BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute between	:	
MERITER HOSPITAL, INC.	:	Case 44 No. 47522 A-4934
and	:	
SEIU LOCAL 150, AFL-CIO	:	

Appearances:
Mr. Todd Anderson, Business Agent, for the Union.
Michael J. Westcott, Attorney, for the Employer.

ARBITRATION AWARD

Pursuant to the terms of the parties' 1992-1994 bargaining agreement, the undersigned was designated by the Wisconsin Employment Relations Commission as arbitrator to resolve two grievances. Hearing was held in Madison, Wisconsin on October 6, 1992. No transcript of the hearing was taken. The Union made oral argument at the conclusion of the hearing and the Employer filed written argument on October 19, 1992.

ISSUES:

The parties stipulated that one of the issues to be resolved was the following:

> Whether the Hospital may only consider written warnings that occur after March 16, 1992 when applying the last sentence of Article XXII, Section 1?

The parties disagreed as to how the second issue should be stated. They agreed that the Arbitrator should frame the issue after considering their respective positions which were as follows:

> Union
>
> Whether the Hospital rightfully terminated the grievant based on Article XXII, Section 1 of the agreement?
>
> Employer
>
> Whether the Hospital had just cause to terminate the grievant and, if not, what is the appropriate remedy?

Having considered the parties' position, I conclude that the second issue is as follows:

Did the Employer violate the 1992-1994 contract when it discharged the grievant and if so, what is the appropriate remedy?

BACKGROUND

On April 23, 1992, the Union filed a grievance which stated:

> Contract Interpretation - The hospital states that it can terminate an employee under this Article by using a combination of three warnings even if some of those warnings were previous to the date this contract went into effect (3-17-92).
>
> The union states that the hospital can terminate an employee using this Article only if the three warnings came after the date this contract went into effect (3-17-92).
>
> Proposed Solution
>
> The hospital may only terminate an employee using this Article if the sum of the three diciplines (sic) were given and counted after the date this contract went into effect (3-17-92).

On May 4, 1992, the Union filed a grievance which stated:

> Dept. Head is using this Article to terminate an employee on 4-29-92 (Jody Lindeman). This Article is being grieved by the union. The union states that the 3 warnings must be given after the date of the present contract, March 17th 1992, in order to terminate an employee. Grievance date is 4-23-92. Any termination is subject to the outcome of the Grievance/Arbitration.
>
> Proposed Solution
>
> To reinstate Jody Lindeman to her former position, F.T.E. status and pay class 53 with back pay and earned time and all benefits she would have accrued from the date of her termination.

On May 15, 1992, the Employer sent the Union the following memo:

> At the most recent negotiations, we agreed upon a change in Article XXII which states: "Three written warnings relating to the same conduct in any twelve (12) month period will result in termination." The Union has taken

the position that the three written warnings must occur after the contract was effective (3-16-92).

Since the language does not set an effective date for the three written warnings to begin, we believe that as long as the third written warning occurred after the beginning of the contract (3-16-92) that an employee may be terminated under this language. We have recognized that all employees who were at a two written warning level or above needed to be notified of the potential of termination under this new language and we have instructed all managers to do so. In fact the one employee who was terminated under this language received her third warning just as the contract was being ratified, was warned about the new language, and given a fourth written warning on her attendance before termination occurred.

Since there are a number of other employees who are at the second or above written warning stage for the same conduct, we would like to skip the mediation step and arrange for an arbitration on this matter as quickly as possible. Normally we would not suggest going directly to arbitration, but since we both agree that we merely have a difference of opinion related to the implementation of this language, a speedy arbitration is in everyone's best interest.

DISCUSSION

The disputed contract language first appeared in the 1992-1994 contract and provides:

> Three written warnings relating to the same conduct in any twelve (12) month period will result in termination.

The Union does not contest that the grievant had received "three written warnings relating to the same conduct" during the year preceding her discharge. The Union does contend that the discharge is improper because the grievant had not received three written warnings during the term of the 1992-1994 bargaining agreement in which the disputed language first appeared. In support of its argument, the Union cites the duration language of the 1992-1994 bargaining agreement and asserts that employes' due process rights are violated if they receive the consequences of contract language which was not in effect when they received all three warnings. The duration language states in pertinent part:

> This Agreement shall become effective on March 16, 1992, with the exception that future wage adjustments agreed to will become effective March 15, 1993.

It is conceded by both sides that there was no discussion at the bargaining table about the question of how the new language would apply to

existing written warnings. Presumably this is because each side assumed the other shared its view as to the answer. Although both parties' answer to the disputed question represents a reasonable interpretation of the 1992-1994 agreement, I find the Employer's answer to be more persuasive.

I reach this conclusion because of the use of the word "any" in the disputed language. As the Employer argues, giving the word "any" its commonly accepted meaning, the phrase "any twelve (12) month period" conveys an intent to have the disputed language cover whatever twelve month period precedes the conduct for which the employe is to be terminated.

The Union argues that the duration clause would allow me to interpret the language to apply only to warnings or conduct which occur after March 16, 1992. However, I find the use of the word "any", which is part of the specific language in dispute, to be a more reliable basis for determining the meaning of the language than the general duration clause.

As to the Union's due process concerns, I note that prior to the discharge, the grievant had received an April 1992 final warning with suspension which specifically stated that discharge would be the consequence if the next written warning was for the same conduct and was the third warning within a twelve month period. I further note the Employer's effort to communicate to all employes its view of how the new language would be implemented. Through these actions, the Employer met whatever due process obligations it had.

Given the foregoing, I conclude that the Employer need not only consider written warnings which occur after March 16, 1992 when applying Article XXII, Section 1, and that the Employer did not violate the contract when it discharged the grievant. Thus, the two grievances are denied.

Dated at Madison, Wisconsin this 8th day of December, 1992.

By Peter G. Davis /s/
Peter G. Davis, Arbitrator

pb
B0065B.05