BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 284, AFL-CIO

and

CITY OF EAU CLAIRE

Case 294
No. 69756
MA-14725

Appearances:

Mr. Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 824 York Street, #2, Manitowoc, Wisconsin 54220, appeared on behalf of the Union.

Ms. Mindy K. Dale, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appeared on behalf of the City.

ARBITRATION AWARD

On April 5, 2010 AFSCME, Local 284, AFL-CIO and the City of Eau Claire filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint Danielle L. Carne, a member of its staff, assigned to hear and decide a dispute pending between the parties. Subsequent to her appointment, the Commission advised the parties that Ms. Carne was no longer available to hear the matter due to caseload considerations. The parties thereafter requested that William C. Houlihan, another member of the Commission's staff, be appointed. Following appointment, the matter was set for hearing on August 11-12, 2010, in Eau Claire, Wisconsin. A transcript of the proceedings was taken and distributed on September 3, 2010. Post-hearing briefs and reply briefs were submitted, and exchanged by November 4, 2010.

ISSUE

The parties stipulated to the following issues.

Did the Union waive its right to file for arbitration?

Did the City have just cause for issuing the grievant a two week, unpaid suspension?

If not, what is the appropriate remedy?

BACKGROUND AND FACTS

The grievant, Katy Martin, worked for the City of Eau Claire, in a number of positions, beginning in 1999. On, or about May, 2006 she posted into a Service Worker I position, which she occupied during the time frame relevant to this dispute. The Service Worker I position performs a variety of functions, including meter reading and Diggers Hotline locates. It was the grievant's primary assignment to travel about the City, in her personal vehicle, reading meters and/or doing locates.

On February 2, 2009 the grievant was given written notice of a two week suspension. The full text of the notice is set forth below. A grievance was filed on February 11, 2009. A response was made, denying the grievance on March 13, 2009. The grievance was subsequently denied by the City Manager on May 5, 2009. The Union indicated that the matter would be appealed to arbitration by letter of May 14, 2009. The matter thereafter sat. It was the testimony of all witnesses that the parties do not adhere to the timelines set forth in the contract.

The grievant was subsequently terminated on December 22, 2009. A grievance over the termination was filed on December 30, 2009. The grievance was processed through the parties grievance procedure, and on February 5, 2010 the City moved the termination grievance to arbitration. In correspondence between the parties City attorney Steve Bohrer wrote: "I am assuming that the Union will not separately pursue the suspension grievance to arbitration. Obviously, we still have to get the suspension facts in for the discharge case (e.g., progressive discipline), but I'd like to know your intentions on the suspension grievance." In response, Union Representative Mark DeLorme responded: "…I'll address this as well as the suspension issue and let you know."

A number of other grievances were processed by the parties. On, or about March 11. 2010 the parties scheduled the termination grievance for April 27, 2010. On April 1, 2010 the Union filed a request to arbitrate the suspension. On April 12, 2010 the Union requested that the termination hearing be postponed to permit the suspension case to be heard, and decided, before the termination hearing. The City objected. There followed a lengthy exchange wherein the Union ultimately indicated that it would not attend the scheduled April 27 hearing, and the arbitrator cancelled the date.

As noted above, the suspension grievance, which is the subject of this Award, then proceeded to hearing on August 11 and 12, 2010.

The events leading to this dispute began on, or about, September 16, 2008. On that date a citizen contacted Jeff Pippenger, who is the Utilities Administrator for the City of Eau Claire, and advised him that the grievant was working out at the Highland Fitness Center during her work day. The following day Pippenger contacted the Fitness Center to see what information he could get relative to when the grievant worked out. On September 18th he was provided with the computer check in log for the grievant for the period June 6, 2008 – September 18, 2008. That log indicated that the grievant had used the facility on 108 occasions, including numerous weekday entries noted as "Training". There were 52 entries that the City regarded as of concern, in that they appeared to fall within the work day.

Pippenger determined to follow Martin on her work route the next day, but lost her. He returned to his office and called the Fitness Center, and was told that Martin was there and working out. He then returned to the Fitness Center, waited for her to leave, and videotaped her exit from the club. Pippenger also did a plotting of the grievant's locates for September 19 and concluded that the club was well out of her way.

James Forster is a retired Eau Claire Police Officer who, upon retirement works with the U.S. Marshall Service in the county courthouse and also has a private investigation business. It was Forster's testimony that he observed the grievant coming to the courthouse on a number of occasions to meet with SCORE, an organization of retired business executives who counsel people on opening a business. According to Forster one such visit, on July 9, lasted for an hour to an hour and one half.

The City determined to hire a private investigator, and by chance, hired Forster. Forster made two attempts to follow the grievant. He lost her on both occasions. His report describes her driving as evasive, making U turns unexpectedly, by-passing scheduled locates and driving randomly to others. He did verify that she was at the Fitness Center in the late morning.

The City concluded that the grievant was taking substantial work time to exercise at the health club and to seek advice from the SCORE program. The City continued the investigation by interviewing her current and past supervisors to see if anyone had granted permission to consolidate breaks so as to go to the health club. No one had authorized such breaks. The City mapped, and attempted to replicate the grievant's claimed mileage, and concluded that she was padding her mileage for purposes of reimbursement. Employees of the health club were interviewed, and those individuals essentially indicated that the times noted on the computerized cards were times the grievant had punched in, that her training sessions lasted approximately 55 minutes, in addition to changing and showering, and that only she could and did use the plan.

