BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO and its affiliated LOCAL 1486	Case 73 No. 46300 MA-6939
and	
VILLAGE OF WHITEFISH BAY	

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, Suite 200, 611 North Broadway, Milwaukee, Wisconsin 53202-5004, by Mr. Alvin R. Ugent, appearing on behalf of the Union.

Quarles & Brady, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, by Mr. Robert H. Duffy, appearing on behalf of the Village.

ARBITRATION AWARD

Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 1486, hereafter the Union, and the Village of Whitefish Bay, hereafter the Village, or the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission, hereafter the Commission, to appoint a staff member as single, impartial arbitrator to resolve the instant grievance. On November 4, 1991, the Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing was held on December 19, 1991 in Whitefish Bay, Wisconsin. The hearing was transcribed and the record was closed on March 25, 1992, upon receipt of post-hearing written argument.

ISSUE:

The Union frames the issue as follows:

> Whether the employe was terminated for just cause?
>
> If not, what is the appropriate remedy?

The Village frames the issue as follows:

> Did the grievant resign his employment from the Village?
> If not, was the grievant discharged for just cause?
>
> If not, what is the appropriate remedy?

The undersigned adopts the Village's statement of the issue.

RELEVANT CONTRACT LANGUAGE

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE VIII - SICK LEAVE PAY

Section 6 - Notice of Absence.

* * *

Employees are expected to notify the department heads [of absence] prior to the starting time.

ARTICLE XI - SUSPENSION, DEMOTION AND DISMISSAL

An employee is subject to discipline only for just cause. Whenever a department head or a supervisor employee of the Municipality believes that an employee under his supervision has acted in a manner which shows him to be incompetent or to warrant disciplinary action including suspension, demotion or dismissal, he shall report the matter to the Village Manager.

The Village Manager shall take such action as he believes to be warranted under the circumstances. Disciplinary action shall become effective at the time designated by the Village Manager; the Village Manager may postpone execution of disciplinary action to permit the employee involved and his representative or both to discuss the matter with him.

An employee involved in disciplinary action shall be informed, in writing, by his superior of the discipline imposed and the reason therefore; when suspension, demotion or dismissal is involved, the employee shall be notified, in writing, by the Village Manager who shall file a copy of the notice with the Village Clerk.

An appeal by an employee or his representative shall be arbitrated as provided in Step 3, Section 2, Article X.

ARTICLE XXII - AMENDMENTS AND SAVING CLAUSE

* * *

Section 3 - Extent of Agreement.

The foregoing constitutes the whole and entire agreement between the parties and is intended to cover the entire

relationship. All rights and privileges not specifically referred to or limited herein are retained by the Municipality.

BACKGROUND

On September 18, 1991, Duane C. Wepking, the Village Director of Public Works, issued the following letter to Michael G. McNutt, hereafter the Grievant:

> RE: Acceptance of Resignation
>
> Dear Mr. McNutt,
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> On Friday, September 13, 1991 at approximately 9:00 A.M. I was informed that you had left work without notice to your supervisor, Dale Solon, or any other employee. At approximately 10:20 A.M., I received a phone call from you in which you stated that you were resigning your position with the Village of Whitefish Bay and that you were giving two weeks notice that your last day of work would be on September 27, 1991. You also stated that you were taking the rest of the day off as "sick leave". You stated that you would return to work on Monday to begin serving your final two weeks. In as much (sic) as you indicated that you were resigning, I decided to accept this and not pursue disciplinary action at that time relative to your leaving work without notice.
>
> On Monday, September 16, 1991 you returned to work as indicated.
>
> On Tuesday, September 17, 1991, you stated that you wanted to apologize for your actions on Friday and that you wanted to "rescind" your resignation. Having accepted your resignation on Friday, we intend to let that action stand.
>
> Village Manager Harrigan has indicated that the Village will compensate you for the balance of this two week period and that your services will not be required on the job. Therefor, (sic) effective immediately, you should not report for work. The Village will compensate you through the date which you indicated in your resignation statement (September 27, 1991) plus what ever (sic) additional vacation benefits you may have coming under the contract.

On September 20, 1990, Michael C. Harrigan, the Village Manager, issued the following letter to the Grievant:

> Pursuant to the recommendation of your department head, Duane Wepking, I am hereby terminating your employment with the Village for the following reasons:
>
> 1. You have acknowledged that you left work on Friday, September 13, 1991 at or about 7:10 A.M. without notifying your supervisor or any other Village employee

that you were leaving or the reasons therefor. (sic) This constitutes an extreme act of insubordination and misconduct. You have further acknowledged that at approximately 10:30 A.M. on September 13, 1991 you telephoned Mr. Wepking, stating that you were unhappy with your supervisor, Mr. Solon, and, as a result, were resigning from the Village. You later, on September 17, 1991, rescinded your resignation.

2. You were suspended for three days without pay on February 20, 1990 for similar acts of insubordination and misconduct and on that date you were issued a final warning that any further similar acts of insubordination or misconduct would result in your termination from the Village.

3. Your employment record with the Village contains further warnings and instances of similar insubordination and misconduct on your part.

The Village can no longer tolerate your repeated refusal to comply with its reasonable expectations, including its requirement that you comply with your supervisor's instructions concerning work assignments and that you provide proper notice concerning your absences.

Accordingly, based upon the incident of September 13, 1991, the suspension and final warning of February 20, 1990, the prior warnings you have received, and your entire work record with the Village, your employment with the Village is hereby terminated effective this date.

Thereafter, a grievance was submitted to arbitration in which the Union alleged that the Grievant was discharged without just cause. The Union requested that the Grievant be reinstated and made whole for all losses suffered as a result of the unlawful discharge.

POSITIONS OF THE PARTIES

Village

Under consistently applied arbitration precedent, where an employe expresses a clear intent to resign, the matter is treated as a resignation rather than a discharge. Similarly, where an employe's actions demonstrate an intent to resign, such actions, even absent an expressed intent to resign, constitute a voluntary resignation. When an employe's expressed intention to quit is accompanied by an act confirming such intention, arbitrators unanimously hold that the employe has voluntarily resigned the employment.

An employe's dissatisfaction with a work assignment or supervisor is not a sufficient basis for overturning the resignation. Arbitrators routinely hold that if an employe is upset with working assignments or other workplace matters, the employe must utilize available grievance procedures rather than

resign. Arbitrators also routinely reject an employe's effort to revoke a two-week notice of resignation, even when such attempted revocation occurs within the two week period. Even arbitrators who find that an employe may not be immediately bound to a two-week notice hold that once the employer accepts the resignation, the employe may not revoke the resignation without the concurrence of the company.

The Grievant expressed a clear intent to resign and acted in a manner consistent with that intent. The Employer accepted the resignation and confirmed that the Grievant's final date of employment would be September 27. The Grievant voluntarily quit his employment.

The Village had no obligation to accept the Grievant's request to rescind his resignation. The Grievant's resignation had nothing to do with his work assignment on his final day of work. On September 13th, the Grievant was not assigned to the allegedly "despised" chipper work, but rather to special pickups.

The Grievant's after-the-fact work assignment complaints are frivolous. Throughout the Grievant's employment, the Village complied with the Grievant's medical restrictions, provided him with safety training and equipment concerning the operation of the chipper, and assigned the Grievant to nonchipping duties almost 50% of his working hours.

Leaving work without notice constitutes just cause for termination. Even where arbitrators do not find that an employe's absence from work without notice by itself constitutes a voluntary quit, they routinely hold that such conduct provides just cause for discipline up to and including discharge. The failure to provide such notice is an insubordinate act which supports grave disciplinary action. When an employe has received a previous warning concerning leaving the workplace without notice, arbitrators uniformly hold that the employe's failure to follow the warning is fatal to the employe's discharge grievance. Even if the Grievant had not voluntarily resigned his employment, and he did, his conduct on September 13th, in abandoning the workplace after he had reported to work, without permission or notice to anyone, provides just cause for his discharge.

The Grievant's after-the-fact "intestinal excuse" is a story and nothing more. It is a story that he failed to tell to any of his co-workers or managers at any point prior to hearing. On September 18th and 19th, when specifically asked why he had failed to give notice, the Grievant stated that he had a "mental lapse," not a medical emergency.

Even if the Grievant had a legitimate medical illness, which he did not, such a condition would not excuse him from providing appropriate notice of absence. Even without his prior disciplinary history, the Grievant's "misconduct" constitutes just cause for grave discipline. When the previous disciplinary history is considered, such "misconduct" constitutes compelling just cause for termination.

Union

When Dale Solon became the Grievant's supervisor, the Grievant was assigned to run the chipper almost all of the time. The chipper is noisy and dangerous and it is generally considered to be undesirable work. The Grievant complained to supervision about being assigned to chipper work many times without receiving any change in work assignments. Other than the Grievant, the persons assigned to the chipper were laborers, not general repair men.

Supervision continued to assign chipper work to the Grievant even though

they knew that the Grievant hated the work and that it was causing the Grievant to become sick. Management was making life so miserable for the Grievant that they were forcing him to quit. Apparently, supervisor Solon did not like the Grievant from the start and picked on him.

On September 13, 1991, the Grievant went to work even though he did not feel well. He arrived at his work location, his condition worsened and he experienced a bout of diarrhea. He did not make it to the bathroom in time and soiled his clothing. Being embarrassed and sick, he just went home. He did not tell his supervisors.

When the Grievant returned home, he changed clothing, took some Pepto Bismol and went to bed. He called in to work a short time after he got home, about 10:00 A.M. When he called in, he told "Sue" that he thought he would give a two-week notice and that he was going to quit. A short time later, the Grievant contacted Duane and told him that he was not going to be in that day and that he was going to give a two-week notice. The Grievant was told that if he wanted to resign, he should put it in writing.

After talking with his wife, the Grievant changed his mind and wanted to rescind his proposed resignation. Management told the Grievant that he would have to put his two week notice in writing. Since it was never put into writing, it was not accepted by management and was not effective.

Even if it were a two-week notice, management did not wait for the two weeks. The Grievant's proposed quit, later rescinded, did not go into effect before the Grievant was terminated.

The Grievant came in, was sick, and was paid sick pay. How can management pay sick pay and then fire him because he went home sick. The evidence shows that other employes were absent and did not call in without getting fired. The Grievant has not received fair treatment.

The Employer attempted to accept the Grievant's resignation even though he did it under extreme distress and even though they told him it had to be in writing. After they wrongfully tried to accept the rescinded resignation not in writing, they were unwilling to give him the pay for the two weeks notice. They fired him at once.

There is not just cause to discharge the Grievant. The Grievant must be returned to work and his discharge cancelled. The Employer must be ordered to make the Grievant whole for all loss of wages and other benefits. Since the Employer is guilty of bad faith in its treatment of the Grievant, the Employer must be ordered to pay interest on the backpay and reasonable attorneys fees.

DISCUSSION

Prior to 10:00 a.m. on Friday, September 13, 1991, the Village's Street Superintendent, Dale Solon, advised the Village's Director of Public Works, Duane Wepking, that the Grievant had left work without notice. At approximately 10:30 a.m., the Grievant called Wepking and submitted his two week notice. As Wepking recalls the conversation, the Grievant indicated that he was resigning because he did not get along with his supervisor. According to Wepking, he responded to the Grievant by confirming that the Grievant's last day of work would be September 27, 1991, clarifying that the Grievant would return to work on the following Monday, and asking the Grievant to submit his resignation in writing.

At hearing, the Grievant confirmed that he had submitted his two week notice to Wepking during the telephone call of September 13, 1991. 1/ The Grievant did not recall discussing the last day of work, but did recall that Wepking told him to submit his resignation in writing. The Grievant and Wepking agree that the Grievant requested and received September 13, 1991 as a sick day.

The Grievant returned to work on Monday, September 16, 1991. On Tuesday, September 17, 1991, the Grievant told Wepking that he wished to rescind his resignation. Wepking advised the Grievant that he would get back to the Grievant. Following this conversation, Wepking reviewed the Grievant's employment record with the Village. Thereafter, Wepking issued the letter of September 18, 1991, confirming that the Village had accepted the Grievant's resignation.

As the Union argues, the Grievant did not submit his resignation in writing. Crediting Wepking's testimony that he confirmed that the Grievant's last day of employment would be September 27, 1991, it is evident that the Grievant's resignation was accepted by Wepking during the telephone conversation of September 13, 1991. Wepking's request for a written resignation was not a condition precedent to the acceptance of the resignation, but rather, was a request for written confirmation of the resignation. Contrary to the argument of the Union, the Grievant's failure to submit his resignation in writing does not invalidate the resignation.

1/ T. 162

A voluntary resignation is not a discharge. Nor does it otherwise involve a disciplinary action subject to the "just cause" provisions of the contract. Arbitrators have found, however, that a "resignation" which is coerced, made under severe emotional distress, or based upon a mistake concerning material facts, is not voluntary and may be treated as a discharge for purposes of arbitral review. 2/ The undersigned turns to the issue of whether the Grievant's resignation was voluntary.

At the time of his resignation, the Grievant had worked for the Village for approximately ten years. According to the Grievant, he did not have any problems with his job until Solon became his supervisor. Claiming that Solon "came in with both barrels firing" and "he didn't like me from the start", the Grievant maintains that he was assigned chipper work in an effort to force his resignation. 3/

The Grievant performed chipper work for several years prior to his resignation. While the Grievant performed chipper work more frequently than other employes in his classification, other employes in his classification have been assigned chipper work. Neither the Grievant, nor the Union, grieved the assignment of the chipper work to the Grievant. 4/

2/ Elkouri and Elkouri, How Arbitration Works, BNA (4th Ed., 1985) p. 655-56.

3/ T. 153 and 166

4/ On June 15, 1989, Union Representative sent Harrigan a letter which stated as follows:

> Per your phone call on 6-12-89, I contacted Mr. Michael McNutt regarding his recent absence. After discussion with him, I believe that it would be appropriate to schedule a meeting to discuss the matter further. Specifically, Mr. McNutt believes that the Village has unfairly assigned him to a lower classi-fication of General Repairman. Mr. McNutt feels that this has been

At hearing, Wepking stated that the Village has the right to assign chipper work to any employe in the Village's Department of Public Works, including the Grievant. The record does not demonstrate otherwise. Having concluded that the Village has the right to assign chipper work to an employe in the Grievant's classification, the undersigned turns to the issue of whether or not Solon assigned chipper work to the Grievant for the purpose of forcing the Grievant's resignation.

Solon became the Grievant's supervisor on January 1, 1988. The Grievant does not allege, and the record does not establish, that the Grievant and Solon had any confrontations prior to the time that Solon became his supervisor. With respect to the period following January 1, 1988, the Grievant made only one specific complaint concerning Solon's conduct, i.e., that Solon assigned him to work the chipper.

> continuing for over six months. Also, he has raised the issue of equalized overtime.
>
> Please contact me at your earliest convenience to set up a time to meet.
>
> Thanks.

Harrigan could not recall meeting with the Union. The letter of June 15, 1989 is not identified as a grievance and is not on the grievance form which is appended to the parties' labor agreement.

The Grievant does not recall, and the record does not establish, that the Grievant performed chipper work prior to the time that Solon became his supervisor. In the years 1989, 1990 and 1991, the Grievant performed chipper work far more frequently than any other employe in his work classification of General Repairman. 5/ At times, the Grievant performed chipper work when employes in lower classifications performed repair work. 6/

According to the Grievant, after Solon became his supervisor, he sought psychiatric care because of migraines and loss of sleep. When the Grievant's doctor indicated that he suffered from work related stress, the Grievant filed a Workers Compensation claim in June of 1989. On September 11, 1989, the Village's insurer denied the claim. The Grievant does not claim, and the record does not establish, that the Grievant appealed the denial of this claim.

Chipper work is unpleasant and, if the chipper is not operated correctly, there is a risk of injury. Indeed, in 1989, the Grievant suffered an injury while working on the chipper. 7/ For a period of time in 1989, the Grievant was under a medical restriction not to perform chipper work. 8/ The Village did not assign chipper work to the Grievant during the period of time in which the Grievant was under this medical restriction.

At hearing, Solon acknowledged that the Grievant had complained about being assigned to the chipper. Solon, who denies having any "attitude problems" toward the Grievant as a person, stated that he assigned chipper work to the Grievant because "it was one of the jobs that needed to be done and he was getting it done." 9/ Solon acknowledged that the Grievant did not perform chipper work better than any other employe. According to Solon, the Grievant had some problems completing repairman work and these problems affected his job assignment decisions because "you put out the best people that you can get to do that job". 10/

It is evident that Solon knew that the Grievant did not like the chipper

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5/ In 1989, the four General Repairman performed chipper work as follows: Lotz - 120 hours; Grievant - 789 hours; Robert - 254 hours; Webel - 1 hour. In 1990, the four General Repairman performed chipper work as follows: Lotz - none; Grievant - 1078(Includes 32 hours allocated to Tree - See T. 173); Robert - 24; Webel - none. In 1991, the four General Repairman performed chipper work as follows: Lotz - none; Grievant - 912; Robert -35; and Webel - none.

6/ The chipper work normally involves two people. According to the Grievant, he worked with laborers. The record does not establish whether the Grievant performed chipper work more or less frequently than individual employes in classifications other than General Repairman.

7/ The record does not establish the exact nature of the injury. It appears that the Grievant had numbness in his arm due to a branch which snapped his hand.

8/ It is not clear whether the medical restriction was due to the arm injury or the claim involving job related stress.

9/ T. 40

10/ T. 50

work. Solon, however, is not obligated to assign work on the basis of an employe's likes or dislikes. To be sure, it would not be reasonable for Solon to assign chipper work to an employe who has a valid medical restriction not to perform chipper work. The Grievant, however, was not assigned chipper work during the period of time in which he had such a medical restriction.

At hearing, Solon offered a reasonable explanation for his decision to assign chipper work to the Grievant, i.e., he was not satisfied with the Grievant's repair work, he was satisfied with the Grievant's chipper work, and he wished to make the most efficient use of employe manpower. The record does not provide any rational basis to discredit Solon's testimony concerning his reasons for assigning chipper work to the Grievant.

For the reasons discussed above, the undersigned is persuaded that Solon was entitled to assign chipper work to an employe in the Grievant's classification. Despite the Union's assertion to the contrary, the record does not establish that Solon disliked the Grievant. Nor does the record establish that Solon's decision to assign chipper work to the Grievant was motivated by a desire to harass the Grievant or to force the Grievant's resignation.

The Grievant recalls that, when he awoke on September 13, 1991, he had a queasy stomach. The Grievant further recalls that, when he arrived at work, he experienced diarrhea, soiled his clothes and, without notifying his supervisor, left for home about 7:00 a.m. According to the Grievant, when he arrived home, he washed, drank something like "Pepto-Bismol" and went to sleep. When he awoke at 10:00 a.m., the Grievant called the Village to tender his resignation. At that time, Wepking was not in the office and the Grievant discussed his intent to resign with Susan Glavin, the Village's Deputy Clerk. As discussed above, he subsequently submitted his resignation to Wepking.

The Grievant did not see a doctor regarding his illness of September 13, 1991. At hearing, the Grievant stated that his illness was due to the fact that "something didn't agree with me". 11/ It is not evident that, at the time that the Grievant tendered his resignation, the Grievant was too ill to make a rational decision concerning his resignation.

At the time that the Grievant tendered his resignation, he had not had any confrontation with Solon nor any other Village employe. Nor had he been assigned to perform the chipper work. The Grievant recalls that, when he called to tender his resignation, he was angry and "I just thought the job caught up with me and now was the time." 12/

The undersigned is persuaded that, to the extent that the Grievant was in emotional distress at the time that he resigned, the distress was due to the fact that the Grievant did not like his job. Such distress is not the type of severe emotional distress which would warrant a finding that the Grievant's resignation was not voluntary.

The record does not demonstrate that the Grievant's resignation was coerced, made under severe emotional distress, based upon a mistake concerning material facts, or otherwise involuntary. While the Village had the right to allow the Grievant to rescind his resignation, the Village was not obligated to

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11/ T. 160

12/ T. 186

accept such a rescission.

At the time that Wepking accepted the Grievant's resignation, he knew that the Grievant had left work on September 13, 1991 without notifying his supervisor. Having knowledge of this fact, Wepking agreed to pay the Grievant a sick day for September 13, 1991 and agreed that the Grievant's last day of work would be on September 27, 1991. Having knowledge of the Grievant's conduct on September 13, 1991, the Village, by its representative Wepking, agreed that the Grievant could work through September 27, 1991. By entering into this agreement, the Village is estopped from arguing that the Grievant's conduct on September 13, 1991 provided the Village with just cause to discharge the Grievant prior to September 27, 1991.

Since the Grievant voluntarily resigned his employment effective September 27, 1991, the Village is not obligated to reinstate the Grievant. Since the Village discharged the Grievant prior to September 27, 1991, without just cause, the Grievant is entitled to be made whole for the wages and benefits that he would have received had he been permitted to work through September 27, 1991. This make whole remedy does not require the Village to pay interest on

monies due the Grievant. The undersigned rejects the Union's argument that it is entitled to be compensated for reasonable attorney fees.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. On September 13, 1991, the Grievant voluntarily resigned his employment with the Village, effective September 27, 1991.

2. The Village did not have just cause to terminate the Grievant's employment prior to September 27, 1991.

3. The Village is to immediately make the Grievant whole for all wages and benefits lost as a result of the Villages failure to permit the Grievant to work through September 27, 1991.

Dated at Madison, Wisconsin this 7th day of May, 1992.

By _____
Coleen A. Burns, Arbitrator