BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABOR ASSOCIATION OF WISCONSIN

and

CITY OF OAK CREEK

Case 134
No. 64234
MA-12847

(Dan Siettmann Grievance)

Appearances:

Thomas Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., appearing on behalf of the Association.

Susan Love, Attorney, Davis & Kuelthau, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and City or Employer, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances arising thereunder. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on January 23, 2006, in Oak Creek, Wisconsin. The parties filed briefs on March 20, 2006, whereupon the record was closed. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

> Did the Oak Creek Police Department violate the collective bargaining agreement by reprimanding the grievant for a false sick leave usage claim? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2004-2005 collective bargaining agreement contained the following pertinent contract provisions:

Article 3 Management and Employee Rights

The City retains and reserves the sole right to manage its affairs in accordance with the applicable laws, ordinances, and regulations and all management rights repose in it. Included in this responsibility, but not limited thereto, is the right to . . .establish work rules, the reasonableness of which shall be subject to the grievance procedure. . .suspend, discharge, demote or take other disciplinary action for just cause; the right to maintain efficiency of operations. . . and to take whatever actions are reasonable and necessary to carry out the duties imposed by law upon the City.

. . .

Article 13 Sick Leave

All employees shall be granted sickleave at the rate of one (1) working day of sick leave for each completed month of service commencing from their date of hire. . . Unused sick leave may be accumulated to a total of one hundred eighty five (185) days. . .

. . .

PERTINENT OAK CREEK POLICE DEPARTMENT RULES AND REGULATIONS

3.52 SICK OR INJURY CLAIMS

A. No officer or employee shall make any false sick or injury claims. No officer or employee shall deceive or attempt to deceive any official of the Department as to the condition of their health.

B. Any officer or employee unable to report for duty because of illness or injury must notify the department **at least two hours prior to their scheduled shift**. Sudden onset of emergency circumstances will be given consideration from departure of this requirement. (Underline and emphasis in original).

C. During the time that the officer or employee would have normally been on duty, he/she must remain at his/her residence unless receiving or procuring treatment from a physician. Exceptions to this section will be granted only with the authorization of the Chief of Police or his/her designee.

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E. The department may, at any time, require a physician of the department's choosing to examine the employee and determine if the use of sick leave is justified and/or to determine if an employee can return to duty.

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In addition, (Department) Directive 95-4, which is entitled "Absence From Duty" provides:

IV. GUIDELINES

. . .

E. An employee on sick leave or duty-incurred injury status shall restrict their activities to commensurate with the illness or injury claimed which prevents performing normal duties. During the time that the employee would have normally been on duty, he/she must remain at his/her residence unless receiving or procuring treatment from a physician. Exceptions to this will be granted only with the authorization of the Police Chief or his/her designee. Any employee engaging in activity which is inconsistent with the nature of the reported illness or injury shall be subject to disciplinary action.

. . .

V. SICK LEAVE

A. Sick leave is accumulated and may be taken pursuant to Oak Creek Police Department Rules and Regulations, Rule #3.52, and the terms of the collective bargaining agreements. In general, sick leave may be used when an employee becomes ill or injured to the extent they cannot perform their customary duties and the cause of illness or injury is not job-related. Sick leave may also be used to provide care to an <u>immediate</u> member of the employee's family. (Underline in original).

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C. A disproportionate use of sick leave on weekends, holidays, in conjunction with other leave, or those days when a request for time off has been made but not approved, may be cause for further investigation which may include medical evaluation, signed release by employee or any/all medical records related to current injury or illness, and/or home checks.

In addition, (Department) Directive 95-2, which is entitled "Disciplinary Action Policy" provides:

III. DEFINITIONS

. . .

E. *Level I Reprimand* (formerly known as a "verbal reprimand") – documented on the appropriate department form (DAR Form #1) in the event they are needed for future reference. This disciplinary action is the lowest level of formal discipline. Level I reprimands must include documentation that the employee was advised that further violations will result in more severe discipline, up to and including termination. A copy of this documented reprimand must be provided to the employee and will be permanently retained inn the employee's Personnel File.

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V. CRITERIA FOR DISCIPLINARY ACTIONS

The criteria which follows is intended as a guideline for the application of disciplinary action. As a general rule, disciplinary action is less severe when the action giving rise to the need for discipline is relatively isolated or the first such occurrence of an infraction. More severe discipline will be applied if the actions giving rise to the need for discipline occur in relative proximity to other disciplinary matters or represent second or subsequent similar infractions. However, certain conduct or actions by personnel may warrant more severer disciplinary measures which would not be properly addressed by lower levels of discipline.

The following is a list of the general order or progression of disciplinary actions. The examples provided under each are meant as a guideline, and supervisors are not restricted to only those examples provided.

A. Counseling and Instruction Report (D.A.R. #2)

Violations of various Rules and Regulations usually would begin at this level if it is considered to be of a very minor nature. Depending on the totality of the circumstances regarding the investigation, a final recommendation could escalate to disciplinary action instead of counseling and instruction. Circumstances and/or the total work record of the employee could lead the supervisor to recommend discipline, up to and including, termination. **Note: Counseling is not an element of progressive discipline.** (Underline and emphasis in original).

B. Level I Reprimand

A Level I Reprimand is issued for rule violations that are either minor in nature, a first occurrence, or which could not be corrected with counseling. Depending on the totality of all circumstances regarding the investigation, supervisors could either escalate or deescalate the final recommendation for disciplinary action. (Underline in original).

C. Level II Reprimand

A Level II Reprimand is issued for rule violations that are either significant in nature, a second occurrence of a rule infraction or a repeat violation which has not been corrected with a Level I Reprimand. Depending on the totality of all circumstances regarding the investigation into the violation, supervisors could either escalate or deescalate the final recommendation for disciplinary action. (Underline in original).

D. Suspension

1. A suspension is issued for rule violations that are either major or substantial in nature or a repeat violation of a rule which has not been corrected with a Level II Reprimand. . . (Underline in original).

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BACKGROUND

Among its many governmental functions, the City operates a police department. The Association is the exclusive collective bargaining representative for the department's detectives, investigators and patrol officers. Dan Siettmann is a patrol officer and thus is a bargaining unit employee.

This case involves a reprimand issued to Siettmann for sick leave used on July 25, 2004.

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Bargaining unit employees have a number of ways to get time off from work. The two ways that are pertinent to this case are compensatory time (hereinafter referred to as comp time) and sick leave.

The Police Department's minimum staffing policy is to have four patrol officers on duty. Just patrol officers are included in this count. The Department has a school resource officer, hereinafter referred to as the SRO, who is assigned to patrol during the summer, but the SRO is not included in the count for minimum staffing prior to the actual day of a requested leave. If a patrol officer calls in for a comp time day and the SRO is working that day, the SRO would count for minimum staffing and the patrol officer may be granted comp time leave.

On July 20, 2004, Siettmann requested comp time for his regularly scheduled 7 a.m. to 3 p.m. shift on Sunday, July 25, 2004. On July 21, 2004, his supervisor, Lt. Hermann, responded via e-mail to Siettmann's request for comp time for that day and denied it. In his response, Lt. Hermann told Siettmann that the reason his request was denied was because there were only four (patrol officers) working (that day). (Note: this meant that the department was at the minimum staffing level for that day). Siettmann was upset and frustrated that his request for comp time for July 25, 2004 was denied and he complained to Lt. Hermann about it. When he did so, Siettmann contended that the SRO should count for minimum manning and that he should be granted comp time for that date. Siettmann also told Lt. Hermann that he would be filing a grievance over the denial of his comp time request. Afterwards, Siettmann was still dissatisfied with the denial of his comp time request by Lt. Hermann, so he went further up the department's chain of command. He talked with Captain Wilson about the matter. He then talked with Police Chief Bauer about it. When he did so, Siettmann raised the same complaint with Chief Bauer that he raised with Lt. Hermann, namely Siettmann's belief that the SRO should count for minimum manning and that his comp time request should be granted. Chief Bauer told Siettmann in response that the SRO did not count for first shift staffing and that comp time was allocated based on time of request. Chief Bauer then reaffirmed Lt. Hermann's decision that Siettmann could not use comp time on July 25, 2004. When he did so, Bauer told Siettmann that he could call in on the 25th and see if the SRO was at work, and if the SRO worked on the 25th, then Siettmann would be able to take the day off.

