

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 NORTH CENTRAL HEALTH CARE :  
 FACILITIES OF LANGLADE, LINCOLN :  
 AND MARATHON COUNTIES : Case 10  
 : No. 42490  
 and : A-4469  
 :  
 LOCAL 150, SERVICE EMPLOYEES :  
 INTERNATIONAL UNION, AFL-CIO, CLC :  
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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by  
 Mr. Kurt C. Kobelt, for the Union.  
 Mulchay & Wherry, S.C., by Mr. Ronald J. Rutlin, for the Employer.

ARBITRATION AWARD

Local 150, Service Employees International Union, AFL-CIO, CLC, herein the Union, and North Central Health Care Facilities of Langlade, Lincoln and Marathon Counties, herein the Employer, requested the Wisconsin Employment Relations Commission to designate Douglas V. Knudson as an arbitrator to hear and resolve a dispute. The undersigned was so designated. Hearing was held in Wausau, Wisconsin on September 14, 1989. A transcript of the hearing was received on October 2, 1989. The parties completed the filing of post-hearing briefs on November 7, 1989.

ISSUE

The parties stipulated to the following issue:

Was the grievant discharged for just cause? If not, what remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS

Article 8 - GRIEVANCE PROCEDURE

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B. Steps of Grievance Procedure:

Step 1: . . . In the event of a grievance, the grievant shall continue to perform his/her assigned tasks and grieve his/her complaint later.

. . .

6. Decisions of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The Arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

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Article 22 - GENERAL PROVISIONS

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E. Discipline: The Employer shall not discharge nor discipline an employee without just cause.

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BACKGROUND

The Employer operates a nursing home and health care facility at which the grievant, Janice Monday, has been employed as a part-time Dietary Aide since March, 1984. Monday also has been a Union steward since June 1988.

In the spring of 1988 the Employer began using work performance forms in the Food, or Dietary, Services Department as a means of communicating with the employees. Through the forms, supervisors could provide feedback, both positive and negative, to employees in regard to their work performance. The forms also are reviewed as part of an employee's annual performance evaluation. Further, the forms are to be used to document that a supervisor had conveyed certain information, as noted on the form, to an employee. The forms are different than the Employer's standard disciplinary forms and are not to be used for disciplinary purposes. At all times relevant herein, the forms did not contain a specific space for an employee's signature, although the forms were revised after May 10, 1989, to include a place for employees to sign the forms.

On September 15, 1988, as a Union steward, Monday filed a grievance concerning the on-call system for Dietary Aides. On September 21, 1988 Monday received a written warning for failing to comply with the on-call system. The warning contained the following statements:

Article 8 - Grievance Procedure, paragraph B, Step 1, states in part the "In the event of a grievance, the grievant shall continue to perform his assigned tasks and grieve his complaint later."

You are therefore directed to comply with the Food Service Department work rules and call-in schedule while the grievance is formally being processed. Failure to do so will result in your suspension from work.

A repetition of the above violation or occurrence of any other may result in disciplinary action.

Apparently, Monday's failure to comply with the on-call system was because she had been with her daughter who was involved in a marital dispute. The warning was not grieved.

On October 14, 1988 Monday was discharged for insubordination. On October 26, 1988 the parties agreed to convert the discharge to a three day suspension and to reinstate Monday with backpay. The following is that settlement agreement:

This is to document our agreement to conclude the step 3 grievance of your termination on October 14, 1988.

The reason for the termination was insubordination and specifically refusal to leave the work station at the request of your supervisor. You and Mr. Wadinski have agreed that we will experience no further instances of improper refusal to perform work practice as directed, but rather to follow stated union contract language if there is to be a grievance.

You also agreed that you would accept as a satisfactory conclusion of this grievance that the termination will be reduced to a suspension without pay of three days in length. The disciplinary action will remain documented in your personnel file. If there are no further instances of this nature for one year the disciplinary documentation will be removed from your file.

On May 2, 1989 1/ Jean Puerner, a Dietary Aide, signed a work performance form which noted that she had failed to complete a task and failed to report to her supervisor. On May 3 Puerner filed a grievance challenging the Employer's use of the work performance form. Monday also signed the grievance as a Union steward.

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1/ Unless otherwise indicated, all other dates herein refer to 1989.

Also on May 3 Monday's supervisor, Gregg Salutz, completed a work performance form when Monday "was late for scheduled shift 1 hour". After adding the statement "because alarm didn't go off" to the form, Monday signed the form to verify that the form had been reviewed with her.

On May 10 Monday worked the 6:30 a.m. - 2:30 p.m. shift. During her twenty minute break (8:40 - 9:00 a.m.) she went to the supervisor's office and removed the department work schedule from the bulletin board where it was posted and took it to the dining room in order to arrange an exchange of work days with another employe. When Monday returned the work schedule to the office after her break, Salutz told her not to take the schedule from the office without permission. Monday replied that, although she and other employes had done so before, she understood the instruction and would comply with it. Monday then returned to work on the tray line. Another supervisor, Jane Beattie, had been observing and evaluating the functioning of the tray line on May 10. Upon completing her observations, Beattie filled out a work performance form for each employe working on the tray line. The form for Monday contained the following notes:

Trayline finished at 8:15 - good job on line only two errors good hand coordination with ticket system

When Beattie talked to Monday and asked her to sign said form to acknowledge receipt of the information on the form, Monday said she could not sign the form while the grievance on the forms was pending and that Chris Hess, the Food Service Director, knew about it. Beattie then went to see Hess. Hess told Beattie she was not aware of any reason Monday couldn't sign the form. Hess told Beattie to have Monday sign the form. Beattie again asked Monday to sign the form. Monday again said she couldn't because of the grievance. At that point another supervisor, Rita Kasten, said she would sign the form to verify it had been read to Monday. Monday then went back to work.

In the meantime, Hess met with the Personnel Director, Michael Jelen, and asked him how the grievance filed on May 3 impacted on the signing of work performance forms. Jelen told Hess the employes should continue to sign the forms while the grievance was pending.

Hess then met with the Food Service Supervisors and told them employes were to sign the forms and they were to be advised of the consequences for refusing to sign the forms. During that meeting Salutz informed Hess that he had told Monday not to remove work schedules from the office without permission. Hess told Salutz to document that instruction by giving Monday a work performance slip to sign. Salutz prepared a form containing the following statement:

All information or posted schedules that are in the office are not to be removed from the board or desk without permission from shift supervisor.

At approximately 11:00 a.m. Salutz summoned Monday to his office, reviewed the work performance form with her and asked her to sign it. Monday said that she couldn't sign because of the pending grievance. Salutz again asked Monday to sign the form and advised her that, if she refused to sign, she could be terminated for not following a supervisor's direct order. Monday said she was

not refusing to sign and she did not want to be terminated, but she wanted to talk to Dave (Dave Wadinski, the Union's Business Representative) about it. Salutz did not agree to wait for Monday to talk to Wadinski and said he wanted her to sign the form. Monday then returned to work without signing the form.

Salutz informed Hess of his conversation with Monday. Salutz and Hess then met with Jelen. Hess and Jelen arranged a meeting with the Employer's Executive Director, Tim Steller, for the morning of May 11, to discuss their recommendation that Monday be terminated.

After Monday completed her shift on May 10, she contacted Wadinski and informed him that there was a problem with employes were being asked to sign the forms. Wadinski called Jelen and set up a tour of the kitchen area for 7:00 a.m. on May 11 with Jelen and Hess. During that tour, Hess explained the quality assurance program. After the tour, as the three people were walking back to Jelen's office, Wadinski asked whether employes would be terminated if they did not sign the forms. Jelen replied that they would wait and see. Wadinski also asked if Monday would be fired. Jelen and Hess made no response.

In the morning of May 11 Amy Sanford, a Food Service Supervisor, gave Monday a performance form containing the following statements:

Good job keeping up with toast prep. Afterward, you helped fill up stations on trayline with dishes, silverware which is very helpful.

Monday said she could not sign the form. Sanford wrote on the form "chooses not to sign".

Later on May 11, Monday and a Union steward, Cheryl Jacobi, met with Hess and Jelen, at which time Monday was informed that she was being terminated for insubordination. Monday was asked to give her reasons for not signing the form. At the end of the meeting Monday was told her termination would stand.

In a prior instance on an undetermined date, apparently during the winter of 1988-89, one of the food supervisors was telling the food service employes that they had to sign a form in order to receive their paycheck. Monday refused to sign and was given her check by another supervisor, Beattie. Later that day Monday met with Jelen, Hess, Wadinski, a Union steward and the supervisor. After a discussion, Jelen concluded that it was incorrect for the supervisor to ask the employes to sign a document in order to get their paychecks and Monday was not disciplined for refusing to sign.

#### POSITION OF THE UNION

The Union argues that the Employer did not have just cause to discharge Monday and that she should be reinstated with full backpay and benefits.

Monday was an aggressive Union steward. That status requires the Employer to show that Monday's discharge was not retaliation.

The October 14, 1988 incident is unrelated to the May 10, 1989 incident since the earlier incident involved a refusal to leave the work station at the request of a supervisor and no more. On May 10 Monday never refused to leave her work station at the request of her supervisor. It can not be presumed that all acts of insubordination are the same.

The discharge letter of May 11 and the step two response both refer to two incidents on May 10, one involving Beattie and the second involving Salutz.

Subsequently, the Employer abandoned the Beattie incident and referred only to the Salutz incident. Since it is impossible to determine whether Monday would have been discharged, absent consideration of the Beattie incident, the entire decision to discharge Monday is tainted.

Monday's conduct on May 10 did not constitute insubordination justifying discharge. Monday never refused to sign the form. Rather, she reasonably hesitated to sign until she could consult with Wadinski to avoid wrecking the grievance filed by Puerner. Arbitrators do not view technical failures to sign forms as constituting insubordination. The Employer did not demonstrate any serious damage to its authority which would have resulted from permitting Monday to consult with Wadinski before signing the form. Moreover, the Employer had led Monday to reasonably believe that refusal to sign forms did not constitute insubordination. Earlier in the year, she was not disciplined for refusing to sign a form to obtain her paycheck. On May 11 Sanford neither disciplined nor warned Monday for refusing to sign a work performance form.

The Employer took advantage of the events on May 10 to rid itself of Monday. Based on Monday's refusal to sign a form for Beattie, Hess anticipated Monday's subsequent refusal to sign a form for Salutz. The forms previously had never been used to convey routine work instructions, but rather, had been used solely to evaluate work performance.

Monday was denied elementary industrial due process rights. Hess and

Jelen could have discussed the Monday situation with Wadinski when they saw him on May 11, if they had wanted to conduct a fair and through investigation. Instead they chose not to do so.

#### POSITION OF THE EMPLOYER

The Employer believes the unemployment compensation decision relating to Monday's discharge should be admitted into the record by the arbitrator. The burden of proof necessary to establish an employe's misconduct in a unemployment compensation proceeding is a substantially heavier burden than is the just cause standard applicable to this dispute. Clearly the decisions are probative and relevant. Further, admission of the decisions would be in accord with the well-recognized arbitral principle that a party be permitted to present its entire case. Moreover, the rules of evidence are not to be strictly applied in arbitration proceedings.

There was just cause to discharge Monday. Insubordination constitutes just cause for discharge. Discharge is particularly appropriate where the employe has resorted to self help, contrary to the obey now and grieve later principle. The contract relevant to this proceeding specifically contains the obey now - grieve later principle.

In September of 1988 Monday filed a grievance challenging the Employer's on-call system. Subsequently Monday failed to comply with the on-call system and was issued a written warning. Then in October of 1988 Monday was discharged for insubordination. Although the discharge was converted to a three day suspension and Monday was reinstated, such was done with the understanding that in the future she would comply with supervisory directives and follow proper grievance procedures rather than resort to self help remedies. In light of these past warnings, Monday's refusal to sign the work performance form was without any justification. Monday's misconduct on May 10 was a continuation of conduct for which she had been disciplined in the past and constituted just cause for discharge.

The arbitrator must defer to the Employer's judgment as to the proper penalty to be imposed for Monday's misconduct.

Monday was not entitled to Union representation during her meeting with Salutz on May 10. Said meeting was for informational purposes only.

The Union's contention that a scheme or plot existed to cause Monday's discharge lacks any support in the record.

#### DISCUSSION

At the hearing, the Employer attempted to introduce into evidence an unemployment compensation decision pertaining to Monday which had been issued by the Appeal Tribunal of the State of Wisconsin Department of Industry, Labor and Human Relations. The undersigned did not admit said decision, but advised the Employer that it could continue to argue for the admission of the decision in its brief. The undersigned has considered those arguments and still is not persuaded to admit either that decision or a subsequent decision by the Labor and Industry Review Commission. The contract governing this proceeding establishes a just cause standard by which the undersigned must determine whether the Employer's discharge of Monday was proper. The undersigned believes such a determination should be based on the evidence presented at the hearing before him and not on a decision by an administrative body which may have had both different evidence to consider than was presented herein and a different standard on which a decision is based. The Employer was not restricted in the calling of witnesses at the hearing in this proceeding. Therefore, the undersigned believes the Employer had sufficient opportunity to present its case even though the unemployment compensation decisions were not received.

The record is clear that on May 10 Monday refused Salutz's directive to sign the work performance slip he presented to her. However, said refusal was not final, but rather, was conditioned on Monday's expressed desire to talk to her Union representative, Wadinski, about what the impact would be on the grievance filed on May 3 if she signed the form. Salutz was aware of that reason, as evidenced by his testimony that Monday told him she did not want to sign the form without instructions from Wadinski. Salutz did warn Monday that she could be terminated for not following a supervisor's direct order if she did not sign the form. At no time did Salutz agree to let Monday talk to Wadinski before deciding whether or not to sign the form. Thus, it must be determined whether Monday's refusal to sign the form was insubordination and, if so, whether discharge was the appropriate discipline for her conduct.

As noted in the Employer's brief, a well-established principle in arbitration cases involving insubordination is the concept of "obey now - grieve later". Under that principle, many arbitrators have stated that employes must not take matters into their own hands, but instead, they must

obey an order, even if they believe the order violates the contract, and then seek redress through the grievance procedure. The undersigned has reviewed numerous arbitration decisions dealing with the "obey now - grieve later" concept and with insubordination, including those cited in the post-hearing briefs. Discipline for insubordination generally has been upheld when the order involved a work assignment and the employee's refusal to comply with the order interfered with the employer's production or operations. An employee's use of offensive language or abusive behavior toward a supervisor also have been deemed to be insubordination because it revealed disrespect for management's authority. The refusal of an employee to comply with a supervisor's directive when the directive does not reasonably relate to an employee's job, is a less clear area.

In the instant case Monday's refusal to sign the form neither involved a work assignment nor impacted on the orderly flow of the Employer's operations. Rather, the purpose of Salutz's order, for Monday to sign the form, was to document that Monday had been informed of the contents of the form. Consequently, Monday's request to talk to Wadinski before signing the form did not create any operational problems in the provision of food services to the Employer's clients. Neither did the refusal occur in the presence of any other bargaining unit employees. Monday did not use either offensive language or abusive behavior toward Salutz. Thus, it is difficult to see how the Employer felt that Monday's request to contact Wadinski before signing the form was a challenge to its authority to direct its work force.

Salutz, Hess and Jelen knew there was a grievance pending over the Employer's policy of requiring employees to sign the forms. While the Employer's representatives believed the pending grievance did not excuse employees from signing the forms, it is understandable that Monday was reluctant to undercut the pending grievance by signing the forms until after she had consulted Wadinski. Monday had been a steward for only a short period of time, since June of 1988, and thus was relatively inexperienced in that capacity. Therefore, her concerns were neither unreasonable nor a deliberate and willful disregard of the Employer's interest which was inconsistent with Monday's responsibilities to the Employer. The record does not establish any rational basis for requiring Monday to sign the form immediately instead of allowing her time to consult with Wadinski. Certainly, Monday's refusal to sign immediately did not interfere with the Employer's orderly functioning, since Monday not only returned to work for the balance of her shift after refusing to sign the form, but she also worked part of her scheduled shift on the following day before she was terminated.

Further, Monday did contact Wadinski after she completed her shift on May 10. Wadinski then met with Hess and Jelen on May 11 prior to Monday's termination, but when Wadinski raised the issue of whether Monday and/or other employees would be discharged for not signing the forms, Hess and Jelen would not discuss the issue with him. At that point, Hess and Jelen had an opportunity to inform Wadinski of the pending discipline of Monday and to determine what he knew of the situation. Instead, Hess and Jelen chose not to discuss the situation and instead to proceed with a recommendation for Monday's termination when they met later that day with Stellar, even though neither Hess nor Jelen had met with Monday to hear her account of the incident in an effort to make a reasonably thorough investigation before deciding on termination as the appropriate level of discipline. Such an approach is indicative of a desire to terminate Monday without concern for the issue of whether termination was the appropriate penalty for the alleged offense.

The Employer asserts that, in light of the past warnings given to Monday in regard to complying with a supervisor's directives, she was aware of the consequences of her refusal to sign the form on May 10. The letter of October 26, 1988 which contained the terms of the settlement of Monday's termination on October 14, 1988 states that Monday agreed she would not improperly refuse to perform a work practice as directed, but rather, would follow the contract language for a grievance. In the instant matter, a grievance already was pending over the same issue, i.e., could employees be required to sign the forms. Monday attempted to explain to Salutz that she was not refusing to sign the form, but that she could not sign until she talked to Wadinski. As discussed previously, Salutz's continued insistence, that Monday sign the form immediately, was unreasonable and served no legitimate business purpose, except to place Monday in a position where she would be subject to discipline for refusing to sign the form.

Further, Monday had a basis to believe that a refusal to sign a form was not considered insubordination and would not result in discipline. Monday had not been disciplined for refusing to sign a form in order to obtain her paycheck on one occasion during the 1988-89 winter. Then on May 10, prior to Monday's refusal to sign the form for Salutz, she had refused two separate requests to sign a similar form for Beattie. Beattie had informed Hess of Monday's refusal each time. However, Beattie never told Monday during either request that a refusal to sign the form could result in discipline. Similarly on May 11 another supervisor, Sanford, did not warn Monday about being disciplined when Monday refused to sign a form. Thus, the Employer was not consistent in advising Monday of the potential for discipline resulting from a refusal to sign the forms. Certainly, there was a lack of consistency by the Employer's three supervisors in responding to Monday's refusals to sign forms on May 10 and 11, which could cause Monday to believe she would not be terminated for refusing to sign the forms.

The Employer also argued that through the written reprimand of September 21, 1988, Monday was fully aware that future insubordination and failure to abide by the "obey now - grieve later" rule could result in her termination. Said reprimand did warn Monday that she could be suspended if she failed to comply with the work rules and call-in schedule while her grievance over the call-in system was being processed. Nowhere in said reprimand is there any use of the term insubordination. While the Employer may have considered Monday's failure to comply with the call-in system to constitute insubordination, the reprimand did not specify or identify that belief in a manner which would make it clear to Monday that she was receiving the reprimand for insubordinate conduct.

In summation, the undersigned concludes that Monday's conduct on May 10 did not constitute insubordination. Her conduct was not of a deliberate or inflammatory nature. Neither did Monday's conduct interfere with the Employer's operation nor directly challenge the Employer's authority. In fact, Monday's conduct became an issue only because of the Employer's rigid and inflexible demand that she sign the form immediately without allowing her an opportunity to consult with Wadinski. Such a demand was unreasonable. The Employer asserts Monday could have noted on the form that she was signing under protest. Conversely, Salutz could have noted on the form that Monday chose not to sign the form, just as Sanford did on May 11. The Employer's stated purpose for having employees sign the form was to document that the information on the form had been conveyed to the employee. However, the Employer did not present any convincing explanation of how a supervisor's notation, that an employee chose not to sign the form, would cause the use of the forms to be less effective than if the forms were signed by the employees. The Employer admits that the forms were not to be used for disciplinary purposes. While the forms are placed in employee files and can be used as a source of information for annual performance evaluations, an employee's wage increases are not affected by those evaluations. Thus, the Employer's concern over an employee's refusal to sign one of the forms is difficult to comprehend as a reasonable and job-related necessity.

The undersigned agrees with the Employer's contention that Monday was not entitled to Union representation when Salutz initiated the meeting with Monday about the form on May 10. Said meeting did not begin as a situation in which Salutz intended to discipline Monday. Rather, Salutz met with Monday to review

his earlier instructions concerning the removal of the work schedule from the office and to have Monday sign the form to acknowledge the instructions had been reviewed with her. It was not until Monday refused to sign the form that Salutz advised her that she could be terminated for her refusal. Monday then expressed her desire to consult with her Union representative, Wadinski. Such an expression did not convert the meeting to a situation covered by Weingarten. 2/ The purpose of the meeting was not to conduct an investigation which might result in discipline to Monday, Rather, Salutz was attempting to get Monday to sign the form. Therefore, Monday did not have a right to Union representation at the meeting with Salutz.

The Employer did not act in good faith in deciding to terminate Monday, since it did not conduct a fair investigation, prior to convening the meeting at which it informed Monday she was being terminated. The Employer had not talked to Monday, before making its decision, in order to get her version of the incident. Jelen testified that at the time Hess and he met with Monday and a Union steward on May 11, the decision to terminate Monday had been made and that the primary purpose of the meeting was to tell her of that decision, although Monday was given an opportunity, a "last ditch effort", to offer anything that might alter the decision. The offer of such an opportunity, after the decision to terminate had been made, did not constitute a fair investigation.

Thus, it is found that the Employer acted in an unreasonable and arbitrary manner in terminating Monday. Under those circumstances it is concluded that just cause for termination did not exist. On that basis, the undersigned has the contractual authority and responsibility to overturn the discipline and such an action does not conflict with Article 8(C)6 of the contract.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the grievant, Janice Monday, was not discharged for just cause; that Monday be reinstated to her former position without any loss of seniority and that she be made whole for all wages and fringe benefits which she lost as a result of her discharge on May 11, 1989, except that the Employer may offset the backpay award by (1) any unemployment compensation received by Monday if the Employer reimburses the State of Wisconsin Unemployment Compensation Fund for the amount of the offset, and, (2) any wages or other payments received by Monday which she would not have received if she had not been discharged.

Dated at Madison, Wisconsin this 14th day of December, 1989.

By \_\_\_\_\_  
Douglas V. Knudson, Arbitrator

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2/ NLRB v. J. Weingarten, Inc., 95 S.Ct. 959, (1975).