BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
KENOSHA PROFESSIONAL FIRE FIGHTERS UNION, LOCAL NO. 414, IAFF	Case 171 No. 46869 MA-7082
and	
CITY OF KENOSHA	

Appearances:
Mr. John Celebre, President, appearing on behalf of the Union.
Davis & Kuelthau, S.C., by Mr. Lon D. Moeller, appearing on behalf of the City.

ARBITRATION AWARD

The above-entitled parties, herein the Union and City, are privy to a collective bargaining agreement providing for final and binding arbitration. Hearing was held in Kenosha, Wisconsin, on March 30, 1992. The hearing was not transcribed and the parties thereafter filed briefs which were received by May 11, 1992.

Based upon the entire record, I issue the following Award.

ISSUES

Since the parties were unable to jointly agree upon the issues, I have framed them as follows:

1. Did the City violate the contract when it threatened grievant John Hainey with disciplinary action over his continued use of sick leave and when it issued him a written warning to that effect.

2. Did the City violate Section 19.01 of the contract when it required Hainey to bring in a doctor's slip for any additional sick leave absences?

DISCUSSION

Firefighter Hainey between 1989-1991 was out on paid sick leave and missed a total of about 100 full twenty-four (24) days between January 24, 1989 and November 2, 1991. Under the parties' collective bargaining agreement, employes have unlimited sick leave.

In response, Assistant Fire Chief Jerome P. Wamboldt in a December 2, 1991, Memorandum 1/ informed Hainey:

December 2, 1991

TO: Jon Hainey

1/ Wamboldt in October, 1987, had earlier warned Hainey about using too much sick leave.

FROM: Assistant Chief Jerome P. Wamboldt

SUBJECT: Poor Attendance

As a result of your past poor attendance with our department, and the fact that you missed at least six (6) days in 1991 alone with the flu, it is my opinion that you are abusing our sick leave privilege. I am, therefore, taking the following action:

1. I suggest that you utilize our Employee Assistance Program to help improve your attendance.

2. Effective immediately and for the next full year, any time you call in sick, you must bring a slip from the doctor substantiating your illness. If you fail to do this, you will not get paid for your sick time.

3. This is to be considered a written warning for your poor attendance. If it continues, further and stronger disciplinary action shall be taken.

Hainey filed the instant grievance on December 5, 1991, which asserted:

"1. Chief Wamboldt's memo of December 2, 1991, violates sick leave provisions of the labor agreement by imposing conditions contrary to those specified in Section 19.01.

2. Written disciplinary warning is not substantiated by any part of sick leave abuse."

In support thereof, the Union primarily argues that Hainey did not violate "any departmental rule, or policy" in taking sick leave on the days in question; that the City has failed to prove that Hainey abused sick leave; that the City's method for determining Hainey's alleged sick leave abuse and insistence upon a doctor's excuse "was bargained and rejected by the Union" in past collective bargaining negotiations; that it is "unreasonable and impossible" for Hainey to prove that he was sick after his prior absences occurred; that the City's reliance on the previously-settled Kevin Carbon grievance should not be considered; that requiring medical documentation for future absences is contrary to the contract and represents a unilateral change; and that the City's requirement for a doctor's excuse would have an unfair financial impact on the grievant and all other bargaining unit employes. As a remedy, the Union requests that the disciplinary notice be removed from Hainey's file and that Hainey be relieved of any obligation to secure a doctor's note for any future absences.

The City, in turn, maintains that it did not violate the contract when it issued a written disciplinary warning to Hainey for his poor attendance because, "The doctor's slip requirement was a reasonable response by the City to Hainey's demonstrated attendance problems which did not violate the contract."

At the outset, it must be noted that the City cannot discipline or warn Hainey over his past sick leave absences, as this record is barren of any proof that Hainey in fact was not ill on all of the days he applied for and received

sick leave prior to the issuance of the December 2, 1991, letter to him.

It is true, as the City points out, that Hainey in 1991 took six days off because of the flu and that between 1989-1991 he missed a great deal of work for various ailments. It is also true that Hainey during that time period incurred nearly twice as many sick days than any other bargaining unit employe.

But some of these absences - such as a gunshot wound and kidney surgery - were well-documented and cannot be seriously questioned. Moreover, Hainey has produced valid doctor's slips whenever the City has asked for them and that he was always at home whenever Wamboldt telephoned him there during any of his illnesses. As for his other sick leave absences, it must be remembered that it is the employer, not the employe, who bears the burden to prove that disciplinary action is warranted. Here, since the City has failed to meet this burden, 2/ it erred in warning him on December 2, 1991, that his past sick leave absences could lead to future disciplinary action. The warning issued to him therefore must be rescinded and expunged from his file.

As for the City's insistence that Hainey obtain a doctor's examination whenever he misses one day of work, I conclude that the City can impose this condition if there is sufficient objective basis for questioning sick leave utilization and if it is practical for the affected employe to see a doctor for the absences in question. The City can do so pursuant to its right under Article 2 of the contract entitled, "Management Rights", to manage its workforce and pursuant to Section 19.02 of the contract to insure that sick leave is being used for its designated purpose i.e., to compensate those employes who are in fact too ill to report for work.

Here, since Hainey did use so much sick leave, and since he missed so many days in 1991 because of the flu, the City has a sufficient basis to question (but not discipline) Hainey's past sick leave absences. It therefore has the right to insist that Hainey secure a doctor's note for any future absences, provided that he does not incur any direct out-of-pocket expenses for such visits 3/ and if he is able to see a doctor that day.

In this connection, Section 19.01 of the contract provides:

> "It will be the administration's responsibility to see that the sick leave shall not be abused. A physician's statement substantiating any claim of illness or injury extending beyond two (2) consecutive working days must be submitted by the employee to the administration upon return to work."

. . .

The Union relies upon this second sentence to support its claim that the City cannot require Hainey to obtain doctor's notes for any of his one-day illnesses.

2/ The City failed to meet this burden under either the just cause standard urged by the Union, or the arbitrary and capricious standard advanced by the City.

3/ If such visits are not covered under the City's health insurance plan, the City must pay for them.

I disagree: this second sentence only goes to the way that things are normally done whenever sick leave is used for its proper purpose. Here, though, because of Hainey's many absences, the City is facing an abnormal situation, one which enables it to take adequate steps under the first sentence of Section 19.01 to ensure that Hainey is not abusing sick leave. To hold otherwise is to in effect say that the City is utterly helpless if it suspects that employes are abusing sick leave by taking off one day at a time for which a doctor's excuse is not otherwise required. Absent clear contract language expressly providing for that, however, there simply is no basis for ruling to that effect.

At the same time, the City has the right to discipline Hainey - or any other employes for that matter - if it is able to prove, through more than mere statistics and suspicion - that sick leave is being abused in a given instance. That, admittedly, may be difficult to prove because some employe illnesses are hard to objectively measure and because subjectivity often comes into play in determining whether an employe is too ill to work. But that is a responsibility which management itself must undertake, no matter how difficult it may be, as that is the very essence of what it means to be a manager and to properly manage a work force.

The City attempted to deal with the general issue of sick leave usage in its negotiations with the Union for the 1987-1988 agreement when - as part of a comprehensive City-wide incentive plan to overhaul its sick leave policies which it also presented to other unions - it proposed contract language (Union Exhibit No. 1) providing that a doctor's excuse would be required whenever an employe used even one day of sick leave. Said proposal also provided for paying bonuses if sick leave was not used during a four-month period. The Union rejected that proposal in favor of the status quo.

The Union therefore maintains, "There can be no doubt Wamboldt was following the City's attendance control policy in his dealings with Hainey; the very same policy which was negotiated, along with its accompanying incentive plan, and rejected by the Union."

There is some truth to this because Wamboldt did use part of those controls to monitor sick leave usage, including Hainey's. But that does not necessarily mean that he acted wrongly and that the City cannot do anything in this case, as it still maintains the independent right under Article 2, the Management Rights provision, and under Section 19.02 to police suspected sick leave abuse, which in this case means that Hainey must produce a doctor's note when ordered to do so. Since the City retained this right both before and after the City's 1987 unsuccessful effort to enact its attendance incentive plan, there is no merit in the Union's claim that the City now is trying to "implement unilaterally" what it could not achieve at the bargaining table.

In light of the foregoing, it is my

AWARD

1. That the City violated the contract when it threatened grievant John Hainey with disciplinary action over his sick leave usage; the written warning issued to him to that effect therefore must be rescinded and purged from his file.

2. The City did not violate Article 19.02 of the contract when it required Hainey to bring in a doctor's slip for future sick leave absences, provided that Hainey does not suffer any out-of-pocket expenses and that the City pay for any such doctor's visits.

Dated at Madison, Wisconsin this 15th day of October, 1992.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator