her of the situation. Andresen responded by assuring the grievant that there was no problem. On that same day, the grievant spoke with the City's designated Employe Assistance Counselor concerning the lack of communication and the poor relationship he was having with his supervisors.

There was no communication from supervision until nearly two months later, when the termination letter of December 3, 1997 was issued. The alleged concern about the lateness of the grievant is belied by the fact that there was a two-month delay in issuing the letter of termination. If the City believed that the grievant's actions merited termination, the City should have taken immediate action of either termination or, preferably, discussing the concern with the grievant.

Many arbitrators have set aside or reduced the Employer's disciplinary action in cases where the violation of the last chance agreement was viewed as minor or where, as here, there were mitigating circumstances.

The grievant is an excellent mechanic, who acted in good faith to adhere to the terms of the last chance agreement. The arbitrator should take into account the testimony detailing a very uncommunicative supervisor who lacks the ability to effectively supervise employes. The arbitrator should sustain the grievance and return the grievant to work.

City

The Public Works Director, Jeff Vito, published a memo on April 28, 1995, addressing several Public Works policies, including establishing the "need for employes to be at work and ready to perform their assigned duty at their specified starting time." The policies apply to all Public Works employes, including the grievant. The grievant testified that he was familiar with the policy.

On February 8, 1996, the grievant, of his own free will, entered into a last chance agreement with the City of Superior. Under this last chance agreement, the grievant agreed that for the period of the agreement, January 11, 1996 through February 22, 1998, he would not "have any unexcused instances of absence or tardiness."

The last chance agreement included a six-month probationary period. Upon completion of that probationary period, the grievant received a notice, dated September 24, 1996, indicating that one area of concern continued to be that he be "ready to work in your work area at the start of the shift."

On September 25, 1996, the grievant was issued a memo regarding work performance issues. Included in this memo was the denial of a request for flexing through the lunch hour, citing a need to "concentrate on having a good compliance program with the present normal shift" before entering into any alternative programs.

On September 26, 1996, the grievant was issued an eight-hour suspension for failing to appropriately complete his starting time entry on his time card. At that time, he received notice that he was expected to be punched in and ready for work in his work area by 7:00 a.m. each morning. Vito's response to the grievance referenced that further violations of the policy would result in termination.

The grievant testified that he was aware of the standard of being on time and ready to work at the appointed starting time. He further testified that his supervisor, Swede, consistently maintained that "late was late," which gave little latitude for not being ready to work on time. The testimony of other Union witnesses demonstrates that this was a well-known standard.

During the period of the last chance agreement, the grievant was late for work on a number of occasions. After several instances of tardiness, Supervisor Swede refused to sign off on the time card. The grievant indicated to Swede that as long as he had an excuse he could not be considered tardy. Swede responded that he had the right to determine whether or not to accept the grievant's excuse.

The two other employes under the last chance agreement were not late during the period of January, 1996 through March, 1997. Supervisor Swede had counseled other employes for being late and they had corrected the problem.

The testimony of supervisors Moen and Swede indicates that clocks were not relied upon solely for determination of tardiness. Rather, a visual viewing by either supervisor would be later verified through a discussion with Erickson.

As the testimony of the two supervisors demonstrates, the grievant did not change his pattern of tardiness after written and oral instructions and reprimands. The attempts to claim there was a personality conflict that caused supervisors to monitor the grievant's behavior is not substantiated by the record evidence.

The grievant was well aware of the requirement to be at work at 7:00 a.m. and was aware of the fact that his supervisors were disappointed and frustrated with his continued inability to meet that requirement. The grievant was provided with a number of chances to correct his pattern of tardiness, including oral and written warnings and a suspension. The City acted appropriately in ending his employment.

DISCUSSION

Notice of the grievant's discharge was provided to the grievant by Public Works Director Vito's letter of December 3, 1997. In that letter, Vito stated that the grievant was discharged for "violation of your last chance agreement and department policy."

The department policy alleged to have been violated was an April 26, 1995 memo "which included the direction that employees are to be at work and ready to perform their assigned duty at their specified starting time." The violation of the last chance agreement was alleged to have occurred when the grievant had unexcused tardies. A "tardy" was defined as not being ready to work at 7:00 a.m. or the grievant's scheduled starting time.

The parties' collective bargaining agreement contains the following:

> **10.01** The City of Superior agrees that it will act in good faith in the discipline or discharge of any employee. No employee will be disciplined or discharged except for just cause.

The City has also implemented various policies and procedures that adopt a policy of progressive discipline.

Neither the language of Sec. 10.01 of the collective bargaining agreement, nor the progressive discipline policies adopted by the City, are relevant. The reason being that, as set forth in Paragraph One of the grievant's last chance agreement," the terms of the last chance agreement "supersede any collective bargaining agreement or other City Ordinance or policy."

Paragraph Seven of the last chance agreement states as follows:

> 7. If Erickson breaches any of the provisions of this Agreement, the City may discharge Erickson. No such discharge shall be subject to review by grievances or arbitration, or breach of contract action, either under this Agreement or any collective bargaining agreement, except that if a collective bargaining agreement is in effect and timely grievance is filed, an arbitrator may review the question of whether the union has proved by clear and convincing evidence that Erickson did not breach this Agreement. No arbitrator has jurisdiction to hear any other issue, nor to decide the severity of the breach by Erickson, nor to consider anything in mitigation of the breach, nor to change the remedy of discharge.

At the time of the discharge, the grievant was bound by the following provision of the last chance agreement:

. . .

> 4. As a condition of continued employment, for the 24-month period beginning on February 23, 1996 and ending on February 22, 1998 Erickson may not:
>
> a. have any unexcused instances of absence or tardiness; and

. . .

The City claims that the grievant breached this provision by having unexcused tardiness on December 16, 1996, December 18, 1996, December 19, 1996, January 5, 1997, January 8, 1997, March 14, 1997, March 17, 1997, June 17, 1997, June 27, 1997, July 17, 1997, and October 6, 1997.

Under the terms of the grievant's last chance agreement, the arbitrator does not have jurisdiction to decide any issue other than whether or not "the union has proved by clear and convincing evidence that Erickson did not breach this Agreement." The undersigned turns to the Union's argument that Erickson did not breach the last chance agreement because his tardiness had been excused.

As the Union argues, on many occasions of alleged tardiness the grievant brought his time card to one of his two supervisors, offered an explanation for the tardiness, and the supervisor initialed the time card without comment. According to the grievant, such conduct by a supervisor indicates that the tardiness was excused. Other Union witnesses confirmed that tardiness was excused by having a supervisor initial the time card.

The evidence demonstrates that the grievant's supervisors initialed, without comment, the late punches that occurred on December 18, 1996; December 19, 1996; January 5, 1997; January 8, 1997; March 14, 1997; and June 17, 1997. The record further demonstrates that the grievant was not advised that any of these late punches were not excused until December 3, 1997, when the grievant received his discharge letter from Vito.

The undersigned is satisfied that, by initialing the grievant's late punches of December 18, 1996; December 19, 1996; January 5, 1997; January 8, 1997; March 14, 1997; and June 17, 1997, without providing timely notification that the tardiness was not excused, the grievant's supervisors excused this tardiness. The Union has provided clear and convincing evidence that the grievant's tardiness on December 18, 1996; December 19, 1996; January 5, 1997; January 8, 1997; March 14, 1997; and June 17, 1997 were excused. Accordingly, the City may not rely upon these incidents to argue that the grievant had unexcused tardiness in violation of his last chance agreement.

On December 13, 1996, the grievant requested and received approval to take four hours of sick leave from 7:00 a.m. to 11:00 a.m. on December 16, 1996 for the purpose of a doctor's appointment. On December 16, 1996, the grievant's unpaid lunch hour was from 11:00 a.m. to 11:30 a.m. The grievant punched into work at 1152, which is approximately 11:31 a.m. (The time clock records in hundredths of an hour.)

On March 14, 1997, the grievant requested and received approval to use four hours of sick leave from 7:00 a.m. to 11:30 a.m. for a doctor's appointment on March 17, 1997. On March 17, 1997, the grievant punched into work at 1156, which is approximately 11:34 a.m.

According to the grievant, he assumed that he could take as much time as was needed for his appointments and, thus, he did not have an unexcused tardy. The grievant's assumption is incorrect. The grievant was entitled to take only the amount of sick leave that was requested and approved. The grievant does not claim, and the record does not demonstrate, that the grievant sought his supervisor's approval to use additional leave time on December 16, 1996 and March 17, 1997.

On June 27, 1997 and July 17, 1997, the grievant had a start time of 7:00 a.m. and punched in at 702. The grievant requested one, or more, of his supervisors to initial his time card on each of these dates, which requests were refused. By this refusal, the supervisors provided the grievant with timely notice that his tardiness was not excused.

Following the July 17, 1997 incident and understanding that he was in trouble, the grievant contacted the employe assistance counselor. The employe assistance counselor advised the grievant to contact either the Union, or the City's Director of Human Resources, Mary Lou Andresen.

The grievant telephoned Andresen, explained that his supervisors were refusing to initial late punches, and was told that Andresen would look into it. In a second conversation, Andresen said that she would have a meeting to discuss it and that the grievant should not worry about it.

The grievant acknowledges that his department has a chain of command from Moen to Swede to Vito. The grievant further acknowledges that he understood that Andresen was

setting up a meeting with Vito. Given this context, it is not reasonable to conclude, as the grievant apparently did, that Andresen had either "excused" his tardiness, or had promised that she would have his supervisors excuse his tardiness.

On October 6, 1997, the grievant had a start time of 7:00 a.m. and punched in at 702. The grievant requested Moen and Swede to initial his late punch and each refused. By this refusal, the supervisors provided the grievant with timely notice that his tardiness was not excused.

At hearing, the grievant and other Union witnesses testified that the time clocks were not accurate. Specifically, these witnesses testified that the two clocks that the grievant was permitted to use were not consistent with each other, or with Central Standard Time.

Supervisor Swede acknowledged that he had an ongoing problem with the time clocks not being consistent with one another. According to Swede, unless the clocks had been tampered with, each time clock was within a minute of one another and within one minute of ATT time, which the undersigned understands to be Central Standard Time. The other record evidence did not rebut Swede's assertion that each time clock was within one minute of Central Standard Time.

There is clear and convincing evidence that the time clocks are not precise. More specifically, there is clear and convincing evidence that there is as much as a one minute variation between each time clock and Central Standard Time.

Given the imprecision of the time clocks, it is not reasonable to conclude that a punch of 1152 demonstrates that the grievant punched in after 11:30 a.m., nor is it reasonable to conclude that a punch of 702 demonstrates that the grievant punched in after 7:00 a.m. However, it is not the time card punch, per se, which determines whether or not the grievant was tardy.

The City Operations Policy of April 26, 1995, which was noticed to all Local 244 employes, including the grievant, expressly states that employes are required to be at work and ready to perform their assigned duty at their specified starting time. The grievant was reminded of his need to conform to this policy when the City issued the "Completion of Probationary Period" memo of September 24, 1996, and advised the grievant that he had completed his probationary period, but that his supervisors continued to be concerned about his "Being ready to work in your work area at the start of the shift. . . ." and when the City issued the September 25, 1996 "Notice of Suspension" in which Supervisor Swede advised the grievant that "You are expected to be ready for work in your work area and punched in by the time clock by 7:00 a.m. each morning."

Contrary to the argument of the Union, the grievant was clearly advised that the City had a standard of timeliness, i.e., that an employe is to be punched in and in the employe's

work area ready to perform the employe's assigned duty at the employe's specified starting time. Additionally, the grievant was clearly advised that he was expected to comply with this standard of timeliness.

The grievant testified that, after he punches in, he normally talks to whoever is around the time clock; goes to his stall; gets his coveralls; and starts to work. By the grievant's own testimony, he is not in his work area and ready to perform his assigned duty at his specified starting time at the time that he punches the time clock.

In summary, the record provides a reasonable basis to conclude that, by punching in at 702 on June 27, 1997; July 17, 1997; and October 6, 1997, the grievant punched in at his specified starting time of 7:00 a.m. and that, by punching in at 1152 on December 16, 1996, the grievant punched in at his specified starting time of 11:30 a.m. There is no reasonable basis to conclude that, by punching in at 1156 on March 17, 1997, the grievant had punched in by his specified starting time of 11:30 a.m.

Neither these time card punches, nor any other record evidence, provide clear and convincing evidence that the grievant was in his work area and ready to perform his assigned duty at his specified starting time. Absent such evidence, the undersigned must conclude that the grievant was tardy on December 16, 1996; March 17, 1997; June 27, 1997; July 17, 1997; and October 6, 1997. Unlike the tardiness discussed above, there is no clear and convincing evidence that the tardiness of December 16, 1996; March 17, 1997; June 27, 1997; July 17, 1997; and October 6, 1997 was excused.

Conclusion

Under the terms of the grievant's last chance agreement, the City has the right to discharge the grievant if he breaches any provision of his last chance agreement. The arbitrator may not overturn the discharge unless the Union has proved by clear and convincing evidence that the grievant did not breach a provision of his last chance agreement.

The Union has not proved, by clear and convincing evidence, that the grievant did not have any unexcused instances of tardiness during the 24-month period beginning on February 23, 1996 and ending on February 22, 1998. Accordingly, the City has just cause to discharge the grievant for breaching a provision of his last chance agreement, i.e., Paragraph Four.

As set forth in Paragraph Seven of the "Last Chance Agreement," the arbitrator does not have jurisdiction to decide the severity of the breach or to consider anything in mitigation of the breach. Nor may the arbitrator change the remedy of discharge. Accordingly, the

undersigned is without jurisdiction to address the Union's argument that the discipline should be set aside or reduced because the breach of the last chance agreement was minor, or there was mitigating circumstances.

The testimony of Union witnesses demonstrates that other employes have not been in their work area and ready to perform their assigned duty at their specified starting time and have not been disciplined for having an unexcused tardy. The last chance agreement, however, does not obligate the City to treat the grievant in a manner that is consistent with any other employe, including those employes that are also the subject of a last chance agreement. The only limitation upon the City's right to discharge the grievant for a breach of a provision of his last chance agreement is the Union's right to "prove by clear and convincing evidence that Erickson did not breach this Agreement."

The Union maintains that the grievant had the choice of entering into the last chance agreement or facing immediate termination and, thus, questions the validity of the City's assertion that the decision to enter into the last chance agreement involved the exercise of "free will." The grievant maintains that the City would not extend a last chance agreement to any of the three employes unless each signed his last chance agreement and, therefore, he was coerced into signing the agreement. Any claim that the grievant was coerced into signing the last chance agreement, or that the grievant did not enter into the agreement of his own free will, is not only untimely, but also, does not fall within the limited jurisdiction conferred upon the arbitrator by Paragraph Seven of the grievant's last chance agreement.

As the Union argues, there was an unusually long delay between the time of the grievant's infraction and the imposition of discipline. Under other circumstances, the length of the delay may be evidence that the conduct was not considered sufficiently serious to warrant discipline, let alone discharge. In this circumstance, however, the severity of the misconduct and the appropriate level of discipline for the misconduct are established by the terms of the last chance agreement. Under the terms of the last chance agreement, the City has the right to discharge the grievant for any unexcused instances of tardiness which occur during the 24-month period beginning February 23, 1996 and ending on February 22, 1998. The last chance agreement does not require the City to impose the discharge immediately following the unexcused instance of tardiness, nor does it establish any other time limit for imposing the discipline.

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

AWARD

The Employer has just cause to discharge the grievant, Steve Erickson.

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 13th day of January, 1999.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

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