

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 67, AFSCME, AFL-CIO

and

THE CITY OF RACINE

Case 623

No. 60173

MA-11548

(Gabriel Simpson Grievance)

Appearances:

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

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

ARBITRATION AWARD

The City of Racine, hereafter “City” or “Employer”, and Local 67, AFSCME, AFL-CIO, hereafter Union, are parties to a collective bargaining agreement that provides for final and binding grievance arbitration. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide the instant grievance. Coleen A. Burns was so appointed. Hearing was held in Racine, Wisconsin, on February 18, 2002. The hearing was not transcribed. The record was closed on May 17, 2002, upon receipt of post-hearing written argument.

ISSUES

The parties were unable to stipulate to a statement of the issues. The Union formulates the issues as follows:

Did the City have just cause to terminate Gabriel Simpson on May 23, 2001?

If not, what is the appropriate remedy?

The City formulates the issues as follows:

Did the City have just cause to terminate Gabriel Simpson on May 23, 2001?

If not, what is the appropriate discipline or remedy?

The undersigned adopts the City's statement of the issues.

RELEVANT CONTRACT LANGUAGE

ARTICLE II

MANAGEMENT AND UNION RECOGNITION

...

- E. Management Rights. The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such practices are modified by this Agreement or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

...

2. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge and take other disciplinary action against employees for just cause.

...

ARTICLE III

GRIEVANCE PROCEDURE

...

- B. Subject Matter. A written grievance shall contain a clear and concise statement of the grievance and indicate the issue involved, the relief sought, the date of the incident or violation took place and the specific section of the Agreement involved.

...

- J. Decision of the Arbitrator. The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

- K. Discipline. The Union shall be furnished with a copy of any written notice or reprimand, suspension or discharge. The City agrees that it will attempt at all times to use the disciplinary process as a means to correct shortcomings on the part of City employees in terms of their overall work performance. Discipline, therefore, is intended to initiate a corrective action on the part of the employee. A written reprimand sustained in the Grievance Procedure or not contested shall be considered a valid warning. The Union agrees upon receipt of the reprimand notice to review the situation with the employee in an attempt to correct the problem. When an employee's record is cleared of minor infringements for a year, all previous records of minor infringements shall be removed from his personnel file.

- L. Discharge. Although the City continues to exercise its sole discretion in determining when it will discharge an employee (subject to the requirement of discharge for just cause), when practical, in its discretion, the City will advise both the Union and the individual employee that his job is in jeopardy. Probationary and student employees are subject to discharge without recourse to the Grievance and Arbitration Procedures of this Agreement. Receipt of reprimands or suspensions will be deemed to serve as such notice to the individual employee. Upon receipt of copies of such notices, the Union agrees that it will meet with the individual employee in an attempt to correct his inadequate job performance.

When a grievance involves discharge, it shall be reduced to writing and referred directly to a special committee consisting of the Personnel Director, the Head of the Department concerned and a member of the City Attorney's Office or the Labor Negotiator. Steps 1 through 2 would not apply in this type of case, and the decision of the special committee shall be subject to arbitration as provided in Section F of the present Grievance Procedure.

RELEVANT WORK RULES

The published "Work Rules Between Local 67, AFSCME and City of Racine" include the following:

I. FOREWARD

The following general work rules and regulations shall apply to all members of Local 67 who work for the City of Racine. It is understood that there still must be individual departmental rules in addition to the following which apply to the particular functions of each department.

It shall be the responsibility of the labor supervisors and other supervisory personnel for the application and enforcement of these rules. Violations of the work rules will result in disciplinary action ranging from oral reprimands to immediate discharge, depending upon the specific form of conduct and/or number of infractions. Some of the work rules are followed by specific forms of disciplinary action which take precedent. The reasonableness of the work rules and their corresponding disciplinary action is subject to the grievance procedure of the Local 67 contract.

These rules are established by the City so that it can attain its objectives in an orderly and efficient manner and are not intended to restrict the rights of employees, but rather to advise employees of prohibited conduct and required procedures.

...

B. Notification of Absence

1. Employees who are unable to report to work due to illness or emergency situations shall notify their labor supervisor or departmental office by calling in at least 15 minutes before the start of their shift. Employees who are completely physically

unable to call in may have a member of the immediate family do so.

2. Employees shall 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.
3. Employees who are absent due to illness must conform with the terms of the Local 67 contract before they are allowed to return to work.

RELEVANT BACKGROUND

In 1991, Gabriel Simpson began full-time employment with the City. On or about January 1, 2001, the Grievant transferred from the Streets Division of the DPW into the Equipment Maintenance Division of the DPW. In the Equipment Maintenance Division, the Grievant worked as a Tire Mechanic/Mechanics Helper in the Garage and was supervised by City Fleet Facility Manager Mike Chevalier.

On February 27, 2001, City Director of Human Resources Carl Tidwell issued the following:

Dear Mr. Simpson:

It has come to our attention that you have improperly used the signatures of two DPW supervisors on medical documentation and have also submitted to your employer, the City of Racine, false documentation for funeral leave time off and pay. These actions are violations of our work rules and constitute misconduct.

Therefore, you are being given a 30-calendar day suspension without pay for your misconduct as described in the above paragraph in conjunction with your overall disciplinary record that includes numerous disciplinary notices and suspensions for attendance problems, work performance, vehicle safety violation, and giving false information. Your suspension is effective tomorrow, Wednesday, February 28, 2001 through Thursday, March 29, 2001. Report back to work on Friday, March 30, 2001.

In the past, your supervisors have counseled you, and you have been given reprimands and suspensions. However, you have failed to improve your overall conduct. Therefore, you are being given this suspension as a "last chance" opportunity to reassess your employment status with the City of Racine.

After you return to work, you will be expected to comply with the following:

1. Good attendance and punctuality.
2. Compliance with all supervisors' instructions and/or directives.
3. Adherence to all department and City work rules.

You should understand that any sub-performance in the above areas or other work rule violations will result in your termination from City employment.

If you have any questions regarding the contents of this letter or its intent or meaning, please feel free to contact me.

The above discipline was grieved and submitted to arbitration. On June 18, 2002, the Arbitrator issued his Award on this grievance, which Award states as follows:

AWARD

1. That the City had just cause to suspend grievant Gabriel Simpson for thirty days.
2. That his grievance is therefore denied.

The Grievant was on authorized vacation on Monday, May 14, 2001 and was to return to work at his normal starting time of 7:00 a.m. on Tuesday, May 15, 2001. At approximately 12:30 a.m. on May 15, 2001, the Grievant called the City Garage and spoke with a third shift Mechanic. While aspects of this conversation are in dispute, the City does not dispute that, during this conversation, the Grievant told the third shift Mechanic that the Grievant's flight had been delayed and that the Grievant needed to take May 15, 2001 as a vacation day.

The Grievant did not report to work on May 15 and Supervisor Chevalier did not call the Grievant at home. When the Grievant reported to work at his normal starting time on May 16, 2001, he met Supervisor Chevalier and it was arranged that the Grievant would meet with Supervisor Chevalier and a Union Representative, which meeting was held on May 16, 2001.

On May 16, 2001, the City's Director of Human Resources received the following "Memo" from Supervisor Chevalier:

05/15/2001 12:30 A.M.

Department of Public Works
Equipment Maintenance Division

One of my 3rd Shift Mechanics received a call at approximately 12:30 a.m. from Mr. Gabriel Simpson stating that he needed a vacation day starting the next morning for his normal 1st shift because he was delayed at an airport. The mechanic told him that he would have to call his supervisor in the morning as the mechanic was not authorized to grant vacation days.

Mr. Simpson did not call back in the morning to speak to his supervisor and did not report for his normally scheduled shift.

5/16/01 7:15 A.M.
Department of Public Works
Equipment Maintenance Division

Meeting with Mr. Simpson and his union representative Mr. Sanchez.

Discussion as follows:

I asked Mr. Simpson why he had not bothered to call in on Tuesday morning to talk to me about his situation and request a vacation day for his emergency. He stated that he had told the third shift mechanic that he was taking a vacation day but now realized that he should have called me in the morning. He also stated that he may have possibly not heard the third shift mechanic tell him to call the supervisor in the morning.

I told Mr. Simpson that I would be contacting personnel in regards to this matter.

I have attached copies of the last violations and suspensions for your review in determining appropriate discipline. This is a repeated violation of work rule "B Notification of Absence".

Please call me at your earliest convenience to discuss this matter.

...

Attached to this "Memo" was the following City Disciplinary Notice of Suspension:

GIVE DATE, TIME, AND PLACE OF REPRIMAND:

8/16/00

MAIN STREET BRIDGE

The above action was taken against you today for the following reasons, (give a statement of the facts causing this action, including the time, and place, acts, and names of persons involved, the work rules and or articles of the contract violated):

ON FRIDAY AUGUST 4, 2000 YOU CALLED THE STREET MAINTENANCE FIELD OFFICE AT 8:07 AM TO NOTIFY SUPERVISION THAT YOU HAD OVERSLEPT. THIS IS A VIOLATION OF WORK RULE "B. NOTIFICATION OF ABSENCE, SEC. 1"

YOU HAVE RECEIVED DISCIPLINE FOR VIOLATION OF THIS WORK RULE IN THE PAST INCLUDING A 1 DAY SUSPENSION. THEREFORE I AM ISSUING YOU ANOTHER 1 DAY SUSPENSION WHICH WILL BE EFFECTIVE FOR MONDAY, AUGUST 28, 2000. PLEASE BE ADVISED THAT YOU HAVE ESTABLISHED A POOR WORK RECORD IN THIS AREA AND ANY FURTHER VIOLATIONS OF THIS NATURE WILL RESULT IN THE APPROPRIATE DISCIPLINE.

...

The bottom portion of this Disciplinary Notice of Suspension indicated that City Supervisor Joseph A. Golden had provided a copy of this reprimand to the Grievant on August 16, 2000.

On May 17, 2001, the Grievant and Union President Doug Dresen met with Human Resources Director Tidwell and Supervisor Chevalier to discuss the Grievant's failure to report to work on May 15, 2001. Prior to this meeting, the City's Human Resources Director prepared a letter that included the following:

Dear Mr. Simpson:

This letter is intended to notify you that it is the City of Racine's intention to terminate your employment status for your continued violations of the City's work rules and pursuant to your "last chance" 30-day suspension notice of February 27, 2001. You have been counseled by your supervisors in the past and given warnings and suspensions; however, you have failed to respond.

You will have until Wednesday, May 23, 2001 at 5 PM to submit to this office, in writing, any mitigating circumstances as to why the City should not carry out its intended action.

Upon receipt of any such documentation, the City will review the matter and inform you of its final decision.

Any questions concerning this matter may be directed to the undersigned.

The above letter was given to the Grievant at the meeting of May 17, 2001.

On May 21, 2001, in response to the above letter, the Grievant provided a letter to the City's Director of Human Resources that included the following:

DEAR MR. TIDWELL,

THIS LETTER IS BEING SUBMITTED PER YOUR REQUEST REGARDING REASONS WHY I SHOULD BE ALLOWED TO KEEP MY JOB WITH THE CITY OF RACINE. FOLLOWING ARE THE REASONS AS I SEE THEM:

- 1) I HAVE BEEN EMPLOYED BY THE CITY SINCE 1981.*
- 2) I HAVE BEEN A HARD WORKING LOYAL EMPLOYEE FOR THE MOST PART WHO HAS ENJOYED MY JOB.*
- 3) I AS WELL AS MY DEPENDENTS NEED HEALTH INSURANCE.*
- 4) I FEEL THAT I AM AN ASSET TO THE CITY AS FAR AS MY WORK ETHICS AND WORKING WITH THE GENERAL PUBLIC AS WELL AS MY CO-WORKERS.*
- 5) I KNOW MY JOB AND I PUT FORTH A GREAT EFFORT IN MAKING SURE MY JOB DUTIES ARE DONE IN AN EFFECTIVE TIMELY MANNER.*

I THANK YOU IN ADVANCE FOR THE TIME YOU HAVE PUT IN ADDRESSING THIS MATTER. I LOOK FORWARD TO HEARING FROM YOU. IF THERE ARE ANY QUESTIONS PLEASE DO NOT HESITATE TO CALL ME AT HOME. 634-5962.

On May 23, 2001, City Human Resources Director Carl S. Tidwell issued the following:

Dear Mr. Simpson:

This letter is to officially notify you that your employment with the City of Racine is hereby terminated effective as of the end of business today, May 23, 2001.

Upon review of and consultation on your letter dated May 21, 2001, it has been decided that there are no mitigating circumstances that would change the City's intention to terminate your employment.

I suggest you contact Julie Anastasio in the Human Resources Department to see what, if any, post-employment benefits may be available to you.

Any questions concerning this letter may be directed to me.

Due to an error in the address, the Grievant did not receive the above letter until June, 2001.

Supervisor Chevalier approved, and the Grievant received, May 15, 2001 as a paid vacation day. At hearing, Supervisor Chevalier stated that this approval was a mistake. It is not evident that, prior to hearing, the Grievant or the Union had been advised that the Grievant was mistakenly paid a vacation day for May 15, 2001.

On or about June 22, 2001, the Union filed a grievance alleging, *inter alia*, the following:

On June 14, 2001, the Union received notice that the City of Racine terminated Gabriel Simpson. This is a Violation of Article II(2) Section E Management Rights and any other Articles that may apply.

The grievance requested the following adjustment:

Reinstate Gabriel Simpson to his former job. Make said Employee whole for any and all lost wages benefits and seniority.

As set forth in Article III (L) of the parties' collective bargaining agreement, a tribunal of City supervisory/managerial employees reviews grievances involving discharges. During the sixteen-year tenure of Union President Dresen, the Union has always received this tribunal's decision prior to receiving notification of the employee's discharge. In the instant case, the decision of this tribunal was communicated to Union President Dresen by a letter dated June 28, 2001, which states as follows:

Dear Mr. Dresen:

In accordance with the collective bargaining agreement between the City of Racine and Local 67, (Article III, Section L. Discharge) the City's discharge committee has met and re-affirmed the decision to terminate Mr. Gabriel Simpson.

Please consider this letter to be our response to Grievance #20-01 and any questions regarding the matter may be directed to the undersigned.

Respectfully submitted,

. . .

This tribunal appropriately included Richard M. Jones, Commissioner of the Department of Public Works; Guadalupe S. Villarreal, Deputy City Attorney; and Carl S. Tidwell. Thereafter, the grievance was submitted to grievance arbitration.

POSITIONS OF THE PARTIES

City

In the instant case, the Grievant was scheduled to return to work from vacation at the start of the first shift, i.e., 7:00 a.m., on Tuesday, May 15, 2001. The Grievant failed to report for work as scheduled and failed to obtain permission to extend his vacation from his immediate supervisor, Mike Chevalier.

The Grievant knew the work rules required him to call the City if he was going to be late or absent from work. Supervisor Chevalier confirmed that the Grievant needed to get permission from him to extend his vacation time and that he accepted phone messages directed at him, which he confirmed when there was a call from an employee requesting the time off.

In the instant case, Supervisor Chevalier did not know the Grievant's whereabouts until Wednesday, May 16, 2001, at which time the Grievant showed up for work and claimed that he had called and left a message with a co-worker. The Grievant should have contacted Chevalier directly and not have relied upon a fellow employee to relay a message that, at best, would allow a delayed arrival, but not an extension of a previously scheduled vacation.

Supervisor Chevalier believed that the Grievant should be disciplined for his failure to obtain permission to extend his vacation and forwarded relevant information to the City's Human Resources Director, Carl Tidwell, for further consideration of the issue of discipline.

Tidwell and Supervisor Chevalier conferred on the situation; considered the Grievant's past disciplinary record, including the "last chance" letter of February 27, 2001; and met with the Grievant and a Union representative to discuss the incident. Throughout, the Grievant's position remained simply that he had called and informed a co-worker of a delayed flight and that he would not be into work the following day.

The Human Resources Director, who was inclined to terminate the Grievant, allowed the Grievant to provide any information that would impact upon the City's disciplinary decision. Prior to the arbitration hearing, the Grievant never provided the City with any documentation regarding his claim that his flight was delayed.

During the Grievant's period of employment with the City, the Grievant developed a substantial disciplinary record that has included forgery, altering medical documents, and lying in requesting paid funeral leave. The Grievant knew, or should have known, that he was on thin ice when he received the City's "last chance" letter of February 27, 2001.

Significantly, the most serious of the Grievant's past disciplinary problems involved the Grievant's prevarications. The Grievant knew he was not trusted to tell the truth. The Grievant should have produced timely, verifiable documentation of "mitigating circumstances." The City would then have had the opportunity to investigate the truthfulness of his statements and/or documentation.

On the day of hearing, the Grievant presented an itinerary and a copy of a letter alleged to have been received from American Airlines. The itinerary indicates that the Grievant was scheduled to arrive in Chicago on Monday, May 14, 2001 at 8:54 p.m.

The letter purports to be from American Airlines, but there is no return address or indication of where, within American Airlines, it originated. Nor is the signer, Helen M. Alvarez, identified with any title or department notation. The letter appears to have been received as a fax, but contains no originating fax number. Although the City was provided with an opportunity to verify this letter, the City was unable to locate a Helen M. Alvarez at any American Airlines offices checked in either Chicago or Dallas. The letter, which is unsubstantiated hearsay, lacks sufficient information for the City to investigate its veracity and the City was unable to verify this letter. The City reasserts its objection to the consideration of this letter.

To sustain the Union's position would mean that an employee could merely call a fellow employee to extend his vacation at the last minute and not suffer any consequence. Moreover, it would mean that a "last chance" letter would not carry the meaning it is given by the City.

The Grievant's disciplinary record is replete with the City's attempts to correct the Grievant's behavior. In the "last chance" letter, the Grievant was placed on notice of the consequence of future misbehaviors. The grievance should be denied as the City met its burden to show its actions were justified by the Grievant's continued inability to conform to the expectations and needs of the City.

Union

The Grievant was on scheduled vacation from Thursday, May 10, 2001 through Monday, May 14. His return flight was originally slated to return to Chicago on the 14th at 8:54 p.m. However, his return flight was delayed until almost midnight.

As the Grievant testified, he intended to return to Racine via United Limo, but due to the delay of his flight, was unable to make the last departure from O'Hare to Racine, *i.e.*, 11:30 p.m. The Grievant then contacted his sister to seek a ride to Racine and learned that she first would need to arrange for childcare prior to driving from Racine to O'Hare, a drive of approximately two hours in length.

After talking to his sister, the Grievant realized that it would be impossible for him to report to work at 7:00 a.m. At 12:30 a.m., some six and half-hours before he was to report to work, the Grievant called the City Garage and spoke with the third shift lead man. While there is some confusion as to what was said, it is clearly established that the Grievant told the lead man that he would not be in to work on the 15th and that, if Mike Chevalier had any questions, then he should call the Grievant at home.

The Grievant testified that his sister arrived in Chicago at about 2:30 a.m., and he arrived at his home at 4:15 in the morning. The Grievant received no message from Supervisor Chevalier either denying his request for a vacation day on the 15th, or requiring that he report for duty on the 15th.

Prior to going to the Garage, the Grievant worked in the Street Division of the DPW. This Division, which is a single shift operation, handles call-ins by workers differently than the Garage.

By May of 2001, Supervisor Chevalier had been the Grievant's supervisor for about three months. Supervisor Chevalier testified that he arrives at work between 5 and 7:30 a.m. and that he requires employees in the Garage to notify supervision of any absence at least 15 minutes before the start of their shifts. When questioned how a worker could talk personally to him 15 minutes before the start of the 7:00 a.m. shift, when Supervisor Chevalier may not be present, he answered the worker could call the Garage and leave a message on his voice mail. According to Supervisor Chevalier, this would satisfy Department reporting requirements.

Supervisor Chevalier confirmed that the call to the lead man was made. While this method may not comport with the work rules, voice mail messages have been established as an acceptable method of contacting a supervisor in the Garage. Significantly, one must ask, "Why would a voice mail message to the supervisor suffice when a direct call to the third shift lead man did not?"

Supervisor Chevalier testified that he was told of the Grievant's vacation request between 5 and 7:30 on the morning of the 15th, via the third shift lead man. Thus, the City cannot be allowed to accuse the Grievant of a willful violation of reporting requirements.

The record clearly establishes that the Grievant called to report his absence almost seven hours before he was to report for work. The supervisor acknowledges the lead man relayed the Grievant's request for vacation day on the 15th. The City never argued that the call was either unmade, or untimely.

Only supervision may approve a request for vacation. The Grievant's time card shows that he received eight (8) hours of vacation time for May 15. Supervisor Chevalier's initials appear on the time card, indicating his approval of the vacation. Supervisor Chevalier acknowledged under cross-examination that this vacation time would not have been paid without his approval.

By practice and policy, when a worker is discharged, the action is subject to review by a tribunal consisting of the City managerial/supervisory employees. Only after the tribunal has acted would a discharge, if found justified by the tribunal, be carried out.

The tribunal's letter to Union President Dresen is dated June 28th, well after the issuance of the Grievant's termination letter. Union President Dresen testified that, during his sixteen-year tenure as President, this is the first case that he can recall in which an employee was discharged before he was allowed due process by the tribunal.

The termination cannot be upheld. The Grievant's due process rights were violated. In light of the fact that the City admitted a voice mail message would be viewed as appropriate, the Grievant acted reasonably. The fact that Supervisor Chevalier ultimately approved the Grievant receiving eight (8) hours of vacation time for the 15th must be weighed.

The grievance must be sustained. The Grievant should be restored to his job duties with no loss of seniority; be made whole for all lost monies and benefits; and this discipline should be expunged from his work record.

DISCUSSION

The City provided the Grievant with two written documents regarding the discipline that is the subject of this grievance. The first is the Human Resources Director's letter of May 17, 2001, which is a letter notifying the Grievant of the City's intent to terminate the Grievant's employment, and the second is the Human Resources Director's letter of May 23, 2001, which confirms that the Grievant's employment has been terminated. The only identification of the conduct that gave rise to the City's decision to discipline the Grievant is set forth in the letter of May 17, 2001, which states as follows:

This letter is intended to notify you that it is the City of Racine's intention to terminate your employment status for your continued violations of the City's work rules and pursuant to your "last chance" 30-day suspension notice of February 27, 2001. You have been counseled by your supervisors in the past and given warnings and suspensions; however, you have failed to respond.

As a review of the above discloses, the conduct for which the Grievant was disciplined was his "continued violations of the City's work rules." The City, however, failed to identify either the "work rules" alleged to have been violated, or the conduct of the Grievant that, in the City's opinion, gave rise to the alleged violation of the City's "work rules."

It is evident that Human Resources Director Tidwell was concerned that the Grievant was not being truthful when the Grievant explained why he was not able to report to work on May 15, 2001. However, neither the testimony of Human Resources Director Tidwell, nor any other record evidence, demonstrates that the Grievant was disciplined for being untruthful or for failing to report to work when the Grievant, in fact, was able to report to work. Thus, notwithstanding the many arguments to the contrary, for the purposes of this proceeding it is irrelevant that the Grievant did not provide the City with timely and reasonably verifiable documentation to substantiate the Grievant's claims that his flight on May 14, 2001 was delayed until 11:55 p.m. and that the Grievant was unable to return to Racine before 4:15 a.m.

The testimony of the Grievant and Union President Dresen, who represented the Grievant at the May 17, 2001 meeting with Supervisor Chevalier and the Human Resources Director, establish that each understood that the Grievant was being disciplined for not calling in properly on May 15, 2001. Their understanding is consistent with the testimony of Supervisor Chevalier, who stated that the Grievant was disciplined because "he did not call his immediate supervisor as stated in the Work Rules."

Supervisor Chevalier's "Memo" of May 16, 2001, demonstrates that the Work Rule alleged to have been violated is Work Rule B, Notification of Absence, which states in relevant part:

B. Notification of Absence

1. Employees who are unable to report to work due to illness or emergency situations shall notify their labor supervisor or departmental office by calling in at least 15 minutes before the start of their shift. Employees who are completely physically unable to call in may have a member of the immediate family do so.

The above Work Rule does not address the use of vacation days. Moreover, mistakenly or not, Supervisor Chevalier authorized the Grievant to be paid a vacation day on May 15, 2001. Thus, notwithstanding the City's arguments to the contrary, the propriety or impropriety of the Grievant seeking to extend his vacation by using May 15, 2001 as a vacation day is not the issue before the arbitrator.

According to Supervisor Chevalier, the Grievant violated the above Work Rule because the Grievant did not make a timely call to Supervisor Chevalier at his home or office, or leave a message on Supervisor Chevalier's voice mail. It is undisputed that the Grievant did not call Supervisor Chevalier at his office or home. It is also undisputed that the Grievant did not leave a message on Supervisor Chevalier's voice mail. Thus, if Work Rule B, Notification of Absence, Section 1, requires any of these actions, then the Grievant has violated this Work Rule, as alleged by the City.

On its face, Work Rule B, Notification of Absence, Section 1, does not require an employee to call his immediate supervisor. Rather, it requires the employee to "notify" either their labor supervisor or their departmental office by calling in at least fifteen minutes before the start of the shift. (Emphasis supplied)

Although this Work Rule, expressly identifies who may call-in, i.e., either the employee or, in specified circumstances, a member of the employee's immediate family, it does not identify who may receive the call. Thus, it is not reasonable to conclude that the "notification" to the supervisor or departmental office must be made by speaking to a supervisory or managerial employee. Nor is it reasonable to conclude that the "notification" may not be made by leaving a timely message for the employee's labor supervisor or departmental office. Indeed, as discussed above, Supervisor Chevalier acknowledges that employees may leave messages on Supervisor Chevalier's voice mail.

While it would be within Supervisor Chevalier's management rights to direct employees under his supervision to make Work Rule B notifications by calling Supervisor Chevalier at his office or home, or by leaving a voice mail on Supervisor Chevalier's voice mail, the record fails to establish that Supervisor Chevalier gave such a work direction. Nor does the record otherwise establish that the Grievant knew, or should have known, that he was required to speak only with Supervisor Chevalier, or Supervisor Chevalier's voice mail.

To be sure, Supervisor Chevalier's "Memo" of May 16, 2001 indicates that the Grievant "now realized that he should have called me in the morning." It is not evident, however, that the Grievant "realized" that he had a duty to call Supervisor Chevalier prior to May 16, 2001, when he first discussed this matter with Supervisor Chevalier.

The Grievant's uncontradicted testimony establishes that, prior to May 15, 2001, the Grievant observed the third shift Mechanic receive a call-in message from a sick employee and relay this message to Supervisor Chevalier by leaving a written note for Supervisor Chevalier. Thus, the record indicates that the Grievant had a reasonable basis to believe that such messages were permitted in his Department and that the third shift Mechanic could be trusted to relay such messages. This third shift Mechanic is a lead worker, but does not have supervisory or managerial authority, and cannot approve vacation requests.

Based upon conversations that Supervisor Chevalier had with this third shift Mechanic/lead worker, Supervisor Chevalier understood that, at approximately 12:30 a.m. on the morning of May 15, 2001, the Grievant telephoned this Mechanic/lead worker at the City Garage; stated that he needed a vacation day for May 15th because he had been delayed at the airport; and that this third shift Mechanic/lead worker told the Grievant to call his supervisor because the third shift Mechanic/lead worker was not authorized to grant vacation days. The Grievant states that, at approximately 12:30 a.m. on the morning of May 15, 2001, he telephoned the City Garage; that the third shift Mechanic/lead worker answered the telephone; that the Grievant told this third shift Mechanic/lead worker that the Grievant would require a vacation day off due to his flight delay; and that the Grievant told this third shift Mechanic/lead worker that Supervisor Chevalier should call the Grievant at home if Supervisor Chevalier had any problems with the request for a vacation day.

Supervisor Chevalier's "Memo" of May 16, 2001 indicates that, when he questioned the Grievant about the Grievant's conversation with the third shift Mechanic/lead worker, that the Grievant "stated that he may have possibly not heard the third shift Mechanic/lead worker tell him to call the supervisor." Neither this statement of the Grievant, nor any other statement of the Grievant, contains an admission that the third shift Mechanic/lead worker told the Grievant to call the supervisor.

Supervisor Chevalier's testimony that the third shift Mechanic/lead worker had told the Grievant to call the supervisor because the third shift Mechanic/lead worker was not authorized to grant vacation is unsubstantiated hearsay. As such, it cannot be credited.

The portion of Supervisor Chevalier's "hearsay" testimony that the Grievant contacted the third shift lead worker at approximately 12:30 a.m. to report a "need" to take a vacation day on May 15, 2001 because of a flight delay is substantiated by the testimony of the Grievant. The Grievant's testimony that he told the third shift Mechanic/lead worker to have

Supervisor Chevalier call him if Supervisor Chevalier had problems with the Grievant's request for a vacation day is un rebutted and, thus, entitled to be credited.

In summary, the record demonstrates that, at approximately 12:30 a.m. on May 15, 2001, the Grievant called in to his Department's Garage; stated that he needed a vacation day on May 15, 2001 because of a flight delay; and requested that Supervisor Chevalier call the Grievant at home if Supervisor Chevalier had any problems with his request for a vacation day. This call was made by the Grievant; this call was made more than fifteen minutes prior to the start of the Grievant's shift on May 15, 2001; and in this call, the Grievant left a message with the only departmental office that was open at that time. The Grievant's message provided notice to the Grievant's labor supervisor, Supervisor Chevalier, that the Grievant would be unable to report to work because of an emergency situation. By this conduct, the Grievant complied with the requirements of Work Rule B, Notification of Absence, Section 1.

It may be true, as the City argues, that Supervisor Chevalier did not receive this message until the morning of May 16, 2001. However, under the facts established herein, the Grievant is not responsible for the failure of Supervisor Chevalier to receive this message in a timely manner.

In conclusion, the Grievant did not violate Work Rule B, Notification of Absence, Section 1, when the Grievant did not call Supervisor Chevalier at his home or office, or did not leave a message on Supervisor Chevalier's voice mail. Rather, as discussed more fully above, the Grievant complied with the requirements of Work Rule B, Notification of Absence, Section 1.

The City does not have just cause to discipline the Grievant for violating Work Rule B, Notification of Absence, Section 1. Inasmuch as the City does not have just cause to discipline the Grievant, the City violated Article II (E)(2) of the parties' collective bargaining agreement when the City terminated the Grievant on May 23, 2001. The appropriate remedy for the City's violation of the collective bargaining agreement is to immediately: reinstate the Grievant to the position that he occupied at the time of his termination; make the Grievant whole for all wages, benefits and seniority lost as a result of his termination; and expunge the Grievant's personnel file of any reference to this termination.

The "last chance" letter of February 27, 2001 imposed a 30-day suspension and included the following:

In the past, your supervisors have counseled you, and you have been given reprimands and suspensions. However, you have failed to improve your overall conduct. Therefore, you are being given this suspension as a "last chance" opportunity to reassess your employment status with the City of Racine.

After you return to work, you will be expected to comply with the following:

1. Good attendance and punctuality.
2. Compliance with all supervisors' instructions and/or directives.
3. Adherence to all department and City work rules.

You should understand that any sub-performance in the above areas or other work rule violations will result in your termination from City employment.

Given the contractual requirement that the City have just cause to discipline employees, the "last chance" letter has application to this grievance only if the City is able to establish that the City has just cause to discipline the Grievant in the instant case. Inasmuch as the City has not established that it has just cause to discipline the Grievant in the instant case, the "last chance" letter of February 27, 2001 is not relevant to this case. Thus, notwithstanding the City's argument to the contrary, this Award neither confirms nor denies, that the "last chance" letter "carries the meaning it is given by the City."

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

AWARD

1. The grievance is sustained.

2. The City did not have just cause to terminate the employment of Gabriel Simpson on May 23, 2001 and, thus, this termination violates Article II (E)(2) of the parties' collective bargaining agreement.

3. To appropriately remedy the City's violation of the parties' collective bargaining agreement, the City shall immediately:
 - a. Reinstatement of Gabriel Simpson to the position that he occupied at the time of his termination from City employment on May 23, 2001.
 - b. Make Gabriel Simpson whole for all wages, benefits and seniority lost as a result of his termination from City employment on May 23, 2001.

c. Expunge Gabriel Simpson's personnel file of any reference to his May 23, 2001 termination from City employment.

Dated at Madison, Wisconsin, this 8th day of August, 2002.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

