

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 2427, SHEBOYGAN COUNTY
INSTITUTIONS, AFSCME, AFL-CIO

and

SHEBOYGAN COUNTY

Case 270
No. 52628
MA-9048

Case 271
No. 52629
MA-9049

Appearances:

Ms. Helen Isferding, District Representative, Wisconsin Council 40, AFSCME,
AFL-CIO, on behalf of the Union.

Ms. Louella Conway, Personnel Director, on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Sheboygan, Wisconsin, on October 20, 1995. The hearing was not transcribed and the parties subsequently filed briefs which were received by November 21, 1995.

Based upon the entire record, I issue the following Award.

ISSUES

The parties have agreed to the following issues:

1. Did the County violate the contract when it suspended grievant Michael G. Mayer for five days on October 12, 1994, and, if so, what is the appropriate remedy?
2. Did the County violate the contract when it terminated grievant Michael G. Mayer on January 23, 1995, and, if so, what is the appropriate remedy?

DISCUSSION

The County operates Sunny Ridge Nursing Home which has about 398 residents. Certified Nursing Assistant Mayer was employed at the Sunny Ridge Nursing Home as a part-time employe from July, 1991 to March, 1994, at which point he achieved full-time status and worked

the second shift.

Mayer was repeatedly warned about his excessive absenteeism and pattern of missing work before and after his scheduled days off throughout his employment. He was given a verbal reprimand on May 5, 1994, for a "pattern of use of sick time"; a written reprimand on June 24, 1994, after he failed to call in sick; and a one-day suspension on July 11, 1994, for missing work after several days off. Mayer never grieved those disciplinary matters. Mayer's 1991 and 1992 evaluations also referred to his absenteeism.

Mayer in 1994 was absent from work on the following dates:

July 30, 1994: Mayer called in sick and missed work because of a sprained ankle. The next day - July 31, 1994 - was a scheduled day off. He did not produce any doctor's note at that time.

August 15, 1994: Mayer called in sick and missed work. Mayer earlier was scheduled to be off work on August 12, 13 and 14, 1994. He produced a doctor's note.

August 26, 1994: Mayer called in sick to say he had the "runs" and missed work. His next scheduled days off were August 27 and 28, 1994. No doctor's note was produced.

September 16 and 17, 1994: Mayer called in sick to tell his supervisor that his relatives were in a boating accident. He was scheduled off work on September 15, 1994. No doctor's note was produced.

In addition, Mayer exceeded his sick leave bank on August 26 and September 17, 1994.

The County on October 12, 1994, suspended Mayer for five days and warned him "Failure to correct will result in termination." Mayer grieved that suspension.

Mayer thereafter was absent from work on the following days:

November 11, 1994: Mayer missed work because his father was ill. No doctor's note was produced. Mayer was scheduled off work on November 10, 1994.

November 25, 26 and 27, 1994: Mayer was on sick leave because he had the flu. Mayer was scheduled off work on November 24, 1994. He produced a doctor's note at that time.

December 11 and 12, 1994: Mayer missed work because of an

illness. Mayer was scheduled off work on December 13, 1994. No doctor's note was provided.

January 7, 8 and 9, 1995: Mayer missed work because he had the flu. Mayer was scheduled off work on January 10, 1995. A doctor's note was produced.

In addition, Mayer exceeded his sick leave bank on November 26, 27 and December 12, 1994, and January 8 and 9, 1995.

The County terminated Mayer on January 23, 1995. Mayer grieved his termination.

In support of the two grievances, the Union mainly argues that the County did not negotiate its absenteeism policy with the Union; that said policy "is insufficient to provide guidance to new employees, new or prior hires"; and that there is no past practice surrounding application of the County's policy. As a remedy, the Union seeks a traditional make-whole order, which includes Mayer's reinstatement and a backpay award.

The County, in turn, asserts that Mayer deliberately violated the County's absentee policy; that he was well aware of the policy; that he was subjected to progressive discipline; and that his extensive absenteeism warranted a suspension and discharge.

This case turns on four central points.

One, the County under Article 3 of the contract, entitled "Management Rights Reserved", has the right to establish "reasonable rules. . ." Pursuant thereto, the County has adopted an extensive absenteeism policy in its Personnel Policies which provides inter alia, that:

4. Guidelines For Monitoring The Use Of Sick Time:
 - a. Administration will review the use of sick time on a continual basis, specifically looking for:
 1. Abuse of sick leave whereby "days off" are asked for using sickness or personal injury as a basis and the employee is engaged in other activity.
 2. Development of "pattern of use".
 - a. Weekends

- b. Days directly preceding or following scheduled days off.
- c. Taking "sick day" off on the same day of the week or the same date each month.
- d. Extension of holiday or vacation by using "sick days" as an excuse.
- e. Exceeding earned "sick days".

Two, Mayer was well aware of that policy since he acknowledged receiving a copy of it on July 21, 1993, and since he was expressly warned by Staffing Coordinator Barbara B. Gruenke at the time of his five-day suspension that he could be fired over his continued absenteeism. In addition, Mayer admitted on cross-examination that he never asked for an explanation of the County's policy. That is why there is no merit to the Union's claim that the policy as applied here is vague and that Mayer's termination should be set aside on that basis.

Three, the County has a legitimate, if not overpowering, interest in properly staffing its nursing facilities, something which cannot be done when employees like Mayer repeatedly miss work in violation of the County's absenteeism policy and when they engage in a pattern of missing work either before or after scheduled days off - which is exactly what Mayer has done here by using sick leave only before or after scheduled days off. Given the regularity of that pattern, and the absence of further documentation that he was always ill on those days, it is inherently implausible to believe Mayer's assertion that he was not abusing the system by using sick leave in that fashion.

Four, the County has followed progressive discipline in dealing with Mayer's chronic absenteeism, as it issued him an oral reprimand, a written reprimand, and a one-day suspension - none of which were ever grieved and thus stand. The record further shows that Mayer was given a one-week suspension only after he missed work without a doctor's excuse on three occasions; exceeded his sick leave bank on two occasions; extended his holiday time on one occasion; and violated the weekend pattern of missing work on four occasions. The County similarly terminated him only after he subsequently missed weekend work on three occasions; exceeded his sick leave bank on five occasions; extended his holiday time on one occasion, and skipped work before days off on four occasions.

The Union argues that it was unfair to punish Mayer over his September 16 and 17, 1994, absences because he had permission to miss work on those days. I disagree. The record shows that Mayer merely called in his absences on those days and that there was no discussion at that time about whether those absences could lead to disciplinary action against him. Given the

County's earlier warning that he could be fired over his practice of missing work before or after his scheduled days off, Mayer either knew or should have known that he was skating on thin ice by missing work on those two days when he was scheduled to be off work on September 15, 1994.

The Union also asserts, contrary to the County's claim, that there is no well-developed past practice regarding this issue. This point is well taken. For while the record shows that the County in the past has applied its policy in several other situations, it is not clear whether the Union was aware of that policy and whether the facts in those other situations give rise to the level of a past practice. However, it is immaterial here whether such a past practice exists since the County in any event retains the inherent right to discipline employees guilty of excessive absenteeism without regard whether it has imposed such discipline in prior situations.

The Union also claims that the County has exhibited favoritism by giving employee Melissa Herm, the daughter of a County Board member, two five-day suspensions in a row, rather than just terminating her after her first suspension the way it did with Mayer. Her situation is somewhat different, however, because she went almost a full year before repeating her excessive absenteeism, as her first five-day suspension was on January 20, 1993, and her second five-day suspension was on February 21, 1994. Here, on the other hand, there was no such one-year interval between the time of Mayer's five-day suspension and his subsequent termination since Mayer kept on abusing sick leave without showing any signs of improvement in that intervening period. As a result, the County had a legitimate basis for treating him differently than Herm.

In light of the above, I find that Mayer knowingly violated the County's absenteeism policy; that he was properly subjected to progressive discipline; that he was expressly warned that his continued absenteeism could lead to further disciplinary action; that he was properly suspended for violating that policy; and that the County had just cause to ultimately terminate him in the face of his continuous absenteeism. However, several needed caveats must be made here.

The first is that employees normally cannot be disciplined when they are legitimately sick and when they avail themselves of the contractual sick leave benefits spelled out in Article 18 of the contract. 1/ Mayer's suspensions and termination therefore are being sustained here only because he so clearly abused sick leave.

A second caveat centers on the Union's claim that the County has not clearly communicated to all employees the full nature of its disciplinary policy, including when employees experience 3 or more instances of a practice and pattern of abusing sick leave in a 3 month period

1/ The same is true for worker's compensation. The County therefore erred when it initially included the time that Mayer was off on worker's compensation as part of its decision to discipline him.

- a policy which Staffing Coordinator Gruenke testified is not in writing. The Union's brief makes a very persuasive case for the proposition that some aspects of that policy are not as clear as they can be. As a result, nothing herein goes to whether other employes have been properly apprised of this policy, as the ruling here is a very narrow one and stands only for the proposition that Mayer was fully warned about this policy before he was terminated.

It is therefore my

AWARD

1. That the County did not violate the contract when it suspended grievant Michael G. Mayer on October 12, 1994.

2. That the County did not violate the contract when it terminated grievant Michael G. Mayer on January 23, 1995.

3. That his grievances are denied.

Dated at Madison, Wisconsin, this 29th day of December, 1995.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator