BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between BROWN COUNTY (MENTAL HEALTH CENTER) and BROWN COUNTY MENTAL HEALTH CENTER EMPLOYEES, LOCAL 1901, AFSCME, AFL-CIO	Discharge grievance of Colleen Myers dated 11-2-89 WERC Case 413 No. 43115 MA-5900

Appearances:

Mr. John C. Jacgues, Assistant Corporation Counsel, appearing on behalf of the County.

Mr. James Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

ARBITRATION AWARD

The Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and determine the above-noted dispute pursuant to the grievance arbitration provisions of the parties' 1989-1990 collective bargaining agreement.

The parties presented their evidence and arguments to the Arbitrator at a hearing held in Green Bay, Wisconsin on January 31, 1990. By agreement of the parties, the Arbitrator recorded the hearing on cassette tape for his exclusive use in award preparation. Briefing was completed on February 16, 1990, at which time the hearing was closed and the matter fully submitted.

ISSUES

At the hearing, the parties stipulated to the following issues:

1. Was the discharge for just cause?

2. If not, what shall the remedy be?

PERTINENT PORTIONS OF THE AGREEMENT

ARTICLE 1. MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided the management of the work and the direction of the working forces, including the right to hire, promote, transfer demote or suspend, or otherwise discharge for proper causer and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the employer. If any action taken by the employer is proven not to

be justified, the employee shall receive all wages and benefits due him/her for such period of time involved in the matter.

. . .

ARTICLE 24. GRIEVANCE PROCEDURE - DISCIPLINE PROCEDURE

. . .

DISMISSAL: No employee shall be discharged except for just cause. Any employee who is dismissed, except probationary, shall be given a written notice of the reasons for the action at the time of dismissal, and a copy of the notice shall be made a part of the employee's personal history record and a copy sent to the Union. Any employe who has been discharged may use the grievance procedure by giving written notice to his/her steward and his/her supervisor within ten (10) working days after dismissal. Such appeal shall go directly to arbitration. If the cause for discharge is dishonesty, intoxication on the job or drinking or use of illicit drugs on duty, and/or if an employee is convicted in the illicit sale of drugs or pushing drugs, the individual may be dismissed immediately from employment with no warning notice necessary.

DISCIPLINARY PROCEDURE: The progression of disciplinary action normally is, 1) oral, 2) written, 3) suspension, 4) dismissal. However, this should not be interpreted that this sequence is necessary in all cases, as the type of discipline will depend on the severity of the offense. Oral warnings shall be maintained in effect for six (6) months, written warnings for twelve (12) months and disciplinary suspensions for eighteen (18) months during which time a repetition of an offense can result in a more serious disciplinary action. In all such cases the employee shall have the right to recourse to the grievance procedure.

The grievance committee chairman or his designated representative shall be present during all disciplinary hearings and shall receive copies of all communications concerning disciplinary actions.

ARTICLE 25. TERMINATION

Termination reports shall be in triplicate and signed by the employer and the employee, when an employee is separated from employment for any reason except sick leave, vacation, or other legitimate leave: one (1) copy shall be retained by the Employer, one (1) filed with the Union and one (1) given to the terminated employee. Any employee leaving employment except for legitimate reason such as sickness, vacation or granted personal leave, shall be considered a terminated employee. Any unjustifiable absences from work for more than five (5) continuous work days shall be construed as voluntary termination from employment. It is, however, understood that on any work day any employee unable to perform his duties shall advise his supervisor prior to the commencement of said work day, if possible.

FACTUAL BACKGROUND

Grievant has been employed by the County since December of 1987. She was first employed in the Dietary Department on a part-time basis and moved to Housekeeping on January 9, 1989 where she worked on a full-time basis.

On or about April 28, 1989, Grievant suffered a broken foot and associated ankle damage at her place of residence. She took sick leave for May 1, vacation for May 2 and 3 and a personal holiday for May 4. That exhausted her paid leave accounts. She then requested and was granted unpaid medical leaves of absence the last of which was effective until October 31, 1989. Grievant's foot injury was apparently misdiagnosed initially, causing her to experience complications and a more prolonged convalescence.

Grievant kept appropriate County personnel informed as to her condition and prognosis each time she visited her physician. She submitted a written physician's statement dated 5-9-89 stating that she would be operated on on May 8, 1989, and would be off work for approximately 6 weeks thereafter. (Exhibit 4). She later submitted a written request for leave of absence (Exhibit 5) which she signed on May 22, 1989, containing an undated physician's statement that her "fracture is healing" and that Grievant would be seen for a follow-up examination "in 3 wks." That document contained a form statement of understanding on the part of the employe requesting the leave that included the following:

> 1. If I do not return to work on the above date, or have scheduled [sic] for an extension from my department supervisor or Personnel Department, I will be voluntarily resigning my position.
>
> 2. If on medical leave, I will be required upon my return to work to submit a physician's statement assuring that I am free of communicable disease and physically fit to perform my regular duties.

Exhibit 5 contained nothing in the space marked "Date Expected to Return," and the spaces for Management's response were not completed, either. However, as noted, it is undisputed that Grievant's last medical leave of absence was granted until October 31, 1989.

On October 30, 1989, Grievant saw her physician for a regularly scheduled appointment. Grievant testified that by the time of that examination, Grievant was no longer in the plaster cast, fiberglass walking cast or wooden surgical shoe that she had been using at various times during her recuperation. Grievant testified that her physician told her that he thought she would

be 'okay" in two weeks but advised that it would be best if she did not return to work until after he examined her again on November 13, 1989. The doctor provided Grievant with a written statement which read,

> October 30, 1969
> RE: Colleen Myers
> TO WHOM IT MAY CONCERN: This patient is medically unable to return to work at least until her return appt. November 13, 1989. R.D. Horak, M.D.

At 4:25 PM on the 30th, Grievant called MHC to speak to Tomchek-May who was not available to answer at that time. Grievant left a message which was relayed to Tomchek-May as follows:

> To Nancy
> From Colleen Myers
> [Message:] Called said her doctor will not release her to work for 2 more weeks. If you have any question give her a call. She won't be home until after 11:00 and she does have a doctors statement.

Grievant personally delivered the above-noted October 30 physician's statement to the MHC lobby receptionist on October 30 and asked that it be given to Nancy Tomchek-May.

Grievant called again the next day and reached Tomchek-May. Grievant asked whether her doctor's statement had been received and Tomchek-May said that it had. Grievant asked where her request for an additional two weeks of leave stood. Tomchek-May replied that because Grievant was not able to return to work at the expiration of her medical leave, Executive Director Robert J. Cole was considering Grievant's request for additional leave as well as reviewing Grievant's employment status and that Grievant would be receiving a letter from Cole on those subjects shortly thereafter. When Grievant asked what that meant and whether her request for additional leave would be granted or denied, Tomchek-May reiterated that Grievant would have to wait for the letter from Cole and that Tomchek-May would answer any remaining questions Grievant might have after Grievant had received Cole's letter.

Tomchek-May testified that she had also spoken with Grievant on another occasion in late October. The record does not establish precisely when that other conversation occurred. It appears, however, that in that other conversation Tomchek-May told Grievant that her medical leave would end October 31 and that Management would be reviewing her overall employment status if Grievant was unable to return to work on that day. Tomchek-May testified that at no time did she tell Grievant that if she did not return to work at the conclusion of her medical leave she would be terminated.

In Cole's October 31, 1989, letter to Grievant (Exhibit 3), the County notified Grievant as follows:

> I have taken the opportunity to review the medical statement which you presented from your personal physician. Dr. Horak states that you are medically unable to return to work until November 13, 1989.
>
> Our records indicate that you have been continuously unable to work due to medical reasons from May 1 to May 5, 1989. During this period you were granted time off with pay by the use of your accrued benefits, and time off without pay May 8, 1989 to the present to cover the rest of the absence. This approved absence fulfills our obligation according to the Wisconsin Family/Medical Leave Act.
>
> Nancy Tomchek-May, Personnel Coordinator, has explained to you on two occasions that your current request for an approved Leave of Absence would expire as of today. She further explained to you that should you be unable to medically return to work as of this date that your employment status would be reviewed.
>
> I now find that due to your continued unavailability to work due to medical reasons, your employment with Brown County Mental Health Center will be terminated as of October 31, 1989.
>
> I ask that you make necessary arrangements to return all Brown County Mental Health Center property (keys, ID card, payroll badge, library books, etc.) to the Personnel Department prior to November 6, 1989. If you have any questions in this process, feel free to contact the Personnel Department at extension 230. Your cooperation in this matter is appreciated.

Grievant filed a timely grievance and the instant proceedings resulted.

At the hearing, the County offered evidence concerning Grievant's absences from work prior to her foot injury on April 28, 1989. That evidence established that Grievant had been granted three prior medical leaves without pay as follows:

November 1-23, 1988 for pneumonia

February 18-27, 1989 (preceded by 4 days of sick leave) for asthma

March 23-April 4 (preceded by 3 days of sick leave and vacation) for asthma.

The County also offered evidence that Grievant's immediate supervisor, Rose Kuczynski, had spoken with Grievant on two occasions, once before and once after April 28 about the need for

Grievant to be available to work and the hardship created for the Department when she was on medical leave of absence.

The Union objected that evidence about pre-April 28 absences is unrelated to the reasons stated in the discharge letter and hence ought not be admitted or considered. The Arbitrator conditionally received the evidence and reserved ruling on its admissibility and the weight to be given it, if any.

Kuczynski also testified that Management had posted Grievant's position on a temporary basis but because no one bid for it, Management had been filling in for Grievant with part-time employes.

The County also introduced the Grievant's signed November 15, 1989 statement submitted during the Unemployment Compensation investigation (Exhibit 7). In that document, Grievant acknowledged that Dr. Horak had advised her not to return to her Maintenance Worker I job until November 13, 1989. In that document, Grievant further stated that she considered herself physically able to work full time, adding, "My foot is about 90% healed. I feel I can work without restriction." Grievant testified that she later submitted to the Unemployment Compensation Division Dr. Horak's written statement dated November 21, 1989, releasing Grievant to return to work. Grievant testified that Dr. Horak was on vacation from November 13 to November 21, such that she was unable to be examined and released to work by him until that later date.

POSITION OF THE COUNTY

It is a well established arbitral principle that an employer has the right to terminate an employe who cannot perform the job for which he/she had been hired. If an employe is of no value because he/she cannot do the work, discharge is justified.

In determining whether an employe is physically able to perform the duties of his/her position, management is entitled and ordinarily required to rely on the opinion of medical experts. Here, the undisputed medical opinion of Grievant's specialist Dr. Horak, clearly and unequivocally indicated that Grievant had a disability which made it impossible for her to resume her regular duties.

Unlike a disciplinary discharge which would be governed by Art. 24, the instant termination was for a medical reason such that it is governed by the "proper cause" provision in Art. 1.

The award in the Pauls case arose under the same contract language and between the same parties as are involved here. In it, Arbitrator Greco stated that ". . . it is well established that an employer can terminate an employee if he/she is unable to physically perform his/her job duties.' He concluded that just cause was present because of a medical disability preventing Pauls from performing essential job duties. That award constitutes controlling support for the same result in this case.

Grievant and the Union claim that the County has failed to prove that she could not perform the job duties of Maintenance Worker I. On the contrary, Exhibits 4, 5 and 6 relate

reasons submitted by Dr. Horak to the effect that Grievant could not perform that job. Indeed, it appears undisputed that Grievant was medically disabled and unable to perform the duties involved in that job at the time she was terminated.

If the Arbitrator concludes otherwise, the County has shown that Grievant received Unemployment Compensation benefits for which the County was billed on a dollar-for-dollar basis. Such benefits should be taken into account if any back pay order is issued.

POSITION OF THE UNION

The discharge was not for just cause. The discharge was imposed without Grievant having been accorded the normal progressive discipline described in Art. 24. There has been no showing that the Grievant's offense was so severe as to warrant bypassing those contractual progressive discipline requirements.

Grievant was also discharged without fair warning. When she timely requested an extension of her leave of absence, she was told only that her employment status would be reviewed. When she asked what that meant, she was told that she would have to wait for a forthcoming letter from the MHC Executive Director. For all Grievant knew, her request for leave might be granted or granted with conditions or whatever. In the circumstances, Grievant had no chance to consider returning to work against her doctor's advice, or to seek additional medical opinion or documentation. Moreover, the County has not questioned the justification for the additional two weeks of leave requested by Grievant, and the County did nothing to try to accommodate Grievant's medical condition as of the end of October.

The Pauls award is easily distinguishable. Arbitrator Greco found (erroneously in the Union's opinion) that the evidence in that case established that Pauls would not be able to perform her job in the future because of aggravation in an already existing medical condition. That judgment was based in part on evidence concerning problems the County had had with Pauls' work performance on the job. Here, the County has never had a problem with Grievant's work performance on the job. Grievant's use of sick leave before her ankle injury is beyond the scope of the County's stated reasons for the discharge; in any event, it has not been shown to be abusive or greater than average. The evidence shows that Grievant kept the County fully informed about her condition and the complications she was experiencing.

Grievant merely requested an additional two weeks of leave and supported that request with her doctor's advice that she not return to work for that period of time. Grievant's statement to UC introduced by the County as Exhibit 7 states that as of November 15 Grievant was physically able to work full-time. The County has presented no evidence that Grievant would not have been able to perform her duties upon returning to work. Nor has it shown that granting the two week extension requested by Grievant would have created any hardship or inability to get the work done.

The County also erred procedurally in that it did not decide whether Grievant's reason for

requesting the additional leave was "justifiable" as is called for in Art. 25. Nor has the County shown why the Grievant's request was not "justifiable."

For the foregoing reasons, the Arbitrator should conclude that the discharge was not for just cause and should order Grievant reinstated to her former position and made whole for lost wages and fringe benefits.

DISCUSSION

ISSUE 1 calls upon the Arbitrator to determine whether there was "just cause" for the "discharge" of the Grievant. The analysis under that standard is no different than that applicable under the "proper cause" standard set forth generally in Art. 1 and referred to by the County.

In the Arbitrator's opinions the County's termination of the Grievant's employment was "unjustified" and not for "proper cause" within the meaning of Art. 1 and not for "just cause" within the meaning of Art. 24. The Arbitrator concludes, for reasons set forth below, that the County's action was substantively unjustified. Having so concluded, the Arbitrator does not reach or rule upon the various procedural deficiencies alleged by the Union, such as lack of fair warning, lack of progressive discipline, etc.

The County relies on the principle "that an employer can terminate an employee if he/she is unable to physically perform his/her job duties." In the Arbitrator's opinion, that reliance is misplaced given the facts of this case.

When Arbitrator Greco applied that principle in the Pauls case it was in the context of an individual whom the medical evidence showed to be suffering from a permanent disability which Arbitrator Greco concluded was such as would prevent her from ever being able to perform essential aspects of her job in the future. Similarly, each of the arbitration cases cited in the County's brief involved an individual who was permanently disabled so as to be unable to perform the duties of his/her job in the future. See, Zellerbach Paper Co., 68 LA 69, 71 (Stashower, 1977)(employe had permanent disability); Butler Manufacturing Co., 70 LA 426, 428 (Welch, 1978)(Arbitrator concludes "Grievant will never be able to adequately perform his job."); Purex Corp., 60 LA 933, 936 (Doyle, 1973)(grievant had 35 percent permanent disability of the left upper limb, preventing her from ever performing her old job); Arkansas Chemicals, Inc., 51 LA 579, 580 (Holly, 1968) (employe was totally and permanently disabled; medical evidence showed to reasonable certainty that the condition would worsen, preventing him from ever returning from work); Shamrock Industries, 84 LA 1203, 1206 (Reynolds, 1985)(employe has partial permanent disability making it impossible for him to reassume his regular job duties despite a recuperation period of nearly 4 years theretofore allowed by the employer); Stowe Woodward Co., 78 LA 1038, 1944 (Thompson, 1982)("There was no evidence received that the condition that caused the absence from work is or can be corrected").

In stark contrast with those situations, Grievant's condition was never diagnosed as a permanent disability.

The Pauls case differs from the instant situation in other ways as well. The County had experienced various and repeated difficulties in getting Pauls to disclose the specific nature of her medical condition and to perform the essential aspects of her position when she was working. The County has neither claimed nor shown similar difficulties with the instant Grievant. On the

contrary, the evidence shows that Grievant informed the County about her medical status each time she visited her physician. The Grievant was not asked for any additional medical specifications and was not uncooperative in any way. The evidence also establishes that when she was working, Grievant's job performance was entirely satisfactory. In addition, Pauls requested and was granted several job structure accommodations only to reject each in turn as insufficient. Grievant has not requested or been granted or rejected any accommodative alterations of her job.

There are certainly limits under the Agreement on how long the County must wait for an employe to recover from a medical problem that renders the employe unable to perform his/her work. However, the Arbitrator is not persuaded that the County was reasonable or justified in concluding that it had reached those limits in this case.

It is true that the County had previously extended Grievant's medical leave on more than one occasion; and that the Grievant's absence was unusually long for a broken foot; and that Dr. Horak's October 30 statement did not specify a date on which Grievant would be able to return to work. The County's perceptions about Grievant's disability were no doubt affected by the fact that there were significant delays and set backs in her recovery. However, these appear to have been due in various respects to the apparently improper initial x-ray examination and diagnosis/prognosis she received at the emergency room. That fact, if known to the County, (and it would have been easily discoverable by the County if it was not known) should have helped the County to understand the lengthy and halting recovery Grievant was experiencing. More significantly, as noted, none of the medical information the County had ever suggested that Grievant's disability would be permanent in nature. Grievant's request for an extension of her medical leave was based on her doctor's undisputed written statement that she would be unable to return for at least another two weeks. The doctor's October 30 statement cannot reasonably be read to portend a lengthy continuation of Grievant's absence, speaking as it did in terms of at least two more weeks. If the County had wanted Dr. Horak's affirmative or more specific opinion on when Grievant would likely be released for work, it could have asked for it. As it was, the County could not reasonably have concluded on the information it had that Grievant was permanently disabled or that she would remain unable to return to work for a lengthy additional period of time.

A showing that Grievant had exhausted her statutory Wisconsin Family/Medical Leave Act protections would not be of major or controlling significance in this contractual dispute. Especially so where, as here, there is no showing that Grievant was put on written notice that exhaustion of that statutory leave would have adverse consequences for her job security.

Finally, the evidence does not show that either the Grievant's absence from May through October or granting her request for at least two more weeks would have involved a hardship for the County. On that subject, Grievant's immediate supervisor Rose Kuczynski testified only that she found it necessary to use part-time employes to fill in for Grievant because no one bid for the temporary vacancy in Grievant's position when it was posted. Kuczynski also testified that she told Grievant that Grievant's absence was causing the County a hardship. However, the record does not show how, if at all, the resort to part-time personnel was creating problems for the County operationally or financially.

For those reasons, then, the County was simply not in the sort of situation experienced by the County in the Pauls case or by the employers in the other arbitration awards cited by the County in its brief.

In sum, the Grievant's reasons for requesting the additional medical leave on October 30 and her absence on and after October 31 were justified in the circumstances. The County's denial of that request was not justified and its imposition of discharge was not for just cause.

In determining the appropriate remedy, the Arbitrator has considered the portion of Art. 1 stating, "If any action taken by the employer is proven not to be justified, the employee shall receive all wages and benefits due him/her for such period of time involved in the matter."

In this case, the Arbitrator concludes that "the period of time involved in the matter" began when Grievant obtained a written statement from her physician releasing her to return to work. Grievant gave undisputed testimony that she was first released to work in writing by Dr. Horak as of November 21, 1989 and that she obtained that release from Dr. Horak on that date. It is appropriate in those circumstances that the County's back pay obligation begin with the following day, November 22.

The Arbitrator has ordered reinstatement and make whole relief accordingly.

DECISION AND AWARD

For the foregoing reasons, and based on the record as a whole, it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above, that:

1. The County's discharge of Colleen Myers was not for just cause.

2. By way of remedy, the County shall immediately offer to reinstate Colleen Myers to her former position or to an equivalent position if her former position no longer exists, without loss of seniority or other rights and privileges to which she would have been entitled had she returned to work on November 22, 1989 and continued to work thereafter.

3. In addition the County shall immediately make Colleen Myers whole (without interest) for losses of wages and benefits she suffered from and after November 22, 1989 on account of her improper discharge by paying her an amount of money equal to the value of the wages and benefits she would have enjoyed since that date had she not been discharged less Unemployment Compensation and interim earnings, if any.

4. The discharge shall be removed from Grievant's record, with the time from October 31 through November 21, 1989

identified as additional medical leave without pay.

Dated at Shorewood, Wisconsin this 1st day of March, 1990.

By _____
Marshall L. Gratz, Arbitrator

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