BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SPOONER COMMUNITY MEMORIAL HOSPITAL AND NURSING HOME

and

SPOONER COMMUNITY MEMORIAL HOSPITAL AND NURSING HOME EMPLOYES, LOCAL #2425, AFSCME, AFL-CIO

Case 15
No. 53872
MA-5460

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by Mr. Stephen L. Weld, 4330 Golf Terrace, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Employer.

ARBITRATION AWARD

Spooner Community Memorial Hospital and Nursing Home, hereinafter referred to as the Employer, and Spooner Community Memorial Hospital and Nursing Home Employes, Local #2425, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the discipline of an employe. Hearing in the matter was held in Spooner, Wisconsin on May 23, 1996. Post-hearing arguments were received by the undersigned by August 6, 1996. Full consideration has been given to the testimony, evidence and arguments presented in rendering this award.

ISSUE:

During the course of the hearing the parties agreed upon the following issue:

> "Did the Employer have just cause to issue disciplinary notice to the grievant?
>
> "If not, What is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 2 - MANAGEMENT RIGHTS CLAUSE

Section 2.01: The Employer shall have the exclusive power, right and privilege to exercise all normal functions, policies and affairs with reference to the management and operation of the hospital and nursing home which are not specifically denied by this contract or forbidden by law. The non-exercise of such function or functions shall not constitute a waiver of any power, right, or privilege to exercise the same. The Employer shall not act unreasonably in the exercise of any such rights.

All economic amenities or benefits in effect April 1, 1986, which are not in conflict with the provisions of this contract, or not specifically referred to herein, shall continue in full force and effect.

Except as expressly modified by other provisions of the contract, the Employer possesses the sole right to operate the Hospital and Nursing Home and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of the Hospital and Nursing Home.

B. To hire, promote, transfer, schedule and assign employees in positions within the Hospital and Nursing Home.

C. To suspend, discharge, and take other disciplinary action against employees;

D. To relieve employees from their duties;

E. To maintain efficiency of Hospital and Nursing Home operations;

F. To take whatever action is necessary to comply with State or Federal law;

G. To introduce new or improved methods or facilities;

H. To change existing methods or facilities;

I. To determine the kinds and amounts of services to be performed as pertains to Hospital and Nursing Home

operations; and the number and kind of classifications to perform such services;

J. To determine the methods, means and personnel by which Hospital and Nursing Home operations are to be conducted;

K. To take action which is necessary to carry out the functions of the Hospital and Nursing Home in situations of emergency.

L. To unilaterally adopt reasonable work rules and policies. The reasonableness of those work rules and policies may be grieved by the Union.

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ARTICLE 11 - PAID SICK TIME

Section 11.01: Paid sick time shall constitute that period of time during which the employee is absent from his/her regularly scheduled workday as a result of any disabling injury or illness not covered by Worker's Compensation, and for which time such employee is entitled to and receives his/her accumulated sick time pay.

Section 11.02: All regular full-time employees shall earn sick time at the rate of one (1) day for each month of employment, computed from the initial date of employment, not to exceed a maximum of ninety-five (95) days.

Section 11.03: Paid sick time for part-time employees shall be computed on a prorated basis, as compared with a full-time employee using two thousand eighty (2,080) hours as a full year employment period. Such sick time shall be computed from the initial date of employment.

Section 11.04: Earned sick time will be paid from the first day of illness or injury for scheduled workdays for the first four (4) episodes of illness or injury during an employee's anniversary year. On the fifth and following episodes of illness or injury, not work related, during an employee's anniversary year, the employee will receive earned sick pay starting with the third scheduled day of

absence resulting from sickness or injury, unless the employee is hospitalized on the first and second day, in which event, the employee will be paid from the first day.

Section 11.05: To receive the benefits stated herein, the employee shall notify his/her department head or supervisor of his/her inability to work prior to the time he/she is to report for work. He/she shall keep his/her department head or supervisor informed on his/her condition, and advise his/her department head or supervisor as to his/her expected date of return to work. Failure to abide by the provisions of this section may result in disciplinary action. No sick time will be paid during an employee's vacation or leave of absence.

Section 11.06: No sick time shall be paid to an employee for any day on which he/she is not scheduled to work.

Section 11.07: Medical proof of inability to work due to injury or sickness, if requested or required, shall be furnished by a qualified physician within twenty-four (24) hours after requested; the cost of such report to be paid for by the Employer.

