BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 150, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC

and

HARTFORD CARE CENTER

Case 1
No. 47408
MA-4924

Appearances:

Mr. Ted L. Mastos, Union Representative, Local 150, Service Employees Intern

Mr. Richard J. Sternke, Administrator, Hartford Care Center, 1202 East Summer

ARBITRATION AWARD

Local 150, Service Employees International Union, AFL-CIO, CLC, hereafter the Union, and Hartford Care Center, hereafter the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a staff member, a single, impartial arbitrator, to resolve the instant grievance. On June 4, 1992, the Commission designated Coleen A. Burns, a member of its staff, as impartial arbitrator to resolve the instant dispute. Hearing was held on October 5, 1992 in Milwaukee, Wisconsin. The hearing was not transcribed and the record was closed on November 13, 1992, upon receipt of written argument.

ISSUE

The Union frames the issue as follows:

> Did the Employer have just cause to terminate the Grievant?

The Employer raises the following issue:

> Was the grievance processed through the grievance procedure in a timely manner?

RELEVANT CONTRACT LANGUAGE

ARTICLE 23 - DISCIPLINE AND DISCHARGE

23.1 The Employer has the right to discipline or discharge for just cause.

23.2 The Employer shall provide written notification of disciplinary warnings, suspensions, or discharges to the employee as soon as possible after the discipline. The employee shall sign the copy of the disciplinary form.

23.3 Grounds for immediate discharge shall include, but not be limited to, the following:

a. Being under the influence of, or in possession of, intoxicants or drugs while on company time or premises.

b. Resident abuse, neglect or mistreatment.

c. Falsification of application form, company records, or files.

d. Theft, dishonesty, or insubordination.

e. Sleeping on the job.

23.4 The Employer shall send a copy of all suspensions and discharges to the Union.

23.5 After eighteen (18) months of an employee not receiving any disciplinary action, all disciplinary notices shall be removed from the employee's file, with the exception of arbitration awards or incidents involving resident abuse, neglect, or mistreatment, which shall never be removed.

ARTICLE 24 - GRIEVANCE PROCEDURE

24.1 A grievance within the meaning of this Agreement is a claim by an employee that the Employer has violated an express provision of this Agreement. To be considered, any grievance must be presented to the Employer within fourteen (14) calendar days after the employee knew or should have known of the alleged violation.

24.2 Any grievance shall be considered settled at the completion of any step in the procedure if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next. The time limits in this

Article are intended to be mandatory. Any failure by an employee or the Union to abide by the time limits specified shall result in the grievance being considered settled. The failure of the Employer to answer a grievance in the time specified shall authorize the grieving party to proceed to the next step.

24.3 All grievances shall be handled and adjusted in the following manner:

a. STEP 1: The grieving employee and/or his/her steward, shall present the grievance orally to the employee's immediate supervisor who shall answer the grievance in writing within five (5) calendar days.

b. STEP 2: If the grievance is not settled in Step 1, the grievance may, within five (5) calendar days after the answer in Step 1, be presented to Step 2. The grievance shall be reduced to writing, signed by the grievant and/or his/her Union delegate, and presented to the grievant's Department Head or designee, who shall give an answer in writing within five (5) calendar days.

c. STEP 3: If the grievance is not settled in Step 2, the grievance may, within five (5) calendar days after the answer in Step 2, be presented by the grievant, Union delegate and/or staff representative in this step to the Employer's Administrator or his designee and he or his designee shall render a decision in writing within five (5) calendar days after presentation of the grievance.

24.4 Only one subject matter shall be covered in any grievance. A grievance shall contain a clear and concise statement of the grievance indicating the issue involved, the relief sought and the date of the incident/violation.

24.5 A grievance which has been processed through, but not resolved by, the grievance procedure may be appealed by the Union to arbitration by written notice. Such notice must be given within ten (10) calendar days after receipt of the answer at the third step of the grievance procedure.

24.6 Within ten (10) calendar days of the

receipt of such notice, the Union and the Employer, or their representatives, shall request the Wisconsin Employment Relations Commission to appoint an impartial arbitrator by and from its staff.

24.7 The jurisdiction and authority of the arbitrator shall be confined to the interpretation of the provisions of this Agreement. The arbitrator shall not have the power to add to, ignore or modify any provisions of this Agreement. The award of the arbitrator shall be final and binding upon the parties to this Agreement.

24.8 The cost of arbitration shall be shared equally by the Union and the Employer. It is further agreed that if one (1) of the parties desires a copy of the transcript, the requesting party shall bear full cost.

24.9 Only one (1) grievance shall be submitted to an arbitrator in any one arbitration proceeding, provided, however, that the parties may, by mutual consent, submit more than one related grievance to the same arbitrator in the same arbitration proceeding.

24.10 Any of the time limits referred to in either the grievance or arbitration sections of this Agreement may be extended by mutual agreement of the Union and the Employer.

24.11 Every employee has an absolute right to meet with his/her steward when an employee believes that he/she has a grievance. Activities as a shop steward shall in no way interfere with any assigned duties of an employee.

24.12 Letters of warning must be appealed through the grievance procedure.

24.13 The Employer shall permit a steward a reasonable amount of time on regular duty status to process grievances and to consult with appropriate supervisors and management officials. He/she must ask for and receive permission from his/her immediate supervisor before leaving his/her job.

BACKGROUND

On April 4, 1991, Rebecca Trotter, hereafter Grievant, was called to the office of Richard Sternke, the Administrator of the Hartford Care Center. The Grievant was not provided with a reason for the call. When the Grievant arrived at Administrator Sternke's office, she was told that there was no Union Steward present in the facility. In accordance with the Employer's normal procedure when a Union Steward is unavailable, the Employer advised the Grievant that she could select another employe to accompany her. The Grievant,

suspecting that the call involved a disciplinary matter, replied that "it was nobody's business but the Union's and herself" and declined the offer to have another employe present at the meeting.

When she entered the Administrator's office, the Grievant was offered, but declined, a chair. The Grievant received two Notices of Disciplinary Action. The first contained an allegation that, on March 22, 1991, the Grievant had violated the policy on resident care. The second contained an allegation that, on April 3, 1992, the Grievant committed resident abuse. The Grievant reviewed the two Notices, threw the two Notices on the Administrator's desk, and left the Administrator's office.

The purpose of the April 4, 1991 meeting was to inform the Grievant that she would be suspended pending the Employer's investigation of the allegations contained in the two Notices of Disciplinary Action. The Grievant, believing that she had been terminated, left the Administrator's office before Administrator Sternke could explain the procedure to the Grievant.

On April 8, 1991, Administrator Sternke received a written grievance, signed by both the Grievant and a Union Steward, alleging that the Grievant had been unfairly accused of hitting a resident and of neglect to a resident. The grievance requested a remedy of reinstatement to the Grievant's Nursing Assistant position and reimbursement for any time lost.

On April 10, 1991, the Administrator sent the following letter to Union Representative Ted Mastos:

> For the purpose of this policy, **Violation of Resident Rights and Resident Abuse Policy**, abuse is defined as follows: Any single or repeated act of force, violence, harassment, deprivation, **neglect**, or mental pressure which reasonably could cause physical pain or injury, or mental anguish and fear. Therefore, I would like to summarize the basis for our decision.
>
> 1. Rebecca Trotter was assigned to Wing 2 where the resident in question is located, therefore it was the responsibility of Ms. Trotter to take care of this resident.
>
> 2. Ms. Trotter has numerous notices of disciplinary actions, ranging from poor resident care, rough treatment of residents, to intimidation of a resident. The disciplinary notices were received from various levels of authority, including a formal complaint reported to the **State of Wisconsin** involving Ms. Trotter in regards to the intimidation of a resident.
>
> 3. In addition, while attempting to communicate to Ms. Trotter in regards to the current disciplinary notices, both the Director of Nursing and myself were subjected to behavior that would be classified as **Insubordination:** Ms. Trotter threw the disciplinary notices onto my desk, stormed out of the office,

slamming the door behind her, before either one of us could communicate to her the procedure for being suspended.

4. During Ms. Trotter's suspension, it was brought to my attention that she stated to another staff member that if she was terminated, she would call families of our residents regarding the above issues for the purpose of them removing their relative from the Hartford Care Center. I have taken her threats as an intentional and substantial disregard of our interest to do business. If Ms. Trotter would have stayed in my office instead of "storming out," I would have informed her of the importance of being discrete regarding her suspension and breaking confidentiality to staff, residents, and residents' families until our investigation was completed.

> Our final decision regarding Ms. Trotter's employment at the Hartford Care Center is that she is terminated effective April 4, 1991.

On December 6, 1991, Union Representative Mastos sent the following letter to Administrator Sternke:

> At our October 17, 1991 meeting concerning the termination of Rebecca Trotter, you inquired about what it is that Ms. Trotter's (sic) wanted out of the situation. I have communicated with Ms. Trotter and can succinctly state her desire. That is, to receive her accrued vacation time and back pay from the point of her termination.
>
> Our investigation leads us to the conclusion that we must proceed to arbitration of this grievance under Article 24.3 of the collective bargaining agreement to comply with Federal and State law.
>
> If an agreement can be reached on the grievant's demands, we shall be able to settle this matter once and for all.
>
> I genuinely appreciate your time, cooperation, and effort in this matter.

Administrator Sternke responded to Union Representative Mastos in a letter dated December 19, 1991, which stated as follows:

> In response to your letter dated December 6, 1991 regarding Ms. Trotter's grievance, you mentioned that we should proceed to arbitration. You also mentioned Ms. Trotter's demands regarding accrued vacation time and back pay from the point of her termination.
>
> First I would like to address the issue of arbitration according to Article 24.3, which at this time is not within the limits set forth in the contract under the

> Grievance procedure. Also Article 24.2 of the contract states "The time limits in this article are intended to be mandatory. Any failure by an employee or union to abide by the time limits specified shall result in the grievance being considered settled." Ms. Trotter was terminated on April 4, 1991 and we still are on her grievance eight months later, which is way beyond the time limits specified in the contract.
>
> The issue regarding Ms. Trotter's demands of accrued vacation time and back pay from the point of her termination. According to the contract, Article 14.13, she does not qualify for vacation pay because she has not been with us for five years and she was terminated for cause. The answer to the issue of back pay from the point of termination is unequivocally no.

DISCUSSION

Arbitrability

The initial question to be determined is whether the grievance is arbitrable. The Employer, contrary to the Union, alleges that the grievance filed on April 8, 1991 was not processed through the grievance procedure in a timely manner and, thus, the undersigned is without jurisdiction to address the merits of the grievance. Specifically, the Employer argues that the grievance was not appealed to arbitration within the time limits set forth in the contractual grievance procedure.

The contractual grievance procedure contemplates that an oral grievance will be filed with the employe's immediate supervisor. In the present case, the record does not establish that either the Union, or the Grievant, filed any oral grievance. It is undisputed, however, that the written grievance was received by the Employer on April 8, 1991. It is also undisputed that the Employer's Administrator, Richard Sternke, responded to the grievance by a letter dated April 10, 1991 and that this response was received by the Union on April 11, 1991.

Administrator Sternke is the Third Step in the contractual grievance procedure. The contract requires the Third Step response to be in writing and rendered "within five (5) calendar days after presentation of the grievance." It is evident that the Employer has complied with the requirements of the Third Step of the contractual grievance procedure.

Article 24.5 requires the Union to file a written notice of an appeal to arbitration within ten (10) calendar days after receipt of the Third Step answer. In the present case, the Union's written notice of an appeal to arbitration was contained in the December 6, 1991 letter from Union Representative Mastos to Administrator Sternke. It must be concluded, therefore, that the Employer did not receive written notice of the Union's appeal to arbitration within the ten calendar day time period set forth in Article 24.5.

Article 24.2 provides, inter alia, that "The time limits in this Article are intended to be mandatory. Any failure by an employee or the Union to abide by the time limits specified shall result in the grievance being considered settled". Application of this language to the instant facts, leads to the conclusion that the grievance has been settled at the Third Step by virtue of the Union's failure to appeal the grievance to arbitration within the ten calendar day time period set forth in Article 24.5. Indeed, Employer

Representative Sternke took such a position when he responded to Union Representative Mastos' letter of December 6, 1991.

Article 24.10, however, provides that "Any of the time limits referred to in either the grievance or arbitration sections of the Agreement may be extended by mutual agreement of the Union and the Employer." The Union, contrary to the Employer, argues that the language of Article 24.2 is not controlling because the Employer agreed to waive the grievance procedure time limits.

Union Representative Mastos recalls that, on April 24, 1991, he had a conversation with Administrator Sternke in which Union Representative Mastos stated that he needed to investigate the grievance. Union Representative Mastos further recalls that Administrator Sternke agreed that Union Representative Mastos "could take some time to investigate". According to Union Representative Mastos, Administrator Sternke did not state how long the Union could have to investigate the grievance.

Union Representative Mastos recalls that the April 24, 1991 meeting was attended by the Union Steward and another member of the Union. Neither the Union Steward, nor the other member of the Union, testified at hearing. Union Representative Mastos' handwritten notes of an April 24, 1991 L/M meeting at the Hartford Care Center stated, inter alia, as follows:

Hartford L/M meeting 4/24/91 @ 2:00 p.m.

General discussion on various topics.
1) The Ee. Network Comm.
2) Staffing
3) Another purse stolen over the week-end (Sternke informed us).
4) Vacations - senior person does get priority as long as request was in on time.
5) 1/2 lunch on nights for people that come in to help and work 8 hrs. Sternke said that should not be a practice. There has been a suggestion that hrs be changed but this is contractual lingo.
6) In-services for dietary on fire, tornado, etc. Sternke said that O.T. can't be used but it can & will be done.
7) Sternke stated many people are not notifying of injuries - He needs incident reports.

Broke @ 2:40 p.m.

"Informed Richard I needed to waive time limits for Trotter to investigate. Agreed."

According to Administrator Sternke, whose testimony on this point was not contradicted, the parties normally followed the time frames set forth in the contractual grievance procedure. Administrator Sternke did not recall having any conversation with Union Representative Mastos in which Administrator Sternke agreed that Union Representative Mastos could have time to investigate the grievance. Administrator Sternke stated that, after he issued the Third Step response to the grievance on April 10, 1991, he did not have any discussions with the Union concerning the grievance until October 17, 1991, when the Union brought up the subject of the grievance.

Administrator Sternke recalls that he was surprised when the Union brought up the grievance on October 17, 1991 because he did not think it was still at issue. Administrator Sternke further recalls that, on October 17, 1991, he informed Union Representative Mastos that he (Sternke) thought that

the matter had been settled and asked "what was going on" and what did the Grievant want. According to Administrator Sternke, he heard nothing further from the Union until he received Union Representative Mastos' letter of December 6, 1991.

It is evident that Union Representative Mastos and Administrator Sternke do not have the same recollection of the April 24, 1991 meeting. For the reasons discussed below, however, it is not necessary to determine whether Administrator Sternke did, or did not, agree to provide the Union with "some time to investigate the grievance".

An agreement to provide the Union with "some time to investigate a grievance" is not an agreement to provide the Union with an unlimited amount of time to process the grievance to arbitration. If, as the Union argues, the Employer did enter into such an agreement, the effect of such an agreement would be to provide the Union with a reasonable amount of time to investigate the grievance.

Given the relatively short time limit for filing the written notice of the appeal to arbitration, i.e., ten (10) calendar days, and the severity of the penalty for failing to comply with the contractual time limit, i.e., forfeiture of the right to appeal to grievance arbitration, the undersigned is satisfied that the parties intended the time limits to be strictly construed. Such a conclusion is supported by the testimony of Administrator Sternke, which establishes that the parties have a practice of complying with the contractual grievance procedure time limits. Thus, assuming arguendo, that Administrator Sternke did agree to provide the Union with "some time to investigate the grievance", such an agreement must be strictly, rather than liberally, construed.

The written notice of the appeal of the grievance to arbitration was issued by the Union on December 6, 1991, some two hundred and thirty-nine (239) days after the Union received the Employer's Third Step response. Thus, the length of time between the receipt of the Employer's Third Step response and the filing of the written notice of appeal of the grievance to arbitration was at least twenty-three (23) times longer than the time period provided for in the contract.

Union Representative Mastos' explanation for the lengthy delay in appealing the grievance to arbitration was due to the following factors: the Union was confused about the basis for the Grievant's discharge; the Union was waiting for the Board on Aging Ombudsman to investigate the Employer's documentation on the abuse; and there was a lack of communication between Union Representative Mastos and the local Union Steward whom Union Representative Mastos was relying upon to investigate the grievance.

The Union does not claim to have contacted the Employer to discuss the grievance at any time between April 24, 1991 and October 17, 1991. While Union Representative Mastos' testimony on this point is not entirely clear, it appears that the delay in processing the grievance to arbitration which occurred between April 24, 1991 and October 17, 1991 was due to the fact that (1) the Union was waiting for the Board on Aging Ombudsman to investigate the Employer's documentation on the abuse and/or (2) the lack of communication between the local Union Steward and Union Representative Mastos.

Neither the testimony of Union Representative Mastos, nor any other record evidence, demonstrates that Administrator Sternke, or any other Employer representative, understood that the Union intended to delay further processing of the grievance until the Board on Aging Ombudsman completed its investigation of the Employer's documentation. Rather, as Union Representative Mastos'

stated, he understood the Employer to have agreed to provide the Union with "some time" to investigate the grievance.

Assuming arguendo, that Administrator Sternke had agreed to provide the Union with "some time" to investigate the grievance, neither the Union's decision to wait for the report of the Board on Aging Ombudsman, nor the "failure in communication" between Union Representative Mastos and the local Union Steward, provided the Union with a reasonable basis to take until October 17, 1991, to investigate the grievance.

Union Representative Mastos' notes of the October 17, 1991 meeting indicate that Administrator Sternke told Union Representative Mastos that the discharge was for insubordination, but that if the Grievant had not been insubordinate, then the Grievant would have been discharged for the abuse charge. Administrator Sternke neither confirmed, nor denied, making the comments during the October 17, 1991 meeting. Administrator Sternke did state, however, that the termination was not for insubordination. According to Administrator Sternke, the reference to insubordination in his letter of April 10, 1991 was intended to explain why the Grievant had not signed the two Notices of Disciplinary Action and to explain why the Employer was prevented from reviewing the suspension procedure with the Grievant.

According to Union Representative Mastos, Administrator Sternke's comments on October 17, 1991 surprised the Union because the Union had understood that the discharge had been for resident abuse. According to Union Representative Mastos, as a result of this "surprise", the Union had to redirect its investigation from resident abuse to insubordination. Apparently, this "surprise", and the ensuing investigation caused by this "surprise", precluded the Union from filing its written notice of appeal to arbitration until December 6, 1991.

On April 4, 1991, the Grievant was presented with two Notices of Disciplinary Action, one which alleged a violation of the Employer's Resident Care Policy and the other which alleged a violation of the Employer's Resident Abuse Policy. Each of the two Notices of Disciplinary Action contained a description of the Grievant's conduct which was considered to be violative of the Employer's policies. The grievance filed on April 5, 1991 states that "I was unfairly accused of hitting a resident and also of neglect to a resident". At the time that the Union filed the grievance, the Union may have been unaware of an insubordination claim. However, Administrator Sternke's letter of April 10, 1991 certainly referenced both insubordination and resident abuse.

It may be argued that Administrator Sternke's letter of April 10, 1991 is not a model of clarity. However, if the Union representatives were confused as to the relative importance of the insubordination and resident abuse claims, they could have asked Administrator Sternke to clarify the matter. It is not evident that any Union representative ever asked for such a clarification.

The undersigned is persuaded, that, as of April 24, 1991, the Union knew, or should have known, that the Employer not only considered the Grievant to have committed resident abuse, but that the Employer also considered the Grievant to have been insubordinate. Neither Union Representative Mastos' testimony, nor his notes, indicate that Administrator Sternke provided any rationale for the discharge of the Grievant at the April 24, 1991 meeting. Nor is there any evidence that, between April 24, 1991 and October 17, 1991, Administrator Sternke, or any other Employer representative, made any statement to Union Representative Mastos, or any other Union Representative, concerning the grievance, or the reasons for the Grievant's discharge.

The undersigned is persuaded that, as of October 17, 1991, the Union did not have a reasonable basis to believe that the Employer's position on the discharge of the Grievant was other than that reflected in the two Notices of Disciplinary Action provided to the Grievant on April 4, 1991 and Administrator Sternke's letter of April 10, 1991. Given the fact that these documents raise both the issue of resident abuse and insubordination, the undersigned is satisfied that the Union had ample opportunity to investigate both charges prior to October 17, 1991. Thus, assuming arguendo, that, on October 17, 1991, Administrator Sternke did advise Union Representative Mastos that the discharge had been based upon insubordination, such a statement did not provide the Union with a reasonable basis to delay filing the written notice of appeal until December 6, 1991. Regardless of whether or not Administrator Sternke, on April 24, 1991, agreed to provide the Union with "some time" to investigate the grievance, it was not reasonable for the Union to wait until December 6, 1991 to file the written notice of appeal of the grievance to arbitration.

In conclusion, the Union's right to process a grievance from the Third Step of the grievance procedure to arbitration is contingent upon the Union's processing the grievance within the time period set forth in the contractual grievance procedure. Under the terms of the contractual grievance procedure, the Union is required to provide written notice of its appeal of the grievance to arbitration within ten (10) calendar days of the Union's receipt of the Employer's Third Step response. In the present case, the Union received the Employer's Third Step response on April 11, 1991 and issued the written notice of its appeal to arbitration on December 6, 1991. While the contract does provide that the grievance and arbitration procedure time limits may be extended by mutual agreement of the Union and the Employer, the record does not establish that the Union and the Employer mutually agreed to extend the Union's time limit for filing the written appeal from the contractual time limit of ten (10) calendar days to nearly two hundred and forty (240) calendar days.

As the Employer argues, the Union did not appeal the grievance to arbitration in a timely manner. The undersigned concludes, therefore, that the grievance is not arbitrable.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The grievance was not appealed to arbitration in a timely manner and, thus, is not arbitrable.

2. The grievance is dismissed in its entirety.

Dated at Madison, Wisconsin this 5th day of February, 1993.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

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