BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DODGE COUNTY HEALTH FACILITIES
EMPLOYEES, LOCAL 1576, AFSCME, AFL-CIO

and

DODGE COUNTY

Case 197
No. 53978
MA-9506

Appearances:

Mr. Sam Froiland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing for the Union.

Davis & Kuelthau, Attorneys at Law, by Mr. Roger E. Walsh, appearing for the County.

ARBITRATION AWARD

Dodge County Health Facilities Employees, Local 1576, AFSCME, AFL-CIO, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. Dodge County, herein the County, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Juneau, Wisconsin, on June 19, 1996. A stenographic transcript was made of the hearing, a copy of which was received on July 3, 1996. The parties completed the filing of post-hearing briefs on August 29, 1996.

ISSUES:

The parties stipulated to the following issues:

> Did the County have the appropriate cause under the collective bargaining agreement to discharge the grievant on October 30, 1995? If not, what is the appropriate remedy?

BACKGROUND:

On March 29, 1990, the grievant, Betty Cullinan, was hired by the County to work at its health care facility as a certified nursing assistant. Cullinan held that same job classification during her entire employment by the County until her discharge on October 30, 1995. 1/

Cullinan was suspended for three days without pay on October 12, 13 and 14. During the County's investigation of the incidents which led to said suspension, Cullinan informed management of certain incidents of patient abuse. As a result of the investigation of those incidents of patient abuse, one employe was terminated and at least one other employe resigned, rather than being discharged. Although Cullinan was the employe who ultimately brought the patient abuse to the attention of management, she received another three-day suspension without pay for failing to report the patient abuse incidents when she first knew of the incidents. The County met with Cullinan and a Union representative on October 17, at which meeting the County informed Cullinan of the second suspension and certain other conditions under which her employment would be continued. That suspension was effective on October 23, 24 and 25. Subsequent to the meeting on October 17, the County prepared a Last Chance Settlement Agreement which set forth the suspension and the other conditions. The Last Chance Settlement Agreement read as follows:

> Non-precedent Setting Agreement
> between
> Management and Union
> concerning
> Conditions of Betty Cullinan's Continued Employment
>
> Due to Ms. Cullinan's efforts in presenting management with information of inappropriate situations, Clearview is willing to make an (sic) non-precedent setting exception to the disciplinary policy and continue Ms. Cullinan's employment under the following conditions:
>
> 1. *Immediate Position Transfer:* Ms. Cullinan immediately accepts a full-time float day shift position and will remain in that position until such time that condition three (3) is met.
>
> 2. *Future Positions:* Ms. Cullinan agrees only to post or accept positions or assignments on units that care for predominantly oriented residents.
>
> 3. *Transferring from Float to Another Position:*

1/ Unless otherwise specified, all other dates herein refer to 1995.

> Should Ms. Cullinan desire to leave the full-time day shift float position, Ms. Cullinan should notify Clearview by signing postings of interest to her and discuss her interest with the Personnel Specialist. The Personnel Specialist will coordinate the administrative consideration of the request. If Administration deems the position appropriate for Ms. Cullinan and in the best interest of Clearview, Ms. Cullinan may be awarded said position without consideration of contractual obligations or policy considerations normally associated with the awarding of such positions.
>
> 4. *Disciplinary Action:* Accept the three day disciplinary suspension that was discussed on October 17, 1995.
>
> 5. *Grievances Regarding this Issue:* Betty Cullinan and the Local 1576, AFSCME, AFL-CIO mutually agree not to grieve or otherwise contest any part of this agreement, related disciplinary action or the administrative consideration of future position requests.
>
> Let there be no misunderstanding that any further work incident in the next two year period, regardless of the incidents (sic) nature, may result in immediate dismissal from employment. If any part of this agreement is violated by either Betty Cullinan or the Local 1576, AFSCME, AFL-CIO, Clearview reserves the right to dismiss Betty Cullinan immediately.

The Settlement Agreement was presented to representatives of the Union on October 18. After reviewing the agreement, the Union representatives returned the Settlement Agreement, with their signatures on it, to the County on October 20. The County then attempted to contact Cullinan by telephone, but Cullinan did not respond to any of the messages left by the County. Cullinan reported to work for the a.m. shift, which runs from 6:00 a.m. to 2:15 p.m., on October 27 as scheduled. When she reported for work, Cullinan was given the Last Chance Agreement to read and to sign. After reading the Agreement, Cullinan said that she did not want to sign it until she had an attorney look at the document. There was a Union representative present at the meeting. The supervisors present at the meeting told Cullinan that she would be terminated if she did not sign the Agreement at that time. Cullinan was very upset by the

County's demand, but she did sign the Agreement. Cullinan finished working her shift on October 27. Part way through her shift on October 28, Cullinan said she did not feel well and left work early at about 9:06 a.m. Prior to the start of her shift on October 29, Cullinan called to report that she was ill and would not be to work on that date. Later on October 29, Cullinan again called to say that she would not be to work on October 30. At the beginning of her scheduled shift on October 30, Cullinan had 3.18 hours of accumulated paid sick leave remaining, so she did not have sufficient accumulated paid sick leave to cover her absence for the entire shift on said date. However, she did not file for a leave of absence to cover the portion of her shift not covered by her accumulated paid sick leave. In a letter dated October 30, the County terminated Cullinan's employment. Said letter read in part as follows:

> On Saturday, October 28, 1995 you left work at 9am. On Sunday, October 29, 1995 at 2:30am you called stating that you would not be at work on either October 29 or 30, 1995. Payroll reported that you do not have sufficient available sick time to cover these absences. Without available sick time to cover these absences, your remaining option, per our policies and practices, was to submit an appropriate leave of absence request before the end of your shift on October 30, 1995. No leave of absence request was received.

In 1985 the County adopted a leave of absence policy procedure. The most recent statement of that procedure is dated August 1, 1990, and contains, in part, the following:

> 1. Employees must request a leave of absence in advance of beginning a leave and as soon as it is known a leave is needed by submitting a fully completed Request Form to their supervisor. These forms are available in the Personnel Office.
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> . . .
>
> The consequences for employees who do not meet the above responsibilities will be as follows:
>
> 1. Employees who absent themselves from duty without prior approval will be placed on unauthorized absence and subject to disciplinary action, which may include discharge.

The County publishes an in-house newsletter, copies of which are available to employes in the breakrooms and lunchrooms and also are posted near employe entrances. The July 29, 1992, issue contained an article entitled "Prior Approval Of Medical Leaves Required" and the following initial paragraphs:

> In the past, Dodge County Health Facilities has approved medical leave of absence requests brought in after the beginning of the leave to cover already elapsed time. Effective August 1, 1992 medical leaves of absence will no longer be retroactively approved. Faxed copies of the leave of absence forms will be accepted. Our fax number is 414-386-3800.
>
> This is not a change in policy, only an announcement that our policy and the union contract will be strictly enforced. Please read the policy and relevant contract section.

The article then quoted the contractual provisions relating to medical leaves and stated the County's Leaves of Absence policy, dated August 1, 1990.

The October 14, 1992 edition of the newsletter contained an article entitled "Prior Approval Of All Leaves Of Absence Required." Said article included the following statements:

> When leaves of absence are received after the beginning of the leave, uncovered time off prior to receipt of the leave is considered unauthorized absence. Employees who have run out of sick leave and call in sick will incur an instance of unauthorized absence if a medical leave of absence form is not submitted prior to the beginning of the shift.
>
> . . .
>
> IT IS IMPORTANT THAT EMPLOYEES KEEP TRACK OF THEIR SICK LEAVE AVAILABLE SO THAT THEY KNOW WHEN A LEAVE OF ABSENCE IS REQUIRED. No one else will notify employees when they need a leave. They can call Kim at 3425 if they work at Clearview or Mike at 3426 if they work at the Health Center to check on their status regarding sick leave, vacation and personal days.

During Cullinan's orientation as a new employe, the County's policy on leaves of absence was among the information presented to her.

On three previous occasions when she was running out of paid sick leave, Cullinan submitted a written request for a medical leave of absence on a timely basis. Cullinan took paid sick leave on June 19 and 20, 1994, which left her with 11.41 hours of paid sick leave. She was not scheduled to work on June 21 or 22, 1994. On June 22, 1994 she submitted a written request for a leave of absence which stated that she would be off from June 19 through June 25, 1994. A physician's statement accompanied the request for a leave of absence. Cullinan was scheduled to work on June 23, 24 and 25, 1994. The request indicated that she planned to take vacation for those hours on June 24 and 25, 1994, not covered by her accumulated paid sick leave. After taking paid sick leave for June 23, she had a balance of 3.66 hours of paid sick leave.

