

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 995, AFSCME, AFL-CIO

and

COLUMBIA COUNTY

Case 162
No. 52215
MA-8874

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Donald Peterson, Corporation Counsel, Columbia County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned arbitrator to hear the grievance of James Voigtlander. A hearing was held on July 12, 1995, in Wyocena, Wisconsin, at which time the parties presented their evidence and arguments. The record was closed at the end of the hearing.

ISSUE:

The parties ask:

Did the Employer have just cause to issue discipline to the Grievant for incidents occurring on August 22, 1994? If not, what is the appropriate remedy?

BACKGROUND:

The Grievant is James Voigtlander, a master mechanic in the Highway Department since October of 1987. He is grieving the written reprimand issued to him by Highway Commissioner Kurt Dey.

Dey became concerned with sick leave use or abuse in the summer of 1994, when Union members complained to supervisors about abuse of sick leave in the Department. On July 14, 1994, Dey sent the following letter to Thomas Borgkvist, President of the Local:

It has been brought to my attention by one of your officers that there have been union employees abusing sick leave. Therefore, I will be starting an investigation into the abuse of sick leave. I would like to thank the officer for bringing this situation to my attention. I would also recommend that you inform the union membership on what the intent of sick leave is to be used for. If you have questions, please feel free to contact me.

Borgkvist talked with Union members, including Voigtlander, about abusing sick leave, and told them that "if they're doing it, don't."

Also during the summer of 1994, Dey asked the Department's account clerk, Teresa Kleifgen, to prepare a document showing how much sick leave time had been used versus how much was available for each employee. Kleifgen produced a document in the summer of 1994 and revised it in January of 1995 (Co. Ex. #6). The County's records show that Voigtlander could have accumulated 688 hours of sick leave by January of 1995, but his balance is only 40 hours. While a few other employees have low balances and records that are not exemplary, Voigtlander's record of sick leave usage is the worst in the Department. The County also believes that there is a pattern to Voigtlander's use of sick leave, that many days are taken in connection with a weekend or a holiday.

When Dey found out that Voigtlander's sick leave balance was small, he asked the Department's executive secretary, Ann Achterberg to get information from the Rio Fire Department regarding fire calls. Voigtlander is a volunteer firefighter for the Rio Fire Department, and was training to be an EMT in 1994 (he is currently an EMT). Dey was trying to see if there was a tie that could be made between sick leave usage and outside activities. He found one such instance in August of 1993.

On August 23, 1993, Voigtlander worked a half day in the morning, and took the afternoon off to go to the doctor for an ear infection. The doctor told him to stay home because dust from the shop could get in his ear. Voigtlander used sick leave on August 24, 1993, but later that day, around 6:00 p.m., he responded to a fire call with the Rio Fire Department. Voigtlander said he was running a pump and not actually fighting the fire.

One year later, on August 22, 1994, Voigtlander called in sick with stomach problems. He has ongoing stomach problems which have been medically diagnosed. He takes medication daily for the problem, but food and nerves affect him from time to time. While he was at home, a page from the Rio Fire Department went out for an ambulance. There was a car accident within 100 yards of Voigtlander's house.

When Voigtlander heard the first call, he did not respond. He listened to the situation as a second call went out for help, and heard that there were children in the car accident who needed an ambulance. A six-year-old girl and an eight-year-old boy were bleeding and needed medical

attention. There were also two older teenagers who were injured. When the third page went out and called for an ambulance immediately, Voigtlander went to the scene to see if he could give a hand. He was not an EMT at the time, but felt he might be able to do something. Although the accident was about 100 yards away, he drove his vehicle to get there faster, and other employees passing by the scene recognized his vehicle. Once at the accident, Voigtlander waited about 10 or 15 minutes until the ambulance arrived, and held a child's neck in position until a collar was put on by the ambulance crew, then left. He made no claim from the Rio Department for payment for this call. He was a firefighter at the time, and the fire department had not been paged.

When the County heard from other employees about the incident on August 22, 1994, it verified with the Rio Fire Department that Voigtlander had responded to a page. On August 31, 1994, Dey gave Voigtlander a one-day suspension and then met privately with him about it. The following day, Voigtlander came in to pick up his check and met with Dey and Achterberg about the suspension. Dey and Achterberg recalled that Voigtlander said that sick leave was a personal holiday. Dey testified that he corrected him about that, and Voigtlander debated the point. Achterberg made a note regarding that statement on her calendar. Voigtlander testified that he asked -- isn't sick leave a personal holiday -- because someone from a different Union told him that. He has also asked that question of his supervisor, Craig Steingraeber. He stated he has never used sick leave as a personal holiday, or to extend a weekend or other paid holiday.

After a further discussion between Dey and Voigtlander, Dey reduced the penalty from a one-day suspension to a written warning. The revised discipline was issued on October 11, 1994.

THE PARTIES' POSITIONS:

The County objects to the Union's contention that this incident should be looked at by itself. It believes it is appropriate to look at the past to see patterns, and that while past incidents such as the 1993 fire call did not result in discipline, the past is probative. The County did not jump on the Grievant for a single isolated incident but found that there was a propensity on the Grievant's part to use sick leave while other incidents demonstrated that he was not sick. The County finds that the Grievant's own statement to Dey and Achterberg that sick leave is a personal holiday is most indicative of abuse of sick leave. This was a statement made against his self interest while there was no evidence that he was indeed sick. If the Grievant had a sterling record, the Union would be coming forth showing that his record demonstrates that there is no abuse. But unfortunately for the Grievant, the record is otherwise. The County concludes that when one sees the evidence in its totality, one must conclude that the Grievant has used paid sick time to his own interest. The discipline was further generously reduced from a one-day suspension to a written warning.

The Union asks the arbitrator to look at what really happened on the day in question here, when the Grievant called in sick with a flare-up of a medically diagnosed stomach problem, and while at home, heard a fire department officer plead for ambulance help. The Union asserts that it

would not have mattered if Voigtlander had two broken legs -- he would have gone down there to help those children, because it's his responsibility as a human being. But then, his reward was to be disciplined and accused of abusing sick leave. The Union says this case is not about what happened in 1993, or the percentage of sick leave days used before and after weekends and holidays. After all, 40 percent of all work days are before or after a weekend, and perhaps another 20 percent occur before or after a holiday. The Grievant may have been ill advised to make a comment about sick leave being a personal holiday, but there is no evidence that he used sick leave for anything other than a legitimate purpose. The Union makes a final plea for compassion, asking who among us would have let those children lie there without coming to their aid?

DISCUSSION:

The parties' labor contract contains a just cause standard for discipline and discharge in Article 3. Article 11, Sick Leave, also contains the following sentence: "Abuse of sick leave may be considered cause for discipline."

Employers and employees have a mutual interest in seeing that the benefit of paid sick leave is not abused. Certain employees here even recognized that and alerted the Employer to the potential abuse situation.

The County has a reasonable expectation that when employees use sick leave, they are too sick to come to work and consequently, too sick to carry on other outside activities or interests. The issue is not whether Voigtlander should or should not have left little children bleeding on the highway and acted humanely toward his fellow human beings. The issue is whether the County had just cause to discipline him for his use of sick leave on August 22, 1995. I find that it did.

If the Grievant had used a normal amount of sick leave, the Employer may have had more sympathy. In fact, the Employer showed some sympathy, and actually reduced the penalty upon hearing the complete story. Now, it should be noted here that an employer is usually better off not making disciplinary decisions without having heard the employee's side of the story, and employers have run some risk in doing so because arbitrators may then find that the employer did not give the employee due process. However, where Dey made a decision and then reduced the penalty, I find that he accorded Voigtlander some due process. The disciplinary action being grieved is not the original one.

While the record does not clearly substantiate that Voigtlander has abused sick leave in the past by taking sick leave to extend weekends or holidays, the record does clearly show that of 69 employees in the Highway Department, he has the worst record of time used versus time available.

The record also shows that in 1993 Voigtlander answered a fire call on a day he called in

sick, and the County was aware of that. Now the County has a heightened concern about Voigtlander's outside volunteer work conflicting with County paid time. It has been said by many that public employees live in fish bowls, and when employees conduct their own personal business while on the public employer's paid time, they may expect repercussions.

All in all, if Voigtlander had a better track record and had not used so much sick leave, the incident on August 22, 1994, would have been fairly insignificant. However, when an employee has a record such as this one, an employer has a legitimate concern about that employee being involved in any extra-curricular activities while on sick leave -- yes, even when small children are bleeding on the highways of Columbia County. The question here is not whether an employee should be a Good Samaritan on a given occasion, but whether an employer may consider outside activities to be an abuse of sick leave. Under all the facts and circumstances of this case, I find that it may.

I am upholding the disciplinary action of a written reprimand for an additional reason. The reprimand should serve notice to Voigtlander that he needs to work on improving his attendance record. Voigtlander certainly knows or should know by now that a sick day is not a personal holiday and he should be on notice that his conduct while on sick leave may be scrutinized or challenged.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin, this 2nd day of August, 1995.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator