

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 67, AFSCME, AFL-CIO

and

CITY OF RACINE

Case 655

No. 61805

MA-12070

(Art Felix Grievance)

Appearances:

John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 67, AFSCME, AFL-CIO.

Guadalupe Villarreal, Deputy City Attorney, on behalf of the City of Racine.

ARBITRATION AWARD

Local 67, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Racine, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on May 7, 2003, in Racine, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by August 11, 2003. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following 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 this grievance is properly before the Arbitrator, but were unable to agree to a statement of the issues and agreed the Arbitrator will frame the issues to be decided.

The Union states the issues as being:

Did the Employer violate the collective bargaining agreement, its work rules, and the past practice between the parties, when it issued the Grievant an oral reprimand on August 19 of 2002, and/or furthermore, when it failed to pay the Grievant sick pay on August 2 of 2002? If so, what is the appropriate remedy?

The City states the issues as follows:

Did the Employer violate Article II, Section E of the collective bargaining agreement when it issued an oral reprimand to the Grievant on August 19, 2002? If so, what is the appropriate remedy?

The Arbitrator concludes that the issues to be decided may be stated as follows:

Did the Employer violate the parties' collective bargaining agreement and/or past practice when it issued the Grievant an oral reprimand and denied him sick leave for his absence on August 2, 2002? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' agreement are cited: 1/

1/ Although not cited, the parties' agreement contains a paid sick leave provision at Article IX, C.

ARTICLE II MANAGEMENT AND UNION RECOGNITION

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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 past 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

...

- 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.

...

In addition to the contract provisions cited, also cited and of relevance is the following work rule:

2. 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 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.

...

BACKGROUND

The Grievant, Art Felix, has been employed by the City since 1988, and in August of 2002 held the position of Equipment Operator in the City's Parks Department. Felix's scheduled work shift in August of 2002 was 7:00 a.m. - 3:00 p.m. Parks Department employees punch in at the Park Service building at the start of their shift. Felix's immediate supervisor is James Kendall, Superintendent of Parks.

Felix was scheduled to start a two-week vacation on Monday, August 5, 2002. On Friday, August 2, 2002, after giving out work orders for the day at 7:05 a.m., Kendall noticed that Felix was not present. What happened after that is in dispute.

According to Kendall, the following occurred on that day. He waited until approximately 7:15 a.m. and then had his secretary call Felix's home. The secretary told Kendall that a female had answered the telephone and said that Felix had gone to work. At 7:20 a.m. Kendall received a phone call from Felix who told him that his alarm clock had not gone off and that he had overslept. Kendall replied, "Fine. Your vacation starts at 3:00 o'clock this afternoon. Today is a work day and I expect you to come to work." Felix then told Kendall he could not be there until 9:00 o'clock, to which Kendall responded, "Alright, be here at 9:00 o'clock." At 9:21 a.m., Kendall's secretary received a call from Felix's wife. The secretary gave Kendall a note which stated,

"08-02-02 9:21 A.M.
Diana Felix called,
Art Felix will not be in."

Kendall did not recall talking to his secretary about the matter after receiving her note. Kendall coded Felix's time card as personal time (unpaid) for August 2nd. Kendall then did not

see Felix until Monday, August 19th, when Felix returned from his two-week vacation. Kendall issued Felix an oral reprimand on August 19th for failing to call in 15 minutes prior to the start of his shift on August 2nd when he was absent on that day.

Kendall testified that since he has been in the Department there have been no instances where an employee called in sick after his start time, but agreed on cross-examination that if an employee called in sick after the start of his shift, he would be paid sick pay from the time he called in to the end of his shift. He also testified that he understood the practice in other departments to be that if an employee oversleeps and calls in, he has to punch in by 8:00 a.m., or he is not allowed to work that day.

The Union presented four witnesses: Art Felix, Diana Felix (spouse), Tony Perales and Trino Romero. Art Felix testified that his daughter awakened him the morning of August 2nd and told him that work had called and that she told whoever it was that he had gone to work, as she did not know he was home. Felix stated he immediately called work and that he was still in a daze from taking Nyquil the night before. Kendall's secretary answered the phone and Felix asked to speak to Kendall. Felix testified he then told Kendall he was not feeling well and that Kendall started arguing with him as soon as he said that. Kendall said, "What do you mean, you are not feeling well? Your vacation don't start till Monday. You better get your butt in here." Felix told Kendall that if he was feeling better by 9:00 o'clock, he would come in to work. According to Felix, he and Kendall argued back and forth about whether Felix was in fact sick. Felix then went back to sleep and awoke around 9:00 o'clock and asked his wife to call work for him, because of his having argued with Kendall. His wife then called work for him. The next time Felix talked to Kendall was when he returned to work on August 19th and was called to Kendall's office sometime after 7:00 a.m. When the meeting started, Trino Romero was there from the Union, as the Parks Department steward was on vacation. Felix asked to have a Union steward present and the first meeting that day ended. There was a second meeting with Kendall that day, with Romero and Tony Perales present with Felix. At that meeting, Kendall said Felix had missed work that Friday (August 2nd) and Felix said that he had called in sick. Kendall then said that Felix had not said he was sick, but that the alarm clock had woke him up. Felix also testified that he (Kendall) has told him and others that he has trouble hearing on the phone.

Diana Felix testified that she was home the morning of August 2nd and that after their daughter told Felix that work had called, he called work and spoke with Kendall. According to Mrs. Felix, Felix told Kendall he was not feeling well and would not be in, and that he repeated it, as it seemed Kendall questioned him, and that Felix then said he would come in at 9:00 o'clock if he felt better. Mrs. Felix testified that around 9:00 o'clock, Felix asked her to call work and tell Kendall that he was not feeling better and would not be in. She then called work and spoke to one of the supervisors in the Parks Department and told that person Felix would not be in. She testified she did not explain why Felix would not be in, as she knew they

were expecting him to call if he felt better, so she guessed they would know why he was not coming in. Mrs. Felix testified that at some point during the vacation (they stayed at home) Felix picked up his paycheck for that week and noticed he was not paid for August 2nd, and that no one ever asked her to make any statement to Kendall or management that she had called and said Felix was sick the day of August 2nd.

Tony Perales testified that he is the Chief Steward for the Union and that he attended the meeting with Kendall and Felix and Romero on August 19th. He stated that when he arrived at Kendall's office, Kendall told him that the reason Kendall called him there was because he was going to meet with Felix and Romero, and the acting steward was gone and Felix wanted the Chief Steward there, as he did not feel Romero was qualified. Kendall then called Romero to the office. Felix had not arrived yet when Romero arrived at Kendall's office. Kendall told Perales the reason they were meeting was because Felix was supposed to have called in sick, but that he did not call in sick, and that he (Kendall) felt Felix was only trying to call in sick because he was going on vacation on Monday. Kendall told Perales that he had called Felix at home and that Felix said he was going to come in at 9:00 o'clock if he felt better. Then Kendall said Felix had not come in and had not called at 9:00 o'clock and that his wife called after 9:00 o'clock and said he was not coming in. On cross-examination, Perales testified that Kendall did not bring up Felix not being paid for August 2nd, that all he said was that he did not believe Felix was sick. At the time Perales was not aware that Felix had not been paid for the day.

Perales also testified that the practice has been that if an employee calls in sick after 15 minutes prior to the start of his shift, he will be disciplined and will only receive sick pay from the time he called in for that day. Perales agreed that if an employee called in, but did not say he was sick, he would not be paid for the day.

Romero testified that he is the Union's Sergeant-at-Arms and that on August 19th he was called to Kendall's office at approximately 7:15 a.m. When he arrived, Felix was in Kendall's office. Kendall said it was about Felix's absence on a Friday and that he wanted Romero there because he wanted to clarify a situation of Felix not reporting to work. Felix said that he had called in and said he was not feeling well and that he would show up at 9:00 o'clock if he could. Kendall said he did not recall any of that happening, that when they spoke Felix did not say he would call back. The meeting ended because Felix wanted a steward present. Romero agreed that Kendall denied having heard from anyone that Felix had reported in sick. Romero also testified that Kendall has told him he has trouble hearing on cell phones.

Felix was not paid for August 2, 2002, and, on August 19, 2002, was issued an oral reprimand for not calling in 15 minutes prior to the start of his shift on that date. Felix filed a grievance regarding the oral reprimand, which grievance requested the following:

Adjustment required: Remove oral reprimand from any and all personnel files and make Art Felix whole for all lost wages and benefits. (8 hrs.)

The grievance was processed through the parties' contractual grievance procedure. Being unable to resolve their dispute, they proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

City

The City takes the position that it had just cause to issue Felix an oral reprimand, and that Felix was not entitled to sick leave for August 2nd.

It is undisputed that Felix did not call in 15 minutes before the start of his shift on August 2nd, and that he did not report to work at 9:00 o'clock that day as he said he would. Felix is familiar with the work rule and offered no excuse for failing to report his absence at 6:45 a.m. or at 9:00 a.m. that day. Felix's wife called at 9:21 a.m., but there is no evidence to show Felix was physically unable to make the call himself, as required by the work rule.

The Grievant's excuse is that he had given Kendall the reason for his absence, but that Kendall just did not hear it, and that he did not want to talk to Kendall at 9:00 o'clock given their earlier conversation. More plausible is that he was embarrassed to explain the change in his story of oversleeping to being sick in such a short time. When given the opportunity to explain his side of the story on August 19th, he instead asked for a more experienced Union representative to be present. Felix also did not dispute his use of sick leave in conjunction with other paid leave, saying only that he did not realize it.

The City concludes that Kendall's version of what was said on August 2nd is more credible, as he continued to believe Felix was coming in at 9:00 o'clock. The calls made by Felix and his wife on August 2nd did not comply with the work rule, and thus, it was as if no calls were made. Therefore, Felix was not entitled to sick leave for that day, especially in light of his frequent use of sick leave in conjunction with vacations or holidays.

Union

The Union cites the testimony of Felix and Mrs. Felix that when Felix called Kendall on August 2nd, he told Kendall he was not feeling well and that he would come in by 9:00 o'clock, if he felt better. The Union asserts that there were no further conversations between Felix and management until he returned from vacation on August 19th.

Perales and Romero both testified that Kendall told them that Felix claimed to be ill, but that he did not believe him. Perales testified that prior to the start of the second meeting on August 19th, before Felix was present, Kendall indicated he questioned the validity of Felix's claim that he was ill on August 2nd, and that Kendall said Felix had informed him that he would report by 9:00 o'clock that morning, if he felt better. Romero testified that Kendall told him that Felix claimed he was ill on August 2nd, and that he (Kendall) did not believe him. Kendall also told Romero that Felix would report by 9:00 o'clock if he were feeling better.

As Kendall's statements were made to Perales and Romero prior to Felix's arrival at either meeting on August 19th, and Kendall had not yet spoken with Felix about the matter, Kendall cannot credibly claim he did not hear that Felix was ill on August 2nd. Given the testimony of Felix, his wife, Perales, and Romero, if the case turns on credibility, the Grievant prevails.

The Union asserts that it is not a matter of Kendall not knowing Felix reported being ill on August 2nd; rather, Kendall did not believe what Felix told him. However, there is no basis for Kendall's position, as Felix had never been disciplined for sick leave abuse. When asked hypothetically whether an employee would be disciplined for calling in sick a half-hour after the start of his shift, Kendall answered in the negative. Thus, there was no reason to discipline Felix and the reprimand should be expunged from his record.

Assuming, arguendo, that discipline was warranted for not timely calling in, the long-established practice of the parties is that in similar situations where an employee calls in absent after the start of his shift, he is allowed to use sick leave for that day from the time of the notification to the end of their work day. Kendall confirmed the practice, and Perales testified he personally had done so and knew of others who had similarly received sick pay in that situation. Thus, Felix is entitled to sick pay from 7:15 a.m. until 3:00 p.m. on August 2, 2002.

DISCUSSION

There are two primary issues to be decided in this case: (1) Did the City have just cause to issue Felix the oral reprimand, and (2) was Felix entitled to sick pay for August 2, 2002?

As to the oral reprimand, the work rule requires an employee to call in at least 15 minutes before the start of his shift to report absence due to illness or emergencies. By his own admission, Felix did not call in until after his shift started at 7:00 a.m., and after Kendall's secretary had called his home at approximately 7:15 a.m. that morning. While Felix testified he was in a daze from taking Nyquil the night before, that does not amount to being "deathly ill" (as in the hypothetical posed to Kendall by the Union's representative) or being

physically unable to call in. 2/ Further, according to Perales' testimony, issuing the oral reprimand to Felix in this case was consistent with how the work rule has been enforced in the past.

2/ The work rule itself only permits an immediate family member to call in for the employee in the latter instance, and does not excuse calling in late.

Based on the foregoing, it is concluded that the City had just cause to issue Felix an oral reprimand for calling in late to report his absence on August 2, 2002.

Resolving the issue of whether Felix is entitled to paid sick leave for August 2nd first requires a determination as to what was said in the phone conversations between Felix and Kendall that morning. Three of the witnesses were privy to what Felix said in his conversation with Kendall – Felix, his wife, and Kendall. Felix and his wife both testified that Felix told Kendall he was not feeling well, and that he repeated this in response to what Kendall said, and that he told Kendall he would come in at 9:00 o'clock if he felt better. Kendall testified that Felix only said his alarm clock did not go off and did not mention anything about being ill. Kendall also stated that Felix said he could not come in until 9:00 o'clock, but did not say that was if he was feeling better.

As to Romero's and Perales' testimony, while Romero's testimony was somewhat confused, he testified that at the start of the meeting the morning of August 19th, Felix claimed he had called in sick and that Kendall denied he had said that. Kendall could have been made aware at that time that Felix was claiming he had called in sick on August 2nd. Therefore, Perales' testimony that Kendall told him at the afternoon meeting on August 19th that Felix was claiming he called in sick on August 2nd, does not establish that Kendall only would have known Felix was claiming he was sick through his phone conversation with Felix the morning of August 2nd.

This leaves the Arbitrator with only the testimony of Felix, his wife, and Kendall to resolve the issue. While Felix has an obvious interest in the outcome, that is less the case for his spouse and Kendall. For the following reasons, Diana Felix's testimony is credited over Kendall's. Diana Felix testified in a straightforward manner as to what she had heard her husband tell Kendall in their phone conversation the morning of August 2nd. There were no attempts to embellish her testimony to favor her husband. She testified that when she called the Parks Department for her husband after 9:00 o'clock that morning, she only said he was not coming in and did not say why. She explained that she did not do so because he had already told Kendall he would come in if he was feeling better, so there was no need to explain why he was not coming in.

The testimony of Felix and his wife is also more plausible with regard to his saying he would come in at 9:00 o'clock if he felt better, as opposed to Kendall's version that Felix simply said he could not come in until 9:00 o'clock. It seems unlikely that Kendall would have accepted the latter statement without questioning it further, especially in light of his testimony that he understands that the practice in other departments to be that if an employee oversleeps and calls in, he has to punch in by 8:00 o'clock or he is not allowed to work for that day. Thus, the testimony of Felix and his wife is credited over that of Kendall.

Based on information it put together later in the fall of 2002, the City points out that this would have been the third instance in a two-month period where Felix called in sick adjacent to a vacation or holiday, and challenges his entitlement to sick leave for August 2nd on that basis as well. There is no doubt that this is a disturbing pattern; however, Felix was not disciplined on that basis in this instance, nor had he been disciplined previously for sick leave abuse. The City's denial of paid sick leave in this instance was based on a failure to call in sick on August 2nd, not on alleged sick leave abuse.

As it has been found that Felix did call in sick on August 2nd when he spoke to Kendall, and that the practice has been that in these situations the employee is allowed to use sick leave from the time he calls in sick, Felix was entitled to sick leave from 7:20 a.m. (when he called Kendall) until the end of his regular shift on August 2, 2002. By refusing to pay Felix sick pay for that time, the City violated the parties' Agreement.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied in part and sustained in part.

The grievance is denied as to the oral reprimand Art Felix received on August 19, 2002.

The grievance is sustained with regard to Felix's entitlement to use sick leave on August 2, 2002. Consistent with the above discussion, the City is directed to immediately make Felix whole by paying him sick pay from 7:20 a.m. to 3:00 p.m. for his absence on August 2, 2002.

Dated at Madison, Wisconsin, this 4th day of November, 2003.

David E. Shaw /s/

David E. Shaw, Arbitrator

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