

**IN RE ARBITRATION BETWEEN:**

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**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,  
AFSCME COUNCIL 5, LOCAL #3937 & 3801**

**and**

**UNIVERSITY OF MINNESOTA**

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**DECISION AND AWARD OF ARBITRATOR  
BMS CASE # 10-PA-0126**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**July 12, 2010**

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AFSCME Council 5, Local 3937 & 3801,

and

University of Minnesota.

DECISION AND AWARD OF ARBITRATOR

BMS Case # 10-PA-0126

David Welde Grievance

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**APPEARANCES:**

**FOR THE UNIVERSITY:**

Brent Benrud, Esq. General Counsel's Office  
Mark Zierdt, Manager, OIT Department  
Lucy Newman, HR Manager in OIT  
Tracy Quick, OIT Wireless Engineer  
Kevin Hinze, Supervisor OIT  
Randy Brink, Supervisor OIT

**FOR THE UNION:**

Joyce Carlson, Field Representative  
David Welde, grievant  
Ken Holm, Union steward  
Jason Iversen, Union President

**PRELIMINARY STATEMENT**

The hearing in the above matter was held on May 10, and May 25, 2010 at the Office of the General Counsel, 240 McNamara Center on the Minneapolis Campus of the University of Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated June 25, 2010 at which point the record was closed.

**ISSUES PRESENTED**

1. Is the grievance timely/procedurally arbitrable?
2. Was there just cause for the termination of the grievant? If not, what is the remedy?

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2007 through June 30, 2009. Article 21, section 3 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

## UNIVERSITY'S POSITION

The University's position was that the matter is untimely and should be dismissed on that basis alone. If the arbitrator reaches the merits, the University's position is that there was just cause for the termination under these circumstances. In support of this position the University made the following contentions:

1. **TIMELINESS:** The University noted that the termination was grieved at Step 2, which is permissible under the terms of the grievance procedure but that there still very specific time limits within which the Union must make certain appeals following the answer to each step. Here the grievance procedure required the Union to send a "letter of intent to arbitrate" within 60 days of the University's Step 3 answer and must "request arbitration" within 90 days of the University's Step 3 response.

2. The University cited the provisions of the grievance procedure which reads in relevant part as follows:

Step Four. If the matter is not resolved, or if no decision is rendered within fourteen (14) calendar days of the [Step Three] meeting, the Union may file a letter of intent to arbitrate within sixty (60) calendar days of when the Step Three response was due. This letter shall be sent to the Office of Human Resources. The Union shall request arbitration within ninety (90) calendar days of the filing of the letter of intent to arbitrate. The Union will make a good faith effort to reduce the sixty (60) calendar day time limit whenever possible...

3. The University terminated the grievant on May 22, 2008. The Union filed the grievance in a timely fashion at Step 2 as noted above. The University's Step Three response to the Union's grievance was issued on February 3, 2009. See, University Exhibit 6. The Union filed its notice of intent to pursue arbitration on March 31, 2009, within sixty (60) calendar days of the Step Three response but failed to send the request for arbitration within the required 90 days. The Union sent another so-called intent to arbitrate on June 8, 2009 but that was nothing more than a copy of the March 31, 2009 letter and did not meet the requirements of a request to arbitrate under the terms of the labor agreement.

4. The University asserted further that the Union's request to arbitrate was due no later than June 29, 2009 and the Union failed to send that required notice. In fact the actual request to arbitrate was not sent until August 12, 2009, nearly 7 weeks too late.

5. The University further cited Article 21 sections 5 and 6 as follows:

SECTION 5. LIMITS ON THE ARBITRATOR'S AUTHORITY

The arbitrator shall have no power to: .... Amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement; ...

SECTION 6. TIME LIMITS

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 ...

The time limits and sequence of steps provided in this Article shall be strictly observed but may be extended or modified by prior written agreement of the parties.

6. No extension of time was given or even requested in this case; the Union simply missed the time deadline or incorrectly assumed that their June 8, 2009 letter was sufficient to meet the requirements of the request to arbitrate. It was not, as evidenced by the fact that the Union did send an actual request to arbitrate 7 months later. Clearly, the Union knows how to send the correct letter but failed to do so in this case.

7. Moreover the University immediately asserted the untimeliness of the grievance and asked the Union to withdraw it. When it refused the University told the Union it would seek a dismissal by the arbitrator. There was a notice of the University's position on this question.

8. The University distinguished the holding by Arbitrator McCoy, who did allow the matter to go forward on the merits, by noting that in that case the University did not raise a timeliness defense until the hearing. It was on that basis alone that the arbitrator allowed the matter to proceed to the merits. Here the facts are quite different and show that the Union was required to send the notice requesting arbitration by June 29, 2009; they did not and the University raised that issue immediately. Under the clear terms of the labor agreement the arbitrator must therefore deny the grievance as procedurally non-arbitrable and dismiss the matter.

9. MERITS: The University asserted that even if the arbitrator reaches the merits of the case, there was ample just cause for the termination of the grievant in this case due to his continual poor attitude, terrible attendance record and persistent failure to adhere to the rules and standards set forth by his supervisor for reporting sick leave and other matters.

10. The grievant worked in the OIT Field Operations department. The Field Operations department provided phone and data installation, repair, and technical services to the University community. It is imperative that people maintain regular attendance since when people are gone others must cover the work or the work may not be completed in a timely manner. This of course can be critical to other University operations and expensive since the OIT department at times has to hire outside contractors to cover the workload if people do not show up for work.

11. The grievant has what can only be called a terrible attendance record and is at the very top or very near the top of any OIT employees in terms of missed work, FMLA and sick leave as well as a large number of unpaid hours because he is constantly out of accrued leave time.

12. In early 2007, the grievant's supervisor, Mr. Mark Zierdt grew concerned that the OIT employees were not working their full shifts and were not properly accounting for their time. On May 15, 2007, he sent all department employees, including the grievant, an e-mail that, among other things, clarified the work hours for department employees, and expectations regarding absences. See, University Exhibit 18. Even though the grievant did not attend the May 16, 2007, staff meeting where the work rule clarifications were discussed because he was out on a FMLA leave. Mr. Zierdt specifically met with him to explain what was expected

13. As evidence of the grievant's poor attitude and the way in which he treats his co-workers, the University pointed to an incident that occurred between the grievant and Ms. Tracy Quick in June 2008. Ms. Quick had recently had foot surgery and was allowed to wear open toed shoes. The managers were aware of this and allowed it even though safety shoes were typically required. When the grievant saw her open toed shoes he became irate and berated her until she was reduced to tears.

14. When managers told him he was not allowed to give orders to employees even though he was a steward, the grievant became even more indignant and got even angrier and more threatening. The grievant was given a letter of expectations following this incident. The University asserted however that the grievant's attitude and demeanor toward co-workers and managers did not improve and that he continued, as discussed below, his poor attitude and belligerent behavior.

15. In February 2008 he was assigned to wire two vending machines. Upon arriving at the location, the grievant reported to the OIT office that the machines were too heavy to move. Two other engineers responded to the location and one of the Engineers moved one of the machines by himself. Even after a review by safety personnel who found that there was not a safety risk and that the machines were safe to move, especially if done by two people. The grievant continued to refuse to perform assigned tasks if he decided that it was unsafe, even though it had already been determined that it was in fact safe.

16. At one point when told he was required to go to meeting to discuss his refusal to move the machines and his continuing attendance issues he refused to attend and stormed out of the meeting. After this he was issued yet another letter of expectations. His behavior did not improve.

17. The grievant was given an oral warning in July 2007 after he left work early and did not inform his supervisor as he had been directed. He told a co-worker he was leaving but the grievant had been told repeatedly that telling a co-worker was not sufficient to place the University on notice he was leaving work, even if the reasons were legitimate. He was to tell his supervisors but he continued to refuse to do so. Accordingly, he was issued an oral warning and told what to do in the future.

18. The grievant's absences from work continued to be a problem. By October 2007 he had more absences than he had accumulated leave and was required to take the leave in an unpaid status. By December of 2007 the grievant had again exhausted all of his sick leave and his supervisor had to again speak to him about attendance and remind him, again, that he needed to report any absences to his supervisor. When confronted about his poor attendance the grievant finally began showing up for work and had no further attendance issues, at least on a temporary basis.

19. The grievant's poor attendance continued and he was issued a written warning in February 2008 after he once again did not report to work due to illness and again reported his absence to a co-worker, not his supervisor as he had been repeatedly told to. This warning was grieved and was upheld by Arbitrator McCoy in his recent award between the parties.

20. The parties held a meeting to discuss all these ongoing issues and the University understood that the Union would remove the grievant as steward. The Union later reneged on this agreement and asserted that the grievant was simply removed as the steward for the OIT area.

21. The grievant was issued a 3-day suspension for his conduct during the February 18, 2008 meeting. He became increasingly disruptive during the meeting and was even told to "shut up" by his steward and asked to leave. While out in the hall he used foul language in a very loud voice; so much so that managers threatened to call police. The 3-day suspension was grieved but was dropped by the Union.

22. The grievant's excessive absences continued in April 2008 and he was again given a letter of expectations regarding attendance and reporting his illnesses. He was also given yet another written warning on April 14, 2008. That too was upheld by Arbitrator Thomas Gallagher after a full evidentiary hearing. Arbitrator Gallagher found that the grievant had a pattern of using sick leave on or around paydays and using sick leave as soon as it was accrued and that when considered along with other instances where he claimed sick leave but was not legitimately ill, this pattern constituted abuse of sick leave.

23. The University argued that progressive discipline does not have to be followed religiously and that there are circumstances where more serious discipline can be imposed under the terms of the labor agreement. Here however, the grievant has been warned repeatedly in letters of expectation, warnings, both oral and written, and was given a 3-day suspension yet nothing seems to get the grievant's attention here.

24. The operative event that led to his discharge occurred in mid-May 2009. The grievant requested Friday May 16<sup>th</sup> off but this was denied. He was overheard the day before saying that he intended to claim sick leave and go hunting. The grievant failed to appear for work on the 16<sup>th</sup> and never notified his supervisor, as he had been told repeatedly to do nor did he give his supervisor a medical release slip upon his return to work on Monday. The grievant's defiant response was that it was "not his job" give the work release slip to his supervisor; rather the supervisor had to ask for it. The University asserted that this sort of cavalier and disrespectful attitude summed up the grievant's poor attitude and his continued refusal to obey the reasonable directives of his supervisors.

25. When the grievant again asked for yet more time off for the morning of May 20, 2009, the supervisors refused it since the grievant had no remaining accrued time off. They further investigated the absence for the 16<sup>th</sup> and discovered that he had not given the work released slip to his supervisor as he had been directed. The University further asserted that there was now a serious job performance issue related to the grievant's frequent and continual absences from work. Management set a time for the grievant to appear at a meeting to discuss the 16<sup>th</sup> for the afternoon of May 20<sup>th</sup>.

26. The grievant failed to appear for the meeting on the 20<sup>th</sup> and had in fact flatly refused a direct order and had left work. He did not notify his supervisor of his absence and disappeared. The University asserted that this was the last straw and his managers and supervisors felt that they could no longer tolerate the grievant's continued insubordination and refusal to follow orders. The University noted that even if he had a valid doctor's excuse for the 16<sup>th</sup> it did not absolve him of the responsibility of notifying a supervisor and of giving the supervisor the work release slip once he returned.

27. The University further cited the contractual provisions dealing with progressive discipline and noted that while the general preference is to follow progressive discipline there are circumstances where the employee's actions are so egregious that deviation from the "normal" steps are warranted and a discharge can be imposed. That provision reads in relevant part as follows:

SECTION 6. CORRECTIVE DISCIPLINARY PROCEDURE

Both parties agree that the order of discipline below is the progressive order of discipline; however, situations may arise where it will be appropriate to depart from this order.

28. The University argued that this is just such a scenario and that this grievant is simply incorrigible and should not be allowed to return to work where it is unlikely, even impossible for him to follow work directives regarding his sick leave and other absences. Moreover, his overall attitude and general disrespect for the reasonable rules of his supervisors and his intimidating and sometimes openly hostile and threatening behavior cannot be tolerated.

The University seeks an award denying the grievance in its entirety.

**UNION'S POSITION:**

The Union's position is that there was not just cause for the termination of the grievant herein. In support of this position the Union made the following contentions:

1. **TIMELINESS:** The Union argued that this matter was timely filed and that it followed the contractually mandated procedure for requesting arbitration. The Union noted that it in deed sent a request for arbitration dated July 8, 2009 so the University was on notice under the terms of the grievance procedure of the Union's intentions with respect to this matter. Moreover, the grievance procedure does not spell out any sort of specific language that must be in the "request for arbitration" and the Union's notice did what the grievance procedure calls for – it placed the employer on notice of the Union's intent to arbitrate.

2. The Union also noted that even Arbitrator McCoy, when faced with the same issue, ruled that the parties have had a loose relationship and that the Union did not need to comply with all of the formal requirements of the grievance procedure.

3. Here too, neither party has adhered to the strict contractual guidelines. The grievant was discharged on May 22, 2008 and the initial grievance was filed on a timely basis, on June 5, 2008. The Step II meeting was held June 10<sup>th</sup> but the University's response was not made until July 10, 2008, some 16 days past the contractual due date. The Step III meeting and its response were held and given months after the contractually mandated time frames. No one objected to this laxity.

4. The first notice of intent to arbitrate was sent March 31, 2009 and a second was sent on July 8, 2009. The Union's request for arbitrators from BMS was dated August 12, 2009. Contrary to the assertion made at the hearing, the University did not object immediately but rather waited until a month later, in mid-September 2008. The Union asserted that Arbitrator McCoy's line of reasoning applies with equal force here as well. Moreover, arbitrators are loathe to dismiss cases on procedural technicalities especially where there has been lax enforcement between the parties in the past. The Union cited Arbitrator Miller's award in *Minnesota Judicial Branch, 10<sup>th</sup> District & AFSCME Council 5, AFL-CIO, BMS Case No. 09-PA-0064*, (Miller, 2008). The Union argued there was both technical compliance with the requirements of the contract here as well as a history of lax enforcement and adherence to contractual time limits. The matter should thus be allowed to go forward on the merits.

5. MERITS: The Union claimed that the termination was unjustified and that it was the result of Mr. Welde's activity as a Union steward and due to ongoing contract violations on the question of overtime pay and a number of grievances Mr. Welde filed on that issue. Further, the Union claimed that the supervisor created a false charge against the grievant based on the claim that he abused sick leave on May 16 and 20, 2009. The Union claimed, as will be discussed below, that the grievant was in fact legitimately ill on both those days and needed medical treatment.

6. The Union noted that there is a long history of conflict between Mr. Zierdt and the grievant over ongoing contractual violations and disputes about overtime pay. This has been the subject of a long series of discussions and grievances and the Union claimed that the supervisor simply got tired of dealing with it and launched an attempt to get the grievant fired by trumping up evidence and treating him differently from other similarly situated employees in the OIT department. The Union further argued that the “trouble” between the grievant and his supervisor began almost immediately after the grievant became a Union steward in 2006. Mr. Holm testified that this was a long and difficult “problem solve” and that he spent considerable time trying to resolve these issues but the friction between the two men made it very difficult.

7. The Union also noted that under generally accepted labor relation principles, a Union steward is no longer subordinate to his or her supervisor once that person begins acting as a steward. Under those circumstances they are equal when the steward is asserting rights under the collective bargaining agreement and cannot be charged with insubordination unless their actions are truly egregious and his were not under any circumstances here.

8. The Union asserted most strenuously that the grievant did follow the instructions given to him in the various letters of expectations to give any medical release slips and doctor’s excuses of absences to his immediate supervisor. The Union claimed that the grievant showed any required documents to his supervisor, Kevin Hinze and once to Supervisor Randy Brinks. See Union Exhibits 16 - 21. Those documents cover all of the grievant’s absences, for himself or his children, between March 17, 2008 and the date of his termination. The Union further noted that Mr. Hinze acknowledged that he did indeed get most if not all of the grievant’s work release slips.

9. The Union assailed the supervisor's credibility and noted that he was inconsistent on several occasions. He indicated he had no knowledge of the work slips given to Mr. Hinze when the Union noted that he was aware of at least one of them and that he knew that they had been given to him. In another he was wrong about the date he claimed he overheard the grievant was going to go hunting – at one point he claimed it was May 14<sup>th</sup> and later recanted that and asserted it was May 16<sup>th</sup>. In yet another instance, he claimed he recalled that the grievant wanted to take May 16, 2008 off to attend steward training. The Union asserted that no such training was offered and that he simply made this up. These dates are more than mere missteps or minor mistakes. The Union claimed that these go directly to his credibility and ability to recall specific and critical details. The Union claimed that since most if not all of the damaging testimony about the grievant came from Mr. Zierdt, his testimony should be discounted or disregarded.

10. The Union asserted most strenuously that the grievant did in fact give work release slips to his supervisors indicating the medical reasons for his absence on both May 16 and 20 as he was supposed to. He spent most of the day at the emergency room on the 16<sup>th</sup> and was suffering from a seeping ulcer on his navel. Further, he made his supervisors aware of the need for a follow-up visit on the 20<sup>th</sup> as well.

11. The Union further asserted that the grievant had 16 hours available in FMLA leave for the fiscal year ending June 30, 2008 and that his supervisors knew or should have known he had that time available. The Union argued too that the University's actions here were illegal and in violation of the grievant's FMLA rights. Clearly, the medical condition he had that caused him to spend the entire day in the ER on May 16, 2008 qualified as a "serious medical condition" under the FMLA and the University deprived him of the right to take that time under the FMLA.

12. The Union asserted that the grievant has been held to a different standard and that many other employees have as much or even more time off and that some even have unpaid hours as well. The grievant has been singled out because of his Union activity and because of the ongoing grievances he has filed. The Union argued that the totality of the evidence shows that Mr. Zierdt has been targeting the grievant for discharge since late 2006, when he became a Union steward by using discriminatory tactics and outright falsehoods to try to build a case against him.

13. The Union pointed to its exhibits 8 and 9 to show that the grievant is by no means “the worst” employee and that in the year prior to this discharge here at least one other department employee has more sick leave hours used; several have more vacation leave hours used; many have more comp. time hours used; at least one has many more paid leave hours used. Overall, the grievant was not even the “top” employee in terms of total leave hours. See Union exhibit 9. Thus, the argument that the grievant’s hours were excessive was simply incorrect.

14. The Union acknowledged that the grievant has been warned on two occasions and that those warnings were upheld by other arbitrators but argued that the policy in favor of progressive discipline should be followed. The grievant’s behavior was essentially the same all along and if it has been shown to be violative of policy in some fashion the University cannot simply skip ahead to discharge but must under the terms of the labor agreement follow proper progressive disciplinary steps.

15. In summary, the Union argued that the grievant did not simply skip out of work as the University asserted but rather spent May 16, 2008 in the Emergency Room. Whether the grievant had a poor record or not does not absolve the University from proving that the grievant violated work rules in this instance – and he did not. He called in and provided medical documentation upon return to work. Even Mr. Hinze did not dispute any of those facts. On May 20<sup>th</sup>, the grievant had follow up appointments and he informed supervisors on Monday, May 19<sup>th</sup>, and again on May 20<sup>th</sup>. Significantly, he provided medical documentation upon return to work and Mr. Hinze did not deny getting that documentation.

The Union seeks an award reinstating the grievant to his former position with full back pay and all accrued contractual benefits.

## **DISCUSSION**

**TIMELINESS:** Initially it must be determined if the matter can proceed to the merits. The University contends that the matter should be dismissed due to a failure to follow the procedural requirements of the grievance procedure.

The evidence showed that the initial grievance was filed in a timely fashion. The University alleged however that the Union failed to properly serve a document requesting arbitration pursuant to the provisions of Article 21. Both the documents themselves and the timing of them are critical in this regard. The grievant was terminated on May 22, 2008. The Union filed a grievance on his behalf on June 5, 2008 and a Step II grievance meeting was held on June 10, 2008. The denial issued by the University was served on July 10, 2008, 16 days past the contractual response due date. No objection was made to that time delay.

The Union made a timely request to move the matter to Step III on July 14, 2008. The Step III meeting was not actually held until January 29, 2009 however. This too was months after the contractually prescribed time frame. The Step III response was dated February 3, 2009.

The Union then served a letter captioned – “APPEAL TO ARBITRATION” dated March 31, 2009. This was well within the 60 day time frame provided for in Step four of the grievance procedure from the date the response was due. The language provides that “the Union may file a letter of intent to arbitrate within 60 calendar days of when the Step III response was due.” Neither party made much of the fact that the language says “may” rather than “shall” or other mandatory language but on this record it was clear that the letter giving notice to the University of the Union’s intent to arbitrate the matter was sent well within the 60 days.

As had been the apparent practice with regard to this grievance at least, there was a long delay after the March 31<sup>st</sup> letter wherein little happened on the file. The Union sent a second letter dated July 8, 2009, this time captioned “APPEAL TO ARBITRATION - 2<sup>nd</sup> Notice” again notifying the University of the Union’s intent to arbitrate the matter. There was no explanation for why this was sent again nor is there anything in the labor agreement preventing such a notice from being sent.

The Union finally sent a letter dated August 12, 2009 to BMS asking for list of arbitrators. This letter was certainly different from the prior letters sent to the University so it was apparent that the Union knew what sort of letter to send. The crux of the University’s claim is that the Union was required to send the letter to the BMS within 90 days of “the filing of the letter of intent to arbitrate.” There is no contractual provision regarding what happens if the Union either does not file a so-called letter of intent to arbitrate or if they file a second one for some reason. The August 12, 2009 letter was certainly within 90 days of the second letter of intent, sent July 8, 2009. It was certainly not within 90 days of the first such letter dated March 31, 2009 however and the question is whether on this record, that set of facts should bar the matter from going forward on the merits.

The Union relied partially upon the ruling of Arbitrator McCoy who ruled that the matter was timely in his case largely on the basis that the University did not raise the issue of timeliness until late in the game. Here however the University raised the issue well before the hearing so the analysis that Arbitrator McCoy used to rule that the matter was timely does not apply with equal force here. Having said that however, it was clear in the McCoy decision that a similar set of facts was presented in that the Union did not make its request for arbitration there either for nearly 7 months after filing the intent to arbitrate. See, McCoy decision at page 8. Despite that Arbitrator McCoy ruled that the matter was timely. His decision was reviewed in detail and his analysis is both well reasoned and articulated.

What was persuasive here was the apparent laxity of enforcement of any of the other time frames in the matter. It is quite apparent that the parties did not enforce the strict time frames set forth in the grievance procedure, at least not with respect to this grievance. There were months of delay here at various steps and neither party raised any objections to that along the way. It was not until September 2009 that the issue of timeliness was first raised. While this was certainly well in advance of the hearing it was not adequate notice that despite all of the other laxity in enforcement the Union would suddenly be held to the strictest of terms under the grievance procedure. As Arbitrator McCoy noted, “it is incumbent upon the parties to make clear, especially when both parties have been lax in doing so on numerous occasions, that their intent is to strictly adhere to the timelines in the Agreement.” Slip op at p. 11. Here for many of the same reasons that same analysis works to render this matter timely as well.

Further, while the request for arbitrators was not sent to the BMS within 90 days of the first notice of intent to arbitrate, it was sent within 90 days of the second one. Further, after the 90 days passed from the first notice of intent to arbitrate, the University still did not raise the issue of timeliness until September 2009. While this alone may not have been fatal to the University’s argument on different facts, when coupled with the lax enforcement of these timelines it was another factor that mitigated in favor of the Union's argument to allow the matter to go forward on the merits.

Accordingly, because of the apparent laxity of enforcement of the strict time limits by both parties, the fact that the request was sent well within the time of the second notice of intent, and the fact that no prejudice was shown by the service of the second notice the matter is deemed to be timely. Finally, as Arbitrator McCoy noted, this ruling in no way alters, amends or modifies the parties’ agreement with regard to timelines.

MERITS: This issue presented a much more difficult analysis. The evidence was fraught with inconsistencies and hotly disputed factual assertions on both sides. The University asserted that it has followed progressive discipline and given the grievant more than ample chances to improve his behavior and that he simply refuses to do so and that they have “had it” with him. He is disruptive, occasionally threatening and disrespectful of co-workers and supervisory personnel and recalcitrant in his compliance with reasonable orders and rules of management.

To be sure the grievant has had a checkered disciplinary history and one that is even worse with respect to attendance. Further, there was considerable evidence on this record that he is sometimes obstreperous with co-workers and managers and at times borders on the mutinous.

The evidence showed that he was given a letter of expectations in June 2007 due to his hostile and intimidating behavior toward a co-worker. This was the incident involving co-worker Tracy Quick. The evidence showed that he indeed berated her for wearing what he thought was improper footwear without listening to her explanation for why she had those on and without knowing that she had been given permission to wear open-toed shoes due to foot surgery. The record reveals that the grievant has a somewhat skewed view of his role here and that the mere fact that he was a steward at the time somehow gave him supervisory authority over co-workers. It does not and the grievant needs to know that. Union stewards do not have supervisory authority. They have certain other rights but they do not suddenly become supervisors, forepersons or managers. This tendency on the part of the grievant to seemingly assume that his status as a steward absolved him of the obligation to follow work directives shows up later on and it was troubling that he was not “getting” that message.

He was issued an oral warning in October 2007 for coming to work knowing that he was unable to meet the requirements of the job and did not inform his supervisor. As Arbitrator McCoy noted, “to make matters worse” he simply walked off the job without notifying anyone.” While these incidents do not go to whether he was in fact guilty of violating work rules that were the basis of the termination, they do go to the remedy and to the appropriateness of future discipline. It is clear that the grievant has an attitude issue and that he treats his supervisor’s orders in a somewhat cavalier manner.

Further, he was given a written warning in February 2008 for failure to follow the proper procedure for calling in sick. See, University exhibit 22. This was the subject of Arbitrator McCoy’s arbitration. Suffice it say that he upheld the employer’s action and denied the grievance.

He was given yet another written warning in April 2008 for the alleged abuse of sick leave that was the subject of Arbitrator Gallagher’s decision dated June 18, 2010. He sustained the grievance in part and denied it in part. Arbitrator Gallagher provided a very cogent analysis of the allegation of abuse of sick leave and found that the immediate use of sick leave, even where there is a pattern of use around paydays or weekends does not necessarily prove abuse. He reasoned that there must be some showing that the instant usage of sick leave is not legitimate and not for the purposes set forth in Article 17. Further, he found that the claimed use of sick leave on February 13 and 14, 2008, which were the subject of the warning, were not for legitimate purposes.

He very appropriately analyzed the instant facts before him and ruled on whether there was abuse of sick on the specific facts giving rise to the discipline. Since there was no note from a doctor Arbitrator Gallagher found that the grievant’s claimed illness was not legitimate and “not made in good faith.” Slip op at 17. He further found on the facts before him that even if there had been a doctor’s note for those days, the underlying circumstances did not persuade him that the use of sick leave for those days was for legitimate purposes. He left the warning in place however but provided a ruling that the pattern itself did not demonstrate abuse on the facts before him.

These cases are discussed as background and because of the analysis they provide. It should also be noted that the grievant was given a 3-day suspension in February 2008 as well for inappropriate behavior. This was grieved but that was later dropped. These prior instances of discipline are important not only for the purposes of determining the remedy but also to show that the University has used appropriate progressive discipline. Thus any claim that the University has not used progressed discipline must fail. The record shows more than amply that the grievant has been told and told what the expectations are and what he must do to comply with reporting his is sick and what documentation he needs and to whom he needs to provide it. If, the facts had shown that there had been abuse of sick leave termination would be the only appropriate option here.

The question is thus whether the grievant abused sick leave in May 2008 and whether he violated other work rules such that it warrants his termination. On these facts they did not.

The University based its decision to terminate the grievant on “inappropriate behavior in the workplace, hostile and aggressive behavior toward your supervisor and co-workers; failure to follow correct call in procedure when sick; abuse of sick leave and unapproved use of sick leave.” See University exhibit 2. It was clear however that the inappropriate behavior and hostile and aggressive behavior allegations were related to prior instances that had already been the subject of prior discipline. While those matters would certainly be related to remedy they cannot be used again to determine whether he violated work rules giving rise to the discharge. There was further no evidence to suggest that the incidents of May 16 and May 20, 2008 were instances of such behavior.

This leaves the last three of those allegations as the real basis of the discharge here. The analysis on this starts with whether there was a failure to follow correct procedure when calling in sick. The basis of much of the University's case was that they suspected that the grievant was going to report in sick on May 16<sup>th</sup> but that this was a subterfuge to go hunting. The University's claim was that his request for sick leave that day was denied and that he should have been at work.

The record demonstrated more than amply that the grievant was however not hunting that day nor was he at a Union steward training – he was at the Emergency Room at United Hospital. He testified credibly that he was there most of the day and that he notified his supervisors where he was that day. Further, there was no question that he was attending a medical appointment due to what the evidence showed was a serious medical condition on May 20<sup>th</sup> as well. See Union exhibit 21. Why these clear facts were not taken into account earlier in this process was puzzling but, despite the showing very early on in the grievance process, they were apparently not. Thus the record clearly demonstrated that the grievant was in fact sick. Whether he made the statement about going hunting or not, the record revealed that he in no way abused sick leave.

The labor agreement contains a definition of abuse of sick leave. Article 17, section 5 (D) provides as follows: “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.” There was no showing that the grievant used his sick leave or was absent for “reasons other than those listed in this Article.” Further it is generally well regarded that abuse of sick leave is the use of sick leave for other than legitimate illness. Here the facts showed just the opposite. While prior arbitrators have noted that the grievant tends to use sick leave in conjunction with paydays and on Mondays and Fridays, that does not necessarily mean that every time the grievant uses sick leave on a Friday or Monday that is an of abuse of sick leave.

The University argued that he should have been at work given his lack of available sick time. This argument runs squarely into the fact that the grievant has in fact been allowed to take sick leave and a variety of paid and even unpaid time in the past. There was nothing on this record to suggest that he had any idea he would be fired if he left work for legitimate health related reasons.<sup>1</sup>

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<sup>1</sup> Clearly he was well aware that he was on very thin ice if he left work for illegitimate reasons but the record reveals that he indeed was ill and had legitimate medical reasons for not being at work on both May 16 and 20, 2008. The main basis of the case against him was that he abused sick leave on those dates and the record simply did not support that assertion.

It should be noted too that the University made the argument that the grievant had a large number of unpaid hours; that will be discussed below but the point here is that there was no evidence to suggest that the grievant had been directed not to leave work even if he were legitimately ill.

Accordingly, at least two of the University's main reasons for terminating the grievant were unsupported by the evidence. On this record there was no abuse of sick leave since his illnesses on May 16 and 20 were for legitimate purposes. That fact also belies the notion that his sick leave was unapproved. The University relied in part on the letter of March 17, 2008 in which the grievant was told that he would not be allowed any unpaid time off as leave. There was a paucity of evidence on this point as to whether that was permissible under the labor agreement and no decision is reached on that point. There was further considerable dispute about whether he had any leave time available.

The grievant certainly thought he did and Union witnesses indicated that they believed he did as well. He was however told that he had no time left as of May 20<sup>th</sup> and that he would not be allowed any further unpaid time off. Other than to argue that they thought the grievant did have additional time the Union did not squarely address this issue. Frankly on this record, despite the apparent legitimacy of the illnesses it was troublesome that the grievant left work without authorization and apparently without telling anyone he was leaving. This sort of open disregard for the reasonable directives of the employer must be rectified in a hurry if the grievant wishes to retain his employment even after the award in this matter.

The remaining charge was that he failed to properly notify his supervisors of the illness as he had been specifically directed to when he returned. There was some argument by the grievant that he only needed to notify the University Health and Safety Department of his illnesses but the evidence did not support that. It was clear that he has been told to report illnesses to his supervisor. This is a legitimate and permissible rule and the grievant must follow it.

The employer has a legitimate right to know why an employee is sick and whether he has indeed been sick; and that can include getting appropriate documentation of an illness in order to approve sick leave. His supervisor was quite clear on this point – the grievant has to report the illness to his direct supervisor and provide proper documentation upon his return.

The Union claimed that he did in fact do that and that Mr. Hinze may just have not recalled it. The overall record shows however that the grievant was less than forthcoming when he returned and indicated that while he had the documentation he did not have to offer it. Rather, he claimed, the supervisor had to “ask for it.”

That was the wrong answer. Here is the correct answer: the grievant has to provide proper documentation to the person he is directed to provide it to. Further, the grievant must comply with all reasonable directives regarding documentation of sick leave and if he has a problem with that he must then follow the time honored labor relations principle – obey now and grieve later.

On this record there was by a slim margin, insufficient evidence to warrant termination. This was due to the absence of convincing proof of abuse of sick leave/inappropriate use of sick leave. The grievant should not however regard the ruling reinstating him as any sort of great victory here. His attitude must improve. His actions whether he acts as a steward or not need to change. To be sure when a Union steward acts as a steward they stand in a different position than that person would in the normal employer/employee relationship. They are regarded as equals but this does not give the steward license to abuse co-workers or supervisors nor does it give them carte blanche to act inappropriately in the workplace. The arbitrator does not have the power to impose a “last chance agreement” on the parties. That is for the parties to discuss subject to the terms of the labor agreement. However given his prior record the grievant should know how perilously close he is coming to discharge for his continued poor attitude and failure to comply with the directives of his supervisors. He should know based on this decision that this is a chance but that it may be the last one he will get.

The final question is what to do in terms of a remedy. As noted above, the record demonstrates that the grievant's past record has been distressing at best. It is by no means a clean record that would warrant any back pay given the clear evidence that while he was out for legitimate reasons he failed to comply with the clear directives regarding notification and providing appropriate documentation upon his return to work. Accordingly, the appropriate remedy is reinstatement to his prior position but without back pay or accrued contractual benefits.

### **AWARD**

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievant is to be reinstated to his former position with the employer within 10 business days of this Award but without back pay or other accrued benefits.

Dated: July 12, 2010

U of M and AFSCME #5 – Welde award

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Jeffrey W. Jacobs, arbitrator