Following the investigation, the grievant was interviewed on October 6, 2008. During the course of the interview she indicated that she could not recall driving to non-work locations, including the Highland Fitness Center, during the prior 5 months. In responding to a follow-up question she indicated that she may have had lunch at the club on approximately 6

occasions in the prior 5 months. The grievant further indicated that she inflated her mileage to take into account "idling", the time when the car ran but was not moving. The practice of "idling" is one the grievant indicated she was instructed to do to account for the time the car was running but not being reimbursed, and she indicated that most employees did the same.

The grievant was interviewed again on October 14, 2008. During the course of this interview, the grievant indicated that she had checked her records and that her babysitter had taken her children to the health club on 4 specified dates. She was asked about the record of her being at the Fitness Center on 43 occasions during the work week working out during work hours and indicated that it was not her, and that it must have been her babysitter, who punched in with her card. At one point she indicated that she may have walked on the treadmill while having lunch with a friend. She further indicated that she may have stopped by the Fitness Center while the sitter had her children there and visited or had lunch.

A third interview was held on November 14, 2008. During this interview the grievant acknowledged adding 132 miles to her mileage reports, and indicated that she had gone to the Fitness club to work out, in addition to her social meetings, on 9 occasions. She indicated that she was sharing a membership with two other women, and that the majority of entries belonged to others. She explained other entries by indicating that she had stopped to use the restroom or to visit with her children during breaks.

Ms. Martin provided a written followup to clarify the seeming inconsistencies which appeared in her three interviews. That document included the following:

TO: Dale Peters

FROM: KATY MARTIN

DATE: 12-1-2008

RE: CITY INVESTIGATION FOLLOW-UP QUESTIONS

> This is in response to the list of questions you sent me, which I received on November 21, 2008. I have taken some time to go over these specific dates and times and I have discussed them with Kayla and Jen (the two other people who have used the health club and who have used my membership card there). . . .I realize that in our meetings I told you I thought it had been a total of about six times that I personally used the club. But in going over the specific dates in your letter with Kayla and Jen I now think it was actually seven days in September and two days earlier in the summer for a total of nine times when I personally went to the club. . .So, in response to question number 1, to the best of my knowledge based on what I can recall, and on my discussions with Kayla and Jen, the days I went to the club were Wednesday, July 30, 2008, Tuesday, August 19, 2008, Tuesday, September 2, 2008, Monday, September 8, 2008,

> Friday, September 12, 2008, Friday, September 19, 2008, Monday, September 22, 2008, Wednesday, September 24, 2008, and Monday, September 29, 2008. As I stated, I have discussed with the two other girls and Kayla thinks she was there using my card on June 25, July 11, July 21, July 24, August 4, August 8, and August 11. Jen said that from what she can recall, the dates she was at the health club using my card were July 8, July 14, July 17, July 25, July 28, August 21, August 27, and August 29. This leaves August 6, August 25, September 3, and September 5 as "no shows".
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> . . .
>
> In your third question you asked me to explain the SCORE visits. I believe that I did visit the score office every time shown on your list of dates except for Wednesday, June 25. When I went there I met with a man named Tom and I would go in and drop off papers for him and visit for only a few minutes. Basically, I would say hello and then answer any quick questions he had. I was usually there no longer than fifteen minutes. These were scheduled days and times when he was in the office and it was usually in the mornings. I do know that the one exception to the short visits was that on July 9th the meeting was a longer one because I left a business partner to finish up the meeting. I do not know how long that meeting was because I left after fifteen minutes but the meeting continued without me.
>
> In the fourth question you asked me to explain other check in times at the health club. I have reviewed the statement showing when my card was shown as being checked in and to the best of my knowledge on most of these occasions my babysitter Kayla used my card to go there with my kids. But on some of those days I may have stopped there and used my card to go in and use the restroom, as it was not uncommon for me to use the bathroom in those facilities if I was in the area.

Attached to the statement were letters from Jennifer and Kayla confirming the essence of the December 1 letter.

The matter was referred to law enforcement, and the grievant was interviewed by the Eau Claire police. Following the police interview, counsel for the grievant sent the City the following letter to further clarify the grievant's responses to questions:

> December 5, 2008
>
> . . .

Dear Sirs:

As you know, I represent Ms. Katy Martin, who is currently employed as a Service Worker I with the City of Eau Claire.

I'm writing this letter at Katy's request to clarify her responses to questions you have both posed to her regarding her attendance at training sessions at Highland Fitness Center from June 25 through October 1, 2008. The questions you posed to Katy were set forth in Mr. Peters' memo to Katy, dated November 21, 2008, and in a videotaped interview Katy and I participated in with Officer Slaggie on Thursday, December 4, 2008.

In response to the questions posed by Mr. Peters, Katy provided a written response on Monday, December 1, 2008. Her response was provided by Mr. Peters to Officer Slaggie, and he asked Katy questions about it during the interview on December 4, 2008. During that interview, Katy noted that there were some inadvertent omissions in her response, which were clarified during the interview. In addition, Officer Slaggie mentioned that Katy's former trainer at Highland Fitness Center, a woman named Hillary, had kept a detailed diary of who she had worked with and when, and that it included 30 entries showing that Hillary had trained Katy on the dates specified on the first two pages of Mr. Peters' letter. Although Officer Slaggie said he could not allow me or Katy to look at or examine the calendar kept by Hillary, he represented that she had given a statement about it and that it was her position that it was an accurate record of when Hillary worked with Katy at Highland Fitness Center during the time period at issue.

There are three points Katy has asked me to clarify for her regarding her responses to the questions you have posed to her regarding this issue:

First, when Katy has been asked about how many times she went to Highland Fitness Center for training she has consistently responded honestly and to the best of her recollection. She also conferred with the two other women (Jen and Kayla), as noted in her written response to Mr. Peters' questions. But her responses have been based on her (and their) best recollections, not on detailed records, because they did not keep such records. As a result, Katy's responses have been consistently truthful based on her recollection, but she acknowledges that her recollection is just that, and may be incorrect.

Given that Katy now knows that Hillary apparently kept a contemporaneous diary with specific information on the dates when Katy trained with her (which Katy and I were not allowed to see or examine, and which we had not been informed of prior to Katy's interview with Officer Slaggie on December 4, 2008), Katy would like to make clear that her recollection of these

events may be incorrect and Hillary's calendar may, in fact, be correct. In other words, Katy is not saying, based on her recollection or on that of the other two women, that Hillary and her calendar are incorrect. Thus, if Hillary is stating positively, based on her calendar, that Katy was there 30 times for training instead of 12 times as Katy has recalled, Hillary may be correct, although Katy still thinks it was only 12 times that she actually trained with Hillary during the time period at issue. Put another way, Katy is not accusing Hillary of being dishonest but she is also not backing off of her previous responses based on her recollection of these events.

Second, while Katy does believe her responses have been consistently truthful on the number of times she trained with Hillary, while conceding that Hillary's calendar may be more accurate, Katy does not believe she exceeded the amount of combined break time she had available to her when she did go to Highland Fitness Center for training with Hillary. Thus, if Hillary's calendar shows that Katy was there for longer periods of time, Katy believes Hillary's calendar is incorrect. This is because while Hillary may have blocked out a certain amount of time, Katy believes she always kept within that time she had available to her based on her combined breaks, and would have left the training sessions early to stay within that time frame. Again, this is based on Katy's best recollection.

Third, Katy recalls initialing slips of paper when she did go to Highland Fitness Center for training sessions. She believes these slips of paper, if available, would show how many times she actually went there and when, and that if these slips of paper could be obtained it would help answer the question of how many training sessions she actually attended with more clarity.

Finally, both of you have indicated that a major issue in your respective investigations is the "inconsistencies" in the information you have obtained from different persons, including Katy, and that you are simply seeking the "truth". While that is understandable, Katy has consistently strived to provide truthful responses to both of you throughout this whole process and is still doing so. However, because she has had to rely on her memory when asked questions, and because you have apparently had specific information from others (particularly Hillary) that you have not been able or willing to show her when you have asked those questions, it seems that the "inconsistencies" you have identified have been unnecessarily created and magnified through the manner in which you have carried out your respective investigations. This has been done through a "gotcha" game, wherein Katy's imperfect recollection has been set against other more detailed information she has not been allowed to see or review, but which you apparently had in your possession. To the extent that this has taken place – whether on purpose or inadvertently – it has been very unfair to Katy. As such, if you have further questions for Katy regarding events

for which you have specific information, I would ask that, in fairness, you disclose that information to me and Katy before you ask her questions about it.

Thank you for your consideration of this information. Please let me know if you have any questions about this letter or if you would like to ask Katy any further questions in this matter.

Glenn M. Stoddard /s/
Glenn M. Stoddard

Following completion of the investigation, the City issued a notice of discipline that involved a 2 week suspension:

TO: Katy Martin, Service Worker I

FROM: Brian Amundson, Director of Public Works

DATE: February 6, 2009

SUBJECT: Notice of Discipline

The purpose of this notice is to inform you that the City has concluded its investigation into allegations that you engaged in misconduct connected with your employment. Supervisory staff of the Public Works Department conducted three interviews with you at which representatives of AFSCME, Local 284 were present. In addition we have received a written response to questions submitted to you following the third interview. As a result of the investigation, you will be suspended without pay for two weeks for the following:

A. Excessive break/meal time

1. Article 15, Section 1, Subsection a. through e. of the Collective Bargaining Agreement (CBA) between the City and AFSCME, Local 284, of which you are a member, details how employees are to take rest periods and meal periods. (Copy Attached).

2. The City of Eau Claire Employee Handbook with respect to pay practices and policies states. . ."Time sheets are used to record hours worked, sick leave days, vacation days, training and all other leaves that occur during your regular work hours. . .They should be updated daily and checked over carefully before submitting to ensure that they are complete and accurate. . ."

3. Between June 10, 2008 and October 1, 2008, you exceeded your combined contractual break and meal times while submitting signed time sheets showing you worked eight (8) full hours each day, inclusive of permissible break/meal times.

   a. Records from the Highland Fitness Center show that you were scanned with a check-in on 52 occasions during regular work hours. Of the 52 check-in scans during work days, a personal trainer at the Highland Fitness Center has stated that you participated in personal training sessions that lasted a minimum of 55 minutes on or about 30 times during contractual regular work hours (8:00 a.m. to 4:00 p.m. M-F).

   b. September 19, 2008 (Friday) – Records show that you scanned in to the Highland Fitness Center at 9:54 a.m. and received a personal training session. You were observed exiting the Fitness Center, going to your car, returning to the center and then exiting the Fitness Center again in different attire – ultimately leaving the parking lot of the Eastridge Center at 11:23 a.m.

      - The Highland Fitness Center was not on the route of any of your locates for that day.

      - From the time of check-in to leaving the parking lot is 89 minutes, not accounting for any travel time (which is to be included in an employees break and meal time Art. 15, Sect. 1, (a)(b) & (c)) - you exceeded the allowable "break/meal" time by 39 minutes.

   c. September 26, 2008 (Friday) - You were observed in the morning wearing a black blouse and dress pants while making copies at the Central Maintenance Facility (CMF). Later in the day you were observed wearing a red tee-shirt and blue jeans. A personal trainer at Highland Fitness Center has stated that on this date you had a personal training session (minimum 55 minutes) during regular work hours. Records show a training session occurring on the morning on this day.

   d. September 29, 2008 (Monday) - Records show a check-in for you at 9:59 a.m. and that you received a personal

training session. You were observed leaving Eastridge Highland Fitness Center at 11:10 a.m. Not taking into account travel time, which is to be included in an employees break and meal times, these 71 minutes exceeded the your total allowable "break/meal" time by 21 minutes.

e. Your response to questions about the 52 check-in scans under your membership have been inconsistent. You did not disclose until the third interview with the City that you had in fact been working out with a personal trainer at the Highland Fitness Center during regular work hours.

- October 6, 2008 Interview – stated that in the past five months you had been to the Highland Fitness Center during the work day six times to meet a friend for a 45 minute lunch.

- October 14, 2008 Interview – maintained that you had gone to the Highland Fitness Center to meet a girl friend on 6 occasions, over the lunch hour to talk about diet and nutrition, and that you may have walked on the treadmill. You stated that if you were at the Highland Fitness Center on September 19th and 29th, it would not have been for 1½ hour on either occasion.

- November 14, 2008 Interview – at this third interview you admitted to working out with a personal trainer while at the Highland Fitness Center during regular work hours. You denied working out with a personal trainer, because you shared a training package with two other individuals and had worked out only 6 times, and your friends had worked out 21 times.

- December 1, 2008 Written Response – your recollection was that you worked out 9 times, your friends worked out 15 times, and the other 4 were "no shows".

- December 5, 2008 Attorney Letter – your attorney states that to the best of your recollection you only worked out with a personal trainer on 12

occasions, but it may have been more. The letter states "Thus, if Hillary is stating positively, based on her calendar, that Katy was there 30 times for training instead of 12 times as Katy recalled, Hillary may be correct, although Katy still thinks it was only 12 times that she actually trained with Hillary during the time period at issue."

f. You stated that you had supervisory approval for combining break/meal time into one 50-minute break. The investigation found no evidence of a blanket approval to combine breaks from any of your prior or current supervisors for the period from June 1, 2008 through October 1, 2008. One supervisor stated that he may have given you permission on one occasion, but not at 10:00 a.m. A co-worker stated you called him on one occasion to notify him that you were combining breaks. A clerical staff member denies ever having contact with you about combining breaks during this time period. Neither employee you claim to have contacted has supervisory authority to approve combining of breaks.

g. You have stated that your workouts never exceeded 45 to 50 minutes and you did not change clothes after workouts. Given the direct observations on two occasions that you exceeded your unapproved combined breaks by 39 and 21 minutes and your personal trainer's statement that your workouts lasted at least 55 minutes on these days, your response is not credible.

4. Between July 9, 2008, and September 16, 2008, you visited the SCORE office five (5) times during regular work hours and exceeded your combined break and meal time on at least two occasions. Records show that you were at the SCORE office, 500 S. Barstow Street on July 9th, August 21st, August 28th, September 4th and September 16th.

a. During regular work hours on July 9, 2008 after meeting with SCORE for close to an hour you were observed standing on the steps outside the building talking with another female for 20 minutes. Not taking into account travel time you exceeded the combined break/meal time by 25 to 30 minutes on this date.

b. During regular work hours on August 21, 2008 you met with Tom Bauer at SCORE for close to an hour. There is evidence that you also had a personal training workout with a trainer at the Highland Fitness Center on this same date. Not taking into account travel you exceeded the combined break/meal time in excess of one hour on this date.

c. Your answers to questions about SCORE visits were inconsistent as illustrated below:

- October 6 & October 14, 2008 Interviews – stated that you had visited SCORE office on only two occasions to drop off papers (approx. 10 minutes each time) and that the SCORE office was on your route to another utility locate site.

- November 14, 2008 Interview – stated you had been there 3 times for no more than 15 minutes and had a lunch appointment with a SCORE representative at Culvers for approximately 45 minutes on another date.

- December 1, 2008 Letter Response – stated you had been there 5 times, but it was for no more than 15 to 20 minutes each time.

d. Regardless of the number of visits to SCORE, it is clear as a result of the investigation that you exceeded your break/meal time and did not accurately report actual time worked on your time sheet.

B. Inappropriate use of sick time

1. Article 24, Section 2 and Section 4 of the Collective Bargaining Agreement (CBA) between the City and AFSCME, Local 284, of which you are a member, details the use of Sick Leave. (Copy Attached).

2. The City of Eau Claire Employee Handbook with respect to pay practices and policies states. . .*"Time sheets are used to record hours worked, sick leave days, vacation days, training and all other leaves that occur during your regular work hours. . .They should be updated daily and checked over carefully before*

submitting to ensure that they are complete and accurate. . .” The Handbook also describes Leaves of Absences including Sick Leave Benefits and Family Leave. (Copy Attached).

3. July 10, 2008 (Thursday) – you took four (4) hours of sick leave starting at noon. Records indicate your membership card being scanned at Westridge Highland Fitness Center at 12:19 p.m. Records show a childcare check-in at the Eastridge Highland Fitness Center at 11:09 a.m., an hour and one-half before the check in at the Westridge Center.

   a. October 14, 2008 interview – stated that one of your children had a doctor’s appointment on this date and your child care provider checked-in your children at the Fitness Center under your name on this date.

   b. November 14, 2008 interview – stated that you were not at the Highland Fitness Center on this date.

   c. December 1, 2008, letter response – stated that you may have been at the Highland Fitness Center to pick up your son on this date.

   d. You did not designate your absence on this date to be for Family Sick Leave. Your explanation does not support a finding that you were not at the Westridge Fitness Center, since the childcare check-in is at the Eastridge Highland Fitness Center. It is an abuse of sick leave to visit a fitness center when you are taking sick leave for a sick child.

4. July 24, 2008 (Thursday) – you took eight (8) hours of sick leave. Records indicate that your membership card was scanned at the Eastridge Highland Fitness Center at 9:12 a.m. and that you utilized a personal trainer beginning at 10:00 a.m. Records indicate that your membership card was also scanned at the Westridge Highland Fitness Center at 11:24 a.m.

   a. October 14, 2008 interview – stated that you had an appointment at Marshfield Clinic. Also stated that you stopped at the Highland Fitness Center to see your children.

b. November 14, 2008 interview and December 1, 2008 Letter Response – stated that you stopped at the Highland Fitness Center to change your shirt after your doctor's appointment because you were bleeding. However, the Highland Fitness Center records show the check-in times at 9:12 a.m. and 11:24 a.m. were before your doctor's appointment.

c. It is an abuse of sick leave to visit a fitness center for a personal training session when you take an entire day off for sick leave for an afternoon doctor's appointment.

C. Falsification of Mileage Records

1. The Finance Department Memorandum to All Auto Reimbursement Recipients, dated July 1, 2008 states the following:

"The City reimburses employees who use their personal vehicles for City business. There are two classifications for reimbursement: local travel and out-of-town trips. Local travel is reimbursed at either a fixed monthly allowance or a per-mile rate ***for actual miles driven****. . . (Emphasis added).*

2. During the course of the investigation discrepancies were noted in your monthly mileage report. A comparison of the odometer reading for the end of the day and the beginning of the next day did not show enough of a difference to account for your commute to and from work each day.

a. You explained this discrepancy in part by indicating that on some occasions between April and September 5, 2008, you left your vehicle at the babysitters house overnight, which is closer to the Central Maintenance Facility (CMF) at 920 Forest Street.

b. You admitted to unilaterally adding mileage to your report to compensate yourself for "idle time" to charge the City laptop computer when you started using your white Kia for work purposes. The dates you provided for when this "idle time" mileage was added on several dates is prior to your use of the white Kia for work purposes.

c. The "idling time" mileage was added to your report without knowledge, approval or authorization from your supervisor. During interviews you indicated this is wrong. Your admission and calculation indicate that you were overpaid for mileage in the amount of at least $33.52.

d. You alleged that this practice of compensation for "idle time" was done by other employees and considered acceptable. Further investigation identified no other utility division employees who have engaged in falsification of mileage by adding "idle time".

Your conduct was contrary to and violated the Collective Bargaining Agreement, City policies, and procedures, including, but not limited to the above cited provisions. Your suspension will begin immediately. You are to report back to work on Monday, February 23, 2009.

We expect that you will take this opportunity to correct your improper conduct. In the future we further expect that you will fully meet the duties and responsibilities of the position and that you will observe all rules and procedures of the job. Failure to do so will subject you to further disciplinary action up to and possibly including termination of employment with the City of Eau Claire.

. . .

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article 7 – PENALTIES

Section 1. The City shall not suspend, demote or discharge any employee except for just cause. If the City suspends, demotes, or discharges an employee for just cause, the City shall notify the employee in writing and forward a copy of the notification to the Union at the same time. If the employee feels dissatisfied, he/she may file a grievance.

Section 2. If, after a proper hearing, the employee is found to be innocent of the charges, the employee shall be reinstated in his/her former job with the City paying for all lost time and the employee shall not lose any benefits that he/she would normally have if work had been continuous.

. . .

Article 13 – HOURS

Section 1. Except as otherwise provided herein, the standard work day for all employees shall consist of eight (8) consecutive hours. In the Engineering Division, the standard work day shall be eight (8) hours of work not including any period established by the City as a lunch period.

Section 2. The standard work week shall begin at 12:01 a.m. Monday and will end 12:00 p.m. Friday.

. . .

Article 15 – REST PERIODS AND LUNCH

Section 1. Employees shall take breaks (rest periods and meal periods) pursuant to the following conditions:

a. Employees shall take a 15-minute rest period two hours after the start of their shift. This rest period shall include any travel time.

b. Employees shall take a 20-minute meal break four hours after the start of their shift. This meal break shall include any travel time.

c. Employees shall take a 15-minute rest period six hours after the start of their shift. This rest period shall include any travel time.

d. Assigned times for rest periods and meal breaks may vary only with the permission of an employee's supervisor. Emergency situations might preclude rest periods or meal breaks at these particular times.

e. Breaks will be taken without interruption at their assigned time and will not be combined with other break times except as specified in Sections 1d and 3.

Section 2.

a. During breaks, employees may stop at a place of business for the purpose of purchasing food and/or non-alcoholic beverages only, and only if the place of business is on the route assigned to the employee and no additional travel is required to reach that destination.

. . .

d. A supervisor may grant wash-up or clean-up time for a meal break when particular job requirements so demand. If travel is required for this purpose, it shall be to the nearest public facility available. The time necessary to complete this task shall not be included in the meal period.

e. Except as modified in this article, employees shall use their rest periods as they desire, for example: telephone, fresh air, snacks, etc.

. . .

Article 29 – GRIEVANCE PROCEDURE

Section 1. A grievance is a complaint, dispute, or controversy in which it is claimed that the collective bargaining agreement has been violated and which involves either a dispute as to the facts involved or a question concerning the meaning, interpretation, scope, or application of this agreement, or both.

Section 2. The parties to this agreement recognize that the grievance should be settled promptly as close to the source as possible. Both parties will endeavor to present all facts relating to the grievance at the first step in the grievance procedure.

Section 3. Disputes arising during the life of this agreement concerning interpretation of terms and conditions of employment as enumerated in the agreement, may after being cleared with the Union Grievance Committee, be submitted through the grievance procedure outlined below.

Step 1. All grievances must be filed within ten (10) days of the time the grievance occurred or ought to have been known to occur. All grievances must be filed orally by the aggrieved employee, Chief Steward, or the president of the Union with the aggrieved employee's immediate supervisor. The employee's immediate supervisor shall within five (5) working days, orally inform the employee with the Union representative of his/her decision. At the time the oral grievance is stated to the employee's immediate supervisor, the employee and the employee's immediate supervisor shall exchange written confirmation of the fact that the oral grievance has been stated or no grievance shall be considered to have been filed.

Step 2. If the grievance is not settled at the first step, it shall be reduced to writing with a copy to the immediate supervisor, division head and Director of Human Resources and presented to the department head within ten (10) working days. Within ten (10) working days thereafter, the department head shall furnish the employee, Chief Steward, and the Union President with a written answer to the grievance.

Step 3. If the grievance is not settled at the second step, the Union may appeal in writing, within ten (10) working days following receipt of such written response, to the City Manager. The City Manager shall answer the grievance in writing within fifteen (15) work days. Copies shall be sent to the employee, Chief Steward, and the Union President. If the written decision of the City Manager is unsatisfactory, the grievance may be taken to arbitration.

If in reviewing the grievance, the City Council determines a need to hear testimony from the Union Grievance Committee in support of the grievance, such testimony may be taken any time during the step procedure before the decision of the arbitrator.

Section 4. The Union may present the grievance to an arbitrator provided the Union notifies the City of its intention within ten (10) days following notice of the City Manager's decision.

Section 5. The Arbitrator shall be chosen by the Union and the City. If the Union and the City cannot agree on an arbitrator within ten (10) calendar days from the date the Union notifies the City of its intent, the Union and the City shall petition the Wisconsin Employment Relations Commission to appoint the Arbitrator. The Arbitrator shall be requested to make a finding known in writing and simultaneously to the City and the Union, within ten (10) [1] days after their final meeting, and the decision and/or recommendations shall be effective and final and binding on both parties. The cost of the Arbitrator shall be borne as follows: Each party shall pay one-half (1/2) of the cost of the Arbitrator. The cost of a court reporter shall be borne by the party requesting such. If the court reporter is requested by the arbitrator, the parties shall share the cost equally.

Section 6. The Arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this agreement. The decision of the Arbitrator shall be based solely upon his/her interpretations of the "express language" of the agreement.

POSITIONS OF THE PARTIES

It is the position of the City that the Union waived its right to arbitrate the suspension grievance. The City notes that the request for arbitration was filed more than a year after the original grievance and after the request for arbitration of the termination grievance. The City acknowledges that the Union has complied with the literal provisions of the contract, but argues that the Union has manipulated the grievance procedure and caused undue delay. It is the view of the City that once the Union went forward with the termination grievance it waived any objection to the suspension.

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[1] The parties waived the 10-day provision.

The City cites arbitral authority for the notion that the identification and scheduling of grievances for hearing should follow a fair and equitable process. What has occurred here is alleged to be neither fair nor equitable. It is the view of the City that it has suffered prejudice in terms of increased costs and liability exposure due to the Union's actions.

As to the merits, it is the view of the City that there existed just cause for the suspension. The City contends that the contract defines the work day and breaks, and that the grievant violated her responsibilities under the agreement. The same is alleged with respect to sick leave use. The grievant is also alleged to have violated the mileage reimbursement policy.

The City analyzes this dispute through the 7 step analysis set forth in Arbitrator Daugherty's ENTERPRISE WIRE CO., 46 LA 359 (1966) decision and concludes that the 7 tests have been satisfied. The City reviewed the evidence and testimony and contends that the grievant has not been credible and that the weight of evidence supports the City's conclusions set forth in the discipline letter.

It is the view of the Union that it never waived its right to proceed to arbitration. The Union contends that it complied with the notice to proceed to arbitration provision of the agreement, and that there exists no contractual time limit to thereafter file. The Union contends that what makes this case unique is the fact that the City filed for arbitration over the termination case. It is this act, contends the Union, that upset the sequence. The Union notes that the parties have a history of lax enforcement of the grievance timelines.

The Union contends that it was common for employees to combine breaks, and not always with supervisory approval. The Union contends that the grievant did not exceed her breaks. The Union points to testimony that Katy shared the package with two others, and contends that the number of sessions relied upon by the employer far exceeds the number of times the grievant used the facility. Similarly, the Union points to the testimony of the trainer, on cross examination, where she concedes that sessions may only have lasted 50 minutes, though that testimony included a comment from the trainer that she "greatly doubted" that to be the case.

The Union points to the testimony of the grievant, who explained why the dates she was observed at the Fitness Center appeared to involve so much time. The grievant also explained her visits to the SCORE offices, and her check in's at the Fitness Centers on days she called in sick.

It is the view of the Union that the grievant added mileage to her mileage records to offset the idling time. This was something she was taught to do, and was a years old practice.

It is the view of the Union that the grievant changed her answers to questions in an effort to give the most accurate information to the City. She was nervous under the circumstances of the interviews, and her answers became more accurate as she had time to think, review her records and talk with her friends.

DISCUSSION

Waiver

The City contends that by waiting for over a year, and by scheduling the termination hearing the Union has waived its right to bring this case. This is not a traditional timeliness claim, where it is alleged the Union has exceeded the time limits of the collective bargaining agreement. The time limits expressed in the contract were honored. The City acknowledges as much.

The collective bargaining agreement sets forth a series of timelines for the filing and processing of grievances. Once the Union has indicated notice of intent to arbitrate, there is no further timeline specified. Section 4 sets forth the condition necessary for the submission of the matter to the arbitrator. The sole condition specified by contract is "…notifies the City of its intention within ten (10) days following notice of the City Manager's decision."

Once the Union has provided its notice, Section 5 delineates the responsibilities of the parties. On its face that provision directs that "…the Union and the City shall petition the Wisconsin Employment Relations Commission to appoint the Arbitrator." As a practical matter it appears that one of the parties, acting on behalf of both, files the petition. In the subsequent termination case it was the City that advanced the petition to the WERC. Under the terms of this contract, the Union does not bear exclusive responsibility for moving matters to the arbitration stage.

It was the testimony of witnesses for both sides that the parties do not hold to the contractually expressed time frames set forth in the contract.

It is this context that the City's waiver argument is advanced. The City complains of the problems that arise from delay. Witness availability and recollection suffer. I agree. However, delay alone does not constitute a waiver, and this grievance procedure has tolerated a good deal of delay. The City complains about the added cost of defending the suspension. However, this cost would have been incurred had the matter been moved forward promptly.

The City complains about the manner in which the termination hearing was cancelled and the potential for greater financial exposure arising from the corresponding delay in the termination hearing and decision. These are concerns properly brought to the attention of the Arbitrator in the termination matter. Both the conduct of that hearing and the scope of remedy, if any, arising from the termination are matters over which he, and not I, has jurisdiction.

A critical element of waiver is that it involves an intentional relinquishment of a known right. (see *Black's Law Dictionary*, 4th edition, West Publishing Co., *Webster's Seventh New Collegiate Dictionary*, G & C Merriam Co.) Unwitting or involuntary forfeiture is disfavored as constituting waiver.

Elkouri offers generalized comment in this area:

> Some agreements provide that within a specified time after notice of intent to arbitrate has been given, a joint request is to be submitted asking that an arbitrator act on the dispute. Failure of parties to act within the specified time may be held to render the dispute nonarbitrable. But if one party fails to meet its obligation in some material respect, that party cannot prevent arbitration on the ground that the other party alone referred the case to arbitration. Where the agreement states no time limit for proceeding to the selection of an arbitrator after notice of intent to arbitrate has been given, considerable delay in selecting an arbitrator might occur without rendering the dispute nonarbitrable, particularly when both parties have been guilty in respect to the delay.

(Elkouri & Elkouri, *How Arbitration Works*, Sixth Ed., BNA, 2003, p.276)

Under the Elkouri analysis considerable delay is tolerated in the absence of a timeline to submit the matter to an arbitrator.

If anything the City seeks an implied waiver. It essentially contends that the Union behaved in such a manner as to cause the City to believe that it intended to waive its right to proceed. In support of this claim, I think 14 months is a long time to sit without proceeding. The Union's silence as to the suspension grievance is particularly significant in the face of the termination. The Union understood that the termination was proceeding to arbitration. The Union has declared its belief that the outcome of the suspension is relevant to the discharge case. The silence of the Union for over a year is not explained.

Generally, implied waiver requires that the injured party has been induced to act by the belief that the other party has waived its right to proceed. I do not believe that to be the case. I do not believe there was a waiver of the right to present this matter to an arbitrator.

Article 29, Section 6 cautions arbitrators not to "…amend, modify, nullify, ignore or add to the provisions of this agreement." It further directs that the basis of the decision be the "express language" of the agreement. Section 4 sets forth but a single condition to the presentation of the grievance to an arbitrator, and that condition, the 10 day intent to arbitrate notice, was satisfied. Under all of the foregoing I am not willing to read an additional condition into the contract.

Suspension

The grievant was suspended for three reasons. She took excessive break/meal time. She made inappropriate use of her sick leave. She falsified her mileage.

I believe the record establishes that the grievant was a regular at the Highland Fitness Center during regular work hours. I believe she had a regular schedule of training sessions which lasted approximately 55 minutes. The training time was in addition to travel and changing/showering time. This conclusion is supported by the health club records and the first person testimony of her trainer. This conclusion is further confirmed by the surveillance observations of September 19 and 29.

The grievant's explanations as to her time at the health club are not credible. Her initial interview answers are so at odds with the tangible evidence as to be deliberately misleading. I believe that she was under a great deal of stress under the circumstance of being called to a meeting with potential disciplinary consequences and interrogated for two hours by three division heads. I have no doubt that the setting caused stress and anxiety, which may well have impeded her memory or ability to recall detail. This level of stress does not explain the grievant's indication that she may have gone to the health club on 6 occasions to have lunch, while as a matter of fact she was on a regular schedule of training. She had a training session a week earlier.

The grievant was interviewed two more times. Given an opportunity to correct the record she declined. Instead she gave up as little information as was necessary to address the growing evidence. She indicated in her third interview that she shared a package with two others. This claim was refuted by two health club witnesses. The two women claimed to be her package partners were not called to testify.

The grievant made a number of visits to SCORE. At least two were protracted. Her testimony as to her SCORE visits was contradicted by both the SCORE advisor and by investigator Forster.

These extended breaks were not authorized or approved by anyone. There is no indication in the record that anyone in a supervisory position was aware of the health club or SCORE visits. The record has a number of references to City employees combining breaks. For example it appears that it is common for construction site employees to work through a break to complete a time sensitive task and add the break time to lunch. There was also testimony that indicated employees on meter reading/ locate assignment had flexibility in taking breaks. I find it credible that the nature of an assignment or sequence of tasks in the field do not always lend themselves to taking breaks at prescribed times.

However, trips to work out at a health club and to the SCORE offices are different in kind. The grievant has taken a part of the work day and converted it to personal use. She has not conformed the contractual breaks around the reality of the work process. She has modified and reduced the contractual work day to conform to her personal needs. Her actions are not supported by the contract or by any interpretive practice.

The grievant knew that she was engaged in behavior that was unacceptable. When confronted with questions and evidence, she denied the behavior and over time constructed an

elaborate series of stories which sought to deny she exercised, minimized her time at the health club, and explained that many of the club records which showed her punched in were really times others were using her card. This is not the behavior of someone who believed she was acting like other employees and acting within the spectrum of accepted behavior.

The grievant was disciplined for inappropriate use of sick time. I regard this as an extension of the use of work time to exercise at the health club.

The grievant was disciplined for falsification of her mileage report. The grievant added "idling" time to her mileage report to increase her reimbursement. Her claim that this was a practice was not supported by the record. The record further supports a conclusion that she added a significant, but unknown, number of miles. Management employees attempted to replicate her work day and returned with significantly fewer miles logged. This is in addition to her trips to the health club.

Much of the Union's post-hearing argument relied upon the testimony of the grievant. I did not find her testimony credible. Her story evolved significantly over time. As to the health club her testimony conflicted with that of both health club employees. Her account of her visits to SCORE conflicted with both Forster and the SCORE representative. Her testimony relative to the padded mileage was contradicted by a number of co-workers.

The Union offers explanation and/or motive as to why the testimony of city witnesses should be discounted. It may be that some of these witnesses have potential self interest that would lead to self serving testimony. Not all of the witnesses have any such motive. I do not believe that this parade of witnesses, many of whom had no relationship to one another, would provide detailed testimony about the grievant that was untrue. Much of the testimony was corroborated by physical evidence. The testimony of the trainer and the club records corroborate one another. Neither the SCORE representative nor Forster have any incentive to report or testify untruthfully.

The grievant has a motive to shape her testimony to avoid discipline. Her explanations involved a number of others who allegedly used her card. None of these individuals were called to testify.

The Union has claimed that the City retaliated against the grievant for her testimony in support of a co-worker in a previous and unrelated matter. The Union argues that the City employed a private investigator, contacted the Police and the District Attorney, engaged outside counsel, interviewed the grievant three times, and put considerable resources into this matter. There is no evidence in support of the retaliation claim. It is not clear whether or not the City was even aware of the grievant's role in the co-workers case as the investigation unfolded. The investigator was hired when the supervisor couldn't trail the grievant. The investigation intensified as the grievant provided explanations which were at odds with what appeared to be the facts.

Considerable resources were expended. The grievant was scrutinized. Few of us would emerge from such scrutiny without blemishes. Here, however, the grievant offered herself up.

I believe the grievant engaged in the behaviors for which she was disciplined. Under the circumstances presented I would not second guess the 10 days. This is not like the employee who stretches his break a few minutes. Nor is this akin to the employee who, in the face of a need to work through a break, fails to call his supervisor to request permission to combine the missed break with lunch. There is a precedent of an employee going to a health club during work, and when discovered, given a 10 day suspension. The grievant's failure to be forthcoming in the investigation compounded the matter.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 26th day of January, 2011.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

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