

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 EAGLE RIVER MEMORIAL HOSPITAL :  
 EMPLOYEES, LOCAL 1311, :  
 AFSCME, AFL-CIO :  
 :  
 and : Case 9  
 : No. 41955  
 : A-4417  
 EAGLE RIVER MEMORIAL HOSPITAL :  
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Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Eagle River Memorial Hospital Employees, Local 1311, AFSCME, AFL-CIO.  
Drager, O'Brien, Anderson, Burgy & Garbowicz, Attorneys at Law, by Mr. Steven C. Garbowicz, on behalf of the Eagle River Memorial Hospital.

ARBITRATION AWARD

Eagle River Memorial Hospital Employees, Local 1311, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Eagle River Memorial Hospital, hereinafter the Employer, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The Employer subsequently concurred in the request and the undersigned was appointed to arbitrate in the dispute. A hearing was held before the undersigned on May 31, 1989 in Eagle River, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by July 10, 1989. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties were unable to agree on a statement of the issue.

The Union would state the issue as being:

Did the hospital have just cause to terminate Gloria Wedow?

At hearing the Employer framed the issue as follows:

Do the facts support a falsification of time card charge and ultimate discharge?

The undersigned concludes that the Union's statement of the issue adequately frames the issue to be decided.

CONTRACT PROVISIONS

The following provision of the parties' 1987-1989 Agreement is cited:

ARTICLE 4 - DISCIPLINARY ACTION

No employee shall be reprimanded, suspended, or discharged except for cause.

4.01 An employee may be discharged for the following offenses without warning or notice:

. . . .

D. Falsification of documents, such as applications, health statements, time cards, equipment logs, etc.;

. . . .

BACKGROUND

The Employer maintains and operates hospital facilities in Eagle River, Wisconsin and in January of 1989 began the operation of a clinic in Land O' Lakes. The Grievant had been employed by the Employer since August of 1984 as a Nursing Assistant at the hospital. Late in 1988 the Grievant posted for, and was awarded, the Medical Assistant position at the Land O'Lakes Clinic and began being trained for the position. The Grievant began working as a Medical Assistant at the Land O' Lakes Clinic in mid-January of 1989. Other than the physician, Dr. Littrell, the Grievant was the only employe at the Clinic. At the time in question the Grievant's duties included answering the telephone and

taking messages at the Clinic. When the Clinic is not open or when the Grievant was too busy assisting patients or the physician, the phone would be switched over to the hospital - the phone rings twice at the Clinic and then the call is automatically transferred to the hospital.

The Land O' Lakes Clinic is open 1:30-4:30 p.m. on Fridays and the Grievant was required to be there at 1:00 p.m. The day in question was a Friday, February 3, 1989, and there is a dispute as to what time the Grievant reported to work - the Grievant asserting she was at the Clinic at 1:00 p.m., but was busy doing other things and forgot to switch the phone over from the hospital to the Clinic until approximately 1:15 or 1:20 p.m., and the Employer asserting that she earlier admitted to not coming in till 1:15 p.m. after being questioned about it by the Employer's Comptroller, Pat Campau.

Campau questioned the Grievant after Rozga, the Ambulance Manager at the hospital, informed Campau that she had tried to contact the Grievant at the Clinic on the day in question for Dr. Littrell and had been unable to reach her till approximately 1:25 p.m. On February 6th or 7th Campau discussed with the Grievant the matter of switching the phone over as soon as she comes in and her failure to answer Rozga's call on February 3rd. The Employer asserts that is when the Grievant admitted she had not come in until 1:15 p.m. on February 3rd.

The Grievant subsequently submitted her time card for the period that included the day in question and indicated a 1:00 p.m. start on that date. The employees fill out their own time cards and submit them to their supervisor for review, and in the Grievant's case that was Campau. Upon receiving the Grievant's time card on February 14, 1989, and noting it stated she had started at 1:00 p.m. on February 3rd, Campau discussed the matter with the Hospital's President, Pat Richardson, and they decided to terminate the Grievant for falsifying her time card. Campau then met with the Grievant on February 14, 1989 and asked her about the time card. There is some dispute as to what the Grievant said at that meeting and what she intended by what she said; however, Campau gave her a written notice of her termination for falsifying her time card.

The Grievant was terminated on February 14, 1989 and she subsequently grieved her termination. The parties were unable to resolve their dispute and proceeded to arbitration on the grievance before the undersigned.

#### POSITIONS OF THE PARTIES

##### Union:

The Union takes the position that there is no hard evidence that the Grievant was not at her worksite at 1:00 p.m. on February 3, 1989 and, therefore, she cannot be said to have falsified her time card by indicating on the card she was present and working at 1:00 p.m. on that date. The Union cites Just Cause: The Seven Tests, Adolph Koven and Susan Smith (Coloracre Publications 1985), and applies the tests cited therein in this case. Regarding the first test, proper notice, the Union concedes that the employees are aware that falsifying a time card is grounds for discipline. The second test is whether the rule is reasonable and the Union, while conceding the rule is reasonable, asserts it has been unreasonably applied - the result being the same as if the rule was unreasonable. In this regard the Union asserts that the Employer alleges that the evidence indicates that the Grievant was in the habit of filling her time card out ahead of time. Even assuming arguendo that the Grievant was not on the job at 1:00 p.m., it is possible she had filled her card out in advance and not realized the mistake. Without further investigation, the Grievant's termination was an unreasonable application of the rule to accomplish a predetermined end. The Union contends that the third test, investigation, was not satisfied, since the only investigation prior to the decision to terminate the Grievant was Campau's phone call to her on February 6th. The Grievant denies having admitted at that time that she arrived at work at 1:15 p.m. on February 3rd, rather, she admitted she did not turn on the phone till 1:15 p.m. The Union finds it odd that if the Grievant admitted being late and if this failure to answer the phone caused the physician such consternation, that there is no mention in the record of any discussion of tardiness. The one conversation, which represents the total investigation, led to the discharge on totally different grounds. Thus, there was no investigation. The fourth test is whether the investigation was fairly conducted and, the Union asserts, Campau intended to terminate the Grievant on February 14th without any investigation. The fifth test is proof the employee is guilty of the misconduct alleged, and the burden is on the Employer to prove guilt by hard facts and not conjecture or suspicion. The only fact proved according to the Union is that the phone was not turned on till 1:15 p.m. on February 3rd. As to the Grievant's alleged offer to change the time on the card at the February 14th meeting with Campau, that offer was in reference to 11:15 on the discharge notice that should have read 1:15. The Grievant was not discharged for filling her time card out in advance or for failing to turn the phone on in a timely manner, but for falsifying her time card, and the Employer has failed to meet its burden of proof on that charge. The last two tests, equality of treatment and penalty are not involved according to the Union. The Union contends that the Employer has failed to meet four of the seven tests of just cause and, therefore, has not met its contractual requirement in the termination of the Grievant. The Union requests as relief that the Grievant be reinstated to her position and made whole.

Employer:

It is the Employer's position that the termination of the Grievant was justified based on "a clear and flagrant case of a falsification of a time card." In support of its position, the Employer first asserts that the Grievant was well aware of the time card procedures and the need for employees to keep their own time as there is no time clock. This is a "trust system" where the employee is expected to be honest in submitting the time worked and is in turn paid for that time. The Employer asserts that when first asked about the day in question the Grievant stated she did not report to work till 1:15 p.m. It was not till the grievance was filed on her discharge that she first indicated she had been at work at 1:00 p.m., but performing other duties till 1:15 p.m. Her first statement was four days after the day in question, while the grievance statement came eighteen days later. It is contended that the Grievant's first statement was correct and is the one that must be utilized in deciding this case. Reliance on that statement leaves one no choice but to uphold the termination, according to the Employer. The Employer also cites a number of arbitration awards involving the falsification of records to support its contention that the penalty of discharge was not too severe in this case. It is argued that the Employer's time card system requires absolute honesty on the part of the employees and that utilizing anything less than discharge would remove the necessity for complete honesty and would not maintain the "integrity of the system." Another case cited by the Employer deals with the credibility of testimony and the factors that should be considered in determining credibility. The fact that the Grievant now testified, contrary to Campau, that she never said she did not come in till 1:15 p.m., does not mean that Campau's testimony in that regard is not to be credited. The Employer reiterates that the Grievant subsequently changed her story and claimed to be at work at 1:00 p.m. on February 3rd, but that she could not recall at hearing specifically what duties she was performing between 1:00 p.m. and 1:15 p.m. that day, even though it had only been four months prior to the hearing. According to the Employer, the Grievant also testified she called Rozga that day, but the note Rozga sent to Campau (Employer Ex. 6) is clear that Rozga called her. Hence, Campau is to be credited. The Employer concludes that this was a case of falsification of a time card, which under the Agreement, calls for immediate discharge.

DISCUSSION

It is first necessary to determine whether or not the Grievant falsified her time card as alleged. To make that determination it is also necessary to decide whether the Grievant reported to her work site on February 3rd at 1:00 or at about 1:15 p.m. In that regard, there is conflicting testimony from Campau and the Grievant as to whether the Grievant had earlier admitted to Campau that she had not come in till 1:15 p.m. on February 3rd.

Contrary to the Union's assertion, the fact that there is conflicting testimony from the Grievant and her supervisor as to what the Grievant said does not mean that there is no evidence, rather, it means that a credibility determination must be made. For the following reasons it is concluded that Campau's testimony is to be credited. First, Rozga testified that she called the Clinic at 12:45 p.m. on February 3rd, and every five minutes thereafter, until the Grievant answered at approximately 1:25 p.m. Campau testified that even when the phone is switched over to the hospital, it still rings twice at the Clinic. The Grievant testified she could hear the phone ring anywhere in the Clinic except the storeroom in the rear of the building, but that she did not hear the phone prior to her talking to Rozga on February 3rd. The Grievant testified that she might have been outside checking the mail or shovelling snow or that she might have been in the storeroom when the phone rang, but it seems unlikely that if Rozga was calling every five minutes that the Grievant would not have heard the phone ring at some time prior to 1:15. Secondly, there is no dispute that when confronted with her time card and discharge notice on February 14th, the Grievant did not assert that she had in fact been at work at 1:00 p.m. on February 3rd. While the passage of time and the tendency to rationalize could explain the differing recollections of what the Grievant said to Campau on February 6th, if the Grievant in fact felt she had been at work at 1:00 p.m. on February 3rd and had so stated the week before when questioned by Campau, it seems reasonable to assume she would have reiterated that point at the time she was informed she was being discharged for indicating a 1:00 p.m. starting time on her time card. Campau's un rebutted testimony was that when shown her time card and given her discharge notice the Grievant offered no excuse or reasons, but only said "I'll fix it." The Grievant testified that her offer to "fix" or "correct" the time was in reference to "1115" on her discharge notice. Her testimony in that regard is not persuasive, since the notice indicated "1:15" and not "1115". Moreover, even if the Grievant could have misread the colon punctuation as a "1", it seems unlikely that she would have offered to correct the notice of her discharge drafted by her supervisor. The undersigned considers it more likely that the Grievant was referring to her time card when she offered to "fix" it.

For the foregoing reasons it is concluded that Campau's testimony as to what the Grievant told her on February 6th, regarding when she came to work on February 3rd, is to be credited. For those same reasons it is further

concluded that the Grievant did not report for work before 1:15 p.m. on February 3rd.

The Union also poses the question that even assuming arguendo that the Grievant did not come to work till 1:15 p.m. on February 3rd, is it not possible that she simply had filled out her time card in advance and failed to later realize her mistake. A review of the Grievant's time card (Employer Ex. 3) makes such an explanation unconvincing. While the evidence indicates that the Grievant at times filled out her time card in advance, her time card shows that on the day in question she indicated a "1300" starting time, but she had changed her quitting time from her original entry to "1715" for that date. In other words, she corrected her quitting time, but not her starting time for February 3rd. It seems unlikely that she would remember to correct one entry, but not the other for that date.

The Union also contends that the Employer failed to adequately investigate the matter before deciding to terminate the Grievant. Campau's testimony that the Grievant told her on February 6th that she had not come in until 1:15 p.m. on February 3rd has previously been credited. Therefore, on February 14th, when Campau received the Grievant's time card indicating a 1:00 p.m. start on February 3rd, she possessed a prior admission by the Grievant that she had started work at 1:15 p.m. and the Grievant's time card indicating a 1:00 p.m. start and the number of hours worked for that day based on a 1:00 p.m. start. Further investigation was not really necessary at that point. Campau also testified that if the Grievant, when confronted, had come up with a valid reason for the discrepancy on the time card, she would have torn up the discharge notice; however, the testimony shows that the Grievant did not offer any reason at that time. The fact that Campau was, in the Union's words, "investigator, chief witness, judge, and jury," is not a valid criticism, as it is often the case that the supervisor is the person responsible for investigating allegations or complaints, as well as the person responsible for, or involved in, making the decision whether to discipline the employee. In this case Campau first discussed the matter with the Employer's President and they then decided to terminate the Grievant.

While the penalty of discharge seems a stiff price to pay for claiming fifteen minutes the employe was not entitled to as time worked, the parties bargained a specific provision in their Agreement that recognizes there is just cause to discharge an employe for falsifying his/her time card. There is no claim, nor evidence, of disparate treatment as to the enforcement of the provision or as to the imposition of the penalty. Therefore, having concluded that the Grievant did falsify her time card as to February 3, 1989, it is concluded that the Employer had just cause to discharge the Grievant.

Based upon the above and foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 8th day of September, 1989

By \_\_\_\_\_  
David E. Shaw, Arbitrator