

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
LOCAL UNION 67, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

CITY OF RACINE

Case 765
No. 66648
MA-13588

(Weatherspoon Suspension and Termination)

Appearances:

Mr. Jack Bernfeld, Staff Representative, AFSCME Council 40, 8033 Excelsior Drive, Suite B, Madison, Wisconsin appearing at the hearing, and **Mr. Nick Kasmer**, Staff Representative, 8450 82nd St., #308, Pleasant Prairie, Wisconsin on the brief, on behalf of Local 67.

Mr. Scott R. Letteney, Deputy City Attorney, City of Racine, 730 Washington Avenue, Racine, Wisconsin, appearing on behalf of the City of Racine.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, AFSCME Local 67 (hereinafter referred to as the Union) and the City of Racine (hereinafter referred to as either the City or the Employer) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over the suspension and subsequent discharge of Jermaine Weatherspoon. The undersigned was so designated. Arbitration hearings were held on the matter on May 29 and July 10, 2007, at which time the parties were afforded full opportunity to present such testimony, exhibits and other evidence as were relevant to the dispute. The record was thereafter reopened to receive additional evidence from the parties in the form of affidavits and responses. The parties submitted briefs, and the City submitted a reply brief, which was received on November 11, 2007, whereupon the record was closed.

ISSUES

The parties could not agree on a framing of the issue and stipulated that the arbitrator should frame the issues in his Award. The issues presented by this grievance are:

- (1) Did the City have just cause to issue a five day suspension to the Grievant, Jermaine Weatherspoon in June of 2006?
- (2) Did the City have just cause to issue a Last Chance letter to the Grievant, Jermaine Weatherspoon in June of 2006?
- (3) Did the City have just cause to terminate the Grievant, Jermaine Weatherspoon, effective September 6, 2006?
- (4) If the City did not have just cause for any or all of these acts of discipline, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE II

CONDITIONS AND DURATION OF AGREEMENT

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

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

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4. To maintain efficiency of City government operations entrusted to it.
5. To introduce new or improved methods or facilities.
6. To change existing methods or facilities.

...

8. To determine the methods, means and personnel by which such operations are to be conducted.

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In addition to the Management Rights listed above, the powers of authority which the City has not officially abridged, delegated or modified by the Agreement are retained by the City. The Union recognizes the exclusive right of the City to establish reasonable work rules. The Union and the employees agree that they will not attempt to abridge these Management Rights to interfere with the rights established under this Agreement, or the existing past practices within the departments covered by this Agreement, unless such past practices are modified by this Agreement, or by the City by rights conferred upon it by this Agreement, or the work rules established by the City of Racine. Nothing in this Agreement shall be construed as imposing an obligation upon the City to consult or negotiate concerning the above areas of discretion and policy.

ARTICLE III

GRIEVANCE PROCEDURE

A. Definition of a Grievance: Should a difference arise between the City and the Union or an employee concerning the interpretation, application, or compliance with this Agreement; the reasonableness of disciplinary action taken against any employee or employees; or the violation of a City, County, State or Federal Law which would have a direct detrimental effect upon employees in the bargaining unit, such difference shall be deemed to be a grievance and shall be handled according to the provisions herein set forth.

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

C. Time Limitations: The failure of either party to file, appeal or process a grievance in a timely fashion as provided herein shall be deemed a settlement in favor of the other party. However, if it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent confirmed in writing.

D. Names of Union Officials: The Union shall provide the Personnel Director and the Labor Negotiator with a list of members of the Grievance Committee in writing and, further, present the Personnel Director with a list of the local Union officials assigned to various aspects of the Grievance Procedure.

Step 1: The employee, with his department steward (or alternate if the department steward is unavailable due to illness or vacation), shall reduce his grievance to writing on an approved form and shall present it to the employee's immediate supervisor within fifteen (15) working days after he knew or should have known of the cause of such grievance. A copy of the grievance shall also be submitted at the same time to the Personnel Director. The immediate supervisor may confer with the grievant and his department steward (or an alternate if the department steward is unavailable due to illness or vacation) before preparing the Step 1 answer.

The employee's immediate supervisor shall, within ten (10) working days of receipt of the grievance, inform the employee and his department steward (or his alternate) in writing, of his decision.

Step 2: If the grievance is not settled at the first step, the Union may appeal to the appropriate Administrative Manager and the Personnel Director, by delivery of two (2) written copies of the appeal within five (5) working days after the date of delivery of the Step 1 answer.

The Administrative Manager and the Personnel Director may meet with the grievant, his department steward (or an alternate if the department steward is unavailable due to illness or vacation) and one (1) additional Union representative prior to preparing the Step 2 answer.

The Administrative Manager shall deliver the written Step 2 answer to the grievant and his department steward (or alternate) within ten (10) working days of receipt of the Step 2 appeal.

E. Work Now - Grieve Later: In the event of a grievance, the employee shall perform his assigned work task and grieve the dispute later. In the event of a safety situation, the work shall be immediately postponed until a satisfactory solution can be determined. This grievance shall thereafter be processed within a reasonable period of time.

F. Arbitration: If the Union grievance is not settled at the second step, or if any grievance filed by the City cannot be satisfactorily resolved by conferences with the appropriate representatives of the Union, the grievance shall be submitted to arbitration upon request of either party within thirty (30) calendar days of receipt of the Step 2 answer.

G. Selection of Arbitrator: In the event any grievance remains unresolved after exhausting the Grievance Procedure, either party may request the Wisconsin Employment Relations Commission (with a copy of the request to the other party) to appoint a WERC representative if possible or an impartial arbitrator to resolve the dispute.

H. Arbitration Hearing: The Arbitrator shall use his best efforts to mediate the grievance before the final arbitration hearing. The parties shall agree in advance upon procedures to be used at the hearing and the hearing shall follow a quasi-judicial format. The Arbitrator selected shall meet with the parties as soon as a mutually agreeable date can be set to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the Arbitrator shall render a written decision as soon as possible to both the City and Union, which shall be final and binding upon both parties.

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

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

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

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

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**EXCERPTS FROM "WORK RULES BETWEEN
LOCAL 67 AFSCME AND CITY OF RACINE"**

1. FOREWORD

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

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

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

A. Time Cards

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3. Tardiness shall not be tolerated and shall be considered a violation of the work rules, resulting in the appropriate disciplinary action.

...

B. Notification of Absence

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

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Q. Work Performance

1. Following is a list of prohibited conduct which may result in disciplinary action ranging from written or oral reprimands to immediate discharge, depending upon the specific form of conduct and/or the number of infractions.
 - a) insubordination, including disobedience or failure to carry out assignments or instructions.
 - b) tardiness, loafing, loitering, sleeping, or engaging in unauthorized City and personal business
 - c) abusive use of sick leave benefits
 - d) failure to comply with health, safety, and sanitation rules and regulations
 - e) negligence in performing assigned duties

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BACKGROUND

The City provides general municipal services to the citizens of Racine in southeastern Wisconsin, including the operation of a Department of Public Works. The DPW, among other things, provides waste and recycling collection. The Union is the exclusive bargaining representative for the non-supervisory employees of the DPW. The Grievant, Jermaine Weatherspoon, was employed as a driver in the DPW's solid waste division from December, 2000 until his termination on September 6, 2006. For the bulk of his time, he was assigned to the garbage pickup section. In the late spring of 2006, he was reassigned to recycling.

On June 6, 2006, the Grievant was assessed a five day suspension for failing to timely notify his supervisor of an absence from work. More specifically, he called in sick 20 minutes after his shift began. The work rules between the parties direct employees to call in 15 minutes prior to the start of the shift. His explanation was he was ill, lost track of time, and called as soon as he was able to leave the bathroom. At the discipline meeting, Superintendent Jeff Fidler read aloud a notice of suspension. Part of the notice included a statement that the Grievant's record was unacceptable, and that in addition to the suspension, he would be issued a Last Chance letter subjecting him to termination for any further work rule violations:

On Friday June 9, 2006 you did not call or report for work by 7:00 a.m. we did not hear from you until 7:20 a.m. when you called the field office to say you were sick. This is a violation of our work rules. You have been reprimanded in the past for this work rule violation, so you are fully aware of how disruptive this behavior is to our operation. Your entire work record has now deteriorated to the point that your employer cannot and will not tolerate any further work rule violations. Therefore, I am issuing you this 5 day suspension for violation of work rule "b. Notification of absence, sec. 1 & 2 ", and on the totality of the work record you have compiled with the city of Racine. In addition, you will receive a "last chance letter" which will detail the city's expectation of you as an

employee. Hopefully you will take every measure to correct your behavior in the future. Please be advised that any further work rule violations will result in your termination of employment with the city of Racine. Please note: suspension days will be Monday June 19, Tuesday June 20, Wednesday June 21, Thursday June 22, and Friday June 23, 2006.

Fidler maintains that he also read and served the Last Chance letter on the Grievant at the discipline meeting, while the Grievant and the Union contend that they never saw the letter until he was terminated. This dispute is more fully discussed later in this Award.

At the time of the June suspension, the Grievant's prior disciplinary history during his full-time employment with the City was as follows:

<u>Date Issued</u>	<u>Discipline</u>	<u>Reason</u>
2006		
June 5, 2006	Written Reprimand	Failure to carry out assigned duties and negligence in performing assigned duties
2005		
December 1, 2005	1 Day Suspension	Tardiness
June 29, 2005	Written Reprimand	Tardiness
April 26, 2005	Written Reprimand	Notification of absence
March 30, 2005	Oral Reprimand	Failure to carry out assignments
January 28, 2005	5 Day Suspension	Work performance and personal actions
January 20, 2005	Oral Reprimand	Negligence in performing assigned duties
2004		
December 20, 2004	Written Reprimand	Failure to carry out assignments
June 29, 2004	Oral Reprimand	Tardiness
May 18, 2004	1 Day Suspension	Negligence in performing assigned duties
March 19, 2004	1 Day Suspension	Negligence in performing assigned duties
2003		
November 19, 2003	Oral Reprimand	Notification of absence
January 15, 2003	Written Reprimand	Work Performance
2002		
None		
2001		
July 19, 2001	Oral Reprimand	Failure to report a personal injury
January 11, 2001	Oral Reprimand	Accident
2000		
None		

On July 11, the Grievant was assessed an oral reprimand for deviating from his assigned route while working recycling, and missing several blocks. The notice of discipline stated that, while the deviation was a minor infraction, he was on a last chance status, and “the city has put you on alert that any work rule violation could result in the termination of your employment. Please be advised that the City of Racine will terminate your employment with them for any further work rule violations, no matter how minor it might be.”

On August 16th, the Grievant contacted the office and asked for advice on how to perform a portion of his recycling route that was under construction. His supervisor, Kevin Molbeck, gave him several options on how to approach that section, a stretch of one-way road where access was blocked by construction, including backing down the street. That section of road is the end of the first of the two recycling routes assigned to the Grievant that day. Some time later, while Molbeck was driving through, checking the route, he noted that the one way portion had been completed, along with several adjacent streets which ordinarily would have been pulled at the end of the Grievant’s second route. He contacted his fellow supervisor, Kelvin Weatherspoon, who is also the Grievant’s brother, and asked him to meet him on the route. The two of them met the Grievant, and Molbeck asked him how he had completed Shelley and Harvey Drives already. The Grievant replied that he hadn’t but would be going back through that portion to be sure nothing had been missed. Molbeck and Kelvin Weatherspoon left, but the Grievant called them back out fifteen minutes later. He noted that Jeff Fidler had said he would be fired for doing anything wrong, and he asked if this was a big thing or a small thing. Molbeck told him he didn’t know, but that there would be a meeting about it that afternoon, and if it had been him, he would have picked up the route differently. Molbeck and Kelvin Weatherspoon left again, but the Grievant contacted them by radio and they went back out to meet him. He told them he felt sick, and asked if he could go home. They told him he could.

The Grievant was terminated for deviating from his assigned route in collecting recycling, and for his overall record. The instant grievance was filed, and was consolidated for hearing and decision with the grievance over the discipline from June 16th. At the hearing in this matter, Jeff Fidler testified that he read the notice of suspension aloud to the Grievant and to his Union representative, Phil Bauer, and also read aloud the Last Chance letter, copies of which he then handed to the Grievant and Bauer. Kelvin Weatherspoon testified that he was present for that meeting, and that he saw Fidler reading from two different documents, though he did not see the documents themselves. Former Superintendent Joe Golden, Jeff Fidler, and Kelvin Weatherspoon all generally agreed that deviating from established routes was not an uncommon occurrence, and that it would normally result in at most a reprimand.

The Grievant and Union President Scott Sharp both testified that it was Sharp and not Phil Bauer who represented him at the discipline meeting on the five day suspension, and both denied that the Last Chance letter was read aloud or provided to them at that meeting, or that it was provided by mail. The suspension notice itself was read, but Sharp noted that it stated that a letter would be sent, not hand delivered, and that mailing was the normal practice for Last

Chance letters. He also noted that the letter was generic, in that it showed a copy to "Union Representative - Local 67" rather than naming him, which was the normal practice, and that it was addressed to the Grievant at his home address, and did not contain any indication that it was to be hand delivered.

The Grievant agreed that he had picked up his recycling route out of order on August 16th. When Molbeck and he discussed how to handle the construction, Molbeck told him to pick it up the way he was going to pick it up, which he thought gave him some discretion to vary the route. He noted that the two streets he picked out of order - Harvey Drive and Shelley Drive - were right next to the end of his first route, and were part of the same garbage hauling route as West Boulevard, even though they were on different recycling routes. When he was asked about it later on by Molbeck and Kelvin Weatherspoon, he said he would go back through to make sure nothing had been missed. He did not recall telling them he had not gone through already.

Phil Bauer testified that employees were expected to follow the routes assigned by management, but that route deviations were a frequent occurrence and are considered a very minor offense. They resulted in at most an oral or a written reprimand, never a suspension or a termination. Bauer conceded that he did not know if management was aware of every instance of employees on recycling routes deviating from their assignments.

Scott Sharp testified that in his experience, the City typically followed progressive discipline, unless the employee had a drug offense or an accident above a certain dollar amount. Many years ago, Joe Golden had taken the position that the progression was a 1 day, a 3 day and a 5 day suspension, followed by termination. Sharp noted, however, that when Jim Kozina became the Personnel Director, he started using longer suspensions before discharge, and it was very unusual to see anyone terminated without first serving a 30 day suspension. Sharp recalled a number of employees who had received 30 day suspensions, but still remained City employees, and stated that he did not believe any employee had ever been issued a Last Chance letter in conjunction with less than a thirty day suspension. On cross-examination, Sharp conceded that an employee named Steve K***** had received a Last Chance letter without first receiving a 30 day suspension, but he expressed the opinion that that was because K***** agreed to the issuance of the letter, transforming it into a Last Chance Agreement.

In rebuttal, the City submitted an affidavit by Assistant Human Resources Director Terry Parker, stating that an employee named Chuck B***** had received both a 30 day suspension and a Last Chance letter, but that the two were issued five months apart and were unrelated. The Last Chance letter was issued for his overall work record, in conjunction with a written reprimand for failing to advise the City of a change in his address. Parker also stated that Steve K***** never signed off on a Last Chance letter. He was issued such a letter in March of 2006 in conjunction with a five day suspension, and was then terminated in May 2006 for missing work. Parker finally noted that there had been formal discipline for deviating from routes since at least 2003, citing nine instances of oral and written reprimands between 2003 and June of 2007.

The Union replied by submitting a settlement agreement concerning Steve K*****'s five day suspension in March of 2006, showing that he accepted the suspension, and that the Last Chance letter was not in effect at the time of his discharge. The Union also objected to the citation by Parker of three instances of discipline for route deviations which occurred after the Grievant's termination.

Additional facts, as necessary, are set forth below.

POSITIONS OF THE PARTIES

The City's Argument

The Grievant had an abominable work record, consisting of 17 disciplines in under six years of employment, 9 of them coming in his last 20 months with the City. Five of those disciplines, including the 5 day suspension at issue here, were for failing to give timely notice of an absence. This was not a requirement he was ignorant of – he had ample notice that he was obliged to call his supervisor before his shift started if he was not coming into work. He failed to do so on June 9th, and thereby exposed himself to discipline. Given his prior history, a five day suspension was easily within the range of penalties available to the City.

The termination of the Grievant followed a minor offense – failure to follow the correct route for picking up recycling. Plainly the discharge was not directly the result of this individual offense. It was simply the final straw for the City in its dealings with him. Following the suspension in June, the City provided the Grievant with clear and unambiguous notice that any further violations, no matter how minor, would lead to discharge. Despite this, he twice violated work rules within the month following the warning. He knew the rules, and he knew that he would be disciplined for violating the rules. More to the point, he was specifically cautioned that the penalty would be discharge. Given his terrible overall record, his relatively short length of service, and the clear warnings he was given, the arbitrator should conclude that discharge was not a disproportionate penalty, and should deny the grievance in its entirety.

The Union's Argument

The Union takes the position that the discipline imposed on the Grievant was not supported by just cause, and that he must be reinstated and made whole for his losses. First addressing the suspension, the Union notes that there is no dispute that the Grievant called in 20 minutes after his shift began. However, it is also undisputed that he was so seriously ill that he could not leave his bathroom. He called as soon as he was physically able to do so, and his good faith attempt to comply with the rules, to the best of his ability, should excuse this minor rule violation. Even if the arbitrator should decide that the Grievant's reasonable efforts to comply do not completely excuse the later call-in, he must find that they substantially mitigate his culpability, and that a five day suspension is far out of proportion to the offense.

The Union also argues that a five day suspension is inconsistent with the tenets of progressive discipline. Progressive discipline generally requires that subsequent disciplinary measures build on and be reasonably related to the preceding penalties. In this case, the Grievant was verbally reprimanded for a late call-in in November of 2003, and given a written reprimand for a late call-in in April of 2005. This third incident took place fourteen months later, and was met with a five day suspension. That is not a normal progression of discipline, under any reasonable system, and it does not conform with the more normal pattern of several reprimands, followed by a short suspension, then a longer suspension that the City has used in other cases. Under any traditional mode of analysis, the City's use of a five day suspension for this late call-in was grossly inappropriate and cannot be allowed to stand under a just cause standard.

Turning to the Grievant's discharge, the Union notes that the City admits the alleged offense – picking up his route in the wrong order – was very minor. Indeed, on the facts of this case, it does not support any discipline at all. The Grievant consulted with his supervisor on how to properly pick the route. It stands to reason that he did so in order to avoid further discipline, and it would make no sense at all to conclude that he then went off on some route of his own devising. Even if he had, the City concedes that picking a route out of order is a fairly common occurrence, and only one employee – Craig St. Amant - has ever before been disciplined for picking his route out of order, without missing a pickup. St. Amant received a verbal reprimand. Given this disciplinary history, no reasonable person could have anticipated formal discipline for this, much less termination.

Even if there was cause for discipline on July 16th, the sole basis on which the termination stands is the alleged Last Chance letter the City says it served upon the Grievant. However, the Grievant and the Union President both credibly testified that the Last Chance letter was never provided to them before the termination. The Union notes that the letter itself shows copies to the Superintendent, the Deputy City Attorney and to the Union, but has a check mark only next to the Superintendent. The City claims it was hand delivered at the meeting on the discipline, but that is at odds with the normal practice of mailing such letters, and with the actual notice of discipline, which stated that a letter would be mailed. The City bears the burden of proof that the Grievant and the Union received the Last Chance letter, and the record supports the opposite conclusion.

Even if a Last Chance letter had been served, the Union argues that there was no valid basis on which such a letter could have been issued. The Grievant's work record does not merit a Last Chance letter. Such letters have only been used in conjunction with serious offenses and lengthy suspensions (generally thirty days) in the past, not in response to being 20 minutes late on a call-in. The Grievant had never received more than a five day suspension in the past, and no employee has ever received a Last Chance letter with that minimal a disciplinary record.¹

¹ The Grievant was once nominally assessed a ten day suspension, but that was reduced to a five day suspension in the grievance procedure. For purposes of this proceeding, therefore, it must be treated as having been a five day suspension.

The City's Reply Brief

The City argues that, in its effort to contest the five day suspension, the Union ignores the simple fact that there is a crystal clear rule requiring employees to call-in at least 15 minutes before their shift if they will be tardy or absent, and the Grievant called in 20 minutes after his shift began. The Grievant violated the rule. Discipline follows from rule violations, a fact he well knows, having been disciplined for late call-ins twice in the past, in addition to his numerous other attendance-related warnings and reprimands. As for the Union's claim that the Grievant acted reasonably because the City did not refute his claim to have been confined to his bathroom, the City argues it is absurd to think it should monitor the Grievant's early morning ablutions. Doubtless he thought he had good reason for calling-in or reporting late on many occasions, but he was nonetheless disciplined, and he deserved discipline in this instance as well.

While the City follows the broad principles of corrective discipline, there is no reference to it in the collective bargaining agreement and there is no requirement of a formalistic, rigid set of steps that must be followed in all cases, nor some multi-track system with separate progressions of penalties for separate categories of offenses. Rather the City is obliged to consider the employee's overall work history and disciplinary record in deciding on the appropriate penalty in a given case. This was the Grievant's sixth offense for being tardy or calling in late, and his prior offense had resulted in a one day suspension only seven months before. Stepping the penalty up to a five day suspension is an appropriate response to his failure to improve.

Turning to the discharge, the City notes again that the Grievant had sixteen prior acts of discipline on his record. In his final twenty months of employment, he had nine acts of discipline. He had many, many opportunities to improve, and he did not. He had ample notice that he was reaching the end of the line, and he failed to take notice. The City specifically told him that his next offense, no matter how minor, would be his last. He failed to follow his correct route, and employees who fail to follow their routes commonly receive discipline.

The Union's attempt to persuade the arbitrator that the last chance letter was never served must be rejected in the face of the clear testimony of Superintendent Jeff Fidler and Supervisor Kelvin Weatherspoon, the Grievant's brother. Both agreed that Fidler read the letter aloud at the disciplinary meeting and provided a copy to the Grievant.

The Grievant's failure to follow his route on July 16th was the last straw in his career with the City. The City had ample cause to discharge him, based on the totality of his record, and the arbitrator should therefore ratify the City's decision and dismiss this grievance.

DISCUSSION

This case is largely concerned with whether the penalties imposed on the Grievant are consistent with just cause, rather than whether there was just cause for any discipline in the first place. The Grievant unquestionably violated City work rules on June 6, 2006, when he failed to call in fifteen minutes prior to the start of his shift. I cannot agree with the Union that his claim of having been too sick to keep track of time and make the phone call before his shift can provide an excuse. An employee's unsupported claim cannot establish a medical excuse for a late call-in, inasmuch as that puts the City in the position of having to meet an impossible burden of proof in such cases – that the employee's call was not only late, but that he was capable of calling earlier. Certainly there may be cases where circumstances or other evidence support an employee's explanation that he or she could not call-in on time, even in the absence of a medical excuse, but that is not the case here. The City had just cause to discipline the Grievant on June 6th.

It appears that the Grievant also engaged in at least a technical violation of the work rules on August 16th, when he made a slight deviation in his assigned recycling route, picking up two streets out of order. This is conduct that has resulted in, at most, oral reprimands in the past.² It is clear that the deviation itself was not the cause of the termination. If the termination is to stand, it must be because the Grievant's overall record justified the issuance of a Last Chance letter, and because that letter had the effect of putting him at risk of termination for even an otherwise trivial infraction.

The Appropriateness of the Penalties

At the outset, the arbitrator notes that the City has disputed in this proceeding the suggestion that discipline under the contract must be progressive. At the hearing, the arbitrator advised the City of his view that progressive discipline was inherent in the contractually agreed standard of "just cause" for discipline, and in specific agreement that the purpose of discipline under the contract was correction of employee behavior. In this regard, Article III, Section K provides:

K. Discipline: The Union shall be furnished with a copy of any written notice or reprimand, suspension or discharge. The City agrees that it will attempt at all times to use the disciplinary process as a means to correct shortcomings on the part of City employees in terms of their overall work performance. Discipline, therefore, is intended to initiate a corrective action on the part of the employee. A written reprimand sustained in the Grievance

² In this regard, I agree with the Union's distinction between cases where employees failed to do a portion of their route, and cases where employees did the entire route, but out of order. There is but one case of discipline for the latter offense before this, and that was an oral reprimand to Craig St. Amant in 2004. An employee named Robert Bernal was given an oral reprimand for a route deviation after the Grievant was terminated. Since that post-dates the Grievant's case, it is not particularly relevant to showing the existing disciplinary standard at the time.

Procedure or not contested shall be considered a valid warning. The Union agrees upon receipt of the reprimand notice to review the situation with the employee in an attempt to correct the problem. When an employee's record is cleared of minor infringements for a year, all previous records of minor infringements shall be removed from his personnel file. [Emphasis added].

In order to have a corrective, rather than punitive effect, discipline must be progressive. The purpose of progressive discipline is to correct employee behavior through the application of increasingly severe penalties, thereby driving home the inappropriateness of the conduct, the need for improvement, and the consequences for failing to improve. The conclusion that the City is committed to a system of progressive discipline is buttressed by the wording of its work rules, which in several places specify that misconduct “may result in disciplinary action ranging from written or oral reprimands to immediate discharge, depending upon the specific form of conduct and/or the number of infractions.”

As indicated by the wording in the work rules, a commitment to progressive discipline does not mean a mechanical or lockstep escalation, without regard to the seriousness of the offense, but it does mean that the penalty is normally determined by looking to the preceding steps of discipline. It is evident from the disciplinary histories in this record, including the Grievant's, that management exercises discretion in electing when and to what measure penalties are increased, based upon the employee's overall record and the nature of the offense. That is not at all inconsistent with progressive discipline. Again, progressive discipline is not a mechanical process, and management's decisions as to penalties remain entitled to deference, so long as the chosen penalty is generally consistent with the employee's past record and with the penalties employed for similarly situated employees.

The Five Day Suspension

In reviewing the choice of a five day suspension for the Grievant's failure to call-in on June 6th, I conclude, contrary to the Union, that it was generally consistent with the principles of progressive and corrective discipline. Although the Grievant had only two prior instances of late call-in, leading to an oral reprimand and a written reprimand, he had a one day suspension for attendance related reasons within the preceding six months, and within a year and one half period had accumulated five reprimands and two suspensions. A lengthier suspension was warranted, and while skipping to a five day suspension rather than a three day suspension was at the margins of allowable discretion, I cannot say it was an abuse of discretion.

The Last Chance Letter

The decision to issue a Last Chance letter, on the other hand, does appear to have exceeded the bounds of general discretion, at least as measured by the City's past disciplinary practices. A Last Chance letter under the City's system, is not the same as a Last Chance Agreement. A Last Chance Agreement (LCA) is, as the name suggests, an agreement between the employer, the union and the employee, by which the employer agrees to forgo discharging

the employee for an offense in favor of a suspension, in return for the employee's agreement to accept the suspension and conform to the rules in the future, and the union's agreement that the appropriate penalty for a future offense will be termination. Thus in cases involving Last Chance Agreements, issues of progressive discipline and proportionality of penalties do not generally come into play. The issues are typically confined to (1) whether there is an LCA; and/or (2) whether the conduct alleged is covered by the LCA; and/or (3) whether the employee violated the LCA.

In contrast to a Last Chance Agreement, a Last Chance letter is a unilateral statement by the City of its intention to put the employee on a kind of probationary status. It is, as the City points out in its post-hearing submission detailing the issuance of Last Chance letters to B***** and K*****, a distinct disciplinary act based on the totality of an employee's record, and not on a specific triggering event. That having been said, the evidence of Last Chance letters in the record shows that employees receiving such letters have generally received quite lengthy suspensions in advance of the Last Chance letter. The Grievant had 13 days of suspension when his Last Chance letter was issued, including two 5 day suspensions. In the twelve months preceding the Last Chance letter, he had a one day suspension and two reprimands. Gabriel S***** had 33 days of suspension, including a 30 day suspension preceding his Last Chance letter. Chuck B***** had 78 days worth of suspensions in his record, including a 30 day suspension and two 10 day suspensions. He had five separate suspensions in the twelve month before the Last Chance letter. It appears that Markus D**** had at least 38 days of suspension, including a 30 day suspension, although the spacing of those suspensions is difficult to determine. Steve K***** had 16 days worth of suspensions, the last of which was a 5 day suspension, one of five separate suspensions in the twelve months before his Last Chance letter was issued. However, it appears that the Last Chance letter issued at the time of that last suspension was withdrawn in the grievance procedure and that his subsequent termination was not challenged. Thus the K***** example has no value in assessing what have been the accepted norms for the issuance of Last Chance letters.

There is no example in the record of a Last Chance letter being issued to an employee whose record was not materially worse than that of the Grievant, and who has not first served a suspension of 30 days. This is not a minor technicality. The effect of a Last Chance letter is supposed to be to suspend the usual requirement that the degree of discipline be in proportion to the act of misconduct alleged. It represents not simply a ratcheting up of discipline, but an abandonment of progressive and corrective discipline in favor of a zero tolerance for any and all rule violations. The justification for this is the overall poor work record of the employee. The City has the right to decide to use this device as a separate and final measure of discipline for employees judged to be incorrigible, but in making that judgment, it must use a consistent definition of incorrigible. In this case, it is not possible to identify what it is in the Grievant's record that placed him in the company of the other employees who had been issued Last Chance letters in the past. His recent disciplinary history had shown improvement, and his overall disciplinary history was markedly better than any other employee who had been placed on Last Chance status.

Separate and apart from any commitment to progressive discipline, an employer operating under a just cause standard has an obligation to impose discipline in an even-handed manner, without engaging in disparate treatment of employees. I conclude that the decision to issue a Last Chance letter to the Grievant, based upon the totality of his disciplinary record as compared to the disciplinary records of others to whom such letters had been issued, was disparate treatment, and was inconsistent with the tenets of just cause.³

The Termination

As discussed earlier, the Grievant was terminated for deviating from the approved route, conduct that is conceded by all to amount to a very minor rule violation. The most any other employee had received prior to this time for doing a route out of order was an oral reprimand, and the City acknowledges that termination would be well out of proportion to the offense, absent the Last Chance letter. I have concluded that the City lacked just cause to issue a Last Chance letter, and it follows that it lacked just cause to terminate the Grievant. Inasmuch as he had previously received an oral reprimand for not following his prescribed route, in an instance in which he had missed some homes, the City would have been justified in issuing a written reprimand to him.

The Appropriate Remedy

The City had just cause to suspend the Grievant for five days, and no remedy is due for that portion of the grievance. The issuance of the Last Chance letter was not supported by just cause, and the appropriate remedy is to rescind that letter. The Grievant was guilty of a rule violation in deviating from his route in August of 2006. This was a very minor offense, which given his prior record would have supported at most a written reprimand. The appropriate remedy, therefore, is to reduce the termination to a written reprimand, and to reinstate the Grievant to his former position, making him whole for the losses he has suffered by virtue of the discharge.

On the basis of the foregoing and the record as a whole, I have made the following

³ I have not found it necessary to resolve the unusual dispute over whether the Grievant was ever actually served with a Last Chance letter at the time of his suspension. Assuming for the sake of analysis that he was, no procedural objections have been raised in this proceeding, and his challenge to that letter would be part and parcel of the challenge to the discipline for the late call-in.

AWARD

The City had just cause to suspend the Grievant for five days for a late call-in in June of 2006.

The City did not have just cause to issue a Last Chance letter to the Grievant for his overall work record in June of 2006.

The City did not have just cause to terminate the Grievant for deviating from his route in August of 2006. The City did have just cause to issue a written reprimand to the Grievant for deviating from his route in August of 2006.

The appropriate remedy is to (1) rescind the Last Chance letter; (2) reduce the termination to a written reprimand; (3) immediately reinstate the Grievant to his former position; and (4) make him whole for his losses by reason of the termination.

The arbitrator will retain jurisdiction over this matter for a period of thirty days for the sole purpose of resolving disputes over the remedy, if requested.

Dated at Racine, Wisconsin, this 20th day of June, 2008.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator