

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BLUE CROSS AND BLUE SHIELD
UNITED OF WISCONSIN

and

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL NO. 787,
AFL-CIO, CLC

Case 3
No. 54089
A-5485

Appearances:

Mr. Robert J. Westheimer, and Mr. Kevin Collins, on behalf of the Company.
Murphy, Gillick, Wicht & Prachthausen, by Ms. Sandra K. Graf, on behalf of the Union.

ARBITRATION AWARD

The above-entitled parties, herein "Company" and "Union", are privy to a collective bargaining agreement providing for final and binding arbitration before a three-person panel. Pursuant thereto, I was selected as panel chair and Ms. Rassandra L. Cody and Mr. Leonard Streich were chosen by the Company and Union respectively. Hearing was held on August 7, 1996, in Milwaukee, Wisconsin, and both parties thereafter filed briefs which were received by October 2, 1996.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Was grievant Nicolette A. Vento, now Jifas, discharged for just cause and, if not, what is the proper remedy?

BACKGROUND

The Company, a large insurer, maintains a facility in Milwaukee, Wisconsin, where grievant Vento has worked for five years, during which time she had a clean work record. Vento was a Claims Preparation Clerk in the Company's Claim Acquisition Department which is the initial intake point for health care claims submitted to the Company for payment.

Donna M. Detvan, a Supervisor in the Micrographics area, testified that Vento and others in the department are responsible for opening up envelopes, removing claims from envelopes and prepping it, and bundling it up "in batches". She also said that such claims should have a 24-hour turnaround time.

Detvan stated that she was told by Senior Clerk Susan Wickland on June 1, 1995, 1/ that certain claims for the Eau Claire region were missing and that Vento at one point had them. Wickland on the next day told Detvan, "You need to see something" and took her over to Vento's desk. There, Detvan saw Fond du Lac claims in one drawer which were all dated May, 1995, and other claims in another drawer dating back to November, 1994. After reporting the matter to labor relations, Detvan spoke to Vento when she came to work and told Vento she was conducting a desk check. Vento's desk drawers were then opened up, revealing 1,279 claims that measured about 15 inches high. Detvan also found amongst those claims a pair of flattened shoes, a fork, pantyhose, cards, and poems, all of which belonged to Vento. Detvan testified that she asked Vento why she had done what she did and that, in Detvan's words, Vento replied "she needed to make sure she could get her production because she didn't feel she could without doing that." Detvan explained that she on November 9, 1994, had a prior conversation with Vento over her low production. Detvan also testified that she on June 2 overheard Vento tell Claim Preparation Clerk Vince McHenry words to the effect: "I messed up big time."

Detvan also explained that the Company spent about two weeks tracking down the claims found in Vento's desk on June 2 in order to determine whether they had been paid. She also stated that the Company has a policy which requires that all pending claims must be placed on desk tops so that supervision can properly monitor work flow and she testified that she on October 22, 1991, and January 5, 1995, sent memos to that effect to employees under her supervision, including Vento. As a result, said she, employees are prohibited from putting claim forms in their desk drawers. Detvan also said that she on June 2 conducted desk checks for all other employees in the Claims Acquisition area and that no files were found in the desks of any other employees.

On cross-examination, Detvan acknowledged that she never took any corrective action against Vento for not meeting production standards in the past; that she did not know where the missing Eau Claire claims are located; that the Company does not stamp claims when they are received; that she did not recall whether one or two Senior Clerks approached her on June 2 regarding Vento's desk; that Vento's desk was the eleventh one checked on June 2; and that she did not overhear all of Vento's conversation with McHenry. She also said that she does not know what happened to all of the envelopes which contained the claims found in Vento's desk drawers on June 2 and that she regularly conducts desk checks.

Detvan further testified that each individual claim is not logged on the board which lists regions and the employes assigned to them, and that she is not certain whether all of the claims

1/ Unless otherwise stated, all dates hereinafter refer to 1995.

found in Vento's desk, which should have taken about two days to process, were initially assigned to her. She also stated that Vento "was fired because of what was found in her desk drawers", and not over the missing Eau Claire files.

Senior Clerk Wickland, (then Stephens), was subpoenaed by the Company and corroborated part of Detvan's testimony by stating that she discussed the missing Eau Claire claims with Detvan on June 1; that she on June 2 went through Vento's desk to locate the Eau Claire files but could not find them; that she then discovered that Vento's left bottom desk drawer contained claims from the Fond du Lac region; and that she told that to Detvan on June 2. She also said that employees are required to keep all claims on the top of their desks; that the files in a box - the size of a banker's box - all came from Vento's desk; and that the missing Eau Claire files never have been found. She also testified that she then went back to her own desk and that Detvan "did her desk checks".

On cross-examination, she said that Detvan on June 2 looked into Vento's desk drawers before she checked out anyone else's desk and that she, Wickland, earlier searched Vento's desk that morning because she was looking for the missing Eau Claire files.

Vento testified that she began working for the Company in August, 1991; that she was not under Detvan's supervision at that time; that her job in the Claims Acquisitions Department in 1995 was "to screen and prepare claims for microfilming"; that up to the time of her termination, she had never been disciplined; that she was never told that she could not keep work in her desk; and that she does not have a key to her desk which is why its drawers are always left unlocked. She explained that she never received any written documentation to the effect that files must remain on top of her desk; that she is unaware of any policy which requires claims to be processed within the same day they are received; and that she was required to keep all documents in her desk when she formerly worked in Claims Administration.

She also said that she had previously complained to Detvan over how work was being distributed in the office; that she had never been told how long she had to complete a claim; that she on June 1 was assigned to process Fond du Lac files by Senior Clerk Amelia Ali; that she started to work on them, but did not have enough time to finish them before she was given more Eau Claire files by Wickland; and that is why she put the Fond du Lac files in her desk drawer at the end of the day. She also stated that there were only about 50 Fond du Lac claims in her desk drawers and that she did not see the box of Fond du Lac files attributed to her until her unemployment compensation hearing. Vento denied telling Detvan on June 2 that she knew she was taking a chance by putting work in her desk and she also denied telling McHenry that morning that she had screwed up.

On cross-examination, she acknowledged testifying at her unemployment compensation hearing that she knew claims had to be processed within 24 hours and that the files in her drawers were about six inches high. She also said that she did not put the files in her desk which were

contained in the box. Asked who put the files in her desk, she replied: "I think it's a very strong possibility that it would have to be a co-worker, yes."

Vento also said that she told Detvan on June 2: "I have claims in my desk from Fond du Lac that were given to me by Amelia. . . so that [Wickland] would not take them away."

Senior Clerk Ali testified that Vento on June 1 asked her for work; that she then gave Vento "some Fond du Lac work to do"; and that she subsequently told Wickland that she should give Vento additional Eau Claire files. She also said she never instructed Vento to keep all of her work on her desk and that June 2 marked the only desk check she had ever seen during her employment.

On cross-examination, Ali said that she sometimes removed old claims from someone's desk if that person were not at work that day; that she had never removed such files if the employee was at work; and that she supposed that she could do so. She also said that she sometimes saw Detvan go through an employee's desk to find their time cards; that Detvan is a "fair person"; and that one of the primary ways for monitoring work is to check how much work employees have on their desks.

Vento was terminated on June 2. She subsequently grieved her termination on June 7, hence leading to the instant proceeding.

The Union argues that the Company lacked just cause to fire Vento because the Company has "unclean hands", because "the desk check is suspicious", and because Company witnesses have lied. It also claims, "There was no showing that the grievant had been assigned the stale claims"; that the discharge penalty in any event is "too harsh" because the Company's policy which requires that all claims remain on the top of an employee's desk was not made known to Vento; and that Vento in fact was not guilty of theft or dishonesty. It also argues that Wickland "had motivation for wanting Vento out of the Department" because of Vento's complaints that Wickland was not distributing work fairly. The Union therefore requests a traditional make-whole order which includes Vento's reinstatement and back pay.

The Company, in turn, contends that Vento was "clearly guilty of dishonesty, falsifying records, and theft by hiding 1,279 claims in her desk"; that arbitral authority supports its discharge decision; and that her "misconduct damaged core interests of the Company."

The Company is certainly correct in pointing out that any hiding of claims damages its core business interests. Thus, the Company is required to process insurance claims as quickly as possible because any failure to do so may subject it to bad publicity, possible interest penalties, loss of business, and even sanctions by the State of Wisconsin. All of this is why time is of the absolute essence in processing claims and why discharge is an appropriate penalty for any employee

found guilty of deliberately delaying the processing of any claims assigned to them.

However, the Union correctly points out that there is no evidence that the stale Fond du Lac claims were ever assigned to Vento. Absent any direct evidence on this key issue, the Company's case thus rests on the inference that such claims were assigned to Vento because they were found in her desk.

The Union also is correct in arguing that Vento was not guilty of theft since she never tried to convert the claims to her own use. As a result, the Company's discharge decision stands or falls on its claim that Vento in effect falsified Company records and disregarded its practices when she supposedly stored the stale Fond du Lac files in her desk.

The Union also is on the mark when it complains that there is no proof that Vento was ever told that she had to keep all claims on the top of her desk. Vento testified without contradiction that she was previously required to keep all files in her desk when she formerly worked in Claims Administration. In addition, there is no proof that she ever received Detvan's October 22, 1991, and January 5, 1995, memos on this subject. Furthermore, Senior Clerk Ali testified that she never told Vento to keep all files on her desk during the time that she trained Vento. Given all of this, there is no clear proof that the Company's policy was ever communicated to Vento. That is why she cannot be disciplined for not having all of her claims on the top of her desk.

Nevertheless, given the Company's overriding concern with processing claims as soon as possible, Vento certainly knew that files cannot be stored for months in her desk. That is why the Company had just cause to discharge Vento if she, in fact, deliberately stored the stale Fond du Lac claims in her desk.

The Company asserts that Vento told Detvan on June 2 that she put the files in her desk drawers because that was the only way for her to meet the Company's production goals. Detvan also testified that she overheard Vento that morning tell fellow employe McHenry: "I messed up big time." If credited, Detvan's testimony shows that Vento deliberately put the files in her drawer to aid her productivity.

Vento, however, flatly denied making either of those two statements.

Since neither side called McHenry as their own witness, there is no independent verification for Detvan's claim, or Vento's denial, as to what Vento supposedly said to him on June 2. If McHenry were a management representative, I would draw an adverse inference over the Company's failure to call him. However, since he is in the bargaining unit, that inference cannot be drawn. Furthermore, such an adverse inference ordinarily would be drawn against the Union over its failure to call him. Given these conflicting considerations, no adverse inference can be drawn either way.

We thus are left with the head-on credibility clash between Detvan and Vento as to whether

Vento told Detvan on June 2 that she hid the files to aid her production. Recognizing the importance of this credibility clash, both parties attack the credibility of each other's witnesses. The record on this score shows that both Detvan and Vento to one extent or the other erred in various parts of their testimony.

For Detvan, she testified that she conducted a desk check on Vento's desk after she conducted desk checks on ten other employes. In fact, I credit Wickland's testimony that Detvan first conducted a desk check on Vento's desk. Detvan also testified that she was Vento's direct supervisor in October, 1991, when the record is somewhat unclear on that point. She also contradicted herself when she testified at Vento's unemployment compensation hearing that Ali and Wickland both approached her on June 2 regarding Vento's work, whereas she testified here that only Wickland approached her.

Vento, in turn, claimed at the unemployment compensation hearing that the Fond du Lac claims assigned to her on June 1 measured about 6 inches, whereas she testified here that they only measured about 2 inches and that there were only about 50 such claims. She also admitted at the earlier hearing that she had been told by Detvan to promptly handle claims and that it was her understanding that "we are to try to turn them around in 1 day." Here, by contrast, she denied ever being told how long she had to complete a claim and she asserted that she was unaware of a policy requiring her to complete a claim the very day it is received.

Vento's discrepancies go to the very heart of this case because it is inherently implausible to believe Vento's assertion here that she was never told that claims had to be turned around in a day. For given the Company's need for speedy processing, it is clear that such a rule exists and that Vento knew about it. Furthermore, while Vento claimed here that she testified about six or seven envelopes at the prior unemployment compensation hearing, a review of that prior testimony clearly shows that she was talking about six or seven inches of Fond du Lac claims. Her attempt to discredit her own earlier testimony thus must fail. It also represents a fatal flaw in her own credibility.

Because of these major discrepancies, I discredit her testimony and, instead, credit Detvan's testimony to the effect that Vento told her on June 2 that she had put the Fond du Lac files in her desk to help her productivity.

This conclusion is buttressed by the fact that there simply is no other explanation as to how the stale 1,279 claims found themselves in Vento's desk. For in order to credit Vento, it would be necessary to find that some unknown person planted them there. While that may be theoretically possible, there is not one iota of evidence showing that to be so. Accordingly, given her own admission to Detvan that she hid the claims to help her production, it can only be concluded that all those claims had been assigned to her.

I therefore find that the Company had just cause to discharge her because that misconduct

resulted in so many stale claims and because the delay in those claims could have damaged the Company's business. The Company therefore had just cause to discharge Vento over this incident even though she had a clean work record.

The dissent charges that this result is wrong because it rests upon the Company's work rule which requires employees to keep all files on their desks and that discharge is an inappropriate penalty for such a first time offense, particularly since Vento has a clean work record.

In fact, I agree that there is no proof that the Company ever communicated this rule to Vento. That is why Vento cannot be disciplined for failing to have all files on her desk. Instead, Vento's discharge is being sustained because she deliberately hid files in her desk drawers in order to help out her production. While Vento denies doing so, I credit Detvan's testimony that Vento relayed that fact to her on June 2.

The dissent also challenges Wickland and Detvan's testimony that 1,279 files were found in Vento's drawers. That testimony, however, is unrebutted in this record and hence must be credited. Moreover, if the Union wanted to question the number of files found, it should have done so at the hearing.

The dissent also questions why Wickland (and Vento) examined Vento's desk drawers without any other witnesses being present. While it may have been better to have other witnesses present so that this kind of question did not arise, I am satisfied that Wickland and Detvan testified truthfully in this matter.

The dissent also claims a "Pre-Discharge Hearing should have been held with fuller disclosure of all information the Company had for the discharge." The contract here, however, does not require any such hearing. Moreover, if the Union wanted additional information during the grievance arbitration procedure, it could have requested such information which apparently was not done here.

But, I do agree with the dissent that there is no direct proof that the files found in Vento's drawers were assigned to her by the Company and that, moreover, it is theoretically possible that someone other than Vento placed them there. However, given Vento's admission to Detvan that she hid the files to help her production, I am satisfied that the files were assigned to Vento and that she deliberately hid them for that purpose. Why else, after all, would she tell Detvan that she hid them in order to help her production?

In light of the above, it therefore is my

AWARD

That grievant Nicolette A. Vento was discharged for just cause; her grievance is therefore

denied.

Dated at Madison, Wisconsin, this 3rd day of February, 1997.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator

Rassandra L. Cody /s/
I concur.

Leonard Streich /s/
I dissent.

1. Ms. Vento worked for Blue Cross/Blue Shield for five years with a clean record. I find it unreasonable that if she did the allegation the company would discharge her on her first violation. I am also troubled that work rule was not in the company work rules but rather derived from a memo which receipt was not acknowledged by obtaining the signature of each employee.
2. There was no signed rules or memos by Ms. Vento dealing with placing files in the desk drawers. If this was an important work rule as stated by the company it should have been in the company work rules book and Ms. Vento should have signed that she received the rules.
3. I do not believe the testimony of Ms. Wickland when she claims that there were 1,279 files in that drawer. I believe it is physical impossibility that the files and Ms. Ventos items could fit into one drawer.
4. When Ms. Wickland went through the desk she could have had a witness rather than going through the desk alone. She claimed that this was the eleventh desk she checked, when in fact it was the first desk. She only checked the other desks after the files were found.
5. Senior Clerk Ali testified that as long as she worked for the company she had never done any desk checks except to get time cards if someone was off of work.
6. The files were not shown to Ms. Vento or the Union on June 2, 1995 but rather were brought into the Workers' Compensation hearing at a much

later date.

7. A Pre-Discharge Hearing should have been held with full disclosure (sic) of all information the company had for the Discharge. I feel an employee and their union has a right to this information before the employee is discharged from employment.
8. The Company claim that the files were given to Ms. Vento can not be proven. Ms. Ventos desk was not locked and anyone could have placed them into her desk. The company does not record which files are assigned to each person on a daily basis. Thus the fact that the company claims the files were in her desk does not prove the files were assigned to and/or given to Ms. Vento.
9. I understand the importance of having the claims resolved as fast as possible so payment can be made within the proper time limits. This management philosophy does not give the company the right to violate an employees rights under the contract and labor law.