BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**GREEN BAY MUNICIPAL EMPLOYEES' UNION,
PARKS DEPARTMENT, LOCAL 1672, AFSCME**

and

CITY OF GREEN BAY

Case 373
No. 65524
MA-13243

(William Arts Discharge Grievance)

Appearances:

Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, appearing on behalf of the Union.

James Kalny, Attorney, Davis & Kuelthau, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Union and the City or Employer, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on May 9, 2006 in Green Bay, Wisconsin. The Union elected to not file a brief, and instead made its closing statement at the hearing. The City filed its brief on July 7, 2006, whereupon the record was closed. Based on the entire record, the undersigned issues the following Award.

ISSUES

The parties stipulated to the following issues:

1. Is the appeal timely?

2. Did the City have just cause, to the extent required by Article 15 of the collective bargaining agreement, to discharge the grievant? If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

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

ARTICLE 6. SICK LEAVE

(A) All full time employees shall be granted sick or emergency leave with pay of eight (8) hours for each month of service. . . .

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In order to be granted sick leave or emergency leave an employee must:

(1) Report prior to the start of the work day to the department head or supervisor the reason for the absence.

(2) Keep the department head informed of his/her condition and the anticipated date of return to work.

(3) Be legitimately ill or attending a member of the immediate family who is ill and unable to care for themselves or make other arrangements for care.

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ARTICLE 15. DISCIPLINARY PROCEDURE

The Employer shall not discharge any employee without just cause, and shall give at least one (1) warning notice of the complaint against such employee to the employee in writing, and a copy of the same to the Union affected, except that no warning notice need be given to an employee before discharge if the cause of such discharge is dishonesty, being under the influence of intoxicating beverages while on duty, recklessness, endangering others while on duty, the carrying of unauthorized passengers, or other flagrant violations. Discharge

must be by proper written notice to the employee and the Union affected. Any employee may request an investigation as to the discharge. Should such investigation prove that an injustice has been done an employee, the employee shall be reinstated and compensated at the usual rate of pay while having been out of work. Appeal from discharge must be taken within five (5) days by written notice, and a decision must be reached within ten (10) days from the date of discharge. In the event a settlement cannot be reached within ten (10) days of the first date of appeal, then such dispute shall be submitted to arbitration as outlined in Article 16, GRIEVANCE PROCEDURE, of this Agreement.

ARTICLE 16. GRIEVANCE PROCEDURE

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(B) (3) Step 3 – The Grievance shall be submitted in writing to the Human Resources Director. A joint meeting of all the parties (the Union and its representatives, management and its representatives, and the Human Resources Director) shall be scheduled within one (1) week of the appeal being filed. The position of the respective parties shall be submitted to the Human Resources Director in a final endeavor to reach a settlement. If no agreement is reached at Step 3, either party can petition for arbitration.

(4) Step 4 – The party desiring arbitration shall notify within fifteen (15) working days the other party of its desire to arbitrate and request the Wisconsin Employment Relations Commission to appoint an Arbitrator.

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(D) The time limits of the grievance procedure as set forth in the above steps, may be waived or extended by mutual, written agreement of the parties. Failure of the City to process the grievance within the stated limits shall constitute a denial of the grievance so that the Union may go to the next step. Failure of the Union to process the grievance within the stated time limit shall result in a final disposition of the grievance at the City's last written position.

BACKGROUND

The City operates a Parks Department which is responsible for the maintenance of all city parks. The Union is the exclusive collective bargaining representative for all regular full-time employees in the City of Green Bay Parks Department. William Arts was a bargaining unit employee.

On December 5, 2005, Arts was discharged from his employment with the City. That action by the City is the subject of this case.

Arts began working for the City in the Parks Department as a seasonal laborer in 1997. As the title indicates, this was a part-time seasonal position. Pursuant to an agreement reached during contract negotiations, he and an unidentified number of other seasonal laborers became full-time workers with the City on January 1, 2001. He worked in a full-time capacity as a park maintenance worker from then until his discharge.

In 2003 and 2004, Arts had two major disciplinary events. In the first, he tested positive for marijuana while at work. In the second, he fell asleep on the job while watching a tow rope on a ski hill. The specifics of those two incidents are identified below.

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On December 4, 2003, Arts was subjected to a random drug test at work. The reason he was subjected to this drug test was because he holds a Commercial Driver's License (CDL). Arts took the drug test and tested positive for marijuana. Since he tested positive, he was removed from his position and placed on leave. As required by federal Department of Transportation (DOT) regulations, Arts was referred to a substance abuse provider for evaluation. Arts returned to work on February 5, 2004. After he returned to work, he was suspended without pay for ten (10) days for testing positive to a random drug test. His suspension letter said that a second positive drug or alcohol screen would result in immediate dismissal. This suspension was not grieved.

The suspension letter which Arts received did not contain any reference to a last chance agreement. When Park Superintendent Keith Wilhelm originally drafted that suspension letter though, he referenced therein a last chance agreement. After he drafted the suspension letter, he asked the Union and Arts to sign a last chance agreement, but they declined to do so. As a result, a last chance agreement was neither drafted nor signed by the parties. Wilhelm subsequently rewrote Arts' suspension letter and simply dropped any reference to a last chance agreement.

The record indicates that in 1993, an employee in the Parks Department bargaining unit named George VanderVeren signed a last chance agreement. VanderVeren was subsequently discharged, and his discharge was reviewed by Arbitrator Sharon Gallagher in CITY OF GREEN BAY (PARKS DEPARTMENT), No. 51327. She upheld the discharge.

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On December 23, 2004, Arts was assigned to work at the Triangle Hill Recreation area in Green Bay. His assignment was to operate the tow rope on a ski hill. As the tow rope operator, he was responsible for supervising the children and adults that use the rope to get to the top of the hill, and for ensuring that they use the rope in a safe manner. The tow rope operator is also responsible for monitoring the tow rope and responding to problems quickly. While he was on duty supposedly watching the tow rope, Arts fell asleep in a small shack on the hill. A supervisor discovered him sleeping. As a result, the tow rope and ski hill were shut down. After Arts left the hill, the supervisor put Arts' gloves inside a cooler that Arts had left there. In doing so, the supervisor discovered that the cooler contained two unopened cans of beer.

When Arts was subsequently interviewed about the incident referenced above, he admitted that he fell asleep in the shack during his work shift. He said that the reason he fell asleep was because he was up late and things were going on in his life outside of work. He apologized for falling asleep on the job. He also admitted to bringing the two cans of beer onto the worksite. He said that the reason the beer was at work was this: he had been at his brother's house before coming to work and when he left there, he grabbed the wrong cooler by mistake. The cooler which he brought to work contained the two beers. Arts said he did not intend to bring the cooler with the beer in it to work. The Employer accepted Arts' explanation of how the beer came to be at the workplace at face value.

The City's Director of Parks and Recreation, William Landvatter, subsequently disciplined Arts for sleeping on the job. In his disciplinary letter to Arts dated January 20, 2005, Landvatter noted that Arts admitted to sleeping on the job while he was the tow rope operator. Landvatter stated that by sleeping on the job, Arts was negligent in his duties and endangered the safety of those individuals using the tow rope. Landvatter noted that Arts had been previously disciplined with a ten (10)-day suspension for a positive drug test. Landvatter then imposed a 30-day suspension on Arts. The last paragraph of this suspension letter read as follows:

> In addition because of the seriousness of sleeping while on duty, you are being informed that this is your "Notice of Last Chance". Any inappropriate conduct or violation of department/City policy and/or procedure will result in your immediate dismissal from the City of Green Bay.

This suspension was grieved. The grievance was discussed at a meeting on February 4, 2005. Following that meeting, Landvatter officially denied the grievance in a letter dated February 9, 2005. In that letter, Landvatter stated his belief that by falling asleep while operating the tow rope, Arts had endangered the safety of the public. He further stated that he had considered discharging Arts for that misconduct since Article 15 of the collective bargaining agreement provides that an employee can be discharged with no warning notice if the cause of the discharge is endangering others while on duty, but he ultimately decided on a 30-day suspension.

The Union appealed the denial of the grievance to the third step and a meeting was held with Assistant City Attorney Steve Morrison on March 21, 2005 to discuss the matter. In that meeting, union representatives raised three different points about the discipline imposed on Arts: (1) they wanted the length of the suspension reduced; (2) they wanted the reference to "Last Chance" dropped; and (3) they wanted the suspension time to be spread out over time to minimize its financial impact on Arts. The parties then essentially negotiated over the discipline. The ultimate outcome of their negotiation was that the suspension stayed at 30 days and the "Notice of Last Chance" remained in effect, but the 30-day suspension was postponed until October, 2005, and would be served intermittently. Following this meeting, Morrison wrote a letter dated May 12, 2005, which confirmed this outcome. In that letter, Morrison stated that the discipline referenced in Landvatter's letter of January 20, 2005, was upheld with the understanding that the 30-day suspension would be served at management's discretion with a maximum of three days running consecutively. Morrison expressly stated that the "Notice of Last Chance" remained in effect, and Arts was cautioned and placed on notice that any further inappropriate conduct or violation of City/department policy or procedure would result in immediate dismissal from employment with the City. Finally, Morrison stated: "This decision is not based, in whole or in part, upon the issue surrounding cans of beer found at Mr. Arts' workplace and it should not be construed that this decision draws any conclusions or inferences regarding that issue." The Union did not appeal Morrison's response. Thus, this grievance was not appealed to arbitration.

Park Superintendent Wilhelm subsequently met with union representatives and Arts and created a mutually-agreeable schedule for the 30-day suspension to be served. The schedule was that Arts would serve the suspension during the months of October and November, 2005. It interspersed suspension days between regular work days.

It was in November, 2005 that the following events unfolded.

FACTS

In late October and early November, 2005, Arts served the first three days of his 30 day suspension.

Friday, November 11, 2005 was a regularly-scheduled workday for Arts. It was not a scheduled suspension day for him. He failed to report to work for the entire day. Neither Arts nor anyone acting on his behalf called in to report his absence that day. In labor relations jargon, he was a no call/no show that day.

On Monday, November 14, 2005, Arts went to work as scheduled. While he was there, Park Superintendent Wilhelm counseled Arts about the procedure he was to follow if he was absent from work or late to work. Specifically, Wilhelm told Arts that if he was going to be absent from work, or was unable to report to work on time (by 7:00 a.m.), he was to call Wilhelm directly prior to 7:00 a.m. Wilhelm then gave Arts two business cards which contained Wilhelm's work and cell phone numbers on them. Wilhelm emphasized that when Arts called in, he was not to leave a message with anyone at the Park Shop; instead, he was to speak with Wilhelm directly so that Wilhelm knew what was going on. After being given these instructions, Arts responded that he understood them.

Friday, November 18, 2005 was a regularly-scheduled workday for Arts. It was not a scheduled suspension day for him. He failed to report to work for the entire day. Neither Arts nor anyone acting on his behalf called in to report his absence that day. Thus, he was a no call/no show that day.

Monday, November 21, 2005 was a regularly-scheduled workday for Arts. It was not a scheduled suspension day for him. Arts was absent that day, but he called in and reported his absence before his shift started. His stated reason for his absence that day was that he was sick.

Later that day, Wilhelm tried to call Arts on the phone, but the phone was not working. Wilhelm then drove to Arts' house for the stated purpose of talking to him about his work schedule for the remainder of that week. After getting there, Wilhelm knocked on the door and Arts answered it. In a short conversation, Wilhelm initially told Arts to take the next day - Tuesday, November 22, 2005 - as his next suspension day, and then work Wednesday, November 23 and Friday, November 25. Wilhelm told Arts that by working the day before and after Thanksgiving (Thursday, November 24), Arts would get paid for the Thanksgiving holiday. Wilhelm then repeated what he had told Arts on November 14 (namely, the procedure Arts was to follow if he was absent from work or late to work).

Friday, November 25, 2005 was a regularly-scheduled workday for Arts. He was not at work when the shift started at 7:00 a.m. and did not call in prior to then. He reported to work about 7:40 a.m. Thus, he was tardy that day and did not call in.

Monday, November 28, 2005 was a regularly-scheduled workday for Arts. He was not at work when the shift started at 7:00 a.m. and did not call in prior to then. He called in about 7:30 a.m. and reported to work about 8:00 a.m. Thus, he was tardy that day.

On November 30, 2005, Wilhelm sent Arts a letter wherein he expressed concern over Arts' attendance and punctuality record for the time period between mid to late-November, 2005. In that letter, Wilhelm noted that during that time period, Arts had been a no-show on two days and tardy on two days. Wilhelm notified Arts that he (Arts) was to meet with management officials on December 1, 2005 to discuss his employment status.

The meeting just referenced was held as scheduled on December 1, 2005. In that meeting, Arts admitted he was a no-call/no-show on November 11 and 18, and that he was tardy on November 25 and 28, 2005. He further admitted that he was supposed to call Wilhelm on all those days before 7:00 a.m., but did not do so. When he was asked why he had not called in before 7:00 a.m., Arts responded that he didn't know why he hadn't called in – it was just that he didn't think about it, or was still sleeping. During that meeting, Landvatter expressed concern over Arts' attendance and punctuality record, and noted that Arts' no-call/no-show days and tardy days had been on Mondays and Fridays and questioned why that was occurring. Landvatter also asked Arts the following question three different times: "What is going on?" Each time, Arts had a different response. One time, Arts responded that he had a bad attitude towards work because he had not gotten a carpenter position that he wanted to get. One time, Arts responded that he was upset with the union for not appealing his last discipline (i.e. his 30 day suspension) to arbitration. One time, Arts responded that he had some personal problems. He did not identify what they were.

Following this meeting, Landvatter decided to discharge Arts for being a no-call/no-show on November 11 and 18 and being tardy on November 25 and 28, 2005 without calling in before 7:00 a.m.

On December 5, 2005, Arts and Union President Steve Kellow attended a disciplinary meeting wherein Landvatter told Arts he was being discharged for the reasons just referenced. Landvatter then gave Arts a two-page discharge letter dated that same day. The first part of that letter identified, in narrative form, what Arts had done on November 11, 18, 25 and 28, 2005 (namely, that he was a no-call/no-show on November 11 and 18 and tardy on November 25 and 28 without calling in before 7:00 a.m.) After it identified those facts, the letter continued with the following narrative:

During our meeting on December 1, 2005, I expressed concern regarding the fact that all of these dates are either a Monday or a Friday, and I questioned why this was occurring. You told me that you felt you had a bad attitude, and that the only person who could change that was you.

These actions and your responses are unacceptable and reflect a total disregard for City and/or department policy. Your actions are in violation of Chapter 14, Discipline and Discharge, of the City of Green Bay Personnel Policies and Procedures as outlined below:

- Insubordination, including disobedience, or failure or refusal to carry out assignments or instructions.
- Negligence in performance of assigned duties.
- Failure to report promptly at the starting time of a shift without the specific approval of the supervisor.
- Unexcused or excessive absenteeism.
- Failure to notify the supervisor promptly of an unanticipated absence or tardiness.

It must also be noted that you have received prior disciplines as follows:

February 11, 2004	10-day suspension	Positive drug test
January 20, 2005	30-day suspension & "Notice of Last Chance"	Sleeping during your work shift – responsibility for supervising Park patrons on the tow rope.

Your actions also violate your notice of "last chance" agreement that was issued to you on January 20, 2005 as part of a 30-day suspension for inappropriate behavior. Your "notice of last chance" stated that any inappropriate conduct or violation of department/City policy and/or procedure would result in your immediate dismissal from the City of Green Bay.

Based upon the seriousness of your recent attendance incidents, your disciplinary history and your violation of the "last chance agreement", I am terminating your employment with the City of Green Bay effective the end of your workday, December 5, 2005.

After getting the discharge letter, Arts and Kellow walked out of the room. As they were walking out the door, Arts turned back to the management representatives (who were still in the room) and said that he had started drinking again. Immediately after Arts said that, Kellow cut Arts off from saying more, and Kellow told the management representatives that the parties would talk about that issue on another date. Arts' statement just referenced (i.e. where Arts said he had started drinking again) marked the first time that Arts essentially told anyone in management that he had a drinking problem. Arts had never previously raised that matter in any disciplinary meeting.

A grievance appealing the discharge was filed the next day – December 6, 2005.

After the grievance was filed, Union Staff Representative Mark DeLorme and Assistant City Attorney Steve Morrison exchanged several e-mails concerning same. In those e-mails, DeLorme contended that Arts' work problems were directly associated with his alcoholism, and he asked the City to reconsider the termination. By e-mail dated December 15, 2005, Morrison confirmed Landvatter's decision to discharge Arts.

The Union appealed the grievance to arbitration on January 24, 2006.

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At the hearing, Arts was the only person who testified about the nature of his drinking problem. During the hearing, Arts characterized himself as a "functioning alcoholic". He testified that he first sought treatment for alcoholism in 1991. By his own admission, he resumed drinking alcohol again in 2003. He testified that in his view, his attendance problems at work in November, 2005 were related to his alcoholism. He testified that in that time period, he was drinking "quite a bit", which he quantified as three or four times a week. Arts testified that following his discharge, he went back to Libertas Treatment Center, which is the same place he was treated for alcoholism in 1991. He also testified he is going to some Alcoholics Anonymous meetings.

POSITIONS OF THE PARTIES

Union

The Union's position is that the City did not have just cause to discharge the grievant. As the Union sees it, discharge was excessive under the circumstances. It makes the following arguments to support that contention.

First, the Union responds to the City's contention that the grievance was not appealed to arbitration in a timely fashion. The Union disputes that assertion. Here's why. The Union acknowledges that Article 16, Sec. B, Step 4 of the parties' grievance procedure says that a party desiring arbitration has 15 working days to request the WERC to appoint an arbitrator. According to the Union, that timetable applies only to those grievances which are appealed under Article 16. The Union avers that here, though, the grievant's discharge was not appealed under Article 16; instead, it was appealed under Article 15. The Union submits that discharge grievances are handled differently than other grievances and are appealed pursuant to Article 15. Building on that premise, the Union asserts that the 15-day timetable referenced in Article 16 (to appeal unresolved grievances to arbitration) does not apply to discharges. As the Union sees it, there are no time limits on appeals of discharges to arbitration under Article 15.

The Union argues in the alternative that even if there are timelines for appealing a grievance to arbitration, there has not been strict adherence to those timelines by the parties herein.

Building on that premise, the Union maintains there should not be strict adherence to a timeline in this case, either. The Union therefore asks the arbitrator to address this case on the merits and not dismiss it on procedural grounds.

With regard to the merits, the Union does not dispute that the grievant did what he is charged with doing. Specifically, the Union acknowledges that in a two-week period in November, 2005, the grievant twice showed up late for work without calling in and twice failed to show up for work at all without calling in. The Union further acknowledges this was misconduct for which he could be disciplined.

That said, what the Union does challenge is the level of discipline which the Employer imposed on the grievant for that misconduct. In the Union's view, the punishment which the City imposed on the grievant (i.e. discharge) was excessive, unwarranted and inappropriate under the circumstances. Here's why.

The Union avers that the attendance and absenteeism problems which the grievant had in the two week period in November, 2005 were substantially related to, and caused by, his alcoholism. It asserts that attendance problems are commonly connected with alcohol dependency. The Union submits that the Employer should have considered the grievant's alcoholism as a substantial mitigating factor, but did not do so. In making that argument, the Union admits that the grievant did not tell his supervisors about his alcoholism prior to his termination. Be that as it may, the Union believes that the Employer should have been constructively aware of the grievant's alcohol problem prior to discharging him because two years ago he tested positive for marijuana, and a year ago he was caught with beer in his cooler at work.

The Union maintains that the majority view of arbitrators is that alcoholism is a disease, and that this must be weighed in determining whether a terminated employee should be afforded another chance. It cites the Denenbergs' book on alcoholism and drug abuse in the work place wherein they write:

> For now, there seems to be an emerging consensus among arbitrators, advocates and treatment specialists that the normal progression of corrective discipline should not be suspended for the alcoholic employee. On the contrary, the alcoholic should be held accountable for his conduct, but, to be truly "corrective", disciplinary penalties should be coupled with opportunities to recover.
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> Denenberg & Denenberg, Alcohol and Drugs, Issues in the Workplace, (BNA

1983) at page 143.

The Union argues that the grievant should have been given some opportunity to recover and prove his ability to function as a productive employee. As the Union sees it, he was not. The Union contends that after the City learned of the grievant's alcoholism, it erred by not reconsidering the grievant's termination in light of his alcoholism. It is the Union's view that instead of firing him, the City should have treated him like it did George VanderVeren in 1994 and required him to attend an EAP program and offered him a last chance agreement. The Union cites various arbitrators who have reinstated discharged alcoholic employees and it asks this arbitrator to follow their lead and reinstate the grievant.

Next, the Union disputes the City's assertion that a last chance agreement was in place when the grievant was fired. It notes in this regard that a last chance agreement cannot be unilaterally imposed by an employer. Instead, by its very nature, it has to be entered into knowingly and voluntarily in order to be binding. It avers that here, though, neither the Union nor the grievant ever signed any type of written document which purported to be a last chance agreement, nor was there any oral agreement either. Thus, the Union avers that there was no last chance agreement in effect when the grievant was fired.

Finally, the Union calls attention to the fact that after he was fired, the grievant sought treatment for his alcoholism at Libertas Treatment Center (i.e. the same place where he was treated for alcoholism in 1991). The Union asks the arbitrator to consider the grievant's willingness to seek help for his alcoholism in deciding on a remedy.

In sum, it is the Union's position that the City did not prove that it had just cause to discharge the grievant. The Union therefore requests that the grievance be sustained, the grievant reinstated, and a make-whole remedy issued.

City

The City contends that the grievance should be denied for two basic reasons. First, the City avers that the Union's appeal of the grievance to the arbitration step was not timely. The City argues that the grievance should be denied on that basis alone. Second, the Employer contends it had just cause to discharge Arts for twice being a no call/no show and twice being tardy without timely calling in beforehand. As the Employer sees it, that misconduct warranted discharge. It makes the following arguments to support these contentions.

First, the City contends that the grievance was not appealed to arbitration in a timely fashion. The factual basis for this contention (that the Union did not file a timely appeal) is that the grievance was appealed to arbitration on January 24, 2006. According to the Employer, that was too late under Article 16, B, Step 4 of the contractual grievance procedure

because that step requires an appeal to arbitration within 15 working days if no settlement is reached at Step 3. In this case, no settlement was reached at Step 3 because Morrison

confirmed Landvatter's decision to discharge Arts on December 15, 2005. The Employer argues that pursuant to Step 4, the Union then had until January 9, 2006 to appeal the grievance to arbitration (i.e. January 9, 2006 being 15 working days after December 15, 2005). Since the appeal to arbitration was filed after January 9, 2006 (namely, January 24, 2006), it is the Employer's position that the appeal to arbitration was untimely. It asks that the grievance be dismissed on that basis alone.

As part of its procedural arbitrability argument, the Employer also addresses two contentions raised by the Union. First, the Employer disputes the Union's argument that there are no time limits on appeals of discharges to arbitration under Article 15. As the Employer sees it, that contention lacks a sound contractual basis. Here's why. The Employer notes that the last sentence of Article 15 says that if "a settlement cannot be reached within ten days . . . then such dispute shall be submitted to arbitration as outlined in Article 16. . ." As previously noted, Step 4 in Article 16 (the arbitration step) requires an appeal to arbitration within 15 working days. According to the Employer, there is nothing in either Articles 15 or 16 that suggests that the 15 working day provision in Step 4 does not apply to terminations. Second, the Employer disputes the Union's contention that the time limits have not been consistently enforced in the past. It avers that the record evidence is to the contrary (namely, that the time limits have been consistently enforced in the past). To support that contention, it cites Landvatter's testimony that the grievance timelines are closely observed. It acknowledges that there have been occasions though where the time limits were not followed, but it maintains that when that happened, it was done by mutual agreement. In sum, the Employer asks the arbitrator to reject both of the Union's procedural arbitrability arguments.

Second, the Employer argues it had just cause to discharge the grievant. It notes that at the hearing, the Union acknowledged that the grievant engaged in misconduct when he was a no-call/no-show on November 11 and 18, 2005 and when he was tardy on November 25 and 28, 2005 and did not timely call in beforehand. In those instances, he failed to appear at work and neglected to follow the proper call-in procedure. Given that acknowledgment about the facts, the Employer believes that the remaining substantive issue, in terms of a just cause analysis, is whether the discipline which it imposed (i.e. discharge) was justified under the circumstances. The Employer avers that it was. In making that argument, it addresses the following matters: 1) the notions of progressive discipline; 2) due process protection; 3) disparate treatment; and 4) the grievant's alcoholism. It addresses those matters in the order just listed.

With regards to the first matter (i.e. progressive discipline), the Employer notes that in 2003 and 2004, the grievant had two major disciplinary events. In the first, he tested positive for marijuana at work and was suspended for 10 days. In the second, he fell asleep on the job

while watching a tow rope on a ski hill, was suspended for 30 days, and given a last chance warning. The Employer emphasizes that these two incidents were not minor offenses; instead,

they were considered "flagrant violations" under Article 15 that were grounds for immediate discharge. Building on that premise, the Employer avers that Arts could have been fired for either violation, but Landvatter was lenient and did not do so. It is in this context that the grievant had two no-call/no-shows and two tardies wherein he failed to follow the proper call-in procedure in about a two-week period. The Employer characterizes these four incidents as "the straw that broke the camel's back."

With regard to the second matter referenced above (i.e. due process protection), the Employer believes that the evidence shows that the grievant was given due process, and was treated fairly, empathetically and reasonably. In support thereof, it notes that on November 14, 2005, Wilhelm personally counseled Arts on the procedure he was to follow for calling in. According to the Employer, this was done to help Arts conform his conduct relating to attendance and punctuality to what the Employer expected of him. The Employer asserts that Wilhelm's personal attention failed to get Arts to change his conduct because just four days later on November 18, the grievant was again a no-call/no-show. Several days later, on November 21, Wilhelm went to Arts' house and counseled him again on the procedure he was to follow for calling in. The Employer notes that Arts responded to Wilhelm's second counseling by being tardy on November 25 and 28, and not following the proper call-in procedure. It is the Employer's view that these facts show that Wilhelm tried to get Arts to follow the proper call-in procedure, but Arts failed to do so.

With regard to the third matter referenced above (i.e. disparate treatment), the Employer addresses the factual situation where in 1993, an employee in the Parks Department – George VanderVeren – signed a written last chance agreement. That employee was subsequently discharged and a reviewing arbitrator upheld the discharge. As the Employer sees it, the fact that VanderVeren had a last chance agreement and Arts did not does not mean that Arts was discriminated against or treated unfairly. Aside from that, the Employer avers that the underlying facts in the VanderVeren case are different from the facts involved here. Accordingly, the Employer sees the VanderVeren case as being of little probative value herein. If the arbitrator finds otherwise, the Employer argues that the outcome in that case (wherein the discharge was upheld) is supportive of the City's actions in this case.

With regard to the fourth matter referenced above (i.e. the grievant's alcoholism), the Employer avers at the outset that the Union did not adequately demonstrate the existence of the grievant's alcoholism; its relationship to his problems at work; show evidence of a sincere effort to undertake treatment; and show evidence that he will not relapse this time, but instead will be successful. It elaborates on these points as follows.

First, the Employer comments as follows on the grievant's testimony about his

drinking. It notes that while the grievant testified that he thinks he has a drinking problem and that his drinking could have been the cause of his falling asleep on the ski hill and his later

attendance problems, the Employer points out that there is no medical documentation or testimony from a health care provider confirming that his falling asleep on the ski hill, failure to appear at work, failure to follow the proper call-in procedure and be at work on time were all caused by the grievant's drinking. The Employer further points out that the grievant did not say that he is actively seeking treatment or going through a specific organized treatment. As a result, the Employer maintains that it does not know if the grievant is currently going to outpatient counseling, undergoing physiological or psychiatric oversight, having periodic visits with an AODA counselor on a one-on-one basis, or what. That being so, the Employer calls the grievant's effort to overcome "his drinking problem. . .weak at best" and "half-hearted". It notes that in the KENOSHA COUNTY case relied on by the Union – where the arbitrator overturned the employee's discharge – there was medical documentation from a treating psychiatrist that the employee's work related issues were related to his alcoholism, that the employee had successfully completed an inpatient treatment program and extensive outpatient program and that the employee was committed to continued treatment. Here, though, no proof was offered at the hearing that the grievant has completed an inpatient treatment program or even has a strategy for dealing with the problem. The Employer also characterizes the grievant's testimony about his drinking as "self-serving" and "unqualified conclusions". It notes that while the grievant testified that his actions during the last two weeks of his employment were caused by his drinking problem, the Employer asks rhetorically how is it that a drinking disorder caused him to not call in? The Employer argues that for the arbitrator to consider the grievant's drinking as a mitigating factor, there should be some evidence of precisely what the action was and why those actions should be considered mitigating. According to the Employer, those facts are essential to the defense that alcoholism is a mitigating factor. As the Employer sees it, that type of proof was offered in the KENOSHA COUNTY case, but was not offered here. The Employer maintains that in this case, the Union did not offer competent evidence of the relationship of the violations to the drinking problem, what the nature of the drinking problem is, the precise nature of the actions taken to deal with the problem and a plan to see to it that there is not a relapse again.

Second, the Employer calls attention to the fact that the grievant has undergone drug and alcohol treatment twice before - once for alcohol dependency in 1991 and once for marijuana dependency in 2004. The latter was an Employer-sponsored treatment. By the grievant's own admission though, he has relapsed. As the Employer sees it, the grievant's failure to stay clean from dependency issues after the marijuana incident and the last chance warning definitely goes to the central issue of whether there is a basis for believing that the grievant will modify his behavior to conform to what is expected. According to the Employer, there is no objective basis for believing that.

Third, the Employer addresses the last chance notice. It acknowledges at the outset that

a binding last chance agreement was never signed by Arts and the Union. Instead, the Employer argues that: 1) the Union and grievant bargained the discipline for the tow rope

incident, took its' benefit of that bargain and are now estopped from denying the City's benefit of that bargain; 2) the Union never grieved to arbitration the last chance condition placed on the discipline, and consequently they cannot now say that the last chance condition was not present in the discipline; 3) under the circumstances of this case, the last chance warning was the result of two flagrant violations; and 4) even without a last chance notice, progressive discipline was followed here so that the grievant's two no-call/no-shows and two tardies were sufficient grounds for discharge.

Given all the above, the Employer submits it did not abuse its discretion in making the decision to discharge the grievant, and its exercise of judgment should not be overturned. The Employer therefore asks that the grievance be denied and the discharge upheld.

DISCUSSION

Procedural Arbitrability

Inasmuch as the City has raised a procedural arbitrability contention, it will be addressed first.

The City contends that the appeal to arbitration was not timely filed. As noted in the **POSITIONS OF THE PARTIES** section, both sides made numerous arguments about this matter (i.e. whether the appeal to arbitration was timely). The reason the parties are fighting about it is because if it was not timely filed, the arbitrator could dismiss the grievance on that basis alone. However, I am not going to address any of those arguments. Here's why. I have decided to presume for the sake of discussion that the grievance was appealed to arbitration in a timely fashion. My reason for doing so will become apparent at the end of my discussion.

Merits

The focus now turns to the merits of the grievance. I begin my discussion by looking at the applicable contract language. Article 15 of the parties' collective bargaining agreement contains what is commonly known as a "just cause" provision. The first sentence provides that "The Employer shall not discharge any employee without just cause. . ." Since the grievant was discharged, the obvious question to be answered is whether the City had just cause to discharge him.

The threshold question is what standard or criteria is going to be used to determine just cause. Arbitrators differ on their manner of analyzing just cause. Some apply the seven-step "Daugherty" standard. Others apply a standard which consists of a two-prong analysis: the

first element is whether the employer proved the employee's misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the

discipline which it imposed was justified under all the relevant facts and circumstances. Of these two approaches, I'm going to apply the latter here (i.e. the two-prong analysis). I only apply the "Daugherty" standard if the parties agree to it, and that did not happen here.

As just noted, the first part of the just cause analysis being used here requires a determination of whether the employer proved the employee's misconduct. Attention is now turned to making that call.

In many disciplinary cases, the underlying facts are disputed and, as a result, the arbitrator has to decide if misconduct actually occurred. Here, though, that is not the case for the following reasons. First, in the Union's opening statement at the hearing, it acknowledged that the grievant did what he was charged with doing – namely, being a no-call/no-show on November 11 and 18, 2005 and being tardy on November 25 and 28, 2005 without timely calling in beforehand. Second, during the hearing, the grievant admitted to that conduct as well (i.e. that he was a no-call/no-show on November 11 and 18, 2005 and was tardy on November 25 and 28, 2005 without timely calling in beforehand). That conduct constituted misconduct in the labor relations sense because an employee is supposed to show up for work and be there on time. That's a basic part of the employment relationship. If an employee is unable to show up for work or be there on time, they are supposed to call and give the employer advance notice so that the employer can plan the day's work accordingly. While this basic principle is usually referenced in an employer's work rules, in this case the parties also wrote it into their collective bargaining agreement in Article 6, Section A, which says: "in order to be granted sick leave. . .an employee must (1) report prior to the start of the work day to the department head. . .[and] (2) keep the department head informed of his/her condition. . ." The grievant knew these were the rules and that he was to follow them because he did just that on November 21, 2005 (namely, when he knew he was going to be absent for that day, he called in before his shift started). While he followed the proper call-in procedure on that one date, he failed to follow the proper call-in procedure on November 11, 18, 25 and 28, 2005. He should have called in before his shift started on those four dates too. He did not do so. His failure to do so was misconduct for which he could be disciplined.

Having just noted that the facts are not disputed and that the grievant committed the misconduct he was charged with, I want to expound on one point concerning the grievant's discharge letter. In the final two paragraphs of that letter, Landvatter twice referred to a "last chance agreement". In labor relations, a last chance agreement is a type of collective bargaining agreement reached between an employer, a union and an employee concerning the employee's continued employment. Landvatter's referring to a "last chance agreement" in those two paragraphs was a mistake because there was no "last chance agreement" that the City, the Union and Arts ever signed concerning Arts' continued employment. What

Landvatter meant to reference, rather than a last chance agreement, was a last chance warning. A last chance warning is a warning unilaterally issued by an employer to an employee. An

employer has the right to issue a last chance warning to an employee as part of its power to discipline employees. Arts' January 20, 2005 suspension letter included a last chance warning that Landvatter decided to denominate as "Notice of Last Chance". When the final two paragraphs of the discharge letter are read in context with what preceded it – namely, a reference to the "Notice of Last Chance" included in the January 20, 2005 suspension letter – it becomes clear that when Landvatter used the phrase "last chance agreement", he was referring to the "Notice of Last Chance" (i.e. the last chance warning) that was included in Arts' January 20, 2005 suspension letter. While it certainly would have been better if Landvatter had not mistakenly used the phrase "last chance agreement" in the discharge letter, and instead just used the phrase "last chance warning" or "Notice of Last Chance", I find that Landvatter's mistaken choice of words in the discharge letter relative to same does not affect the ultimate outcome herein.

The second part of the just cause analysis being used here requires that the Employer establish that the penalty imposed for the employee's misconduct was appropriate under all the relevant facts and circumstances. In reviewing the appropriateness of discipline under this standard, arbitrators generally consider the notions of progressive discipline, procedural due process and disparate treatment. The undersigned will do likewise in reviewing the appropriateness of the discipline imposed here (i.e. discharge). These matters will be addressed in the order just listed. After that, I will address the Union's alcoholism defense.

With regards to the first matter (i.e. progressive discipline), the record indicates that in 2003 and 2004, the grievant had two major disciplinary events. In the first, he tested positive for marijuana at work. For that, he was suspended for ten days and required to undergo drug assessment and treatment. In the second, he fell asleep on the job while watching a tow rope on a ski hill. For that, he was suspended for 30 days and given a "Notice of Last Chance". These two incidents were not minor offenses; rather, each was considered a "flagrant violation" under Article 15 which meant he could have been summarily discharged. That did not happen though and he instead received lengthy suspensions for each incident. What is particularly noteworthy about the discipline for the second incident (the ski hill incident) is this: after the discipline was issued, the Union grieved it, and then the parties negotiated over the terms of the discipline. The outcome of their negotiations was that the grievant would serve a 30-day suspension, but its imposition was suspended until October and the suspension would be served intermittently. Additionally, the discipline included a "Notice of Last Chance". There was nothing obtuse about what this "Notice of Last Chance" was or meant. It was a last chance warning. The suspension letter said in pertinent part:

> [Y]ou are being informed that this is your "Notice of Last Chance". Any inappropriate conduct or violation of department/City policy and/or procedure will result in your immediate dismissal

from the City of Green Bay.

Its meaning could not have been clearer. It warned him that any other problems would result in his termination. This warning, together with the length of the suspension, put the grievant on notice that he was on very thin ice, job-wise, and if he engaged in any more "inappropriate conduct", he would be discharged. If the Union felt this discipline was excessive, it could have appealed the discipline to arbitration. That did not occur. It is set against this backdrop, wherein the grievant had already been progressively disciplined with two lengthy suspensions and a last chance warning, that in about a two-week period he had two no-call/no-shows and two tardies wherein he failed to timely call in beforehand. An employee who has already been progressively disciplined is rightly exposed to more severe consequences for his actions than another employee with a clean record. It is basic progressive discipline that as disciplinary steps become more severe, employees are supposed to modify their behavior. If they do not, they can justifiably be discharged.

With regard to the second matter referenced above (i.e. due process protection), there is no evidence that the grievant was denied due process before he was fired. This finding is based on the following facts. On November 14, 2005 - the Monday following Arts' first no-call/no-show - Wilhelm personally counseled Arts on the procedure he was to follow for calling in. Wilhelm gave Arts this personal attention to help him conform his conduct relating to attendance and punctuality to what the Employer expected of him (i.e. to follow the proper call-in procedure). After receiving these instructions, Arts told Wilhelm that he understood them. Thus, he knew what he was supposed to do when he was absent and/or tardy (i.e. call in beforehand). Four days later though on November 18, Arts was again a no-call/no-show. The following workday – Monday, November 21 – Wilhelm went to Arts' house and counseled him again on the procedure he was to follow for calling in. Thus, Wilhelm counseled Arts on the proper call-in procedure twice in one week. Arts responded to this counseling by being tardy on November 25 and 28, and not following the proper call-in procedure on those days. On November 30, 2005, Wilhelm sent Arts a letter wherein Wilhelm expressed concern about Arts' attendance and punctuality record in the previous two-week period, and directed him to meet with management officials the next day. At that meeting, Arts was given the opportunity to tell his side of the story. As previously noted, during that meeting he admitted that in a two-week period he had twice been a no-call/no-show and twice been tardy without timely calling in beforehand. He then offered several reasons for his failure to follow the proper call-in procedure. After considering them, the management representatives were not persuaded that Arts would henceforth follow the proper procedure for calling in. Following that meeting, the Employer decided to discharge Arts. In my view, there is nothing in the foregoing facts that raise any so-called red flags regarding procedural due process problems. Accordingly, I find that the City gave Arts due process before it fired him.

Next, with regard to the third matter referenced above (i.e. disparate treatment), I find that Arts was not subjected to disparate treatment in terms of the punishment imposed. In so

finding, I am aware that in 1993, an employee in the Parks Department – George VanderVeren – signed a last chance agreement. As previously noted, Arts never signed a last chance agreement. However, just because VanderVeren had a last chance agreement and Arts did not does not prove that Arts was discriminated against or treated unfairly. Arts received the same punishment as VanderVeren did in that both were discharged. Aside from that, in order to establish disparate treatment, it is necessary to show that the factual circumstances involved are similar. That was not shown here.

The above discussion shows that the grievant was progressively disciplined, received procedural due process and was not subjected to disparate treatment. That being so, no reason has been established thusfar for overturning the grievant's discharge.

The next question is whether there are any mitigating circumstances which warrant altering this conclusion. The Union avers that there are. According to the Union, the grievant's alcoholism and the steps he took following his discharge to treat it should mitigate the discharge. Those contentions will be addressed in the order just listed.

I've decided to begin my discussion of the Union's alcoholism defense by reviewing how it was that the Employer learned of the grievant's drinking problem. The Employer learned of it at the meeting where Arts was discharged. After the meeting ended and Arts was literally walking out the door, Arts told the management representatives that he had started drinking again. That's all Arts said before Union President Kellow cut him off from saying more. Given Kellow's action, the Employer's representatives could not ask Arts any follow-up questions about what he meant by his statement and/or what they were supposed to infer from it. Be that as it may, the logical inference under the circumstances is that Arts intended his statement to essentially tell management that he had a drinking problem. This was literally the first time that Arts essentially told anyone in management that he had a drinking problem. He had never raised it as an issue before: not at the meetings held after he tested positive for marijuana; not at the meetings held after he fell asleep on the ski hill; and not at the meeting held December 1 to address his attendance and punctuality record in mid-November, 2005. Since Arts had never raised his drinking problem with anyone from management prior to the day he was fired, this was not a situation where the Employer already knew of it. The Union contends that the Employer should have nonetheless been aware of the grievant's drinking problem before he was fired for two reasons: (1) because he had previously tested positive for marijuana at work, and (2) because he was caught with beer at work in the ski hill incident. I find those two instances to be insufficient to ascribe such notice to the Employer. Here's why. While the marijuana matter certainly put the Employer on notice that the grievant was a marijuana user, it does not automatically follow that the Employer would know that his usage of another drug – namely, alcohol – would be problematic as well. Said another way, just

because someone is a marijuana user does not mean they are also going to be an alcoholic. Similarly, there was nothing in the ski hill sleeping incident that involved alcohol except for

the fact that Arts had two beers in his cooler. He subsequently offered an explanation for the beers which the Employer accepted. It would be one thing if the Employer had disciplined Arts for having the beer in the cooler. However, Assistant City Attorney Morrison's letter of May 12, 2005 made it crystal clear that Arts was not being disciplined for having the beer in the cooler. While there are certainly cases where an employer takes disciplinary action against an employee knowing they have a drinking problem, that was not the case here. In this case, the Employer did not learn of the grievant's drinking problem until after he was already fired. When an employee's alcohol dependency has been found to mitigate their termination, it has oftentimes been because the employer knew of the employee's alcohol dependency and further knew that it was the likely underlying cause of the employee's misconduct. That is not the case here.

While the Employer did not know of the grievant's drinking problem until after he was fired, it has been a longstanding problem for the grievant. In the remainder of this discussion, I've decided to accept at face value the Union's characterization of the grievant as an alcoholic. He first sought treatment for alcohol dependency in 1991. To put that date in perspective, that occurred ten years before he became a full-time worker with the City. By his own admission, he relapsed and began drinking again in 2003.

Next, I've decided to repeat some of the grievant's testimony from the hearing about his drinking because I'm going to comment on it. The testimony I'm referring to is this: (1) his attempt to tie his work misconduct to his alcoholism, and (2) the steps he took following his discharge to rehabilitate himself.

First, as just noted, he testified that he thought his problems at work in November, 2005 were caused by his alcoholism. That was his subjective opinion. However, no one else, such as a medical or health care provider, objectively confirmed that the grievant's workplace misconduct (i.e. his failing to come to work at all, his failing to come to work on time, and his failing to call in to work per the proper procedure), was caused by, or linked to, his alcoholism. The grievant was the only person who testified at the hearing about the nature of his drinking problem. Since there was no testimony from anyone other than the grievant that his workplace misconduct was related to, or linked to, his alcoholism, the question is whether I am going to accept his subjective opinion on that critical matter as a given. I decline to do so. Just because he felt that his workplace misconduct was connected to his alcoholism does not establish it. Additional proof was needed to show a causal connection between the grievant's workplace misconduct and his alcoholism, and is lacking here.

Second, as previously noted, he testified that following his discharge, he went back to Libertas Treatment Center (which is where he was treated for alcohol dependency in 1991) and

is going to some Alcoholics Anonymous meetings. What is noteworthy about this testimony is what it leaves out. From my perspective, this testimony raised more questions than it

answered. Here's what I mean. When the grievant said he went back to Libertas, what does that mean? Specifically, did he actively seek treatment? Was he there for a day or two months? What type of organized treatment did he undergo? Did he successfully complete an inpatient program? As for attending some Alcoholics Anonymous meetings, what does that mean – one a day or one a month? Given these unanswered questions, we don't know if the grievant successfully completed an inpatient program or any program whatsoever, or whether he is still part of an ongoing outpatient program. In order for me to consider the grievant's post-termination conduct as a mitigating factor, there should be detailed evidence of what the actions were and why those actions should be considered mitigating. Those facts are essential. As an example, in the case referenced earlier that the Union relied on – KENOSHA COUNTY – there was medical documentation from a treating psychiatrist that the employee's work-related problems were related to his alcoholism, that the employee had successfully completed an inpatient treatment and extensive outpatient program, and that the employee was committed to continued treatment. Here, though, none of the foregoing has been shown. Specifically, it has not been objectively shown that the grievant's workplace misconduct was linked to his alcoholism and what precise actions the grievant has taken to rehabilitate himself and avoid another relapse. That being so, I find that the post-discharge evidence in this record relative to rehabilitation is so weak that it does not supply a basis for concluding that the grievant has successfully undergone treatment for alcohol dependency and will not repeat the same misconduct he committed in November, 2005.

Accordingly, then, it is held that the severity of the discipline imposed here (i.e. discharge) was not excessive, disproportionate to the offenses, or an abuse of management discretion, but rather was reasonably related to the grievant's proven misconduct. Additionally, based on the record before me, the grievant's alcoholism and his post-discharge attempts to rehabilitate himself do not warrant overturning the discharge. The City therefore had just cause to discharge the grievant.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the City had just cause, to the extent required by Article 15 of the collective bargaining agreement, to discharge the grievant. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 22nd day of August, 2006.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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