BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
EAGLE RIVER MEMORIAL HOSPITAL	
and	Case 10 No. 42191 MA-4439
EAGLE RIVER MEMORIAL HOSPITAL EMPLOYEES UNION LOCAL 1311, AFSCME, AFL-CIO	

Appearances:
Drager, O'Brien, Anderson, Buggy & Garbowicz, by Mr. Steven C. Garbowicz, on behalf of the Employer.
Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

ARBITRATION AWARD

The above-entitled parties, herein the Employer and Union, are privy to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission staff arbitrator. Pursuant thereto, I heard this matter on August 18, 1989 in Rhinelander, Wisconsin. The hearing was not transcribed and both parties filed briefs which were received by October 6, 1989.

Based upon the entire record, I issue the following Award.

ISSUES:

Since the parties were unable to jointly frame the issue, I have framed it as follows:

> Did the Employer have cause to discharge grievant Terry Hurlbutt and, if not, what is the appropriate remedy.

DISCUSSION:

Nursing Assistant Hurlbutt, who previously worked as a part-timer, was hired as full-time employe on November 22, 1988 to work on the night shift. She was bumped from that position in February, 1989, at which time she became a part-time employe on the second shift. Hurlbutt grieved her bumping and the parties subsequently agreed to put her back on the night shift effective April 8, 1989. 1/

Hurlbutt was scheduled to work on April 3, 4 and 5, and she did so, with April 6 being a scheduled day off. She was scheduled to work on April 7, but she missed work that day because she called in sick. Prior thereto, she had filled out her time card to show that she worked on that day. On the next day, she reported for work at the beginning of the night shift, but was told by supervisor Carol Ische that she had been scheduled to work on the afternoon shift, and that she would have to return home again. Since Hurlbutt had filled out her time card beforehand, it showed that she had worked on April 8, when in fact she did not. Hurlbutt at that time never attempted to change her time card to show that she in fact did not work either that day or the day before.

Hurlbutt subsequently met with Director of Nursing Patricia Beelow on Tuesday, April 11 who told her that she was being discharged effective immediately and she gave Hurlbutt a written "Disciplinary Notice To Employee" which stated: "Terry Hurlbutt falsified her time card on two occasions (4/7/89

1/ Unless otherwise noted, all dates hereinafter refer to 1989.

and 4/8/89). According to Article 4 of the Local 1311 AFSCME, AFL-CIO (sic), this is justification for discharge." Hurlbutt subsequently filed the instant grievance on April 21.

In support thereof, the Union primarily argues that the Employer lacked just cause to discharge Hurlbutt because it "neither instructed her nor provided her with any written rules governing the method for time card completion"; that she has previously filled out her time card ahead of time on at least three (3) prior occasions without being disciplined; that an April 28 letter from former supervisor and Clinical Coordinator Sandy Roe 2/ which states to the contrary should be disregarded because it is hearsay; that Hurlbutt never tried to deceive the Employer over the fact that she did not work the hours in issue; that Hurlbutt was never given the chance to sign and verify her time card; and that the Employer itself has acknowledged that its policy is unclear. As a remedy, the Union seeks Hurlbutt's reinstatement, a make whole remedy, and the expunging of the instant discipline from her personnel file.

The Employer, on the other hand, asserts that Hurlbutt in fact was instructed upon her hire on how to properly fill out her time card by Accounts Clerk Linda Riedel; that she had been previously warned by supervisor Sandy Roe over filling out her time card ahead of time; that most of Hurlbutt's testimony should not be credited; and that she deliberately falsified her time card for April 7 and 8, hence warranting her discharge.

In resolving this issue, it first must be noted that the Employer does not maintain any time clocks and that, as a result, it is absolutely essential that all employes accurately and honestly fill out their time cards since, as the Employer correctly points out, it operates on an "honor system." Indeed, that is why the Employer for some time has had a rule to the effect that time cards must not be filled out ahead of time and that is why it on April 27 issued a memorandum to all employes reiterating its time card policies. The Union certainly understands the importance of all this since it has agreed to Article 4.01 (D) of the contract which provides for immediate discharge for: "Falsification of documents such as applications, health statements, time cards, equipment logs, etc."

Having that policy, though, it a separate question of whether it was ever communicated to Hurlbutt and, whether she deliberately falsified her time card in order to deceive the Employer into believing that she worked on April 7 and 8, as alleged.

Accounts Clerk Linda Riedel testified on behalf of the Employer to the effect that she regularly explains the Employer's time card procedures to new hires and that she likewise did so at the time of Hurlbutt's hire. She admitted on cross-examination, however, that she could not specifically recall telling Hurlbutt about it at the time of her hire. For her part, Hurlbutt denied that Riedel or any other Employer representative ever told her about the policy.

This is a difficult issue to resolve because there is no objective evidence proving that said policy was ever so communicated. But since this is a discharge case, and since the Employer bears the burden of proof, it must be concluded that the Employer has failed to prove that said policy was ever clearly communicated to the grievant. 3/

The Employer also asserts - primarily through the testimony of Director of Nursing Bellow - that Hurlbutt was repeatedly admonished over her past failures to properly fill out her time cards by supervisor Sandy Row. The problem with this claim is that there is no contemporaneous documentary evidence showing that Hurlbutt had in fact been previously disciplined over similar infractions. Thus, Bellow herself acknowledged that she did not know why no "consultation sheets" had been filled out by Row over said incidents, as required by the Employer's disciplinary policies.

Instead, the only evidence offered by the Employer regarding those incidents was an April 28 letter from Row, (who left her employment prior to April 7) to Beelow stating that she had previously warned Hurlbutt on or about January 26 and February 14 about filling out her time cards ahead of time. But, as the Union directly notes, said statements are hearsay because Row herself never testified, thereby preventing any cross-examination of her and/or her claim. Accordingly, said letter must be disregarded in its entirety, and it must be concluded there is no reliable record evidence proving that Hurlbutt

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2/ The parties have spelled this name as both "Roe" and Rowe"; the former designation is used herein.

3/ In order to avoid this very problem, many employers require new hires to sign a checklist showing that they have received certain information and/or documents. If that is done here, the Employer in the future will be able to avoid situations such as the one herein involving what was and was not said to new hires.

was ever disciplined over these prior incidents.

We are left, then, with a record showing that Hurlbutt incorrectly filled out her time cads for December 17, 1988, February 11, March 11 and March 25, hence supporting her claim that she was unaware of the Employer's time card signing policies. In addition, Hurlbutt on at least three (3) occasions filled out her time cards to show that she was working, when in fact she ended up missing work because of illness. While supervision in all of those instances corrected Hurlbutt's time cards, she was never disciplined.

Furthermore, and as the Union correctly points out, it seems inherently implausible to believe that Hurlbutt would deliberately falsify her time cards on April 7 and 8, as she certainly knew at that time that the Employer was well aware that she had not worked on those days and that her chances of successfully trying to deceive the Employer were practically nonexistent.

Given all the foregoing - the fact that there is no reliable record evidence showing that she was ever told about the Employer's time keeping policy, that she had previously filled out her time card ahead of time on several occasions without being disciplined over it, and that supervision corrected those errors on its own - it can only be concluded that the Employer has failed to meet its burden of proof that Hurlbutt, in fact, was foolish enough to deliberately falsify her time cards on April 7 and 8. Hence, it lacked cause to terminate her. 4/

In so finding, I am mindful of the Employer's claim that much of Hurlbutt's testimony is implausible and that her protestations of innocence should not be credited. Said suspect testimony, however, cannot overcome the fact that it is the Employer who bears the burden of proving that Hurlbutt engaged in misconduct. Measured by that high standard, said testimony in and of itself is insufficient to establish that she committed the misconduct alleged.

I am also mindful of the various arbitration cases the Employer relies upon in claiming that it had cause to discharge Hurlbutt, i.e. Fraser Shipyards, Inc., 78 LA 129; Metro Contract Services, Inc., 68 LA 1048; Misco Precision Casting Co., 40 LA 87, and Hilo Coast Processing Co., 74 LA 236.

In Fraser, it is true that this arbitrator ruled that the "mere nonuse of a clear right does not preclude the exercise of that right at a future date." However, that case turned upon whether that employer ever told its employes that they could be fired if they engaged in a wildcat strike when they had never been disciplined before in prior work stoppages. Finding that no such notice was given to the great bulk of the strikers, it was decided that the employer lacked just cause to fire them. That case, then, involved advanced notice of possible disciplinary action, just as the one herein. Since Hurlbutt was never warned ahead of time that she could be fired if she filled out her time card ahead of time, her discharge must be reversed, just as were the ones in Fraser.

Metro also was an advanced warning case, with the arbitrator finding that employes could not be disciplined for holding a Christmas when they always had

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4/ The Union correctly points out that since Hurlbutt was not disciplined for missing her shift on April 8, she cannot be disciplined over that mistake, thus meaning that the Employer's discharge decision stands or falls on the deliberate falsification change. For the reasons just noted, it falls.

done so without incident in the past. Said case therefore again supports the grievant here.

In Misco, it is true that the arbitrator in dicta discussed the falsification of time cards and ruled that no advanced notice of discipline had to be made in such situations. Here, though, the threshold issue is whether Hurlbutt deliberately falsified her time card in the first place; if she did, the discharge would stand for the very reasons cited by the Employer and the arbitrator in Misco. But the Employer here has failed to meet its burden of proof that Hurlbutt in fact did so; hence, Misco does not apply.

In Hilo, the arbitrator for various reasons discredited the grievant's testimony and sustained his discharge. Here though, for the reasons noted above, I find that there is insufficient basis for discrediting Hurlbutt's entire testimony, as urged by the Employer.

To rectify Hurlbutt's wrongful discharge, the Employer shall immediately expunge all references to her discharge from her personnel file and it shall immediately offer to reinstate her to her former or substantially equivalent position and make her whole by paying to her a sum of money, including all benefits, that she otherwise would have earned from the time of her termination to the present, less any amount of money that she earned elsewhere.

To resolve any disputes which may arise over the application of this Award, I shall retain jurisdiction for at least thirty (30) days.

In light of the foregoing, it is my

AWARD

1. That the Employer lacked cause to terminate grievant Terry Hurlbutt.

2. That as a remedy, the Employer shall undertake the remedial action noted above.

3. That I shall retain jurisdiction over this matter for at least thirty (30) days.

Dated at Madison, Wisconsin this 10th day of January, 1990.

By _____
Amedeo Greco, Arbitrator