

**IN THE MATTER OF ARBITRATION
BETWEEN**

UNIVERSITY OF MINNESOTA

Employer,

**OPINION AND AWARD
(Welde Grievance)**

and

BMS Case No. 10-PA-0124

April 13, 2010

**AMERICAN FEDERATION OF STATE
COUNTY AND MUNICIPAL
EMPLOYEES, COUNCIL 5**

Union.

**A. Ray McCoy
Arbitrator**

Appearances

For the Employer

Mr. Brent P. Benrud, Esq.
Associate General Counsel
University of Minnesota
Office of the General Counsel
360 McNamara Alumni Center
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For the Union

Ms. Joyce Carlson
Field Representative
AFSCME Minnesota Council 5, AFL-CIO
300 Hardman Avenue S.
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Jurisdiction

The arbitrator has jurisdiction to resolve this matter pursuant to the COLLECTIVE BARGAINING AGREEMENT BETWEEN THE UNIVERSITY OF MINNESOTA AND AFSCME LOCALS 3937 & 3801 COUNCIL 5, AFL-CIO, TECHNICAL UNIT, Effective July 1, 2007 through June 30, 2009. (Hereinafter “Agreement” or “CBA”) Article 21, Section 4 provides general provisions regarding arbitration and Section 5 defines the limitations on the arbitrator’s authority.

The Union filed the grievance on March 3, 2008. The Parties processed the grievance through all relevant steps outlined in the Agreement. The Parties notified the arbitrator of his selection by electronic mail on November 19, 2009. The Parties selected February 19, 2010 for the hearing. The hearing was held on that date at the University of Minnesota, Office of the General Counsel, 360 McNamara Alumni Center, 200 Oak Street SE, Minneapolis, MN 55455.

The Parties had a full and fair opportunity to present their cases including the introduction of documents and the examination of witnesses.¹ After presentation of their respective cases, the Parties decided to submit briefs in lieu of an oral closing. The Parties selected March 12, 2010 for exchange of briefs electronically. The arbitrator received the briefs as agreed and the record was closed as of that date.

Issue

The Parties agree that the issue to be decided is whether the Employer had just cause to issue the Grievant a written warning. The Employer also asked the arbitrator to determine

¹ The Employer called two witnesses, Mr. Zierdt, Manager of Field Operations, Office of Information Technology and Ms. Victoria Sheehan, Director of Quality Assurance. The Employer submitted 13 exhibits. The Union called five witnesses, Mr. Kenneth Holm, Chief Steward, Alan Koppenhaver, Info Tech professional, Mr. Kevin Willis, engineering technician, Mr. Dennis Mitchell, systems technician and the Grievant, Mr. Welde. In addition, the Union submitted 9 exhibits.

whether the grievance was timely.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 17

SICK LEAVE

Section 5. REQUESTING SICK LEAVE

- A. Employees must request and receive approval for use of sick leave from the designated or appropriate administrator in the Department as soon as possible after the onset of illness.**
- B. While supervisors must be informed of the general nature of an illness, such information shall be treated by the supervisor with appropriate confidentiality.**
- C. In the case of extended or chronic illness, the designated or appropriate administrator in the Department may require statements from a physician or dentist which includes the anticipated date of return. Upon request of the Employer, when the Employer has reasonable cause to believe that an employee has abused or is abusing sick leave, employees utilizing leave under this Article may be required to furnish a statement from a medical practitioner as defined in the Family Medical Leave Act stating that the practitioner finds the employee unable to work due to illness. Requests to furnish a statement from a medical practitioner may be oral or written. Oral requests shall be reduced to writing as soon as practicable. The written requests shall state the reason(s) for the request as well as the period of time that the employee will be required to furnish the statement. If the employee does not bring a medical practitioner's statement of illness when requested, the supervisor may deny the use of sick leave.**
- D. Abuse of sick leave shall be one form of just cause for disciplinary action. Abuse shall be defined as use of paid sick leave for reasons other than those listed in this Article. Use of paid sick leave in a pattern such as Mondays, Fridays, or the day after payday is an example of a use of sick leave that may constitute abuse.**

E. A designated or appropriate administrator may require an employee to leave the workplace:

- 1) If the employee is unable to perform job responsibilities in an up-to-standard manner because of what appears to be a health condition or**
 - 2) If the employee may expose others in the workplace to illness or disease.**
- Such time shall be charged against sick leave, if available.**

F. If an employee becomes ill while on vacation leave and presents satisfactory proof of illness or injury, the designated or appropriate administrator in the Department may approve the use of sick leave in lieu of vacation leave.

ARTICLE 22

DISCIPLINE

SECTION 1. DISCIPLINE FOR JUST CAUSE

Disciplinary action shall be taken only for just cause, however probationary employees may be discharged without just cause and shall have no right to grieve discharge (see Article 7, Probationary Period). Disciplinary action, except discharge, shall have as its purpose the correction or elimination of incorrect work-related behavior by an employee.

Supervisors may not take disciplinary action against an employee who, in good faith, reports a violation of any federal or state law or regulation to a governmental body or law enforcement official. Disciplinary action may not be taken against an employee who is requested by a public agency to participate in an investigation, hearing, or inquiry, as well as an employee who refuses to participate in an investigation, hearing or inquiry, as well as an employee who refuses to participate in any activity that the employee in good faith, believes violates state or federal law.

SECTION 2. COACHING

The normal corrective disciplinary procedure shall consist of three (3) steps, except that initial minor work deficiencies will normally be privately brought to the employee's attention through coaching. Coaching may include, but is not limited to instructions, directions, or prompting to the employee. Coaching provides feedback on job performance and is intended to be corrective and constructive. Coaching shall not be considered disciplinary.

ARTICLE 29 WORK RULES

The Employer may establish and enforce reasonable work rules which are not in conflict with the terms of this Agreement. Such rules may be established on an organizational unit basis such as a work location, Department, Coordinate Campus, Collegiate/Administrative Unit, or University-wide and shall be the same rules for all Unit 7 (Technical Agreement) employees in an area but may vary according to what is appropriate for the work assigned to employees and shall be applied uniformly to all employees who are affected within these organizational units. The rules shall be posted and/or distributed to directly affected employees.

Whenever new or amended rules are established, the organizational work unit shall inform affected employees prior to the effective date of the rule whenever practicable. The University shall make a reasonable effort to discuss, and upon request, shall meet with the Local Union, explaining the need for the rules, and shall allow the Union reasonable opportunity to express its views prior to placing the rules in effect. For the purposes of this Section, the Local Union for issues related to rules at the local level shall be the local Union Steward, or in his/her absence the Area Steward or Chief Steward, and for issues at the campus or bargaining unit wide level it shall be a Union Officer.

Background

The Grievant is a member of the Office of Information Technology, field operations group that is responsible for installing and maintaining the Employer's voice and data communications network. Employees of the field operations group are further divided into two groups: technicians and engineers. The Grievant was hired as a technician primarily responsible for installation of voice and data communication lines. When phones and computers are moved from one office to another, the Grievant's job is to install the needed phone and computer lines in the new location. When new buildings were brought online, the Grievant might be assigned to assist with the installation of the voice and data equipment in those buildings.

The need for timely installation and completion of work orders regarding office moves prompted the Grievant's supervisor, Mr. Zierdt, to issue work rules in May 2007. The work rules were aimed at reinforcing the notion that employees should work all of the hours assigned to them and be on time. In addition, the rules were designed to make clear that pre-approval was required for any deviations from the assigned work schedule. Mr. Zierdt's goal was to maximize the use of his work force in the face of mounting concerns from the university community that work orders regarding voice and data communication lines were not being completed in a timely manner.

The Grievant was unable to attend the staff meeting at which Supervisor Zierdt explained the newly issued work rules. However, Mr. Zierdt emailed the rules to everyone on his staff and sent a copy by regular mail to the Grievant's home. In addition, Mr. Zierdt met with the Grievant to discuss the rules when he returned to work. Furthermore, by letter dated June 15, 2007, Mr. Zierdt reminded the Grievant of the work rules and specifically asked that he review and abide by them. Mr. Zierdt sent the June 15, 2007 letter to the Grievant as a Letter of Expectations specifically aimed at addressing what the supervisor viewed as a need for the Grievant to improve his performance with respect to the items mentioned in the letter and specifically to make sure he abided by the rules issued in May 2007.

Nevertheless, on October 2, 2007, Mr. Zierdt found it necessary to issue a verbal warning to the Grievant for failure to abide by those rules. The Grievant left work early that day and rather than inform Mr. Zierdt, decided to tell a co-worker. The oral warning to the Grievant specifically addressed the Grievant's failure to inform his supervisor that he arrived at work unable to perform his duties due to a medical condition and then left work without permission as required by the work rules issued in May 2007. In the fall of 2007, Mr. Zierdt assigned the Grievant to work with the Office of Information Technology's Quality Assurance unit. The Quality Assurance Office was conducting audits of buildings with regard to voice and data communication functions. The assignment was temporary. The Quality Assurance supervisor, Victoria Sheehan, issued work assignments to the Grievant during this temporary arrangement and signed off on the Grievant's sick leave and vacation requests. Mr. Zierdt informed the Grievant that he needed to continue to abide by the rules issued in May 2007 and that he needed to report any deviations from his assigned work schedule to Ms. Sheehan.

The Grievant failed to follow the rule regarding informing his supervisor of a change in his assigned work schedule. On February 1, 2008, the Grievant decided that he was unable to come to work. Rather than call his supervisor, Ms. Sheehan, the Grievant contacted a co-worker, Mr. Koppenhaver. The Grievant did not attempt to contact Ms. Sheehan by phone or email but simply relied upon Mr. Koppenhaver to relay the message. When Mr. Zierdt learned of the deviation from the work rule he issued a written warning to the Grievant. The Union filed the grievance to challenge the Employer's right to issue a written warning. The Union's primary claim is that the Grievant was following what was considered an established practice in the Quality Assurance area when he chose to contact Mr. Koppenhaver rather than Ms. Sheehan.

Positions of the Parties

Employer's Position

1. The Union's appeal to arbitration is untimely. The Employer's Step 3 response to the Grievance was issued on August 27, 2008. The Union had 60 calendar days from the

issuance of the Step 3 response to provide notice of intent to arbitrate. The Union provided notice on October 24, 2008. The Union is required to actually request arbitration within 90 days of filing its notice of intent to arbitrate. However, the Union did not request arbitration until nearly seven (7) months later.

2. The arbitrator has no authority to “modify, nullify, ignore, add to, or subtract from” the provisions of the collective bargaining agreement and therefore must dismiss the grievance as untimely.
3. The Grievant has a history of failing to adhere to the proper call-in procedures when he is ill and cannot come to work. He also has left work early without following proper procedures and generally refused to comply with rules regarding who to inform when sick and unable to come to or remain at work as scheduled.
4. Mr. Zierdt, the Grievant’s supervisor, met with him personally to discuss the work rules, gave him a letter of expectations specifically referencing the work rules and issued an oral warning to him when he failed to follow the call-in procedures.
5. Even while temporarily assigned to Quality Assurance, the Grievant understood that he was expected to contact his supervisor directly when he needed to deviate from his assigned work schedule.
6. However, the Grievant again ignored the requirement that he contact a supervisor and not a co-worker to report his absence from work. Having failed to follow the required notification procedure, the Employer issued a written warning to the Grievant.
7. Because the Employer informed the Grievant of the procedure, the Grievant acknowledged that he was aware of the procedure, the procedure was reasonable and the Employer issued an oral warning to the Grievant regarding his failure to follow the procedure, the written warning is supported by just cause.

Union’s Position

1. The Employer never raised the issue of timeliness at any of the stages of the processing of this grievance. The Employer did not raise the issue after receipt

of a list of arbitrators, the exchange of exhibits and witness list in preparation for the hearing or the selection of the arbitrator and selection of a date to hold the hearing.

2. Neither party has ever adhered to the strict or literal language of the Agreement with regard to timelines.
3. The Employer should not be permitted to demand strict adherence to timelines retroactively and this grievance should be found to be timely.
4. The Employer did not have just cause to issue a written reprimand to the Grievant. The Grievant was held to a different standard than other employees from the Office of Information Technology who were temporarily assigned to the Audit Unit under the supervision of Ms. Sheehan.
5. The work rules issued by the Employer in May 2007 did not mention sick leave or its usage.
6. The Employer did not mention rules regarding sick leave in its Letter of Expectations issued to the Grievant on June 15, 2007.
7. Employees temporarily transferred to the Audit Unit worked under the immediate supervision of Mr. Koppenhaver, a regular employee of the Audit Unit.
8. Employees transferred to the Audit Unit received approval for sick and vacation leave from Ms. Sheehan and not from Mr. Zierdt.
9. The Grievant followed the practice of the Audit Unit. When calling in sick he spoke to Mr. Koppenhaver, from whom he received his work direction.
10. Mr. Koppenhaver was responsible for arranging and assigning their daily work in the Audit Unit and started his shift at least 2 hours before Ms. Sheehan reported to work. Mr. Koppenhaver needed to know who was or was not coming in each day so he could order the work for each day. It was his practice to pass the information on to Ms. Sheehan regarding absences due to illness or other reasons.
11. Ms. Sheehan never gave specific directions to the Grievant regarding call-in

procedures when sick and it was undisputed that Mr. Koppenhaver received calls from Audit Unit employees who called in sick.

12. The procedure of calling in to Mr. Koppenhaver who was then responsible for informing Ms. Sheehan was the accepted practice and the same practice the Grievant followed.
13. The Employer is essentially creating a work direction after the fact and therefore the reprimand is not supported by just cause.

OPINION AND AWARD

Timeliness

The arbitrator finds the Grievance in this instance to be timely. Doing so, in no way amends, modifies or otherwise changes the Parties' Agreement with respect to timelines. Here as the Union points out, the Employer acquiesced. The Employer cannot participate in the process while ignoring the plain language of the Agreement and thereby induce the Union to move forward only to surprise the Union at the hearing of its objection to a missed deadline. The appropriate moment would have been when the Union actually requested arbitration. It would have been a simple matter for the Employer to say "No." The Employer would have been perfectly within its right to do so given that the Union does not deny making its request for arbitration well beyond the 90 day period called for in the Agreement.

It is not uncommon for arbitrators to require Parties' to be bound by their conduct when that conduct intentionally ignores clear language in the collective bargaining agreement and especially when that conduct gives one side an unfair advantage in the resolution of grievances. . Doing so does not modify the Agreement. It does, however, accept that the Parties' have demonstrated a desire to ignore the clear and unambiguous language in a given instance. It also permits the Parties to agree to return to strict adherence to contractual language during the processing of subsequent grievances.

In this case, the Employer's conduct actually induced the Union's reliance and in doing so forced the Union to commit time and resources to prosecuting the grievance. The Parties' Agreement states: Within ten (10) calendar days from the Union's request for arbitration the Union and the University shall select an arbitrator from an agreed upon list of arbitrators." (Agreement, Article 21, Section 3 at p. 45-46) Having induced such reliance the Employer cannot fall back on the strict language of the Agreement in order to avoid a determination of the grievance on the merits. As importantly, the Parties' Agreement states: "Should the Union fail to appeal a decision within the time limits specified, it shall be considered settled on the basis of the Employer's last answer and all further proceedings shall be dropped." (Agreement, Article 21, Section 3 at p. 46) Rather than making it plain to the Union that its request for arbitration was untimely, the Employer participated in the selection of an arbitrator, the exchange of documents in preparation for the hearing and otherwise behaved as if it had no objection to the late request for arbitration. The clear and unambiguous language of the Agreement instructs the Employer to drop further proceedings once the Union fails to proceed to arbitration in a timely manner. This the Employer did not do. It is incumbent upon the Parties to make clear, especially when both sides have been lax in doing so on numerous occasions, that their intent is to strictly adhere to the timelines of the Agreement. Again, the matter is properly before the arbitrator for resolution.

With regard to the merits of the grievance, the arbitrator finds that the Employer had just cause to issue a written reprimand to the Grievant. The Employer met its burden that it established, communicated and sought to help employees understand its work rule and the reason(s) for it. The Grievant acknowledged receipt of the work rule in writing on more than one occasion and does not dispute receipt of a verbal warning following his failure to follow the work rule. These facts established at the hearing create an enormous hurdle for the Union in its attempt to have the discipline overturned. In an attempt to accomplish its goal, the Union argues the rule changed when the Grievant was temporarily transferred to the Quality Assurance or Audit Unit. The Grievant testified that prior to the transfer, his supervisor, Mr. Zierdt, instructed him that he would be supervised by Ms. Sheehan. Therefore, requests for sick and vacation leave were to be submitted to Ms. Sheehan. However, the Union seeks to make more of this instruction

than the record supports. The Union takes the position that once transferred, Mr. Zierdt no longer had any control over the Grievant and whatever warnings and rules that applied to the Grievant were set aside when he was transferred to Ms. Sheehan's unit. Specifically, the Union advances the argument that Ms. Sheehan had in place, call-in procedures different from those of Mr. Zierdt. The Union argued that Ms. Sheehan's call-in procedures, while not in writing, were known to permit the use of another employee as opposed to a supervisor to relay information regarding absences to Ms. Sheehan. That argument does not overcome what has been proven to be a directive clearly explained and applied to the Grievant. The Grievant was given an oral reprimand on October 2, 2007 as a result of his failure to follow the clearly established work rule. The fact of his temporary transfer to the Audit Unit did not give him license to ignore the work rule. The rule is actually quite simple to understand. In the written communication regarding the rule that was sent to all employees including the Grievant, Mr. Zierdt states in part: "All exceptions to assigned work hours must be pre-approved by me." The critical language here is "all exceptions to assigned work hours must be pre-approved." All exceptions to assigned work hours include sick leave requests. The Union seeks to distance sick leave requests from the work rule, since the phrase "sick leave" is not used in the work rule distributed in May 2007. However, it is reasonable for anyone looking at the language to conclude that if, for any reason, you have to change your assigned work schedule that you will either seek the required pre-approval or make certain that you inform your supervisor as soon as practical.

The work rule did not, in other words, need to list every reason such as sickness or illness in order for the Grievant to understand that should he require a change for any reason including sickness that he should have sought pre-approval or at the very least informed his supervisor of the reason for his deviation from his assigned work schedule as soon as possible. The Letter of Expectation issued to the Grievant on June 15, 2007 specifically asked him to review the work rule and to seek clarification if he did not understand it. It also told him that he was expected to follow those procedures. It did not tell him he was expected to follow the procedures of the Audit Unit when and if he was temporarily assigned to it. It instructed him to follow the procedures outlined in the May 15, 2007 email. Once transferred to the Audit Unit, nothing changed except the person to whom the Grievant was required to report his need to deviate from an assigned

work day. That person was his supervisor, Ms. Sheehan. The Union argues that the May 15, 2007 work rule, the Letter of Expectation and the Oral Warning issued to the Grievant should be ignored simply because it was the practice in the Audit unit to call a co-worker and not a supervisor. The testimony regarding this practice cannot be given the weight the Union believes it deserves. First, doing so would undermine what was clearly a good faith attempt by the Employer to encourage the Grievant to change his behavior with regard to calling-in when he needs to adjust his work schedule for any reason and leaving work early when he feels he cannot complete his assigned work day. The record is clear that the Grievant has indicated a disdain for following the appropriate procedures. His work record shows that even before his transfer to the Audit unit that he took upon himself to decide when he would call Mr. Zierdt, who was his supervisor at that time.

The oral reprimand, for example, makes clear that on July 10, 2007, the Grievant came to work knowing he was unable to meet the physical requirements of his job and did not inform his supervisor, Mr. Zierdt. To make matters worse, the Grievant then chose to simply leave the workplace without informing his supervisor. Obviously, as the oral reprimand states: “any future violation of these work rules will lead to further disciplinary action, up to and including discharge.” (Employer Ex. 12) The Grievant chose to ignore the rule once more by not informing his supervisor but relying on a co-worker to relay the information. Once the Grievant was put on notice that conduct of a similar nature as that resulting in the oral reprimand would lead to further discipline, it is hardly convincing to argue that the Grievant did not understand what was expected of him simply because he was on temporary transfer to another unit. This is especially true since it was demonstrated at the hearing of this matter that while Ms. Sheehan, as Mr. Zierdt instructed, signed off on sick leave and vacation requests for the Grievant, she was not responsible for evaluating his performance or issuing discipline. Those responsibilities remained with Mr. Zierdt. It was incumbent upon the Grievant to take the oral warning seriously or face the consequences. He did not do so.

Secondly, what the Union is seeking to argue here is that there exist an established past practice that should be given greater weight than contractual language and existing work rules. However, there clearly was a lack of mutuality with regard to the practice the Union relies upon.

Specifically, the Union basically argues that in the Audit Unit it was common practice to alert Mr. Koppenhaver and that he was responsible for relaying that information to the supervisor, Ms. Sheehan. However, in this case, it was clear that Ms. Sheehan, as she testified, had not established the practice urged upon the arbitrator by the Union. Ms. Sheehan testified that Mr. Koppenhaver was not a lead worker and therefore did not have supervisory authority over the Grievant. Ms. Sheehan also testified that it was her expectation that employees notified her of their inability to report to work as scheduled and of their need to leave work early. She also said that she never told any of her employees to report this information to Mr. Koppenhaver. Testimony revealed that by the time Ms. Sheehan arrived to work on February 1, 2008, Mr. Koppenhaver had not yet informed her of the Grievant's absence from work that day and she found out from another source. The fact that she did not learn of the Grievant's absence from the person the Union claims was responsible for informing her demonstrates the flaws in that procedure.

Furthermore, the testimony revealed that the Grievant did not speak directly with Mr. Koppenhaver but simply left a voicemail. He could have done the same by sending a voicemail to Ms. Sheehan or Mr. Zierdt for that matter, especially since he had already been warned that further deviations from the rule would result in additional discipline beyond that of the oral reprimand.

Here again, it is important to note that the Employer demonstrated an effort to inform the Grievant of its expectations. Whether the Letter of Expectations or specific conversations amount to coaching or not is unimportant. What is important is that the Employer took specific pains to let the Grievant know what was expected of him and the Grievant failed to follow that advice. It appears to the arbitrator, however, that the Agreement is instructive on this point as well. Article 22, Section 2, Coaching defines "coaching" and makes clear that it is meant to be constructive, corrective and designed to prompt and direct the employee in the desired direction. Such actions need not be reduced to writing but may consist of a simple conversation. Here the Grievant received a Letter of Expectation, further instruction and prompting prior to being issued an oral reprimand and cannot now claim that he was unaware of the appropriate procedures to be followed.

The arbitrator finds that the Employer's actions are supported by the clear language of the Agreement. The Agreement gives the Employer the right to establish reasonable work rules and to apply those rules to "all Unit 7 (Technical Agreement) employees in an area." (Agreement, Article 29 at p. 60) As required by Article 29, the Employer distributed the rules directly to affected employees including the Grievant. The Union could have requested an opportunity to meet and discuss the rules as permitted by Article 29. Even though it did not, the Grievant did receive a Letter of Expectation alerting him to the need to adhere to the rules and to request clarification if needed. Having failed to do so, especially in light of the oral reprimand issued for failing to follow those rules, the Union's arguments that the Grievant was held to a different standard or that he did what he was supposed to do on the morning of February 1, 2008 are simply unpersuasive.

Moreover, Article 17, Sick Leave plainly states that employees are required to speak with a designated or appropriate administrator. Contrary to the Union's position, Mr. Koppenhaver was not that person. This is significant because, among other reasons, there is always a concern with confidentiality in the reporting of personal information about illness or family matters that require employees to be absent from work. The Parties recognized the importance of the confidentiality issue and included language to address that concern in Article 17. "While supervisors must be informed of the general nature of an illness, such information shall be treated by the supervisor with appropriate confidentiality." (Agreement, Article 17 at p. 27) Given this language, it is clear that the Employer intended and the Union agreed to language designed to protect the confidentiality of information passed on in the process of reporting absences or deviations from assigned work schedules. In short, the arbitrator is satisfied that the Articles 17 and 29 of the Agreement as well as the oral reprimand provided the Employer just cause to move to the next step in the progressive disciplinary process and issue the Grievant a written reprimand for his continued failure to follow the procedures applicable to this situation.

Award

Based on the foregoing, the grievance is DENIED. The Employer had just cause to issue a written warning to the Grievant. The arbitrator retains jurisdiction to clarify the award if necessary.

Respectfully submitted

A. Ray McCoy
Arbitrator

Dated: April 13, 2010