BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150	
and	Case 12 No. 43743 A-4609
UNICARE HEALTH FACILITIES d/b/a JACKSON CENTER	

Appearances:
Mr. Thadd Hryniewiecki, Union Representative, SEIU Local 150, appearing on beh
Mr. William Isaacson, Labor Attorney, UniCare Health Facilities, appearing on behalf of the Employer.

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and the Employer respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on May 24, 1990, in Milwaukee, Wisconsin. The hearing was not transcribed and the parties did not file briefs. Based on the entire record, I issue the following award.

ISSUE:

The parties stipulated to the following issue:

Did the Employer have just cause for the discharge of Theresa Morgan?

PERTINENT CONTRACT PROVISION:

The parties' 1987-89 collective bargaining agreement contained the following pertinent provision:

ARTICLE XI - Discharge

Section 1. The Employer may discharge or suspend an employee for just cause, but in respect to discharge, shall give warning of the complaint against such employee to the employee, in writing, and a copy of the same to the Union, except that no warning notice need be given to an employee if the cause of such discharge is dishonesty, drinking, four or more garnishments, or recklessness that could result in an accident to a patient, abuse of a patient, verbal or physical, sleeping on the job, leaving patients unattended, disclosing privileged information or if an employee does not report unavailability for work at least one hour before starting time. However, no action shall be taken if the employee can show to the satisfaction of the Employer that his/her availability prevented him/her from doing so. The Union will be notified as soon as possible after a member is discharged.

FACTS:

The Employer operates a nursing home in Milwaukee, Wisconsin. The grievant, Theresa Morgan, was employed by the Employer for about two years before she was terminated on September 6, 1989. 1/ At the time of her discharge Morgan was working as a resident living assistant. She was terminated for excessive absenteeism.

In the nine month period from January through September, 1989, Morgan was absent from work 42 full days. She also left work early four times and was tardy nine times during that same period. Of the 42 full days she was absent, all were for either personal or family illness. 41 of these absences occurred between January and July.

Bernadette Pier, Morgan's supervisor, counseled Morgan in February about her poor attendance record and what could be done to improve it. Morgan

1/ All dates hereinafter refer to 1989.

indicated that many of her absences were due to her husband's medical condition (he was recuperating at home from a serious car accident). Pier advised Morgan to consider going to part-time or on-call status in order to improve her attendance.

On February 24, Morgan received a document recording a counseling session for excessive absenteeism and a first written warning for poor attendance and violation of the Employer's absenteeism policy.

On April 26, Morgan received a second written warning for poor attendance and violation of the Employer's absenteeism policy.

On June 8, Morgan received a third written warning for poor attendance and violation of the Employer's absenteeism policy. This document indicated it was Morgan's final warning for excessive absences. None of these warnings were apparently grieved.

A month after her third warning, Morgan accepted management's offer to go from full-time to part-time status. After going to part-time status effective July 17, Morgan was absent one of the eight days she was scheduled to work. She was discharged on September 6 for excessive absenteeism. Her discharge was grieved and processed to arbitration.

POSITIONS OF THE PARTIES:

The Union concedes that the grievant had numerous absences and was warned on several occasions about her attendance record. It further acknowledges that the Employer can discipline employes for violation of its attendance policy. However, according to the Union, discipline should not have been imposed in this particular instance for two reasons. First, it submits that many of the grievant's absences were due to circumstances beyond her control (namely her husband's medical condition). Second, it notes that after the grievant went from full-time status to part-time status, she missed just one day of work. In its view this improved attendance record shows that the grievant could be relied upon to attend work. Thus, the Union challenges the Employer's presumption that the grievant's attendance was not going to get better. The Union therefore contends the Employer did not have just cause to discharge the grievant. As a remedy, it requests that the grievant be reinstated with a make-whole remedy.

It is the Employer's position that it had just cause to discharge the grievant for her chronic absenteeism. According to the Employer, the grievant was properly discharged for her failure to show up for work on a regular basis. It notes in this regard that she was absent 42 days in the nine month period from January through September, 1989. The Employer submits that it was sympathetic with the grievant's problems at home and tried to accommodate her as best it could, but nevertheless it still has a business to operate. In the Employer's view the grievant's discharge was the result of her extensive absences - conduct about which she had been progressively warned - and for which she must be held accountable. The Employer therefore contends that the grievance should be denied and the discharge upheld.

DISCUSSION:

The employment relationship is a two-way street. As a general rule, the employer is obligated, subject to the varying needs of the business, to provide employment on a continuing basis. In return, the employe assumes one basic obligation, namely that he or she will report for work in a reasonably timely and consistent fashion in order to uphold their end of the bargain. Thus, an employe has a fundamental obligation to show up for work. If the employe is unable or unwilling to do so, the employer is justified in terminating the relationship because of that employe's unwillingness or inability to provide the contracted for services. This is true even when there is no question as to the bona fide nature of the employe's illness or disability; the absenteeism and the impact on the employer are nonetheless severe. 2/

Application of these general principles to the grievant's attendance record for her last nine months of employment satisfies the undersigned that Morgan was not able to fulfill her side of the employment bargain and meet her attendance obligations. During that period she was absent 42 days for personal or family illness, a figure which by conventional standards qualifies as excessive. Juxtaposing these absences with actual work time, Morgan missed one out of every six days from January through July and one out of eight days after she went on part-time status in July. There is no question though that many of these absences were due to her husband's medical condition. While the undersigned empathizes with the difficult situation faced by the grievant in caring for her husband, the fact remains that even if these absences were not all her fault, neither were they the Employer's fault.

The Union notes that the grievant's attendance record improved after she went from full-time to part-time status in July, specifically that she only missed one of the eight days she was scheduled to work. In its view this showed that her attendance was going to get better. Suffice it to say though that the Employer was not so persuaded. It felt that her overall attendance record was indicative of what she would likely do in the future, even on part-time status, and it considered this possibility to be intolerable. The undersigned is hard pressed to disagree with this presumption since past attendance records are commonly viewed as a prologue to the future or, said another way, as a predictor of future attendance. Thus, since the grievant's absences in the past had been excessive, the undersigned believes it was reasonable for the Employer to conclude that the grievant's future attendance record would hold more of the same.

The record indicates that the Employer tried to provide the grievant with both the opportunity and incentives to alter her attendance habits. Supervisor Pier did this by counseling the grievant about her attendance record, advising her what changes were expected and how she could meet those expectations. When these counseling efforts proved unsuccessful, the Employer imposed progressive discipline upon her (specifically three written warnings), none of which were apparently grieved. These three corrective warnings in a five month period put her on notice that her job was in jeopardy unless her attendance record improved. While the grievant took the step of going to part-time status per the Employer's suggestion, it was not until a month after her third and final warning that she did so. As a practical matter though, this change in job status was too little too late because by that time she had already been absent 41 days in six months. Had it wanted to, the Employer could have discharged the grievant at that point in time. However, by not doing so, the Employer did not somehow waive its right to impose discipline in the future; it still retained that right which it exercised several months later. It is therefore held that since an employer is not required, over its objection, to employ someone who cannot fulfill their attendance obligations, and such has been found to be the case here, the Employer was not required to continue to employ the grievant. That being so, it is concluded that the Employer had a reasonable basis, as well as just cause, for discharging the grievant.

2/ Zack and Block, Labor Agreement In Negotiation And Arbitration, BNA Books, 1983, page 160.

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

AWARD

That the Employer did have just cause for the discharge of Theresa Morgan. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 26th day of June, 1990.

By _____
Raleigh Jones, Arbitrator