BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF HORICON

and

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

Case 27
No. 58942
MA-11120

(Kolb Grievance)

Appearances:

Lindner & Marsack, S.C., by **Attorney Alan M. Levy**, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, on behalf of the City.

Mr. Lee Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2236, Fond du Lac, Wisconsin 54936-2236, on behalf of the Union.

ARBITRATION AWARD

According to the terms of the 1999-2000 collective bargaining agreement between City of Horicon (City) and City of Horicon Public Works, Local 1323-H, AFSCME, AFL-CIO, Wisconsin Council 40 (Union), the parties requested that the Wisconsin Employment Relations Commission designate an arbitrator to hear and resolve the dispute between them regarding the discharge of John Kolb. Sharon A. Gallagher was designated by the Commission as arbitrator. A hearing was held on August 30, 2000, at Horicon, Wisconsin. No transcript of the proceedings was made. The parties agreed that they would post-mark their briefs to the Arbitrator on October 20, 2000, and that the Arbitrator would thereafter exchange those briefs. The parties agreed to waive reply briefs herein.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties stipulated that the following issues shall be determined in this case:

> Did the City of Horicon violate the labor agreement when it terminated John Kolb? If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE III – MANAGEMENT RIGHTS

Section 3.01 The management of the work and the direction of the working forces, including but not limited to the right to hire, promote, demote, suspend, discharge or otherwise discipline for just cause, layoff, transfer, subcontract (provided no employee is laid off), classify and assign work, and determine the table of organization is vested exclusively in the Employer.

Section 3.02 The Employer shall have the right to establish reasonable work rules.

ARTICLE VI – DISCIPLINARY PROCEDURES

Section 6.01 The specific objective of this provision is not to discipline and/or penalize employees but to correct violations of work rules, working instructions and/or working habit.

Section 6.02 The City shall have the right to establish and amend reasonable rules and regulations for the conduct of the City's business and of its employees in accordance with terms of this Agreement.

Section 6.03 Employees shall comply with all reasonable work rules. Said rules and regulations shall be in writing and shall be posted on the City premises at a designated location where they shall be visible to all employees. A copy of said rules and regulations and any changes thereof shall be sent to the Union.

Section 6.04 Discipline may take the form of oral reprimands, written warnings, demotions, suspensions, or discharge from employment and will be progressive in nature. The following guidelines shall be followed:

A. Every type of disciplinary action taken against [sic] non-probationary employee shall be for just case and administered in a fair and impartial manner.

B. In determining the penalty to be imposed, the City shall consider the severity and gravity of the offense and the employee's work record, including length of service and disciplinary records.

C. In imposing discipline, the City will not take into account any prior infraction which occurred more than three (3) years previously without intervening disciplinary action. After a written warning has been on file for one (1) year without any intervening disciplinary action, it will be removed from the employee's employment record.

D. For each disciplinary action, excluding discharge, the City will indicate the desired correctional action(s) for the employees to take.

. . .

ARTICLE XIV – AUTHORIZED ABSENCES

Section 14.01 – Vacations

A. All employees shall be entitled to annual vacation leaves with pay on the anniversary date of their employment in accordance with the following schedule:

Upon completion of 1 year, but less than 8 years of service = 10 workdays

Upon completion of 8 years, but less than 15 years of service = 15 workdays

. . .

B. Vacation leave earned in the preceding year shall be taken within one calendar year of the employee's anniversary date. Any employee terminating employment will be paid prorated vacation pay in lieu of vacation leave.

C. Selection of vacation time shall be by seniority within the department and must be made by April 1 of each year. The most senior employee shall select his first and second weeks of vacation if he so selects, two weeks at once, and then the next most senior employee, etc., until all personnel have made their selection. For additional vacation weeks, the same procedure shall be followed.

D. Normally no more than two (2) employees from the Street Department may be on vacation at any one time. Notwithstanding the above, at the sole discretion of the Department Head, a third (3rd) employee may be granted vacation. Normally no more than one (1) employee from the Water Department and one (1) employee from the Wastewater Department may be on vacation at any one time. Notwithstanding the above, at the sole discretion of the Department Head, a second (2nd) employee from each department may be granted vacation. All scheduling and taking of vacations will be subject to the prior approval of the Department Head and at their discretion.

E. Employees will be allowed to take singe days of vacation if they so elect, with the approval of their supervisor.

. . .

Section 14.02 – Sick Leave

A. Employees shall earn sick leave at the rate of one (1) day per month accumulative to one hundred twenty (120) workdays. Sick leave may be taken in the event of personal illness or injury up to a maximum of the total number of days accumulated.

B. An employee who exhausts his sick leave credits and is still unable to return to work due to a continuing illness or injury shall be granted a medical leave of absence without pay until such time as his physician or chiropractor certifies his fitness to return to work. Such leave shall not exceed one (1) year unless extended by the Employer and the Union.

1. Illness of Member of Family: Employees shall be allowed to use up to a maximum of five (5) days of sick leave in any twelve (12) month period in case they must be absent due to a family emergency or to severe illness in their family. Such leave will be deducted from accumulated sick leave. The term "family" as used in this Section shall be defined to include the employee's current spouse, parent, son, or daughter. Leave granted under this section shall run concurrent to and not in addition to any leave to which the employee would be entitled under the Wisconsin or Federal Family and Medical Leave Acts.

C. Probationary employees shall be entitled to accumulate sick leave while on probation but will not be allowed to use it until completion of probation.

D. The Employer shall have the right to require that a doctor examine said "sick person" in his or her home; however, the cost of the such examination shall be paid by the Employer.

. . .

Section 14.04 [sic] Personal Leave A non-probationary employee, upon written application, may, in the sole discretion of the City, be granted an unpaid leave of absence for personal leave not to exceed three (3) days. No employee shall be allowed in excess of three (3) unpaid personal leave days in any calendar year.

FACTS

The Grievant, John Kolb, Jr., was hired by the City in April, 1998 and employed until his discharge on April 12, 2000. At hire, Kolb's position was operator-in-charge of the Water Plant at the City of Horicon. Effective September 13, 1999, Kolb was demoted from operator-in-charge to a regular operator of the Water Department. Kolb was given a written notice of his demotion on September 13, 1999, from Utility Supervisor Jerry Herman. However, that written notice did not contain the reasons why Kolb was being demoted. Indeed, prior to his demotion, Kolb had never been disciplined in any fashion by the City of Horicon. On September 16, 1999, Utilities Supervisor Herman issued a written statement containing seven reasons for Kolb's demotion, which read in relevant part as follows:

. . .

1. On 1-29-99, we were notified about a hydrant hit by a truck on Division Street. I told you to remove the 2 ½" damaged threaded fitting so it could be replaced. You asked me how to do that and I told you with the torch and melt the lead holding it in. I asked you later if you did this and you told me, "I had Dave DePlover do it." The City paid two people to do one job.

2. On 4-27-00, I asked you to rebuild a deduct meter for a homeowner. According to your time card, you spent one-half hour testing the meter. The meter had stopped and needed to be rebuilt, not tested. Russ did this job in less than one hour.

3. After water bills were mailed from the June 1999 meter reading, I gave you a note to do a flow test for Dave Meier, 610 Horicon Street, and to call between 10:00 a.m. & 2:00 p.m. first. One week later I had to give you a second note to do this job.

4. Damage to pumps at Mill Street Pumphouse caused because you forgot to turn the deepwell pumps back on after a static, residual, and pumping test on April 8, 1999. Over $12,000 in damage was done.

5. On August 20, 1999, you failed to notify Russ & Jim about the closed valves at Mill Street Pumphouse after you left early from the valve replacement job on Mill & Hubbard Street. This could have resulted in more damage to the pumps. As it was, they pumped against closed valves until Mike Kasten discovered some sort of problem the next day during weekend duty. He contacted Russ Poritz and together they remedied the problem. This also resulted in a two hour callout for Russ.

6. On September 1, 1999 you failed to resample the raw water after you knew the sample was contaminated. Instead, you wrote a note on the sample form indicating how the sample became contaminated. This resulted in an unsafe sample.

7. Meter rechecks from June, 1999 meter reading were not given to Rose as requested. As we discussed, the meter readings for billings need to be on time every quarter. As Rose stated, she went to the Mayor with this meter reading problem.

Kolb's demotion entailed his loss of 20 cents per hour premium pay for operator-in-charge work. Kolb did not grieve his demotion.

Sometime in May, 1999, the City arranged for mandatory training needed by all Water Plant employees under OSHA and DNR regulations. The City arranged for training to be done in-house on three separate dates — September 13, 20 and 27, 1999, by Advanced Safety Technology, Inc. Sometime in May, 1999, Utilities Supervisor Herman posted the dates of training on the common plant calendar used by employees to record their vacation requests and keep track of plant activities, with a notation on each date "Training. No vacation" in large letters. 1/

1/ The Grievant stated that it was not until the calendar was turned over (apparently in early September) that he became aware that there would be training scheduled for September 13, 20 and 27, 1999. I note that September 1, 1999, fell on a Wednesday. Therefore, the Grievant had approximately 19 days prior to his attendance at the Green Bay Packer game on September 19, 1999, when he knew that he would not be allowed to take vacation on September 20th.

In approximately mid-August, 1999, the Grievant spoke about attending a Green Bay Packer game in Detroit, Michigan, sometime in September. Supervisor Herman was present during this conversation. Sometime during the week of September 13, 1999, Kolb asked

Herman what repercussions there would be if he failed to attend the mandatory training session on September 20th. Kolb told Herman that he planned to go to the Packer game in Detroit and fly back on Monday, September 20th. Herman responded that if Kolb missed the September 20th training, he (Herman) would reveal this to the Personnel and Finance Committee and they would decide what discipline would be necessary.

After this conversation occurred, employee Russ Poritz reported to Herman that after Kolb and Herman had spoken regarding the September 20th training, Kolb had been very upset. Kolb had then stated to Poritz that "if Herman thinks I'm coming back for (training) he is f'-ing crazy." 2/ On September 17, 1999, Herman hand-delivered the following memo to all employees including Kolb:

2/ The above quote is from the testimony of Russ Poritz whose recollection of Kolb's comment to him is entirely credible.

. . .

> This 2nd notice (1st notice was posted on vacation calendar 5-99) is a reminder that mandatory training will take place on Monday, 9-20-99 at 8:00 a.m. & Monday 9-27-99 at 8:00 a.m. Failure to attend this training will result in disciplinary action, up to & including termination.

. . .

On Friday, September 17, 1999, Kolb made a late afternoon appointment with his Physicians' Assistant (PA), Thomas Hawkins. 3/ Thereafter, Hawkins saw Kolb who came in complaining of dizziness and that he felt stressed due to work. Kolb asked that Hawkins write him a medical release so that he could be off work for five work days, stating that the stress that he was having trouble with would end at that time. 4/ Kolb said he was undergoing counseling and Hawkins took him at his word. Hawkins authorized the time off Kolb requested and asked the clinic doctor to issue Kolb a prescription for an antidepressant that also attacks symptoms of anxiety.

3/ PA Hawkins stated herein that the first time he saw Kolb as a patient was on March 26, 1999, when Kolb complained to him about dizziness that he had been having for approximately two months. Hawkins saw Kolb on several occasions thereafter but stress was not involved in those consultations.

4/ On September 17th, Hawkins took Kolb's weight but did not take his pulse, blood pressure or temperature. Kolb's blood pressure was normal on September 17th.

PA Hawkins stated herein that on September 17th, Kolb did not tell him that he would be attending a Packer game over the weekend and that he would be flying in a small plane to the game. Hawkins stated that given Kolb's symptoms, it would have been inappropriate for him to travel in a small plane, as dizziness can be worsened by changes in air pressure and that a person with anxiety problems might have difficulty with the crowds and noise of a football game. Hawkins stated that there were no follow-up visits with Kolb for six months after the September 17th appointment.

After receiving the medical excuse from Hawkins, Kolb took that excuse to the home of David Pasewald (City Clerk/Treasurer), as the Water Department was then closed for the day. Pasewald called PA Hawkins and asked him to elaborate on what he meant by "illness" in the medical excuse. Hawkins stated that the he could not expand upon the excuse given without a medical release from Kolb, but stated that Kolb's condition was not contagious. Pasewald asked Hawkins about how long Kolb should be off work and Hawkins stated that the period of time needed for Kolb to recuperate was stated on his medical excuse.

Kolb attended the Green Bay Packer football game in Detroit, Michigan, on September 19, 1999, and flew back from Detroit in a six passenger plane with his wife and some friends sometime during the day on September 20, 1999. 5/ Therefore, Kolb missed the mandatory training session which was held on September 20th.

5/ During the time he was on medical leave, Kolb worked for his grandmother, attended a banquet he had paid for in advance and went bow hunting (according to Poritz).

After Kolb failed to attend the mandatory training session on September 20th, he could not perform certain duties covered by that training under State and Federal regulations. After Kolb returned from the medical leave authorized by Hawkins, Herman spoke to him and told him that he did not have enough sick leave and that he would have to use vacation for the period of time he had been off between September 20 and September 26, 1999. The City took no other action against Kolb at this time and Herman did not counsel Kolb in any way or warn him regarding this incident.

Herman set up another training session on January 26, 2000, at City expense, so that Kolb could get the training he had missed. Herman gave Kolb a receipt the City had received for the training class indicting the date of the training and the place it was to occur, but the training for Kolb was not marked on the Water Department calendar as the mandatory training had been for all employees in September.

On November 9, 1999, Chief Glamann of the City Police Department questioned Kolb regarding his attendance at the Green Bay Packer game in Detroit on September 19th and the medical excuse he gave for his absence from September 20 through September 26, 1999.

Chief Glamann asked Kolb for a medical release to investigate his medical records concerning his "illness" during the week of September 20th. Kolb and his wife asked Chief Glamann if Kolb would be terminated if he failed to sign the release and Glamann stated he would not be terminated. Kolb then declined to give Glamann such a release. Chief Glamann concluded his investigation, as far as it went, on November 9, 1999. As Chief Glamann had been unable to obtain a medical release from Kolb, Glamann could not investigate Kolb's medical records or speak with his physicians' assistant. 6/

6/ Glamann testified that he wrote up his notes from his investigation and submitted them to the Mayor within a week of November 9, 1999. During the past four to five years, Chief Glamann has investigated approximately nine charges against employees and department heads at the Mayor's request. None of these, except Kolb's, have ended in discipline or termination. Two of the people investigated were bargaining unit employees.

On November 15, 1999, Herman posted the following notice at the Water and Wastewater Departments:

. . .

SUBJECT: Violations By Union Employees

Any City of Horicon Public Works and Utilities employees not complying with the union contract will receive:

- First incident – Verbal Warning
- Second incident – Written Warning
- Third incident – Warning With Time Off
- Fourth incident – Termination

The City Council is in full support of the disciplinary procedures listed above.

. . .

On December 6, 1999, Kolb's wife was scheduled for pre-operative tests as well as consultations with her surgeon at St. Agnes Hospital in Fond du Lac. Over the weekend prior to December 6th, Kolb and his wife discussed whether she felt she needed him at her doctor's appointments on December 6th. Mrs. Kolb decided that she needed her husband with her on December 6th. Therefore, on December 6th at 6:30 a.m., Kolb called the Water Plant and

Kolb was scheduled to be in court at 9 a.m. regarding a domestic abuse charge filed against him earlier in the year. At approximately 10:00 a.m. to 10:30 a.m., Kolb called the City Clerk/Treasurer and asked if he had sufficient sick leave to accompany his wife for her pre-operative appointments. Deputy Clerk/Treasurer Miller checked Kolb's sick leave and stated that Kolb had approximately eight hours of sick leave remaining but that her records were not up-to-date. Also sometime during the morning, Kolb called the Water Plant and spoke to Union Representative Larry Michael asking how much sick leave he had accumulated. Shortly thereafter, Kolb called the Water Plant again and spoke to Michael indicating that he would be off all day on sick leave giving the reason that his wife was having an operation and there was a pre-operative conference on December 6th. 7/ At no time did Kolb tell the City that he had a court appearance on December 6, 1999.

7/ The City did not ask Kolb whether he placed any calls to the Water Department or to the Clerk/Treasurer's office on December 6th regarding his sick leave before he left for Fond du Lac with his wife.

After Kolb returned to work, Herman stated that he (Kolb) did not have enough sick leave to take a sick day on December 6th and that the City would not pay him to be sick when he was in fact in Court on another matter. Thereafter, the City changed Kolb's timecard to leave without pay for December 6, 1999. Herman did not counsel or warn Kolb regarding his actions on December 6th and Kolb was not otherwise disciplined therefore.

Kolb missed his re-scheduled training session on January 26, 2000, because he forgot about it. Kolb worked at the Water Department for his entire shift on January 26th. It was not until after his re-scheduled training had taken place that Kolb (and Herman) discovered that Kolb had missed this mandatory training a second time. The City paid $75.00 for the January 26th training. The City did not warn, counsel or otherwise discipline Kolb for missing this re-scheduled training session in January, 2000.

On March 8, 2000, the City met with Kolb and indicated that Kolb should resign. At this meeting, the City first raised the December 6th incident with Kolb and asked again for a medical release regarding his medical leave of September 20-26, 1999. Kolb signed a medical release at this time. The City also discussed issues surrounding Kolb's September, 1999 demotion at this meeting. At this time, no City representative either warned or disciplined Kolb. For the first time, at this meeting, Kolb mentioned his mental health problems regarding stress and anxiety.

After Chief Glamann received the medical release, he interviewed Physicians' Assistant Hawkins and got Kolb's medical records from the doctor's office. Kolb's medical records

indicated that in August, 1999, Kolb sought counseling for anger management due to problems he was having at home and a domestic abuse charge which had been filed against him. On March 26, 1999, Kolb went to the doctor complaining of dizziness. From March, 1999, through the Spring of 2000, Kolb was prescribed a variety of anti-stress/anxiety and/or anti-depressant drugs.

At Kolb's request, PA Hawkins issued the following letter to the City dated March 10, 2000:

. . .

> I saw Mr. John Kolb Jr. on September 17, 1999 and suggested with his health problem at that time that he be off work from September 20, 1999 through September 26, 1999. He could return to work on September 27, 1999. At the time of that office visit, he was not advised on any restrictions of travel. His health problem was such that he did not need to be homebound.

. . .

The City took no action against Kolb until April 12, 2000, when Mayor Richard Greshay issued Kolb the following termination notice:

. . .

> Having carefully reviewed the investigation reports concerning your conduct since late summer of 1999, I have concluded that you must be, and hereby are, terminated effective as of Friday, April 7, 2000.
>
> The investigation, including the independent work of the Chief of Police, our conference with you on March 8, 2000, and the subsequent review of medical records and interview of health care providers which you authorized during that meeting, has determined that:
>
> 1. You did not attend a mandatory training session in September 1999, even though you had clear and ample notice that you were required to be present.
>
> 2. You misrepresented and falsified a health condition for the purpose of justifying that September 1999 absence.
>
> 3. You knowingly and intentionally disobeyed clear and direct instructions from your supervisor as to the attendance at the September 1999 training session and a subsequent make-up session in January 2000. In the course of this conduct, you indicated your refusal to accept the instructions and orders of

your supervisor.

4. You gave a false explanation for an absence in December 1999.

This conduct constitutes just cause for discharge pursuant to the collective bargaining agreement under which you worked. Your actions in falsifying the reasons for absences, disregarding and disobeying assignments and orders, and refusing to follow the orders of your superiors constitute dishonesty, insubordination, and dereliction of duty. Your prior work record has been considered, but is not sufficient merit and longevity as to warrant mitigation of the penalty.

. . .

After his discharge on April 12th, Kolb took the mandatory training course he had missed twice, at his own expense. Kolb thereafter filed the grievance regarding his termination.

On May 10, 2000, the City issued the following letter to Kolb which denied his grievance:

. . .

Your union representative, Mr. Lee Gierke, presented several issues which the committee has reviewed in detail. Here are the conclusions of the committee:

1. The committee understands that it will have the burden of proof in the event the claim goes to arbitration.

2. The reasons for the discharge are all four items stated in the letter of Mayor Greshay dated April 12, 2000. The note you received at the time of the last personal meeting with Mayor Greshay was not the official notice of discharge, but was an outline he used only to prepare himself for that meeting.

3. The reason for the September 1999 absence is deemed unacceptable. There was ample notice that the second training session (which the grievant missed) was mandatory. Nevertheless, the grievant was intent on being absent that day regardless of instruction. An excuse from Physician's Assistant Hawkins was presented, but the City believes the information given Mr. Hawkins was neither accurate nor complete, and the activities of the grievant during the week of his absence were inconsistent with the claim of medical need to miss work. (While the contract does allow the City to send a doctor to the absentee's home, this is not a mandatory prerequisite for discipline.) The investigation file (a copy of which was given to the union

two weeks before the May 2, 2000 meeting) contains significant evidence that Mr. Kolb was deceptive, inaccurate, and dishonest in the way he elicited the medical excuse and the reasons he gave for the absence.

4. The combination of deception, dishonesty, activities during the absence, and comments to others about true motivation for absence constitute a firm basis to conclude that Mr. Kolb was dishonest and insubordinate in his actions surrounding that absence.

5. While the City is committed to a system of progressive discipline, that system does not require limiting employers to lesser penalties where the issues are dishonesty and insubordination.
6. The union has questioned why no action was taken about the September absence until the following March. The grievant knew the matter was being investigated by the Chief of Police (to assure both the expertise of professional investigator and the objectivity of someone outside the Department of Public Works) because he was notified of an interview as early as November 8, 1999. The committee sees nothing wrong with taking time for a careful and complete investigation.

7. The union argued that the December 1999 absence was not properly part of these proceedings. The committee notes that it was mentioned as point four of the official discharge letter, and that it was also mentioned in the employer's Step 1 response to the grievance. That episode was another example of incomplete and inaccurate reporting by the grievant because he never mentioned that one of his activities during his working hours was a court appearance unrelated to his wife's medical treatment. This not only confirms the grievant's tendency to misrepresent his conduct by deliberately offering incomplete information, but also is an independent incident of an untruthful explanation for absenteeism.

8. The union said it also felt this case presented issues of disparate treatment because other employees have been treated differently. No detailed information was offered by the union to support this claim, and the committee cannot act on that basis without specific proof of other employees being treated less severely for comparable misconduct.

. . .

POSITIONS OF THE PARTIES

The City

The City noted that Article VI gives its right to discharge employees for just cause and that Section 6.04, allows the City to consider disciplinary actions which have occurred within the prior three years and written warnings issued within the year prior to the incident being adjudged. The City also noted that there was no reason to mitigate the penalty of discharge in this case as John Kolb was a short-term employee who had been demoted just before the Packer game incident on September 17th.

In assessing this case, the City argued that Kolb had been guilty of insubordination, dishonesty and deceitfulness. In regard to the insubordination, the City noted that Kolb's refusal to attend the September 20th mandatory training session, when he knew full well that it was required of all employees, and his later statement to Poritz referring to Herman, constituted insubordination. In the City's view, the fact that Kolb misrepresented himself to PA Hawkins in seeking a medical excuse and also misrepresented himself to the City in taking a medical leave of absence constituted dishonesty. In addition, when Kolb asked for paid sick leave to make a court appearance without fully explaining the situation to the City, this too, was dishonesty. In the City's opinion, Kolb's seeking a letter from PA Hawkins for his file, which he knew was based on his omissions of important relevant information, was an additional act of deceitfulness. Thus, for his acts of "dishonesty, insubordination and dereliction of duty" the City urged that it had just cause to fire John Kolb.

The City argued that Kolb knowingly presented "an improper medical excuse" to avoid attending the mandatory training session and to receive paid sick leave for September 20th. The City argued that there was "no doubt" that Kolb had "manufactured a false medical excuse" so that he could skip the mandatory training session on September 20th to attend a Packer football game and surrounding festivities. In this regard, the City noted that Herman had made it clear to Kolb and all employees, both verbally and in writing, that the September 20th training session was mandatory for all employees. The City noted that in the summer of 1999, Kolb attempted to get Herman to excuse him from the September training but Herman refused. Thus, Kolb clearly knew that he was expected to attend the September 20th training session. In the City's view, Kolb's defiant statement to Poritz after his conversation with Herman further indicated that Kolb not only had no intention of attending the September 20th training session, but also that he knew that it was a requirement of his job. The City noted that Kolb worked all day on September 17th without complaint and that at his visit with PA Hawkins, Kolb failed to tell Hawkins relevant facts and sought an excuse for September 20-26, 1999, to be off work when in fact Kolb intended to go to a banquet during the week and to go bow hunting. In addition, the City argued that Hawkins did not fully examine Kolb and that Kolb's silence and/or his failure to disclose relevant information to Hawkins constituted deliberate conduct which was the same as an affirmative misrepresentation.

Kolb's misrepresentations and omissions in seeking paid sick leave for his December 6, 1999, absence are further evidence of Kolb's dishonesty and his intent to profit therefrom. In this regard, the City noted that Kolb requested sick leave in order to accompany his wife for pre-operative appointments but used a portion of the day to attend a court proceeding. In the City's view, this constituted misrepresentation and dishonesty on Kolb's part, establishing a pattern of misconduct which the City should not have to put up with in the future.

The fact that Kolb missed the make-up class that Herman had scheduled for him in January, 2000, further indicated that Kolb was willing "to cheat the system" by telling inconsistent stories. In this regard, the City noted that at his interview with the City, Kolb had indicated that he had placed the notification of the date of the training on his refrigerator door, while at trial, Kolb stated that he had placed the notification of the date on the window sill at work. The City also noted that Kolb's attendance at a make-up class for this training at his own cost came far too late, after he had been terminated by the City.

The City contended that Kolb's dishonesty could not be offset by claims that the City did not do enough to save him. The City noted that the Union had suggested that the City owed Kolb counseling and progressive discipline prior to discharging him for the reasons it gave on April 12, 2000. The City argued that dishonesty is too serious an offense to allow second chances and counseling. Concerning the Union's argument that the City should have sent a doctor to Kolb's residence to corroborate Kolb's illness during the week of September 20th, the City noted that Kolb only bragged about the football game, bow hunting and attending a banquet after he returned to work on September 27th. Furthermore, the City observed that the second opinion doctor's visit is an option in the collective bargaining agreement, not a requirement. Without further information than it had on September 17th, the City argued that it had a responsibility to take Kolb's medical excuse at face value.

Finally, the City urged that its investigation was fair and regular and that if it was delayed at all, it was due to Kolb's attempts to hide his dishonesty, which the City dealt with as quickly as it could upon receiving Kolb's medical release. In the City's view, the only reasonable conclusion that can be reached in this case is that Kolb deliberately defied his supervisor, mislead PA Hawkins and mislead and cheated the City. Therefore, the City urged that the grievance be denied and dismissed in its entirety.

The Union

The Union argued that in order to analyze this case, one must analyze the reasons for the discharge as well as how the City "handled the disciplinary procedure." In regard to the reasons for discharge, the Union noted that the first reason the City gave was that Kolb missed the mandatory training session on September 20th. However, the Union noted that under Article XIV, Section 14.02, the City could have gotten a second opinion regarding Kolb's health and it chose not to do so. The Union observed that City Treasurer Pasewald was

suspicious on September 17th, when Kolb handed him his medical excuse, so suspicious that he talked to PA Hawkins in order to validate the excuse. Thereafter, the City did nothing in regard to Kolb's medical excuse until it mentioned the issue on March 8, 2000, at an investigatory meeting with Kolb. The Union observed that the City failed to put in any evidence to prove that Kolb misrepresented and falsified a health condition to justify his absence on September 20 - 26, 1999. In the Union's view, as of September 20th, Kolb had a valid medical excuse which did not contain any travel restrictions. The Union noted that the City does not have a policy requiring employees on medical leave to stay home and that Kolb was embarrassed to admit his mental illness to the City.

The Union urged that the City's claim that Kolb had attended counseling only because it was court ordered was untrue, as Kolb did not have a court appearance outside his initial arraignment until December 6, 1999. In regard to Kolb's illness, the Union noted that in January, 1999, and then again on March 26, 1999, Kolb had gone to the doctor and complained of anxiety symptoms; and that tests were done by Dr. Luy Tan which indicated that there were no physiological reasons for his symptoms. Thereafter, Kolb engaged in individual counseling sessions, three each in August, September and October, 1999, one in November and two in December of 1999 and then two in January and one in February of 2000. In addition, Kolb attended group counseling sessions, three in January, 2000; four in February, 2000; and, five in March, 2000. Thereafter, on September 17, 1999, Kolb visited the doctor again with anxiety symptoms for which he received a prescription and a medical excuse. On March 9, 2000, Kolb visited the doctor again complaining of an anxiety attack for which he was given a prescription. Finally, on April 10, 2000, Kolb revisited the doctor for the same reason and again on May 5th, Kolb visited the doctor for anxiety symptoms. In these circumstances, the Union argued that Kolb's mental condition was real and was not simply a ruse so that Kolb could get away with misconduct as the City claimed.

The Union defended Kolb's statement to Poritz, stating that Kolb made this statement out of frustration and that it was not intentional. Indeed, the evidence demonstrated that Kolb could have changed his travel plans if he had wished. In the Union's view, Kolb's demotion could have triggered the September 17th anxiety attack, as no discussion was held with Kolb to explain why he had been demoted prior to September 17th.

The second reason for discharge listed by the City was Kolb's request for sick leave on December 6, 1999. In this regard, the Union asserted that the facts are not disputed that at 6:30 a.m. Kolb called the City and explained that he needed to be off on sick leave to attend his wife's pre-operative appointments; that at 9:00 a.m. and for approximately 30 minutes thereafter, Kolb attended a court appearance regarding a domestic abuse charge; that at 9:30 a.m. Kolb left with this wife for St. Agnus Hospital in Fond du Lac and that at 10:30 a.m. Kolb called City Hall regarding his accumulation of sick leave, which he hoped to use that day. It was not until two weeks later that Herman told Kolb that he could not have sick leave for December 6th, that he would be given leave without pay for the day because the City would not pay him sick leave to attend court. The Union urged that this action by the

City showed that Herman "authorized the leave" under the contract as being leave without pay. Therefore, the Union argued that the City is attempting to discipline Kolb twice for his conduct on December 6th when it has already docked his pay for that day as a disciplinary action.

The third reason listed by the City for termination of Kolb is his having missed his January 26, 2000, make-up of the mandatory training session he missed on September 20th. The Union argued that both Herman and Kolb simply forgot about the rescheduling of this training session and that Herman did nothing in regard to counseling Kolb or disciplining him for missing this make-up training session. Indeed, it was not until March 8, 2000, that the City raised this as a problem issue. Although the City claimed that Kolb could not perform all of his duties because he had missed the mandatory training session, the Union noted that the City failed to prove that it was harmed in any way by Kolb's having missed the training make-up on January 26, 2000. In addition, there was no evidence offered by the City to support its claim that Kolb missed the training knowingly and willfully. In short, the Union urged that the City's case was made up of its suspicions rather than hard evidence and that at hearing, Kolb had stated plausible explanations for each incident.

The Union argued that the City failed to follow its own policies and the labor contract in Kolb's case. In this regard, the Union noted that the City failed to follow progressive disciplinary principles which were stated in its written policy posted on November 15, 1999, at the Water Department. Furthermore, the Union urged that discipline, as general matter, should be reasonably prompt. In the Union's view, holding the threat of a penalty over the head of an employee is a punishment in and of itself, which essentially doubles the penalty for each offense and is contrary to concepts of justice and fairness.

Indeed, in this case the City offered no excuse for the extreme delays in processing the discipline that was meted out against Kolb. In this regard, the Union observed that although the September 17th incident made the City immediately suspicious, it did nothing. It was not until six weeks later that the Chief of Police questioned Kolb (November 8, 1999) regarding this incident. Then, another four months elapsed before the March 8, 2000, meeting with Kolb and his Union Representative in which the City urged Kolb to resign. Thus, in the Union's view, the City failed to follow the axiom that an employee should receive discipline within a reasonable time after the infraction.

In regard to the December 6, 1999, incident, the Union noted that the City delayed in processing any charge against Kolb for this incident. Indeed, it was not until December 20, 1999, that Herman changed Kolb's sick day to a day without pay. Yet, the City raised this issue among the reasons for the City's displeasure with Kolb on March 8, 2000. Finally, in regard to the fact that Kolb missed the January 26, 2000, make-up training session, the Union noted that no investigation was made of this incident and that no penalty was given to Kolb for this incident until this too was raised at the March 8, 2000, meeting with Kolb, the City and the Union wherein the City expressed its displeasure with Kolb's actions. Therefore, from September 20, 1999, to his April 12, 2000 termination 199 days elapsed; from the

December 6, 1999, incident to his termination was 122 days and from the January 26, 2000, incident to Kolb's termination was 72 days. These timeframes, in the Union's opinion, were too lengthy and constituted a violation of Kolb's due process rights.

In addition, the Union argued that the City's decision to use the Chief of Police as the investigator of Kolb's misconduct amounted to prejudging Kolb and that the City should have used either the immediate supervisor or department head (referred to in the grievance procedure) instead of employing the Chief in this unusual manner. In conclusion, the Union argued that the City failed to prove that Kolb had been insubordinate or that he had ever refused to follow a direct order. The Union, therefore, asked that Kolb be reinstated with full back pay and that his record be expunged of all reference to the discipline.

DISCUSSION

The City is correct in its assertion that Article VI gives it the right to consider disciplinary actions up to three years old and written warnings up to one year old in assessing new discipline against employees. Thus, the City had a right to consider Kolb's September 16, 1999 demotion in disciplining him for conduct thereafter. Certain facts in this case are not disputed: that the September 20, 1999 training session was mandatory for all Water Plant employees and necessary for them to perform their jobs; that Kolb knew he could not take vacation on September 20th and that he was expected to attend the training session on that date; and that Herman would ask the City to discipline Kolb if Kolb failed to attend the training.

However, there are overwhelming problems in this case which center around the City's failure to take action against Kolb, over many months, following Kolb's misconduct on September 20, 1999, December 6, 1999, and January 26, 2000. Under classic concepts of just cause, discipline (except in cases of serious offenses) should be progressive, not punitive. Therefore, discipline should generally be given in increasing amounts to encourage the employee to improve his/her behavior. Of course, if increasing amounts of discipline do not result in improvement, discharge is appropriate. However, an employer is not free to sit back and allow the employee's offenses to pile up without the employer's intervention in order to justify issuing the employee a severe penalty.

This record makes it clear that the City should have given Kolb lesser appropriate discipline for his first offense and escalated the discipline for each successive offense. Had the City taken this approach, Kolb might have realized the error of his ways long before January, 2000. The City's delay and failure to take prompt action against Kolb for his offenses may have given Kolb the mistaken impression that the City did not believe his misconduct warranted discipline or that the City condoned it. In this regard, I note that on November 15, 1999, approximately one week after Police Chief Glamann interviewed Kolb regarding his misconduct in September, Herman posted the City's policy regarding progressive discipline.

The posting of this notice and its timing cannot be ignored. This notice (and the City's delay in disciplining Kolb) could have lead Kolb to believe he would receive no discipline for his past misconduct, despite Chief Glamann's November 9, 1999, investigation of that conduct.

In its April 12, 2000, termination letter, the City lists as its first reason for discharging Kolb that he failed to "attend a mandatory training session in September, 1999" although Kolb had "clear and ample notice" that he was "required to be present." There is no question in this case that Kolb knew (through both written and oral notices) that he was expected to attend the September 20th training session and that if he failed to do so he would be subject to discipline. Kolb demonstrated his comprehension of these notices when he angrily told Russ Poritz he had no intention of attending the September 20th training. Indeed, he did not attend the training. Thus, it is clear that the City provided sufficient proof to support the first reason for discharge. However, although Kolb's actions on September 17th and September 20th would clearly have warranted discipline, the fact that the City waited seven months to discipline Kilb for his misconduct makes this charge against Kolb too stale to be relied upon herein by the City.

The second reason for discharge listed in the City's April 12th letter was Kolb's misrepresenting and falsifying a health condition to justify his September 20th absence. There is no doubt in this Arbitrator's mind that the City met its burden of proof on this point. Having said that, does not mean that this reason for discharge can stand against the inordinate delay which again leads to the necessary conclusion that this charge is also too stale to stand scrutiny in a case where just cause must be shown.

In this regard, I note that the City offered no evidence to explain why it waited from September 27, 1999, to April 12, 2000, to complete its investigation and terminate Kolb. The City implied in its answer to the grievance that it had not delayed its investigation of Kolb's misconduct but that to do a thorough investigation required the time spent. It is clear on this record that the Chief finished his initial investigation (begun on November 9th) in one day and that the Chief had his report typed and sent to the Mayor within a week or two thereafter. The City's investigation apparently resumed (for reasons unknown) on March 8, 2000, and concluded for a second time some time prior to April 12, 2000. In these circumstances, it cannot be said that the City needed the seven-month period from September 27, 1999, to April 12, 2000, to fully investigate Kolb's misconduct.

In its April 12th termination letter, the City stated that Kolb "knowingly and intentionally" failed to attend the make-up training session in January, 2000, thereby refusing "to accept the instructions and orders" of his supervisor. The evidence of record failed to show that Kolb knowingly and intentionally failed to attend the make-up training session in January, 2000. In my view, it was Kolb's responsibility (not the City's) to make sure he attended this make-up training session. (Herman stated, without contradiction, that he never reminded employees of individual training sessions they were expected to attend.) Kolb testified credibly that although he received notice of the January 26, 2000 make-up session, he

simply forgot all about the training session and worked the entire day at the Water Plant. In these circumstances, I cannot find that Kolb "knowingly and intentionally" disobeyed Herman's order to attend the make-up training session on January 26, 2000. 7/ Thus, although this misconduct could have formed the basis for minor discipline by the City (an oral or written warning), it is insufficient to support just cause for Kolb's termination and is also quite stale, coming 2.5 months prior to his discharge.

7/ I note that Kolb's statements on this point were essentially corroborated by Russ Poritz.

The last reason for termination stated in the City's April 12th letter was that Kolb "gave a false explanation for an absence in December, 1999." It is undisputed that there is nothing in the collective bargaining agreement which requires employees to give a reason for their request for sick leave. Section 14.04 [sic], the contract allows employees "upon written application" and within the sole discretion of the City, to be granted an unpaid leave of absence for personal leave not to exceed three days. Thus, Kolb could have sought an unpaid personal leave day for December 6, 1999. Instead, he chose to use his wife's pre-operative appointments in Fond du Lac, Wisconsin, as a cover for his 30 minute attendance in court on a purely personal matter.

However, I agree with the Union that Herman essentially disciplined Kolb and authorized Kolb's leave on December 6, 1999, when Herman (on December 20, 1999) changed Kolb's status from paid sick leave to leave without pay for December 6th. For the City to further discipline Kolb, as a part of his termination, for Kolb's unauthorized use of sick leave to attend court on December 6th would violate rules against double jeopardy. Therefore, the City's use of the December 6th incident as a reason for Kolb's termination was improper and inappropriate.

The Union has argued that the Mayor's decision to have the Police Chief investigate Kolb's misconduct was improper and amounted to prejudgment of the case. I disagree. Although as a general rule, it may be preferable for supervisors who are designated in the chain of command above the grievant to investigate their employee's misconduct, this does not mean an employer cannot reasonably determine that an investigation would be better handled by a supervisor outside that chain of command.

The City made an elliptical reference to insubordination — Kolb's "refusal to accept the instructions and orders" of his supervisor — in paragraph 3 of the April 12th termination letter. It appears from the City's arguments herein that this reference is to Kolb's statement to Poritz that "if Herman thinks I'm coming back for (training) he is f'—ing crazy." In my opinion, Kolb's statement does not constitute insubordination. In this regard, the statement was made by Kolb in private to Poritz, not to Herman. The statement was certainly disrespectful and intemperate but it did not rise to the level of insubordination.

The City argued herein that Kolb was dishonest in asking PA Hawkins to write the letter of explanation dated March 10, 2000. As this letter was not referred to in the April 12th termination letter as grounds for Kolb's termination, it has not been considered herein.

Based on all of the relevant evidence and argument herein, I issue the following

AWARD

The City violated the labor agreement when it terminated John Kolb. The grievance is, therefore, sustained. The City is ordered to expunge Kolb's personnel record of any reference to the discharge and to reinstate him with full back pay and benefits from the effective date of his termination, April 7, 2000, forward.

Dated at Oshkosh, Wisconsin, this 6th day of December, 2000.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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