On July 7, 1994, Cullinan submitted a written request for a medical leave of absence, which leave would end with her return to work on July 16, 1994. The request specified that she wished to use vacation and paid holiday time to cover her absence. Cullinan had used sick leave to cover her absence on July 6, which reduced her accumulated paid sick leave balance to zero. She was not scheduled to work on July 7. She was scheduled to work on July 8, 9, 10, 11, 14 and 15 and she received vacation pay for those days.

On January 16, 1995, Cullinan submitted a written request for a medical leave of absence due to an injury. The request did not specify a date for her return to work. Cullinan had worked on January 12, but was scheduled off work on January 13, 14 and 15. She was scheduled to work on January 16. As of January 16, Cullinan had a balance of .72 hours of accumulated paid sick leave. Because the medical condition had resulted from an on-the-job injury, the leave was not required and her request was not processed.

POSITION OF THE UNION:

The Union believes that the County did not have just cause to discharge Cullinan. The "last chance agreement" should be given no weight, since it was signed under duress. The County acted in an unreasonable manner when it told Cullinan that she would be terminated if she refused to sign the agreement immediately. Prior to October 27, Cullinan was not aware that the County was drafting such an agreement. The Union had no idea that the County intended to present the agreement to Cullinan in the manner in which it was done.

The County did not establish a violation of any work rule related to the specific incident for which Cullinan was terminated. Even if the County had established a rule violation, the degree of discipline administered was far too severe for an infraction such as a violation of an absenteeism and leave of absence policy.

Cullinan reported some instances of patient abuse to investigators for the State of Wisconsin. In retaliation for that act, the County initially suspended Cullinan for not reporting the abuse earlier, even though she previously had reported it to the County's Director of Nursing, and, ultimately, discharged her for reporting the abuse.

Cullinan should be reinstated to her former position and should be made whole for all loss of wages and benefits.

POSITION OF THE COUNTY:

The Union's attempt to attack the Last Chance Agreement should be rejected. The terms of the agreement had been discussed and agreed to in principle by all of the parties at the meeting on October 17. When the agreement was presented to Cullinan, the signatures of two Union representatives were already on the document.

Cullinan violated a policy of which she was aware, as evidenced by her prior compliance with the policy. In 1993, an employe was terminated for failing to submit a written request for a leave of absence prior to the end of the first shift of the absence. An arbitrator upheld that termination. Cullinan was advised that her job was in jeopardy and that any violation of a work rule or policy could subject her to discharge. The claim that the discipline was too severe for the infraction ignores the last chance agreement.

The grievance should be denied.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE III
MANAGEMENT RIGHTS

3.1 Except as hereinafter provided, the Employer shall have the sole and exclusive right to determine the number of Employees to be employed, the duties of each of these Employees, the nature and place of their work and all other matters pertaining to the management and operation of the Facilities including the hiring, promotion, transferring, demoting, suspending, or discharging for cause of any Employee. This shall include the right to assign and direct Employees, to schedule work and to pass upon the efficiency and capabilities of the Employees and the Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or

Employees, such rights are retained by the Employer. However, the provision of this section shall not be used for the purpose of undermining the Union or discriminating against any of its members.

ARTICLE IV
NON-DISCRIMINATION

4.1 The Employer agrees that no Employee will be discriminated against on the basis of Union involvement, age, race, national origin, religion, color, handicap, sex, physical condition, developmental disability, family relationship or arrest or conviction record.

. . .

ARTICLE XIV
LEAVE OF ABSENCE

. . .

14.2 **Medical Leave.**

14.21 An Employee who has exhausted his/her sick leave accumulation and is unable to return to work due to illness or injury shall be granted, upon written request accompanied by a physician's or chiropractor's certification stating that the leave is necessitated by the disability of the Employee, a leave of absence for a period not to exceed six (6) months.

. . .

ARTICLE XVII
DISCIPLINARY PROCEDURE

17.1 The following disciplinary procedure is intended as a legitimate management device to inform Employees of work habits, etc. which are not consistent with the aims of the Employer's public function and thereby to correct those deficiencies:

A. For the first offense, the Employee may receive an oral written warning, not to be placed into any personnel file.

B. For the second offense, the Employee may receive a written warning to be placed into the personnel file.

C. For the third offense, the Employee may be subject to disciplinary action.

D. For the fourth offense, the Employee may be subject to further disciplinary action, including discharge.

17.2 The above sequence of disciplinary action shall not apply in cases which Management feels are just cause for suspension or immediate discharge.

. . .

DISCUSSION:

The Union contends that the Last Chance Agreement should not be given any weight, since it was signed under duress. The undersigned is not persuaded by the Union's arguments. There is little doubt that the County intended to put pressure on Cullinan by telling her that she had to sign the document immediately to avoid termination. Cullinan was present at the meeting on October 17 when the terms of the agreement were discussed. There is nothing in the record to show that the terms of the agreement went beyond the conditions which were discussed at said meeting. Such a conclusion is supported by the fact that the Union representatives signed the agreement and returned it to the County on October 20. If the agreement had contained conditions which had not been agreed to on October 17, the Union would have objected to those conditions before signing the agreement. By October 20, Cullinan's three-day suspension already was scheduled and the parties were all aware that she would not return to work until after the suspension. Certainly, it was not unreasonable for the County either to reduce to a written form the conditions for Cullinan's continued employment which had been agreed to by the parties on October 17, or, to require Cullinan to sign the resulting document without further delay. Thus, Cullinan should not have been surprised by either the document or the requirement that she sign the document immediately.

Further, after the Union signed the agreement, the County did try to contact Cullinan before her scheduled return on October 27. If she had responded to those attempts, she would

have had some time to review the agreement with an attorney before her scheduled return to work. There is no evidence in the record to show that Cullinan attempted to review the agreement with an attorney after she signed it. Neither did she file a grievance on October 27 or 28 to protest the County's action in requiring her to sign the agreement on October 27. If Cullinan intended to contest the County's requirement that she sign the Last Chance Agreement, the undersigned does not understand why she waited to file a grievance until after she was terminated. A grievance, protesting such pressure or alleging duress, could have been filed immediately after she signed the agreement on October 27.

Section 14.21 of the contract gives an employe, who has insufficient accumulated sick leave to cover an absence, the right to a medical leave of absence. Said language requires the employe to file a written request for such a medical leave. The policy adopted by the County sets forth the procedure to be followed by an employe in submitting such a request. The County has the right to adopt such policies for the administration of medical leaves, unless the policies unreasonably limit or restrict the employe's ability to utilize the medical leave provided in Section 14.21.

The record leaves no doubt that Cullinan was aware of the County's policy requiring an employe, who did not have sufficient accumulated paid sick leave to cover an absence, to file a written request for a medical leave of absence prior to the end of the employe's first scheduled shift covered by the leave. The County had publicized the policy in the employe newsletter on at least two occasions. The policy also was covered during the orientation of new employes. Cullinan had complied with the policy on at least two occasions in 1994, when she was going to be off work due to illness and she did not have sufficient accumulated paid sick leave to cover the full period of absence on either occasion. In early 1995, Cullinan also submitted a timely request for a medical leave, but the request was not processed since the absence was due to a worker's compensation injury.

The record fails to show that it was unreasonable of the County to expect Cullinan to file a request for a medical leave before the end of her scheduled shift on October 30. There is nothing in the record to demonstrate that Cullinan was physically unable to file a leave request on October 30. Based on her previous requests for medical leaves, it is reasonable to assume that Cullinan was aware of the amount of accumulated sick leave in her account at any given time. If she was unsure of how much accumulated sick leave was in her account, then she should have checked on the amount with the County.

Even if she did not agree with the contents of the Last Chance Agreement, Cullinan knew from the agreement that the County was of the opinion she could be discharged for any instance of misconduct during the next two years. As noted above, Cullinan was aware of the policy requiring an employe, who had exhausted their paid sick leave, to file a written request for a medical leave of absence prior to the end of the first shift covered by the leave. Thus, she was obligated to file a written request for a medical leave of absence on October 30. Her failure to file such a request violated a County policy which was known to her and thereby provided the County with cause to discipline her.

The Union believes that discharge was too severe a penalty for Cullinan's violation. Standing alone, it is unlikely that Cullinan's failure to request a medical leave prior to the end of her shift on October 30 would justify discharge. However, her violation of the medical leave policy followed a very specific warning in the settlement agreement "that any further work incident in the next two year period, regardless of the incidents (sic) nature, may result in immediate dismissal . . ." The settlement agreement only refers to any further work incident, without distinguishing between less serious and more serious incidents. Accordingly, the County did not violate either the settlement agreement or the contract by discharging Cullinan. Neither is there any evidence that the County has applied the relevant policy in an inconsistent manner.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the County had appropriate cause under the collective bargaining agreement to discharge the grievant, Betty Cullinan, on October 30, 1995; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 12th day of December, 1996.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator

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