Section 11.08: Abuse of sick time taken by an employee shall constitute cause for discharge by the Employer; provided, no employee shall be discharged for such cause unless two (2) written warnings, in advance, have been given to said employee, with copies of said warnings to be given to the union steward, or other union official; this section shall be subject to the grievance procedure of this contract.

Section 11.09: All employees hired on or prior to April 26, 1991, who have five (5) consecutive years or more of service with the hospital or nursing home shall be entitled to receive fifty percent (50%) of their unused sick time as a separation benefit on voluntary termination, including retirement or death. All employees hired after April 26, 1991, who work for the hospital or nursing home for five (5) consecutive years or more shall be entitled to receive fifty percent (50%) of their unused sick time as a separation benefit on retirement or death.

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ARTICLE 18 - DISMISSAL

Section 18.01: After six (6) months of employment, an employee may be disciplined for just cause. For any and all offenses committed by employees, the Employer shall exercise reasonableness in taking disciplinary action with respect to any employee. The Employer shall, to the extent possible and reasonable, adhere to a policy of progressive discipline. A Union member, if he/she so requests, may have a Union steward present during any conference regarding disciplinary action. The Employer will notify the Union of any disciplinary action taken.

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BACKGROUND:

The Employer and the Union have been parties to a series of collective bargaining agreements and the most recent is effective from April 1, 1996 until March 31, 1998. Under the provisions of the collective bargaining agreement the Employer has the right to adopt reasonable work rules and policies. In 1988 the Employer issued a Personnel Policies Manual to all employes. This manual contained a section entitled Rules of Conduct, which itemized offenses for which the Employer would take disciplinary action. Amongst the offenses listed was excessive absenteeism. The Union never grieved the issuance of the manual, nor was an employe ever disciplined for excessive absenteeism. In 1990 the Employer twice issued a policy regarding Sick Time Abuse, with the second issuance being inserted in all employes pay envelopes. This policy states as follows:

POLICY
REGARDING: SICK ABUSE

Abuse of sick time by any employee will result in disciplinary action including, but not limited to, reprimand, suspension or discharge.

Abuse of sick time is defined as:

Four or more occurrences in an anniversary year, for a period of two years in a row.

Six or more occurrences in an anniversary year.

Michael Schafer /s/ 12/15/90

Administrator Date

The Union never grieved issuance of the policy. Employes were disciplined for violating the policy, however, discipline was neither consistently applied nor uniform.

During negotiations which culminated into the current collective bargaining agreement the parties discussed absenteeism and agreed to award employes who did not use sick leave during a six-month period with a $50.00 bonus. The parties also agreed to amend Section 11.04 of the collective bargaining agreement to the above language. On October 20, 1995 the Employer issued the following sick time abuse policy:

POLICY
REGARDING: SICK ABUSE

Abuse of sick time by any employee will result in disciplinary action including, but not limited to, reprimand, suspension or discharge.

Abuse of sick time is defined as:

Five or more occurrences in an anniversary year, for a period of two years in a row.

Six or more occurrences in an anniversary year.

Michael Schafer /s/ 10/20/95
Administrator Date

In November, 1995 the Employer issued written notices to ten (10) employes whose actions, in the Employer's determination, met the above definition. Thereafter, Roxanne Mueller, hereinafter referred to as the grievant, filed a grievance alleging the Employer's actions violated the collective bargaining agreement. The grievant had had seven absences in 1994 and six absences in 1995. The grievant had not been disciplined previously for any absences, did not have any absences between the date of the issuance of the October 20, 1995 and the issuance of the disciplinary notice on November 17, 1995, and she alleged she had not abused sick leave. The instant matter was then processed to arbitration in accordance with the parties grievance procedure.

Employer's Position

The Employer contends it unilaterally adopted a reasonable work rule, points out it has the right under the collective bargaining agreement to do so and asserts the Union has never challenged the reasonableness of the Employer's sick leave abuse policy. The Employer further

asserts that even if the policy is unreasonable it had just cause to issue the disciplinary notice to the grievant.

The Employer argues that it has the right to establish an absenteeism control policy, sick leave abuse policy, and that such a right is a fundamental or reserved right of management. The Employer asserts arbitrators have held that absenteeism control rules are an inherit right of management based upon the fact that attendance strikes at the core of any organizations viability. The Employer further argues that arbitrators have held that "no-fault" absenteeism policies that prescribe progressive discipline meet the test of reasonableness. The Employer contends the sick time abuse policy it adopted is a "no-fault" absenteeism rule. The Employer argues that such a policy removes any subjective judgements as to "fault" that often result in inconsistent treatment of employes. In support of its position the Employer points to Webster Electric Company, Inc., 83 LA 141, 146 (1984), wherein the Arbitrator in concluding a no fault absenteeism policy was valid pointed out that an employe's primary obligation is regular attendance and that no employer can tolerate a situation where absenteeism is excessive. The Employer also points to Dap, Inc., 84 LA 459, 461 (1984) wherein the Arbitrator concluded even valid medical excuses can be legitimately disregarded in an absenteeism policy. The Employer also points to Atlantic Richfield Co., 69 LA 484 (1977), wherein the Arbitrator upheld the discharge of an employe based upon frequency of occurrence of absence and to Menasha Corp., 89 LA 1316, 1320, (1987), wherein the Arbitrator upheld the termination of an employe whose absences due to illness affected the efficient operation of the business. In addition the Employer points to Cosmair, Inc., 80 LA 22 (1982), wherein the Arbitrator concluded the employer had the right to institute and apply a disciplinary policy which included paid sick leave in computing an employe's record of absenteeism. The Employer also points to General Metal & Heat Treating, Inc., 80 LA 7, where in the Arbitrator upheld the discharge of an employe with recurring throat problems and an employe with an amputated leg. The Employer also points to L. Gordon & Son, Inc., 80 LA 561, wherein the arbitrator ruled that it was beyond his authority to review the reasons for an absence.

The Employer asserts that the safe and efficient operation of a hospital/health care facility is fundamentally dependent on having a reliable work force. The Employer points out that high absenteeism is a problem the Union itself has requested the Employer address and deal with. Further, even after the parties settled the contract the Union raised the matter in Labor/Management meetings. The Employer asserts it responded to the concerns raised by revising the policy to conform with the changed language in Section 11.04, and by issuing disciplinary notices to those employes who where in violation of the policy. The Employer also points out that the concern raised by the Union about the retroactiveness of the policy disregards the fact that the current policy is more lenient than the previous policy.

The Employer contends the attendance policy does not prohibit an employe from being ill or using paid sick leave. What has occurred is a limit has been set on the number of times an employe's use of sick leave can disrupt work in the employe's anniversary year. When an employe exceeds those limits, discipline is appropriate. The Employer points out Section 11.08,

recognizes that abuse of sick leave is cause for discipline and the progressive steps of discipline.

The Employer also argues that legitimate reasons for use of sick leave is irrelevant. Here the Employer points out the Union failed to grieve the previous policy which imposed a stricter standard. The Employer also points out that employes had received disciplinary notices under the 1990 and under the 1995 policies.

The Employer also asserts the sick leave abuse policy incorporates progressive discipline. Further, that Section 11.08, provides for discipline for abuse of sick leave up to and including discharge. The Employer acknowledges that the collective bargaining agreement does not define sick leave abuse but asserts that obviously the phrase "sick leave abuse" was intended to apply to excessive use. The Employer points out that under the policy five (5) or more occurrences in a year, for two (2) consecutive years, or, six (6) or more occurrences in a year are considered excessive and will result in disciplinary action.

The Employer also asserts the Sick Time Abuse Policy conforms with the sick leave provision of the collective bargaining agreement. Further, that the instant matter is distinguishable from the undersigned's decision in Brown County (Mental Health Center), Case 294, No. 38184, MA-4446 (8/6/87). The Employer points out that Section 11.08, provides for discipline in matters of abuse and there is no guarantee of pay for each occurrences of illness, employes are not paid for the first two (2) days taken on the fifth (and subsequent) episode or occurrence. The Employer argues that as in Worchester Quality Foods, 90 LA 1305, 1309 (1988), the attendance policy and the payment for sick leave are mutually exclusive. The Employer also argues that the provisions of the sick leave article are not guarantees to be absent from work. The Employer argues that as in Detroit Riverview Hospital, 96 LA 639, 643 (1991), they are a protection from loss of income when an employe is ill and are not to protect the employe from being disciplined when absences exceed reasonable limits.

The Employer also contends that regardless of whether the Sick Abuse Policy is considered reasonable, the Employer had just cause to discipline the grievant. The Employer argues that it acted in good faith, had a fair reason for disciplining the grievant and that reason is supported by the evidence. The Employer also argues the discipline imposed was appropriate and based upon the employe's prior record and the severity of the incident. The Employer points out the grievant had seven (7) absences in 1994 and six (6) in 1995. The Employer points out these thirteen (13) separate episodes or occurrences of sick leave usage over a twenty-three (23) month period resulted in over thirty-seven (37) days, or, over seven (7) weeks of absence. The Employer asserts this is clearly excessive.

The Employer also stresses this is not an instance where employes were not informed of the policy nor is this an instance of inconsistent disciplinary treatment. The Employer points out the grievant was aware of the concern about excessive absenteeism, was aware of the Employer's 1988 definition of excessive absenteeism, was aware of the 1990 revision, and was aware of the

1995 revision. The Employer argues the grievant was not singled out for discipline. The Employer reviewed all attendance records in November, 1995 and issued warnings across the board. The Employer contends it could of issued two (2) warnings to the grievant, one for 1994 and one for 1995. The Employer asserts the Union defense that the grievant had no reason to believe she would be disciplined ignores the fact she had received the 1990 policy and still violated it. The Employer contends the grievant had no reason to believe she would not be disciplined.

The Employer argues that the total amount of time the grievant was away from her job, thirty-seven (37) days in a two year period, was sufficient cause to issue a disciplinary warning. The Employer asserts these absences had an impact on the grievant's job, that the grievant was aware of it and that the grievant had been questioned as to why work was not being performed in a timely manner. The Employer contends the written warning is an effort by the Employer to inform her that continued excessive absenteeism could result in further discipline

The Employer also asserts that it complied with the contractual requirement of progressive discipline. The Employer points out that the specific contractual requirement of two (2) written warnings of sick leave abuse precede further disciplinary action was complied with when the Employer issued a written warning to the grievant. The Employer points out the grievant was not treated any differently than the other (10) employes who were issued disciplinary warnings for excessive absenteeism.

The Employer would have the undersigned deny the grievance.

Union's Position

The Union does not dispute that the Employer has the right to discipline employes for abuse of sick leave in accord with the terms of Section 11.08 of the collective bargaining agreement. However, the Union argues the Employer does not have the right to arbitrarily define the term abuse. The Union argues that "abuse" is generally defined as misuse, improper use or to use improperly. The Union points out there is nothing in the record which would indicate the grievant misused her sick leave. Further, that the Employer acknowledged it was making no such claim. Thus, the Union concludes the Employer cannot have a basis for disciplining the grievant under Section 11.08.

The Union also argues that discipline is governed by Article 18 of the collective bargaining agreement. The Union stresses the Employer disciplined the grievant for acts which occurred prior to the issuance of the policy. The Union points out the Personnel Director acknowledged she did not know if the previous policy had ever been enforced. The Union also points out that the Employer never rebutted the grievant's testimony that the previous policy had never been enforced in her department. The Union also stresses the lack of enforcement is supported by the fact the grievant was not disciplined in 1994 for her use of sick leave. The Union asserts the grievant had no reason to believe the policy would be enforced, let alone one enforced that was not in existence

at the time of her usage of sick leave.

The Union contends the Employer's Sick Leave Abuse Policy is an improper limitation on the sick leave benefits agreed to by the parties. The Union also reasserts that the Employer's definition of "abuse" is arbitrary and contrary to any intent of the parties. The Union also argues that the retroactive application of the policy is contrary to due process and just cause.

The Union would have the undersigned sustain the grievance and direct the Employer to cleanse the grievant's records of any reference of the matter.

DISCUSSION:

In support of its position the Employer has cited several arbitral authorities which basically uphold no fault absentee policies. The undersigned has reviewed these cases and finds the Employer argument that in reality its Sick Leave Abuse Policy is in essence a "no-fault absentee policy" is without merit. The Employer policy only addresses use of sick leave. It does not address other forms of absenteeism. Webster Electric Company, Inc., wherein the Arbitrator held a no fault absentee policy to be valid, is distinguishable from the instant matter. A review of Webster demonstrates that the Arbitrator held that a unilateral policy change from allowing excused absences to a no fault absentee policy was reasonable absent the existence of specific contractual language. However, the collective bargaining provisions cited in Webster did not include a paid sick leave provision. Thus the Arbitrator was not faced with the question of whether the Employer's actions violated a paid sick leave provision of a collective bargaining agreement. A careful review of Dap, Inc., also demonstrates that the Arbitrator therein is upholding an attendance policy to be valid was not faced with a question of paid sick leave. In Atlantic Richfield Co., the Arbitrator noted there was no vesting or carrying over of sick leave to a maximum accumulation as in the instant matter. In Menasha Corp., there was no sick leave provision nor was there vesting or carrying over of sick leave. Cosmair, Inc., is also distinguishable from the instant matter. Therein the Arbitrator found that the no fault attendance policy was a past practice demonstrated by the Union's request during negotiations not to include paid days as part of the calculation in determining an employe's absentee record. The record herein demonstrates the previously issued policy had not been enforced consistently or uniformly, as evidenced by the fact that the grievant had not been disciplined in 1994. The undersigned also notes here that he disagrees with the Arbitrator in Cosmair on the inclusion of paid sick leave in calculating an employes absentee record. Herein the Employer has agreed to allow employes to accumulate one (1) paid sick day per month with a maximum accumulation of ninety-five (95) days. The Employer also has the right to request medical proof of inability to work due to illness or injury. Yet herein there is no evidence the Employer ever requested any medical proof of illness or injury and the Employer is attempting to discipline an employe solely for using paid sick leave. General Metal & Heat Treating, Inc., in also not on point. Therein the arbitrator in upholding a no fault attendance and tardiness policy did not have to consider a paid sick leave provision. Further, one employe had been absent sixty-seven (67) times and tardy eighty-three (83) times and

the other employe had been absent one hundred and two (102) times and tardy forty (40) times. The undersigned also finds that L. Gordon & Sons, Inc., is not on point. Therein the Arbitrator applied a mutually agreed upon attendance policy to an employe who had been absent one-third of her work days over a three (3) year period. Worchester Quality Foods, is also not on point. Worchester did not have a carrying over of unused sick leave or the creation of a sick leave bank. Detroit Riverview Hospital, is distinguishable from the instant matter because in Detroit occurrences are only those upon which there is no advance notice, was limited to a one (1) year period of review, employes only accrued ten (10) days per year, and discipline did not commence until after the eighth (8th) occurrence. Herein, even if advance notice is given the absence would still be counted as an occurrence of absence. Thus the undersigned finds that none of the authorities cited by the Employer are persuasive.

The undersigned again notes here that the record herein demonstrates that the Employer, although having issued previous policies on Sick Leave Usage, had not consistently or uniformly applied the policies. Thus the grievant, like other employes, had no reason to believe the Employer would commence enforcing the policy. Therefore the undersigned concludes the Employer's retroactive review of employes attendance records was unreasonable. The undersigned also finds that the parties have agreed that the Employer can discipline employes who "abuse" Article 11. However, there is no evidence the grievant failed to properly notify her employer of her absences, there is no evidence she failed to comply with Section 11.07 by failing to provide requested medical proof of her illness or injury, and there is no evidence she had exhausted the sick leave benefit. Thus there is no evidence the grievant abused the sick leave provision of the collective bargaining agreement. While the grievant has been counseled on the impact her absences have had on her job, the evidence is she used a contractually agreed upon benefit. To allow the Employer to discipline the grievant for use of a contractually agreed upon benefit would put a chilling effect on the benefit. Particularly herein where the agreement allows the Employer to request medical certification of any illness or absence, and, where the parties have recently modified the agreement to exclude one (1) or two (2) day usage of sick leave benefits after the fourth episode of illness or injury in a anniversary year. Thus the undersigned concludes the Employer's policy is unreasonable.

The undersigned also finds the Employer did not have just cause to discipline the grievant for the number of her sick days over a twenty-three (23) month period. There is no evidence the grievant misused the benefit. Absent such evidence, to allow the Employer to discipline an employe for using a contractually agreed upon benefit would create impediments to the use of the benefit and would substantially dilute that benefit. The Employer does not have the authority to unilaterally dilute the contractually agreed upon benefit.

Therefore, based upon the above and foregoing, and the testimony, evidence and

arguments presented, the undersigned concludes the Employer did not have just cause to discipline the grievant. The Employer is directed to cleanse her records of the written reprimand. The Grievance is sustained.

AWARD

The Employer did not have just cause to discipline the grievant. The Employer is directed to cleanse her record of the written reprimand.

Dated at Madison, Wisconsin, this 6th day of January, 1997.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator