BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 727-D and AMERICAN LUTHERAN HOME	Case 16 No. 51944 A-5315

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751-0364, appearing on behalf of American Federation of State, County and Municipal Employees, Local 727-D, referred to below as the Union.

Mr. Stephen L. Weld, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of American Lutheran Home, referred to below as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Calli Schutts, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on April 19, 1995, in Menomonie, Wisconsin. The hearing was transcribed, and the parties filed briefs and waived the filing of reply briefs by July 28, 1995.

ISSUES

The parties stipulated the following issues for decision:

Did the Employer have just cause to terminate Calli Schutts?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 - RECOGNITION

. . .

1.04 Management Rights: Except to the (sic) specifically abridged by specific provisions of this Agreement, the Employer reserves and retains solely and exclusively all of its common law, statutory and inherent rights to manage its own affairs as such rights existed prior to the execution of this Agreement. The sole and exclusive rights of the Employer which are not abridged by this Agreement shall include but are not limited to its rights:

To determine the existence or nonexistence of facts which are the basis of a management decision . . . to establish or continue policies, practices and procedures for the conduct of the operation of the Employer and from time to time change or abolish such policies, practices or procedures . . . to discipline, suspend or discharge for just cause, and otherwise take such measures as the Employer may determine to be necessary for the orderly and efficient operation of the public service.

1.05 Rights Limited: Rights claimed in this Agreement shall be consistent with those rights and responsibilities conferred upon the Employer and/or the Union by applicable state and federal statutes.

. . .

ARTICLE 3 - GRIEVANCE PROCEDURE

. . .

3.06 Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract. The arbitrator shall not modify, add to or delete from the express terms of the Agreement. The arbitrator's decision shall be final and binding upon both parties.

. . .

ARTICLE 4 - DISCIPLINARY AND DISCHARGE PROCEDURE

4.01 Just Cause Disciplinary Action: Employees shall not be disciplined or discharged without just cause . . .

4.02 Procedure: The normal procedure for discipline and/or discharge shall include only the following:

A) Oral Reprimand;
B) Written warning;
C) Suspension:
D) Discharge.

The number of written warnings and length of suspensions shall be determined by the Employer in accordance with the gravity of the violation, misconduct or dereliction involved, taking into consideration that such steps are intended as corrective measures.

If the Employer has sufficient reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before other employees or the public. Likewise, the employee shall respect the Employer's right to be treated in a respectful manner. The employee shall be notified in writing when an oral or written reprimand is taking place, or when a reprimand is placed in their personnel file . . .

ARTICLE 8 - SICK LEAVE

8.01 Accrual: Every employee shall be entitled to accumulate a total of four hundred and eighty (480) hours of sick leave at the rate of one (1) hour per each twenty-five (25) hours of work.

8.02 Pay: While on sick leave employees shall be paid at their regular rate of pay for the number of hours they would have been scheduled to work had they not been ill or injured.

8.03 Qualification: In order to qualify for sick leave, employees must report their need for sick leave as far in advance of their next shift as possible.

8.04 Verification: Sick leave is to be taken only in case of actual illness and each employee may, therefore, be required to verify the alleged illness with a physician's report. Any employee who is found to have abused sick leave will be subject to discipline or discharge.

8.05 Termination Benefit: Employees shall be paid in cash for one-half (1/2) of their unused sick leave upon termination of employment.

8.06 Attendance Incentive: In any given year, based on the anniversary date of employment, employees shall receive additional vacation benefits beyond those benefits earned in Article 13 of this Agreement under the following conditions:

A) Employees using eight (8) hours of sick leave or less shall receive (3) additional days of vacation.

B) Employees using more than eight (8) hours of sick leave but not more than sixteen (16) hours shall receive two (2) additional days of vacation.

C) Employees using more than sixteen (16) hours of sick leave but not more than thirty-two (32) hours shall receive one (1) additional day of vacation.

Benefits prescribed in this section shall be prorated as follows:

Employees averaging less than twenty (20) hours per pay period shall receive one-third (1/3) of the benefit scheduled above.

Employees averaging over twenty (20) hours per pay period shall receive two-thirds (2/3) of the benefit scheduled above.

Employees averaging over sixty (60) hours/pay period shall receive the full benefit described in this section.

. . .

ARTICLE 20 - ENTIRE MEMORANDUM OF AGREEMENT

> 20.01 This Agreement constitutes the entire agreement between the parties and no oral statements shall supersede any of its provisions. Any amendment or agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto (the Employer and the Union may, by mutual agreement at any time, negotiate additions, deletions or changes to this Agreement).

BACKGROUND

The grievance, filed on October 31, 1994, 1/ alleges the Grievant's discharge violated Sections 4.01, 8.01, 8.03 and 8.04. Anita Raffesberger, the Employer's Director of Human Resources, responded to the grievance in a memo dated November 3. In that memo, she denies the grievance, based on Sections 1.04 and 4.02, and states:

> (The Grievant) began employment January 3, 1994. She was terminated on October 31, 1994.
>
> Between date of hire and date of termination, (the Grievant) had 18 instances of absence and 1 day that she did not show nor call-in.
>
> (The Grievant) was counseled repeatedly concerning attendance issues. She received progressive discipline beginning with verbal warning up to and including discharge.
>
> Termination of (the Grievant) was just cause termination.

The Employer's Absenteeism Policies

At the time of the Grievant's hire, the Employer maintained an employee handbook, which stated, among other points, the following:

> . . . (E)xcessive absenteeism and/or excessive tardiness may lead to

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1/ References to dates are to 1994, unless otherwise noted.

> discipline up to and including discharge . . . . Unexcused absences from work on scheduled work days without calling in or notifying American Lutheran Homes, will be considered to be a voluntary resignation.

It is undisputed that this policy was not bargained with the Union, and that the policy was less than strictly enforced. Employe absenteeism was an ongoing problem, and in a staff meeting conducted in late June, the Employer announced the following absenteeism policy:

> 8. Absenteeism policy.
>
> A. If absent for 5 times within a 12 month period, staff will get a verbal warning.
>
> B. The sixth absence will be a written warning.
>
> C. The seventh will require a suspension.
>
> D. The 8th will result in termination.
>
> This policy will be enacted immediately. Any staff member with more than 5 absences since January 1 will be treated as if they have 5 absences.

Employe absences continued to be a problem, and in a "Brainstorming" session conducted on October 12, Employer representatives and unit employes met to discuss the problem. The Grievant did not attend the June meeting, but did attend the October meeting.

The Employer and the Union did not collectively bargain the attendance policy announced at the June staff meeting. Some informal discussions were conducted in late October between the Employer and the Union regarding the Employer's implementation of the policy. At least partially in response to those discussions, the Employer implemented the following "Second Chance" provision:

> Effective November 3, 1994, if an employee agrees to fill-in two (2) available 8 hour shifts, at the Facility's request, within 14 days of the absence occurrence, it will result in a deletion of one absence day/instance. This provision may be used on two (2) occasions throughout the 12-month period (defined as 12 months from the first day of absence).

This provision was not applied to the Grievant.

The Grievant's Attendance Record/Disciplinary History

As noted above, the Grievant began her employment as a Certified Nursing Assistant on

January 3. She worked well with residents, but had, from the onset of her employment, difficulty in maintaining regular attendance. This difficulty came to a head with the completion of the Grievant's probation period. A memo to the Grievant from Margie Ware, the then-incumbent Director of Nursing, dated March 23, stated the problem thus:

> This is to confirm our conversation re: extending the probationary period based on your attendance at work. As we discussed, you have had 7 absences since beginning your employment. We will extend your probationary period ending 4/3/94 to ending on 5/16/94. As we discussed, I expect you to have no more than 2 absences in this time frame.

The Employer permitted the Grievant to pass the extended probationary period.

The Grievant was absent from work the following dates: January 17, January 24, February 13, March 5, March 12, March 14, March 21, April 18, May 4, June 1, June 11, June 16, June 17, June 27, July 5, July 24, August 3, August 21, August 28 and October 28. She reported for work late on August 20 and September 16. On August 2, the Grievant reported for work, but left early due to illness. She was verbally counseled regarding her attendance problems on several occasions. On July 6, she received written documentation of a verbal warning for excessive absenteeism. The form stated "further corrective action" would follow if her attendance did not improve. On August 18, she received a written warning for excessive absenteeism. That form noted "3 day suspension will be next corrective action". On August 29, the Grievant was suspended without pay for two work days. The form documenting the suspension noted that the next disciplinary step would be "loss of job". On October 31, the Employer terminated the Grievant for her absence from work on October 28.

The Grievant's Absence on October 28

Prior to the start of her scheduled shift on October 28, the Grievant called Ware to state she was going to see a doctor and would not report for work. The absence record for this call-in states the call came in at 5:00 a.m., and related to "vomiting and diarrhea". Ware informed her that Ware would call her back. Sue Siedlecki, the Employer's Scheduling Coordinator, learned of the call-in and relayed her concern about the absence to Ware. Ware then reported the call-in to Raffesberger for a determination of how the absence should be handled. Raffesberger informed Ware that if the Grievant reported for work and worked one-half of her shift, the absence would be excused. Ware then instructed Siedlecki to contact the Grievant to inform her of Raffesberger's determination.

Siedlecki left call-back messages for the Grievant noting that it was imperative for the Grievant to call back immediately. She left the call-back message at the Grievant's home, at the Grievant's mother's home, at the Grievant's clinic and at the emergency room the Grievant might

have reported to. The Grievant did not call back until 11:30 a.m. The Grievant gave the Employer a memo from her clinic, dated October 31, which states: "Excused from work 10/28 due to illness".

Further facts will be set forth in the DISCUSSION section below.

THE EMPLOYER'S POSITION

After a review of the evidence, the Employer contends that its "(r)ight to establish an absenteeism control policy is a fundamental or reserved right of management". This contention is, the Employer argues, established by arbitral precedent. That Section 1.04 grants it the right

to establish work rules underscores, according to the Employer, the applicability of the arbitral precedent to the grievance and serves to preface the applicability of other precedent. More specifically, the Employer argues that Commission and arbitral precedent establish that "the work rules provision of the collective bargaining agreement serves as a waiver by the union of its right to bargain over reasonable work rules". The Union's citation of Heyde Health System, Inc., to rebut this precedent only establishes, according to the Employer, that "(i)n that decision, Arbitrator Squillacote, unfortunately, forgot that he was no longer working for the NLRB and . . . disregarded the volume of arbitral precedent" relevant to this issue. Beyond this, the Employer argues that "the Union . . . waived its right to bargain due to inaction".

The Employer's next major line of argument is that a no-fault absenteeism policy that prescribes progressive discipline meets the test of reasonableness. Since the Union and the Employer mutually recognized the significance of employe absenteeism, it follows, the Employer concludes, that it was required to address the problem. That its no-fault policy is reasonable is, the Employer argues, established by arbitral precedent and by the liberality of its terms. That arbitrators have sustained the reasonableness of more onerous policies underscores this conclusion.

A review of arbitration decisions in which an arbitrator has declined to uphold discipline based on a no-fault policy is, the Employer asserts, meaningful in this case. Those decisions demonstrate that "three basic reasons" underlie arbitral reticence to uphold such discipline: (1) employes were not informed of the policy; (2) the Employer disciplined employes in an inconsistent manner; and (3) the discipline imposed conflicted with the exercise of contractual sick leave. In this case, the Employer asserts that a review of the evidence establishes that none of the three factors are applicable to the grievance. To conclude otherwise would, the Employer urges, make sick leave an entitlement when it was bargained to be a form of income protection insurance. The Employer also urges that a failure to sustain the discipline voids the fundamental focus of the policy -- to address "the type of absenteeism that hinders scheduling: short term intermittent absences when the employer has little advance notice or time to find replacements". That the policy has been modified does not, the Employer concludes, have any impact on this grievance. The egregious nature of the Grievant's absenteeism record only underscores the reasonableness of

the policy's application.

Nor can the Employer's application of its policy be said to have voided the just cause provision. The Employer contends that a review of the evidence confirms that the Grievant's discharge withstands the seven standard test posited by Arbitrator Daugherty. 2/ After an examination of those seven standards, the Employer contends that the Grievant's record is void of "compelling mitigating circumstances". Section 3.06 restricts, the Employer cautions, an arbitrator "only to determine whether the just cause provision of the bargaining agreement was violated".

It necessarily follows, the Employer concludes, that the grievance must be denied.

THE UNION'S POSITION

The Union contends that the Employer's attempt to unilaterally establish a no-fault absenteeism policy violates well-established arbitral precedent. The Union notes that the only absenteeism policies the Employer had in effect prior to June applied to non-Union employes and to locations other than the Menomonie facility. Neither had or have been agreed to by the Union.

The Employer attempted to unilaterally install its policy at staff meetings not attended by the Grievant. Once the Union became aware of the Employer's desire to enforce the policy, the Union advised the Employer it "would continue to judge any discipline received under this policy by contractual standards and not by such policy".

The Union argues that Section 1.04 does not grant the Employer the authority it seeks to assert here. Section 1.05 limits that right, the Union contends, by underscoring contractual and statutory limits to the Employer's authority. Noting it has never waived its right to bargain the policy and that the Employer has never sought such bargaining, the Union concludes its statutory bargaining rights stand between the Employer and its desire to enforce the unilateral policy.

The Union also contends that the Agreement limits the sweeping right the Employer seeks to establish here. More specifically, the Union points to Article 20 which precludes non-consensual amendment of the Agreement. Article 4 and Article 8 similarly limit the Employer's asserted authority:

> It cannot be considered just cause to be disciplined for legitimate and proper use of a contractual benefit such as sick leave. It cannot be considered corrective to discipline an employee because they are ill.

2/ Citing Grief Bros. Cooperage Corp., 42 LA 555 (Daugherty, 1964).

Section 8.06 establishes an attendance incentive policy which establishes, the Union argues, that the parties bargained on attendance issues and through that bargaining "made a conscious choice of the carrot rather than the stick".

Turning to the circumstances surrounding the Grievant's discharge, the Union asserts that the record establishes that the Grievant has a poor attendance record. The Union asserts, however, that it is no less concerned about attendance problems than the Employer since its members are saddled with covering absences. With this as background, the Union notes that after the Grievant's suspension, she worked "from the end of August to the end of October with no absences". Beyond this, the Union notes the Grievant "complied with all the requirements for the use of sick leave" on October 28. To discharge her for this compliance is, the Union concludes, "arbitrary and capricious".

The Union concludes by requesting the following remedy:

> (T)he grievant (should) be returned to her previous position of Certified Nurses Aide . . . and (should be) made whole for all losses caused by her violative termination and (the Employer should) remove all references to this matter from her personnel file. Further . . . the Arbitrator should declare any Policy that limits the use of a contractual benefit null and void and remove all discipline from the files of employees disciplined for the legitimate use of the contractual sick leave benefit.

DISCUSSION

The issues are, in a sense, stipulated. The issues stated above reflect the parties' mutual understanding of the merits of the grievance. The Union acknowledged that addressing the merits of the grievance would pose the propriety of the Employer's absenteeism policy, but that issue was not, at the hearing, stated separately by both parties.

The difficulty with addressing the propriety of the absenteeism policy as a threshold issue is that, in my opinion, the issue need not be resolved to address the issue of just cause for the Grievant's discharge. This is of some significance. Contract provisions reflect the considerable labor of negotiators and the interpretation of a contract should be as narrow as possible. This limits the effect of an award, but also assures that arbitral damage done to negotiated provisions is minimal. Because the parties have mutually argued the propriety of the absenteeism policy, it is necessary to address it. That issue will, however, be addressed after an examination of the stipulated issues. The discussion of the absenteeism policy thus becomes dicta. This is, in my estimation, appropriate. The parties can accept it for whatever it may be worth.

The Employer has analyzed the cause determination under the seven standards created by

Arbitrator Carroll Daugherty. The Employer has turned that analysis on its no-fault absenteeism policy. The Union has not used those standards. The Daugherty standards are often cited, but cannot be considered universally accepted. I am reluctant to imply them into the parties' agreement. In the absence of a stipulation, I believe a just cause analysis turns on two elements. First, the Employer must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Employer must establish that the discipline imposed for the conduct reasonably reflects its disciplinary interest. This does not state a definitive analysis to be imposed on contracting parties. It does state a skeletal outline of the elements which must be addressed and relies on the parties' arguments to flesh out that outline.

The first element is the focus of the parties' dispute. The disciplinary interest asserted by the Employer in the events of October 28 is two-fold. The first and most fundamental is the Grievant's pattern of absenteeism, which came to a head with the October 28 absence. The second is whether the events of October 28, standing alone, can be said to pose the Employer's interest in that pattern. The Union asserts the Grievant did nothing wrong on October 28. If this is true, the Employer's interest in a pattern of absenteeism is irrelevant.

The evidence does, however, establish the Employer has a disciplinary interest in the Grievant's October 28 absence. The Union bases the propriety of the absence on the Grievant's pre-shift call-in, and on the October 31 excuse. Each of these factors, however, indicate only that the Grievant represented to Employer and to medical representatives that she felt ill. Considerable doubt surrounds each point.

Siedlecki's uncontroverted testimony establishes that Ware informed the Grievant she would call the Grievant back. Siedlecki, on Ware's instruction, attempted to do so. The call-back message she left was urgent and was communicated to every location Siedlecki believed the Grievant could claim to be, if ill. Inexplicably, the Grievant did not return the call until the second half of her shift. It is apparent, at a minimum, that the call back message was received. Against this background, the pre-shift call-in stands as no more than the Grievant's assertion of an illness.

The written excuse is, at best, troublesome. The excuse appears on a prescription form. The signature on the form is, not surprisingly, incomprehensible. It does not, however, appear to match the physician's name at the head of the form. Even if it does, the excuse does no more than restate the Grievant's assertion that she felt ill on October 28. That the excuse is dated October 31 undercuts whatever persuasive force the general assertion may be given.

Against this evidence stands an uncontroverted string of absences supported by no more than the Grievant's general representation that she felt ill. The twenty absences documented by the Employer between January and October cast considerable doubt on these representations. Of the twenty absences, four were on a Sunday; six were on a Monday; one was on a Tuesday; three were on a Wednesday; one was on the Thursday after the Fourth of July; two were on a Friday and three were on a Saturday. As Carin Klasse, the current Director of Nursing, testified, the Grievant's absences around week-ends became sufficiently predictable that they became a standing

joke. The October 28 absence, on a Friday, confirmed this pattern.

Thus, the Employer, on October 28, had a reasonable basis to conclude the Grievant's assertion of illness could not be accepted at face value. With this as background, the Grievant's failure to respond in a timely fashion to the call-back message is noteworthy. It is, at a minimum, apparent she received the call-back message. Against this background, the Employer's conclusion that she had abused sick leave privileges on October 28 was reasonable.

The Grievant chose not to testify. It is arguable that this precludes finding she was not ill on October 28. She is, however, the only one aware of her physical condition, and the absence of her testimony cannot be held against the Employer. In the absence of direct evidence on her physical condition, which is not available to the Employer, her condition can be established only on her observed conduct on October 28 and on her prior conduct. That conduct is, on the facts posed here, damning. The absence of her testimony leaves a demonstrated pattern of absenteeism unrebutted. To conclude the Employer must prove her medically ill on that date to demonstrate sick leave abuse within the meaning of Section 8.04 is to make that provision practically unenforceable. Sick leave is a significant benefit. To make Section 8.04 practically unenforceable only puts the general benefit at risk to those individuals who abuse it.

In sum, the Employer does have a disciplinary interest, within the scope of Section 8.04, in the Grievant's absence on October 28.

The second element of the just cause analysis requires a determination whether the Employer's disciplinary interest in the October 28 absence is reasonably reflected by the Grievant's discharge. Application of this element is governed by Section 4.02.

The Employer had, prior to October 28, exhausted steps A), B) and C) of Section 4.02. The paragraph following the delineation of these steps mandates that the Employer determine the "number of warnings and length of suspensions . . . in accordance with the gravity of the violation . . . involved". A review of the evidence establishes the Employer complied with this provision. The Grievant was orally counseled many times before receiving a documented verbal warning on July 6. She received a written warning prior to receiving a notice of suspension on August 29. That suspension was for two days even though the prior written warning noted a three day suspension would follow. Preceding this, the Employer had extended her probation period, and passed her from probationary status even though her attendance record during the extended probation period was less than unblemished. Had the Employer enforced its absenteeism policy as written, the Grievant could have been terminated as early as her August 3 absence. The record establishes the Employer afforded the Grievant ample opportunity to change her conduct.

The severity of the October 28 absence should not, standing alone, be exaggerated. It does not, however, stand alone. The Employer's repeated attempts to get the Grievant's attention are set forth above. That the Grievant has offered no satisfactory explanation for her inability to respond to Siedlecki's call-back message only underscores the reasonableness of the Employer's conclusion that the events of October 28 were an inextricable part of her ongoing unwillingness to address her attendance problems. That she functioned well with residents has been noted, but does

not mitigate the attendance problems at issue here. That this problem has existed since her hire and that her employment with the Employer never reached a single year underscore that her work record affords no mitigation to the Employer's disciplinary interest. Under Section 4.02, then, the discharge reasonably reflected the Employer's disciplinary interest in her conduct.

As noted above, this conclusion stands whether the Employer's no-fault absenteeism policy is applied to the facts or whether the provisions of Sections 4.02 and 8.04 are applied in a traditional just cause analysis. This makes it arguably unnecessary to reach the issue of the contractual propriety of the Employer's no-fault absenteeism policy. As noted above, however, the parties' stipulations make such a determination necessary, if gratuitous.

Section 1.05 of the labor agreement makes the Union's statutory rights to bargain relevant to the application of the contract. It is, however, unnecessary to explore those statutory rights. Whether the Employer was statutorily obligated to bargain the policy before implementing it, the ultimate issue, as a contractual matter, is whether the no-fault policy can be reconciled with existing agreement provisions.

The Employer persuasively notes that the second paragraph of Section 1.04 grants it the authority to implement attendance policies. The interpretive issue posed here is whether the general grant of the authority in the second paragraph of Section 1.04 to "change policies" can be applied to the no-fault attendance policy without, within the meaning of the first sentence of Section 1.04, abridging "specific provisions" of the agreement.

Even presuming the Employer can reconcile its no-fault policy with the provisions of Article 8, the policy cannot be reconciled to the provisions of Article 4. On its face, the attendance policy does not conflict with the incentive program of Section 8.06, since that program ends with the use of four days of sick leave, and discipline under the attendance program starts with the fifth absence. The policy at least facially complies with the provisions of the first paragraph of Section 4.02 by incorporating steps A), B), C) and D) into the policy. It is not necessary to determine whether the policy can be applied without reading the benefits of Article 8 out of existence to note that the policy cannot, on its face, be reconciled with the second paragraph of Section 4.02.

As noted above, the second paragraph of Section 4.02 mandates, through the use of the term "shall", that the Employer apply a case by case analysis to issues of discipline:

> The number of written warnings and length of suspensions shall be determined by the Employer in accordance with the gravity of the violation, misconduct or dereliction involved . . .

The June absenteeism policy cannot, on its face, be reconciled with this provision. That policy

does not provide for any evaluation of the circumstances surrounding an absence. Rather, each specified level of absence "will" result in the specified discipline. This no-fault approach is irreconcilable to the second paragraph of Section 4.02, and thus abridges that section. Because the policy is not within the grant of authority contained in Section 1.04, it cannot be considered enforceable.

It can be noted that November 7 policy arguably addresses this point by noting:

> Extenuating circumstances will be evaluated on a case by case basis, maintaining fair, consistent and predictable discipline procedure.

Whether the November 7 policy addresses the problems posed by the June policy is, however, an academic point on this record. The November 7 policy, like the June policy, mandates a given discipline for specified levels of absence. If that mandate is honored over the case by case proviso cited above, the conflict already noted regarding the June policy would preclude enforcement of the November policy. The proviso cited above makes the November 7 policy something other than a no-fault policy. Whether it can be applied consistently with Articles 4 and 8 cannot be determined in the absence of fact, since the proviso which makes the policy facially reconcilable with the agreement turns on the facts of each case. For the purposes of this grievance, however, the determinative point is that neither policy cannot be applied as a no-fault policy without posing an irreconcilable conflict with the second paragraph of Section 4.02.

As a final point, it is appropriate to note that the "no-fault" enforcement advocated by the Employer cannot be squared with the actions of its supervisory staff. From the implementation of the June policy, those supervisors tempered the rigors of the policy with their assessment of the facts. This is not inappropriate. It is no less than Section 4.02 requires.

The conclusion that the June policy is not reconcilable with the agreement affords no basis to overturn the Employer's determination to discharge the Grievant. The June policy afforded the Employer no greater authority than that granted by Articles 1 and 4. The non-enforceability of that policy affords the Grievant no greater rights than those granted by Articles 4 and 8. Section 8.04 proscribes the abuse of sick leave. Section 4.02 specifies how that proscription is enforced. The liberality of the Grievant's supervisors in not discharging her before October 28 is authorized, but not required, by Section 4.02. That liberality cannot be held against the Employer.

AWARD

The Employer did have just cause to terminate Calli Schutts.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 6th day of November, 1995.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator