BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 1901, AFSCME, AFL-CIO	Case 503 No. 49571
and	MA-7987
BROWN COUNTY (MENTAL HEALTH CENTER)	

Appearances:

Mr. James E. Miller, Wisconsin Council 40, AFSCME, appearing on behalf of the Union.

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

ARBITRATION AWARD

The Union and County named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear the grievance of Dana Seering. Hearings were held on September 28 and October 26, 1993 and on April 18, 1994, in Green Bay, Wisconsin. The parties completed filing briefs by August 15, 1994.

ISSUE:

The Arbitrator is to decide:

> Did the Employer have just cause to terminate Dana Seering? If not, what is the appropriate remedy?

BACKGROUND:

The Grievant is Dana Seering, who had been employed at the Brown County Mental Health Center as a nursing assistant for 11 years before she was discharged on July 13, 1993.

On November 13, 1992, the Grievant was given an oral warning for tardiness and failure to report or call in on a scheduled day. The disciplinary record includes the following statements by management and the Grievant:

> MANAGEMENT STATEMENT:
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> During the period of January 1, 1992 through October 23, 1992, the employee reported late for duty 45 out of 173 scheduled days. This is a 26 percent tardiness rate. This employee has also been instructed on several occasions that it is necessary to contact the RN Supervisor when she is going to be late, and not the unit. The employee has continued to contact the unit regarding her tardiness and not the RN Supervisor.
> Also, on May 2, 1992, employee was a "no show/no call." May 2nd was a posted day for this staff. On July 10, 1992, employee called in sick late (50 minutes before the start of her shift). There was no sick leave accrual to cover the eight hour absence.
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> These are not acceptable practices and will not be tolerated. Therefore, discipline is hereby issued: An

oral warning. Further incidents will necessitate other progressive discipline up to and including discharge.

EMPLOYEE STATEMENT:

On May 2nd 1992 I over slept. The supervisor did not have my new phone number to call me. When I did wake up I called Dawn to let her know I over slept but I was already replaced.

On January 13, 1993, 1/ the Grievant received another oral warning for failing to attend a mandatory in-service held on January 11th. The Grievant responded that the inservice was held on her day off and she was out of town. The Employer admits that this is not an attendance issue, as were the other disciplinary actions.

On March 10th, the Grievant was given a written warning. She refused to make a statement or sign the warning. Management's statement is the following:

MANAGEMENT STATEMENT:

During the period of November 17, 1992 to February 1, 1993, employee reported late for duty 8 out of 49 scheduled days. This is a 16 percent tardiness rate. Then on February 19, 1993, employee was a "no show/no call." Attempts were made during the morning of February 19, by telephone to contact the employee, but Management was unable to reach her until the afternoon. Employee usually calls in sick less than 45 minutes prior to the scheduled start time. (Late records also show a tardiness on 2/27/93.)

On April 6th, the Grievant was given a three-day suspension. The following is from the disciplinary conference:

MANAGEMENT STATEMENT:

Dana Seering reported for duty for a 0600 shift on Sunday, March 21, 1993 at 0630 hours. Per the charge RN, she called at approximately 0600 hours that she would be late. Dana then submitted a brown card for signature to her RN Coordinator on Wednesday, March 31, for 0600 hours on March 21, 1993. The RN Supervisor on duty had told payroll to check this employee's brown card when it was submitted to ensure that it would accurately reflect her tardiness on March 21, 1993. Payroll then asked Joe Mader, RN Coordinator, who signed it to double check with Dana if she was indeed tardy on that date. She stated she was here on time and did not punch in, therefore, needed to brown card an "in" time. The discrepancy in Dana's story can be discounted by staff RN who remembered clearly that she was late on March 21, 1993.

In addition, Dana had also not reported for duty for an 0600 shift on March 12, 1993. She called the facility

1/ All subsequent dates refer to the year 1993 unless otherwise stated.

> at 0600 hours stating her car broke down on Shawano Avenue and would not be in. She later requested an emergency vacation day to cover her absence on March 12, 1993. She was not granted emergency vacation as she was unable to provide backup information regarding the incident such as a repair bill, towing receipt, parts, etc. Therefore, this day was considered an unexcused absence.
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> . . .
>
> EMPLOYEE STATEMENT:
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> Employee didn't punch in for fear of being disciplined for being tardy. I did call to say I would be late but didn't punch in. I didn't realize that it would be fraudulent for my actions, which appears to be a more serious offense.
>
> Employee did have car problems but had a friend help out. Didn't have a tow truck or garage services for cost purposes. Was not aware it was necessary. It hasn't been necessary for employees of the recent past.

At this point, the Employer demanded that the Grievant seek counseling to develop a plan to correct areas of concern. She was asked to see a health care provider of her choice to help develop a plan of action. On April 8, 1993, the Grievant saw Diane Moga-Roach of the NorthEast Wisconsin Wellness Associates for counseling, and they developed an action plan with the following four points:

> 1. Dana will appropriately reassign personal activities/work responsibilities.
>
> 2. Dana will increase organization skills, i.e., awaken earlier, structure A.M. activities and transportation to work.
>
> 3. Dana will approach the day and work on a positive/responsible base.
> 4. Dana will be responsible for initiating communication between herself and supervisors with the goals of problem solving and the conflict resolution in the event of any further issues.

The Grievant received a five-day suspension on April 16th for tardiness on that date. She was called at home a few minutes after her scheduled starting time, and she arrived 33 minutes after her regular starting time. She did not make a statement or sign the disciplinary notice. She was told again to see a health care provider of her choice and find a plan to prevent her from being tardy again.

At this point, the former Nursing Services Administrator, Lee Ann Sachs, and the Personnel Coordinator at the Mental Health Center, Nancy Tomchek-May, told the Grievant that if she had one more tardy incident, she would be discharged.

The Grievant was scheduled to work at 6:00 a.m. on June 13th, and she called the Nursing Supervisor sometime after 6:00 a.m. to state that she was going to be late, and that she was concerned that she would be dismissed and did not know what to do. The Nursing Supervisor told her to come into work and the issue would be discussed the next day with Sachs. So the Grievant came

in that day, June 13th. The Grievant was off on June 14th, and she and Sachs agreed to meet on June 15th.

On June 15th, the Grievant called in to say that she was unable to come in due to a doctor's appointment. On June 16th, the Grievant called to state that she could not come in due to personal reasons. On June 17th, the Grievant called in before the start of her shift and asked the RN Supervisor, Carol Gilsdorf, if she was replaced. Gilsdorf said she was replaced, and the Grievant told Gilsdorf that she was in the Bellin Psychiatric Center AODA program. The Grievant actually started the program at Bellin on June 16th.

On June 21st, the Grievant called Sachs and told her she had started outpatient treatment at Bellin between 8:00 a.m. and 12:15 p.m. daily, and Sachs told her not to report to work until Sachs received information from the Grievant's doctor regarding her ability to return to work and a statement relating to her June 13th tardiness. Sachs told the Grievant that since she had been gone for more than three working days -- June 15th, 16th, and 17th -- the Grievant would need a statement saying she was able to return to work.

In a letter dated June 16th, Michael Goldstone, M.D. and Medical Director, Adult Addictive Services at Bellin Psychiatric Center, wrote to Sachs the following:

> I evaluated Ms. Seering on 6/16/93 at the request of her psychiatrist, Ed Johnson, M.D. After a complete assessment, I feel she is in acute need of treatment for alcoholism and depression and have asked that she engage in intensive treatment. This treatment format will initially be in the day hospital program here at Bellin Psychiatric Center beginning Monday, 6/21/93.

Sachs testified that she never received that letter. The letter was not signed and it is possible that it was not sent out. It was found to be part of the Grievant's medical records from Bellin.

The Grievant also told Sachs during their conversation on June 21st that Sachs could contact her counselor at Bellin, Paula Depner. Depner was the primary case manager with the Grievant, and another drug and alcoholism counselor at Bellin, Deborah VanZeeland, was also involved with the Grievant's case.

The first contacts between Bellin counselors and the Employer took place on June 24th, when Depner called Sachs. Depner told Sachs that Bellin has a back-to-work interview which would be conducted by VanZeeland, and that such an interview was needed because some of the Grievant's alcoholism was related to job stress.

The Employer agreed to participate in a back-to-work-interview at Bellin, which took place on June 28th. Sachs was on vacation during this week, and Tomchek-May represented the Employer. RN Coordinator Joseph Mader was present, along with Union representative Cathy Christensen, the Grievant, and VanZeeland. All of them signed the following agreement:

> NOTICE OF TERMS FOR RETURN TO WORK
>
> You are hereby given notice, Dana Seering, Nursing Assistant, that you must adhere to the following conditions to continue employment at Brown County Mental Health Center.

> 1. Report to duty on time for all scheduled shifts, or call in at least one hour before work with a justifiable reason why you cannot report to work.
>
> 2. Perform the duties specified in her job description for Nursing Assistant according to facility standards of performance.
>
> 3. Adhere to facility rules, policies, and procedures, which the employee has been made aware of and agrees to abide by as evidenced by her signature on the Receipt of Employee Handbook form.
>
> This employer has serious concerns regarding this employee's past performance problems relating to tardiness, no calls/no shows, and taking time off without accrued benefits. Therefore, any future incidents of failure to abide by Brown County Mental Health Center facility policies and procedures will result in termination from employment with Brown County Mental Health Center.

Also at the June 28th meeting at Bellin, according to Tomchek-May, the Grievant was given until noon on July 1st to decide if she would work AM or PM shifts. VanZeeland recalled that the option was to work days or work part-time every other weekend if the Grievant remained in the day program at Bellin. The Grievant could have traded shifts in order to take either the day or evening course at Bellin. VanZeeland wanted a decision within 24 hours as to whether the Grievant was going to stay in the day-time outpatient program or transfer to the evening outpatient program. The Grievant decided to take the evening course at Bellin, but before she could do so, the Bellin counselors discharged her from the outpatient program.

By June 29th, Depner had decided that the outpatient treatment program was no longer an option for the Grievant. The counselors at Bellin believed that the Grievant had used alcohol while in the outpatient program. Depner told Tomchek-May on June 29th that the Grievant needed to be treated on an inpatient basis. The Grievant would not have been able to work while an inpatient but could remain working while being treated as an outpatient.

Depner was off work for a long Fourth of July weekend. Her notes show that her last contact on the case was June 30th, a Wednesday. She testified that she was off starting July 2nd and not expected back at work until the following Tuesday, July 6th.

On July 2nd, the Grievant told VanZeeland that she would agree to be in the inpatient treatment program. VanZeeland contacted Dr. Johnson for inpatient orders, which he gave. But later that day he called back to say that the Grievant did not want inpatient treatment and he thought the Grievant would benefit from taking Antabuse and going into the evening outpatient treatment program.

VanZeeland then called the Grievant on July 2nd and told her that she would not be admitted for inpatient treatment, and she would need to contact Depner on July 6th. VanZeeland also told the Grievant that her Employer would be contacted and the treatment status explained. Then VanZeeland called Tomchek-May to apprise Tomchek-May of the Grievant's status on July 2nd, and Tomchek-May explained that the Grievant had not called her on July 1st and that Sachs needed to be contacted. VanZeeland's notes also indicate that a staff decision would be made on July 6th as to whether the Grievant stayed in the

program or not.

When Tomchek-May did not hear from the Grievant by noon on July 1st, she called her and left a message on her answering machine. The Grievant did not return the call. Tomchek-May called VanZeeland on July 2nd and was told that the Grievant had been discharged from the Bellin outpatient treatment program and there was no reason why the Grievant could not come back to work. Tomchek-May then sent the Grievant a letter dated July 2nd which states:

> I have been informed by Bellin Hospital that you have been discharged from Outpatient treatment. I also understand that you are not participating in the Inpatient Treatment Program. I also did not receive a telephone call from you as requested by Noon on Thursday, July 1, 1993.
> Therefore, this letter is to notify you that you are expected to return to work on your next scheduled day of Tuesday, July 6, 1993 at 6 AM as a full-time Nursing Assistant on Unit 8. You are reminded that the "Terms for Return to Work" (which was agreed to by yourself, Local 1901, Bellin Psychiatric Center and the Brown County Mental Health Center) are in effect. Failure to comply with any of the conditions will result in immediate termination from employment.
>
> If you have any questions in this matter, feel free to contact Lee Ann Sachs since I will be out of the office the week of July 5-9. Your cooperation in this matter is appreciated.

The above letter was hand delivered to the Grievant, as well as sent by regular and certified mail. Tomchek-May also had a clerk deliver the letter to the Fox Valley Hospital, because she had heard from someone that the Grievant might be there.

The Grievant did not report for work on July 6th, and she called Sachs and told her that she thought everything was on hold and that she did not need to report for work. Actually, Sachs recalled that she phoned the Grievant when the Grievant did not show up for work and left a message on her answering machine, and the Grievant called her back. The Grievant said she was waiting to hear from her therapist, Depner. Sachs called Depner and relayed to Depner that the Grievant thought everything was on hold. Depner told Sachs that whatever the Grievant and Brown County agreed upon did not impinge on their treatment and that she saw no reason why the Grievant could not take responsibility for her job.

Depner testified that when Sachs told her that the Grievant had said that her return to work was put on hold until the Grievant could meet with Depner, Depner felt that the Grievant was playing the Employer against the treatment program and avoiding treatment. After talking with the Grievant and notifying her that she would have to seek treatment elsewhere, Depner informed Sachs of this status.

Depner sent the following letter dated July 7th to Sachs:

> Through this letter I will attempt to give you specifics regarding my involvement with Dana and the very complicated efforts to treat her alcoholism.
>
> I will start by verifying the events of the past few days which seem most pertinent regarding her

> employment. On Friday, July 2, 1993, in my absence, a co-worker, Debbie VanZeeland, spoke with Dana about our inpatient recommendations. Dana first agreed to come into Bellin Psychiatric Center for inpatient treatment despite wanting to. Debbie phoned Dana's physician for admission orders which were given. Shortly after, her doctor phoned Debbie back stating he received a call from Dana who now didn't want to enter inpatient treatment but was willing to start taking Antabuse and enter our evening outpatient program. The doctor felt Dana "was serious at this time and could benefit from our staff watching her take Antabuse daily." Debbie verbalized to the doctor that Dana was "manipulative and has continuously called her own shots." At this time, Debbie agreed the patient's treatment would be put on hold until I could resume the case on Tuesday, July 6th, and make a decision whether Dana would be allowed in treatment or discharged. At no time was it said or implied that her job status was on hold. When Debbie phone Dana back to inform her that she wouldn't be admitted inpatient "due to her manipulation," she became angry blaming staff for "not trusting her and allowing her into evening outpatient treatment." She was told that her employer would be notified of the circumstances. Debbie explained these events to Nancy Tomacheck-May on 9/02/93. If Dana received a certified letter from you to report to work on 7/06/93, there is no reason on our part why she couldn't take responsibility for her job.
>
> . . .

Depner's letter concluded with the statement that on July 6th, she discharged the Grievant from any involvement with Bellin Psychiatric Center. A discharge summary document written by Depner shows a discharge date of June 29, although later in the document, the narrative shows that a staff decision was made to discharge the Grievant from the treatment program on July 6.

Sachs tried to call the Grievant back on July 6th with a message to report on July 7th to the Brown County Mental Health Center. Sachs did not reach the Grievant that second time on the 6th, but apparently did so on the 7th, as she followed up a conversation with a letter to the Grievant dated July 7th which states:

> This is written confirmation of our telephone conversation of July 7, 1993 at approximately 3 PM. The following information was relayed to you:
>
> 1. You were informed <u>not</u> to report to work until further notice.
>
> 2. You will be notified by telephone when you should report to Brown County Mental Health Center for a meeting with myself, Joe Mader, a Union Steward, and any other appropriate management representative.
>
> If you have any questions in this matter, feel free to contact me.

The Grievant testified that she received the letter dated July 2nd, the letter stating she should report to work on July 6th, but that she did not read it clearly or thoroughly. She said she was not clear on coming back to work on July 6th because VanZeeland told her that everything was on hold, that Bellin was considering putting her in the inpatient program, and that she was to hear from Depner after the weekend regarding her status. The Grievant also thought that the Bellin counselors were in touch with Sachs and Tomchek-May.

Between July 2 and July 6, 1993, the Grievant did not contact the Employer, because she thought VanZeeland was to contact the Employer. It was a confusing time for her, because she had just decided to go back to her regular full-time job posting on AM's and take the night course of treatment from Bellin, when she was dismissed from the Bellin outpatient program reportedly because someone told the Bellin counselors that she had been drinking the previous weekend. Then the Grievant was told that she would have to go into the inpatient treatment program, and initially, she resisted that idea. The Grievant talked with VanZeeland and told her she would go into inpatient treatment, but then she spoke with her psychiatrist, who apparently did not give authorization for the inpatient treatment at that time. According to the Grievant, VanZeeland said to the Grievant that everything was on hold until Depner came back after the Fourth of July weekend. When the Grievant asked VanZeeland about work, VanZeeland said she would let the Employer know her status.

The Grievant testified that Depner told her -- at the time she was dismissed from the outpatient program at Bellin -- that either the Grievant went into inpatient treatment or she would lose her job. Depner's notes from July 7th indicate that Depner assumed that the Grievant would be discharged from her job, as well as discharged from the treatment program.

Judy Pakanich, an LPN at the Brown County Mental Health Center, is a friend of the Grievant. Pakanich testified that the Grievant had a misunderstanding about the letter demanding that she return to work on July 6th, and that the Grievant believed that everything was on hold and waiting for a decision as to whether the Grievant would become an inpatient or not. Pakanich's recollection is somewhat vague, but she testified that the nursing scheduler, Charlene Bode, made a comment on July 6th that Grievant was supposed to be at work and did not show up. That is when Pakanich said that there must be a misunderstanding, because the Grievant was trying to get into inpatient treatment. Pakanich called the Grievant after that conversation with Bode to tell her that Pakanich had heard that the Grievant was supposed to be at work. The Grievant was shocked and called Sachs that morning, July 6th, to explain.

On July 9th, Sachs sent another letter to the Grievant:

> This letter is being sent to you to request that you contact me immediately to set up a meeting with myself, Joe Mader, a Union Steward, and any other appropriate management representative. This meeting will take place at the Brown County Mental Health Center. I have tried to reach you by leaving messages on your home answering

> machine July 8, 1993 and July 9, 1993, but have not heard from you. I expect to hear from you on Monday, July 12, 1993 to setup a time to meet as soon as possible.

Sachs received no reply to those last two letters, and on July 12th, the Employer decided to terminate the Grievant's employment. The Grievant testified that she received the letters dated July 7 and 9, since she did not enter the inpatient treatment at the Fox Valley Hospital until July 11th. Since the last letter indicated that she was to contact the Employer on July 12th, she called the Employer from the Fox Valley Hospital on July 11th to let the Employer know she was in the inpatient program there.

The termination letter is dated July 13th and is signed by Sachs and the Executive Director, Robert Cole. The letter states:

> This letter informs you that you are being discharged from employment because you have violated the terms of the agreement presented to you in the letter you received on July 2, 1993 (see Appendix A 2/).
>
> You contacted Lee Ann Sachs at 1015 hours on July 6, 1993 stating you had received the letter dated July 2, 1993 on that same date; however, you did not "read it through carefully." You went on to say you thought everything was "on hold" until July 6, 1993 and were waiting to hear further instructions from Paula Depner. Lee Ann Sachs then contacted Ms. Depner on July 6, 1993. Ms. Depner stated that if you received a certified letter from Brown County Mental Health Center to report to work on July 6, 1993, there was no reason on the part of Bellin Psychiatric Center why you could not take responsibility for your job. This corresponds with the terms and conditions set forth in our agreement which is attached as Appendix B 3/.
>
> Lee Ann Sachs then re-contacted you on July 6, 1993 at approximately 1500 hours, stating you were <u>not</u> to report to work until further notice, and that you would be notified by telephone when you should report to Brown County Mental Health Center for a meeting with Lee Ann Sachs, Joe Mader, a union steward, and any other appropriate management representative. This was hand delivered to your apartment as well as sent by certified

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2/ Appendix A is the July 2nd letter from Tomchek-May to the Grievant notifying her to return to work on July 6th, which was reproduced earlier in the background facts.

3/ Appendix B is the "Notice of Terms for Return to Work" dated June 28th and reproduced earlier in the background section.

mail and also regular mail (see Appendix C 4/). We have been unable to reach you to set up this meeting even though we had attempted to contact you by phone at your home on July 8 and July 9, and left messages on your answering machine on both dates.

In the latter dated July 9, 1993 (see Appendix D 5/), you were instructed to contact Lee Ann Sachs to set up a meeting as soon as you received the letter. It is our understanding that you did notify the RN Supervisor at Brown County Mental Health Center at approximately 1945 hours on July 11, 1993 stating you were admitted on an inpatient basis at Fox Valley Hospital. I have been able to verify with your permission that you were an inpatient there since Saturday, July 10, 1993. However, this does not absolve you from your previous commitment to Brown County Mental Health Center.

In summary, you have not upheld the conditions for notice of "Terms for Return to Work" agreement (see Appendix B), and are being discharged from employment effective July 13, 1993. It should be pointed out that it is not a practice of Brown County to terminate employment through a letter, however, you have been continually unavailable and delinquent and/or have failed to respond in a timely manner regarding the status of this situation. The Report of Conference with Employee has been enclosed with this letter since we were not able to meet with you in person (see Appendix E. 6/

4/ Appendix C is the July 7th letter from Sachs to the Grievant reproduced earlier in the background section.

5/ Appendix D is a July 9th letter from Sachs to the Grievant, which is not reproduced earlier, and which basically states that the Grievant is to contact Sachs immediately to set up a meeting, and that Sachs expects to hear from her by July 12th to set up that meeting.

6/ Appendix E is titled "Brown County Mental Health Center Report of

Conference with Employee" and is dated 7/13/93. It states the reason for the conference as willful and wanton disregard of the employer's interest by misconduct of:

1. Failure to report to work on July 6, 1993.
2. Tardiness on June 13, 1993 causing burden on Management and staff due to increased work load staff were required to assume.
3. Failure to notify the facility of absence at least one hour prior to shift.

The management statement, which need not be reproduced in its entirety here, is a statement of the background and events leading to the discharge.

> You must turn in your keys and badge prior to receiving your last pay check. If you have any questions, you may contact Nancy Tomchek-May regarding the remaining payment of any benefits you may have.

The Employer sent the discharge letter to the Fox Valley Hospital where the Grievant sought treatment on an inpatient basis on July 11th. She was there for about two weeks.

The Grievant did not grieve the prior disciplinary actions of the oral and written warnings and the suspensions, but did file a grievance over her discharge.

The Employer's handbook states that employees are to call in an hour ahead of their scheduled starting time when calling in sick or if they are going to be absent, and three occurrences of absence within a six-month period will ordinarily subject an employee to disciplinary action. The handbook also notes that if an illness or injury is three or more days long, employees will be required to submit a doctor's certificate.

The Union and Employer have an agreement that employees must call within 15 minutes after the start of their shifts to inform a supervisor that they intend to report late for work. If they do not call or report within the 15 minute period, they may be sent home without pay for that shift.

The Employer's records show a "no call" from an employee even when an employee punches in exactly at the start of his or her shift, because according to the Employer, all staff are to be at their positions ready to work a couple of minutes prior to the start of their shifts. The staff punches in on the ground floor and it may take time to get to their units. For example, the Employer marked the Grievant as a "no call" on February 4, 1992, even though she punched in at 6:00 a.m., the starting time of her shift. The same thing happened on April 19 and 27, May 1, July 12 and 25 and 28, September 6, October 2 and 21, November 6 and 10 and 14, December 4 and 21 and 22 and 30, all in 1992. In 1993, the same thing is reflected on the dates of January 19 and 20 and 26, March 11 and 21, and June 8. According to the Grievant, no one told her that she was late when she punched in at 6:00 a.m., and she was not aware of any written or verbal policy that one is late if one does not punch in early. The Grievant was marked for a "no call" on many other occasions when she punched in two or three minutes late.

The Employer counted 75 incidents of tardiness in 329 shifts between the dates of January 1, 1992 and June 13, 1993. Of those, 23 were times when the Grievant punched in exactly at 6:00 a.m. Another 22 incidents show that the Grievant punched in between 6:02 and 6:05 a.m., or by five minutes of her starting time of the shift. 7/

7/ Actually, that's not quite accurate and gives the benefit of doubt to the Employer. Exhibit 10 shows that "time in" and "time out" is based on units that differ from 60 minutes to the hour, and apparently the time clock reads 100 units to the hour.

The biggest work load occurs between 6:00 and 8:00 a.m., and when one person is tardy, the work load is shifted onto other nursing assistants or the staff gets behind. Patients may not get up on their customary schedules, which may affect them. It may also affect the breakfast schedules.

The Unit Coordinator of Unit 8, where the Grievant worked, is Joseph Mader, who started in that position on January 4, 1993. He got written complaints about the Grievant's attendance from supervisors and other nursing assistants. Mader said he got complaints from Cathleen Tauschek, the night shift nurse who had to make adjustments in giving assignments at 6:00 a.m., as well as from nursing assistants such as Debbie Sipes, Mary Ann Becks, Mary Pennington, Kelly Kellewich, and Carol Kelm.

Kelm disputed that claim and testified that she never complained about the Grievant to Mader. While Kelm was aware of the Grievant's attendance problems, she did not agree that she was burdened by them or that the Grievant's attendance affected her in any way. The night shift overlaps the day shift by one hour.

Pennington testified that she has talked to Mader about everyone's attendance problems. Pennington was particularly disturbed about working shorthanded on the weekends. She did not recall specifically complaining about the Grievant's tardiness. She told Mader that the work load was a lot harder when nursing assistants were tardy, because the assistants would get their own cases or clients up first and then have to work on the other clients if the assistants who were tardy were not there by that time. She stated that most of the time, the tardy person still does his or her own work. Pennington was also concerned that the people who were present and working were not helping each other or teaming up to do the work.

The Grievant admitted to having had a drinking problem for quite a few years, and the problem became worse in the last year and a half before her discharge. It was hard for her to wake up on time in the morning to get to work, and she was sometimes late for work. The Grievant was also on antidepressant medication for the last year and a half. She went to therapy for that same period of time and saw a clinical psychotherapist, Diane Moga-Roach. She also saw a psychiatrist, Edward Johnson, during that period of time.

Both Johnson and Moga-Roach tried to help the Grievant with her drinking problem, as well as with her work attendance problem. Moga-Roach eventually recommended that the Grievant might find the Bellin alcohol treatment program useful, and Johnson concurred.

The outpatient program at Bellin is a four-week program, followed by 16 weeks of more care or follow up. The Grievant was in the outpatient treatment program at Bellin for only a week and a half. During that time, she drank alcohol on one occasion and admitted this to Depner. Depner's letter dated July 7th to Sachs indicates that a friend of the Grievant told Bellin counselors that the Grievant was drinking over the weekend of June 25th and 26th. Such information was used by Bellin in determining whether the Grievant should be treated on an outpatient or inpatient basis. VanZeeland testified that not everyone is discharged from outpatient treatment when found to be using alcohol while in the program, but that it would depend upon the patient's motivation afterwards to determine whether to do something different or not.

Pakanich was listed as a contact person -- someone that Bellin could contact. Pakanich met with VanZeeland while the Grievant was receiving outpatient treatment with Bellin and told VanZeeland that the Grievant had told her about an occasion when she was drinking while in the program. Pakanich also met with Depner and VanZeeland together about two days later, and asked them to reconsider discharging the Grievant from their program. The Grievant believed that another nursing assistant, Mary Ansell, was the person to tell

Bellin that she had been drinking, but Ansell denied ever speaking with anyone from Bellin.

The Grievant was not available to work between July 11 and July 21, the dates which she was hospitalized.

The Grievant has recovered and is able to work.

The Grievant signed several release forms, including a release for the exchange of information between the staff of Bellin Psychiatric Center and Tomchek-May on June 25th for social worker reports and reports regarding job concerns and treatment status. A release form dated June 24th allowed Bellin to disclose to Sachs a written letter regarding treatment. During the hearing in this matter, the Grievant waived privileges she may have asserted and asked that her AODA counselors testify, despite their refusal to testify even under subpoena. On January 20, 1994, Federal District Court Judge Robert Warren ordered VanZeeland and Depner to comply with the subpoena and testify. Judge Warren further ordered that all patient records of Bellin Psychiatric Center be sealed from public scrutiny.

THE PARTIES' POSITIONS:

The Employer:

The Employer states that the factual basis for just cause to discharge the Grievant is all stated in its discharge letter of July 13th, and that the attendance problems relating to tardiness, absenteeism and failure to comply with reasonable rules and procedures were proven by the evidence and constitute just cause for discharge. Failure to show up for work on time is a well-recognized cause for discharge. Regular attendance is an essential function of any position and is an absolute minimum requirement of a job.

The Employer points out that the Grievant admitted she was continually tardy or absent. She had no justifiable excuse for her continued pattern of attendance problems. Even after the use of progressive discipline, the Grievant's unacceptable attendance problems continued. The Grievant was given opportunities to return to work, following the "plan of action" on April 8th and the "last chance" on June 28th. The Grievant was clearly told that future incidents would result in termination. However, shortly after that, she failed to show up for work on July 6th.

The Employer asserts that there is no factual dispute that the Grievant was given progressive discipline, that she was warned of the consequences of further attendance violation, and that she was given two chances to get professional help in correcting her attendance problems. Despite all that, she continued her past pattern of attendance problems.

While the Grievant sought to blame her counselors at Bellin for her final day of absence, the counselors established that she had the ability to take responsibility for showing up for work.

The Employer argues that expert medical opinion is needed to excuse conduct due to incapacity, and the Grievant submitted no credible evidence and provided no medical excuse for being absent on July 6th. The Grievant had the ability to control her tardiness, had the ability to show up for work and had the ability to perform her job duties. The Employer asks that the grievance be denied.

The Union:

The Union contends that the actual reason for the Grievant's discharge is

not at all apparent. The termination letter does not state that she lost her job because of attendance or tardiness or for failing to report to work on July 6th. The Employer's discharge letter refers from one document to another without reaching a conclusion. The Union maintains that the issue is far more than the Grievant's past attendance and tardiness record or the supposed failure to abide by a return-to-work document. What is at stake is how the mental health provider system -- that the Grievant sought help from for alcoholism and its effect on her work -- viewed that treatment as it related to her Employer. Ultimately, the Union asserts, that treatment program was more of an impediment to the Grievant's ability to return to work than an advocate for her return to a normal work schedule.

The Union notes that in the June 28th return-to-work document, no specific date was established for the Grievant to return to work. Only general statements were made regarding the Employer's expectations, with a specific statement that she would be terminated if she did not abide by the facility's policies. However, a major part of the return-to-work meeting concerned whether the Grievant would change her work shift or change her outpatient program from mornings to evenings. While the Grievant did not believe there was a specific deadline to tell the Employer her decision on that matter, by the time she made a decision, it was a moot issue because she was told she could not be in the outpatient program. The Union finds no documentation that the Grievant was to honor a deadline of July 1st to notify the Employer of this decision, other than Tomchek-May's testimony.

The Union points out that the counselors decided to discharge the Grievant from the outpatient program on June 29th because of unconfirmed statements made by Pakanich that the Grievant had been drinking the previous weekend. Yet when the Grievant missed a session during her first week of treatment and then admitted that she had been drinking the day before, she was allowed to stay in the program.

In the letter to Sachs dated July 7, Depner states that VanZeeland agreed that the Grievant's treatment would be put on hold until Depner could resume the case on July 6th and make a decision whether she would be allowed in treatment or discharged. The Union asserts that both the therapists at Bellin and the management at the Mental Health Center have difficulty in distinguishing between the issue dealing with medical treatment available and the perceived employment needs of the Mental Health Center. Moreover, the Grievant was getting conflicting messages.

The Union submits that the problem lies in how the Grievant understood what was going on, such as at the time she received the July 2nd letter to report to work on July 6th. She felt her status at the hospital was on hold, and she resigned herself to going into the hospital on an inpatient basis, which would have kept her from returning to work. The Union submits that the Grievant's understanding of the situation is really quite simple -- she believed that a decision on her treatment would be made on July 6th, and that she could not return to work before that decision was made. She also believed that her counselors would be contacting her Employer, and that once a decision was made on her treatment, she would know what to do about returning to work.

Further, the Union states, the actual termination letter was delivered to her while she was an inpatient at the Fox Valley Psychiatric Hospital. She was trying to get professional help with her problems related to drinking and she was under treatment at the time of the discharge.

The Union questions why the Employer would have expected or allowed the Grievant to work on July 6th, since no release had been provided to the Employer when she previously missed three days of work and was told that she must have a return to work slip. Also, it appears that a medical release was in fact drafted by Dr. Goldstone of Bellin but may not have been signed or sent

to the Employer. In any event, the Union maintains that these issues should not have received as much attention as they did, because the Mental Health Center should have been aware that there would be need for medical documentation before anyone was enrolled in a certified alcohol and drug abuse program, inpatient or outpatient.

The Union argues that it is a reasonable inference to draw from the facts that the Grievant was not ready to return to work on July 6th, when she may have been going into an inpatient treatment program on the very next day and actually did so within a week of July 6th. The Grievant acted on what she believed to be the truth concerning her status at Bellin when she did not report for work on July 6th, and she should not have been terminated for not doing so. The Union also believes that the return-to-work document is the crux of whether the Employer had just cause to terminate her, and the evidence does not show that it did. At best, the Employer misconstrued information about her treatment status, and at worse, the Employer manipulated the terms of the return-to-work document to its own convenience.

The Employer's Reply:

The Employer notes that the Union views the evidence to show that the Employer either misconstrued information or manipulated the terms of the return-to-work condition. Under any view of the evidence, it is uncontroverted that the Grievant did not show up for work on July 6th, nor did she call to excuse her absence at the time required, and she was not in any treatment program which would have prevented her from showing up for work on that date. Between July 6th and July 11th, she was not in any treatment program and she did not submit any medical excuse for her absence on July 6th. Her only excuse was refuted by the testimony of VanZeeland and Depner.

The Grievant refused to comply with her outpatient treatment program, failed to make a choice as to working day or night shifts, failed to comply with two "last chance" agreements, and failed to take responsibility for coming to work on July 6th. These facts, says the Employer, constitute just cause for discharge.

Further, the Employer contends that it was the Grievant that manipulated the terms of the return-to-work agreement and tried to use her counselors to excuse violations of attendance requirements. The Bellin counselors refuted her excuse and testified that she could take responsibility for her own actions.

The Employer points out that the Grievant could have been discharged for her tardiness on June 13th for violating a "last chance" agreement, but she went into the Bellin outpatient treatment as a means to get another last chance. The Grievant was given every opportunity to correct her attendance problems and was clearly told twice of the consequences of violating attendance rules. An employer cannot force employees to show up on time for work, it can only assist them as the Employer did in this case.

The Union's Reply:

While the County claimed that the Grievant submitted no justifiable excuse for her attendance problems, the Union asserts that the Grievant clearly testified that her problems with alcoholism and anti-depressants led her to her tardiness problems. Neither the Union nor the Grievant tried to disguise her work record. It is the primary contention of the Union that the County did not have just cause to terminate the Grievant because of the circumstances in which she found herself when she sought treatment for her alcoholism, first at Bellin Hospital and later at Fox Valley Hospital.

The Grievant did not believe that she had been totally released from treatment at Bellin and that she could work July 6th, the date used for her termination. The totality of the circumstances and confusion surrounding her inpatient treatment at Bellin showed that the Employer did not have just cause to terminate her at that particular time.

The Union objects to the Employer's statement that the Grievant sought to blame her counselors for her final day of absence from work. Instead, the record shows that VanZeeland stated that the Grievant's treatment would be put on hold until July 6th when Depner could make a decision regarding her status. What is crucial here is how the Grievant understood the conversations she had with VanZeeland pertaining to the issue of her treatment status being on hold. No one claims that Bellin had the authority to tell her not to report to work on July 6th.

The Union also takes issue with the Employer's characterization of Pakanich's testimony. Finally, the Union notes that the Employer suggests that the basis of the Union's case is that the Grievant did not have the capacity to report to work on July 6th. This is wrong -- the Union contends that the Grievant had a real, if somewhat mistaken, understanding about her status when she was removed from the outpatient program and was not sure if she would be admitted into the inpatient program.

DISCUSSION:

Article 1 of the parties' collective bargaining agreement provides that the Employer shall have the right to discharge for proper cause. Article 24 states that no employee shall be discharged except for just cause. It also states that the normal progression of disciplinary action is an oral warning, a

written warning, a suspension, then dismissal. Oral warnings are maintained in effect for six months, written warnings for 12 months, suspensions for 18 months, and a repeat of an offense can result in a more serious disciplinary action.

The Employer used progressive discipline and warned the Grievant of the consequences of continued tardiness or absences. The prior disciplinary measures of warnings and suspensions were not challenged. 8/ Continued and excessive absences or tardiness constitute just cause for discipline which may end in discharge. This grievance revolves solely around the discharge phase of the disciplinary process, and the events surrounding the time in question. The critical period of time starts with the June 13th date, the date that the Grievant called in late but did come to work. She had been previously warned, following the disciplinary suspension on April 16th, that one more tardy incident would lead to her termination.

To the Employer's credit, it did not use this incident of tardiness to discharge the Grievant, because before Sachs could set up a meeting with the Grievant about it, the Grievant notified RN Supervisor Gilsdorf on June 17th that she was in the Bellin outpatient program. The Grievant further notified Sachs on June 21st that she was in the morning outpatient program between 8:00 a.m. and 12:15 p.m. on a daily basis. The Employer displayed some tolerance with the June 13th incident, due to the circumstances.

The Employer, also to its credit, then agreed to a back-to-work interview. The Employer gave the Grievant her choice of shifts -- the Grievant could work either an AM or PM shift and take outpatient treatment at her choice of days or nights. In all of this, the Employer has tried to accommodate the Grievant to some extent, certainly. While the Union contends that the only evidence that Tomchek-May gave the Grievant one day to choose between day or night shifts is Tomchek-May's own testimony, the record shows that the Grievant was aware that she had to make such a choice. She realized that if she kept her day shift and went into the evening outpatient program, she would have to start all over with the treatment program. But at the time she decided to do just that, Depner was already telling her that she could no longer be in any outpatient treatment program. The Grievant never called Tomchek-May or Sachs to state that she wished to keep her AM shifts.

A key question here is whether the Employer gave the Grievant a fair opportunity to live up to the "last chance" agreement of June 28th, her second last chance (she could have been fired for failing to show up on June 13th).

After the parties agreed to the terms in the last chance agreement of

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8/ The Arbitrator counted 23 times where the Grievant punched in at 6:00 a.m., her scheduled starting time, but was considered a "no call" or tardy. However, the discipline resulting from that period of time was not challenged, and even if it were, there were numerous other incidents of tardiness. The Arbitrator would note, for the future, the Employer's practice of considering an employee tardy or a "no call" when that employee punches in at the scheduled starting time may not stand up to the test of just cause. If the Employer deems it important that the employee be on the unit at the scheduled starting time and punch in before the scheduled starting time, it has at least three options -- it can so advise all employees, it can schedule employees a few minutes earlier so they have time to reach their units, or it can place time clocks on the units instead of a central location which results in a loss of time between punching in and reaching the unit.

June 28th, the Employer established a return to work date of July 6th. It is undisputed that the Grievant received the Employer's July 2nd notice to return to work on July 6th. And it is undisputed that she did not show up for work on July 6th. There is also no dispute that if the Grievant was not an inpatient, she could work. She did not become an inpatient until July 11th.

The Employer knew by July 2nd when it sent its notice to return to work on July 6th that the Grievant was no longer in the Bellin outpatient treatment program, and that while the Grievant might become an inpatient, the Grievant was resisting inpatient treatment. Therefore, since the Grievant was not in any treatment program between July 2nd and July 6th, the Employer could have determined that there was nothing that prevented the Grievant from returning to work. VanZeeland had told Tomchek-May on July 2nd that there was no reason why the Grievant could not come back to work. The Grievant had not sought any extended leave of absence and had been working previously, despite her problems with alcoholism.

The Grievant's main contention is that there was much confusion in her mind during this time, due to Bellin telling her she was no longer a candidate for inpatient treatment, the unavailability of Depner during this critical period of time, etc. Granted, July 2nd was a busy time for the Grievant -- she had agreed on that date to come in for inpatient treatment and apparently talked with her doctor who gave admission orders. On that same day, she then called the doctor back and tried to get a change in procedure, stating that she was willing to take Antabuse and enter the evening outpatient program. There were calls back and forth between the Grievant, VanZeeland, and her physician. The Grievant was aware that VanZeeland was in touch with the Mental Health Center personnel regarding her status.

Although the Grievant was told by VanZeeland that her treatment status was on hold until Depner returned to work on July 6th, there is nothing in the record to demonstrate that the Grievant had a reasonable basis to believe that her job was similarly on hold until Depner returned. The Employer did not agree to hold off on the July 6th date for returning to work. The Union believes that the Grievant was getting conflicting messages. If so, it was up to the Grievant to straighten them out. After all, it was her job. When she received the July 2nd notice stating that she was to return to work on July 6th, it was up to her to do something about that notice. She admitted that she did not read it carefully, and that she was relying on her counselors who seemed to be telling her about that time that everything was on hold. VanZeeland was only saying that her treatment status was on hold over the Fourth of July weekend until Depner returned to work. However, it was the Grievant's basic responsibility to take care of her job -- she could not reasonably rely on her counselors to protect her job. Only she could do that. The counselors had no authority to put the Grievant's job on hold, and the Grievant had no reasonable basis to believe that the counselors had such authority. Nor is there any evidence on the record that the counselors did indeed tell the Grievant to hold off from returning to work. To the contrary, the counselors told the Employer that there was no reason that the Grievant could not return to work, from their perspectives.

At a minimum, the Grievant could have called the Employer anytime from July 2nd when she received the letter to July 5th, the day before she was scheduled to report, and advised the Employer that there was a problem with her returning on that date, that she was no longer a candidate for outpatient treatment and it appeared that she was to go into inpatient treatment, but she was not certain when. At the maximum, the Grievant could have showed up for work on July 6th as requested in the July 2nd letter, and either worked in order to avoid being discharged or explained the situation more fully at that time.

Instead, there appear to be several "lost" days, where nothing happened over the July Fourth weekend.

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was on vacation during the week of June 28th to July 2 and probably returned after the Fourth of July weekend, on July 6th. Tomchek-May was gone the week of July 5th through July 9th. There were some critical times in this period. June 28th was the back-to-work-interview. June 29th was the deadline established by VanZeeland for the Grievant to decide on morning or evening outpatient program, as well as the date that Depner decided the Grievant could not continue in outpatient treatment. July 1st was the deadline established by Tomchek-May to notify her of which shifts the Grievant preferred to work. July 2nd was the date of Tomchek-May's letter hand-delivered to the Grievant. July 6th was the date established by the Employer for the Grievant to return to work or lose her job. Depner, Sachs, and Tomchek-May were unavailable for parts of these dates. Sachs was gone on June 28, 29, and July 1 and 2. Depner was gone on July 2nd. Tomchek-May was gone on July 6. So these three key players had to rely on what each other was telling them, even though they were not there and working during these times. However, both VanZeeland and Depner had told the Employer on July 2nd and on July 6th respectively that there was no reason why the Grievant could not work.

The Union believes there has been some confusion on the part of the Bellin counselors and the management at the Mental Health Center in dealing with the medical treatment and employment problems, which led to the Grievant receiving mixed messages. The Union does not contend that the Bellin counselors had the authority to determine anything regarding the Grievant's job, but that they were the ones who always told the management about the Grievant's status. There was also the odd message that Depner gave the Grievant -- that either the Grievant receive inpatient treatment or lose her job.

The fact that the Bellin counselors had plenty of contact with the management people at the Mental Health Center does not absolve the Grievant of her responsibility to show up for work or notify a supervisor of why she cannot do so. The Grievant received no assurances from VanZeeland between July 2nd and July 6th, or from Depner on July 6th, that it was acceptable to the Employer to not report to work on the 6th, or to disregard the July 2nd notice of when to return to work. The Grievant had no notice from the Employer or the Bellin counselors to disregard the July 2nd notice to return to work on July 6th.

There is the question of why the Employer set the date of July 6th, knowing that the Grievant had only been in outpatient treatment for a week and a half and knowing that the Grievant may soon go into inpatient treatment. However, it is reasonable for the Employer to set some date for the Grievant to return to work. She had not worked since June 13th. She was not in any treatment program on July 2nd or July 6th. The Employer had some suspicions that the Grievant may have gone to Fox Valley Hospital for treatment, because Tomchek-May had a clerk deliver the July 2nd letter there due to a rumor that she had heard that the Grievant might be there.

All in all, it is not unreasonable for the Employer to establish a date for returning to work. If the Grievant were physically unable to meet such a date, it would have been up to the Grievant to so notify the Employer and be prepared to provide verification if necessary. Instead, the Grievant let the date come and go, without notice to the Employer that it would be unlikely that she would work July 6th, since she wanted to hear from Depner about her treatment status.

Moreover, the Grievant had been warned at least three times about being

discharged. She was warned about being terminated after the five-day suspension in April, as well as warned again during the back-to-work interview in late June with Bellin. Finally, the July 2nd letter which demanded that she return to work on July 6th clearly stated: "Failure to comply with any of the conditions will result in immediate termination from employment." If July 6th were an isolated incident, it would be a different matter. However, the pattern of absences and tardiness covers a period of time, and the progressive disciplinary measures designed to correct conduct had no effect.

By early July, the Employer could have felt that the Grievant was abandoning her job. There were indications of abandonment -- such as the Grievant's failure to return phone messages left by the Employer. When the Grievant did not notify Tomchek-May by noon on July 1st of her choice of shifts, Tomchek-May called her and left a message on her answering machine, but the Grievant did not return that call. When Tomchek-May sent the July 2nd letter, the Grievant did not respond to it. Sachs reached the Grievant by phone once on July 6th, but when Sachs called back to tell the Grievant to report on July 7th, Sachs had to leave a message. The Grievant did not report on July 7th, and Sachs reached the Grievant by phone on July 7th and told her not to report to work until further notice. Sachs left a message on July 8th and again on July 9th, but the Grievant did not respond to those messages. Sachs followed up her July 9th message with a letter, which told the Grievant that Sachs expected to hear from her on July 12th. The Grievant finally responded to this letter, because she called the Employer from the Fox Valley Hospital on July 11th to let them know she was in the hospital as an inpatient.

While the final decision to terminate the Grievant was made on July 12th, after the Grievant became an inpatient, it apparently would have been made earlier but for the Grievant's evasion of meeting face-to-face with management representatives. The practice of the Employer is to conduct disciplinary meetings with the employee as well as the Union representative and appropriate management representatives. The employee is given an opportunity to make statements, written or oral. The Grievant had been through this process several times in earlier steps of the disciplinary process, so she knew the drill well. In its letter discharging the Grievant, the Employer pointed out that it is not its practice to terminate employment through a letter, but that the Grievant was continually unavailable or failed to respond in a timely manner.

The Grievant's avoidance of meeting directly with the Employer should not be held against the Employer, who was attempting to give the Grievant due process in the termination phase. While the Employer could have shown more restraint and waited until the Grievant emerged from inpatient treatment, it is not required to do so. It would be difficult to say that the Employer should then give the Grievant another "last chance" -- the third last chance. The Employer has shown some forbearance and tried to work with the Grievant, but it did ultimately have just cause to discharge her when she failed to show up for work on July 6th or even notify the Employer of a valid reason for not being able to report to work on that date.

I admire the Grievant's courage in combating alcoholism. The Grievant has also been open and honest about a disease that touches her private and personal life, and many so burdened would not be so open. The Grievant even waived privileges she had and opened her medical records for this proceeding. It is so very unfortunate, but not so uncommon, that this very insidious disease has cost so many their jobs. However, the basic issue before the Arbitrator is whether the Employer had just cause to terminate the Grievant. The record substantiates that it did.

AWARD

The grievance is denied.

Dated this 3rd day of November, 1994, at Elkhorn, Wisconsin.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator