BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 71, AFSCME, AFL-CIO

and

CITY OF KENOSHA

Case 191
No. 58956
MA-11129

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Roger E. Walsh, Attorney at Law, Davis & Kuelthau, S.C., and **Mr. Stephen Stanczak**, Risk Manager, City of Kenosha, appearing on behalf of the City.

ARBITRATION AWARD

The parties named above jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned as the Arbitrator to resolve the grievance of Grievant James Radoy. The undersigned was appointed and held a hearing on August 8, 2000, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on October 24, 2000.

ISSUE

The issue is:

> Did the City have just cause to terminate James Radoy? If not, what is the appropriate remedy?

BACKGROUND

The parties' collective bargaining agreement for 1998-2000 calls for final and binding arbitration and includes the just cause standard for discipline and discharge. This grievance is

over the discharge of James Radoy, who started his employment with the City on January 12, 1970, and was discharged on March 6, 2000. The parties stipulated that the Grievant was not regularly scheduled to work on weekends and that he worked a Monday through Friday shift as a building maintenance repairer in the Museum. The parties also stipulated that the fourth step of the grievance procedure was waived and that the matter was properly before the Arbitrator.

The City's work rules include the following relevant portions:

A. *Notification of Absence*

1) Employees who are unable to report to work due to illness, injury or emergency situations must notify their supervisor no later than the start of their shift. Employees who are completely physically unable to call in must have someone else do so for them.

2) Employees must call in EACH DAY that they are absent to inform the supervisor of their availability unless previous arrangements are made with the supervisor to cover such cases as surgery, hospitalization, long recuperation, etc.
Note: Absence of three consecutive days without an acceptable excuse will result in loss of employment.

3) Supervisors may require substantiation, including doctor's reports, for any absence due to illness or injury. Absence for more than three days always requires medical substantiation of inability to work.

4) Upon returning to work after an illness or injury, an employee may be required to furnish a physician's statement certifying his/her ability to resume normal work duties.

. . .

J. *Prohibited Conduct*

The following types of conduct or behavior are prohibited and may result in disciplinary action:

1) Insubordination, including refusal or failure to follow instructions or carry out assignments.

. . .

Paula Touhey has been the Director of the Kenosha Public Museum since 1984 and supervises 14 employees, including the Grievant. The Grievant is responsible for the maintenance of the building inside and of the outside grounds. He sets up chairs, receives deliveries, and is responsible for the general safety of the building. He is the only full-time maintenance employee, and there are part-time guard custodians who do some light maintenance work on weekends.

The Museum has a phone answering system and whoever comes in first takes the messages from the answering machine. Rita Myers is a clerk-typist at the Museum. On February 10th (all dates will refer to the year 2000 unless otherwise stated) Myers received a phone call or message from the Grievant, stating that he had hurt his leg and arm and would not be at work on that date. On February 11th, she received a phone call or message from him stating that his leg was better but his arm was still hurting and he would not be at work. On Monday, February 14th, she received a call that he was going to contact his doctor or try to see his doctor. Myers was not sure of dates following February 14th. Myers recalled that the Grievant called on February 23rd, stating that he had a doctor's appointment on March 1st. She did not recall receiving any phone calls or messages from the Grievant between February 25th and March 1st. Myers' shift starts at 8:00 a.m. The Grievant's shift starts at 7:30 a.m. Myers and other employees call in and leave messages if they will not be at work.

On February 15th, the Grievant called Touhey to tell her that his doctor was on vacation and he could not see him for a couple of weeks, until early March. Touhey told him that he needed to either go to the emergency room or walk-in clinic so that he could be seen by a doctor in a timely fashion. The Grievant told Touhey that he did not want to see another doctor other than his own, and that he did not have to. Touhey told him that that was unacceptable and that he needed to see a doctor. Touhey testified that she was following Section 9.02 of the collective bargaining agreement, which states in part:

> The Department Head may require reasonable evidence to support a claim for sick leave and shall, in case of absence for more than three (3) consecutive working days, require a doctor's certificate to justify the absence.

Touhey testified that the Grievant did not call the Museum at all on February 16th. She reviewed the answering machine messages. Then she called his house and left a message on his answering machine, telling him that he had not called in that day and that he had to do so every day. She also gave him her work phone and her home phone numbers and told him that she needed to talk with him personally. The Grievant called back about 4:00 p.m. that day and said his leg was injured. Touhey asked him if it were possible for him to come in and perform light duty work and he told her that he did not have to do light duty since it was not an injury covered by Worker's Compensation. She told him that he needed to call her each day and talk with her personally and he told her that he did not have to do that, that he could leave a message. Touhey told the Grievant that it was insubordination if he did not speak to her.

Touhey relied on an appendix to the collective bargaining agreement, Appendix E, which states in part:

> Employees who are not excused from work in advance of the scheduled reporting time are required to promptly call the Department Head or designee thereof prior to the normal starting time on any day should he/she be late for work, or should they be absent form work for all or part of one (1) or more scheduled workdays. Employees and persons calling in on behalf of employees must provide their name, the reason for the absence or late arrival, the expected time of arrival or return to work, and the address and telephone number at which the employee can be reached. Employees shall be subject to disciplinary action for non-compliance. Nothing in this section shall be construed to prevent a department from continuing to use or implementing alternative call-in procedures.

Touhey also wanted to talk with the Grievant about operational issues. One snow blower was broken and she wanted to know where equipment usually went to be fixed, and she needed to know where a key to the recycling was.

Although Touhey told the Grievant on February 16th that he needed to speak with her personally, he did not do so on February 17th. He left a message on the machine. Touhey called him at his house and left a message on his answering machine, telling him that he needed to call in every day and talk to her personally, that this was an order, and that if he did not do this, it was insubordination and discipline would follow. The Grievant did not call in on February 18th to speak to Touhey. He again left a message at 6:42 a.m. on February 18th. Touhey informed the Personnel Department that this had happened. The Personnel Director, Charles Grapentine, went to the Grievant's house twice, but no one answered the door.

On February 21st, the Grievant called in at 12:32 a.m. and did not personally contact Touhey. She called his house and left a message. She told him that no sick leave would be approved from that day forward and that she needed certain information. First, she wanted to know when was his doctor's appointment. Second, she wanted to talk to him about specific items that had to be on any doctor's slip. Third, she told him that he needed to talk to her each day when he called in and he had not done this as ordered and that such insubordination would be dealt with when he came back to work. This was the second time that Touhey told him that he was insubordinate.

The next day, February 22nd, the Grievant called in sick at 1:38 a.m. and did not personally contact Touhey as ordered. On February 23rd, Myers gave Touhey the message that he had called in sick and said that his doctor's appointment was March 1st. Touhey called Grapentine about the matter, and a message was written so that it could be read over the phone into the Grievant's answering machine, should he not answer the phone. The Union steward,

Kay Seidel, came to the Museum and Touhey called the Grievant in the presence of the steward. The message that she read into the Grievant's answering machine was the following:

> On February 17, 2000 I ordered you to call me personally every day you were not going to appear at work.
>
> On February 21, 2000, because you did not call me personally every day, I considered you to be insubordinate. I consider that to be an oral warning. In addition, I told you that no sick leave would be approved on and after February 21, 2000.
>
> On February 22, 2000 you called the department at 1:38 a.m., another instance of insubordination. Discipline is considered to be at the Written Warning Level for this violation. Further refusal to obey my orders will result in further discipline up to and including discharge. The Written Warning will be sent and/or delivered to you.
>
> To be clear, you are ordered to call me each day personally to report any absence at the Museum #653-4140 or at my home at #697-0155.
>
> An appointment for you to be examined by a City Doctor has been set for you at 2:00 p.m. on February 24, 2000. You are to see Doctor Sergio Casaclang at Aurora Health Center Emergency Room Entrance in Rear of building located at 10400 75th Street.
>
> Failure to do so shall be considered insubordination and will result in discipline up to and including discharge.

The above message was also sent to the Grievant's home by certified mail and it was delivered personally by a police officer. The letter sent by certified mail was unclaimed, but the police officer signed an affidavit stating that she had successfully hand-delivered the letter to the Grievant at his home. The letter was shorter than the telephone message and it stated:

> An appointment for you to be examined by a City Doctor has been set for you at 2:00 p.m. on February 24, 2000. You are to see Doctor Sergio Casaclang at Aurora Health Center located at 10400 75th Street, Emergency Room Entrance in Rear of Building. Failure to do so shall be considered insubordination and will result in discipline up to and including discharge.
>
> To be clear, you are ordered to call me, personally to report any absence at the Museum #653-4140 or at my home at #697-0155. You are also ordered to report to Doctor Sergio Casaclang on February 24, 2000 at 2:00 p.m.

Touhey considered the above letter to be a disciplinary notice, a written warning. She never used the form that is called "Notice of Disciplinary Action."

On February 24th, the Grievant called the Museum and left a message that he would not be in but did not contact Touhey directly. She called his answering machine and left the following message:

> You have failed to call me personally to report your absence from work on February 24, 2000. You previously received both oral and written warnings that such behavior was insubordination and would result in discipline up to an including discharge. You are hereby suspended without pay through March 1, 2000. You are hereby ordered to call me personally on March 2, 2000 at the Museum between the hours of 8 a.m. and 9 a.m. Failure to do so shall be considered insubordination and will result in discipline up to and including discharge.
>
> This message was left on the answering machine 2/24/2000 at 8:45 a.m. after receiving a recorded message from you.

The Grievant did not attend the doctor's appointment on February 24th that was arranged at the Aurora Health Center Emergency Room with Doctor Casaclang, as Touhey found out when she called the Personnel Department at about 4:00 p.m. that day. The Grievant also did not call Touhey personally but left a message at 6:56 a.m. that he would not be in. She called his house that morning and left a message that he had already received oral and written warnings and was now suspended without pay through March 1st, and that he was being ordered to call her on March 2nd between 8:00 and 9:00 a.m.

On March 2nd, the Grievant called Touhey at 8:55 a.m. She told him that he should meet with Grapentine and herself at City Hall at 10:30 a.m. and that he should contact the Union if he wanted representation and he should bring his doctor's slip in at that time. The Grievant asked her why his paycheck was short and she replied that they would discuss it at the meeting.

The meeting was held with Grapentine, Touhey, the Grievant and the Vice-President of the Union, Chuck Stachowski. The Grievant brought in a doctor's return to work note that Grapentine and Touhey considered to be unacceptable for an excuse. She noted that it did not list the dates that the Grievant was incapacitated and did not work, that it did not clearly state the nature of his conditions, that it did not state that he had been examined by a doctor, and that it was not signed by a doctor. She found that the document did not justify the Grievant's use of sick leave. The return to work note stated that he was ready to return to work as of March 1. She stated that the Grievant and the Union steward were told of the necessary requirements for an acceptable doctor's excuse at that time.

Also during this meeting, the Grievant was asked why he had not called Touhey every time he called in sick and he said that he did not have to. He said he did not show up for the doctor's appointment arranged by the City because he did not have to and he wanted to see his own doctor. Another meeting was scheduled for March 6th.

Grapentine prepared a summary of the March 2nd meeting, which states:

> This memo is on behalf of the Museum Director Paula Touhey and summarizes our meeting of March 2, 2000. It also summarizes your status.
>
> Meeting of March 2, 2000:
> You were present at this meeting in Room 204 of the Municipal Office Building. Your union representative was AFSCME, Local 71 Vice-President Charles Stachowski. Museum Director Paula Touhey and I were also present.
>
> At this meeting you acknowledged and understood results of telephone calls and messages including orders to call Ms. Touhey personally, refusing those orders, oral, written warning and receipt of same and suspension effective February 24, 2000. You also acknowledged being informed that no sick leave would be approved on and after February 21, 2000.
>
> You stated that, in spite of a supervisory order, you did not have to call and speak to Ms. Touhey personally.
>
> You acknowledged that a doctor's appointment had been scheduled for you for 2:00 p.m., February 24, 2000 and that you had been ordered to report. You also acknowledged that you did not report for the appointment in spite of an order from your supervisor.
>
> Status:
> 1. No sick leave will be approved on and after February 21, 2000 and until further notice.
>
> 2. You are on suspension without pay effective February 24, 2000 for repeated willful failure to contact your supervisor personally in violation of work rule J1.
>
> 3. You are also in willful violation of work rules A1, A2, A3 and further disciplinary action may be taken in this regard.
>
> 4. You are also in willful violation of work rule J1 for failure to keep a doctor's appointment on February 24 and further disciplinary action may be taken in this regard.

> 5. You have been ordered to report to Room 204 of the Municipal Office Building on Monday, March 6, 2000 at 11:00 a.m.
>
> 6. The document offered to management on March 2, 2000 as a result of your alleged injury requiring the use of sick leave is unacceptable.

Stachowski was not aware that the Grievant was represented by the Union, any steward or officer, before the March 2nd meeting. He did not recall that the Grievant acknowledged receiving an oral warning and he did not agree with the oral warning but did not tell the City that. He expressed his surprise that the City claimed to have given the Grievant a written warning and asked where in the February 23rd document does it say that this is a disciplinary action, and more specifically, a written warning.

On March 6th, another meeting was held, with Grapentine, Touhey, the Grievant, Stachowski and Steve Hunt, President of the Union. The Grievant presented the same doctor's note as before and said he did not need a different one. He also stated that he had not called Touhey as requested because he did not need to do so and that he did not have to show up at the City's doctor's appointment.

The Grievant had no disciplinary actions in his file between 1987 and 1999 – a break of 12 years. Although he had worked at the Museum since 1989, there appears to be no documented record of discipline until March 19, 1999, when he was given a warning for leaving without setting up tables for meetings and classes. On April 26, 1999, the Grievant was given a five-day suspension for insubordination (failing to work on the weekend during an emergency without a justifiable excuse). On January 4, 2000, Touhey gave the Grievant a memo telling him that a bill regarding maintenance was not acceptable. On February 9, 2000, Touhey sent the Grievant a memo stating that failing to tell her about a contractor who wanted to donate service was unacceptable. Touhey testified that she took prior discipline into account in terminating the Grievant. She considered her memos regarding unacceptable matters to be warnings, although the memos do not directly state that they are disciplinary notices.

The City has a form called "Notice of Disciplinary Action" which is uses in many instances of discipline. Touhey did not use this form for any of the disciplinary notices she gave the Grievant in the year 2000 and her notices to the Grievant in January and February did not use the word "discipline."

On March 6, 2000, Grapentine and Touhey gave the Grievant a letter of termination, which states:

> On March 2, 2000 you and your representative, Mr. Charles Stachowski met with Ms. Paula Touhey and Chuck Grapentine concerning your attitude, behavior and previous disciplinary actions.

At this meeting you were also expected to provide documentation justifying your absence on sick leave from February 10, 2000 through March 1, 2000. The documentation you provided was incomplete and unacceptable to management.

You had previously been ordered to call in each day you were absent and talk personally to Ms. Touhey. You refused to obey this order on February 21, 2000 and for this insubordination you received an oral warning for violation of work rule J1. You again refused to obey this order on February 23, 2000 and for this continued insubordination you received a written warning for violation of work rule J1. On February 24, 2000 you again refused to obey this order and were placed on suspension through March 1, 2000 for violation of work rule J1. On each instance of discipline, you were told that further violations of this order could result in further discipline up to and including discharge.

On the fourth day of your absence, February 15, 2000, you were requested to seek an examination by a physician to verify your inability to work either full duty or light duty. It was requested that you go to the emergency room or the walk-in clinic. You refused. Subsequently, you were ordered to see Dr. Casaclang at 2:00 on February 24, 2000. You were told that failure to obey this order could result in discipline up to and including discharge. You did not attend this appointment. This further act of insubordination in violation of work rules J1, A1 and A2 prevented us from verifying whether or not you were able to work at full duty or light duty during the period from February 10, 2000 through March 1, 2000.

Your continued rude and very uncooperative attitude, your willful and repeated insubordination in refusing to call your supervisor personally, your further lack of cooperation in refusing to be examined by a physician on a timely basis and your willful refusal to obey an order to be examined by Dr. Casaclang, shall now result in your termination from employment from the City of Kenosha effective immediately.

The Grievant was sent another letter the next day that said:

This supplements our letter of termination of March 6, 2000.

Another factor leading to your termination was your failure to provide the City with an acceptable report from a physician at our meeting on March 6, 2000.

On March 2, 2000 you presented documentation to us in an attempt to justify your absence from work from February 10, 2000 through March 1, 2000.

> That documentation was incomplete and not acceptable. You were told, at the conclusion of our meeting on March 2, 2000 that you were required to provide to us a physician's report, signed by the doctor, that provided that following information: dates of absence, the fact that you were incapacitated during that period because of the injury and could perform no work, the nature of the condition and the fact that you were examined by the doctor. This information was to be provided to us at our meeting scheduled for 11:00 A.M. on March 6, 2000.
>
> On March 6, 2000 you provided no such physician's report. This is another example of your continuing lack of cooperation with Museum management and it contributed to the decision to terminate your employment effective March 6, 2000.

The City has an Employee Assistance Program. The City's Risk and Safety Procedural Manual states the following about referrals to the EAP:

> The appropriateness of a supervisory referral is based on the following Policy Statement:
>
> When a supervisor recommends the EAP to an employee, it is a suggestion to help the employee return to an acceptable performance level. There is no threat or penalty whether the employee elects to use the EAP or not.
>
> In the event that an eligible employee is involved in a disciplinary or work performance correction action, an offer of the EAP benefit must be made to the employee at the time of the first step in the disciplinary procedure.

Touhey did not offer the Grievant EAP assistance or refer him to the program. Stephen Stanczak, the City's Risk Manager, developed the safety procedure manual that includes the above reference to the EAP. He testified that the language requiring a supervisor to offer EAP to an employee on the first instance of discipline is not a mandatory rule in the City. Department heads were not trained when the manual was handed out. He was not aware of any departments that offer EAP suggestions to employees at the first levels of discipline.

Union President Steve Hunt has been with the City for 22 years, in different divisions such as the street division and service division. He testified that the only requirement for calling in sick is that the call has to be made before the start of the shift and it has not mattered who takes the call. When he has called in sick in the past, no one has challenged it. He is unaware of any other case where an employee was required to talk to his or her supervisor when calling in sick. He did not believe that any employee was required to call in on a daily

basis when he or she has established a doctor's appointment and informed management of the date of the appointment. The only requirement that he knew of was that upon returning to work, one must provide a doctor's slip stating he is capable of returning to work. Hunt was not aware that any other employee had been instructed to see a doctor that the City chose.

THE PARTIES' POSITIONS

The City

The City asserts that the labor agreement gives it the right to require reasonable evidence to support a claim for sick leave. The City has the right to establish reasonable work rules and one of them provides that supervisors may require substantiation for absence due to illness or injury. An absence of more than three days always requires medical substantiation of inability to work under Rule A(3). The Grievant told Touhey that he was unable to see his doctor for several weeks and when she told him to see another doctor, he refused. The City scheduled an examination for him with a doctor which he failed to attend.

The City states that sick leave is not an entitlement. The City is allowed to manage sick leave usage by requiring verification. Section 9.02 of the labor agreement provides that the department head shall require a doctor's certificate to justify an absence of more than three days. The Grievant provided no information to Touhey and the City had a sufficient basis to question the sick leave absence and to insist that he provide a doctor's certification and attend an examination set up by the City.

The City further asserts that the labor agreement gives it the right to require that an employee speak directly to a supervisor when receiving sick leave benefits. Touhey repeatedly ordered the Grievant to speak to her each day he was going to call in sick and he failed to comply with this directive. In defying her directive, he even left messages on the Museum's answering machine at 12:32 a.m. and 1:38 a.m. on February 21st and 22nd respectively. Appendix E establishes the calling in procedures for employees and the supervisors' responsibilities for monitoring sick leave use. The work rules require that an employee notify his or her supervisor, not merely leave a message to avoid any personal contact.

The Grievant was guilty of repeated and deliberate insubordination, giving the City just cause for termination. The City points out that the Grievant was forewarned of possible or probable consequences of his conduct. He refused to call Touhey directly, to provide an acceptable doctor's certification and to attend a City-ordered doctor's appointment. On five dates in February, Touhey ordered the Grievant to speak to her directly and warned him that his failure to speak to her directly would be considered insubordination and that continued defiance would result in discipline, up to and including discharge. On February 21st, Touhey issued the Grievant an oral warning for failing to contact her personally. On February 23rd, she issued him a written warning for his continued failure to contact her. On February 24th, Touhey suspended him without pay until March 1st.

The City further notes that on February 15th, Touhey told the Grievant to go to an emergency room or walk-in clinic since his doctor was on vacation. He refused to do that. On February 23rd, she ordered him to see a specific doctor and told him that the failure to do so would be considered insubordination and would result in discipline up to and including discharge. The Grievant refused to see that doctor. On March 2nd, he brought in a return to work note signed by a physician's assistant from his doctor's office, but the note did not contain any justification for his absences from February 10th through March 2nd and it was not signed by a doctor. He was then told to obtain a proper doctor's certificate and bring it in on March 6th, but he refused and stated that the return to work note was all he needed to bring in.

The City claims that the Union tried to split hairs in cross-examination of Touhey, suggesting that the words "oral warning" or "discipline" had not been used consistently by Touhey in her communications with the Grievant. The City contends that the Grievant was given sufficient notice in a progressive fashion that his insubordinate conduct was improper, and that an employee does not need to be told that refusing to obey legitimate orders can lead to discipline. The Grievant was disciplined in April of 1999, given a five-day suspension for insubordination. While the labor contract does not require the City to discipline in progressive steps, it used progressive discipline in this case. When the parties met on March 2nd, the Grievant acknowledged receiving oral and written warnings and a suspension from Touhey on February 21, 23 and 24.

The City argues that its order was reasonably related to its business and the performance expected of the Grievant. He was the sole maintenance employee and there was a need to address operational matters. The fact that he openly refused to see any doctor for several weeks while using sick leave caused the City to question the legitimacy of his sick leave. The Grievant should have followed the "work now, grieve later" principle of contract administration and not take matters into his own hands.

The Union representatives were aware of the Grievant's improper conduct, the City asserts, where the local steward, Kay Seidel, read and listened to a message left on the Grievant's answering machine on February 23rd. Moreover, the Union cannot make a claim of disparate treatment where the Grievant is the only employee who refused orders to comply with such directives.

In determining the level of discipline, the City considered the Grievant's history, which shows his long history of defiance toward supervision and unacceptable job performance. The City gave significant weight to his 1999 insubordination and suspension, which was similar wherein he was given three separate warnings to follow a direct order. Less than one year later, he showed the same insubordinate behavior. The Union objected to two warnings dated January 4 and February 9, 2000, because there were not issued on a disciplinary action form and did not contain the word "discipline." Those warnings stated that the Grievant's actions were not acceptable. Throughout the Grievant's 30 years of City employment, there were many attempts at rehabilitation through progressive discipline. The repeated verbal warnings

and written notice had no rehabilitative effect on the Grievant. The subsequent suspension should have showed him that the City meant business. The City has the right to sever his employment where he has shown himself beyond rehabilitation.

Supervisors have no obligation to refer an employee to the Employee Assistance Program, the City states. While the Union has argued that the only obligation of an employee out on sick leave is to provide medical information, the work rules also note that absences of three consecutive days without an acceptable excuse will result in loss on employment. Another rule notes that supervisors may require substantiation for absences. The rule that employees are required to bring a doctor's statement certifying their ability to return to work does not satisfy the other requirements. After the Grievant had used seven consecutive unexcused sick days, he was ordered to provide medical substantiation for his illness. Under work rule A(2), the "acceptable" excuse means an employee is required to provide justification or a reason for his or her absence. The Grievant's return to work note was not an acceptable excuse for his absence. There was no substantiation of his illness as requested by Touhey.

The Union

The Union asserts that the work rules and collective bargaining agreement require employees to notify their supervisor before the start of their shifts to report an absence and to supply the City with a doctor's release when returning to work after being absent more than three working days. The Union believes the Grievant complied with contractual requirements as well as the City's work rules and the long-established practice between the parties. The Union points out that Section 8:01 of the labor contract requires that employees notify their department head before the start of their work shifts to report absences, and the same requirement is found in work rule A(1). Work rules then indicate the need of the employee to substantiate their absence if it is for more than three days, and the entire process is culminated in work rule A(4) which says that upon returning to work, an employee may be required to furnish a doctor's statement certifying his ability to resume work. In all cases, the Grievant complied.

In Myers' opinion, the Grievant's calls to the Museum before the start of her day and the Museum Director's day adhered to the requirements imposed upon employees. She would do what the Grievant did in a similar instance. Local 71 President Hunt concurred. He testified that the agreement and the work rules require employees to notify the City of their absence before the start of their shift. He also testified the only requirement regarding doctors' excuses was for workers to supply management with a return to work release form the doctor upon their return. He further stated that once a worker informed management that he or she had a doctor's appointment set, the worker did not have to contact management in the interim on a daily basis. This is the first case that Hunt knew of when the City required an employee to report his absence after the start of his day and the first time the doctor's release to return to work was rejected by the City.

The Union states that Touhey admitted that employees are to report absences before their shifts and when the Grievant told her he was not required to talk to her daily, she did not dispute his position. The Grievant complied with the rules. To treat him any differently than others would result in disparate treatment in the workplace. The City did not have just cause to terminate the Grievant.

The level of discipline imposed is unreasonable, the Union asserts. Many of the past disciplines cited by the City must be rejected. All entries starting in 1972 and through 1987 are clearly stale and should not be considered. The Grievant's work record was clear of any discipline between January 14, 1987, and March 19, 1999. The Union does not dispute the written warning on March 19, 1999, and the suspension on April 26, 1999. However, the memos of January 4, 2000, and February 9, 2000, are not disciplinary, even though Touhey considered them to be disciplinary. The memos are not the forms the City uses when an employee is being disciplined, no formal notice was given and no Union steward was informed that the memos were disciplinary. Although Touhey considered these memos when deciding to terminate the Grievant, they must not be considered in this proceeding.

The Union also attacks the other disciplinary actions that Touhey used. For example, her February 21st message to the Grievant from her notes show that a reprimand was never issued to the Grievant nor was he informed that one was forthcoming. The entry states: "This is insubordination which will be dealt with when you are back to work." That infers there was no discussion of an oral warning and that the Grievant was not told that there was an oral warning. Touhey admitted that the February 21st message did not threaten discipline, yet she considered the same as formal discipline when the Grievant was terminated.

The February 23rd letter that the Grievant received from the City is void of any reference of discipline being imposed, yet Touhey contends that this letter constitutes a written reprimand. In fact, she elevated this letter to the level of a written warning as a progression response to her alleged oral reprimand given on February 21st. The Grievant then received a letter dated February 24th which stated that he was required to call Touhey on March 2nd, and that failure to do so would result in discipline up to and including termination. He complied and called her on March 2nd, yet he still was terminated.

At the March 2nd meeting, the Grievant supplied the City with a doctor's release as required by the contract, work rules and practice. Local 71 Vice President Stachowski questioned the City over the past disciplines and the Union told the City that the February 23rd letter was not disciplinary. During the March 6th meeting, the Grievant again tried to submit his doctor's release but the release was rejected once more.

The Union submits that the City failed to show due process and did not have just cause to terminate the Grievant.

The Union further asserts that the City failed to offer the Grievant the assistance of the Employee Assistance Program. Touhey was aware of the EAP and made no referral to the program. The City's policy states that the EAP benefit must be made to the employee at the time of the first step in the disciplinary procedure.

The Union concludes that to terminate a 30-year employee based on the City's contentions is preposterous and asks for all lost wages and benefits. If it is determined that discipline is warranted, termination is a punishment that does not meet the crime. An oral reprimand would be appropriate if the City met its burden of proof.

In Reply – the City

The City states that the Union attempts to render meaningless the requirements of work rules A(2) and A(3) as well as Section 9.02 of the labor agreement. The Grievant was discharged due to his repeated insubordination of intentionally refusing to obey direct orders repeatedly given by Touhey asking him to contact her personally, to submit an acceptable excuse for his sick leave use and to attend a City-ordered doctor's appointment. In light of his past disciplinary and work record and his most recent five-day suspension for insubordination, the City decided to terminate him. His conduct amounted to defiance of Touhey's orders.

While the Union tried to argue that Touhey's requests were inappropriate and disparate treatment, Hunt admitted that he was not aware of any other case where an employee would not see a doctor for several weeks when asked to provide a doctor's certification to substantiate his current condition. Hunt admitted that if his supervisor instructed him to call in and talk to the supervisor personally, he would do it.

The City objects to the Union's belief that employees do not have to personally contact a supervisor while using sick leave, as work rules A(1) and A(2) and Appendix E of the contract require that an employee notify the supervisor. The supervisor can amend the time to call in if he or she wants the employee to contact him or her personally. Touhey even gave the Grievant her home phone number but he refused to contact her at her home before the start of the shift and had no intention of call her personally. Contrary to the Union's contentions, the Grievant did not comply with all the requirements of the work rules and the contract. He never submitted either an acceptable excuse or medical substantiation for his absence.

Regarding the level of discipline, the City gave significant weight to the Grievant's 1999 suspension for insubordination. The history also includes warnings dated January 4 and February 9, 2000. Those warnings stated that the Grievant's actions were "not acceptable." The purpose of such warnings is to stop inappropriate behavior. While the Union claims that the February 21st statement read to the Grievant did not threaten discipline, the quote states that the Grievant's conduct is insubordination. The Union maintains that if the word "discipline" is not used and is not accompanied by a certain form, then the City should be barred from taking

action on any inappropriate employee behavior. The Grievant had been given sufficient notice in a progressive fashion that his insubordinate conduct was improper. His actions were so patently unacceptable that he should have known discipline would follow. Moreover, nothing requires the City to discipline in a schedule of progressive discipline steps.

The City also takes issue with the Union's contention that the February 23rd letter was not a written warning. The Grievant was warned by Touhey in the phone message. At the March 2nd meeting, he confirmed that he got oral and written warnings from Touhey and was suspended without pay since February 24th. Disciplinary action forms were not needed in this case, and the Grievant was well aware that he had received prior disciplines. Contrary to the Union's assertion that it met with the City the first time on March 2nd regarding the status of the Grievant, Union representation was afforded to the Grievant by a steward on February 21st.

While the Union is satisfied that the Grievant supplied the City with a doctor's certification as required by the contract, work rules and practice, the doctor's return to work note did not contain any justification for his absences from February 10th through March 1st and was not signed by a doctor. He was told to get a proper doctor's certificate but he refused to do this. His refusal to see the City-ordered doctor was one of many significant factors in the decision to terminate him.

In Reply – the Union

The Union first notes that the Grievant complied with work rule A(4) when he returned to work, supplying documentation which gave a diagnosis of elbow contusion as the reason for his absence. The same note indicated he could resume his work duties on March 2nd with no restrictions, the day following the date the slip had been signed. The City's argument conveniently omits work rule A(4). Hunt testified that the only requirement an employee must meet when returning to work, where a doctor's excuse is required, is to supply a return to work slip as was done by the Grievant. The return to work slip supplies a diagnosis as well as a return to work date, giving ample documentation as the reason for the Grievant's absence. While the City required the Grievant to see a doctor of its choosing, Hunt knew of no other instance where the City required a worker to see a doctor that the City chose.

While the City argued that the Grievant failed to talk directly to his supervisor, the labor contract, as well as the work rules and practice, require that an employee must call before the start of his work shift. Touhey started her day an hour after the Grievant. To comply with the rules, contract and practice, there was no way for the Grievant to call Touhey one hour after the start of his shift and meet his obligation. Hunt calls in before the start of his shift and talks to whoever answers the phone, not necessarily his supervisor. He knew of no bargaining unit member who was required to talk directly to their supervisors when reporting absences. Myers did not think the Grievant did anything wrong by reporting his absence

before the start of his shift. And for daily call-ins, Hunt stated that once a worker established a future doctor's appointment and notified the City of that date, he or she would not be required to report daily absences in the interim.

The Union takes issue with the City's claim that it used progressive discipline. The record contains past disciplines which are clearly stale, as well as attempts to claim that memos which are not disciplinary have some bearing. The City fails to acknowledge that an alleged oral warning lodged against the Grievant on February 21st was not received by him. Moreover, the City refers to a written warning issued to the Grievant on February 23rd. The Union has shown that letter was not a written warning and no disciplinary form was issued to the Grievant on either occasion, either February 21st or the 23rd. Although the City claims that these warnings were accepted by the Union as factual, the Union challenged the City's contention at the March 2nd meeting. Both Hunt and Stachowski expressed the same position.

The Union contends that the City did not use progressive discipline in terminating the Grievant. The girth of his work experience must be weighed against attempts to introduce inconsequential history. The memos issued to the Grievant in January and February of 2000 were not disciplines. The City did not meet its burden.

DISCUSSION

Insubordination has been defined as "deliberate defiance of . . . supervisory authority" (Bornstein and Gosline, Labor and Employment Arbitration, Mathew Bender, 1996 at Sec. 20.04), and the refusal to obey an order from proper authority and a willful disregard of the express or implied directions of the employer (NAPOLEON BOARD OF EDUCATION, 74 LA 303,306 (ROUMELL, JR., 1980).

Employees are to obey supervisory orders and do what they are told regardless of whether or not they agree with it. They may challenge orders at a later time, but it is a well-known rule that employees are to work now, grieve later. There are exceptions to the rule, such as refusing to obey on the grounds of safety, morals or illegality, but the exceptions to the rule do not arise in this case.

Insubordination is an offense for which severe discipline may be imposed. It is not unusual for insubordination to result in discharge (TENSION ENVELOPE CORP., 99 LA 1208, (BANKSTON, 1992). It is a direct affront to supervisory authority, and it undermines authority and impedes supervisors' ability to manage or oversee production.

The City has proven that the Grievant was insubordinate several times in this case. On the fourth day of his absence from work, the Grievant called to tell Touhey that he could not see his doctor for a couple of weeks. When she told him that he needed to either go to an emergency room or walk-in clinic so that he could see another doctor in a timely fashion, he told her that he did not have to. Strike one.

Note here: the collective bargaining agreement in Section 9.02 states that the Department head may require reasonable evidence to support a claim of sick leave. Touhey's request was in line with the collective bargaining agreement.

The next day – February 16th – the Grievant never called in at all before or during his shift, except he called at 4:00 p.m. after Touhey called him and left a message on his answering machine. When they talked in the afternoon, she asked him if he could do light duty and he replied that he did not have to do light duty because it was not a worker's compensation injury. She then told him that he must call in each day and talk with her personally and if he didn't, it was insubordination. He said he did not have to talk to her, that he could leave a message. Strike two.

The next day, the Grievant did not call Touhey as ordered the previous day but called the Museum's answering machine and left a message. Strike three.

It was at this point on February 17th that the disciplinary process started into action. Touhey left him a message that he was being ordered to talk to her personally and that it was considered insubordination and discipline would follow if he did not. This was considered an oral warning – the Grievant was warned about the consequences of his conduct and refusal to report to Touhey each day.

Despite that warning, the Grievant again called in the next day, a Friday, February 18th, early in the morning and left a message and did not talk to Touhey. Strike four.

On that date, Personnel Director Chuck Grapentine went to the Grievant's house twice – and no one answered the door.

The following Monday, February 21st, the Grievant called in at 12:32 a.m. – an obvious attempt to avoid talking to anyone at the Museum and a direct affront to the order to speak to Touhey personally each day. Strike five.

At this point, Touhey called the Grievant, left him a message, told him no sick leave would be approved from that day forward, that she needed to know when his doctor's appointment was, that he needed to know specific items to be on a doctor's slip, that he needed to talk with her each day when he called in. Again, Touhey warned him that he had been insubordinate for not calling her as ordered and it would be dealt with when he returned to work.

Despite being told twice that he was insubordinate and despite being told three times that he must talk to Touhey personally each day, the Grievant called in the next day – February 22nd – at 1:38 a.m. and left a message that he would not be in. Strike six.

On February 23rd, the Grievant called in early and left a message. He did not talk to Touhey as previously ordered. Strike seven. His message also stated that he had a doctor's appointment for March 1st.

It was at this point in the process that Grapentine was involved in the matter again and a Union steward was called over to the Museum to listen to Touhey read a message onto the Grievant's answering machine. The message reiterated the order to call Touhey personally every day and warned him again that he was considered to be insubordinate for not doing so. Touhey's message further warned him that he was considered to be at the written warning level for his insubordinate act of February 22nd of calling in at 1:38 a.m., and that further refusal to obey her orders would result in further discipline up to and including discharge. She repeated the order to call her each day, told him that a doctor's appointment had been arranged for the next day and that failure to see the doctor would be considered insubordination.

The message that was read to the Grievant's phone differed substantially from the written message actually delivered to the Grievant. The City sent the message by certified mail, which was unclaimed, but it was also hand delivered by a police officer who was able to give the Grievant the document. While Touhey considered the written message to be a written warning, it is insufficient to be considered as such because it never says that it is a written warning. The message stated:

> An appointment for you to be examined by a City Doctor has been set for you at 2:00 p.m. on February 24, 2000. You are to see Doctor Sergio Casaclang at Aurora Health Center located at 10400 75th Street, Emergency Room Entrance in Rear of Building. Failure to do so shall be considered insubordination and will result in discipline up to and including discharge.
>
> To be clear, you are ordered to call me, personally to report any absence at the Museum #653-4140 or at my home at #697-0155. You are also ordered to report to Doctor Sergio Casaclang on February 24, 2000 at 2:00 p.m.

The Union correctly points out that the above message does not result in a written warning where it never states so.

Disciplinary actions need to be clearly defined. An employee needs to know that he is indeed being disciplined and what the discipline is for. The employee needs to have a chance to grieve it if he so chooses or to respond with an attachment to his personnel file or even ignore it. However, it is a lack of due process to later claim that something is discipline when it is not clear that it was ever intended to be a disciplinary action at the time that the employee could have done something about it.

The written message hand delivered by the police officer to the Grievant lacked the clarity needed for a disciplinary notice. While the Union objects to the City not using the form called "Notice of Disciplinary Action" (Joint Ex. #7), the form or format does not have to be consistent for an employee to be put on notice that he is being disciplined. The form is a matter of choice – it is the substance of words that need to be weighed. The written message that was hand delivered – City Ex. #9 – will not be viewed as a written warning in this Award. The letter talked about failure to see the doctor will result in discipline, but it does not

specifically state that the Grievant is being disciplined for his insubordination for refusing Touhey's orders to call her personally each day of his absence. The phone message relayed that information, and if the written message that was delivered to the Grievant were the same as the phone message, it would have clearly been a written warning.

There were also two other items in the record prior to the February and March incidents in the year 2000 that the City considered to be written warnings, but those suffered from the same lack of clear notice that they were disciplinary notices. The January 4th and February 9th memos in the Grievant's record refer to unacceptable job performance, but do not state that they are disciplinary at all. While Touhey characterized them as uncomplimentary, they were not also disciplinary where they failed to state so. Those memos, as well as City Ex. #7, are not considered to be written warnings in this Award.

It is unnecessary to determine in this case whether the phone message read to the Grievant which stated that he was at a written warning level constituted a written warning, due to the fact that other discipline followed. The Grievant cannot complain that he was not warned of disciplinary consequences and given opportunities to comply with orders.

Going back to the events of February 23rd – and assuming that the City failed to give the Grievant a written warning due to the written message's contents, the story does not end there. There's more – again the very next day, February 24th, the Grievant was to see the doctor scheduled by the City on his behalf. He did not go. He also did not call Touhey personally on that date. Strike eight.

Responding to the Grievant's failure to call her personally on February 24th, Touhey called him and told him he was suspended until March 1st and that he was to call her on March 2nd.

By March 2nd, the Grievant had defied Touhey's orders on eight occasions. At the March 2nd meeting with Grapentine, Touhey, the Grievant and his Union representative, the Grievant continued to assert that he did not have to call Touhey every time he called in sick and that he did not have to show up for the doctor's appointment arranged by the City. He gave no other justification for his refusal to follow orders. He was told that the doctor's excuse that he submitted at that time was unacceptable, because it was not signed by a doctor and did not show that he was examined by the doctor. It also did not show that he was incapacitated and could not work during the period of time between February 10th and March 1st. He was told to get this information to the City by March 6th when they were to meet again.

On March 6th, the Grievant presented the same doctor's excuse that he gave to the City on March 2nd and he said he did not need a different one. He was told precisely what was wrong with his doctor's return to work slip but continued to refuse to acknowledge that he had to comply with the City's directives and orders. Strike nine.

Thus, the Grievant was insubordinate on nine occasions and gave the City no reason to refuse to comply with orders other than stating that he did not have to. Clearly, the Grievant was insubordinate in a defiant and flagrant manner and without any justification whatsoever. His only response to refusing Touhey's orders was to say that he did not have to call her personally or that he did not have to see the doctor that he was ordered to see or that he did not have to bring in a doctor's excuse other than the return to work slip that he presented. Not good enough.

The Grievant had been warned about his insubordination. He was given oral warnings. While a true written warning may be lacking, he was told he was being suspended. Despite warnings and progressively stronger measures being taken to get the Grievant to respond, he continued to defy Touhey and refused to comply with her orders. Therefore, when the City determined to discharge him, it had no reasonable expectation that he would comply with orders from supervisors.

While the Union has objected to the order to report to Touhey personally and notes that other employees may call in early and leave messages with anyone, there is nothing to prevent a supervisor from making such a request, and indeed, Appendix E of the labor contract allows for such an alternative procedure. The language in the Appendix calls for employees to report prior to their normal starting time and it also states: "Nothing in this section shall be construed to prevent a department form continuing to use or implementing alternative call-in procedures." Touhey did just that – she ordered the Grievant to call her personally. She did not do so immediately when the Grievant started to call in sick, but by the fifth day of absence, when the Grievant did not call at all, she told him to call her personally.

The City has right and responsibility to monitor sick leave use and abuse. It had little information from the Grievant about his condition, his expected return, his ability to perform light duty, etc. The vagueness of his condition caused some concern. Then Grapentine went to his house twice and he did not answer the door. He never answered the phone. A certified letter mailed to him by the City remained unclaimed. Certainly, the City had reason to be suspicious of his claim for sick leave and demand some detail or verification. The contract allows a Department head to require evidence to support a claim for sick leave in Section 9.02.

The City's work rules also state that supervisors may require substantiation, including doctor's reports, for any absence due to illness or injury. Rule A(3) states that absence for more than three days always requires medical substantiation of inability to work.

The Union notes that employees in the past have not been required to personally call their supervisors and that the City in the past has accepted return to work slips from other employees. There is no evidence that the Grievant received disparate treatment. There were no other cases where an employee would not see a doctor for several weeks. Moreover, the orders given were reasonable under the circumstances and the Grievant should have complied and challenged them at a later time if he thought he was being treated unfairly. Work rule A(3) calls for the medical substantiation of inability to work after an absence of more than

three days. Rule A(4) states that an employee may be required to provide a return to work certification from a doctor. Moreover, the Grievant was not treated differently than other employees in regard to the Employee Assistance Program. There is no evidence that all employees are referred to the EAP or that any of them are so referred. Thus, the Grievant was not denied any assistance given to others.

There is no evidence in the record that would tend to mitigate the Grievant's conduct or excuse him from responding to his supervisor's clear and direct orders. His refusal to obey orders does not fall within the exceptions noted above in this Award.

The Arbitrator has struggled with the level of discipline in this case, given the fact that the Grievant has worked for the City for 30 years. That is a very long time for an employee to work for an employer and is worth much consideration and some mention here. If the Grievant had a clean work record for 30 years, the discharge would clearly be excessive and he should be given another chance. However, the Grievant's record is not clean. While the Arbitrator gives little weight to stale disciplinary actions, the fact is that the Grievant had a clean record of 12 years, not 30 years. This employee had a long history of troubled employment, including a termination in 1980 with a last chance agreement to return to work. In January of 1987, the Grievant agreed to cooperate with the City, fellow employees, supervisors and the public and several grievances were dropped. He stayed out of trouble – or did not get any formal discipline – for the next 12 years. However, he had been given a five-day suspension less than a year before the February-March incidents that led to this discharge. The City tried progressive measures to no avail. It had no way to determine that the Grievant would comply with supervisory orders, where the Grievant simply refused to comply and gave no reason except to tell the City and his supervisor that he did not have to obey those orders. The Grievant had many, many chances to rectify the situation and he was aware that he was being disciplined yet did nothing about it. Under these circumstances, the penalty cannot be said to be clearly excessive. This employee does not have an exemplary record to fall back upon. Thus, despite the length of service, the City had just cause to terminate the Grievant and the grievance will be denied.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin this 12th day of January, 2001.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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