BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between THE SAUK COUNTY HEALTH CARE CENTER EMPLOYEES UNION, LOCAL 3148, AFSCME, AFL-CIO and SAUK COUNTY	Case 121 No. 53288 MA-9292

Appearances:

Mr. Todd Liebmann, Attorney at Law, Corporation Counsel, Sauk County, Sauk County West Square Building, 505 Broadway, Baraboo, Wisconsin 53913, appeared on behalf of the County.

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appeared on behalf of the Union.

ARBITRATION AWARD

On October 25, 1995, the Wisconsin Employment Relations Commission received a joint request from Local 3148, AFSCME, AFL-CIO, and Sauk County to appoint William C. Houlihan, a member of the Commission's staff, to hear an arbitration pending between the parties. On January 19, 1996, the Commission appointed the undersigned to hear and decide the matter. An evidentiary hearing was conducted on April 24 and 25, 1996, in Baraboo, Wisconsin. A transcript of the first day of the proceedings was made and distributed by April 29, 1996. Briefs and reply briefs were submitted and exchanged by June 28, 1996.

This arbitration addresses the discharge of employe M.B. On October 14, 1996, an Interim Award was issued, denying the grievance.

BACKGROUND AND FACTS

M.B., the grievant, was hired on July 26, 1994 and worked as a Certified Nursing Assistant (CNA) for the Sauk County Health Care Center until the day of his discharge, April 5, 1995. As a part of the orientation to his new job, the grievant was given a number of documents and forms including the County's personnel policies. The personnel policy booklet is a 27-page manual of policies addressing various terms and conditions of employment of County employes. The grievant accepted, and signed for the policy manual, though it is his testimony that he never read it. Among the various policies includes a leaving the premises policy which states the following:

LEAVING THE PREMISES

> Employes must obtain permission from their supervisor should it be necessary for them to leave the premises during their working hours. Employes must punch out when leaving, and punch in upon returning. Employes are not restricted to the building for meal time, but permission must be obtained from their supervisor to leave the premises.

On or about November 2, 1994, the grievant was given a three-month performance evaluation which essentially described him as doing an average job. He was graded no lower than satisfactory in any performance criteria, and on a number of the criteria received above-average assessments. The document contained substantial positive narrative, including observations that he always working, that he is enthusiastic and outgoing, that he provides good care to residents, that he demonstrates initiative and is not afraid of challenges, and that his attendance is very good. It also points out that he has a problem with respect to his interpersonal skills as applied to co-workers.

On December 6, 1994, the grievant was given a written writeup relating to a conversation which he initiated with a co-worker. In early December, a supervisor questioned the quality of care a resident had received at the hands of one of the grievant's co-workers. The supervisor approached the grievant and inquired who had cared for the resident. The grievant identified the co-worker caregiver. At the time, the co-worker had already left for the day. The supervisor was not working the following day, and when the supervisor returned yet the subsequent day discovered that in her absence, the grievant had advised the employe in question, that the supervisor was very angry with her, and that she was in trouble. The supervisor regarded that as a breach of the institutional protocol and inappropriate behavior on the part of the grievant. When she confronted the grievant over the matter, her notes indicate, "Initially, M. denied the above. After he calmed down and admitted he was wrong in confronting a co-worker and will work on refraining from this".

On December 26, 1994, a meeting was convened involving a supervisor, the grievant and a co-worker. The purpose of the meeting was to address the inability of the two employes to work together effectively. The relationship was so bad that it was interfering with the work of the unit. The co-worker was upset, and afraid to work with the grievant. She did not want to be paired with him. The feeling was mutual. During the course of the December 26 meeting, the grievant became so angry that he either stormed out of the room, or was directed to leave the room as a consequence of his anger. He subsequently returned to the meeting and expressed a willingness to cooperate and make things work out.

On January 23, 1995, the grievant was given his six-month performance evaluation. The evaluation indicates satisfactory performance in all areas evaluated. In some areas, the evaluation is better than satisfactory, running to above-average. The evaluation led to his being released from probation. The evaluation makes positive comments on his ability to deliver care. It goes on to note that he needs to develop a more diplomatic approach in his interactions with co-workers.

Deb Halweg, RN, the grievant's supervisor testified that in late February the grievant came to her and indicated that a co-worker, B.Y. was going home for supper, without approval. She looked into the matter and discovered that B.Y. was leaving and returning within the allocated break time. It was her perspective that the grievant was informing on a co-worker. The grievant could not recall having that conversation. Halweg testified that it was in response to this incident that she and Beverly Mickelson met and determined to issue a memo on the topic. On March 1, 1995, Mickelson issued a ten-point handwritten memo, titled "Nurses-PM Shift: Please Follow Through on These Things on Your Unit". The fifth item of that memo provides as follows:

> "5. Please remind your n.a.'s that they may not leave the SCHCC premises during work hours without punching out and without permission from the Supervisor."

Employer witnesses testified that the memo was posted. The grievant testified he never saw it nor was he aware of its contents.

The Sauk County Health Care Center employs both full-time and part-time CNAs. The full-time positions are described by these parties as "key" positions. The "key" or permanent full-time positions enjoy both full-time employment, and regularly-fixed hours. This is in contrast to part-time positions whose incumbents have fewer hours of work, and do not have the kind of fixed, predictable schedules as do their full-time counterparts. Key positions are regarded as highly desirable jobs, and are essentially filled by seniority. More senior employes hold key positions. Junior employes have part-time positions. Darlene Connors, a bargaining unit employe, who occupies a key position, took a medical leave which began on August 23, 1994, and ended on April 5, 1995. At the outset of his employment, the grievant occupied a part-time position. At some point during Connors' medical leave, the grievant, due to his seniority, filled Connors' key position on a temporary basis.

Approximately two weeks prior to her April 5 scheduled return to work, Ms. Connors came to the Health Care Center to hand in her notice to return to work. It was her testimony that while she was in the facility, the grievant approached and asked when she was coming back. She replied the fifth of April. She asked where he was working and he advised her that he was working her key. She responded that she guessed she would be coming back to that key when she returned on the 5th. She testified that he was upset and asked for the source of this information. She replied that she had gone to the office and talked with Jane Hahn. She indicated that he got more upset and indicated he would see about that. She declared that she was entitled to her key position back upon her return. He responded, "The hell you are." She replied, "The hell I ain't." Following that, she testified he stormed off the floor.

Deb Halweg testified that on March 23rd, 1995, the grievant approached her while she was charting and asked if she had heard that Darlene was coming back. He inquired whether she would be getting her original position back and Halweg indicates she responded, "Absolutely, she deserves that position back." Later in the shift, Halweg overheard the grievant talking to a unit nurse in another area. According to Halweg, the nurse was administering medication to her resident, and the grievant, with his face right in the nurse's face, was indicating that he was upset, that he would probably lose his position because Darlene would be coming back. Halweg testified that she intervened and directed him to get back to work. She testified that the grievant did return and subsequently returned to her and apologized for being indiscreet about when and with whom he was holding this conversation. It is the grievant's testimony that Halweg became very angry and excited during the course of one of their conversations. According to his testimony, he indicated to Halweg that it was her decision that he not retain his key. She replied that Jane Hahn had decided that, to which he said that Hahn had advised him that it was Halweg's decision. Following this exchange, according to the grievant, she became irate, and told him to watch his step. She further indicated that Ho-Chunk and Hardee's were hiring; that if he didn't like it, he ought to go there. He replied that he might have to look for a different job.

Karen Hisel, a union steward, testified to a conversation she had with the grievant. According to Hisel, the grievant expressed a concern about Darlene coming back. He indicated he wanted to keep the key. She testified that she responded that it was Darlene's position. According to Hisel, the grievant replied, "If they fuck with my key, I'll quit." On April 3, 1995, Hisel called Halweg at home at approximately 8:20 p.m., to ask questions about the status of Darlene's key. Both Halweg and Hisel understood that Connors was entitled to return to the position that she had vacated. It was during the course of this conversation that Hisel repeated to Halweg the grievant's threat to quit. The grievant denies having had any such conversation with Hisel.

Jane Hahn is the Human Resource person employed in the Health Care Center. It is the grievant's testimony that Hahn advised him that he would keep his key, even following the return of Connors. His testimony in that regard is corroborated by a co-worker, who is now his wife. F.B. the grievant's wife, testified that on or about April 2, Hahn had advised both the grievant and her that the key would not be switched. According to F.B., Hahn had assured the grievant that he would keep his key on a number of occasions. Their testimony is supported by that of Pearl Lenz, Chief Steward, who understood, based upon a conversation she had with Karen Hisel, that the grievant was under the impression he could keep his key.

Ms. Hahn denies that she ever advised the grievant that he could keep his key. It was Hisel's testimony that the grievant advised her that he wanted to keep the key, but that she advised him that he could not. It is her testimony that he thereafter indicated that he was dealing with personnel.

The foregoing places the events of April 5, 1995 in context.

On April 5, 1995, the grievant was scheduled to work a full shift commencing at 3:00 p.m. That day, at approximately 12:30 in the afternoon, the grievant's wife called in sick, with the flu. It was her testimony that she indicated to Jane Hahn at that time that while the grievant was ill, he was coming to work anyway. Hahn, who testified both on direct and rebuttal exam, was never asked about this conversation.

On April 5, the grievant came to work as scheduled and commenced work. At some point during the first half of his shift, he and Darlene Connors, who had returned to work, had a conversation with respect to the key. At the time the grievant was working in the position that had been vacated by Connors. Upon her return, it was Connor's understanding that she was to get her prior position back. According to Connors, they argued about whether she would get her original key back. Following the conversation, the grievant continued to work his shift. He did so until approximately 5:35, approaching his lunch break. At that time he saw Bev Mickelson and noticed that she had a new schedule on the desk. They had a brief conversation, during the course of which Mickelson confirmed that Connors was to get her original key back. According to the grievant, he was not happy with the information, grabbed his coat, punched out, and left the premises. He got into his truck and went home. Both Hisel and Connors observed the grievant as he left. Hisel described him as looking mad, not sick. Connors described him as "madder than hell".

Carol Berendes observed the grievant's conversation with Mickelson, which she described as "animated". According to Berendes, as the grievant was leaving the building, he approached her and indicated that according to Mickelson he was not going to keep his key, since Darlene Connors was returning to work. Berendes went on to indicate the grievant thereafter indicated "it sucks", or some similar remark, and that he was going on a supper break. Berendes testified that the grievant never indicated that he was ill or not feeling well. Berendes testified that the grievant's body language and his tone of voice indicated to her that he was upset and angry both while talking to Mickelson and as he left.

The grievant drove home. Upon his arrival at home, he told his wife that he had lost his key. The grievant and his wife both indicated that he was ill at the time. They indicated that he felt physically ill and began to vomit. The grievant indicates that he requested that his wife call him in sick, and as soon as he was able, he thereafter went to bed.

At approximately 5:50 p.m., the grievant's wife telephoned Jane Hahn at home. According to Ms. Hahn, who was cooking dinner when the phone call came, the grievant's wife phoned and indicated, "M. came home from work, and is he pissed." Hahn claims she asked why and was told that no one told him his key was switching. Hahn then claims she asked the grievant's spouse whether or not he had indicated that he was leaving, and when told no, replied she wished he would have because past practice has been termination for such an event. The grievant's wife indicates that during the course of the conversation she advised Hahn that M. was not feeling well. She indicated that she called Hahn because Hahn had previously assured both of them (she and her husband) that he would keep his existing key. According to her testimony, the two talked about the key. She denies that Hahn ever indicated that her husband would be subject to termination for failure to report back to work. Hahn denies that she was ever advised that the grievant was feeling ill.

Following this conversation, Hahn called the Health Care Center and talked with Bev Halweg and indicated that she had just received a phone call from the grievant's wife, indicating that the grievant had left the facility. Following her conversation with Hahn, the grievant's wife called the Health Care Center and indicated that her husband was ill and would not be returning to work. According to the grievant's wife, this phone call occurred prior to 6:00 p.m. The ward clerk who received the phone call clocked the call in at 6:12 p.m. The grievant punched out for his break at 5:39 p.m. He would have been due back from his break at 6:09 p.m.

Following these calls, the grievant's wife called Ms. Hahn at home a second time. She estimates the time of this call to be approximately 6 p.m. She indicates that she made this call because she was upset about the key and Hahn's role in advising the two of them that her husband would be able to keep the key. During the course of this very brief conversation, she indicated that she had called her husband in sick, and that Hahn responded that she had already called Deb Halweg and that Deb Halweg had said he was fired, so it did not matter. Hahn acknowledges the second phone call, which she described as occurring 10 or 15 minutes after the first one. According to Hahn, the grievant's wife indicated that her husband had come home and was sick and was vomiting.

The next day, April 6 a meeting occurred involving various management officials, the grievant, his spouse. During the course of that meeting, the allegations of abandoning his job were made against the grievant, and, according, to Hahn, the grievant made no statement. The grievant was thereafter discharged, the discharge was grieved, and appealed to this proceeding.

The Sauk County Health Care Center personnel policy that governs this matter is set forth above. According to Ms. Hahn, and Ms. Halweg, the policy is well known, critically important, and followed. According to Jane Zuehlke, Director of Nurses, the Grievant was discharged for violation of this policy. The Grievant testified that he was not aware of the policy. Ms. Lenz testified that the policy is not rigidly enforced.

Both parties point to prior incidents in support of their respective positions. Five incidents have been made a part of the record. The first incident occurred on February 1, 1995 and involved an employe by the name of Tonia F. On that day, Tonia was pulled from one work site to another. She responded in anger indicating that she did not want to work on the site to which she had been assigned. She confronted her supervisor about the move and indicated she was leaving. When reminded that if she left the facility, she would be terminated, she indicated, "I don't care", and left. She was thereafter terminated. All witnesses characterize this incident as an employe quit.

The second incident occurred on February 8, 1995 and involved employe Kim B. On that day, Kim was evidently upset with a co-worker. She spoke with her supervisor about her concern and apparently unsatisfied, punched out and walked off the job without informing her supervisor. The Employer regarded her action as grounds for termination, and she was terminated. The employe in question was a probationary employe without access to the grievance procedure.

The third incident made a part of the record occurred on Friday, September 23, 1994, and involved an employe named Monica L. September 23 was employe L's last work day as a CNA. Evidently, she left work during the middle of her shift, left a note indicating that she had gone, and did not return. The employe was not terminated, but rather received a written warning.

The fourth incident in the record occurred on April 5, 1995 and involved an employe named Jim B. On that evening, Mr. B requested a change in floor assignments in order that he not have to work with a certain part-time aide. When that request was denied, Mr. B. left a note indicating "You'll have to find someone else to work 5E. I'm leaving." Mr. B. then left the premises. A series of phone calls transpired. Mr. B. was advised that he would be terminated unless he returned to the facility, and he did return. The management of the Health Care Facility determined to discharge Mr. B. and he was discharged. The County Personnel Committee reinstated Mr. B. on a last-chance basis.

The fifth incident noted in this record involved an employe named Candi F., and occurred on February 26, 1995. It appears that Ms. F. left the facility during her 15-minute paid break, drove to a convenience store, purchased cigarettes for a resident, and returned to the facility within the 15-minute break. She was given a written warning for leaving the facility without contacting a supervisor.

ISSUE

The parties stipulated to the following issues for decision.

1. Did the grievant resign his position on April 5, 1995?

2. If not, did the County have just cause to discharge the grievant?

3. If the answers to questions 1. and 2. above are answered in the negative, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 3 - MANAGEMENT RIGHTS

3.01 The Employer possesses the sole right to manage and operate its affairs in all respects and retains all such rights it possessed prior to this Agreement which are not expressly modified of superseded by this Agreement. Such rights of the Employer to manage its affairs shall be liberally construed and modified only by the express language of this Agreement. Those management rights include, but are not in any way intended to be limited by, the following:

A) To manage, direct, and control the operation of the work force;

B) To determine the type, quality and amount of services to be provided and the appropriate means of providing those services;

C) To hire, transfer and promote, and to demote, discipline, and discharge employees for just cause;

D) To make, modify and enforce reasonable rules or regulations and standards of performance applicable to the work force;

E) To evaluate employee performance and to plan and schedule training programs;. . .

. . .

ARTICLE 9 - SENIORITY

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9.04 Loss of Seniority: Employees shall lose their seniority for any of the following reasons:

1. Discharge for just cause;

2. Resignation. Any employee absent for two

consecutive work days without notifying the Employer of the reasons for absence shall be considered having resigned. Questions on the reasons given for absence shall be dealt with in a write-up conference. Evidence of abuse given by the Employer shall subject the employee to appropriate discipline;

3. Retirement;

4. Unexcused failure to report to work after the expiration of a vacation period, leave of absence or period of which worker's compensation has paid; or failing to report to work within ten (10) days after written notice of recall from layoff; or,

5. On layoff for a continuous twelve (12) month period of time.

. . .

12.05 Doctor's Certificates: A doctor's certificate may be requested by the employee's supervisor after the employee has been absent for three (3) consecutive work days. For sick leave days with pay taken on weekends, or holidays, or days immediately preceding or following weekends or holidays, the employee may be required to submit a doctor's certificate that the employee was unable to work. This provision shall apply only to employees who the Employer has reason to believe are abusing sick leave and shall not apply on a bargaining unit-wide basis. It is agreed between the parties that falsification of sick leave information is dishonesty, and, as such, may subject an employee who falsifies such information to discipline.

POSITIONS OF THE PARTIES

Citing Arbitrator Carroll Daugherty's seven standards, the County contends it has met its burden of proof in establishing that the discharge of the grievant was for cause. Citing arbitral authority, the County contends that proof by a preponderance of the evidence is sufficient for the Employer to satisfy its burden. The Employer contends that the grievant does not dispute the fact that he violated the County rule requiring him to notify his supervisor if he was leaving the premises. Citing further authority, the County contends that the scope of review of its decision is limited.

The County's post-hearing brief is structured to address the seven questions posed by arbitrator Daugherty.

Arbitrator Daugherty's first question; "Was the employe given advance warning of the possible or probable disciplinary consequences of his conduct?" The Employer contends that the personnel policies, applicable to the grievant, control this proceeding. The Employer points to the leaving the premises rule and contends the grievant violated the rule on its face. The Employer points out that there are disciplinary consequences for violation of the rules. The Employer further points out that the grievant signed to acknowledge receipt of the rules. On March 1, 1995, slightly one month before the grievant walked off his job, a memorandum was circulated to all unit nurses reiterating that employes should not leave the SCHCC premises during working hours without punching out and without permission from a supervisor. Halweg testified that the memo was disseminated throughout the Center, and that all employes had access to it.

The Employer points to Tonia F. and Kim B. and contends that their actions in leaving the premises resulted in their discharge.

The Employer contends that the grievant's claim that he was unaware of the County policy is not credible in light of the fact that Halweg testified that the grievant informed on a co-worker for what the grievant believed to be a violation of the policy. Other witnesses testified that the policy was well-known.

Arbitrator Daugherty's second question; "Was the rule or order reasonably related to the efficient and safe operation of the business?" The Employer contends that a rule which requires patient caregivers to remain on premises and/or to inform their supervisors if they are leaving the premises, is critical to the delivery of quality care to patients who desperately need it.

Arbitrator Daugherty's third question; "Before administering discipline, did the Employer make an effort to discover whether the employe did, in fact, violate a rule or order of management?" The Employer contends that there is no dispute the grievant failed to tell his supervisor he was leaving the premises. The Employer goes on to argue that it is not credible, for reasons set forth above, that the grievant did not know of the policy. The County goes on to argue that the grievant was feigning illness and that the Employer was aware of that fact at the time of termination. The Employer relies upon Ms. Hahn's version of the telephone conversations. At the time the Employer's wife called in it was 6:12 p.m. and the grievant was already absent without authority. The Employer points to the testimony of numerous witnesses who described the grievant as angry, but not ill, prior to the time he left on April 5. The Employer notes that the grievant never presented any medical evidence in support of his claim of illness. The Employer points out that the grievant's testimony conflicts with that of a number of other witnesses and contends that the grievant had a motive to fabricate the tale of his illness.

Arbitrator Daugherty's fourth question; "Was the Employer's investigation conducted fairly and objectively?" The Employer contends that it was and further contends that there is no substantial dispute as to the facts.

Arbitrator Daugherty's fifth question; "Did the investigation produce substantial evidence or proof that the employe was guilty as charged?" Once again, the Employer contends that there is no dispute of fact that a violation of the policy occurred.

Arbitrator Daugherty's sixth question; "Had the Company applied its rules, orders, and penalties without discrimination?" The Employer contends that under circumstances paralleling that of the grievant, employes who left the premises without notifying their supervisors were discharged. The Employer relies upon the Tonia F. and Kim B. incidents. The Employer notes that Jim B. was reinstated, but that that occurred only after the management of the facility determined to discharge him. The County further distinguishes the B. situation in that he had returned to his post. The County goes on to distinguish the Candi F. matter in that she left and returned within her allotted time and also the Monica L. matter because Ms. L. had provided a note to her supervisor prior to leaving her unit. The Employer also notes that with respect to Ms. L. it was her last day on the job.

Finally, Arbitrator Daugherty's seventh criteria; "Was the degree of discipline administered in the particular case reasonably related to a.) the seriousness of the offense, and b.) the employe's record of service?" The Employer contends that the act of walking off the job without notice is a most serious offense. The context is that the grievant cares for severely incapacitated residents who are in need of a high degree of care. The Employer analogizes this to the creation of a safety hazard and contends that such action warrants strong disciplinary reaction. In the instant case, the Employer contends that the grievant's actions put the residents entrusted to his care at risk.

With respect to the grievant's record of service, the County notes that the grievant had a relatively short record of service marked by several counselings for anger and that the grievant's record was noteworthy for his demonstrated difficulty in working with others. In short, the County contends that the grievant's short, lackluster employment record strongly militates in favor of the penalty of discharge.

Finally, the employer cites arbitral authority in support of the penalty of discharge where an employe quits his post in violation of a work rule.

In its reply brief, the County contends that reasonable minds could conclude that a preponderance of the evidence supports the conclusion that the grievant resigned his position when he walked off the job on April 5, 1995. The County cites the grievant's remarks to Hisel on April

3. The grievant made it clear to at least two other employes that he was very displeased with the prospect of losing his key. Finally, the grievant's fiance called Jane Hahn communicated the grievant's anger over the loss of the key, and never mentioned anything about his alleged illness. The employer's reply brief goes on to take issue with the Union's characterization of certain facts and with certain arguments set forth by the Union.

The Union contends that there is no evidence that the grievant resigned. It characterizes this allegation as completely baseless and argues that there is no letter of resignation, nor is there testimony that the grievant told any supervisor that he was quitting prior to his leaving the facility on April 5. The Union cites arbitral authority for the proposition that an employe is deemed to have quit only where there is a clear intent expressed to do so. The Union contends that had the grievant intended to quit, why would he have had his wife call the facility to report that he was too sick to return to work? Finally, the Union contends that even the facility management did not deem his actions to constitute a quit. Had the administration believed the grievant's actions of April 5 to have constituted a resignation, they would not then have issued a letter of dismissal the next day.

The Union contends that the County lacked just cause to discharge the grievant, citing Arbitrator Carroll Daugherty's seven standards. (Enterprise Wire, 46 LA 359).

The Union contends that there is no well-stated and well-understood rule that the grievant can be said to have violated. The Union contends that there is no rule that warrants discharge for leaving the facility. The Union does acknowledge the existence of Rule #16 but contends that the applicability of this rule to the circumstances at hand is questionable, since the grievant left on his unpaid lunch break which is by definition not "while on duty". As to the Mickelson reminder memorandum, there is no evidence that that document or the information contained on it was ever shared with the Nursing Assistants. Management witnesses testified that the information was communicated by word of mouth. The grievant testified that he was personally unaware of its content.

The Union contends that the enforcement of the rule has been, at best, inconsistent. The Union contends that the County came up with two cases in which an employe left the facility during work hours and were terminated. One of these, Tonia F., quit. Another, Kim B., was a probationary employe without recourse to the grievance procedure and not covered by a just cause standard. The Union points to three other cases and notes that they all involved employes who left the facility without notice, and who were not terminated. To the extent that there is a rule, the Union contends that the enforcement has been inconsistent. The Union contends that the record establishes that the grievant's behavior, for which he was discharged, was conduct tolerated by other employes.

The Union contends that the grievant had a good work record. The Union acknowledges that he was a short-term employe but points to his performance evaluations which were no lower than satisfactory, and in many instances, above-average. The Union contends that the grievant had a discipline-free record and favorable performance evaluations, but was discharged nonetheless.

The Union contends that the County's action in terminating the grievant demonstrated a complete disregard for common standards of fairness. The Union contends that the grievant left the facility during his unpaid lunch break, went home, and became too ill to return to work. His fiance called him in sick. The Union notes that the County does not believe the grievant was sick. However, no one questioned his illness at the time. No one suggested that he get a doctor's note. The Union notes Halweg's testimony that if she believes someone has falsely called in sick, there is not much that can be done about it. The Union also notes Zuelke's testimony that if she had reason to believe that someone called in sick who was not in fact sick, she would try to encourage them not to let it happen again. The Union reiterates that there is no evidence that the grievant was not sick when he arrived at home on April 5.

In summary, the Union contends that there is no evidence to support a conclusion that the grievant resigned. The Union also contends that there is no rule which supports a discharge in this case. The Union contends that whatever rule exists does not cover the circumstances that occurred. Finally, the Union contends that there has been inconsistent application of the work rule. Finally, there was absolutely no attempt made to try and determine whether or not the grievant was legitimately ill. His claim of illness was discounted with no attempt to determine its truthfulness.

In its reply brief, the Union takes issue with several of the employer's arguments, and also with the factual underpinnings of the Sauk County argument.

DISCUSSION

The first question raised in this proceeding is whether or not the grievant resigned. The simple answer to that is that he did not. I credit Hisel's testimony to the effect that he indicated to her that he would resign if his key were removed. I regard those remarks as born of frustration and bravado. His comments to Hisel, no matter how broadly disseminated, do not constitute an effective resignation. Those remarks were not made contemporaneously with his April 5 exit of the building. There is no indication that he said anything to that effect to Berendes. Her testimony was that he made a reference to the fact that "It sucks" and "he was going to his supper break". His reference to a break is inconsistent with a state of mind that he was in the process of resigning his position. There was no testimony in the record that he said anything to Mickelson that could be construed as a resignation. Once home, he directed his wife to call him in sick. That is consistent with an intent to return to work and inconsistent with an intent to resign.

The Grievant evidently returned to work the next day, April 6. Article 9.04 of the parties' collective bargaining agreement defines a resignation as an absence for two consecutive work days without notice of the reasons for absence. In light of the contractual provision, his behavior cannot be viewed as a constructive resignation within the meaning of the parties' labor agreement.

The second question raised in this proceeding is whether or not the grievant was discharged for cause. I believe the record establishes that the grievant walked off the job in anger over the loss of his key. This conclusion is consistent with the testimony of numerous witnesses and anger manifested by the grievant on other occasions. I do not believe the grievant was ill, or at least not so ill that he could not return to work. If he fell ill at home, it was anxiety-driven.

Any stress-induced illness experienced by the grievant once he arrived at home was not the responsibility of the Employer. The grievant, and his wife, claim that Ms. Hahn misrepresented the status of the key. Hahn denies having done so. I am skeptical that Hahn would make any such representation given the universal testimony to the effect that an employe on leave of absence was entitled to return to the position vacated. 1/ Assuming arguendo, that Hahn did make such a representation, I do not believe that Ms. Hahn was in any position to make any such commitment. I believe that fact should have been reasonably apparent to the grievant. If she made such a commitment, the grievant believed it because he wanted to believe it. He believed it in the face of contrary indications from Halweg, his supervisor, Hisel, the union steward, and Connors, the individual whose key was in dispute. At an absolute minimum, his conversations with those individuals put him on fair notice that many people believed that Connors was entitled to her key upon her return.

I credit Ms. Hahn's version of the telephone conversations with the grievant's wife. I further credit her testimony with respect to the sequence. Her testimony is more logical. The grievant's wife is a CNA, employed at the Sauk County Health Care Center. If her testimony is to be credited, her initial reaction to her violently ill husband's presence at home was to call Hahn at home, after working hours, and engage in a conversation over the status of the key. While it is certainly possible this occurred, it seems unlikely. To further credit the grievant's wife, I must discredit completely Hahn's testimony that she advised the grievant's wife that his failure to advise his supervisor of his departure threatened his employment. The grievant's wife categorically denied that those remarks were made. There is absolutely no explanation for the second call from the grievant's household to Hahn. I believe it to be far more plausible that the grievant, upset and angry over the loss of his key, went home. Upon his arrival, he advised his wife that he had lost his key, and she thereafter called Hahn who she regarded as someone who would be sympathetic to the issue. I believe Hahn advised the Grievant's wife that he was in trouble because of his leave. When he realized, or was made to realize that he had made a mistake, I believe the grievant claimed to be ill. I believe his judgment in so doing compounded his original error.

1/ I do not regard Lenz' testimony as corroborating the grievant with respect to what he was told about the key. Her source of information was Hisel. Hisel's source of information was the grievant, who allegedly was given assurances by Personnel.

Both parties argue that this matter should be analyzed under Arbitrator Daugherty's seven standards. In deference to that mutually-advanced contention, I will do so. Daugherty's first question essentially asks whether or not the employe was put on notice that his behavior was objectionable. It is not clear how well that policy has been communicated. The grievant received the policy manual. The policy manual is a lengthy document, with numerous provisions. It is entirely believable that he did not review those provisions one by one for the purpose of committing them to his memory. Similarly, the Mickelson memo was no doubt circulated. There is absolutely no evidence in the record the contents of that was communicated to the grievant. However, it is clear to me that the grievant knew, or should reasonably have known, that he could not simply abandon his job and not return. This premise is fundamental to the existence of the job. Any reasonable man knows that abandoning his job in the middle of his shift will subject him to some disciplinary consequence.

Arbitrator Daugherty's second question is whether or not the rule is reasonably related to the efficient and safe operation of the business. Clearly, the answer is yes. This health care facility exists for the purpose of providing care to residents who require significant care. No one should be more sensitive to that fact than a caregiver.

Arbitrator Daugherty's third question is whether or not the employer made an adequate investigation. The investigation here was adequate. Prior to discharge, the employer satisfied itself to a reasonable certainty that the grievant had walked off the floor, without permission, and was angry over loss of his key. This was corroborated by several witnesses. The employer was also privy to the rather bizarre sequence and series of conversations between Ms. Hahn and the grievant's wife. I believe that the employer had fully satisfied itself as to the applicable facts. The Union notes that the Employer, though skeptical of the grievant's illness, never demanded medical verification. This would certainly seem to be a logical request, especially in the context of the management mindset, expressed by Halweg and Hahn, that the grievant's behavior warranted summary discharge. The right of the County to demand such documentation is addressed in Article 12.05 of the labor agreement. The scope of this right was neither argued nor briefed in this proceeding. To the extent that this represents an employer oversight, I do not regard it as fatal to the decision to discharge. I regard the grievant's alleged illness as so inherently implausible in the context of all of the evidence and testimony as to reject it. Given my conclusions as to what occurred and credibility determinations as set forth above, I am not prepared to overturn this discharge on this basis.

With respect to Arbitrator Daugherty's fourth criteria, the question of whether the investigation was conducted fairly and objectively, there is no indication of a biased investigation. Similarly, with respect to the fifth criteria, whether or not the investigation produced substantial evidence that the employe was guilty, I believe the only factual dispute was whether or not the grievant fell ill. As noted, I believe that under all the circumstances, the employer was reasonable in rejecting the grievant's claim of illness.

With respect to the sixth criteria, "Had the Company applied its rules, orders, and penalties without discrimination", I disagree that there are a significant number of prior incidents so as to constitute a practice. Tonia F. quit. The circumstances of her resignation/discharge are simply no parallel to this proceeding. Kim B. walked out and was discharged. The record is silent as to whether Ms. B. desired to continue her employment or not. Ms. B. was probationary. There is simply an inadequate record with respect to Ms. B. to support either the Union or the County in this matter. Similarly, I do not believe the facts surrounding Ms. Candi F. are relevant to this proceeding. While it is certainly true that she left her post during work hours to get a packet of cigarettes for a resident, that is a far cry from simply walking out and not returning to the job. It may well have been an indiscretion, and one for which she was entitled to discipline, however, it was not the equivalent of the grievant's action. Admittedly, Monica L. abandoned her post, and was not discharged for so doing. However, the facts in the L. matter also include the fact that she left early on her last day of work at the Health Care Facility. While technically this constitutes support for the Union's claim, as a practical matter, the management of the Health Care Facility had little or no interest in attempting to discharge an employe who had already worked her last day on the job.

The most troublesome prior occurrence was that involving Jim B. Mr. B. was terminated for walking off the job. He was ultimately reinstated by the County Personnel Committee. Evidence in the record suggests that the reason for that reinstatement was the Committee's view that his subsequent return to work mitigated his prior action. Mr. B's return to work certainly does distinguish the facts of his case from the facts presented here. I believe the grievant, when he recognized the seriousness of his action, was confronted with another decision. I believe he elected the wrong course. I believe the behavior supports the decision to discharge. To the extent the County Personnel Committee determined that Mr. B's return to work warranted mitigation, that is within the province of that body. Having done so, I do not believe the County is now saddled with a practice whose effect is to allow employes to walk off the job free of concern that their conduct will lead to termination.

Arbitrator Daugherty's final criteria is "Was the degree of discipline administered in the particular case reasonably related to a.) the seriousness of the offense; and b.) the employee's record of service?" I believe this was a serious offense. The grievant's actions left the employer in the lurch for patient care. I also believe that this was not an isolated incident. The grievant had previously demonstrated bouts of anger which had interfered with his ability to perform his job. He is a nine-month employe which is a short-term employe. This is not an employe with a long-standing and trouble-free work record against which an indiscreet moment must be measured.

In essence, I believe the grievant did that with which he was charged. He walked off the job, in anger over the loss of his key, and subsequently feigned illness. This conclusion is the product of a number of credibility determinations. To credit the grievant's testimony requires me to find that a number of employer witnesses including Jane Hahn, Deb Halweg and Karen Hisel seriously misrepresented events and/or conversations under oath. It further requires that I discredit the testimony of Hisel, Connors, and Berendes to the effect that the grievant appeared angry and not ill as he left.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 24th day of October, 1996.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator

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