On Sunday, July 25, 2004, at 4:45 a.m., Siettmann called the City's dispatch center and spoke to a dispatcher. Their conversation was recorded and a transcript of same was subsequently prepared. According to that transcript, Siettmann said: "Hey this is Dan Siettmann; could you put me in for a sick day please?", to which the dispatcher replied in the affirmative. Siettmann then said: "Hey can you check and see if there's a comp time available? I'm kind of using up too much sick time here", to which the dispatcher replied in the negative (meaning that there was no comp time available). Siettmann then asked if Sagan (the SRO) was working. The dispatcher replied that Sagan was not working because he (Sagan) had taken comp time for the day. Siettmann then told the dispatcher to mark him sick to which the dispatcher replied "OK". Siettmann was absent for his entire shift on July 25, 2004. His absence that day caused a shortage on the day shift which was filled with eight hours of overtime.

Later that morning, Lt. Hermann learned that Siettmann had called in sick for the day. Lt. Hermann was immediately suspicious of Siettmann's absence from work because he (Lt. Hermann) knew that Siettmann's request for comp time for that same day had been denied. Lt. Herman then directed Sgt. Mitchell to visit Siettmann's residence to verify that Siettmann was there (i.e. at his house) and find out why he (i.e. Siettmann) called in sick.

Sgt. Mitchell did as directed and drove to Siettmann's house later that morning. When he arrived there, he saw Siettmann standing in his driveway holding a new exhaust pipe. Sgt. Mitchell surmised from this that Siettmann was working on his car. Sgt. Mitchell walked up to Siettmann and told him that he was there to check on him and find out the nature of his (i.e. Siettmann's) illness. Siettmann responded that he had a little diarrhea thing going on, and that he couldn't be five minutes away from a bathroom. The two men then made small talk for awhile and afterwards, Sgt. Mitchell left. Sgt. Mitchell subsequently reported the foregoing to Lt. Hermann.

The next day, July 26, 2004, Lt. Hermann and Sgt. Mitchell met with Siettmann to discuss his absence of the previous day. In that meeting, Siettmann told them that the reason he used sick leave the previous day was because he had a little diarrhea. Siettmann also admitted that while he was at home that day he had installed a new exhaust system on his car.

Lt. Hermann then consulted with Captain Wilson and Chief Bauer regarding the circumstances of Siettmann's sick leave usage on July 25, 2004. They collectively decided that Siettmann had engaged in sick leave abuse on that date. When they considered which level of discipline to impose, they decided on a Level I reprimand. A Level I reprimand is the lowest level of formal discipline in the department. In deciding on the appropriate level of discipline, they considered counseling as an alternative to a Level I reprimand, but rejected it (i.e. counseling) because they felt Siettmann's misconduct was intentional.

On July 28, 2004, Siettmann was given a Level I reprimand for his absence from work on July 25, 2004. That written reprimand indicated in pertinent part that by calling in sick on July 25, 2004, Siettmann violated Departmental Rule 3.52, A. That rule provides in pertinent

part that "no officer. . .shall make any false sick or injury claims." This was Siettmann's first discipline for sick leave abuse.

Siettmann grieved the letter of reprimand on August 5, 2004. The grievance was processed through the contractual grievance procedure and was appealed to arbitration in December, 2004. Hearing on the case was scheduled for April 27, 2005, but that hearing was cancelled. The case was then held in abeyance for about six months. It was subsequently reactivated.

. . .

Siettmann was not docked any pay for his absence on July 25, 2004. His absence that day was counted as a sick day. He did not grieve the denial of his comp time request for July 25, 2004.

It is not common for management to make home visits to check on employees taking sick leave, but it has happened several times before.

POSITIONS OF THE PARTIES

Association

The Association contends that the Employer violated the collective bargaining agreement by giving the grievant a letter of reprimand for his absence on July 25, 2004. According to the Association, the City failed to provide evidence to support their allegation of a false sick leave claim. It makes the following arguments to support those contentions.

First, the Association tries to give some context to what happened on July 25, 2004 by calling attention to what happened several days before. Specifically, it notes that on July 21, 2004, the grievant requested comp time for July 25, 2004, and his request was denied. This upset him. He then complained to his supervisors about the denial of his comp time request. As the grievant saw it, the SRO should be counted in the shift for the total number of employees working as it relates to time off requests. The Department's view was otherwise. The grievant also felt that comp time requests should be granted by seniority. The Association avers that the grievant had the right to raise those matters with management officials and question whether the Employer's actions complied with the collective bargaining agreement.

Next, the Association contends that when the grievant called in sick on July 25, 2004, he complied with the Department's rules and regulations relating to sick leave. Here's why. First, he called in more than two hours before the start of his shift in conformance with Sec. 3.52(B) of the Department's rules and regulations. Second, he remained at his residence for the entire time that he would have been on duty on July 25, 2004. He was there when Sgt. Mitchell came by to check on him. Third, while the grievant worked on his car during the day and installed an exhaust pipe, the Association avers that there is nothing in either the

Department's rules and regulations or the collective bargaining agreement that precludes or restricts an employee from doing that (i.e. working on their car while at home on sick leave). The Association argues that if the Employer wants to restrict employees' activities at home while they are on sick leave, at a minimum, it has to inform them of same. The Association contends that did not happen here. That being so, the Association maintains that the grievant's sick leave call in on July 25, 2004 was proper and complied with all the requirements for making a sick leave claim.

Third, the Association notes that when the grievant was asked why he took sick leave on that date, he responded that he had a case of diarrhea. The Association submits that if the Employer suspected the grievant of sick leave abuse, there were a number of measures they could have taken. Specifically, they could have asked him if he was taking any medication to relieve the diarrhea, or whether he was under a physician's care for same. They also could have required him to get a physician's certification of illness. None of those measures were taken. Since they were not, it is the Association's position that the Employer did not prove that the grievant filed a false sick leave claim on July 25, 2004.

As part of its discussion on this matter, the Association once again acknowledges that the grievant was upset over the denial of his comp time request for that same day and that while at home, he worked on his vehicle during the day. However, the Association argues that those facts do not prove that the grievant filed a false sick leave claim on July 25, 2004. The Association maintains that if the Employer did not believe the grievant's claim that he had diarrhea on that day, it could have denied his sick leave claim for that day. That did not happen, though. Instead, the Employer took the following approach: it granted his sick leave claim for the day (because it paid him for the day), but then gave him a letter of reprimand for filing a false sick leave claim. The Association argues that that approach (i.e. giving a letter of reprimand) was unwarranted because the City lacked just cause for any discipline.

In sum, it is the Association's position that the City did not prove that the grievant filed a false sick leave claim on July 25, 2004. It therefore requests that the grievance be sustained, the discipline overturned, and the letter of reprimand expunged from the grievant's personnel records.

City

The City contends it did not violate the collective bargaining agreement by reprimanding the grievant for his usage of sick leave on July 25, 2004. It is the Employer's position that Siettmann shirked his responsibility to show up for work and falsified his claim of illness on that date. According to the Employer, it proved that he abused sick leave on that date. The City also avers that the level of discipline which it imposed (i.e. a Level I reprimand) was appropriate under the circumstances. It elaborates as follows.

The Employer begins with these comments on the contract language. First, it avers that it has the right, under the management rights clause (Article 3) to investigate, prevent and

correct suspected sick leave abuse. Second, it asserts that the sick leave language found in Article 13 only addresses accrual; it does not address use. Building on that premise, the Employer maintains that there is no contract language which restricts the City's actions related to suspected sick leave abuse. It cites Elkouri for the proposition that "except as restricted by the agreement, the granting or denial of leaves of absence is a prerogative of management." Third, it argues that it does not have to approve every sick leave request based on the employee's representations alone. It avers that if it did, this would convert sick leave into another form of vacation or personal leave. It maintains that sick leave, as the name implies, is just for "sick" employees. Fourth, it submits that there is no contract language herein which requires the City to support a finding of sick leave abuse with medical documentation of no illness.

Second, the Employer contends that in this instance, it had a compelling reason to suspect Siettmann of sick leave abuse. It was the following sequence of events: Siettmann used sick leave on the same day (July 25, 2004) that he wanted to take comp time and his comp time request had been denied. The Employer knew that Siettmann was upset, angry and frustrated by the denial of his comp time request because he tried unsuccessfully to get Captain Wilson and Chief Bauer to overturn Lt. Hermann's decision. Under these circumstances, when July 25, 2004 came around and Siettmann took the day off anyway and called in sick, it looked to his supervisor (Lt. Hermann) like Siettmann was engaging in self-help. Since Lt. Hermann was suspicious of Siettmann's sick leave claim, he dispatched Sgt. Mitchell to make a home check on Siettmann. The Employer calls attention to the fact that it has a Departmental rule covering the use of sick leave, namely Directive 95-4, section 5, which specifically gives it the right to do that (i.e. make home checks). That rule says in pertinent part: "When a request for time off has been made but not approved," it "may be cause for further investigation which may include. . .home checks." The Employer notes that when Sgt. Mitchell went to Siettmann's house, Siettmann was in his driveway installing a new exhaust system on his car.

Next, the Employer contends that Siettmann's stated reason for taking sick leave on that date – namely that he had diarrhea – was a ruse. The Employer characterizes it as a "self-serving statement", an "unsupported assertion" and a "contrived ailment." According to the Employer, there is no evidence that Siettmann was ill as claimed. The Employer contends that even if it had tried to get medical evidence of Siettmann's supposed condition (i.e. diarrhea), their efforts would have failed.

Aside from that, the Employer maintains that there is more evidence of sick leave abuse in this case than there is that Siettmann had diarrhea. To support that premise, the Employer once again cites the following sequence of events: First, Siettmann asked for comp time for July 25, 2004 and his request was denied. He was angry and frustrated over not getting the day off. He tried to get Captain Wilson and Chief Bauer to overturn Lt. Hermann's decision to no avail. Second, when July 25, 2004 arrives, Siettmann calls in and asks for a sick day, but when he does so, he inquires about a comp time day under the guise he was using too much sick leave. Third, when Sgt. Mitchell subsequently checks on Siettmann at his house,

Siettmann is installing an exhaust system on his car. The Employer maintains that when all these circumstances are considered together, there is more than sufficient evidence of motivation for sick leave abuse by Siettmann.

With respect to the level of discipline which was imposed, the City argues that a Level I reprimand was appropriate under the circumstances. It maintains that in sick leave abuse cases where there is evidence that an employee falsified his claim of illness, like this one, the discipline imposed by management should be upheld unless the contract specifies how abuse is to be handled. The City therefore asks that the grievance be denied and Siettmann's Level I reprimand be upheld.

The Employer warns that if the arbitrator does not find sick leave abuse in this case, he will be telling employees that if they really want a sick day, all they have to do, as the Employer put it in their brief, is "pick an illness which will last only a few hours and they are home free" and "can stay home and engage in whatever activities they choose."

DISCUSSION

This case arises out of the grievant's use of sick leave on July 25, 2004. The Employer reprimanded the grievant for his usage of sick leave on that date. The City contends that this discipline was warranted because the grievant falsified his claim of illness on that date and thus abused sick leave. The Association counters that the Employer did not prove that the grievant filed a false sick leave claim on that date. Based on the rationale which follows, I find there is insufficient proof of sick leave abuse and thus overturn the discipline.

Since this is a sick leave abuse case, I have decided to begin my discussion with the following comments about sick leave and sick leave abuse. This collective bargaining agreement, like many other public sector collective bargaining agreements, provides that employees earn sick leave "for each completed month of service commencing from their date of hire. . ." Thus, one of the types of leave which employees can take is sick leave. It is a contractual entitlement. While it scarcely seems necessary to say it, I'm next going to state the obvious: sick days are to be used only in cases of legitimate illness. Employees who view sick leave as synonymous with vacation, and use it when they are not sick or ill are, in fact, abusing sick leave. Employers are well within their rights to respond to employee sick leave abuse by either denying sick leave or by imposing discipline. The discipline that employers can impose on employees for fraudulent use of sick leave can run the gamut from warnings to discharge. It is common for employers to try to police the legitimacy of sick leave usage and guard against fraudulent sick leave claims. They oftentimes do this by establishing certain administrative procedures for using sick leave. For example, some employers may require evidence of illness in all or only selected cases of absenteeism, or may require medical examination by a physician, or may require medication documentation, or may subject the absent employee to unannounced inspection visits to determine the authenticity of a questioned absence. When an employer has reasonable grounds for suspecting fraudulent use of sick leave, an employer is within its rights to investigate the sick leave claim.

The Employer believed that Siettmann's use of sick leave on July 25, 2004 was suspicious because of the circumstances that preceded it. I agree. Here's why. Siettmann had asked for comp time for that date and Lt. Hermann had denied the request. It is an understatement to say that Siettmann did not take that denial well. He was angry and frustrated by Lt. Hermann's denial of his request and let him know it. He also told Lt. Hermann that he was going to grieve the denial of his comp time request. While that did not happen (meaning Siettmann did not file a grievance as he said he was), he did take his complaint further up the chain of command. Specifically, he asked both Captain Wilson and Chief Bauer to overturn Lt. Hermann's denial of his comp time request. Neither did. Siettmann did all of this on his own without assistance from the Association. His dogged pursuit of this matter all the way to the Chief establishes that the denial of his comp time request was a very big issue for Siettmann. He felt he was entitled to comp time on that day, and he tried mightily to get three supervisors to grant his request. However, that did not happen. It is against this context that when July 25, 2004 rolls around (i.e. the day Siettmann wanted off for comp time but his request was denied) that Siettmann calls in sick. Since the timing of Siettmann's absence on July 25, 2004 coincided with the denied comp time day, the Employer concluded that Siettmann was resorting to self-help and taking the day off anyway. This conclusion was reasonable under the circumstances. Siettmann's absence that day was suspicious. Very suspicious.

That said, it must next be noted that suspicious circumstances and inferences are usually insufficient to prove abuse of sick leave. The general rule in sick leave abuse cases is that if an employer challenges the validity of a sick leave claim, it must present sufficient evidence to rebut the presumption that the employee was actually sick. Such proof is needed here because the grievant testified that the reason he took sick leave that day was because he had diarrhea. The Employer disputes his assertion of illness and doubts his truthfulness. Given the disputed question of fact of whether Siettmann did or did not have diarrhea on July 25, 2004, in the context of this case, just cause for discipline requires sufficient evidence establishing that the grievant did not have diarrhea as he claimed, and thus abused sick leave.

The focus now turns to the question of whether the grievant did nor did not have diarrhea on that date. There is no direct evidence on the matter one way or the other.

Knowing that, the Employer relied on the following circumstantial evidence to support their contention that the grievant's claim of diarrhea was a ruse.

First, the Employer once again relies on the fact that the grievant's comp time request for that same day was denied. I have already addressed this point and found that Siettmann's absence that day was very suspicious. However, just because Siettmann's absence that day was very suspicious does not mean I can simply infer that Siettmann's explanation of his illness was untruthful. Proof is needed for me to make that finding.

In an effort to supply that proof, the Employer relies on the fact that when Siettmann called in to the dispatch center on July 25, 2004 to report his absence for his upcoming shift, he first told the dispatcher to put him down for sick leave. Siettmann then asked whether a comp day was available because he was "using up too much sick time." While the City avers that the statement just quoted establishes Siettmann's intent to defraud the City of sick leave, I don't see it that way. I interpret Siettmann's statement about "using up too much sick time" to simply be his subjective opinion about his overall sick leave usage. It does not matter that the Employer disagreed with that assertion. Consequently, I find that the quoted statement does not establish what the Employer avers it establishes, namely that Siettmann was abusing sick leave because he did not have diarrhea.

In another attempt to supply proof of sick leave abuse, the Employer cites the fact that when Sgt. Mitchell went to Siettmann's house, Siettmann was working on his car. Before I address the matter of Siettmann working on his car though, I am first going to comment on something the Employer overlooks. It is this. One of the reasons Lt. Hermann directed Sgt. Mitchell to go to Siettmann's house was to verify that Siettmann was there (i.e. at his house). He was. The fact that Siettmann was at his house, as opposed to anywhere else, buttresses his contention that he had diarrhea that day because people who have diarrhea usually try to be close to a bathroom, and particularly their own bathroom. Thus, Siettmann was where one would normally expect to find someone with diarrhea (i.e. at their home).

The focus now turns to what Siettmann did while on sick leave that day. I am referring, of course, to the fact that he worked on his car. My analysis on this point is divided into two categories. First, it would be one thing if the Department's rules and regulations or the collective bargaining agreement contained specific restrictions on the activities of employees while on sick leave. While Directive 95-4 states in Section IV, subparagraph E that "an employee on sick leave. . .shall restrict their activities to commensurate with the illness . . .claimed which prevents performing normal activities", that language does not explicitly identify what an employee on sick leave can and cannot do while at home. As it pertains to this case, does that language preclude an employee on sick leave from working on their car while at home? The testimony at the hearing was that that language has not previously been interpreted to preclude that. That being so, neither the Department's rules and regulations nor the collective bargaining agreement currently preclude an employee from working on their car while at home on sick leave. Second, the level of activity that someone with diarrhea is willing to undertake obviously depends on the severity of their case of diarrhea. In this case, Siettmann twice told his supervisors that he had "a little diarrhea". Thus, by the grievant's own account, his case of diarrhea was not severe. I am unwilling to say that having "a little diarrhea" automatically precludes someone from working on their car. Consequently, the fact that Siettmann worked on his car that day does not prove that his explanation of his illness was untruthful.

What the Employer essentially asks me to do here is put the burden of proof on the grievant so that he had to substantiate his claim of diarrhea (rather than the Employer doing so). I could see doing that if the grievant had a pattern of using diarrhea as the reason for sick

leave, or had been previously warned and/or disciplined about questionable use of sick leave, or had been previously directed to provide proof of an illness like diarrhea. If any of those facts had existed, it would justify shifting the burden of proof from the Employer to the grievant so that he had to substantiate his claim of diarrhea and justify his absence. However, none of those facts exist here. Insofar as the record shows, this was the first time something like this had arisen with the grievant. Since the grievant has no history of sick leave abuse, the standard burden of proof applicable to disciplinary cases applies here. That means that the burden of proof was on the Employer to substantiate that the grievant did not have diarrhea on the day in question. It did not prove that. I find there is insufficient evidence to disprove the grievant's claim of diarrhea and likewise insufficient proof that he falsified his claim of diarrhea on that date. As a result, the discipline which the Employer imposed on the grievant for sick leave abuse, namely a Level I reprimand, is therefore overturned because just cause for discipline was not established.

In light of the above, it is my

AWARD

That the Oak Creek Police Department violated the collective bargaining agreement by reprimanding the grievant for a false sick leave usage claim. In order to remedy this contractual violation, the City shall expunge the letter of reprimand dated July 25, 2004, and all related documentation of the incident, from the grievant's personnel records.

Dated at Madison, Wisconsin, this 30th day of June, 2006.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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