BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF WISCONSIN RAPIDS (DPW)

and

LOCAL 1075, AFSCME, AFL-CIO

Case 137
No. 61645
MA-12019

(L.R. Last Chance Grievance)

Appearances:

Ruder Ware, by **Attorney Dean R. Dietrich**, 500 Third Street, P.O. Box 8050, Wausau, WI 54402-8050, on behalf of the City.

Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 35, Plover, WI 54467-0035, on behalf of the Union.

ARBITRATION AWARD

The City of Wisconsin Rapids (City) and Local 1075, AFSCME, AFL-CIO (Union) are parties to a collective bargaining agreement covering the years 2001-03, which provide for final and binding arbitration by an arbitrator appointed by the Wisconsin Employment Relations Commission. The Commission designated Sharon A. Gallagher to hear and resolve the dispute between them regarding the enforcement of L.R.'s last chance agreement. 1/ Hearing on the matter was held on December 17, 2002, at Wisconsin Rapids, Wisconsin. No stenographic transcript of the proceedings was made. By agreement, the parties submitted their initial briefs on February 5, 2003, which the Arbitrator exchanged for them. The parties reserved the right to file reply briefs which were received by February 25, 2003, whereupon the record was closed.

1/ The Grievant's initials will be used in this Award.

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

ISSUES

The parties stipulated that the following issues should be determined herein:

Did the Employer violate the collective bargaining agreement when it discharged L.R.? If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3
MANAGEMENT RIGHTS - CONTRACTING AND SUBCONTRACTING

A. The union recognizes that the Management of the City of Wisconsin Rapids and the direction of its working forces are vested exclusively in the City, including, but not limited to, the right to hire, suspend or demote, discipline or discharge for just cause to transfer or lay off because of lack of work, or other legitimate reasons, to determine the type, kind, and quality of service to be rendered to the City, to determine the location of the physical structures of any division or department thereof, to plan and schedule service and work programs, to determine the methods, procedures, and means of providing such services, to determine what constitutes good and efficient City services, subject to the terms of this Agreement. Any unreasonable exercise of the Management rights by the City, as set out in this paragraph, may be appealed by the Union through the grievance procedure.

APPENDIX A

EMPLOYEE RULES

The City's rules for employees are mutually adopted by the City and the Union. In order to accomplish the best results in our work and to preserve, at the same time, a spirit of fairness and justice, it shall be the duty of both parties to see that such rules are enforced.

These rules, and others which may be established from time to time, are hereby published to provide and promote understanding of what is considered unacceptable conduct, and to promote consistent disciplinary action for violations of these rules.

Any of the following conduct will be considered in violation of City rules and unacceptable. Any employee who engages in such misconduct may be disciplined, including discharge from employment, either after a warning or immediately without warning, depending on the seriousness, nature, and circumstances of the violation(s). Repeated violations of the same rule, or compounded violations of more than one, shall be cause for accelerated disciplinary action. The purpose of disciplinary action is not for punishment but to discourage repetition of misbehavior by the offender.

1. Refusing to follow instructions of the supervisor or to perform assigned work, except that which would endanger himself or other employees.

2. Leaving one's job assignment, location, or department, except in the line of duty, or leaving the premises without express permission of supervision.

3. Sleeping on the job.

4. Malicious damaging, destroying, mutilating, or defacing any property on City premises, including posting, altering or removing any matter on bulletin boards without authorization.

5. Stealing City property or that of another employee, or removal of City property or records without supervisory permission.

6. Falsifying City records.

7. Reporting for work or being on City premises under influence of an intoxicating beverage or a drug which has not been prescribed by a physician; or possessing or consuming same on City premises.

8. Excessive absenteeism without satisfactory reasons.

9. Disregarding established or normal safety, fire, and health regulations, practices, and precautions.

10. Failing to report immediately to his supervisor any accident which caused an injury or damage to property regardless of the severity.

11. Smoking in unauthorized areas on City premises.

12. Fighting, physically assaulting any person, or acting with intent to do bodily injury to anyone on City premises.

13. Threatening, intimidating, coercing other employees; or directing abusive, vile, or insulting remarks to or about another employee; on City premises at any time; also, engaging in horseplay.

14. Bringing firearms, concealed weapons, or explosives onto City premises.

15. Committing immoral or indecent acts on City premises.

16. All employees are required to punch the clock upon entering or leaving City property for work purposes, and are required to be on their respective jobs at the time their pay starts and shall not quit work in advance of the time their pay stops.

17. Failure to observe parking and traffic regulations on City property.

18. Eating at work station except during rest periods and lunch periods. (where not permitted)

19. Contributing to unsanitary conditions or poor housekeeping.

20. Operating, using or possessing machines, tools or equipment to which the employee has not been assigned, or performing other than assigned work. Also, possessing another employee's tools without his consent.

21. Causing scrap of material or parts due to carelessness.

22. Participating in organized gambling operations.

23. Vending, soliciting, or collecting contributions for any purpose, unless authorized by Management.

24. Distributing written or printed matter of any description during working time. (Not required by job or without Management authorization)

25. Making false, vicious or malicious statements about any employee, the City, or its policies.

26. Misusing, destroying or damaging through carelessness, any City property or private property of any employee.

27. Deliberately restricting output.

28. Insubordination.

29. Knowingly punching another employee's time card; having one's time card punched by another; altering time card for any reason whatsoever.

30. Engaging in sabotage or espionage.

31. Causing damage to City property, private property, or personal injury while operating City vehicles or equipment.

32. Negligent operation of City vehicles or equipment causing damage to City property, private property, or personal injury.

33. Grossly negligent operation of City vehicles or equipment causing damage to City property, private property, or personal injury.

34. Excessive Tardiness.

The foregoing are not all-inclusive. There are other examples of unacceptable conduct which shall not limit Management in its prerogative to maintain discipline and to apply disciplinary action for misconduct that is not listed but which is properly and customarily the subject of disciplinary action. If it becomes necessary to establish additional rules, employees will be notified of such mutually adopted rules by posting them on the bulletin boards.

Violation of employee rules herein will result in disciplinary action as outlined in the Standard Application Frequency Guide.

EMPLOYEE RULES
STANDARD APPLICATION FREQUENCY GUIDE*

Rule #	Violation 1st	2nd	3rd	4th	Time Factor
1	3	4			1 year
2	1	2	3	4	1 year
3	3	4			1 year
4	3	4			1 year
5	4				None
6	3	4			1 year
7	3	4			1 year

8	1	2	3	4	1 year
9	2	3	4		1year
10	2	3	4		1 year
11	3	4			1year
12	4				None
13	1	2	3	4	1 year
14	3	4			1 year
15	3	4			1 year
16	1	2	3	4	1 year
17	1	2	3	4	1 year
18	1	2	3	4	1 year
19	1	2	3	4	1 year
20	1	2	3	4	1 year
21	2	3	4		1 year
22	3	4			1 year
23	1	2	3	4	1 year
24	1	2	3	4	1 year
25	1	2	3	4	1 year
26	3	4			1 year
27	1	2	3	4	1 year
28	1	2	3	4	1 year
29	3	4			1 year
30	4				None
31	1	2	3	4	1 year
32	2	3	4		1 year
33	3	4			1 year
34				1	1 year

VIOLATION CODE:
1 – Verbal warning
2 – Written warning
3 – Disciplinary suspension
4 – Discharge

* Disciplinary action may be given up to and including the violation code listed under each frequency column, dependent upon severity.

BACKGROUND

In June of 1988, the City issued a non-contractual policy regarding tardiness which has been in effect since that date. The June 7, 1988 policy reads as follows:

The below policy will become effective July 1, 1988. All employees will start July 1, 1988, with a clean record and future records will be kept on a twelve-month revolving basis.

It is the policy of the City that all employees report to work on a regular basis and also report to work on time. If for some unavoidable reason you are not able to report to work on time, you are required to notify your immediate supervisor of your tardiness prior to your normal starting time. You are also required to tell your immediate supervisor why you will be late and when you will arrive at work.

Giving notice to your immediate supervisor does not excuse you from being tardy. Being late is an actual fact and part of your work record.

Generally, employees who are tardy more than three times in a twelve-month period will be subject to the following progressive disciplinary procedure:

Fourth Tardiness	Verbal Warning
Fifth Tardiness	Written Warning
Sixth Tardiness	One-day suspension without pay
Seventh Tardiness	Three-day suspension without pay
Eighth Tardiness	Termination

When administering disciplinary policy on tardiness, the City will consider the employee's past work record, unusual circumstances which have caused the tardiness and the employee's actions to correct the problems.

At various points after the establishment of this policy, the City issued a follow-up memos regarding it. On December 18, 1989, two such memos issued, the first was from former Human Resources Director Jansky to all Street, Park and Wastewater Employees, regarding tardiness, and it read as follows:

. . .

The well established, long standing policy regarding tardiness is that you are docked 15 minutes of pay or docked to the quarter hour if you are late for work. You are not required to work during the period you are docked.

The docking of pay and Personnel Action Form is not a disciplinary notice. The disciplinary policy for tardiness is explained in my memo of June 7, 1988, which is attached to this memo. 2/

. . .

2/ The document attached and referred to was the above-quoted tardiness policy issued June 7, 1988.

On the same day, Street Superintendent Jim Borski issued his own memo regarding tardiness to all Street, Wastewater, Sign Shop and Park Department employees, as follows:

. . .

> It was brought to my attention at the December Labor/Management meeting that some questions exist among employees regarding the Late-for-Work policy. I have re-posted the policy that went into effect in July of 1988.
>
> Employees who show up late for work will lose pay by fifteen minute increments. For example: If the employee punches in at 7:08 a.m. he/she would lose 15 minutes of pay. If the employee punches in at 7:16 a.m., he/she would lose (30) minutes of pay that day. It should be understood that the employee is not required to start work until he/she starts receiving pay.

. . .

The Employee Rules section contained in the 1998-2000 labor agreement was different from that in the effective labor agreement. There, number 8 of "Employee Rules" stated "excessive absenteeism or tardiness without satisfactory reasons." And the "Standard Application Frequency Guide" indicated that the first violation for Rule 8 would be a verbal warning, the second violation would cause a written warning, the third violation would require a disciplinary suspension and the fourth violation of Rule 8 would result in the employee's discharge if four violations of Rule 8 occurred within a one-year timeframe.

During negations for the 2001-03 labor agreement, the Union proposed to change Rule 8 so that tardiness would be separated from absenteeism and placed in a separate rule. Union Representative Jay Bemke stated herein that the parties discussed and agreed that four tardinesses in a one-year period would garner a verbal warning and that thereafter, the June 7, 1998 Tardiness Policy would apply to tardinesses after the fourth. Bemke admitted, however, that there was no verbiage placed in the labor agreement to refer to the June 7, 1988 Tardiness Policy. Bemke stated that it was his understanding that the fifth tardiness would require a written warning, the sixth a one-day suspension, the seventh a three-day suspension and the eighth would require termination of the employee. Bemke stated that this has been the Employer's policy for many years and that the only time the City deviated from the policy was in the treatment of L.R.

L.R. was hired by the City into the Street Department approximately four years before his discharge on August 20, 2002. The following list is a history of L.R.'s tardiness incidents starting with the first incident which occurred August 14, 1998, during his probationary period at the City:

8-14-98	½ hr. late (verbal warning)
3-12-99	¼ hr. late
6-18-99	½ hr. late
3-24-00	¼ hr. late
9-7-00	¼ hr. late
12-7-00	½ hr. late
12-20-00	½ hr. late
1-10-01	½ hr. late (written warning) 1/11
5-14-01	¼ hr. late (written warning) 5/15
6-29-01	¼ hr. late (written warning) 7/10 issued due to time clock discrepancy and docked 15 minutes' pay
11-5-01	¼ hr. late (two-day suspension later reduced to a one-day suspension) 11/13
12-7-01	¼ hr. late (three-day suspension) 12/7
3-12-02	late (14 hr suspension) grievance filed and case settled 4/8/02
6-6-02	No call/no show
6-7-02	No call/no show
8-20-02	late (Terminated)

On August 14, 1998, L.R. punched in 21 minutes late; L.R.'s supervisors verbally warned him and confirmed that this was a "serious matter" by letter dated August 24, 1998. From March 12, 1999 through December 20, 2000, L.R. was tardy six times (as listed above). On January 10, 2001, L.R. was late again and on January 11th, Public Works Superintendent Borski sent a letter to L.R., a written warning, as follows:

. . .

> We met today to discuss your tardiness in the past year. Present for the meeting were Terry Younger, Kevin Anderson, John Koeshall, yourself, Jim Tauschek and I. Our records show you have been late for work five times since March, 2000. Both Jim Tauschek and I have had conversations with you recently when you were late, attempting to correct the problem.
>
> As I said in the meeting our policy calls for a written warning at the fifth (5th) occurrence, so this letter serves as a written warning. As we also discussed in the meeting the Employee Assistance Program is available if you need help. Please take whatever steps are necessary to correct this situation so no further disciplinary measures are not required.

. . .

On May 15, 2001, Borski sent L.R. the following written warning letter:

. . .

> We met today in my office to discuss your tardiness. Present were union steward Gary Florence, yourself, and I. Your file once again shows that you have been late five times in the past one year period. There doesn't seem to be any particular time or season you have trouble with, but you continue to have the problem of not reporting for work on time.
>
> Please take whatever steps are needed to correct this situation so no further discipline is required. Remember that our Employee Assistance Program is available to you if you need it.

. . .

Six weeks later, L.R. was tardy to work again. Due to a time clock error, L.R. was not given the one-day suspension the City had intended. Only July 10, 2001, Borski sent L.R. the following letter:

. . .

> We met twice last week in my office to discuss your being late for work on Friday, June 29, 2001. You feel you would have been on time if the clock in the construction trailer had not been set ahead of the clock in the garage. I confirmed the difference with Jim Neitzel and instructed him to re-set his crew's time clock.
>
> As we discussed, you have a responsibility to be to work on time, regardless if it is at the garage or the ditch. I recommended in May that you take whatever steps are necessary to change this situation. Obviously you do not take me seriously because you feel you can leave for work with only minutes to spare and make it on time.
>
> I have decided to give you what you should realize is a generous break since the time clock was fast. Your being late for work will result in a loss of 15 minutes pay but the standard one-day suspension will not be imposed. As we agreed in the meetings your next time will probably result in an accelerated disciplinary measure. You've been warned at least twice in writing. There will not be any more warnings. Your union representatives feel the circumstances warrant leniency in this case, but obviously based on their comments agree any more similar events should result in progressive discipline.

> As I said last Friday you seriously need to change your efforts to correct this situation before you get suspended or discharged.
>
> . . .

On November 5, 2001, L.R. was tardy. For this misconduct, L.R. received a two-day suspension. Borski sent L.R. a letter dated November 6th, as follows:

> . . .
>
> We met with you today with Gary Florence, Jay Bemke, and myself to discuss your being late Monday November 5, 2001. Once again it shows that you have been late six (6) times in the past one year period. L., this is a bad situation that you are in. The last time you were late you met with Jim Borski and talked about the situation you were in, and he discussed what would happen if you were late again.
>
> Your disciplinary action will be a two (2) day suspension without pay. The suspension days will be November 13th and 14th 2001.
>
> We also discussed the Employee Assistance Program, and you said you would contact them and make an appointment. Please make the appointment to get some professional help with your tardiness problem
>
> . . .

On November 12th Borski sent L.R. a letter reducing his two-day suspension to a one-day suspension, as follows:

> . . .
>
> I met today with union representatives Jay Bemke and Kevin Anderson to discuss your two-day suspensions for being tardy on November 5th, 2001. Also present at the meeting was James Tauschek.
>
> Your union representatives felt a two-day suspension was not appropriate based on a meeting we had in June to discuss your tardiness at that time. If you recall, I told you the one-day suspension would be waived due to discrepancies in our time clocks, but another incident of tardiness would result in a two day suspension if it occurred prior to September 7, 2001.
>
> In my absence Jim Tauschek had issued a two day suspension for your most recent incident. Since Jim wasn't at the June meeting he interpreted that

> disciplinary letter correctly based on what I had written. Your union reps and I discussed it and my intent was unclear in my last letter to you, but the two-day suspension would have been for a violation prior to September 7, 2001.
>
> Therefore I am reducing your suspension without pay to one day, to be served on November 13, 2001. . . .
>
> It is my understanding that you have been reminded of our Employee Assistance Program, again, and you will take steps to correct this situation. I certainly hope this [sic] the case because future disciplinary action is serious and it should not have to go any further.
>
> . . .

On December 7, 2001, L.R. failed to come to work as assigned at the City's Wastewater Facility. Wastewater facility Manager Tom Zager sent L.R. a letter confirming his three-day suspension which read as follows:

> . . .
>
> On December 7, 2001 you did not come in to work at your usual time so I called you at your home twice, once at 6:59 A.M. and again at 7:11 A.M. At approximately 7:14 A.M. you called the Wastewater plant and told me you could not make it into work and that you could not have called earlier because you were sick. At this time I told you you would still be considered tardy and that I would be reviewing your personnel records for disciplinary action.
>
> Later that morning I met with Jim Borski, Street Superintendent, Beth Bakunowicz, Human Resources Director and Jay Bemke, Local 1075 President to discuss your 7th (seventh) tardiness in a 12-month period. According to the agreed policy of June 7, 1988 the 7th tardiness carries a 3-day suspension without pay. L., reviewing your past records, there being no unusual circumstances for your tardiness and no action on your part to correct this problem I am issuing you a 3-day suspension starting December 10th through December 12th, 2001. You will report back to the Wastewater Facility on December 13th, 2001.
>
> I again will remind you as Jim Borski and Jim Tauschek have in the past that the City does have an Employee Assistance Program that you can take advantage of and I would hope you will, before the next step in disciplinary action according to the policy is termination.
>
> . . .

On March 12, 2002, L.R. was tardy. On March 14th, Borski sent L.R. the following letter, confirming his 14-hour suspension, as follows:

. . .

> We met on Tuesday, March 12, 2002 and twice on Wednesday, March 13, 2002 to discuss our [sic] continuing problem with tardiness, specifically Tuesday when you did not report for work at 6:00 a.m. Union representatives were present except for Wednesday morning when you came in to my office to talk. You requested no union representation at that time.
>
> You were suspended indefinitely on Tuesday at 9 A.M. Since then we have spent several hours trying to figure out what the penalty should be to change your behavior and report to work on time. As I told you yesterday in our meeting at the City Hall I seriously doubt if any length of suspension will change your behavior. You were suspended for three days in December and it appears that hasn't gotten your attention. I'm afraid this most recent suspension of six (6) hours on Tuesday and eight (8) hours on Wednesday won't either.
>
> You have been offered help through the City's Employee Assistance program at least four times in the past year. I strongly urge you to make use of the program to help you in changing your behavior. The disruption of work schedule and lost time spent in these types of meetings is unacceptable. As the contract states on page 38 repeated violations of the same rule shall be cause for accelerated disciplinary action. This letter serves [sic] written record of your third disciplinary suspension of tardiness in the past five- (5) months. Future instances may result in more serious disciplinary measures.

. . .

L.R. filed a grievance over this suspension. 3/ Ultimately, thereafter, the City and the Union entered into a settlement dated April 8, 2002, regarding L.R.'s grievance, as follows:

. . .

> After our telephone conversation on April 5, 2002, it is my understanding that the Union is willing to drop the grievance dated 3-20-02, regarding the disciplinary action administered to L.R. for excessive tardiness, if the City is willing to agree that this disciplinary action will not set precedent. The City acknowledges that the Union's decision to drop this grievance does not mean that the Union will not grieve any future situations that may involve accelerated disciplinary action.

As I mentioned to you in our telephone conversation, it is the City's position that there may be situations that warrant accelerated disciplinary action, and the contract stipulates that "repeated violations of the same rule, or compounded violations of more than one, shall be cause for accelerated disciplinary action". I believe that L. has repeatedly violated the same rule and that the City is within its right to accelerate discipline in this situation. L. has already been suspended; he does not demonstrate an understanding of how serious his situation is or may become; and it does not appear that he is taking the appropriate steps to change his behavior.

Thus, although the City is not willing to give up what I feel is not only a management right, but a right that is specifically stated in the contract, the Union's concern that the City might abuse this right is acknowledged. I believe, however, that the Union's concern is unfounded; the City's history of administering discipline demonstrates that discipline has been administered in a fair and equitable manner. There have been very few instances where the City has actually accelerated discipline. There is only one situation that I am currently aware of.

The City will agree to continue to follow the disciplinary process and time limitations set forth in the contract. However, the City will also continue to consider the merits of each individual case and may accelerate discipline for repeated violations of the same rule or compounded violations of more than one rule. The City will strive to administer discipline in a fair, consistent, and equitable manner and will continue to use discipline to discourage repetition of misconduct.

. . .

3/ This was the first grievance L.R. filed regarding the actions the City had taken against him for tardiness.

FACTS

According to record documents, on May 8, 2002, L.R. called Supervisor Borski and stated that he was not feeling well and would not be coming to work that day. From May 8 through May 13, 2002, L.R. was hospitalized at Norwood Health Care Center. On May 15, 2002, the City received a copy of L.R.'s Aftercare Plan/Discharge Orders dated May 13th, which indicated that as of May 13, 2002, L.R. had been discharged from the hospital and would begin outpatient treatment with follow-up appointments with an alcohol counselor and

psychiatrist. On May 31, 2002, the City received a Certification of Health Care Provider (FMLA) form confirming the above facts from L.R.'s psychiatrist (although no diagnosis was included on the form). At this time, the doctor also certified that L.R. had a "serious medical condition" under the FMLA.

On June 6, 2002, L.R. was expected to report to the City garage by 5:00 a.m. so that he and two other City employees could travel together to Watertown, Wisconsin to attend a conference for work. L.R. failed to report as scheduled. One of the other City employees called L.R. at his home but did not reach him. Thereafter, the two City employees waited until 5:20 a.m. and they then left for Watertown without L.R. At 5:45 a.m., Supervisor Borski saw the Grievant driving past the entrance to the Wastewater Treatment Plant. However, L.R. failed to call in and failed to report to work on June 6th.

On June 7, Borski received a call from a City employee who told him that L.R. had failed to report to work that day. Thereafter, Borski and another City employee went to L.R.'s home and when L.R. did not respond to their knocking on the door, Borski called the police. 4/ When the police arrived, they entered L.R.'s home. Borski and the City employee left. Borski later found out that L.R. had been found on the floor of his home, and that he was taken to a facility in Wausau that day.

4/ Borski stated herein that he had been told by L.R.'s mother and another City employee that L.R. had been depressed and that they were worried about his condition.

On June 12, the City placed on L.R. suspension pending an investigation into his failure to report to work on June 6 and 7, 2002. However, as of June 10, 2002, L.R. was placed on leave under the Family and Medical Leave Act, which leave continued from June 10 until June 21, 2002.

On June 28, 2002, the City received L.R.'s request for Family and Medical Leave Act leave dated June 17, 2002, in which he indicated he believed he had a serious health condition, "mental illness" and requested FMLA leave from June 10 through June 21, 2002. The City then notified L.R. verbally on June 12, and in writing on June 25, that he had been placed on FMLA leave as he requested. On June 21, 2002, L.R.'s doctor, Dr. Larsen, certified that L.R. had a serious health condition as of May 9, 2002, for State FMLA purposes. There, the doctor stated that L.R. was unable to work only until he had completed treatment but that after treatment, L.R. would be "free to work" and "likely to be able to return to work." On this form, Dr. Larsen also stated that L.R. had "difficulty with mood and thought process" but he failed to list a diagnosis. H.R. Director Bakunowicz stated that the City did not know that L.R. had been ill in May, 2002, nor did it know the extent of L.R.'s illness until after June 21st when it received the form from Dr. Larsen on June 28th.

On August 5, 2002, the City received a Medical Update from Dr. Root, L.R.'s psychiatrist, dated August 2, 2002, in which for the first time the doctor revealed his diagnosis of L.R.'s medical condition and indicated that Dr. Root would re-evaluate L.R.'s ability to return to work at their next appointment on August 8, 2002. In this document there was no reference to any medication, prescription or otherwise, for assisting L.R. to sleep soundly. On August 9, 2002, the City received another Medical Update from Dr. Root, which listed a different diagnosis of L.R.'s condition than the one dated August 2, 2002, but released L.R. to work for the City as of August 12, 2002, to perform "regular duty" with no restrictions. There was no reference in this form to any medications that L.R. was on or that medication might affect his work performance. On August 12, 2002, Dr. Larsen also released L.R. to return to work listing yet a third diagnosis of L.R.'s condition but releasing him to "regular duty" without any restrictions and specifically stating that there would be no restrictions on L.R.'s driving. 5/

5/ The City had submitted L.R.'s job description to Dr. Larsen before he filled out this form and requested information whether L.R. could operate equipment.

On August 12, 2002, L.R. met with City officials and the Union regarding his tardiness problem. At this meeting, the City presented L.R. with its performance expectations for his work from August 13th, forward. It is undisputed that the Union and L.R. fully understood the contents of the performance expectations document; that the City discussed these expectations with L.R. and his representatives; that neither the Union representatives present nor L.R. had any questions or professed any confusion regarding the terms of the performance expectation document, which read as follows:

. . .

> The City has been advised that you are reporting back to work after receiving proper clearance from your treating physician that you are able to return to regular duty with the City. You have been the subject of a series of disciplinary actions by the City for your failure to report to work on a timely basis and to be available for work as an employee in the Street and Wastewater Departments. You were recently unavailable for work on June 6 and June 7, 2002 without reporting your unavailability to your supervisor or advising the City of your unavailability to report to work.
>
> Since you have been the subject of a series of disciplinary actions for your failure to report to work on a timely basis and your failure to be available at work, the City could have terminated your employment for your conduct on June 6 and 7. Instead of taking that action, the City is issuing the following notice regarding the expectation of your performance as an employee of the Street and Wastewater Departments:

1. In recognition of the prior disciplinary action issued to you, the City expects that you shall report to work on a timely basis without being tardy. You are also expected to report to work at all times unless you are sick and unable to report to work due to illness and provide a doctor's excuse within 24 hours indicating your sickness and inability to report to work.

2. In the event you fail to report to work at the required start time for your position or fail to report to work for regular work shifts without proper medical excuses, you shall be subject to immediate termination.

3. You are also expected to comply with any outpatient counseling or other physician orders and to provide periodic (monthly) reports to the Director of Human Resources of your compliance with any treatment plan required by your treating physician or other treating professionals.

   Failure to comply with the treatment plan established by your treating physician/professionals and/or provide monthly written reports as directed shall result in appropriate discipline, up to and including termination from employment with the City.

4. This directive shall be effective upon your return to work and shall be effective for a period of one year after the date of implementation.

. . .

L.R. reported to work without any restrictions on August 13, 2002. At this time, L.R. never gave the City any documentation that he would not be able to report to work on time due to his taking any medications. L.R. stated herein that he started taking the prescription medication "Sonata" on approximately August 5th, eight days prior to his return to work. Although there were references to other medications in the May 13, 2002, Aftercare Plan/Discharge Order, ("Paxil" and "Risperdal"), "Sonata" was not listed thereon. In addition, there was no references to specific mediations on the various documents the City received from L.R.'s doctors dated June 21, August 2, 8 and 12, 2002. L.R. admitted herein that he never talked to his supervisors about any problem he had with alcohol and he never told any one at the City that he was taking a medication that would affect his ability to sleep and arrive at work on time prior to his discharge on August 20, 2002.

On August 19, 2002, L.R. took at least two Sonata sleeping pills during the night. On August 20th, L.R. woke up late, dressed and immediately left for work. He punched in at 7:02 a.m. on August 20th, two minutes late. Supervisor James Tauschek began meeting with employees in the garage lunchroom at 7:00 a.m. and assigned work to them. On that day, L.R. was assigned to put in roadway patches and he was expected to report to work at or before 7:00 a.m.

Tauschek stated that he was surprised to see L.R. arrive late. Tauschek spoke to Union Representative Bemke and stated that according to L.R.'s performance expectation, he would have to be discharged for arriving late to work. Union Representative Bemke stated that he was also surprised when L.R. arrived late at work. Both Bemke and Tauschek attempted to get L.R. to tell then why he was late and L.R. refused to give any explanation. L.R. then cleaned out his locker and left.

H.R. Director Beth Bakunowicz stated that she reviewed the performance expectation document dated August 12, 2002, as well as L.R.'s entire personnel file which contained the history of his tardiness and absence problems before she decided to terminate L.R. Bakunowicz also stated that L.R. never called in to indicate that he would be late arriving at work, that he never gave an explanation for his lateness on August 20th, that he arrived at work two minutes late on that date and never provided any medical excuse to cause the Employer to change its decision to terminate him. The Union timely filed the instant grievance which stated that L.R. "was placed on last chance agreement without just cause" and sought reinstatement and a make-whole remedy for L.R.

Union Representative Bemke stated that it was a Union proposal to change the Employee Rules section of the contract so that absences would be separated from tardiness. Bemke also stated that this was done so that the contract would be consistent with the 1988 Tardiness Policy. Bemke stated that the last sentence of the Tardiness Policy has a provision which allows acceleration of discipline. In addition, Bemke stated that the two-day suspension L.R. originally received for his tardiness on November 5, 2001, was reduced to a one-day suspension to be consistent with the Tardiness Policy (which calls for a one-day suspension followed by a three-day suspension). Finally, Bemke stated that the City has followed its 1988 Tardiness Policy with L.R., as well as other employees in a consistent pattern prior to this case.

Bemke stated that he had no idea that L.R. was taking any kind of sleep medication prior to August 20, 2002. Bemke stated that it was his belief that the City's April 8, 2002, letter confirming the settlement of L.R.'s March 20 grievance was an agreement not to set a precedent with L.R. or any other employee and that it meant that the Employer was not to consider this discipline against L.R. in the future.

H.R. Director Beth Bakunowicz stated that it was her belief that the reference to the settlement of the March 20th grievance as non-precedent setting was used to convey the idea that the Union could grieve other accelerated discipline cases but that this disciplinary action was to stand in L.R.'s record and be used for the future and that the City was not waiving its right to accelerate discipline in the future with L.R. and other employees by entering into this settlement. In addition, Public Works Superintendent Borski stated that when he spoke to L.R. regarding his being late for work on June 29, 2001, he specifically spoke to L.R. about the acceleration of discipline option that the City possessed. Bakunowicz also stated that during the processing of L.R.'s March 20th grievance, she believed that she sent L.R. a copy of the 1988 Tardiness Policy.

POSITIONS OF THE PARTIES

The City

The City argued that it had not violated the labor agreement when it discharged the Grievant for excessive tardiness. In this regard, the City noted that arbitral decisions show excessive tardiness can be cause for discharge. Where progressive discipline has failed and an employee has been given a last chance, where there has been a pattern over a long period of time of tardiness and suspensions, an employer has just cause for discharge. Thus, the City had just cause to terminate the Grievant for excessive tardiness in this case.

Here, there was a list of warning letters back to the Grievant's probationary period, a one-day suspension, a three-day suspension and a 14-hour suspension; the Grievant was clearly told repeatedly of the availability of the EAP and that more severe discipline would result if he was tardy in the future. The City noted that it is important for Street Department employees to be on time to their work location because Street Department employees often work in crews and assignments are made to the entire workforce at 7:00 a.m. each morning.

The City argued that the labor agreement and the 1988 Tardiness Policy allowed the City to accelerate the Grievant's discipline. In this regard, the City argued that the contract language is clear and unambiguous; that the Employer can accelerate discipline for repeated violations of the same work rule or compounded violations of more than one rule and that the acceleration clearly applies to all rules. The 1988 Tardiness Policy supports this conclusion as it states that "generally" progressive discipline applies, implying that where there is an unusual case of repeated wrongdoing or misconduct, acceleration can occur.

The City noted that a long-standing rule of arbitral construction states that the Arbitrator should construe the contract as a whole. Here, the contract, the 1988 Tardiness Policy, the Employee Rules as well as the past practice all demonstrate that the City can consider prior disciplinary actions beyond the past 12-month period to determine appropriate discipline, thus overriding the literal meaning of the contract's Frequency Guide. Thus, contrary to the Union's assertions, the City urged that the Frequency Guide of the labor agreement must be read together with all other provisions of the contract as well as the 1988 Tardiness Policy in order to arrive at a fair result in this case. The City noted that the 1988 Tardiness Policy specifically states that the City can consider the past work record of employees who engage in misconduct and that the Employee Rules state that repeated violations of one rule or compounded violations of more than one rule can be cause for acceleration of discipline.

Finally, the City noted that no language in the labor agreement indicates that prior disciplinary actions need be expunged or removed from employee personnel files after a one-year period. Therefore, the City argued that it was appropriate for the City to consider the repeated violations of the Grievant and his past work record to determine the appropriate

discipline in his case. The result was that the City accelerated discipline in the Grievant's case, after he was absent without calling in on June 6 and 7, after he had been released without restrictions to return to work on August 12th and after the City had given him a clear set of performance expectations.

Therefore, the City argued that its approach in this case did not violate the contract, the 1988 Tardiness Policy or past practice and that the Union's approach, relying solely on the Frequency Guide, would do violence to the labor agreement and essentially render portions of it meaningless. Therefore, the City argued that the grievance should be denied and dismissed in its entirety.

The Union

The Union contended that the contract language is clear. The parties agreed in the effective labor agreement that tardinesses should be separated from absenteeism in an attempt to make the contract consistent with the 1988 Tardiness Policy. As such, this would result in a verbal warning for a fourth tardiness in a one-year period rather than an employee receiving discharge for a fourth tardiness in one year. Although the contract and the 1988 Tardiness Policy both provide for acceleration of discipline, the Union argued that the Policy provides for the only acceleration referred to in the contract. In this regard, the Union noted that the Policy states that a verbal warning should be issued for a fourth tardiness, a written warning for a fifth, and one-day suspension for a sixth tardiness, a three-day suspension for a seventh tardiness and only upon the eighth tardiness in a 12-month period, may the employer discharge the employee. The Union argued this list of actions in the Policy is the only acceleration allowed. In addition, the Policy states that records are to be kept on a 12-month basis only. Because L.R.'s suspension for his tardiness on March 12, 2002, was reduced, and the parties agreed it would not set a precedent, a 12-month count of violations allowed under the Policy, separating out L.R.'s absences, would not have resulted in discharge of L.R. on August 20, 2002. The Union noted that because L.R. was absent on June 6 and 7, those misconducts should not be counted along with his tardiness and therefore L.R. should only receive a verbal warning for his conduct up to and including August 20. In addition, the City knew that L.R. was ill on June 6th and they should have excused him on June 7th.

The Union asserted that the City wants to get rid of the Grievant, who has a mental health condition "which he is just beginning to grasp and adjust to." On the evening of August 19, the Grievant took medication, woke up early in the morning on August 20th and took another dose, causing him to oversleep for his arrival at work on August 20th. He arrived at work only two minutes late and was fired for it. In these circumstances, L.R. should have received only a written warning at the most and even if accelerated discipline were applied to his case, he should have received only a suspension in that event.

The Union contended that the City knew of L.R.'s health condition before June 21. In this regard, the Union noted that the City must have known on May 8, 2002, that L.R. had a mental health problem due to the forms that it had received and on May 13th, when the City received the Aftercare Plan/Discharge Orders for the Grievant, the City knew that the Grievant was seeing both an alcohol counselor and a psychiatrist and that he was taking medication.

The Union argued that the 1988 Tardiness Policy specifically controls acceleration of discipline and that the Employer's actions in this case show that it wanted to change that procedure without following the contract — that to establish new rules or to change rules there must be mutual agreement. In all of the circumstances, the Union urged that the grievance should be sustained, that L.R. should be given backpay and reinstatement and that his termination should be converted to a written reprimand.

In Reply

The City

The City argued that the record does not contain any evidence to support the Union's claim that the City discharged the Grievant because he suffered from an alleged disability. Therefore, the Arbitrator should reject the Union's groundless accusations. In this regard, the City noted that medical forms submitted by the Union merely indicate that the Grievant received information from the City regarding his right to request FMLA leave. The City urged that it was not "intolerant" — that the City endured a lengthy pattern of tardiness by the Grievant and repeatedly told the Grievant each time it disciplined him that the EAP was available to him. The Grievant refused to utilize the EAP. The City was never given any information that the Grievant's alleged health problems were related to his recurring tardiness. Indeed, the Grievant gave the City no justification or reasons for any of his tardinesses throughout his career. Before the Grievant returned to work on August 13, 2002, the doctor specifically notified the City that the Grievant had been released to return to work without restrictions and that he would be able to operate equipment and drive. Furthermore, the Grievant admitted that he never told the City he was taking medications that could have or would have affected his arrival time at work. In all the circumstances, the City's discharge of the Grievant for excessive tardiness was based on his misconduct, not on any alleged medical condition.

The Union's additional claims are confusing and without merit. In this regard, the City noted that the Union claimed the 1988 Tardiness Policy itself contains an acceleration of discipline provision. The City noted that the Tardiness Policy shows progressive discipline for that offense but that acceleration of discipline is covered by the contract, Appendix A - Employee Rules. If this were not so, the Employee Rules language would be superfluous. As all language of a labor agreement must be given affect under rules of contract construction, the Arbitrator should reject the Union's interpretation.

The Union asserted that the parties agreed that the Grievant's 14-hour suspension in March, 2002, would not set a precedent regarding any subsequent discipline of the Grievant. The City urged that this was simply not true. Rather, the settlement agreement merely stated that there would be no precedent setting value for the Union's dropping of the grievance and the City's failure to pursue it's argument that acceleration was appropriate in this case or future cases. Thus, there is no language contained in the April 8, 2002 settlement letter which indicates that the 14-hour suspension of L.R. should be expunged from his file nor does it specifically state that the discipline meted out to L.R. cannot be used against in the future.

Furthermore, the City noted that there was absolutely no evidence on this record to demonstrate why the parties changed the Employee Rules to separate absences from tardiness. Thus, the Union's claim that the punishment for tardiness and absences was too severe is just that. Finally, the City argued that the CITY OF STURGEON BAY case cited by the Union is inapposite as the employee in that case had just one prior disciplinary action across a long employment history (23 years) and the labor agreement in that case had no acceleration provision for disciplinary action. 6/

6/ CITY OF STURGEON BAY, CASE 75, NO. 54409, MA-9672 (HONEYMAN, 6/97).

The Union

The Union argued that L.R. has a fine work record except for his tardiness and that there was no testimony to the contrary in this case. In regard to the June 6th no call/no show, the Union argued that L.R. simply missed his ride to Watertown for training, but that he in fact showed up to work. That regarding the June 7th absence, L.R. was ill and placed in a psychiatric hospital and that therefore he could not have been absent without leave. The Union noted that this was the second time the L.R. had been hospitalized that summer and that the City was aware of this. Indeed, the Union argued that L.R. had suffered delusions since childhood. As such, the Union urged that H.R. Director Bakunowicz should have required medical certification pursuant to Article 9, Section E, for L.R.'s absence on June 7th. Whether L.R.'s absence on June 7th is considered excessive absenteeism or tardiness, L.R. should still not have been discharged under the 1988 Tardiness Policy. The Union argued that the City was aware in May and certainly in June, 2002, that L.R.'s medical condition dated back to May 9, 2002, yet Bakunowicz did not ask for any medical certification regarding L.R.'s illness.

The Union asserted that it declined to enter into the August 12th last chance agreement with the City regarding L.R. because L.R. should not have been subject to discharge for the next offense based on the Union's count of his tardiness/absences. Thus, the Union argued that the City gave L.R. performance expectations that violated past practice, the Employee

Rules and the Tardiness Policy and that by doing so the City was arbitrary and capricious in its treatment of L.R. To expect L.R. to be perfect in regard to absences and tardinesses for a one-year period was unreasonable because L.R. was "just beginning to struggle with a newly diagnosed addiction and mental illness."

On August 20th, L.R. was two minutes late for work because he had taken a medication in order to sleep. The contract requires that the City have just cause to discipline employees. Here, L.R. had a disability and the Employer was well aware of it. L.R.'s previous tardinesses were relevant to his mental health condition. There was no need to give the City a reason for his tardiness because the Employer had medical forms revealing L.R.'s condition. The Union contended that the 1988 Tardiness Policy is the only appropriate discipline acceleration method and that Policy was incorporated into the contract so that the Employer had the right only to look at the prior 12-month period to determine discipline. The Union argued that the use of the words "12-month revolving basis" mean that the Employer must wipe the slate clean for all employees suffering from tardiness problems on a 12-month by 12-month basis. As there was no justification to depart from the 1998 Tardiness Policy in L.R.'s case, the Union urged that the grievance should be sustained, L.R.'s record should be expunged, he should be reinstated as of August 20, 2002, and made whole. The Union noted that the City could properly issue L.R. a verbal reprimand for being late on August 12, 2002, in accord with its 1988 Tardiness Policy.

DISCUSSION

It is undisputed that the City has applied the 1988 Tardiness Policy (1988 TP) consistently over the years. However, there is no evidence to show that the City has ever applied the accelerated discipline language of Appendix A — Employee Rules (paragraph 3) for excessive tardiness or for any other misconduct. It is also clear based upon this record, that during negotiations over the effective labor agreement (2001-03), the parties agreed to separate tardiness from absences in the Employee Rules and to change the contractual Frequency Guide so that the contract would be consistent with the 1988 TP. Therefore, the 1988 TP and Appendix A, as well as the Frequency Guide, must be applied to L.R.'s situation.

Applying this approach to the instant case, I note that the 1988 TP allows the City to assess tardiness on a "12 month revolving basis." this means the City must assess appropriate discipline for the most recent tardiness incident by looking back over the prior 12-month period counting back from the most recent incident. Thus, the facts therein show that from March 24, 2000, to January 10, 2001, L.R. was tardy five times. On January 10, 2001, (in accord with the 1988 TP) the City issued L.R. a written warning. On May 14, 2001, L.R. was tardy again. Looking back over the prior 12-month period, L.R. had therefore been tardy five times in the prior 12 months, justifying another written warning under the 1988 TP, the level of discipline L.R. received. On June 29, 2001, L.R. was tardy for a sixth time across the prior 12-month period and the City could have given L.R. a one-day suspension for that incident. However, the City merely docked L.R. 15 minutes pay for this instance because of a discrepancy between the garage time clock and the construction site time clock.

On November 5, 2001, L.R. was tardy for the sixth time across the prior 12-month period. Although the City originally gave L.R. a two-day suspension for this instance, the City reduced this discipline to a one-day suspension based on a conversation between City Managers and Union Representatives which took place regarding L.R.'s discipline in June, 2001. On December 7, 2001, L.R. was tardy for the seventh time across the prior 12-month period. Expressly in accord with the 1988 TP, the City stated that L.R. would be suspended for three days and L.R. served that three-day suspension.

At no time prior to December 7, 2001, did the City invoke in writing the accelerated discipline language of Appendix A. Given the language of the 1988 TP, the next disciplinary action the City should have taken against L.R. was a written warning for his fifth tardiness across the prior 12-month period. However, when L.R. was tardy on March 12, 2002, the City suspended L.R. for 14 hours and it specifically cited the accelerated disciplinary action language of the labor agreement. The City's letter stated that this was L.R.'s third disciplinary suspension for tardiness in the past five months and that "future instances may result in more serious disciplinary measures." The language of this letter, as well as the disciplinary action taken against L.R. (in excess of the written warning called for by the 1988 TP) demonstrate that the City intended to accelerate discipline against L.R. for this tardiness instance in March of 2002.

This letter and disciplinary action drew the first grievance from the Union regarding L.R.'s tardiness problem. The parties later settled this grievance, which settlement was memorialized in Ms. Bakunowicz' April 8th letter. The parties strongly disagree as to what Ms. Bakunowicz meant by the language she used in her letter of April 8th. However, several facts are clear. First, the Union had objected to the acceleration of discipline against L.R. by the imposition of a 14-hour suspension when the 1988 TP would have called for a written warning only. Second, it appears that L.R. served the 14-hour suspension for this tardiness incident despite the April 8th settlement and no reference was make in Bakunowicz' letter to expunging L.R.'s record of this discipline. Third, most of Bakunowicz' letter addressed the issue of acceleration of discipline in general.

Specifically, the letter states that the Union's decision to drop L.R.'s grievance would not mean that the Union was thereby waiving its right to file future grievances regarding acceleration of discipline and it also would not mean that the City was thereby waiving its right to accelerate discipline in future cases where in an employee has repeatedly violated one employee rule or engaged in compounded violations of more than one rule. However, Bakunowicz also specifically stated:

> . . . I believe that L. has repeatedly violated the same rule and that the City is within its right to accelerate discipline in this situation. L. has already been suspended; he does not demonstrate an understanding of how serious his situation is or may become; and it does not appear that he is taking the appropriate steps to change his behavior. . . .

It is in this context that L.R.'s tardiness/absence problems in May, June and August of 2002 must be analyzed. Initially, I note that L.R.'s absences in May were excused. Indeed, on May 8, 2002, L.R. called his supervisor, indicated that he was not feeling well and could not come to work that day. From May 8 through May 13, 2002, L.R. was hospitalized at Norwood Health Care Center. The City did not discipline L.R. for his absences in May, 2002, and it never considered these instances as a part of L.R.'s absence/tardiness record.

On June 6, 2002, L.R. was expected to report to work at 5:00 a.m. so that he and two other City employees could travel together to a conference in Watertown, Wisconsin. L.R. failed to report as scheduled and at approximately 5:45 a.m. his supervisor saw L.R. driving past the entrance to the City's wastewater treatment plant. L.R. failed to call in on June 6 and he never reported to work that day. Thus, L.R.'s June 6th no call/no show was unexcused. On June 7th, L.R. failed to call in to work and never reported to work. On that day, he was taken to a hospital in Wausau for treatment. As of June 10, 2002, the City placed L.R. on leave pursuant to the Family and Medical Leave Act, which leave continued through June 21, 2002. During this time, the City also placed L.R. on suspension pending an investigation into his failure to report to work on June 6 and 7, 2002. Ultimately, L.R. was off work until he was released by his doctors to return to work on August 13, 2002, without any restrictions.

The next question that must determined in this case is what effect, if any, does the settlement of L.R.'s March 20, 2002, grievance have on his discharge. The evidence regarding the meaning of the April 8, 2002, settlement agreement is directly contradictory. The City argued that by the April 8th settlement, it had retained the right to use the 14-hour suspension in the future against L.R.; that it had not waived its right to accelerate discipline in the future with L.R. and other employees by entering into the settlement; and that the Union had not waived its right to grieve other accelerated discipline cases. The Union argued that it dropped its grievance allowing the discipline to stand against L.R. in exchange for the City's agreement that the settlement not set a precedent for any future cases and the City's assurance that it would not use the 14-hour suspension against L.R. in the future.

Bakunowicz' letter, quoted above, is certainly ambiguous. It failed to state on what basis no precedent would be set by the settlement of the March 20, 2002 grievance — whether no precedent would be set for all future cases or only for future cases involving L.R. Yet, L.R. had his pay docked 14 hours and he did not receive any back pay based upon the parties' settlement of his grievance. In this context, I can understand why the Union would be led to believe that the settlement of the March 20th grievance was not to set a precedent against L.R. in the future, that the discipline would not be used against L.R. in any future case. Otherwise, the Union and L.R. would have received nothing tangible in exchange for dropping the March 20th grievance. In addition, the phrase Bakunowicz used in her April 8th letter that "this disciplinary action not set a precedent" is so general and broad that the language supports the Union's view on this point. As Bakunowicz (an agent of the City) drafted the letter, under ordinary principles of arbitral construction, the language of the letter should be construed against the drafter (the City). Thus, I find that the settlement of the March 20th grievance should, in fairness, be construed to mean that the City could not use L.R.'s tardiness on March 12, 2002, against him in future cases.

However, having reached the above conclusion does not require a further conclusion that the City could not accelerate discipline against L.R. following its settlement of the March 20th grievance. As I described in detail above, L.R. had an extensive list of tardinesses starting back as far as his probationary period in August of 1998. Indeed, in every year since his employment, L.R. had instances of tardiness ranging from one instance up to five instances in the calendar year 2001. I note in addition that because of his extensive tardinesses, L.R. received three written warnings as well as two suspensions in the year 2001.

The question that one must ask is how much more misconduct did the City have to bear before it could invoke the accelerated disciplinary action language of Appendix A of the labor agreement. Even setting aside the discipline for L.R.'s tardiness on March 12, 2002, and not considering it in any way, the question arises whether the City in the circumstances of this case was privileged to invoke accelerated discipline for L.R.'s no call/no show on June 6, 2002. I believe that it was. In this regard, I note that no evidence was submitted to show that L.R. was ill on June 6th. Rather, L.R. was seen in the vicinity of the wastewater treatment plant by his supervisor at 5:45 a.m., he failed to call into work and he failed to report to work that day. The fact that on June 7th, L.R. was hospitalized means that his absence on June 7th could not be counted against him as he had the ultimate excuse, that being hospitalization.

However, rather than discharge L.R. for his failure to call in and/or report to work on June 6th, the City decided to issue performance expectations to L.R. when he reported again to work after his illness and treatment in August, 2002. These performance expectations were specifically based upon L.R.'s record of prior disciplinary actions and provided for accelerated disciplinary action for any tardiness or absence in the future which was unexcused. Thus, the performance expectations given to L.R. on August 12, 2002, constituted a specific notification that L.R. would be subject to accelerated discipline as described in the August 12th document.

The question then arises whether, in the circumstances, the City was privileged to accelerate discipline in this fashion given L.R.'s tardiness/absenteeism record. I note that the clear language of Appendix A — Employee Rules states that repeated violations of the same rule or compounded violations of more than one, shall be cause for accelerated disciplinary action. The language of this portion of the Employee Rules does not define how many violations will be considered "repeated" or how many violations of more than one rule will be considered "compounded," leaving to the City, the decision when an employee's record should trigger accelerated disciplinary action.

The Union has argued that the only allowable accelerated disciplinary action is described in the 1988 TP and that that Policy should be followed, requiring a conclusion that L.R. was unjustly discharged. I disagree with the Union's analysis on this point. It is a well-established arbitral principle that the language of the labor agreement (for example, Appendix A — Employee Rules) shall take precedence over the language of a non-contractual policy, such as the 1988 TP. Furthermore, the 1988 TP does not specifically provide for accelerated discipline in any of its terms. Rather, the Policy merely describes the type of items the City

should consider in determining discipline for tardiness, such as the employee's past work record, unusual circumstances which have caused tardiness and the employee's actions to correct his/her problems regarding tardiness. 7/

7/ The record evidence is clear that the City considered all of these factors when it decided to terminate L.R.

Thus, even if the discipline regarding L.R.'s March 12, 2002 tardiness is entirely discounted, the language of Appendix A allows the City to accelerate discipline regarding the grievance.

The Union has made several arguments which are either unsupported by record evidence or are irrelevant to this case. In this regard, I note that in its reply brief, the Union asserted that L.R. had actually reported to work on June 6, when in fact the record evidence shows that he did not report to work on that day and he did call in to notify the City of his absence. Also, the Union stated in its reply brief that L.R. had suffered from delusions since childhood. There was no record evidence submitted to support this assertion and no evidence that the City had ever been aware of L.R.'s alleged childhood health problems. The Union also argued on reply that the City should have required L.R. to get a medical certification of his illness on June 7th pursuant to Article 9, Section E. Article 9 of the labor agreement addresses sick leave and specifically states in Section E, that that section applies to cases where the City has reason to believe that an employee is abusing sick leave. There was no evidence offered in this case to demonstrate that L.R. had ever abused sick leave or that the City had suspected him of doing so. Therefore, Article 9, Section E, is not applicable to this case.

The Union also argued herein that the fact that L.R. was late by two minutes on August 20, 2002, because he had taken a prescribed sleeping medication on the evening of August 19th, requires a conclusion that L.R.'s tardiness was not within his control and that in any event his tardiness was *de minimis* and should not have triggered his discharge. On this point, I note that neither Appendix A of the contract, the 1988 TP nor the August 12th last chance agreement recognize a difference between a few minutes of tardiness and a more lengthy tardiness. Thus, any tardiness can trigger discipline apparently even if only of one of two minutes under the language of the Appendix A and the 1988 TP. In addition, the specific language of L.R.'s August 12, 2002, last chance agreement makes any tardiness that is unexcused cause for immediate discharge.

The Union also asserted in its reply brief that there was no need for L.R. to give the City a reason for his tardiness on August 20th (or otherwise) because the City had medical forms which revealed L.R.'s health condition. This assertion is contrary to the specific language contained in Article 9, Section D, which requires that employees who are sick give the employer notice at a reasonable time prior to the start of the workday and that when giving notice, they need to give the employer a reason for the absence and the anticipated duration of their absence.

Also in its reply brief, the Union argued that the use of the phrase "12-month revolving basis" contained in the 1988 TP implicitly requires the City wipe all employees tardiness records clean on a 12-month by 12-month basis. I disagree. The specific language of the labor agreement in Appendix A indicates that repeated violations of the same rule or compounded violations of more than one rule shall be cause for accelerated discipline. The fact that the 1988 TP also states at its last sentence that the employer can consider the employees past work record, unusual circumstances causing the tardiness, as well as the employees actions taken to correct the problem, also bolster the conclusion that the City can look at the employee's past work record beyond the prior 12 months when it has decided to accelerate discipline. The use of the "12-month revolving basis" language specifically applies to instances where the City has decided to apply the terms of the TP and has not decided to accelerate discipline.

The Union also argued that the City was aware of L.R.'s medical problems before June 28th, probably by its receipt of the Aftercare Plan/Discharge orders for the Grievant in mid-May, 2002. However, the documentary evidence demonstrates that the City was unaware of the specific problems that L.R. had until it received a form from L.R. at the end of June, which indicated that L.R. believed he was suffering from a serious health condition "mental illness" and requested FMLA leave from June 10 through June 21, 2002. Although the City did receive a form from Dr. Larsen on June 28, which indicated that L.R. had difficulty with mood and thought processes, Dr. Larsen failed to put a diagnosis on that form. In addition, in early August, the City actually received contradictory diagnoses from various doctors regarding L.R.'s medical condition. Thus, I do not believe that the City fully knew the nature and extent of L.R.'s health condition prior to June 28 and even after June 28, the City had conflicting information regarding the nature of L.R.'s problem. 8/ Also, as the City followed the provisions of the labor agreement in Appendix A by accelerating discipline, there was no need for the parties to consider establishing new rules or changing old rules contained in Appendix A, contrary to the Union's assertions.

8/ The Union argued that the City wanted to "get rid of" L.R. because of his mental health condition. There was no record evidence to support this argument.

The City has argued in this case that it had reached its limit of toleration of L.R.'s lengthy pattern of tardiness, his failure to call in, his failure to provide any reasons for his absences or any explanation to the City why he continued to arrive late to work. In this regard, I note that although L.R. was repeatedly offered the services of the Employee Assistance Program, the record failed to show that he ever contacted the EAP or took advantage of any its programs. In addition, there was no evidence on this record that L.R. took any action to correct his problems prior his becoming ill in May, 2002.

Furthermore, L.R.'s failure and refusal to offer the City any explanation for his tardinesses when they occurred or thereafter, gave the City no alternative but to impose discipline. In this regard, I note that on August 20th, when asked by his supervisor and union representative why he was tardy, L.R. failed to mention that he had taken a prescription medication as a justification for being late that day. The August 12th last chance agreement indicated that if L.R. was sick and unable to report to work, he could provide a doctor's excuse within 24 hours indicating illness and an inability to report to work. L.R. failed to offer such a doctor's excuse for his tardiness on August 20, 2002. In all of the circumstances, I believe the City was justified in accelerating discipline regarding L.R.'s tardiness and absences pursuant to the language of Appendix A – Employee Rules of the contract and I issue the following

AWARD

The Employer did not violate the collective bargaining agreement when it discharged L.R. The grievance is therefore denied and dismissed in its entirety.

Dated in Oshkosh, Wisconsin, this 2nd day of May, 2003.

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

SAG/anl