BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between FOND DU LAC HEALTH CARE CENTER EMPLOYEES LOCAL 1366 A, AFSCME, AFL-CIO, WISCONSIN COUNCIL 40 and FOND DU LAC COUNTY	Case 110 No. 42981 MA-5863

Appearances:

Mr. James L. Koch, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, N7242 Winnebago Drive, Fond du Lac, Wisconsin 54935, appearing for the Union.

Mr. Richard Celichowski, Director of Administration, Fond du Lac County, City-Government Center, 160 South Macy Street, Fond du Lac, Wisconsin 54935, appearing for the County.

ARBITRATION AWARD

The above-captioned parties, herein the Union and the County, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission appointed Jane B Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Fond du Lac, Wisconsin, on February 8, 1990. The hearing was not transcribed. The parties submitted briefs. The County submitted a reply brief and on April 6, 1990, the Union notified the Arbitrator that it declined to submit a reply brief.

ISSUE

At the hearing, the parties agreed to the following statement of the issue:

> Did the Employer have just cause to suspend Grievant Shirley Liegl for one day without pay on May 2, 1989 for her alleged infraction of the tardiness policy, and if not, what is the appropriate remedy?

The Union also proposed a second issue which this arbitrator does not consider the ultimate issue, but will address in the Discussion section. 1/

BACKGROUND

Among its other governmental functions, the County operates a Health Care Center. Grievant Shirley Liegl has been employed by the County as a Licensed Practical Nurse for fourteen years. She currently works a 7:00 a.m. to 3:30 p.m. shift. On April 15, 1989, when she arrived to work, she did not have the key she needed to enter the locked room where the time clock is situated. She then went to find her supervisor, Nancy White, who responded by saying, "That's no problem. We'll just fill out a slip." The form in question was entitled "Report of Overtime." Grievant changed the line: "Date of overtime" to "Date worked," changed "Hours of Overtime" to "Hours worked" and changed "Reason for overtime" to "Reason." Grievant and White signed the slip. On May 2, 1989, Grievant received notice that she was receiving a one-day suspension for tardiness. The disciplinary notice also cited tardiness on February 28 and March 31, 1989. The discipline was grieved, which grievance remained unresolved and is the subject of this arbitration award.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE V. MANAGEMENT RIGHTS

5.01 The Union recognizes the prerogative of Employer to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers or authority which Employer has not officially abridged, delegated or modified by this Agreement are retained by Employer. The Union recognizes the exclusive right of the Employer to establish reasonable work rules.

ARTICLE VI. DISCIPLINE, DISCHARGE AND SUSPENSION

6.01 No regular employee shall be disciplined or discharged except for just cause.

. . .

ARTICLE VII. GRIEVANCE PROCEDURE

1/ The second issue proposed by the Union was: "Is the no fault tardy policy a fair and reasonable work rule?"

7.01 GRIEVANCE: Any matter involving the interpretation, application or enforcement of the terms of this agreement, or a claim by an employee, employees or Union, that he has been discriminated against or treated unfairly or arbitrarily by the Employer by any action taken in the exercise of its rights or powers, may become a grievance. Grievances must be presented in Step 1 within ten (10) days of (1) the occurrence of the event causing the grievance; or (2) within ten (10) days of the time an employee reasonably should have known of the events causing the grievance, or else the same shall be barred as a grievance.

. . .

RELEVANT DOCUMENT

MEMO

TO: Health Care Center Staff

FROM: Donn Stout, Administrator

RE: Tardiness Policy

DATE: December 28, 1987

It is very important for our patients and for our fellow workers that all staff report for work on time. Most of you have been very good about this, and it is appreciated.

But there have been some problems. The Employee Personnel Manual states that excessive tardiness will result in discipline. A guideline has been developed so that you will know what is considered excessive. This is posted next to the time clock.

As you already know, you are expected to punch in before the start of your shift. There are two situations where you will be considered tardy.

First, you will be considered tardy if you punch in one or more minutes after your scheduled start time. That is, if you are scheduled to start at 7:00 A.M., 7:00 is okay but 7:01 will be considered late. Likewise, if you are scheduled to start at 3:00

P.M., 3:01 will be considered late.

Second, you will be considered tardy if you fail to punch in at the beginning of your shift. If you are at an inservice or have come in early to fill in and cannot punch in, the "Report of overtime" sheet will be used to show the punch in time and it would not be considered a tardiness.

To allow for the unexpected such as oversleeping, trains, babysitter problems or car problems, the policy allows for up to two tardinesses in a six-month period of time without penalty. As such, calling in to explain why you will be late will not excuse the tardiness.

Three tardinesses within a six-month period of time will be considered excessive and will result in disciplinary action. At any time that you are tardy, the previous six months will be reviewed for other tardinesses. If this is the first or second time you were tardy within the six-months period of time, no action would be taken. If it is the third time, disciplinary action would be taken.

If no action has been taken on a tardiness and if six months has passed, the tardiness will be dropped from your file.

If disciplinary action is taken, you will not be disciplined again until you have been tardy three times in a new six-month period.

As an example, if you were late on May 5, the six-month period of time would go back to November 5. If you had been tardy twice before November 5, they would not count. If you had been tardy one time between November 5 and May 5, you would not be disciplined, but if you were tardy twice after November 5 in addition to May 5, you would be disciplined for excessive tardiness.

If you have any questions, please feel free to ask your supervisor or myself.

POSITIONS OF THE PARTIES

The Union

The Union contends the County cannot justify its discipline of Grievant by relying on the

No Fault Tardiness Policy because that policy is not a reasonable work rule. The policy's deficiency, according to the Union, is that it does not distinguish between excusable and inexcusable reasons for tardiness. Additionally, the Union asserts the incidents occurring more than a year before April 15, 1990 are irrelevant. As to the events of April 15, 1990, the Union disputes that Grievant was indeed tardy since the clocks on the work floor were not synchronized with the punch-in clock. Finally, the Union applies the traditional seven tests of just cause and concludes that the County did not meet those standards.

The County

The County asserts the Union is barred from challenging the reasonableness of the work rule at this time because it did not object to it when it was issued on January 1, 1988. The County insists the arbitrator should consider Grievant's past tardiness record, especially in this case where the earlier incidents are only one to three years old. Turning to the facts, the County argues that even allowing for the alleged discrepancy in the clocks, Grievant could not have arrived at work on time on April 15. It concludes by stating the one-day suspension was appropriate in light of Grievant's past record and the warning she had been given.

ADDITIONAL FACTS AND DISCUSSION

Consideration of the facts in this case are intertwined with consideration of the reasonableness of the County's Tardiness Policy. The County argues that the Policy itself is not now arbitrable because it was issued on January 1, 1988, and this grievance was filed a considerable time afterwards. The County cites an arbitration award for the proposition that a Union may challenge the reasonableness of a work rule prior to any employe's being disciplined under the rule. That award, however, does not also stand for the obverse proposition, and the right to challenge reasonableness at the time a policy is issued does not necessarily prevent the Union from raising the issue at the time when the policy results in discipline. It is at the time of imposition of discipline that the actual application can be seen and a policy's reasonableness can be most accurately assessed. 2/ Moreover, the collective bargaining agreement provides that grievances must be presented within ten days of the occurrence of the event causing the grievance. Here, the event being challenged is the imposition of discipline, and since the County relies upon its Tardiness Policy to justify the discipline, it is appropriate to review the reasonableness of the Policy as it was applied.

The Union's only complaint with the Policy is that it is unreasonable because it does not

---

2/ Although the County states in its brief the hearing was two years after the issuance of the Policy, the grievance was, in fact, filed May 8, 1989, slightly less than a year-and-a-half after the issuance of the Policy. The Arbitrator notes these time periods for the record, but they are not significant in reaching the conclusions found in this award.

allow for excuses for tardiness for reasons it considers legitimate, such as physical injuries and car accidents. At the same time, the Union does not contend that either the tardiness triggering the discipline in this case, or any of the previous late arrivals should have been excused for such reasons. Consequently, since the undersigned is loathe to rule on hypothetical facts not present in a case at hand when the parties have not requested her to do so, she declines to rule whether in another, hypothetical fact situation, it would be reasonable to discipline an employe for tardiness relating to events outside the control of the employe such as physical injuries and car accidents. It is sufficient to conclude the Policy was reasonable as applied in this instance.

Turning to the facts of the instant grievance, it must be determined whether Grievant was in fact tardy on April 15, 1989. There is no dispute Grievant did not punch in. Under the County's tardiness policy, failure to punch the time clock is considered a tardy arrival unless the employe is attending an inservice program or unless the employe arrives early to fill in for another employe. Since Grievant did not fall within either exception, the Report of Overtime form signed by Supervisor White indicated for payroll purposes that Grievant worked that shift, but that form did not excuse the Grievant from the rule regarding failure to punch in. Presumably, the rule was established to preclude the kind of dispute present in this case: because an employe fails to punch in, the employer lacks any documentation of the time of the employe's arrival. If such a rule did not exist, an employe arriving late could fail to punch in and take the chance that a supervisor or arbitrator could be persuaded, based on various estimations, that he or she arrived on time. This is precisely the kind of subjective application of discipline that can be both unfair to employes and time-consuming for management. This is precisely the kind of problem which time clocks are designed to eliminate. The undersigned finds reasonable the aspect of the policy that makes a failure to punch in the same as a tardy arrival except in the two instances noted above (in service training and fill-in shifts). Applying this rule to the facts of this case produces the conclusion that Grievant was late on the day in question.

Having found that Grievant was tardy on April 15, 1989, it remains to be determined whether the one-day suspension was an appropriate penalty. The County based the suspension on the principle of progressive discipline, pointing to earlier, lesser disciplines, whereas the Union objects to such use of earlier incidents, calling them stale evidence. In general, earlier misconduct of a similar nature and the resulting discipline is relevant to show an employer's efforts to induce the employe to change and to warn the employe that future problems would result in more severe penalties. Such evidence is relevant unless the incidents were so remote in time as to indicate the employe had experienced a period of rehabilitation when no misconduct occurred and therefore deserved to have the slate wiped clean.

In this case, however, the earlier disciplinary actions for tardiness were recent enough to warrant consideration. The prior written warning, which stated on its face that a suspension might result from future tardiness 3/, occurred on December 29, 1988, only two months before February

---

3/ The Grievant testified she did not recall noticing the sentence at the end of her disciplinary

28, 1989, the first of the three late arrivals that resulted in the April 15, 1989 suspension. The verbal warning that preceded the December 29, 1988 written warning was only

---

notice that read: "Any further incidents of this nature may result in suspension." But there is no evidence upon which to find the sentence was not part of the notice given the Grievant, and the undersigned concludes that the Grievant was properly warned about the possibility of suspension.

a year and a half earlier, July 6, 1987. (Although other disciplinary actions were admitted to the record, the undersigned considered only those mentioned here in making this award.) It should also be noted that each of these disciplinary actions were the result of three separate occasions of tardiness, and none were grieved at the time of imposition and none is being challenged at this time for any reason other than their dates. Since the prior two disciplinary actions, both for tardiness, constituted an appropriate basis for an increasingly severe discipline, the County was justified in imposing a one-day suspension for the series of late arrivals culminating on April 15, 1989.

In the light of the record and above discussion, the arbitrator issues the following

1. The Employer had just cause to suspend Grievant Shirley Liegl for one day without pay on May 2, 1989 for her infraction of the tardiness policy.

2. The grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 22nd day of June, 1990.

By Jane B. Buffet /s/
Jane B. Buffett, Arbitrator

gic
G4691G.21